

Surrogacy Law and Policy in the U.S.: *A National Conversation Informed by Global Lawmaking*

Report of the Columbia Law School
Sexuality & Gender Law Clinic

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Executive Summary

Surrogacy raises many complex, contested, and ever-developing questions at the intersection of the law, science, ethics, and public policy. Surrogacy concerns both the most intimate and deeply personal aspects of family life, but also important public matters about promoting and protecting the best interests of vulnerable groups such as children, women, and minorities, both nationally and across international borders. This debate occurs in a context where surrogacy is now a fast-growing and globalizing industry. At least several thousand children are born each year as a result of surrogacy arrangements, and this could be a significant understatement. This Report aims to inform advocates and citizens about important developments and fundamental issues concerning surrogacy. This information can be a particularly useful tool in evaluating proposed changes in state surrogacy laws.

Part 1 of this Report introduces the international surrogacy industry and how surrogacy is currently regulated in the U.S. and across the globe.

U.S. states have responded to the policy issue of surrogacy in very different ways. Some states expressly allow surrogacy. However, other states leave surrogacy partially or fully unaddressed, and some expressly prohibit surrogacy altogether. Despite the wide degree of inconsistency across the U.S., most states are moving away from prohibition and towards regulation. New York is one of only four U.S. states that bans surrogacy entirely.

There is no consensus on how to approach surrogacy around the world. In some countries, surrogacy remains unregulated, but there is a general trend towards introducing laws that explicitly address surrogacy one way or another. Other jurisdictions permit and regulate only non-commercial surrogacy while prohibiting commercial surrogacy. Finally, there are some countries that permit all forms of surrogacy, including commercial surrogacy. Many surrogacy-friendly jurisdictions have become or were previously destination states for foreigners. Many concerns have been raised about the lack of regulatory, legislative, and health standards, making conditions dangerous and exploitative for surrogates and children in these locations. Notably, many destination countries are working to close down their international surrogacy markets.

Part 2 of the Report canvasses the key arguments for and against the legalization of surrogacy.

An important starting consideration is that many people have a strong desire to be a parent even though they may not be able to carry a child themselves. This includes LGBTQTI couples (especially gay men), single people, and people suffering from infertility, disability or other health problems. But the right to have a biological family needs to be balanced with other rights and interests. A competing concern is what is in the best interests of children. Key issues include the risk of a child becoming stateless, the right of a child to know their ancestry, and

broader concerns about the commodification of children. However, as a practical matter, states must also do what is in the best interests of children who are born through surrogacy even where parents have contravened their laws. Also paramount are the rights and interests of surrogates. Key issues include surrogates' bodily autonomy and informed consent. Critically, the situation of individual surrogates is also connected to the much broader concerns about the objectification and exploitation of disadvantaged women worldwide. Furthermore, there are arguments regarding the impact of surrogacy upon deeply held convictions regarding the family. Finally, this Part concludes with an overview of key issues regarding the impact of state intervention. A key question is whether regulation serves to legitimize an inherently dangerous and exploitative practice or whether it is the best route to mitigate the risks of surrogacy and promote the interests of all involved.

As this Report demonstrates, one of the difficulties in assessing the arguments for and against surrogacy is the lack of data on surrogacy as well as limited empirical studies into the consequences of surrogacy across hugely varying contexts. Even where data and empirical studies are available, many of the arguments are grounded in ethical, philosophical, religious, or other normative positions that are difficult to empirically measure or to compare against each other.

Part 3 of this Report then moves to examine New York's proposed bill, the Child-Parent Security Act, Assemb. B. 4319, 2015 Assemb., Reg. Sess. (N.Y. 2016), as a case study in analyzing such proposed legislation. This Part considers the proposed criteria for intended parents and surrogates, and how these criteria compare with the approaches taken in other jurisdictions. Part 3 also examines the proposed requirements for the content and enforceability of surrogacy contracts including provisions regarding compensation, in comparison with other jurisdictions. Finally, this Part considers and compares how the proposed bill assigns parentage presumptions and manages the transfer of parental rights.

Surrogacy is undeniably an immensely complex and controversial policy issue. Neither international trends nor the practice in other U.S. states provides clear guidance for policymakers. Similarly, there are compelling arguments both for and against surrogacy, which are often incommensurable to one another. However, in light of growing and globalizing surrogacy trends, decisions made by individual states will have important ramifications not only for the residents of this state but across the U.S. and the international community as a whole.

Part 1 – Definitions and Context

A. Definitions and Terminology

Surrogacy is an issue that has developed a complicated set of acronyms and terms. Key terms are defined here at the beginning of the Report for reference.

The terms “**surrogate**,” “**surrogate mother**,” “**gestational mother**,” “**birth mother**” and “**gestational carrier**” refer to the woman agreeing to become pregnant and carry the child as part of a surrogacy arrangement. Notably, the most appropriate term is often debated due to the normative implications about motherhood suggested by the various terms. In this Report, the term “**surrogate**” is used throughout.

“**Intended parent/s**” (sometimes also described as “**intending parent/s**” or “**commissioning parent/s**”) refers to the individual/s who plan to receive the child into their home and raise the child as their own after the surrogate has given birth.

“**Full surrogacy**” refers to a surrogacy arrangement in which all of the genetic material involved originates either from the intended parents or donors. Full surrogacy requires the use of **assisted reproductive technology** (“**ART**”). Full surrogacy is also referred to as “**gestational surrogacy**.” This term can create some confusion, particularly in case law, given that before ART was available, partial surrogacy (explained below) was sometimes referred to as a gestational agreement. However, the proposed bill in the New York state legislature refers to full surrogacy contracts as “**gestational carrier agreements**.”²

By contrast, “**partial surrogacy**” refers to surrogacy arrangements in which the surrogate’s genetic material is used to conceive the child as part of the contract. This method is also sometimes referred to as “**traditional surrogacy**” because this was how surrogacy arrangements worked before ART developed. In this report, we will use the term partial surrogacy, because it is more accurate and current in its usage.

“**Altruistic surrogacy**” stands in opposition to “**commercial surrogacy**.” Commercial surrogacy refers to surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for “reasonable expenses.” Altruistic surrogacy, on the other hand, refers to arrangements in which the surrogate volunteers to perform a service without being paid, except potentially some payment for expenses. Notably, the distinction between what constitutes “reasonable expenses” and what constitutes “payment for services” has been and continues to be a difficult line to draw. Quite a few countries have legalized altruistic surrogacy while outlawing commercial surrogacy. In the U.S., commercial surrogacy is most often referred to as “**compensated surrogacy**,” and altruistic surrogacy is called “**uncompensated surrogacy**.”

² See Assemb. B. 4319, 2015 Assemb., Reg. Sess. (N.Y. 2016).

When intended parent/s travel overseas to engage a paid surrogate, this is called “**international commercial surrogacy**,” sometimes also described as “**reproductive tourism**” or “**fertility tourism**.”

B. Overview of the Surrogacy Industry

This section briefly introduces key information about the surrogacy industry both in the U.S. and globally, including: the size of the industry and factors contributing to its expansion, the number of children born each year via surrogacy arrangements, the costs involved, and the role of intermediaries such as surrogacy agencies. Importantly, although surrogacy is a growing and globalizing trend, the practice varies considerably from jurisdiction to jurisdiction. Factors such as the costs involved, the role and regulation of surrogacy agencies, the quality of medical care, and the life circumstances of the surrogate and her relationship with the intended parents, all vary depending upon where the surrogacy arrangement is taking place. Thus, surrogacy is not, in all respects, a singular phenomenon; some would argue that this must be taken into account when making general statements about it.

Surrogacy is a “booming, global business.”³ The Permanent Bureau of the Hague estimates that the industry grew by 1000 percent internationally between 2006 and 2010.⁴ Other commentators estimate that the industry is now worth up to \$6 billion annually.⁵ Indeed, the number of international surrogacy arrangements each year has “grown significantly (if not, dramatically) over the past 5 years and is continuing to grow.”⁶ Several thousand children are born each year through surrogacy worldwide, and “this could well be a significant understatement.”⁷ By way of caution, however, it is important to note that there is very limited data regarding surrogacy trends, including in particular, information about the number of children born annually. This is due to the fact that even where surrogacy is legal, countries often do not distinctly track the incidence of surrogacy from other ART procedures.⁸ Additionally, reporting difficulties arise due to intended parent/s travelling across borders, or being reluctant to report their arrangements because of social disapprobation and/or illegality.⁹

³ PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Private International Law Issues Surrounding The Status of Children, Including Issues Arising From International Surrogacy Arrangements*, Preliminary Doc. No. 11, March 2011, at 11, [hereinafter Hague Conference Document 2011], available at <<https://assets.hcch.net/upload/wop/genaff2011pd11e.pdf>>.

⁴ PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Preliminary Doc. No. 10, March 2012, at 6, [hereinafter Hague Conference Document 2012] available at <<https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>>.

⁵ Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANN. HEALTH L. 190, 193 (2012).

⁶ PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Study of Legal Parentage and Issues Arising From International Surrogacy Arrangements*, Preliminary Document No. 3 C, March 2014, at 125–129 [hereinafter Hague Conference Document 2014], available at <https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf>.

⁷ *Id.* at 129.

⁸ Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J. L. MEDICINE & ETHICS 240, 241 (2013).

⁹ *Id.*

Many commentators have remarked that advances in ART technology has made surrogacy vastly more popular and this underlies the significant growth in the industry in recent years.¹⁰ Full surrogacy (using an embryo fertilized with the egg and sperm of the intended parents or a third party donor) is now by far more common than partial surrogacy (where the surrogate donates her own egg).¹¹ By one estimation, ninety-five percent of all surrogacies in the U.S. utilize full surrogacy.¹²

Although intended parents include married and unmarried same-sex couples and single males and females, most frequently clients appear to be married, heterosexual couples with a medical need for surrogacy.¹³

Intended parents travel from all regions of the world in order to undertake international surrogacy.¹⁴ As of 2014, surrogacy-friendly states such as California in the U.S. and India were the most popular destinations.¹⁵ Other popular destinations included Thailand, Ukraine, Russia, Georgia, and Canada.¹⁶

There is significant variation in how much surrogacy costs in different jurisdictions. Different costs associated with surrogacy include medical, legal and agency fees, payments made to the surrogate and donors, as well as health insurance costs.¹⁷ Surrogacy arrangements in the U.S. are usually more expensive than other countries, but how much more so will depend upon the facts of the case.¹⁸ Medical costs reportedly range from \$11,600 reported in Ukraine, to \$2,818 reported in Canada, to an average between \$20,000 to \$80,000 in the U.S.¹⁹ By way of example, legal costs in the U.S. have been estimated to be between \$3,000 to \$15,000.²⁰ In the U.S., agency fees also vary widely, ranging between \$6,000 to \$54,000.²¹ Average fees for surrogates in the U.S. is estimated to be between \$20,000 to \$55,000.²²

Intermediaries—such as surrogacy agencies, fertility clinics, health institutions, and medical tourism companies—are now regularly involved in the surrogacy industry.²³ Whether and how these intermediaries are regulated varies considerably between jurisdictions.²⁴ Agencies provide services including recruiting, assessing, and selecting surrogates; matching intended

¹⁰ Seema Mohapatra, *Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412 (2012).

¹¹ *Id.* at 135.

¹² Richard F. Storrow, *Surrogacy American Style*, in SURROGACY, LAW, AND HUMAN RIGHTS 191, 200 (Paula Gerber & Katie O'Byrne, eds., 2015) (citing Diane S. Hinson and Maureen McBrien, *Surrogacy Across America*, FAMILY ADVOCATE 32, 34 (2011)).

¹³ Hague Conference Document 2014, *supra* note 3, at 140.

¹⁴ *Id.* at 132.

¹⁵ Hague Conference Document 2014, *supra* note 3, at 130.

¹⁶ *Id.*

¹⁷ *Id.* at 136.

¹⁸ *Id.* at 138.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Hague Conference Document 2014, *supra* note 3, at 138.

²² *Id.*

²³ *Id.* at 139.

²⁴ *Id.*

parents with surrogates; and putting intended parents in contact with lawyers and hospitals, among other services.²⁵ In the U.S., for example, surrogacy agencies are commonly involved in pairing intended parents with surrogates and they are usually independent of medical clinics.²⁶

The life circumstances of the surrogate (i.e., her socio-economic status, level of education etc.) and the relationship she has with the intended parent/s differs significantly depending upon the country.²⁷ For example, in India surrogates are often significantly disadvantaged, and there is normally very little contact between the surrogate and intended parent/s. However, this is not reflected in the U.S. where there is generally frequent contact between the surrogate and the intended parent/s, including at the matching stage, during the pregnancy, and sometimes following birth.²⁸

Similarly, the quality of medical care varies tremendously between countries, and it is likely to be impacted by the level of regulation or self-regulation of the industry.²⁹ The vast majority of concerns that have been reported to the Permanent Bureau of the Hague Conference on Private International Law relate to India, Thailand, and Ukraine.³⁰

C. U.S. State Law: Overview of Diverging Positions on Surrogacy

Across the fifty U.S. states legal approaches to surrogacy vary widely, from complete prohibition to some of the most permissive approaches in the world. Indeed, as Richard F. Storrow remarks, the U.S. is “a microcosm of the rest of the world, with the whole range of global attitudes towards surrogacy subsumed within its borders.”³¹

Nearly half of the states have some legislation relating to surrogacy.³² Some states only have case law governing surrogacy contracts, and some have no regulation at all.³³ Model laws intended to bring legal uniformity across the country have had limited success.³⁴ Today, however, there is little legislative activity seeking to prohibit surrogacy.³⁵ Storrow notes that the legislative trend—if there is one at all—is toward legalizing surrogacy where it is illegal or providing a statutory framework where the industry operates without legal regulation.³⁶

²⁵ *Id.* at 143.

²⁶ *Id.* at 143.

²⁷ Hague Conference Document 2014, *supra* note 3, at 141.

²⁸ *Id.*

²⁹ *Id.* at 145.

³⁰ *Id.* These concerns include: high number of embryo transfers, which result in multiple births; multiple surrogates being impregnated at the same time by the same intended parent/s; gamete mix-ups (accidental use of incorrect sperm, ova or embryos during in vitro fertilization procedures); routine caesarean section births when not medically necessary; the deaths of the surrogate following childbirth; fetal reductions (when one or more fetuses are aborted in cases of multi-fetal pregnancy to preserve the viability of the remaining fetuses and decrease health risks to the mother); and sex-selective abortions.

³¹ Storrow, *supra* note 12, at 193.

³² *Id.* 194.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 198.

³⁶ *Id.*

This section overviews illustrative examples of where surrogacy is expressly prohibited, expressly permitted, as well as where the legal position remains unclear.³⁷

1. States Where Surrogacy is Expressly Prohibited

Currently, four states explicitly ban surrogacy: New York, New Jersey, Indiana, and Michigan. In three of these states—New York, Indiana and Michigan—surrogacy contracts are void and unenforceable.³⁸

In 1989, closely following the highly controversial *Baby M* case,³⁹ New York Governor Cuomo introduced a bill to ban surrogacy within the state. The legislature passed it into law in 1992,⁴⁰ and since that time surrogacy contracts have been prohibited in New York state. However, the recently proposed Child-Parent Security Act seeks to repeal New York’s surrogacy ban, in favor of regulating the practice.⁴¹ The specific provisions of the proposed Child-Parent Security Act are discussed below in Part 3 of this Report.

2. States Where Surrogacy Is Expressly Allowed

There are fourteen states that regulate and permit some form of surrogacy via statute.⁴² Even among these states, however, there is little consistency in their approach. For example, some surrogacy-friendly states allow compensation whereas others prohibit it. Some states have no restrictions on who can be an intended parent, whereas others only allow access to married couples with a medical need who are residents in that state. Similarly, some states have no requirements on who can be a surrogate, whereas others regulate this considerably. Furthermore, some states only legally address full surrogacy, and some address both full and partial surrogacy. Additionally, there is a great deal of variation in the process to establish legal parentage. The examples outlined below seek to highlight this variation among surrogacy-permissive states.

In **California**, there is a law explicitly allowing and regulating full surrogacy contracts only. California also allows compensation for the surrogate, and the law does not clarify whether there is a reasonableness limitation on the amount that can be paid. California has no restrictions on who can be a surrogate or an intended parent, and the law does not impose residency requirement on either intended parents or surrogates. The state also allows for pre-birth parentage orders (i.e., court order assigning legal parentage status to the intended parents prior to the birth of the child), but these do not become effective until the moment of birth.

³⁷ For a more thorough comparison along additional dimensions, please refer to Appendix A.

³⁸ See Appendix A.

³⁹ See *id.*; *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

⁴⁰ Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 J. L. & CONTEMPORARY PROBLEMS 109, 118 (2009).

⁴¹ Assemb. B. 4319, 2015 Assemb., Reg. Sess. (N.Y. 2016), at Part 7, §§ 2-3.

⁴² Ala. Code § 26-17-801 (1984); Cal. Fam. Code §§ 7960-7962 (2013); Colo. Rev. Stat. § 19-4-106 (1987); Del. Code § 13-8-807 (2013); Fla. Stat. §§ 63.213 (2003), 742.15 (2015); Ill. Comp. Stat. § 750-47 (2005); Me. Rev. Stat. 19-A §1931, 1932 (effective July 2016); Nev. Rev. Stat. §§ 126.500-126.810 (2013); N.H. Rev. Stat. § 168-B (2014); Tex. Code § 160 (2001); Utah Code §§ 78B-15-801, 78B-15-809 (2008); Va. Code §§ 20-156–20-165 (1991); Wash. Rev. Code §§ 26.26.210–26.26.260 (1989).

Florida allows both full and partial surrogacy contracts, but a different law governs each. Both laws allow compensation for the surrogate for reasonable expenses, and in both types of contracts the intended parents agree to accept custody of and to assert full parental rights and responsibilities for the child immediately upon the child's birth. To enter a full surrogacy contract: (1) the intended parents must be married and older than eighteen; and (2) a licensed physician must certify that the commissioning mother is either unable to physically gestate a pregnancy or a pregnancy would cause a risk to her physical health or to the health of the fetus.⁴³ For partial surrogacy contracts, the above restrictions do not apply. Because of the distinction between full and partial surrogacy, pre-birth parentage orders are not allowed.⁴⁴ The intended parents in a full surrogacy contract must file a petition within three days after the child's birth and the court will amend the birth certificate.⁴⁵ In the partial surrogacy context, if the child is biologically related to the surrogate then she has the right to rescind the contract up to forty-eight hours after the birth of the child. Therefore the intended parents must wait at least forty-eight hours after the birth of the child before seeking a judgment of parentage.

In **Maine**, a new law regulating full surrogacy will go into effect in July 2016. This law will allow compensation to the surrogate so long as it is reasonable and negotiated in good faith. Surrogates must be at least twenty-one years old and have undergone a medical examination. Intended parents must undergo a medical evaluation and mental health consultation. Both parties must obtain independent legal representation. The law requires that one party be a resident of Maine and the surrogate must become pregnant within one year of entering into the agreement.

Virginia adopted, in part, the model Uniform Status of Children of Assisted Conception Act, the precursor to the model Uniform Parentage Act. Accordingly, Virginia's statute does not distinguish between full and partial surrogacy. Under the law, compensation for the surrogate is not allowed. The surrogate must have had at least one previous pregnancy and live birth and must undergo a medical evaluation. There is also a required home study of the intended parents, filed with the court. Intended parents must meet the standards of fitness applicable for adoptive parents. The intended mother must be infertile, unable to bear a child, or unable to do so without unreasonable risk to the fetus or her health. One of the parties must reside in Virginia. To transfer parentage, the intended parents must petition within seven days of the birth of the child. Upon the filing of this notice and a finding that at least one of the intended parents is the child's genetic parent, the court will order the birth certificate to be amended.

3. States Where Surrogacy Is Not Clearly Addressed

A number of states do not clearly address surrogacy either by legislation or through case law. Among these states there is considerable variation as to whether and how surrogacy operates. The sampling of the states of Massachusetts, Tennessee, and Oregon below seeks to demonstrate the variety of legal positions that can result when surrogacy is not addressed by statute.

⁴³ FL Stat. § 742.15

⁴⁴ Storrow, *supra* note 12, at 211–212

⁴⁵ *Id.*

Although **Massachusetts** law names the surrogate (and her husband if she is married) as a child's parent,⁴⁶ the state grants pre-birth orders in the case of full surrogacy contracts. Case law also establishes that the biological parents should be listed on the birth certificate in such a situation.⁴⁷ In the case of partial surrogacy, the rules of adoption apply and the surrogate has four days to refuse to give up the child after giving birth. The existence of a surrogacy contract may be used in custody proceedings following such a case, however, provided that no compensation has been paid beyond pregnancy-related expenses.

Other factors for a court to weigh include: (a) whether the surrogate's husband gave his informed consent to the contract in advance; (b) whether the surrogate is an adult and has had at least one successful pregnancy; (c) whether the surrogate, her husband, and the intended parent/s have been evaluated for the soundness of their judgment and for their capacity to carry out the contract; (d) whether the intended father's wife is incapable of bearing a child without endangering her health; (e) whether the intended parent/s are suitable persons to assume custody of the child; and (f) whether all parties had the advice of counsel.⁴⁸ Massachusetts also requires that the surrogate or intended parent/s be residents of the state for at least 90 days prior to the contract for it to potentially be valid.⁴⁹

Oregon does not have any statutes that directly address surrogacy. However, surrogacy agencies consider Oregon to be a surrogacy-friendly jurisdiction because the state grants pre-birth parentage orders.⁵⁰

While **Tennessee** law defines surrogacy, it neither allows nor prohibits the practice.⁵¹ As a matter of practice, the state does not allow pre-birth parentage agreements so surrogacy agencies consider Tennessee to be an unfriendly jurisdiction.⁵²

D. Overview of Other Countries' Positions on Surrogacy

Globally, there is no consensus regarding the legality of surrogacy. In general terms, countries have adopted four approaches: (1) prohibiting all forms of surrogacy; (2) leaving surrogacy unregulated; (3) expressly permitting and regulating non-commercial (i.e., altruistic) surrogacy only; and (4) allowing all types of surrogacy, including commercial surrogacy.⁵³

⁴⁶ Mass. G.L. c. 46, § 4B.

⁴⁷ *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285 (2001).

⁴⁸ *R.R. v. M.H.*, 426 Mass. 501 (1998).

⁴⁹ *Hodas v. Morin*, 442 Mass. 544 (2004).

⁵⁰ See *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, Creative Family Connections, <http://www.creativefamilyconnections.com/#!/surrogacy-law-by-state/f49jq>, last visited April 2, 2016.

⁵¹ Tenn. Code Ann. §36-1-102(48).

⁵² *Id.*

⁵³ See Sonia Allan, *The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations*, in *Surrogacy American Style*, in *SURROGACY, LAW, AND HUMAN RIGHTS* 113, 130 (Paula Gerber & Katie O'Byrne, eds., 2015); see also Appendix B. For a comprehensive overview of surrogacy regulation worldwide, see generally *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* (Katarina Trimmings and Paul Beaumont eds., 2013).

1. States That Prohibit All Forms of Surrogacy

There are a sizeable number of countries that prohibit all types of surrogacy.⁵⁴

In **France**, surrogacy contracts are void⁵⁵ and prohibited.⁵⁶ However, in 2015 the highest civil court decided to recognize surrogate children born abroad as French citizens as long as they have one French parent.⁵⁷ The number of parents who have tried through various mechanisms to circumvent the prohibition against surrogacy has given rise to significant debates and proposed reforms by French authorities.⁵⁸

Similarly, in **Germany** surrogacy contracts are void and prohibited.⁵⁹ The main reason for prohibiting surrogacy is the perceived violation of the human dignity of the child and the surrogate by being reduced to objects of contracts.⁶⁰ However, in 2014 the German Federal Court of Justice recognized the parental rights of a German same-sex couple who had a child through a surrogate in California, utilizing full surrogacy with the genetic material of one of the intended parents.⁶¹ The court expressly left open, however, questions of full surrogacy with no biological link to the intended parent/s, as well as cases of partial surrogacy.⁶²

In **Italy**, surrogacy is also prohibited.⁶³ An Italian court also recently ordered that a child born of surrogacy in Russia be taken away from his Italian parents and placed in a foster home.⁶⁴ However, in 2015, the European Court of Human Rights ruled that this decision violated Article 8 of the European Convention on Human Rights which provides a right to respect for one's

⁵⁴ Countries include: Afghanistan, Albania, Algeria, Austria, Bahrain, Bangladesh, Croatia, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Iceland, Indonesia, Italy, Jordan, Kuwait, Malaysia, Maldives, Malta, Mauritius, Mexico (Queretaro), Moldova, Morocco, Norway, Oman, Portugal, Qatar, Saudi Arabia, Serbia, Singapore, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Taiwan, Tajikistan, Tunisia, Turkey, Turkmenistan, the United Arab Emirates, Vietnam and Yemen. Allan, *supra* note 53, at 131, n. 82.

⁵⁵ Civil Code, arts. 16-7; Louis Perreua-Saussine & Nicolas Sauvage, *France*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 119, 120 (Katarina Trimmings & Paul Beaumont eds., 2013).

⁵⁶ French Penal Code, art. 227-13, art. 511-24; Perreua-Saussin & Sauvage, *supra* note 55, at 121-22. There are also severe penalties for intermediaries such as agencies, clinics, and doctors who assist: French Penal Code, art. 227-12, art. 511-24.

⁵⁷ *Cour de cassation* decision July 3, 2015; see *Press Release, Surrogate Motherhood Alone Cannot Justify the Refusal to Transcribe into French Birth Registers the Foreign Birth Certificate of a Child Who Has One French Parent*, Cour De Cassation, available at <https://www.courdecassation.fr/documents_traduits_2850/english_2851/the_transcription_7252/press_release_32236.html>.

⁵⁸ Perreua-Saussine & Sauvage, *supra* note 55, at 127-30.

⁵⁹ Sussane L Gossel, *Germany*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 131, 131-34 (Katarina Trimmings & Paul Beaumont eds., 2013) (discussing the Adoption Placement Act and Embryo Protection Act of 1990).

⁶⁰ *Id.* at 132.

⁶¹ Supreme Court of Germany decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), December 10, 2014 <<https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>>.

⁶² *Id.*

⁶³ Rules on Medically Assisted Reproduction Act Feb. 19, 2004, No 40 (Italy), available at <http://www.ieb-eib.org/en/pdf/loi-pma-italie-english.pdf>.

⁶⁴ European Court of Human Rights, Second Section: Case of Paradiso and Campanelli v. Italy (Application No. 25458/12) (2015).

“private and family life” subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society.”

In **Spain** surrogacy contracts are null and void, and the surrogate is a child’s legal mother.⁶⁵ However, in 2010 there was a controversial case concerning two married Spanish men who had a child through a surrogacy arrangement in California. In response, a department of the Ministry of Justice⁶⁶ issued an Instrucción directing that, in the majority of situations, foreign surrogacy will be recognized in Spain,⁶⁷ allowing the intended parents to keep the child. However, the Instrucción limits recognition only to cases where there has been a judicial decision in the foreign jurisdiction.⁶⁸ Spanish courts have not been able to agree with the administrative authorities on the viability of the recognition of foreign surrogacy.⁶⁹

Switzerland has similarly outlawed all types of surrogacy.⁷⁰ Significantly, in 2015 the Swiss Federal Court refused to recognize the parental rights of a Swiss same-sex couple who had a child through a surrogate in California,⁷¹ but did not bar the couple from keeping the child.

2. States That Leave Surrogacy Unregulated

Some countries do not have an express prohibition against surrogacy, although surrogacy contracts are unenforceable under general law.⁷²

Sweden is an example of a country where surrogacy is currently unaddressed in law.⁷³ However, in February of 2016, a governmental commission issued a prominent report concluding that Sweden should affirmatively ban all types of surrogacy. The legislature is expected to adopt the recommendation.⁷⁴

⁶⁵ Ley 14/2006 of 26 May, *sobre Técnicas de Reproducción Humana Asistida*, BOE no 126, 27 May 2006; see also Patricia Orejudo Prieto De Los Mozos, *Spain, in International Surrogacy Arrangements: Legal Regulation at the International Level* 347, 347 (Katarina Trimmings & Paul Beaumont, eds., 2013).

⁶⁶ Dirección General de los Registros y del Notariado (DGRN).

⁶⁷ Orejudo, *supra* note 65, at 349–55.

⁶⁸ *Id.* at 351.

⁶⁹ *Id.* at 354. Orejudo notes that there have already been two judicial decisions in Spain that demonstrate that it is very probable that the entry in the register of the birth of a child of a surrogate arrangement could be temporary. *Id.* Orejudo further argues that Spanish courts could potentially deny recognition of a foreign judgment based on their assessment of the international jurisdiction of the foreign authority and also on public policy grounds. *Id.*

⁷⁰ Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz), Article 4 (1998) (Switzerland).

⁷¹ Swiss Federal Court, Case 5A_748/2014 (2015) (Switzerland).

⁷² Countries include: Argentina (legislative amendments to both allow and prohibit surrogacy have been proposed), Belgium (legislative amendments to criminalize commercial surrogacy have been proposed), Brazil, the Czech Republic (legislative amendments to allow altruistic surrogacy have been proposed), Ireland (legislative amendments to prohibit commercial surrogacy have been proposed), Japan, Mexico, Mexico (Mexico City) and Venezuela. Allan, *supra* note 53, at 131 n. 84; see also Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 439, 462 (Katarina Trimmings & Paul Beaumont eds., 2013).

⁷³ Kajsa Ekis Ekman, *All Surrogacy is Exploitation - the World Should Follow Sweden’s Ban*, GUARDIAN (Feb. 25, 2016), available at <<http://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban>>.

⁷⁴ *Id.*

3. States That Expressly Permit and Regulate Non-Commercial Surrogacy

A number of countries only permit non-commercial or altruistic surrogacy.⁷⁵ Although these countries often impose criminal sanctions on commercial surrogacy, they sometimes allow the payment of “reasonable expense.”⁷⁶ In some jurisdictions only full surrogacy is permitted or expressly regulated.⁷⁷ In several others, surrogates must also meet certain criteria, including: age requirements, satisfying a medical and psychological screening, already having given birth to their own biological child, having residency status, and receiving independent legal advice prior to entering the agreement.⁷⁸

In **Australia**, surrogacy is regulated at the state and territory level.⁷⁹ All states and the Australian Capital Territory prohibit compensated surrogacy but permit altruistic surrogacy and allow reimbursement of some of the surrogate’s costs.⁸⁰ In some Australian states, the prohibition against compensated surrogacy has extraterritorial application.⁸¹ Notably, a federal committee is currently conducting an inquiry into reforming and harmonizing surrogacy arrangements in Australia and is expected to report by June 30, 2016.⁸²

In **Canada**, commercial surrogacy is prohibited under federal legislation.⁸³ All other aspects of surrogacy are regulated on a provincial level.⁸⁴ However, altruistic surrogacy

⁷⁵ Countries include: Australia, Belarus,, Bulgaria, Canada, Denmark, Greece, Hungary, Latvia, some states in Mexico, the Netherlands, New Zealand, South Africa, South Korea, the United Kingdom and Peru. Allan, *supra* note 53, at 132 n. 86.

⁷⁶ *Id.*

⁷⁷ *Id.* (citing Hague Conference Report 2012, *supra* note 4).

⁷⁸ *Id.*

⁷⁹ See *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA). There is no legislation in the Northern Territory.

⁸⁰ Castan Centre for Human Rights Law, Monash University, Submission to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry Into Surrogacy Arrangements (Submission 19) 3 <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into_surrogacy/Submissions>.

⁸¹ In the Australian Capital Territory (*Parentage Act 2004* (ACT), § 45), New South Wales (*Surrogacy Act 2010* (NSW), § 11) and Queensland (*Surrogacy Act 2010* (Qld), § 54(b)). *Id.* at 4–6.

⁸² Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry Into Surrogacy, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into_surrogacy. Prior to the announcement of the federal inquiry, the New South Wales Department of Justice also commenced an inquiry into the state’s *Surrogacy Act 2010* (NSW), reportedly to make access to surrogacy easier: New South Wales Government, Department of Justice, Statutory Reviews: Review of Surrogacy Act 2010, available at

<http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.aspx#ReviewofSurrogacyAct2010>; Cosima Marriner, *Federal Surrogacy Inquiry Won't Halt NSW Law Reform*, SYDNEY MORNING HERALD, Dec. 6, 2015, <<http://www.smh.com.au/national/federal-surrogacy-inquiry-wont-halt-nsw-law-reform-20151204-glfzi4.html>>.

⁸³ See *Assisted Human Reproduction Act* (S.C. 2004), arts. 6–7.

⁸⁴ Susan L. Crockin, *A Legal Primer on Fertility Law in Canada*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, <https://www.asrm.org/Legally_Speaking/A_Legal_Primer_on_Fertility_Law_in_Canada/>; Dave Snow & Rainer Knopff, *Assisted Reproduction Policy in Federal States: What Canada Should Learn From Australia*, 5(12) UNIVERSITY OF CALGARY, THE SCHOOL OF PUBLIC POLICY, SPP Research Papers (2012), available at <<http://www.policyschool.ucalgary.ca/sites/default/files/research/dave-snow-art-final.pdf>>.

generally remains unregulated. Only three provinces have enacted legislative provisions to address filiation in surrogacy contexts.⁸⁵ In Quebec, preconception agreements are void and unenforceable,⁸⁶ although there is currently public and political debate regarding the recognition of surrogacy contracts.⁸⁷

In **South Africa**, both full and partial altruistic surrogacy is legal,⁸⁸ but compensation is not allowed except for “reasonable expenses.”⁸⁹ There are a number of legal requirements relating to the surrogate including that she be a South African citizen and have one biological child living with her.⁹⁰ At least one of the intended parents must be a permanent resident of South Africa.⁹¹

In the **United Kingdom** (U.K.), altruistic surrogacy is permitted⁹² and a surrogate’s “reasonable expenses” can be covered.⁹³ However, surrogacy contracts are unenforceable, meaning that U.K. law does not recognize surrogacy contracts as binding on either party.⁹⁴

4. Jurisdictions That Allow All Types of Surrogacy

There are also a number of countries that have a permissive approach to surrogacy, including commercial surrogacy.⁹⁵

Israel is a unique example of a permissive approach to commercial surrogacy. Full surrogacy is permitted under legislation enacted in 1996. Under the Israeli Act, surrogacy arrangements must be approved by a state appointed Committee, composed of three physicians, a clinical psychologist, a social worker, a public representative who is a jurist by training, and a person of the clergy of the parties’ religion.⁹⁶ The Committee’s Guidelines also specify clauses that must be incorporated into the contract.⁹⁷ After the birth of the child, a governmental welfare agent is the guardian of the child until a court decides otherwise.⁹⁸ Surrogacy is only available to

⁸⁵ British Columbia (*Family Law Act*, SBC 2011, c. 25); Alberta (*Family Law Act*, SA, 2003, c. F-4.5); Nova Scotia (*Birth Registration Regulations* N.S. Reg 390/2007); see also Ellen K. Embury, *A National Review of the Law of Parentage Declarations*, FERTILITY CONSULTANTS, <<http://fertilityconsultants.ca/blog/national-review-law-parentage-declarations-ellen-k-embury/>>.

⁸⁶ Civil Code of Quebec, art. 541.

⁸⁷ Alain Roy, *Quebec Surrogacy Contracts May Soon Be Recognized*, CBC NEWS, March 8, 2015 <<http://www.cbc.ca/news/canada/montreal/quebec-surrogacy-contracts-may-soon-be-recognized-1.2986424>>.

⁸⁸ Children’s Act 2005, § 298(1).

⁸⁹ *Id.* at § 301.

⁹⁰ *Id.* at § 292, 295, 297.

⁹¹ *Id.* at § 292.

⁹² Surrogacy Arrangements Act 1985.

⁹³ For further discussion, see Michael Wells-Greco, *United Kingdom*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 367, 377–381 (Katarina Trimmings & Paul Beaumont eds., 2013).

⁹⁴ *Id.* at § 1A.

⁹⁵ Countries in this category include: Armenia, China (which recently reversed its prohibition), Georgia, Israel, Kyrgyzstan, Russia, Uganda and Ukraine. *Id.*

⁹⁶ Sharon Shakargy, *Israel*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 231, 231–2 (Katarina Trimmings & Paul Beaumont eds., 2013).

⁹⁷ *Id.* at 232–3.

⁹⁸ *Id.* at 234.

couples composed of a man and woman, and intended parents must be habitually residing in Israel.⁹⁹ Due to the requirements of religious law, the surrogate must be unmarried, the same religion as the mother, and not a blood relative of the parents.¹⁰⁰ Notably, this latter requirement makes the practice of commercial surrogacy “practically inevitable.”¹⁰¹ Another factor that makes Israel particularly unique is that the Act authorizes the Committee to approve monthly compensation payments to the surrogate for pain and suffering, as well as reimbursement of expenses resulting from the contract such as time spent for the procedure, loss of income, or temporary inability to work, and any other reasonable compensation.¹⁰² The Act does not require that surrogates be compensated and does not specify minimum or maximum amounts; in practice surrogates are paid between approximately \$35,000 to \$45,000.¹⁰³

There are also a number of other surrogacy-friendly jurisdictions, typically in developing or middle-income countries, which have become hubs of the growing international surrogacy market. As noted by the Permanent Bureau, “[t]he prohibitive or restrictive legal approach of many States to surrogacy (in particular, commercial surrogacy), combined with the liberal approach of a minority, means that prospective intending parents are often using surrogacy services abroad because they are prohibited or restricted at home.”¹⁰⁴ These countries often have measures which allow intended parents to obtain legal parentage and do not have nationality or residence requirements for intended parents.¹⁰⁵ As a result, commercial surrogacy is performed on a relatively large scale, attracting intended parents from anti-surrogacy and anti-commercial-surrogacy jurisdictions.¹⁰⁶

The most popular destination for intended parents where commercial surrogacy is explicitly allowed by statute is **Ukraine**.¹⁰⁷ Another increasingly common destination in Eastern Europe is **Russia**.¹⁰⁸ At one time, **India** was the most notable hub of the international commercial surrogacy market, and, as it had no legislation expressly permitting surrogacy, its allegedly billion dollar industry¹⁰⁹ was unregulated.¹¹⁰ However, in light of high-profile controversies and allegations of exploitation, India recently banned international commercial surrogacy for foreign intended parents.¹¹¹ Many other destination countries are now seeking to

⁹⁹ *Id.* at 235.

¹⁰⁰ *Id.* at 236.

¹⁰¹ *Id.* (citing R. Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 36 (R. Cook, S. Day Schlater & F. Kaganas eds., 2003)).

¹⁰² *Id.* at 238.

¹⁰³ *Id.*

¹⁰⁴ Allan, *supra* note 53, at 133 (citing Hague Convention Report 2012, *supra* note 4).

¹⁰⁵ Trimmings & Beaumont, *General Report*, *supra* note 72, at 439, 443.

¹⁰⁶ *Id.*

¹⁰⁷ Trimmings & Beaumont, *General Report*, *supra* note 72, at 451.

¹⁰⁸ *Id.*

¹⁰⁹ Nirmala George, *Indian Surrogates Feel Hurt By Gov't Ban On Foreign Clients*, AP: THE BIG STORY, November 18, 2015, <<http://bigstory.ap.org/article/ce693e91afac4b7b9169b3b6894c4357/surrogates-feel-hurt-indias-ban-foreign-customers>>.

¹¹⁰ Trimmings & Beaumont, *General Report*, *supra* note 72, at 444.

¹¹¹ Nehaa Chaudhari, *Regulating Assisted Reproductive Technologies in India*, OXFORD HUMAN RIGHTS HUB, November 12, 2015, <<http://ohrh.law.ox.ac.uk/regulating-assisted-reproductive-technologies-in-india/>>; Aditi Malhotra & Joanna Sugden, *India's Surrogacy Industry Needs Regulation, Not a Ban, Say Women's Rights Groups*, WALL STREET J. BLOG, November 17, 2015.

ban or restrict foreign access to surrogacy.¹¹² As of April 2016, countries that have recently banned international commercial surrogacy for foreign intended parent/s include **India**,¹¹³ **Thailand**,¹¹⁴ **Nepal**,¹¹⁵ and **Mexico**.¹¹⁶

In conclusion, there is significant variation in the approach to surrogacy worldwide. Many countries prohibit surrogacy altogether, whereas others allow some or all forms of surrogacy. The regulatory surrogacy landscape is also currently in flux, as many jurisdictions have recently or are currently considering amending their laws. Critically, however, it is clear that no state exists in a vacuum. Each jurisdiction's policy towards surrogacy impacts other states, and the policy position of other states impact all others'. Even where states completely prohibit surrogacy, they face difficult conundrums when children who have been born out of surrogacy arrangements are brought back into their jurisdictions. Similarly, although developing countries have initially taken advantage of the prohibitions of surrogacy elsewhere, they too are responding to allegations of exploitation and harm. Due to the international dimensions and growing complexities involved in surrogacy, many commentators argue that there is an urgent need for a multilateral, legally-binding instrument to establish a global, coherent, and ethical practice of international commercial surrogacy.¹¹⁷

¹¹² Mary Papenfuss, *Developing Nations Closing Wombs-To-let To Westerners*, INT'L BUS. TIMES (UK), March 31, 2016

<<http://www.ibtimes.co.uk/developing-nations-closing-wombs-let-westerners-1552343>>.

¹¹³ Nehaa Chaudhari, *supra* note 111; Malhotra & Sugden, *supra* note 111.

¹¹⁴ *Thailand Bans Commercial Surrogacy For Foreigners*, BBC NEWS, February 20, 2015 <<http://www.bbc.com/news/world-asia-31546717>>.

¹¹⁵ EMBASSY OF UNITED STATES, KATHMANDU, NEPAL, *Surrogacy In Nepal*, October 30, 2015, <<http://nepal.usembassy.gov/service/surrogacy-in-nepal.html>>.

¹¹⁶ *Mexican State Votes To Ban Surrogacy For Gay Men and Foreign People*, GUARDIAN, December 15, 2015 <<http://www.theguardian.com/world/2015/dec/15/mexico-tabasco-state-surrogacy-gay-men-foreign-couples>>.

¹¹⁷ Trimmings & Beaumont, *General Report*, *supra* note 72, at 531.

Part 2 – Arguments and Issues

This Part provides an overview of the key arguments for and against legalizing and regulating the ability of intended parent/s and surrogates to enter into surrogacy contracts. It examines the arguments concerning the rights, well-being, and best interests of children born to surrogates, the rights and interests of women who act as surrogates, the potential objectification and exploitation of disadvantaged women, the rights of the intended parent/s, fragmentation of the traditional conception of the family and parenthood, and the consequences of regulation on domestic and international surrogacy markets.

This Part simply seeks to present the arguments without providing a conclusive assessment of them. An overarching difficulty with the surrogacy debate is the limited empirical research to date; another is the fact that many of the potential harms of surrogacy are not easily measurable, but rather reflect normative judgments about what constitutes harm or risk of harm to society, with the result that much of the discussion is as philosophical as it is technical.

A. The Rights, Well-being, and Best Interests of the Child

Children born of surrogates are uniquely situated. Their existence is exceptionally intentional, the product of a contract designed and executed not only before their birth but also before their very conception. The surrogate purposefully enters into pregnancy, yet knows from the moment she conceives that she has no intention of later parenting the child. In cases of full surrogacy, the surrogate provides no genetic contribution to the embryos with which she is implanted. Thus, the child that is born has no biological connection to the woman who carried it.

These children may also face questions of parentage that children born of traditional pregnancy avoid. For instance, children born of full surrogacy arrangements, where the surrogate has no biological connection to the child, may find themselves not only the subject of a potential custody dispute, but may also face legal uncertainty over which adult(s) even constitute their parents. In the case of a couple who enter a full surrogacy agreement, a child could be born with three adults claiming parental status; this is complicated in a legal system that only recognizes two parents per child.

These distinctive aspects of surrogacy raise concerns about the commodification of children, worries that children may be left stateless if their parentage cannot be determined or will not be recognized by either the state in which they were born or in which they reside with their intended parent/s, questions of how a child's right to parentage should relate to the child's biological background, and uncertainty as to how the "best interest of the child" standard should apply to disputes over parentage, rather than custody.

1. Commodification of Children

The debate about whether surrogacy commodifies children arises from two different views of surrogacy: as a contract for services or an exchange of parental rights (so any

compensation is for gestating and giving birth to a child or for waiving the rights that come with birth) as opposed to a contract for the children themselves (so any compensation is for the child itself).¹¹⁸ Yasmin Ergas describes how those who take the first view emphasize the fact that arrangements are made prior to conception, arguing that the embryo, fetus, and eventually child, would always belong to the commissioning parties and thus cannot be the subject of the contract.¹¹⁹ David Smolin, on the other hand, discusses how those who favor the second view find this distinction to be irrelevant. He points to anti-slavery and anti-trafficking norms and international prohibitions on selling children for adoption, all of which have no exception for “pre-conception” or “pre-transfer” contracts.¹²⁰

Those who view the children born of surrogacy as the objects of the contract also argue that these contracts ignore the best interests of the child in favor of the rights of the contracting adults.¹²¹ Smolin, for instance, details how, if children are commodities being traded and paid for, market mechanisms would then apply to the contract.¹²² He argues that, because these market mechanisms are adult-centered and focus on bargaining power between adults, they cannot properly account for the rights and best interests of children.¹²³ Relatedly, focusing on the needs of the adults neglects some of the child’s more fundamental needs. At least one court has expressed concern that children may suffer adverse effects upon learning they were ‘bought and paid for.’¹²⁴

On the other hand, if surrogacy contracts are viewed as compensation for the gestational service, it may be appropriate for market values to regulate services provided by adults to other adults. Additionally, before a child is born its best interest cannot be evaluated, so contracts made pre-conception should not fundamentally affect the question of the child’s best interest.

Some commentators who view surrogacy as the commodification of children argue that transportation of children across borders in the case of a transnational surrogacy thus becomes a violation of international agreements that prohibit the sale of children. The UN Convention on the Rights of the Child (CRC), for example, contains language explicitly prohibiting certain kinds of transfer of children across international borders, and provides that signatory countries must take measures to combat illicit transfer and non-return of children abroad, as well as the abduction, sale of, or traffic in children for any purpose or in any form.¹²⁵ The Hague Adoption Convention contains language similar to the CRC. One of the Convention’s objectives is to establish a system of cooperation among states to respect safeguards and to prevent the abduction, sale, or trafficking of children.¹²⁶ The preparatory materials for the Convention indicate that “child trafficking” was meant to include obtaining children illicitly for the purposes

¹¹⁸ Richard Posner, *SEX AND REASON* 409–17 (1992).

¹¹⁹ Yasmin Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 *EMORY INT’L L. REV.* 117, 140 (2013).

¹²⁰ David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 *PEPP. L. REV.* 265, 316 (2016).

¹²¹ *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1990).

¹²² Smolin, *supra* note 120, at 331.

¹²³ Smolin, *supra* note 120, at 331–32.

¹²⁴ *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1990).

¹²⁵ UN Convention on the Rights of the Child Art. 11, 35.

¹²⁶ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Art. 1.

of adoption, as well as other illegal purposes.¹²⁷ It is possible to interpret these international agreements as prohibiting transnational surrogacy, arguing that it represents a human rights violation for the child.

2. Statelessness

A related human rights concern is that children born of surrogates could potentially be left without state recognition. In countries that lack laws regulating the establishment of legal parenthood, for example, there is the possibility that children may be left parentless, and thus stateless.¹²⁸ Without state identification, it may be difficult to obtain travel documentation for children born of surrogates, stranding them in their birth country away from those who desire to raise them.¹²⁹ This is not merely a theoretical concern: in 2014, the International Forum on Intercountry Adoption and Global Surrogacy cited instances of such statelessness.¹³⁰ The Forum pointed to the connection between these instances and the lack of regulation and oversight in the surrogacy industry.¹³¹

Christine Kerian raises the concern that children seen as ‘less desirable’ after their birth may be particularly vulnerable to abandonment or statelessness. For instance, intended parent/s who find out about a birth defect while the surrogate is pregnant may find an excuse to not assume responsibility for the child after its birth, or to potentially pressure the surrogate into an abortion.¹³² In these cases the child will lose its right to nationality and identity, as protected by the CRC.¹³³ This would occur where the initial contract did not address this scenario, or addressed it in a manner which was not enforceable.

3. A Child’s Right to Know His/Her Biological Parentage and Heredity

There is also uncertainty as to the rights of children born of surrogacy to know about their own biology and heredity. Because it is only recently that children can be born to women with whom they share no biological connection, there does not appear to be clear consensus on what rights a child has in relation to knowledge of, or connection with, its biological foundation. The fact that adoption is a widely accepted process across the globe further complicates this question.

Courts in the U.S. tend to examine the question of biology from the point of view of the parents, exploring whether or not an intended parent or surrogate should have parental rights because of his or her biological link to the child, rather than whether the child has a right to a relationship with his or her biological parent/s. International courts have also looked to biology to only a limited extent, and appear to come to differing conclusions.

¹²⁷ Smolin, *supra* note 120, at 273.

¹²⁸ Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT’L L. REV. 527, 593–94 (2013).

¹²⁹ *Id.* at 593–94

¹³⁰ Brianne Richards, “*Can I take the Normal One?*” *Unregulated Commercial Surrogacy and Child Abandonment*, 44 HOFSTRA L. REV. 201, 223 (2015).

¹³¹ *Id.* at 223

¹³² Christine Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113 (1997) (citing *In re Adoption of Matthew B.* 232 Cal.App.3d 1239 (1991)).

¹³³ CRC Art. 7(1); Art. 8.

a. United States

Courts in the U.S. vary in how much importance they place on biology when considering the rights of a child born to a surrogate. The *Baby M.* case is an example where biology played a central role in determining parentage. In *Baby M.*, the New Jersey Superior court emphasized that one reason surrogacy contracts should be void is because they violate the public policy principle that children remain with and be brought up by both their natural parents.¹³⁴ Ohio has also looked at the importance of biology, with a Court of Appeals stating in one case that the “individuals who provide the genes of that child are the natural parents”¹³⁵ and a Court of Common Pleas reflecting a similar sentiment in another, saying that “the law requires [that those] who provided the child with its genetics . . . must be designated as the legal and natural parents.”¹³⁶ Other courts have deemphasized the importance of biology in determining custody of children born of surrogacy contracts. For instance, in Pennsylvania, a Court of Common Pleas granted custody to a surrogate on the grounds that she had acted *in loco parentis*, despite the fact that she had done so after taking the children from the hospital against the wishes of the biological father who argued he should have custody.¹³⁷ This decision was later reversed by the Superior Court of Pennsylvania, holding that the surrogate could not have assumed *in loco parentis* status because the father did not participate in or acquiesce to her assumption of custody.¹³⁸ The Superior Court also held that the trial court could not void the surrogacy contract because no party had sought invalidation.¹³⁹

While courts have differed on how they have addressed the child’s rights when born to same-sex couples utilizing surrogacy contracts,¹⁴⁰ one Vermont case specifically pointed to the deprivation a child born of artificial insemination would face if denied access to its second, non-biological parent.¹⁴¹ By ruling that custody should not always be linked to biology, these decisions imply that some courts at least do not see an overriding right for the child to stay with their biological parent/s.

Biology has also factored into the decisions courts make as to whether or not to issue pre-birth orders of parentage in the case of surrogacy contracts. The Massachusetts Supreme Judicial Court has endorsed biology as an important factor in determining parentage, holding that in cases of full surrogacy, the biological parents should be listed on the birth certificate and that in cases of partial surrogacy, traditional adoption rules should apply.¹⁴² Iowa and Louisiana, however, require the biological parents to petition for adoption or to have the birth certificate re-issued.¹⁴³ Thus, although biology appears to be a consideration for some states or courts, the inconsistent status of surrogacy in the U.S. makes it difficult to determine a clear trend.

¹³⁴ *In re Baby M.*, 537 A.2d 1227, 1246–47 (N.J. 1988).

¹³⁵ *J.F. v. D.B.*, 848 N.E.2d 873, 879 (Ohio Ct. App. 2007).

¹³⁶ *Belsito v. Clark*, 644 N.E.3d 760, 762, (Ohio Misc.2d 1994).

¹³⁷ *Flynn v. Bimber*, 70 Pa. D. & C.4th 261, 261 (2005).

¹³⁸ *J.F. v. D.B.*, 897 A.2d 1261, 1261 (Pa. Super. Ct. 2006).

¹³⁹ *Id.*

¹⁴⁰ Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 109 (2010).

¹⁴¹ *Miller-Jenkins v. Miller Jenkins*, 912 A.2d 951, 955 (Vt. 2006).

¹⁴² *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285 (2001); *R.R. v. M.H.*, 426 Mass. 501 (1998).

¹⁴³ Iowa Code § 641-99.15(144); K.S.A. § 23-2201 et. seq.

b. Europe

European courts seem to be similarly divided as to whether or not biology should be deemed important in determining the parentage of a child born to a surrogate. In a French case brought to the European Court of Human Rights (ECHR), the court asserted that the fact that the intended father was also the biological father of the children supported the argument that remaining with the intended parents would be in the children's best interest.¹⁴⁴ However, in an Italian case in front of the same body, the court held that the lack of a biological link between the intended parents and the children was not sufficient to justify removal of the child from a family setting without the presence of immediate danger.¹⁴⁵ The Supreme Court of Germany has refused to hold that a child has the right to know his or her ancestry under German law, and has accordingly rejected the use of that 'right' as a basis for not enforcing surrogacy contracts.¹⁴⁶

4. *Judicial Interpretations of the Best Interest of the Child*

a. United States

Although the standard for determining custody in U.S. courts is the "best interest of the child" standard, courts faced with disputes surrounding surrogacy contracts have looked more often at issues related to the adults who entered into the contract. This includes questions such as intent, contract, genetics, and gestation.¹⁴⁷ Very few courts use the best interest of the child test in cases of surrogacy.¹⁴⁸

In one instance where a court did look at the best interest of the child standard, an appellate court in California held they need not even determine the legality of the surrogacy contract because the best interest of the child determines custody decisions and because private ordering plays a recognized role in family structures.¹⁴⁹ The court additionally noted that the public policy concerns related to surrogacy should be addressed by the legislature, rather than the courts.¹⁵⁰ However, the Supreme Court of California instituted an intent-based test for determining parentage two years later, stating that "determination of parentage must precede, and should not be dictated by, eventual custody decisions."¹⁵¹ California courts now look at the intent of the contracting parties when faced with a surrogacy dispute, rather than the best interest of the child.¹⁵²

b. Europe

¹⁴⁴ ECHR 185 (2014), press release issued June 26, 2014.

¹⁴⁵ Watson, *The European Courts of Human Rights Support Surrogacy*, *supra* note 162.

¹⁴⁶ Decision XII ZB 463/13.

¹⁴⁷ Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 97; 106 (2010).

¹⁴⁸ *Id.* at 106.

¹⁴⁹ Kerian, *supra* note 132, at 113 (citing *In re Adoption of Matthew B.* 232 Cal.App.3d 1239 (1991)).

¹⁵⁰ *Id.* at 127.

¹⁵¹ *Johnson v. Calvert*, 851 P.2d 776, n.10 (Cal. 1993).

¹⁵² Spivak, *supra* note 126, at 103.

European courts have interpreted international human rights law on the rights of children to be applicable to the surrogacy context. For instance, the UN Convention on the Rights of the Child (CRC) instructs that a child shall be registered immediately after birth and has the right from then on to a name, nationality, and to know and be cared for by his or her parents.¹⁵³ Particular concern is to be applied where a child would otherwise be left stateless.¹⁵⁴ The child's right to know his or her identity includes knowledge of nationality, name, and family relations, and any deprivation of this right should be speedily re-established.¹⁵⁵ The CRC also specifies that "the best interests of the child shall be a primary consideration" in all actions concerning children taking place in courts, administrative authorities, and legislative bodies.¹⁵⁶ Other international human rights agreements with similar provisions include the European Convention on Human Rights, which protects the right of each individual to respect for private and family life,¹⁵⁷ and the Universal Declaration of Human Rights, which identifies citizenship as a fundamental right and states that everyone has the right to a nationality.¹⁵⁸

i. European Court of Human Rights

Because surrogacy is illegal in many European countries, European courts have had to decide how to address parentage of children born to a surrogate in a country that recognizes the parental status of the intended parent/s, who then bring the child back to their own home country that does not recognize their parental status. If the home country does not recognize the children's intended parentage, this may trigger negative implications for the child's nationality and/or other legal parental benefits. Recent decisions by the European Court of Human Rights (ECHR) recognize that it is often in the best interest of children to be considered the legal children of their intended parent/s. The court has looked to the human rights guarantee of identity, discussed above, in conducting its best interest analysis in these cases.

In judgments on two French cases, consolidated and brought before the ECHR, the ECHR interpreted the child's right to private life, as codified in Article 8 of the European Convention on Human Rights, as including the right of each individual to establish the essence of his or her identity, including his or her parentage.¹⁵⁹ In a case where twins were birthed with the assistance of a surrogate, the intended parents had cared for the twins since the day of their birth and lived as a family with the children. The court held that denying them status under French law would undermine the children's identity within that legal system, by leaving them with an uncertain position regarding French nationality and a limited ability to inherit from the intended parents. Because surrogacy was not legal in France at the time of the children's birth, the parents' asserted rights would not have been enough to grant legal status to the children. However, in the view of the ECHR, human rights concerns on the children's behalf required that result in order to promote their best interest.¹⁶⁰ Using similar reasoning in a recent judgment on an Italian case, the ECHR cited the CRC to emphasize that it is necessary to ensure a child is not

¹⁵³ CRC, Art. 7(1).

¹⁵⁴ CRC Art. 7(2)

¹⁵⁵ CRC Art. 8

¹⁵⁶ CRC Art. 3(1)

¹⁵⁷ European Convention on Human Rights, Art. 8.

¹⁵⁸ United Nations Universal Declaration of Human Rights, Art. 15.

¹⁵⁹ ECHR 185 (2014), press release issued June 26, 2014.

¹⁶⁰ ECHR 185 (2014), press release issued June 26, 2014.

disadvantaged because he or she was born to a surrogate, particularly in terms of citizenship or identity.¹⁶¹ The ECHR also emphasized that public policy considerations, such as a ban on surrogacy, cannot take precedence over the best interests of the child.¹⁶²

ii. Germany

In a case interpreting recent ECHR determinations regarding surrogacy, the Supreme Court of Germany also prioritized the best interests of a child born through a surrogate over the ban on the practice within the country.¹⁶³ The court recognized the CRC's mandate that preference must always be given to the child's best interests, the recognized right to respect for private and family life, and the connection between this right and the legal parent-child relationship that forms an integral part of a child's identity. The court also emphasized the right to parental care and upbringing protected under German law.¹⁶⁴ This decision demonstrates that similar reasoning to that of the ECHR is also being applied in some national European Courts.

c. Canada

Not all countries that prohibit surrogacy have interpreted the best interest of the child standard to require recognition of the intended parent/s' parental status, however. In 2009, the provincial Court of Quebec refused to allow an adoption proceeding between an intended mother and a surrogate, because surrogacy is prohibited in Quebec and commercial surrogacy is prohibited throughout Canada.¹⁶⁵ Declaring that the best interests of the child is "not an autonomous standard of law in itself" but rather a rule of interpretation, the court declined to apply the standard, saying it is not a catch-all argument that will justify anything.¹⁶⁶ However, this may no longer be the standard even in Quebec, as in 2014 a Quebec Court of Appeal granted custody of a child born of a surrogate to the intended parent/s.¹⁶⁷

B. Rights and Interests of the Surrogate

1. Informed Consent

The ability of women to fully and freely consent to becoming a surrogate is central to any evaluation of the ethics of the practice.

¹⁶¹ Case of Paradiso and Campanelli v. Italy, ECHR Case No. 25358/12 (2015).

¹⁶² Clara Watson, *The European Courts of Human Rights Support Surrogacy*, WORLD YOUTH ALLIANCE, <https://www.wya.net/op-ed/the-european-courts-of-human-rights-support-surrogacy/>.

¹⁶³ Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), CHILD RIGHTS INTERNATIONAL NETWORK, <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

¹⁶⁴ Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), CHILD RIGHTS INTERNATIONAL NETWORK, <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

¹⁶⁵ Ergas, *supra* note 119, at 180.

¹⁶⁶ *In re X*, R.J.Q. 445, 69–70 (2009) (Can.).

¹⁶⁷ *Adoption – 1445*, QCCA 1162 (2014) (Can.).

Some commentators argue that prohibiting surrogacy restricts the freedom of women to use their reproductive capacity as they choose and that it is an affront to the autonomy of women to make their own choices about the way they will spend their time and their talents.¹⁶⁸ In this view, women are rational and autonomous actors who have the capacity to make fundamental decisions about their lives and bodies, including pragmatic choices in light of their practical realities and the opportunities available to them.

These commentators tend to argue that surrogacy is like any other form of labor or work and the best approach is therefore to offer protections and regulations which identify the conditions that heighten risks of exploitation as well enhancing the possibility of positive outcomes.¹⁶⁹ For example, Julie Shapiro argues that if surrogacy is properly constructed and regulated, then some women will choose to be surrogates and they will find it a satisfying and rewarding experience, and society should allow women to make this choice.¹⁷⁰

Conversely, other commentators have argued that an abstract notion of freedom to contract obscures the ways in which women's choices are constrained by poverty, unequal bargaining power, social and cultural pressures, and the unique nature of pregnancy and childbirth.¹⁷¹ These factors are outlined in more detail below.

a. Whether Informed Consent Is Possible Due to the Unique Experience of Pregnancy and Childbirth

One of the key challenges to giving informed consent relates to the unique nature of the experience of pregnancy and childbirth. Some argue that the significant hormonal, biological, and physiological changes a woman experiences during pregnancy and birth, including the bonding that occurs between her and the child, make it too difficult for a woman to consent prospectively to acting as a surrogate.¹⁷² This may be the case particularly where a woman has not experienced previous pregnancy and birth and so cannot predict the bond she may feel with the child.¹⁷³ Surrogates also must consume large doses of hormones in order to prepare their bodies for implantation, which may lead to serious side effects and also affect their decision-making ability while negotiating a surrogacy contract.¹⁷⁴

Others argue that women will find it too difficult to relinquish a child. Some studies suggest these concerns are overstated, and some commentators argue that the issues can be addressed with carefully written contracts. One study indicates that in Western countries most

¹⁶⁸ Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1352–53 (2014).

¹⁶⁹ Allan, *supra* note 53, at 129 (citing A. Pande, *Not An Angel, Not A Whore: Surrogates as Dirty Workers in India*, 16 Indian Journal of Gender Studies 160 (2009)).

¹⁷⁰ Shapiro, *supra* note 168, at 1372.

¹⁷¹ Allan, *supra* note 53, at 129; Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L. J. 1811, 1816–1820 (1988).

¹⁷² M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, J. MED. ETHICS 171, 172 (2009).

¹⁷³ Allan, *supra* note 53, at 127 (citing Molly Walker, *Precommitment in Free-market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity* 31 J. LEGIS. 330 (2005)).

¹⁷⁴ Stark, *supra* note 218, at 375.

surrogates view the relinquishment of the baby as a happy event and express that they would be surrogates again.¹⁷⁵ Moreover, parties can arguably avoid the potential issues arising from the consumption of hormones by entering into the surrogacy contract prior to the commencement of any hormonal or other medical treatment.

b. Whether Informed Consent Is Possible Due to Power Imbalances

Another issue regarding the ability for surrogates to provide meaningful consent is whether surrogates are vulnerable to manipulation by a broker, agent, assisted reproductive clinic, and/or the intended parent/s.¹⁷⁶ Some commentators have noted that intended parent/s generally have greater wealth, education, and social status, as well as stronger connections to institutions of power than surrogates and that even well-intentioned intended parent/s may unwittingly exploit their surrogates simply by making demands she is not in a position to resist.¹⁷⁷ Similarly, highly educated and skilled individuals run surrogacy agencies; they have access to legal professionals, and are repeat players with established expertise and experience.¹⁷⁸ By contrast, surrogates generally bring little experience or expertise and may be vulnerable due to financial need.¹⁷⁹ If a surrogate demands more favorable terms in the contract, she might reasonably fear that she will not be hired.¹⁸⁰ If a surrogate lacks independent legal representation or independent medical and psychological services, it may increase a woman's vulnerability when consenting to be a surrogate.¹⁸¹

Similarly, some argue that surrogates face strong social and cultural pressure that undermines their bargaining position. If surrogates feel pressure to "help" others and be "giving" women, (i.e., to be motivated by altruism rather than financial need or gain), they may be convinced to accept less compensation than they would otherwise demand.¹⁸²

In response to concern about power imbalances between the intended parent/s and the surrogate, some argue that the empirical evidence on surrogacy in Western countries tends to dispute the view that surrogates are poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure them into a surrogacy arrangement.¹⁸³ However, even in light of this empirical research, surrogacy is an expensive, and thus exclusive, process. This means that the intended parent/s are likely to be from a higher socioeconomic class than the surrogate, which could cause coercion during decision-making.¹⁸⁴ One response to this concern, however, is that paid surrogacy is not fundamentally different from other kinds of jobs

¹⁷⁵ Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555, 562–3 (2013).

¹⁷⁶ Allan, *supra* note 53, at 127 (citing Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1449 (2009)).

¹⁷⁷ Shapiro, *supra* note 168, at 1349.

¹⁷⁸ *Id.* at 1350.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1350–1.

¹⁸¹ Allan, *supra* note 53, at 127 (citing Jennifer Rimm, *supra* note 176).

¹⁸² Allan, *supra* note 53, at 128 (citing Ruth Macklin, *What's Wrong with Commodification?*, in *WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* 106 (Cynthia B. Cohen ed., 1996)).

¹⁸³ Peng, *supra* note 175, at 560 (citing Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 51–52 (2010)).

¹⁸⁴ *Id.* at 565.

where people are motivated by money and are employed by people who are wealthier than they are.¹⁸⁵

Some risks of power imbalance and exploitation during contract bargaining can be reduced through legal regulation. Factors that may help to neutralize power imbalances include: (1) independent legal counsel and independent medical assistance and advice, particularly if paid for by the intended parent/s; (2) mandatory payment for a surrogate's health insurance and costs of prenatal and personal health care during pregnancy; and (3) the provision of sufficient information and counseling regarding the agreement in advance.¹⁸⁶ However, some of the overarching causes of socioeconomic disparities, such as economic policy that allows for economic inequality, may be difficult to completely address via legislative intervention.¹⁸⁷

c. Whether Informed Consent Is Possible Due to the Coercion Inherent in Compensation

In the context of commercial surrogacy contracts, a surrogate will likely be motivated, at least in part, by the compensation involved.¹⁸⁸ As medical ethicists have noted, there are concerns that money may be offered to induce people to participate in activities that carry risks that they would not otherwise willingly incur.¹⁸⁹ Thus if the amount of money offered is large enough, it could coerce women who would not otherwise become surrogates into participating in such a contract.

Because of the offer of compensation, some argue that women may enter into a surrogacy contract because of a need to support their already existing children, or because of significant financial need.¹⁹⁰ These circumstances may mean that surrogates could feel forced to agree to certain conditions because they are concerned about their ability to meet their current family's needs if they are not paid, or they risk being left with an unwanted child.¹⁹¹

However, others argue that an objection based on potential coercion resulting from the offer of compensation is not an objection to all compensation *per se*, but only to compensation on a scale that would be coercive.¹⁹² Some also question whether the fact that a surrogate's decision may be influenced by financial need is enough to discount the practice as unacceptable.¹⁹³

¹⁸⁵ *Id.* at 565 (citing Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, 21 PHIL. & PUB. AFF. 211 (1992); Stephen Wilkinson, *The Exploitation Commercial Surrogacy*, 17 BIOETHICS 169, 183 (2003)).

¹⁸⁶ Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1114 (2014).

¹⁸⁷ *Id.* at 73–73.

¹⁸⁸ Peng, *supra* note 175, at 565.

¹⁸⁹ Shapiro, *supra* note 168, at 1371 (citing Ari Vander Walde & Seth Kurzban, *Paying Human Subjects in Research: Where Are We, How Did We Get Here, and Now What?*, 39 J. L., MED. & ETHICS 543 (2011)).

¹⁹⁰ Allan, *supra* note 53, at 128.

¹⁹¹ *Id.*

¹⁹² Shapiro, *supra* note 168, at 1371.

¹⁹³ Allan, *supra* note 53, at 128–9 (citing Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MEDICINE 41 (2000)); R. J. Anderson, *Commodification and Commercial Surrogacy*, 21 PHILOSOPHY & PUB. AFFAIRS 132 (1992); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*,

d. Whether Informed Consent Is Possible Due to Coercion in Altruistic Surrogacy

In altruistic surrogacy contracts, some argue that it may be difficult for a surrogate to provide genuine informed consent in the context of close and complex family or friend relationships. For example, M. M. Tieu argues that although altruistic surrogates overwhelmingly report that they choose to bear children primarily out of altruistic concerns, or to share in the enjoyment of a pregnancy, this should not be taken for granted.¹⁹⁴ Tieu refers to a study which revealed that, for some women, the motivation to become a surrogate was due to feelings about guilt over a previous abortion or having given up a child for adoption.¹⁹⁵

2. Health Risks to the Surrogate

a. Risks to Physical Health

All pregnancies, including those which take place in developed countries with advanced public health care systems, carry certain health risks. As Kristiana Brugger notes, even with an uncomplicated pregnancy women “face the pain of labor[,] . . . physiological damage from the birthing process, infection, [and] negative health effects flowing from pregnancy, such as weight gain, postpartum depression.”¹⁹⁶ Sara Ainsworth further describes how “[s]hort of death, pregnant women face risks to their health such as gestational diabetes, high blood pressure, childbirth complications and injuries.”¹⁹⁷ The American College of Obstetricians and Gynecologists also notes unanticipated medical complications that can arise during pregnancy, including antenatal diagnosis of fetal disease (for which treatment is necessarily invasive to the surrogate) as well as serious pregnancy-induced disease in the surrogate (whose treatment jeopardizes the health of the fetus).¹⁹⁸

In addition to the usual risks involved in pregnancy, full surrogacy requires the use of ART, which carries its own health risks, including an increased likelihood of multiple pregnancies. Because the ART process involves multiple embryos being implanted in the surrogate, it is more likely that her pregnancy will result in twins or triplets, which makes pregnancy more difficult and dangerous. As noted in a recent review of studies into the obstetric, medical, and psychological outcomes for surrogates conducted by Viveca Söderström-Anttila et al, risks of almost all maternal health complications are increased by multiple pregnancies. This

Surrogacy, Adoption, 8 IND. L.J.1223 (2013); A. Pande, *Not an Angel, Not A Whore: Surrogates as Dirty Workers in India*, 16 INDIAN J. GENDER STUDIES 160 (2009)).

¹⁹⁴ Tieu, *supra* note 172, at 171 (citing H. Ragone, *Surrogate Motherhood: Conception in the Heart* 74–78 (1994)).

¹⁹⁵ *Id.*

¹⁹⁶ Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665, 675 (2012).

¹⁹⁷ Ainsworth, *supra* note 186, at 1097.

¹⁹⁸ AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Family Building Through Gestational Surrogacy*, Committee Opinion Number 660, March 2016, <<http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Family-Building-Through-Gestational-Surrogacy>>.

includes, for example, hypertensive disorders, hemorrhage during pregnancy and delivery, preterm labor and delivery, and operative delivery.¹⁹⁹

These health risks are heightened where the medical industry is poorly regulated. For example, in developing countries, implantation with many embryos at one time is more common due to limited regulation.²⁰⁰

Overall, empirical studies to date, as reviewed by Söderström-Anttila et al²⁰¹ and Karen Busby and Delaney Vun,²⁰² indicate that women who act as surrogates in Western countries do not face heightened short or long term health implications due to pregnancy. Söderström-Anttila et al conclude that “a surrogate undergoes risks during pregnancy similar to any other pregnant woman [including] possibility of miscarriage, ectopic pregnancy and common obstetric complications, which are increased by the risk of multiple pregnancies.”²⁰³

Some have argued that the implementation of processes and procedures that safeguard the interests of surrogates can minimize the health risks of pregnancy.²⁰⁴ For example, to avoid unnecessary endangerment of the health of the surrogate and the future child, Söderström-Anttila et al strongly recommend that only one embryo be transferred at a time to the surrogate.²⁰⁵ In its Committee Opinion published in March 2016, the American College of Obstetricians and Gynecologists also recommended additional steps to minimize health risks to the surrogate, including:

Preconception counseling should help clarify values and expectations of all parties, and specific scenarios and their resolution should be discussed with all independent legal representatives and documented in a signed, written preconception agreement. Topics to address should include, but are not limited to, questions of how many embryos to transfer during treatment, how to proceed if a high-order pregnancy is conceived or a serious fetal anomaly is discovered, what kind of prenatal testing will be sought, and how parties will respond to an unexpected birth defect in the newborn. Although preconception counseling and contract negotiation may help prepare involved parties to resolve such

¹⁹⁹ Viveca Söderström-Anttila et. al, *Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting families—A Systematic Review*, 22 HUMAN REPRODUCTION UPDATE 260, 263; see also Malene Tanderup, et. al, *Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India*, 12 BIOETHICAL INQUIRY 491, 493 (2015).

²⁰⁰ Nila Bala, *The Hidden Costs of the European Court of Human Rights’ Surrogacy Decision*, 40 YALE J. INTL. ONLINE 11, 15 (2014) (citing Jenni Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious Regulation or ‘25 Brick Walls’?*, 35 MELB U. L. REV. 2, 32 (2011)); Fred de Sam Lazaro, *Surrogate Mothers in India*, PBS (Aug. 17, 2012), <http://www.pbs.org/wnet/religionandethics/2012/08/17/august-17-2012-surrogate-mothers-in-india/9612>; Deepa Padmanaban, *Murky Cases, Happy Endings*, HINDU (Aug. 19, 2014), <http://www.thehindu.com/books/books-authors/gita-aravamudan-on-her-book-baby-makers-the-story-of-indian-surrogacy/article6331751.ece>).

²⁰¹ Söderström-Anttila et. al, *supra* note 199, at 263.

²⁰² Busby & Vun, *supra* note 183, at 80–1.

²⁰³ Söderström-Anttila et. al, *supra* note 199, at 273.

²⁰⁴ Busby & Vun, *supra* note 183, at 86.

²⁰⁵ Söderström-Anttila et al, *supra* note 199, at 272; see also Tanderup et. al, *supra* note 199, at 493.

issues, it is important in these situations to remember the primacy of the gestational carrier's right to autonomous decision making related to her body and health.²⁰⁶

The fact that health risks for a surrogate can be reduced through the use of specific safeguards further emphasizes the importance of effective legal representation and regulation.

b. Risks of Psychological Harm

Along with the fact that surrogates face an increased risk of a physically difficult pregnancy, many commentators point to a concern that surrogates may suffer psychological or emotional trauma or other unanticipated emotional consequences when they relinquish the child after birth.²⁰⁷ This is said to occur because of the physical, hormonal, and emotional changes that take place during pregnancy and due to the emotional bond that is formed that cannot be predicted in advance. These commentators often analogize the stress on the surrogate to the regret biological mothers are said to feel in traditional adoption.²⁰⁸

However, other commentators have noted that empirical research does not support these concerns. They point to studies conducted in Western countries that indicate that few women have regretted participating in surrogacy contracts or experienced distress on giving up the child after birth, and that surrogates rarely refuse to relinquish the child after birth.²⁰⁹ On the contrary, empirical studies of commercial surrogacy have largely concluded that surrogates and the intended parent/s are satisfied and enriched by the process.²¹⁰

3. Bodily Autonomy and Medical Decision-Making

Much of the commentary in this area focuses on a perceived sharp tension between a surrogate's reproductive autonomy and ability to make use of her reproductive capacity, versus the intense nature of pregnancy and childbirth that some say undermines bodily autonomy and integrity.

Pregnancy necessarily has an intense and long-term impact on the surrogate. The surrogate and the fetus are biologically and physically interdependent,²¹¹ and therefore surrogacy arrangements tend to regulate the life of the surrogate throughout the pregnancy. Indeed, "their body is literally being used for someone else's purposes in a constant and inseparable manner."²¹² As Pamela Laufer-Ukeles describes:

²⁰⁶ American College of Obstetricians and Gynecologists, *supra* note 198.

²⁰⁷ Söderström-Anttila et al, *supra* note 199, at 262 (citing FIGO, COMMITTEE FOR ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN'S HEALTH, *Report: Surrogacy*, 102, INT. J. GYNECOLOGY & OBSTETRICS 312 (2008)).

²⁰⁸ Peng, *supra* note 175, at 562–3.

²⁰⁹ Busby & Vun, *supra* note 183, at 67–71; Peng, *supra* note 175, at 562–3; Söderström-Anttila et. al, *supra* note 199, at 268.

²¹⁰ Laufer-Ukeles, *supra* note 193, at 1224; Peng, *supra* note 175, at 560.

²¹¹ Laufer-Ukeles, *supra* note 193, at 1236.

²¹² *Id.*

There is no going home at the end of the day; there are no breaks and one cannot really quit or get a new job without complete upheaval and the suffering involved in undergoing an abortion. Once a pregnancy is initiated, surrogates are literally trapped, physically, into their agreements and into their entangled relationship with intentional parents. Moreover, commissioning parents are interested in and can even assert control over the daily actions of the surrogate. Surrogacy contracts may prevent surrogates from international travel or participation in high impact sports or cigarette smoking, or they may require certain actions and encumber surrogates' freedom generally.²¹³

A key issue during a pregnancy that can impact a surrogate's bodily autonomy and her health is medical decision-making regarding multiple inseminations and the consequent risk of multiple pregnancies. If multiple pregnancies or other complications do occur, the decision about whether to perform a fetal reduction—aborting one or more of the 'extra' fetuses—or to abort a pregnancy when the surrogate is suffering from complications affects the surrogate's bodily autonomy and her health.

Another facet of a surrogacy arrangement that may be in tension with a surrogate's bodily autonomy is the fact that a surrogacy contract regulates a surrogate's lifestyle and conduct over the course of the pregnancy. For example, a recent European Parliament report noted that such contracts often require surrogates to undergo sampling tests, amniocentesis or vaginal ultrasound, to change their diet or lifestyle, and/or terminate the pregnancy under certain circumstances.²¹⁴

The choice between Caesarean section and vaginal delivery also implicates surrogates' bodily autonomy. Caesarean sections without medical indication may have some disadvantages compared to vaginal delivery, including a higher risk of infection, a longer recovery period, the risk of future caesarean sections, and scarring.²¹⁵ However, some have noted, in the context of India for example, that caesarean sections are carried out routinely in the case of twin pregnancies in surrogacy.²¹⁶

The efficacy of regulatory efforts in protecting a surrogate's bodily autonomy can be disputed. On one hand, some of the risks and intrusions to a surrogate's bodily autonomy discussed above can possibly be alleviated through effective legal representation during contract negotiations and through legislative regulation. These include, for example, contractual protections or regulations promulgated through legislatures, administrative bodies, or medical associations regarding concerns raised above as to insemination with multiple embryos, fetal reduction and abortion, putting reasonable limits upon intrusions on a surrogate's lifestyle and conduct, prohibiting the surrogate from being required to make medical decisions that compromise her health, and ensuring that a surrogate is properly informed about the risks and impact of the surrogacy.

²¹³ *Id.*

²¹⁴ Allan, *supra* note 53, at 127–28 (citing European Parliament, Director General for Internal Policies, Policy Department Citizens Rights and Constitutional Affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States* 25 (2013), <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)>).

²¹⁵ Tanderup, *supra* note 199, at 493.

²¹⁶ *Id.*

On the other hand, there is arguably only so far that legal representation during contract negotiation or legislative intervention can go in managing an inherent tension between the surrogate's right to bodily autonomy and the best interests of the fetus.

4. International Human Rights Law

Under international human rights law, a woman's decision to enter into a surrogacy contract is arguably protected *prima facie* by her right to privacy and reproductive autonomy. As such, attempts to limit these rights must be justified as being reasonable in all the circumstances.²¹⁷

However, it is unclear what guidance international human rights law can provide in weighing these competing interests. Barbara Stark argues that the protections and safeguards for pregnant women under the Convention on the Elimination of all Forms of Discrimination Against Women²¹⁸ (CEDAW) are not inconsistent with surrogacy.²¹⁹ On the contrary, in Stark's view, CEDAW may indicate that regulations which protect the health of the surrogate reduce objections to the practice.²²⁰ However, Stark also notes that recognition of maternity as "a social function" rather than a commercial function in Article 5 is difficult to reconcile with commercial surrogacy.²²¹ John Tobin concludes that from the perspective of international human rights law it is arguable that transnational commercial surrogacy should be prohibited because it risks the exploitation of disadvantaged women especially in developing countries, and/or maintains gender inequality, although he concedes these propositions are subject to dispute.²²²

C. A Broader Context: Systematic Objectification and Exploitation of Disadvantaged Women

The concern that surrogacy exploits women who act as surrogates does not apply only to each individual case where a woman enters a surrogacy contract. There are specific demographics of women that some argue are especially vulnerable to exploitation. Some further argue that because the practice of surrogacy objectifies women's bodies, *all* women are in fact exploited in the context of surrogacy.

A particularly vulnerable demographic of women are those in developing countries, where the surrogacy industry is likely to be poorly regulated and there is a larger pool of poor and uneducated women who may easily be used as surrogates. As Western courts begin to recognize children born to surrogates abroad as being citizens of the countries where they are

²¹⁷ John Tobin, *To Prohibit or Permit: What is The (Human) Rights Response To The Practice of International Commercial Surrogacy?*, 63 INT'L & COMP. L. Q., 317, 344. (2014).

²¹⁸ *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res 34/180, art. 11.2, 12, 14, 16 U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981) (CEDAW) (discussed in Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 372 (2012)).

²¹⁹ Stark, *supra* note 218, at 372.

²²⁰ *Id.*

²²¹ *Id.*

²²² Tobin, *supra* note 217, at 351.

being raised by their intended parent/s, even in cases where that country prohibits surrogacy within its borders, the disincentives to engaging in surrogacy intended by the ban may begin to fade. If more intended parent/s are thus encouraged to go abroad to find a surrogate, disadvantaged women in developing countries may be taken advantage of. A similar demographic concern is that poorer women of color may be taken advantage of in developed countries, by being disproportionately used as surrogates when compared to wealthier white women.

For those who find the very concept of surrogacy to be contrary to the principles of feminism and offensive to women, the practice seems to make light of, or even ignore, the special and unknowable nature of motherhood. It commodifies women by turning them into ‘breeding machines.’ As discussed in more detail below, however, a different feminist view sidesteps the commodification concern and embraces surrogacy while still focusing on women’s unique role in reproduction. In this view, rather than turning women into commodities, surrogacy offers an opportunity for the market to value uniquely female services that have traditionally been overlooked or dismissed as valuable outside the home.

1. Impact on Disadvantaged Women

a. Potential Exploitation in Developing Countries

Because a large number of surrogacy contracts now take place in developing countries, populations of poorer, less educated women of color often function as surrogates. Since these countries tend to regulate the surrogacy industry poorly, if they regulate it at all, some fear that legalized surrogacy makes this subset of women particularly vulnerable.²²³ For instance, a woman in India may make the equivalent of ten years’ salary through one surrogacy contract²²⁴—such overwhelming economic incentives may make poorer women particularly vulnerable to participation in a potentially dangerous and exploitative practice.²²⁵

Women in developing countries may also risk agreeing to be surrogates without fully understanding to what they have agreed. While this is a broad concern for any woman agreeing to be a surrogate, there are particular dangers in countries where the demographics of those acting as surrogates and those with less education overlap. For instance, Nila Bala points to occasions in which illiterate women have not had a surrogacy contract sufficiently explained to them, or in which women who do not have legal education have found themselves with unequal bargaining power and thus agreed to assume all medical, financial, and psychological risks of the pregnancy.²²⁶

Bala describes a similar concern that surrogates in developing countries are not always informed of the extent to which the process is going to affect their bodily autonomy. Because a woman may not always understand a surrogacy contract, she may agree to medical procedures

²²³ Michele Goodwin, *Reproducing Hierarchy in Commercial Intimacy*, 88 IND. L. J. 1290, 1293 (2013).

²²⁴ Bala, *supra* note 200, at 11 n.31 (citing Nicola Smith, *Inside India’s International Baby Farm*, TIMES (May 9, 2010), available at <http://www.geneticsandsociety.org/article.php?id=5192>).

²²⁵ Goodwin, *supra* note 223, at 1293.

²²⁶ Bala, *supra* note 200, at 15.

that she otherwise would not, such as placement on life-support to protect the fetus in the case of extreme harm to her (the surrogate's) body.²²⁷

However Bala also proposes that better monitoring and regulation of the global industry may alleviate some of these concerns.²²⁸ She suggests an international treaty, which could create central agencies in countries to regulate surrogacy agencies and agreements, and mandate basic requirements for contracts, such as payment and a comprehensive explanation of the surrogates' rights.²²⁹ Rather than concluding that surrogacy should be prohibited or that surrogates should be paid less, which might only exacerbate concerns of exploitation or objectification, Bala argues that these potential issues highlight the need for protections for surrogates.²³⁰

b. Potential Exploitation in Developed Countries

Concerns about disproportionate exploitation of certain populations of disadvantaged women do not arise only in the context of developing countries, however. Some worry that poorer, less educated women of color may act as surrogates more often in developed countries as well.

There does not appear to be a definitive trend of poorer women most often acting as surrogates in developed countries. Although some studies have found that the majority of surrogates would not participate in the process without compensation,²³¹ there is debate over whether or not such compensation makes surrogacy inherently exploitative. Scholars have argued and courts have held that paying lower-class women to act as surrogates is not exploitative in and of itself,²³² and recent studies have found that surrogates in the U.S., and similar countries like Canada and the U.K., are not necessarily poor nor claim to feel pressured into surrogacy. Many say they are appreciative of the fee but were inspired to be surrogates for other reasons, including that they enjoy being pregnant and are proud to be able to make such a difference in an otherwise childless couple's life.²³³

In response to the argument that surrogates are not motivated purely by the compensation provided, however, some argue that if altruism were the true motivation behind surrogacy there would be more surrogates performing the service for lower-class couples who could not afford to pay much as compensation.²³⁴

There also does not appear to be a definitive trend of less educated or psychologically vulnerable women acting as surrogates at a disproportionate rate in Western countries. Busby

²²⁷ Bala, *supra* note 200, at 15–16.

²²⁸ Bala, *supra* note 200, at 18.

²²⁹ *Id.*

²³⁰ Bala, *supra* note 200, at 15.

²³¹ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 717 n.6 (2003).

²³² *Id.* at 717 n.9.

²³³ Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 611 J. OF SOC. ISSUES, 21, 36 (2005); Kerian, *supra* note 132, at 113; Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 376 (2012).

²³⁴ Ciccarelli & Beckman, *supra* note 233, at 36; Kerian, *supra* note 132, at 161.

and Vun found that studies on surrogates show that most women in developed countries who agree to become either altruistic or commercial surrogates are Caucasian, Christian, and in their late 20s-early 30s.²³⁵ Surrogates have varying degrees of education, but a large portion have had some higher education.²³⁶ Researchers using standardized psychological tests to evaluate surrogates have concluded that they are within normal ranges and are more likely than the general population to be self-sufficient, independent thinkers, and nonconformists, and therefore tend to be less affected by social pressure than other women.²³⁷ Lina Peng argues that this profile of surrogates as mature, experienced, stable, self-aware, and extroverted non-conformists who make the initial decision that surrogacy is something that they want to do is not surprising,²³⁸ given the interests of commissioning parents and surrogacy agencies to screen out financially or emotionally unstable women who are more likely to change their minds.²³⁹

Racial disparities between surrogates and the intended parent/s likewise appear not to follow a set pattern of exploitation. Although some express concern that women of color will be disproportionately used as surrogates for white intended parent/s, particularly in the U.S. context,²⁴⁰ studies thus far have found that women of color are actually underrepresented in the U.S. among surrogates as a whole.²⁴¹

2. Surrogacy as Exploitative of All Women

a. Economic Exploitation More Broadly

Beyond explicit economic exploitation, some scholars also voice concern about the potential for surrogacy to take advantage of larger structural economic inequalities built into society, which affect all women. There is a fear that some women may be pressured into surrogacy to alleviate economic pressures at home, or that women's traditional role providing feminized work will lead some women to participate in surrogacy arrangements without feeling it is a choice they have freely made.²⁴²

b. Exploitation in a Patriarchal Society

There are also social, as well as economic, reasons that surrogacy can be seen as exploitative of women as a whole. Some argue that, given the fact that society is patriarchal and that women hold a unique role in reproduction, women will never be able to consent to surrogacy no matter how the industry is regulated. In a male-dominated society, they argue, women are socialized to believe they should put the interests of others above their own and measure their

²³⁵ Busby & Vun, *supra* note 183, at 42–43.

²³⁶ *Id.*

²³⁷ *Id.* at 46.

²³⁸ *Id.* at 560, 566 (citing Busby & Vun, *supra* note 183, at 51–52).

²³⁹ Peng, *supra* note 175, at 566.

²⁴⁰ Stark, *supra* note 233, at 375.

²⁴¹ Ciccarelli & Beckman, *supra* note 233, at 31.

²⁴² Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND L.J. 205, 215 (1992) (citing GENA COREA, *THE MOTHER MACHINE* 228–230 (1985)).

self-worth by their level of sacrifice.²⁴³ These commentators also question whether or not women are able to consent to surrogacy in a society where childbearing is the prime function for which women are valued.²⁴⁴ Related to this is the argument, previously discussed above in Part II.B.2(b), that women cannot know the full depth of the bond that they will develop with the fetus over the course of a pregnancy, and thus cannot give voluntary, informed consent to surrogacy in advance.

Because of the patriarchal structure of society, some argue that surrogates suffer from a kind of “false consciousness” and thus their “choice” and subsequent positive reporting of their experiences cannot be given full weight.²⁴⁵ For example, Gena Corea argues that because childbearing is the prime function for which women are valued, it is not surprising that some women only feel special when they are pregnant and assert that they love reproducing.²⁴⁶

In response, however, Peng argues that rejecting a surrogate’s personal account of her experiences, no matter how well-considered and fully voluntary, fails to listen to what women say and to respect their choices, ultimately amounting to paternalism.²⁴⁷ Shapiro similarly notes the relevance of the fact that thousands of women have served as surrogates and found it to be a rewarding and enriching experience.²⁴⁸ Just as it seems impossible to ignore the potential for exploitation, it is also seems unreasonable to discard or invalidate the experience of the women who have benefitted from being surrogates.²⁴⁹

Another line of thought argues that questioning the contracting power of surrogates is dangerous because the reasoning that women’s role in society makes them uniquely unable to make decisions could be extrapolated to other contexts, ultimately sending women back to a time when that very rationale was the motivation for such policies as preventing women from holding property.²⁵⁰ Jessica Munyon emphasizes that courts have found informed consent to be present in other situations where it is impossible to know in advance what the emotional toll will be, such as sterilizations, abortions, sex change operations, and heart surgery.²⁵¹ Thus, she argues that the fact that surrogacy could have unexpected emotional consequences for the surrogate should not prevent her from being able to give informed consent. Munyon also describes how the argument that hormones may affect decision-making could be extended to excuse other hormone-based activities. This would set a dangerous precedent because, taken to its extreme conclusion, a focus on how hormones can cloud rational decision-making could potentially excuse crimes such as rape.²⁵²

c. Commodification of Women and Reproduction

²⁴³ Kerian, *supra* note 132, at 160.

²⁴⁴ Lieber, *supra* note 246, at 215.

²⁴⁵ Peng, *supra* note 175, at 567.

²⁴⁶ As described in Lieber, *supra* note 242.

²⁴⁷ Peng, *supra* note 175, at 567.

²⁴⁸ Shapiro, *supra* note 168, at 1352.

²⁴⁹ Shapiro, *supra* note 168, at 1352.

²⁵⁰ Lieber, *supra* note 246, at 216.

²⁵¹ Munyon, *supra* note 231, at 230 n.74.

²⁵² *Id.* at 230 n.75.

The focus on women's role in society as being primarily one related to reproduction leads some to worry that surrogacy commodifies women through its singular focus on one physical aspect of her being. Kerian describes the fear that valuing a woman for her reproductive capacity will turn her womb into a commodity, thus dehumanizing her by focusing on her womb's potential contribution to society rather than her own.²⁵³ Recognizing a compelling state interest in preventing the exploitation of women, some courts have echoed this concern that for-profit surrogacy has the potential to reduce women to the status of "breeding machines."²⁵⁴

Kerian turns on its head the argument that compensation is problematic and argues that surrogates should be paid *more* for their services. Kerian describes how rather than worrying that women will be recognized only for their value as a womb, the problem is undervaluing the unique reproductive capacity of women.²⁵⁵ Equating paid surrogacy with the commodification of women's bodies suggests that reproductive activity has no economic value. However under this argument, the exploitation comes not from being paid for surrogacy but from the lack of recognition of the amount of work that being a surrogate entails.²⁵⁶

D. The Rights of the Intended Parent/s

1. U.S. Constitutional Law

At present there is no Supreme Court precedent on the issue of surrogacy, but those who support surrogacy contend that the issue is ripe for review.²⁵⁷ Advocates for intended parents believe that privacy arguments from the Fifth and Fourteenth Amendments would support their right to pursue surrogacy.²⁵⁸ According to the *Skinner, Griswold, and Roe* line of cases,²⁵⁹ decisions about procreation are subject to strict scrutiny. Advocates for intended parents argue that this should extend to the decision to procreate through surrogacy, although there is a lot of scholarly disagreement in this area.

Andrea Carroll cites three scholarly positions on the argument that an intended parent's right to pursue surrogacy is protected by the Fifth or Fourteenth Amendment.²⁶⁰ The first is a narrow view and narrow framing of the fundamental right in a *Glucksberg* analysis.²⁶¹ This view frames the inquiry as a fundamental right to pursue surrogacy. It contends that either the fundamental right to privacy in reproductive decisions only applies to traditional means of

²⁵³ Kerian, *supra* note 132, at 725.

²⁵⁴ *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App 1992).

²⁵⁵ Kerian, *supra* note 132, at 164.

²⁵⁶ *Id.* at 164.

²⁵⁷ Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 860, (2012-2013).

²⁵⁸ Carla Spivak *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L., 97, 114, (2010).

²⁵⁹ *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. State of Oklahoma*, ex. Rel. Williamson, 316 U.S. 535 (1942).

²⁶⁰ Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L. J. 1187, 1195-96, (2013).

²⁶¹ See *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (describing a two-part fundamental rights analysis where to be considered a fundamental right a practice must "objectively, deeply rooted in this Nation's history and tradition" and carefully described).

reproduction deeply rooted in history or that it only applies to reproductive decisions that intrude on bodily integrity like sterilization or forcing someone to carry a child to term.²⁶² This view rejects the application of strict scrutiny to surrogacy and allows a government to ban it under rational basis review.

Alternatively, an expansive reading of the right to enter surrogacy contracts says that the right to procreation is what must be protected. As Peter Nicolas notes, surrogacy contracts are “nearly always” pursued by couples who cannot procreate without the assistance of third parties.²⁶³ These individuals need surrogacy to exercise the right to procreate and denying them that right is, for Nicolas, the equivalent of the forced sterilizations in *Skinner*.²⁶⁴ Under this view, if the government wanted to ban surrogacy, it would need a compelling interest to pass the strict scrutiny test.

A third possibility is that there is no absolute right to surrogacy, but that if some intended parents are allowed to access it, then it must be available to all intended parents on equal protection grounds. One instance in which this argument becomes relevant is in evaluating Florida’s surrogacy law, for example, which restricts surrogacy to married couples.²⁶⁵ Unmarried couples or single intended parents in that instance might bring an equal protection claim.

Nicolas argues that even if the expansive reading of the procreation cases is rejected, a new *Glucksberg* analysis would still lead to a fundamental right for surrogacy. He shows that surrogacy is deeply rooted in history by quoting the Bible and surveying the landscape of state law to show that most states have permitted and currently permit surrogacy in some form.²⁶⁶ No court has yet recognized a fundamental right to surrogacy, however, leaving room for disagreement with this theory.

Advocates for intended parents also make an equal protection argument for surrogacy. If a state allows artificial insemination in the case of an infertile male, then the state should allow surrogacy as the remedy for when a woman is infertile.²⁶⁷ To not do so would be formal sex discrimination. The counterargument is that surrogacy burdens a surrogate in a way that artificial insemination does not burden a sperm donor.²⁶⁸ Advocates have applied this particular equal protection argument in the context of putting the intended mother’s name onto the birth certificate and have had mixed success in courts.²⁶⁹

2. *International Human Rights Law*

²⁶² *Id.*

²⁶³ Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1280 (2014).

²⁶⁴ *Id.* at 1281.

²⁶⁵ FL Stat. § 742.15

²⁶⁶ *Id.* at 1282–94.

²⁶⁷ Spivak, *supra* note 258, at 110.

²⁶⁸ *Id.*

²⁶⁹ Storrow, *supra* note 12, at 212.

Similar to the constitutional law landscape, international human rights law does not directly support surrogacy because there is no recognized right to a child. But, certain international principles can be extended to support the intended parent/s rights to enter into a surrogacy contract. For example, members at the World Conference on Population held in Cairo said that, “the aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.”²⁷⁰

The counter argument to this proposition is that the reproductive rights of one individual should not allow him or her to enlist a third party, the surrogate, in pursuit of his or her right.²⁷¹ Other relevant rights that intended parents often argue to support their cause are the right to form a family and the right to privacy in family life.²⁷² Article 17 of the International Covenant on Civil and Political Rights says that the right to respect for privacy and family cannot be subject to arbitrary or unlawful interference.²⁷³ But, this right is in competition with the rights of others, including the surrogate and the child. In sum, international human rights law provides some indirect support to intended parents’ claim that they have a right to surrogacy.

3. Medical Infertility, Other Health Problems, and the Rights of People With Disabilities

According to the Center for American Progress, as of 2007, fourteen states had a mandate to cover or offer infertility-related procedures as part of health insurance coverage.²⁷⁴ These plans differ on multiple dimensions, including the procedures covered and their restrictions on who can receive the benefits. For example, some plans only cover people who meet a medical definition of infertile and thus restrict the coverage from those considered situationally infertile.²⁷⁵ This would include, for example, single men who are not medically infertile but are looking to have a child on their own.

Surrogacy, however, is just one of many infertility treatments and the right to receive infertility treatments does not necessarily mean there is a right to surrogacy. Any argument about a right to surrogacy for these groups could be more compelling due to their lack of practical alternatives, but the core argument would still come from either a constitutional or international human rights norm discussed above.

When discussing disability and surrogacy, commentators tend to focus on whether the fetus or child develops a disability and not on the disability status of the intended parent/s. When any disabilities of the intended parent/s are considered, it is often to restrict access to surrogacy, because people with disabilities can sometimes be wrongly viewed as less capable parents.²⁷⁶

²⁷⁰ Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, ILSA J. INTL & COMP. L. 1, 10 (2012).

²⁷¹ Tobin, *supra* note 217, at 324.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Jessica Arons, *Future Choices: Assisted Reproductive Technologies and the Law*, CENTER FOR AMERICAN PROGRESS, 8–9. (2007).

²⁷⁵ *Id.*

²⁷⁶ Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1111 (2014).

States should be careful when regulating surrogacy to not use mental health restrictions in particular to discriminate against disabled persons.²⁷⁷

4. LGBTQI People, Unmarried Couples, and Single People

The recent Supreme Court rulings in *Windsor* and *Obergefell* have the potential to shift the terrain around surrogacy.²⁷⁸ Both opinions defend the legitimacy of same-sex families. According to Khiara Bridges, the court might extend this stance to also protect the legitimacy of how these families come to be, which is often through surrogacy.²⁷⁹ In other words, the legal recognition of same-sex couples implicitly encompasses the only way same-sex couples and single persons can form families: with the assistance of third parties.²⁸⁰ Martha Field critiques this position, however, stating that there is no necessary connection between surrogacy and marriage.²⁸¹ She notes that not all marriages entail the ability to procreate and that heterosexual and homosexual, married and unmarried, people use surrogacy.²⁸²

Both LGBTQI people and/or the unmarried, have potential equal protection claims to access surrogacy. Multiple commentators argue that if a state is providing infertility services including surrogacy to a married heterosexual couple, then equal protection principles dictate that everyone should have access to those services.²⁸³ Just as it would be irrational to deny contraceptives to single people, it would also fail rational basis review to deny surrogacy to single people if couples were allowed to participate in it.²⁸⁴

Prior to *Obergefell*, the marriage requirement for the intended parent/s seeking surrogacy functioned as a bar to same-sex couples who wanted to legally employ surrogacy. Now that same-sex marriage is legal in all states, that issue is moot. However, states that have a marriage requirement in their surrogacy laws, including Florida, Texas, and Utah, could be vulnerable to a potential equal protection challenge from unmarried individuals. If a state chose to ban surrogacy, however, an equal protection argument to access it would be unavailing.

E. Fragmentation of the Traditional Conception of the Family and Parenthood

Surrogacy implicates deeply held convictions about family formation and motherhood and fatherhood, underpinned by diverging moral, ethical, and religious frameworks.

Surrogacy is often opposed on the basis that it undermines the integrity of the familial unit and the role of the parent, especially motherhood. These concerns are rooted in a position

²⁷⁷ *Id.*

²⁷⁸ See *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

²⁷⁹ Khiara M. Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1130 (2014).

²⁸⁰ Nicolas, *supra* note 263, at 1280.

²⁸¹ Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1169 (2014).

²⁸² *Id.*

²⁸³ See, e.g., Carroll, *supra* note 260; Spivack, *supra* note 258.

²⁸⁴ Carroll, *supra* note 260, at 1198.

that the family is the natural and fundamental unit underpinning society and that it is an institution that serves an indispensable role in contributing to the flourishing of children, adults, communities, and society at large. Anxiety surrounding surrogacy reflects a view that it threatens the integrity, stability, and functionality of the “natural” family, and is an “invalid” form of family formation.

As Elly Teman describes:

Surrogacy upsets the moral framework in which reproduction is regarded as a “natural fact” grounded in love, marriage, and sexual intercourse. Surrogacy constructs families through the marketplace, making them a matter of choice rather than fate. By threatening the understanding of families as biological facts, surrogacy reveals instead that families are social constructs.²⁸⁵

As well as overarching concerns about the integrity of the family unit, other critics emphasize that surrogacy fragments the intrinsic meaning and integrity of motherhood. In particular, they object to the way in which gestational, genetic, social, and legal aspects of motherhood can be separated and no longer need to be housed in the one woman. As Teman describes, “[g]iving birth to a child for the purpose of relinquishment also defies mainstream assumptions that identify pregnancy with the birth mother’s commitment to the project of subsequent lifelong social mothering and threatens dominant ideologies in many cultures that assume an indissoluble mother-child bond.”²⁸⁶

However, others argue that notions of motherhood, parenthood, and the family are not “natural” or static concepts, but instead are contested and highly fluid constructs capable of shifting meaning and disruptions across changing historical and social context, including the advancement of medical technology. Indeed, some argue that surrogacy directly challenges the “ideology of motherhood,” and reveals that “the belief in motherhood as the natural, desired, and ultimate goal of women in general is also constructed.”²⁸⁷

As Peng notes, an overarching difficulty with the surrogacy debate is that the harms are not tangible or measurable, but rather normative and ideologically driven judgments about what constitutes harm or risk of harm to society.²⁸⁸ This makes it difficult to create consistent policies across jurisdictions whose values and priorities may vary; without consistent policies, however, no jurisdiction can fully control surrogacy within its boundaries, as intended parent/s can engage in the process in a jurisdiction whose regulations, or lack thereof, they find to be more friendly to their personal circumstances.

²⁸⁵ ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 7 (2010).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Peng, *supra* note 175, at 557.

F. The Impact of State Intervention: Consequences of the Regulation of Domestic and Transnational Surrogacy Markets

1. Broad Positions

There are two main opposing views of state intervention in the surrogacy market: depending on one's position, it is either (1) a legitimation of a problematic practice, or (2) a regulation necessary to mitigate risks of exploitation in an industry that has the potential to be helpful for families, but also of being exploitative to women.

Deontological opposition to surrogacy opposes legalizing surrogacy to any extent.²⁸⁹ In this view, even heavily regulating surrogacy would still constitute state approval of a practice that denigrates women and views them and their bodies as valuable solely for their reproductive capacities.²⁹⁰ This view also sees the practice of surrogacy as the exchange of money for a child, which is also something that the state should not allow or support for commodification reasons.²⁹¹

The opposing view—focusing on bodily autonomy and accepting the conclusion that most participants in regulated surrogacy arrangements report satisfaction with the experience—supports state intervention to facilitate surrogacy. In this view, state regulation provides for necessary safeguards to ensure that surrogacy operates in a way that protects the rights of the parties involved, particularly of the surrogate. The position of legalization plus regulation is supported by empirical surveys of participants in surrogacy arrangements.²⁹² Such reports have found that participants in U.S. surrogacy arrangements report positive experiences on the whole.²⁹³

2. State Framing of the Practice of Surrogacy and Rights Protection

Among those who agree that the state should permit and regulate surrogacy, however, further debate remains regarding which view of surrogacy the state should promote. How exactly the state presents surrogacy, or how the state frames the practice, can serve to protect important rights of the parties in the process.

Currently, many U.S. states and a significant number of other countries, including Australia, New Zealand, and the U.K., frame surrogacy as “a form of adoption.”²⁹⁴ The majority of U.S. states do not have a clear policy on, or comprehensive regulation of, surrogacy arrangements.²⁹⁵ As such, generally, if and when parties enter into a surrogacy contract, the intended parent/s file for parental rights after the birth of the child to the surrogate.²⁹⁶ In other

²⁸⁹ Martha Field, *Compensated Surrogacy in the Age of Windsor*, 89 WASH. L. REV. 1069, 1155 (2014).

²⁹⁰ *See id.*; Scott, *supra* note 40, at 131, 134.

²⁹¹ *See id.* at 128.

²⁹² *See generally* Ciccarelli & Beekman, *supra* note 233, at 21.

²⁹³ *Id.* at 31–32.

²⁹⁴ Liezl van Zyl & Ruth Walker, *Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model*, 12 J. BIOETHICAL INQUIRY, 383, 383.

²⁹⁵ *See infra* Appendix A.

²⁹⁶ *See id.*

words, this tends to take the form of a kind of adoption. In certain ways, this prioritizes and supports a surrogate's access to the child more than a system in which the intended parent/s are also the legally presumed parent/s upon the birth of the child.²⁹⁷

Some commentators believe that surrogacy is instead “best understood as a commissioned pregnancy rather than a form of adoption.”²⁹⁸ This view sees a formalization and professionalization of the process as the way to avoid tough issues of attachment or exploitation. Other commentators believe that the state should presumptively give surrogates parental rights, reasoning that this is the only way for the government to adequately respect their bodily autonomy and dignity.²⁹⁹

Similarly, advocates debate the morality of compensating surrogates. Some believe that compensating a woman for her work as a surrogate is the only way to fully dignify it,³⁰⁰ while others believe that compensating a woman for surrogacy is degrading.³⁰¹

4. Conflict of Laws, Uniformity of Laws, and Regulatory Conflict Concerns

Concern over how other jurisdictions regulate surrogacy and the resulting spillover effects also presents a powerful argument for regulation. In considering surrogacy regulation domestically, there is a concern over uniformity in state laws. Internationally, there is a concern that if surrogacy is illegal in a certain country, the intended parent/s will travel to a country with more lax regulation instead, which could compromise protection of both surrogates' and children's rights.

The first concern inter-jurisdiction conflict of laws on surrogacy presents is that individuals living where surrogacy is illegal will still be able to participate in surrogacy arrangements in other permitting jurisdictions through travel.³⁰² This concern exists for both interstate and international surrogacy, and it is largely connected to concerns about exploitation of women acting as surrogates or a lack of protection for the intended parent/s' rights.

Countries that have become destinations for international surrogacy arrangements are typically ones that do not provide legal protections for either surrogates or the intended parent/s.³⁰³ This dynamic exists somewhat within the U.S—the surrogacy industry generally treats states where surrogacy is unaddressed in the law as welcoming³⁰⁴—however, the

²⁹⁷ van Zyl & Walker, *supra* note 294, at 385

²⁹⁸ *Id.*

²⁹⁹ See Laufer-Ukeles, *supra* note 193, at 1253; Shapiro, *supra* note 168, at 1357.

³⁰⁰ See *id.* at 1352–3.

³⁰¹ *Id.* at 1369.

³⁰² See Laufer-Ukeles, *supra* note 193, at 1265; Nicolas, *supra* note 263, at 1246–49; *Comments Regarding Surrogacy Inquiry*, L. INSTITUTE VICTORIA, <<http://www.liv.asn.au/getattachment/4262f182-7e07-40cf-b5e0-a9b4f10017e0/LIV-Comments-regarding-Surrogacy-Inquiry.aspx>> (“Although 18 U.S. states allow commercial surrogacy, Americans remain well represented among the consumers of international commercial surrogacy. There are also reports that surrogate business is thriving underground.”).

³⁰³ See, e.g., Laufer-Ukeles, *supra* note 193, at 1266 (discussing the case of India being a destination for surrogacy where there is little regulation of the practice, although it is allowed).

³⁰⁴ See, e.g., Nicolas, *supra* note 263, at 1246–49 (citing Oregon as an example of a state viewed as friendly to the surrogacy industry where there are no explicit laws regulating or banning it).

dichotomy between locations is not of a similar extent. Internationally, this leads to concern over the conditions in which surrogates are agreeing to these arrangements (is it with full informed consent, or is there an element of economic or other coercion?).³⁰⁵

Both interstate and international surrogacy also present particularly difficult issues regarding children of surrogacy arrangements. In the U.S., even though states technically have purview over family law, federal law on citizenship is supreme and prevents some particularly tricky issues in interstate surrogacy from arising; such issues, however, can arise in the international surrogacy context.³⁰⁶ For instance, a child born out of a technically illegal international surrogacy arrangement could potentially be denied citizenship rights in their intended parents' home country (an example of a country where this would be the case is France).³⁰⁷ As mentioned previously, courts like the European Court of Human Rights have recently begun to overrule these decisions, requiring home countries of intended parents to recognize the citizenship rights of children born through international surrogacy arrangements.³⁰⁸ This trend could significantly decrease countries' and states' incentives for banning surrogacy and simultaneously increase incentives to welcome surrogacy, as a way to combat the problematic aspects of international surrogacy.³⁰⁹

5. Effect of Criminalization

Finally, criminalization of surrogacy arrangements, while presenting the ability to strongly deter a practice some view as against public policy, presents difficulties from two perspectives. First, there is a potential argument that this violates the due process and equal protection rights of intended parent/s. Second, criminalizing the practice results in legal uncertainty for children who are born from surrogacy arrangements, notwithstanding the ban, in either other states or other countries.

Nicolas argues that, particularly given that a great number of intended parents are gay couples, criminalizing surrogacy violates equal protection and due process by excluding a specific class of parents from the right to procreate.³¹⁰ Viewed in this way, not only banning but also criminalizing surrogacy cuts off one of the only options that gay couples might possess to have biological children.³¹¹ Criminalizing the practice goes one step further than simply banning surrogacy, given that surrogacy bans are often hard to enforce when there are no real enforcement mechanisms.³¹²

Second, criminalization only adds to the concern for children's welfare mentioned above.³¹³ While some countries limit criminal penalties to intermediaries or people who arrange

³⁰⁵ Laufer-Ukeles, *supra* note 193, at 1267–75.

³⁰⁶ Laufer-Ukeles, *supra* note 193, at 1250–51.

³⁰⁷ *Id.*; see also *infra* Appendix B.

³⁰⁸ See *id.* (specifically France and Italy).

³⁰⁹ Laufer-Ukeles, *supra* note 193, at 1277.

³¹⁰ See Nicholas, *supra* note 263, at 1293 (stating that a right to engage in surrogacy arrangements exists under 14th Amendment due process protection).

³¹¹ See generally *id.*

³¹² Laufer-Ukeles, *supra* note 193, at 1276.

³¹³ *Id.*

or advertise surrogacy contracts, a few countries do not specify who could be liable for criminal punishment. Left undefined, these criminal penalties could impact the intended parent/s or surrogates.

Part 3 – Possible Legislative Provisions under Proposed New York Law

This part analyzes certain provisions contained in New York’s proposed bill, the Child-Parent Security Act, Assemb. B. 4319, 2015 Assemb., Reg. Sess. (N.Y. 2016). The objective of this part is to contextualize these provisions of the proposed Child-Parent Security Act by comparing them with other states and by placing the provisions within the broader context of issues around surrogacy discussed in Part 2.

This information is relevant to advocates and citizens in New York, interested in how New York’s proposed law would work in practice and how the bill could be tweaked to improve its coverage. It is relevant to those outside New York as well because it provides an example of a current pending statute that could be revised based on the above analysis. Such an example is a useful illustration of how various provisions contained in surrogacy laws relate to theoretical debates and practical consequences of these contracts.

A. Access and Approval Processes

1. Criteria Applying to All Parties

The proposed Child-Parent Security Act (Assemb. Bill 4319) requires that both the intended parent/s and the surrogate verify and sign a gestational surrogacy contract, in addition to the spouse of the surrogate, if applicable.³¹⁴ Both the surrogate and the intended parent/s must be represented by separate, independent counsel “in all matters concerning the gestational carrier arrangement.”³¹⁵ This is in line with the fact that all states that address representation in their surrogacy statutes currently require that the parties be represented by independent counsel.³¹⁶

Proponents of the separate legal counsel requirement reason that it ensures that a licensed attorney will advocate for and protect the interests of all parties will be advocated for and protected by a licensed attorney. Because surrogacy contracts are particularly complex, having separate legal counsel can better ensure the contract’s validity and that each party is clear on his or her rights and responsibilities.³¹⁷

Residency appears to be an issue in the proposed Child-Parent Security Act only if parentage is disputed. In that case, the surrogate or intended parent/s must be able to show New York residency of at least 90 days, or that the child was born in New York.³¹⁸ However some

³¹⁴ Assemb. B. 4319, 2015 Assemb., Reg. Sess. (N.Y. 2016) [hereinafter proposed Child-Parent Security Act].

³¹⁵ *Id.* at § 581-405 (5)

³¹⁶ California Family Code § 7962(f), 79 Del. Laws, c. 88, § 8-806, Me. Rev. Stat. § 1931, NRS 126.750(2), NH Stat. Title XII, Chapter 168-B:8-9, NJ Assembly No. 910(5)(5) (proposed).

³¹⁷ Amanda M. Herman, *The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts*, 18 CHAPMAN L. REV. 553, 566 (2015). Some states provide for optional reimbursement of the surrogate, including funds to pay for separate legal counsel. *See infra* Appendix A (for example, New Hampshire specifically includes legal expenses in its list of what may be reimbursed).

³¹⁸ Child-Parent Security Act § 581-203.

states require a similar 90-days' residency before parties can even enter into a surrogacy contract.³¹⁹ Residency requirements reflect the complicated nature of surrogacy across the U.S. states and the attempts states have made to protect themselves from intended parent/s traveling across state lines to take advantage of laws seen as more favorable to surrogacy.³²⁰

2. Criteria Applying to Intended Parent/s

The proposed Child-Parent Security Act requires that the intended parent/s be adults, and, if married, both spouses must enter into the contract unless they are legally separated or have lived apart for at least three years.³²¹ However, it also allows single people and those in intimate partnerships to enter into surrogacy contracts.³²² Proponents reason that these neutral provisions ensure that the state does not discriminate against certain non-traditional family structures and protect the right to procreate as being independent from marital status.³²³

Under the proposed Child-Parent Security Act, intended parent/s need to agree in advance to accept legal custody of all children immediately upon birth.³²⁴ Including this clause in the contract provides certainty to the intended parent/s and ensures stability for the child, thus following the best interest standard.³²⁵

Some states require that the intended parent/s be unable to conceive naturally without the risk of health problems to the parents or fetus.³²⁶ These restrictions face criticism from those who claim they could create complications for same-sex couples or single men, who would not be able to biologically conceive as a couple but may not have any medical condition related to fertility.³²⁷ Although the proposed Child-Parent Security Act requires the surrogates to undergo a medical evaluation, it does not say anything about the health of the intended parent/s' or their ability to conceive. This increases the number of people who could enter into surrogacy contracts.

Some states also require a home study before intended parent/s can enter into a surrogacy contract,³²⁸ reflecting a view of surrogacy that is more like adoption, even in the cases of full surrogacy where the intended parents contribute all genetic material.

³¹⁹ Me. Rev. Stat. § 1932(3)(C), TX Family Code, Title 5, Subtitle B, Ch. 160, Subchapter A § 159.201, Utah Code Ann. § 78B-15-802(2).

³²⁰ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 816 (2012); *see also* Herman, *supra* note 317, at 575 (describing how aspects of Illinois' surrogacy law "opens the door for legal issues when intended parent/s who travel to Illinois to utilize a surrogate return home to their own state, which may or may not have a favorable view of surrogacy").

³²¹ Child-Parent Security Act § 581-404 (b)(2).

³²² *Id.* at § 581-404 (b)(2).

³²³ Arshagouni, *supra* note 320, at 809.

³²⁴ Child-Parent Security Act § 581-405(a)(7)(ii)(A).

³²⁵ Herman, *supra* note 317, at 569.

³²⁶ Ch.742.15(2)(a) FL Stat., 750 ILCS 47/20(b)(2)., TX Family Code, Title 5, Subtitle B, Ch. 160, Subchapter A § 160.756(2), Utah Code Ann. § 78B-15-803(2)(b), VA Code § 20-160(B)(8).

³²⁷ Arshagouni, *supra* note 320, at 809–10.

³²⁸ TX Family Code, Title 5, Subtitle B, Ch. 160, Subchapter A § 160.756(3), Utah Code Ann. § 78B-15-803(2)(c), VA Code § 20-160(A).

3. Criteria Applying to the Surrogate

The proposed Child-Parent Security Act requires that the surrogate be at least 21-years-old and undergo a “medical” exam relating to the anticipated pregnancy.³²⁹ The surrogate, and her spouse if applicable, must agree to surrender the child to the intended parent/s immediately upon birth.³³⁰

To protect the surrogate from medical risk and exploitation, the proposed Child-Parent Security Act requires her to have—or she would be required by the contract to obtain—a health insurance policy covering major medical treatments and hospitalization. This policy must be valid until at least eight weeks after the birth of the child. Such insurance can be paid for by the intended parent/s, however.³³¹

Some states also have additional requirements for surrogates. To address concerns about a surrogate’s ability to give informed consent, some states require that a surrogate previously have given birth.³³² This appears to be a particularly common provision in surrogacy statutes recently enacted or currently pending in legislatures,³³³ but the proposed Child-Parent Security Act does not have this requirement. Two states currently require a mental health evaluation as well as a medical examination as to physical health,³³⁴ but, like the majority of states with surrogacy statutes, New York’s would not require a mental health evaluation under the proposed Child-Parent Security Act. Those who advocate for such an examination express concerns about exploitation of women and the necessity of ensuring truly informed consent, while those who do not feel a mental health evaluations is necessary point to studies that have found very few incidences of negative psychological impacts on surrogates in Western countries.³³⁵

Restrictions on who can act as a surrogate are commonly included in surrogacy statutes, and proponents of such restrictions cite them as reasonable safeguards that minimize the risk of exploitation while still allowing competent and willing women to serve as surrogates.³³⁶ While specifications as to age, parity, and health of the surrogate are commonly included in statutes regulating surrogacy,³³⁷ the specific nature of these restrictions vary by state and reflect the concerns of the enacting legislature in the specific context of their state.

³²⁹ Child-Parent Security Act § 581–404 (a)(1)-(2).

³³⁰ *Id.* at § 581-405 (a)(7)(i)(B).

³³¹ *Id.* at § 581-404 (a)(4).

³³² 79 Del. Laws, c. 88, § 8-806(a)(2), 750 ILCS 47/20(a)(2); Me. Rev. Stat. § 1931(1)(B); NH Stat. Title XII, Chapter 168-B:9(II); Utah Code Ann. § 78B-15-803(2)(f); VA Code § 20-160(B)(6).

³³³ *See* Me. Rev. Stat. § 1931(1)(B); NH Stat. Title XII, Chapter 168-B:9(II); NJ Assembly No. 910(5)(2) (proposed) (*see also* Utah Code Ann. § 78B-15-803(2)(f) and VA Code § 20-160(B)(8)).

³³⁴ 750 ILCS 47/20, NH Stat. Title XII, Chapter 168-B:9(IV).

³³⁵ Arshagouni, *supra* note 320, at 828–29.

³³⁶ *Id.* at 809.

³³⁷ *Id.*

B. Legal Rights and Responsibilities

1. Provisions in Surrogacy Contracts and Enforceability

a. Enforceability

A contract is enforceable when each party is able to legally compel other party or parties to fulfill their obligations under that contract. The issue of enforceability is an important one in the context of surrogacy, because it directly concerns the issue of whether the court can legally compel a surrogate to relinquish the child.

The proposed bill provides that a gestational contract will be enforceable if it meets certain specified criteria.³³⁸ A gestational contract is enforceable under the Child-Parent Security Act if:

- the agreement is in a “signed record” verified by the intended parent/s, the gestational carrier, and her spouse, if any ;³³⁹
- the agreement is executed prior to the commencement of any medical procedures;³⁴⁰
- the intended parent/s and gestational carrier meet the prescribed eligibility requirements;³⁴¹
- the intended parent/s and gestational carrier have been represented by separate, independent legal counsel;³⁴²
- if the agreement provides for compensation, the compensation is placed in escrow with an independent escrow agent prior to the commencement of medical procedures;³⁴³
- the agreement provides that the gestational carrier agrees to undergo an embryo transfer and attempt to carry and give birth to the child,³⁴⁴ and to surrender the custody of the child to the intended parent/s immediately upon birth;³⁴⁵
- the agreement provides that the gestational carrier has the right to utilize the services of a healthcare practitioner of her choosing after consultation with the intended parent/s; and³⁴⁶
- the agreement provides that the intended parent/s accept custody of all resulting children immediately upon birth regardless of the number, gender, or mental or

³³⁸ Child-Parent Security Act §§ 581-401, § 581-409.

³³⁹ *Id.* at § 581-405(1).

³⁴⁰ *Id.* at § 581-405(2).

³⁴¹ *Id.* at §§ 581-405(3)–(4); *see supra* notes 314–337 and accompanying text.

³⁴² Child-Parent Security Act § 581-405(5).

³⁴³ *Id.* at § 581-405(6).

³⁴⁴ *Id.* at § 581-405(7)(i)(A).

³⁴⁵ *Id.* at § 581-405(7)(i)(B).

³⁴⁶ *Id.* at § 581-405(7)(i)(C).

physical condition,³⁴⁷ and that they assume sole responsibility for the support of those children,³⁴⁸ and that those rights and obligations are not assignable.³⁴⁹

As an additional step, after entering into the surrogacy contract, the parties must then obtain a judgment of parentage.³⁵⁰ Where the parties have failed to obtain a judgment of parentage, the judge will determine parentage based on the best interests of the child taking into account genetics and the intended parent/s.³⁵¹

The proposed Child-Parent Security Act further clarifies that, except as expressly provided for in the surrogacy contract, the intended parent/s and the surrogate are entitled to all remedies available at law or equity in any dispute related to the contract,³⁵² but there can be no specific performance for a breach of a term requiring the surrogate to be impregnated.³⁵³

Some argue that surrogacy contracts should not be enforceable because they commodify the children born pursuant to the contracts. Similarly, under this view, making surrogacy contracts enforceable has the potential to undermine a surrogate's autonomy and denies her the right to change her mind. On the other hand, making surrogacy contracts enforceable is important in order to create legal certainty and confidence in the surrogacy process.

b. Rights of Parties During the Pregnancy and Birth

As discussed in *supra* Part 2, there are considerable concerns that intense regulation and intrusive supervision during pregnancy may facilitate the potential exploitation of the surrogate and the undermining of her bodily autonomy due to intense regulation and intrusive supervision during pregnancy.³⁵⁴ On the other hand, the interests of the surrogate should be balanced with best interests of the fetus that depends on the surrogate for its wellbeing.

The proposed Child-Parent Security Act seeks to address these concerns by providing that the surrogacy contract may not limit the right of the surrogate to make decisions to safeguard her health.³⁵⁵ It also provides that contracts must include a term stating that the surrogate can utilize the services of a healthcare practitioner of her choosing, after consultation with the intended parent/s, to provide the surrogate's care during the pregnancy.³⁵⁶ Similarly, the surrogate's right to independent legal counsel can help ensure that she is able to advocate for her rights and interests during the negotiation of the surrogacy contract.³⁵⁷

³⁴⁷ *Id.* at § 581-405(7)(ii)(A).

³⁴⁸ Child-Parent Security Act § 581-405(7)(ii)(B).

³⁴⁹ *Id.* at § 581-405(7)(ii)(C).

³⁵⁰ *See id.* at §§ 581-201–206; *see also infra* notes 374–383 and accompanying text.

³⁵¹ Child-Parent Security Act § 581-408.

³⁵² *Id.* at § 581-409(b).

³⁵³ *Id.* at § 581-409(c).

³⁵⁴ *See supra* Part 2(B)(3).

³⁵⁵ Child-Parent Security Act § 581-401(d).

³⁵⁶ *Id.* at § 581-405(7)(ii)(C).

³⁵⁷ *Id.* at § 581-405(5).

However, the proposed Child-Parent Security Act is silent on the specific issues of multiple inseminations, fetal reduction, and abortion. Furthermore, although the surrogate's right to make decisions to "safeguard her health" cannot be limited,³⁵⁸ the surrogate has no right to make decisions according to her lifestyle, beliefs, or interests. Therefore, the proposed Child-Parent Security Act still allows for the surrogate to be intensely regulated and monitored during the pregnancy.

2. Reimbursement of Expenses to the Surrogate versus Compensation

Although some states and countries distinguish between the legality of 'commercial' surrogacy and the legality of reimbursing a surrogate for her 'reasonable expenses,' there is considerable theoretical tension embedded in this distinction. In theory, reimbursement merely covers the cost of the pregnancy while compensation would allow the surrogate to be paid beyond expenses and profit from the surrogate contract. In practice, there is no clear line between the two—some states allow "reimbursement" for "hardship," which goes above and beyond reasonable expenses and enters the realm of compensation. The proposed Child-Parent Security Act contributes to the tension by failing to define what "reimbursement" or "reasonable compensation" means and by including reimbursement for reasonable expenses within the definition of compensation.³⁵⁹

The proposed Child-Parent Security Act allows for compensation "based on services rendered, expenses that have been or will be incurred, time, and inconvenience."³⁶⁰ The proposed act provides several guidelines for what reasonable compensation entails, which are: (1) the compensation must be "reasonable;" (2) the compensation must not include payment conditioned on the purported or actual quality of either gametes, embryos, or other genetic material; and (3) the compensation is limited to the duration of the pregnancy and the eight weeks after birth.³⁶¹

While the reasoning for limiting money exchanged in surrogacy contracts to money in repayment for expenses often focuses on dignity arguments, there are in fact arguments based on dignity that cut both ways. In terms of how jurisdictions implement reimbursement or compensation policies in practice, there are a variety of iterations. Some European nations have taken the stance that compensation turns surrogacy contracts into exploitative arrangements and so only allow what they term "altruistic" surrogacy arrangements.³⁶² These arrangements allow reimbursement for expenses but not compensation above and beyond actual expenditures.³⁶³ These jurisdictions reason that this limits the number of women participating in surrogacy arrangements to only those women who want to provide a service to help a loved one, friend, or other close relation.³⁶⁴ Additionally, there are some states that similarly limit compensation to

³⁵⁸ *Id.* at § 581-401(d).

³⁵⁹ *Id.* at Part 5.

³⁶⁰ Child-Parent Security Act Part 5.

³⁶¹ *Id.*

³⁶² See *infra* Appendix B (as an example, South Africa explicitly requires, under Children's Act Section 295, that a surrogate mother have an altruistic motive and not be compensated for her surrogacy services).

³⁶³ See *id.*

³⁶⁴ Melodie Slabbert & Christa Roodt, *South Africa, in* INTERNATIONAL SURROGACY ARRANGEMENTS (Katarina Trimmings & Paul Beaumont, eds., 2013).

reasonable expenses, because of the fear that further compensation will be exploitative.³⁶⁵ On the other hand, several U.S. states permit compensation beyond reasonable expenses, with certain restrictions and limitations, just as the proposed Child-Parent Security Act does.³⁶⁶

The proposed Child-Parent Security Act in no way requires compensation, in fact it does not even require reimbursement. Some would say that allowing any compensation beyond reimbursement demeans the women who act as surrogates and presents potential for their exploitation as well.³⁶⁷ Such arguments center on the same deontological concerns as those arguments that oppose state sanctioning of surrogacy at all—in the same way, the very fact that compensation is allowed is wrong because of the exploitative potential and the irrevocable impact of viewing pregnancy as a transaction that allows for profit.³⁶⁸

Others disagree about the degree to which allowing compensation is theoretically problematic. Shapiro has argued that, although the feminist critique of surrogacy has long focused on the issue of compensation for carrying a child, the true feminist problems with surrogacy are (1) not being named a legal parent of the child and (2) differentiating partial and full surrogacy.³⁶⁹ She does not see whether or not the intended parent/s compensate the surrogate over and above exact reimbursement for expenses as a determinative of whether the arrangement respects the autonomy and dignity of the surrogate.³⁷⁰ Instead, Shapiro suggests that if surrogacy law were modified as she suggests, to grant parental rights to both the intended parent/s and the surrogate initially, then compensating a surrogate would not constitute payment for parental rights, since those would already belong to the intended parent/s as well.³⁷¹

Some commentators would assert that compensation for the surrogate’s “work” is the best way to fully dignify the arrangement.³⁷² These voices focus on autonomy arguments—if it is a woman’s choice to enter into a surrogacy contract, the monetary compensation further dignifies the work that she will be doing and the service she will be providing.³⁷³

3. *Transferral of Parentage*

The proposed Child-Parent Security Act’s approach is one of several ways states have handled the transfer of parentage. The surrogacy industry heavily considers the ease of obtaining pre-birth parentage orders when determining which states it considers friendly towards surrogacy.³⁷⁴

³⁶⁵ See *infra* Appendix A.

³⁶⁶ See *infra* Appendix A.

³⁶⁷ See Laufer-Ukeles, *supra* note 193, at 1238; Scott, *supra* note 40, at 112.

³⁶⁸ See, e.g., Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 222 (2009) (“We potentially do harm to ourselves and to human flourishing if we treat something integral to ourselves as a commodity, that is, as separate and fungible.”).

³⁶⁹ Shapiro, *supra* note 168, at 1346.

³⁷⁰ *Id.* at 1369.

³⁷¹ *Id.*

³⁷² van Zyl & Walker, *supra* note 294, at 384.

³⁷³ Shapiro, *supra* note 168, at 1372.

³⁷⁴ See <http://www.creativefamilyconnections.com/#!/surrogacy-law-by-state/f49jq>

The proposed Child-Parent Security Act allows a judge to issue a judgment of parentage prior to birth through a judicial hearing. The judgment would not become effective, however, until after the birth of the child.³⁷⁵ Delaware and California employ the same approach.³⁷⁶ The proceeding to seek a judgment of parentage can commence once all of the parties have executed the surrogacy contract.³⁷⁷ When judgments of parentage are granted, the court will declare that the intended parent/s are the legal parent/s of the child and declare that the surrogate, and their spouse if applicable, are not the legal parent/s of the child.³⁷⁸ The proposed Child-Parent Security Act also stipulates that a copy of the judgment be served on the proper department of health or the registrar of births in the hospital where the child is born.³⁷⁹ Intended parent/s will then be listed on the birth certificate.³⁸⁰

If the parties fail to obtain an order of parentage prior to birth then the result is that the court will determine parentage using the best interest of the child test taking into account genetic ties and the parties' intent.³⁸¹ If a party petitions for parentage after the birth of the child, the court will grant it if the court finds by clear and convincing evidence that the petitioner has met all five factors listed in §581-601.³⁸² The proposed Child-Parent Security Act also allows spouses to obtain a judgment of parentage regardless of any presumptions that may apply.³⁸³

³⁷⁵ Child-Parent Security Act §581-201(b).

³⁷⁶ Del. Code. Ann. 13 §8-611 (2016), Cal. Fam. Code §1733 (West 2016).

³⁷⁷ Child-Parent Security Act §581-203.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* Or if a birth certificate has already been issued it will be amended and the original will be sealed.

³⁸¹ *Id.* at §581-408.

³⁸² (1) Any parent or parents of a child consented to the putative parent's formation of a parent-child relationship with the child, such consent to be expressed in written form, including but not limited to, any of the following examples: a signed letter agreement, an executed contract, a birth announcement, a religious ceremony document, or a school or medical record; and (2) The putative parent resided in the same household with the child for a length of time sufficient, given the age of the child, to have established with the child a bonded, dependent relationship parental in nature; and (3) The putative parent performed parental functions for the child to a significant degree; and (4) The putative parent formed a parent-child bond with the child; and (5) Such judgment is in the best interest of the child.

³⁸³ *Id.* at §501-205.

Appendices

Appendix A: U.S. State Laws Comparison Table

Key

<i>Full and/or partial surrogacy is legal and regulated by statute</i>
<i>The legality of surrogacy is not addressed by statute</i>
<i>Surrogacy is banned</i>

A.1. State Law Overview

	Legal Status of Surrogacy	Legislation	Caselaw
Alabama	Adopted the UPA entirely.	AL § 26-17-801 adopts the UPA. Specifically discusses changes in Ch. 8 of the UPA.	--
California	Full surrogacy is legalized and regulated under Cal. Fam. Code §§ 7960-7962.	Cal. Fam. Code §§ 7960-7962.	--
Colorado	Partial surrogacy is allowed and regulated under § 19-4-106; full surrogacy is not addressed.	CRSA § 19-4-106.	--
Delaware	Surrogacy is legalized and regulated under DE Code 13 §§ 801-810.	DE §§ 801-810: Title 13 (Domestic Relations), Chapter 8 (Uniform Parentage Act).	--
Florida	Surrogacy is permitted for married persons who are allowed to file petitions for affirmation of parental status under FL Stat. § 742.15.	FL Stat. § 742.15: Gestational Surrogacy Contract.	§ 742.15 protections apply to both homosexual and heterosexual couples (<i>D.M.T. v. T.M.H.</i> , 129 So. 3d 320 (Fla. 2013)).
Illinois	Comprehensive regulation for surrogacy contracts, including requirements for both intended parents and gestational mothers, are permitted and registered with the IL Dep't of Public Health under 750 ILCS §§ 47/1 – 47/75.	750 ILCS §§ 47/1 - 47/75.	--
Maine	Surrogacy is permitted and regulated under the Maine Parentage Act (Title 19-A, § 1932); surrogacy had previously been sanctioned by case law.	Title 19-A, § 1932 (Maine Parentage Act); pre-birth orders are granted by most courts.	Genetic parents can listed on the birth certificate of a child born to a gestational surrogate (<i>Nolan v. Labree</i> , 2012 ME 61) - the reasoning was that Me. Rev. Stat. Ann. tit. 19-A, § 1556 (2011) provided a statutory basis for the district court to declare "parentage," a term that included both paternity and maternity. Therefore, based on § 1556, the district court had authority to declare the maternity of the female genetic parent.

Legal Status of Surrogacy		Legislation	Caselaw
Nevada	Full surrogacy is permitted and regulated by NRS 126	NRS 126.580 defines a gestational carrier as full surrogate, but there is no case law as to whether partial surrogacy is also allowed; courts grant pre-birth orders.	--
New Hampshire	Gestational Surrogacy is legal and regulated by N.H. Rev. Stat. § 168-B.	N.H. Rev. Stat. § 168-B.	--
North Dakota	Full surrogacy is allowed under NDCC § 14-18-08; partial surrogacy is banned under NDCC § 14-18-05.	NDCC § 14-18-08 allows full surrogacy, and NDCC § 14-18-05 bans partial surrogacy.	--
Texas	Full surrogacy is permitted for married intended parents who follow the procedures specified in the statute, including having the agreement validated by a court before birth. A gestational agreement that is not validated as provided the Act is unenforceable, regardless of whether the agreement is in a record. The parent-child relationship of a child born under a gestational agreement that is not validated as provided is determined as otherwise provided by TFC Chapter 160.	Tex. Fam. Code Ch. 160, from § 160-751 to § 160-763 (Subchapter I - Gestational Agreements). Added by Acts 2003, 78th Leg., ch. 457, Sec. 2, eff. Sept. 1, 2003.	--
Utah	Full surrogacy is permitted for married intended parents. A gestational agreement is enforceable only if validated as provided in § 78B-15-803.	Utah Code Ann. §§ 78B-15-801 to 78B-15-809.	--
Virginia	Both full and partial surrogacy contracts are permitted for intended parents who meet the enumerated restrictions. However, no compensation is payable.	Va. Code Ann. §§ 20-156 to 20-165.	--

	Legal Status of Surrogacy	Legislation	Caselaw
Washington	Full surrogacy contracts are allowed under Wash. Rev. Code § 26.26.210–26.26.260. However, surrogacy contracts for compensation are prohibited and a surrogate parentage contract entered into for compensation whether executed in Washington or another jurisdiction is void and unenforceable as contrary to public policy. Any person, organization, or agency who intentionally violates this or other provisions under the statute is guilty of a gross misdemeanor.	Act of May 13, 1989, ch. 404, 1989 Wash. Sess. Laws 2178, 2179 (codified at Wash. Rev. Code §§ 26.26.210–26.26.260).	--
Arkansas	Caselaw addresses surrogacy with regard to contract technicalities, but does not address the larger question of surrogacy's legality.	--	Surrogacy is mentioned in <i>In re Adoption of K.F.H.</i> , 311 Ark. 416, 844 S.W.2d 343 (1993) and <i>Matter of Adoption of Samant</i> , 333 Ark. 471, 475, 970 S.W.2d 249, 251 (1998), but only as regards the technicalities of contracts, not the legality of surrogacy.
Arizona	A statute voiding agreements was declared unconstitutional, however a bill with the same provisions but a very minor correction was reintroduced in 2016.	Ariz. Rev. Stat. Ann. § 25-218 used to void surrogacy agreements; it was declared unconstitutional, but introduced with a technical correction as 2016 Arizona Senate Bill No. 1087 (Jan 2016).	A statute voiding surrogacy agreements and declaring the surrogate mother the legal mother was held to violate the biological mother's equal protection interests and was therefore declared unconstitutional (<i>Soos v. Superior Court in & for Cty. of Maricopa</i> , 897 P.2d 1356, 1361 (Ct. App. 1994), <i>review denied</i> July 11, 1995).
Connecticut	Caselaw read Conn. Gen. Stat. § 7-48a as permitting an intended parent to be declared a child's parent upon child's birth without requiring an adoption.	Conn. Gen. Stat. § 7-48a regulates birth certificate issuance and includes provision for how to proceed if the birth is subject to a gestational agreement.	Gestational mother in full surrogacy arrangement (intended parents were same-sex couple living in Romani) challenged the agreement, but the CT Supreme Court the intended parents to be the legal parents (<i>Raftopol v. Ramey</i> , 299 Conn. 681, 687 (2011)); <i>but see Oleski v. Hynes</i> , No. KNLFA084008415, 2008 WL 2930518, at *1 (Conn. Super. Ct. July 10, 2008) (refusing to recognize an intended parent's parentage rights in a surrogacy arrangement (intended parent was the same-sex partner of the biological father)).
Georgia	No statutes or case law regulating or prohibiting surrogacy.	--	--

	Legal Status of Surrogacy	Legislation	Caselaw
Hawaii	No statutes or case law regulating or prohibiting surrogacy.	--	--
Idaho	No statutes or case law regulating or prohibiting surrogacy.	--	--
Iowa	Surrogacy is implicitly allowed, because although there are no statutes or case law directly addressing or regulating it, there are statutes that reference it.	Iowa Code § 710.11 (prohibiting the purchase or sale of an individual) states that the law against selling people "does not apply to a 'surrogate mother arrangement'"; § 641—99.15(144) regulates the establishment of a new certificate of live birth following a birth by gestational surrogate arrangement - for partial surrogacy the birth mother is listed as the mother, but for full surrogacy the intended parents have to petition the court to birth certificate re-issued (this section is actually really detailed on who has to petition for what based on who is the biological donor of which genetic material, which parties are married, etc. - this seems to imply Iowa is okay with gestational surrogacy, but it has not introduced a specific statute).	--
Kansas	No case law or statute prohibits surrogacy; partial surrogacy requires adoption by non-biological parent.	Actions to determine maternity follow actions to determine paternity (KS Paternity Act, KSA § 23-2201 et. seq.); in cases of full surrogacy a pre-birth agreement is honored, but partial surrogacy requires the non-biological parent to adopt.	--
Kentucky	No case law or statute prohibits full surrogacy, but Ky. Rev. Stat. § 199.590 prohibits partial surrogacy.	Consideration is prohibited in both adoption and surrogacy proceedings (Opinion of Attorney General 81-18); partial surrogacy is prohibited by Ky. Rev. Stat. § 199.590; pre-birth orders are allowed.	While there are no recent cases, the older cases seem to object mostly to consideration in both surrogacy and adoption circumstances (<i>Commonwealth ex rel. Armstrong v. Surrogate Parentings Assocs.</i> , 1985 Ky. App. LEXIS 568; <i>Surrogate Parenting Associates, Inc. v. Commonwealth</i> , 704 S.W.2d 209 (1986)).

	Legal Status of Surrogacy	Legislation	Caselaw
Louisiana	No case law or statute prohibits full surrogacy; partial surrogacy is "void and against public policy."	Partial surrogacy is "void and against public policy" under La. Rev. Stat. § 9:2713; pre-birth orders are not issued, and upon birth the gestational mother is listed as the mother and the biological father as the father, and intended parents must then petition for adoption.	--
Maryland	Surrogacy was implicitly approved through case law, but the court explicitly stated it was leaving surrogacy policy to be determined by the legislature (who have not yet enacted any laws); compensation for surrogacy is banned.	No payment for surrogacy (Md. Criminal Law Code Ann. § 3-603; Md. Family Law Code Ann. § 5-3B-32); pre-birth orders are granted by most courts.	A child was conceived using an egg donor and carried by another woman, and neither the gestational surrogate nor the biological father wanted the surrogate listed as the mother on the birth certificate. The court interpreted the paternity statute to apply to women, and allowed the birth certificate to be issued with only the father's name. The court's reasoning was that there was no reason to think it's not in the best interest of the child to have the father be parent (<i>In re Roberto D. B.</i> , 399 Md. 267 (2007)).
Massachusetts	Surrogacy is permitted through case law.	Under Mass. G.L. c. 46, § 4B, partial surrogacy names the birth mother (and her husband if married) as parents ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); pre-birth orders are granted.	A proceeding to validate a gestational agreement may not be maintained unless a gestational carrier or the intended parents have been residents of the State of Massachusetts for at least 90 days (<i>Hodas v. Morin</i> , 442 Mass. 544 (2004)); biological parents should be listed as parents on birth certificate in a full surrogacy arrangement (<i>Culliton v. Beth Isr. Deaconess Med. Ctr.</i> , 435 Mass. 285 (2001)); the rules of the adoption statute apply in the case of partial surrogacy, meaning that the gestational mother has four days to refuse to give up the child. However, "if no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father's custody of the child unless she consents after a suitable period has passed following the child's birth, the objections we have identified in this opinion to the enforceability of a surrogate's consent to custody would be overcome. Other conditions might be important in deciding the enforceability of a surrogacy agreement, such as a requirement that (a) the mother's husband give his informed consent to the agreement in advance; (b) the mother be an adult and have had at least one successful

	Legal Status of Surrogacy	Legislation	Caselaw
			pregnancy; (c) the mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the father's wife be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel. The mother and father may not, however, make a binding best-interests-of-the-child determination by private agreement. Any custody agreement is subject to a judicial determination of custody based on the best interests of the child." (<i>R.R. v. M.H.</i> , 426 Mass. 501 (1998)).
Minnesota	No statutes or case law regulating or prohibiting surrogacy.	Whether courts will grant pre-birth orders varies; under Minn. Stat. §257.62, subd. 5 (c) the donor of genetic material for assisted reproduction for the benefit of a recipient parent, whether sperm or ovum, cannot claim to be the child's biological or legal parent.	Under the Minnesota Parentage Act (Minn. Stat. §§ 257.51-.74) the gestational surrogate in a partial surrogacy arrangement is the biological mother. But the court purposefully left it up to the legislature to make the determination as to surrogacy agreements in general, citing them being a matter of public policy (<i>A.L.S. v. E.A.G.</i> , 2010 Minn. App. Unpub. LEXIS 1091).
Mississippi	No statutes or case law regulating or prohibiting surrogacy.	Pre-birth petitions are decided on a case-by-case basis; adoption is not possible by unmarried couples (must be married or single to adopt).	--
Missouri	No statutes or case law regulating or prohibiting surrogacy.	Missouri currently follows the old Uniform Parentage Act (UPA) on artificial insemination, which permits a petition to be filed before the birth, but requires courts to wait until after the birth to issue any orders; partial surrogacy is permitted but may be subject to adoption requirements; § 210.819.1 lays out the regulations for determining "natural" parentage, declaring that "the natural mother may be established by proof of her having given birth to the child, or under the provisions of sections 210.817 to 210.852; (2) The natural father may be established under the provisions of sections 210.817 to 210.852."	--

	Legal Status of Surrogacy	Legislation	Caselaw
Montana	No statutes or case law regulating or prohibiting surrogacy.	Courts grant pre-birth orders.	--
Nebraska	Surrogacy is not allowed if compensation is involved, but no statutes or case law exist regarding to non-compensated surrogacy.	Surrogate parenthood contracts are declared void and unenforceable under Neb. Rev. Stat. 6 25-21,200, but the same statute defines a surrogate parenthood contract to be a contract "by which a woman is to be compensated for bearing a child of a man who is not her husband"; pre-birth orders are not issued, and only the father can obtain a post-birth order; the couple must be married in order to complete a step-parent/second-parent adoption.	--
New Mexico	Gestational surrogacy agreements are neither expressly permitted or prohibited under NM Stat. Ann. § 40-11A-801.	NM Stat. Ann. § 40-11A-801 states that gestational surrogacy agreements are neither expressly permitted or prohibited.	--
North Carolina	No statutes or case law regulating or prohibiting surrogacy.	--	--
Ohio	Case law declares full surrogacy to not be against public policy.	--	Full surrogacy agreements for compensation do not violate public policy (<i>J.F. v. D.B.</i> , 879 N.E.2d 740 (2007)).
Oklahoma	Surrogacy is not expressly banned, but many courts will not enforce pre-birth determinations of parentage.	--	--
Oregon	Courts are friendly to surrogacy and have been willing to change the birth certificate to bear the name of the intended parents prior to birth through declaratory judgments, but no statutes regulate or prohibit surrogacy.	Courts grant pre-birth orders.	--

Legal Status of Surrogacy		Legislation	Caselaw
Pennsylvania	Full surrogacy is legal because case law says it is not against public policy.	--	Full surrogacy agreements do not violate public policy (<i>J.F. v. D.B.</i> , 897 A.2d 1261 (Pa. Super. Ct. 2006)); <i>In re Baby S.</i> , 128 A.3d 296 (Pa. Super. Ct. 2015).
Rhode Island	The chief judge of the family court in Providence presides over all surrogacy matters and petitions.	--	--
South Carolina	No statutes or case law regulating or prohibiting surrogacy.	--	A child born to a gestational surrogate is the natural child of the intended parents and not the surrogate (<i>Mid-South Ins. Co. v. Doe</i> , 274 F.Supp.2d 757 (S.C.C.D. 2003)).
South Dakota	No statutes or case law regulating or prohibiting surrogacy.	--	--
Tennessee	Surrogacy is defined, but not regulated or prohibited; agreements that deny parentage to the surrogate prior to birth will not be enforced.	While no legislation is directly on point, the courts have attempted to interpret Tenn.Code Ann. § 36-1-102(48), which regulates adoption, when considering surrogacy situations.	Traditional or partial surrogacy is allowed, with restrictions (<i>In re Baby</i> , 447 S.W.3d 807 (Tenn. 2014)); Surrogate mother must be listed on child's birth certificate (<i>In re Amadi Slip</i> , Copy 2015 WL 1956247).
Vermont	No statutes or case law regulating or prohibiting surrogacy, however there seems to be an operational surrogacy industry.	--	--
West Virginia	No statutes or case law regulating or prohibiting surrogacy, however W. Va. Code §61-2-14h(e)(3) on "crimes against the person" includes an exception for "fees and expenses included in any agreement in which a woman agrees to become a surrogate mother."	W. Va. Code §61-2-14h(e)(3) contains an exception to crimes against the person for "fees and expenses included in any agreement in which a woman agrees to become a surrogate mother."	--
Wisconsin	Although the legislature has not addressed the issue, the Wisconsin Supreme Court has concluded that surrogacy contracts are enforceable unless they are contrary to a child's best interests.	--	Surrogacy contracts are enforceable unless contrary to the child's best interest (<i>Paternity of F.T.R.</i> , Rosecky v. Schissel 349 Wis.2d 84 (2013)).
Wyoming	WY Stat. 1977 § 14-2-403(d) provides that the Act "does not authorize or prohibit" surrogacy, and the surrogacy industry appears to operate.	WY Stat. § 14-2-403(d) states that WY does not "authorize or prohibit" surrogacy; WY Stat. § 14-2-901 et seq (Article 9. Child of Assisted Reproduction) provides that consent by a woman and a man who intend to be parents of a child born to the woman through assisted reproduction shall be in a record signed by the woman and the man.	--

Legal Status of Surrogacy		Legislation	Caselaw
Indiana	Surrogacy agreements are void and unenforceable under Ind. Code § 31-20-1-1.	Ind. Code § 31-20-1-1 makes unenforceable and against public policy any surrogacy contracts including provisions requiring a surrogate to: (1) Provide a gamete to conceive a child; (2) Become pregnant; 3) Consent to undergo or undergo an abortion, (4) Undergo medical or psychological treatment or examination; (5) Use a substance or engage in activity only in accordance with the demands of another person; (6) Waive parental rights or duties to a child; (7) Terminate care, custody, or control of a child, or; (8) Consent to a stepparent adoption under IC 31-19 (or IC 31-3-1 before its repeal).	--
Michigan	All surrogacy is prohibited by the Surrogate Parenting Act (Act 199 of 1988).	All surrogate parentage contracts are "void and unenforceable as contrary to public policy" under the Surrogate Parenting Act (Act 199 of 1988), § 722.855, Sec. 5); no compensation is allowed for surrogacy contract, and violation is subject to criminal penalties under the Surrogate Parenting Act (Act 199 of 1988), § 722.859, Sec. 9.	(1) A surrogate parentage contract is void and unenforceable under § 5; (2) A surrogate parentage contract entered into for compensation is unlawful and prohibited by § 9; (3) For a surrogate parentage contract to exist there must be present the elements of (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child; and (4) A contract, agreement, or arrangement that does not contain both elements set forth in (3) above is neither void and unenforceable under § 5 nor unlawful and prohibited by § 9, even when entered into for compensation (<i>Jane Doe v. Attorney Gen.</i> , 194 Mich. App. 432); no consideration is allowed for surrogacy agreements (reaffirmed in <i>Doe v. Kelley</i> , 106 Mich. App. 169).
New Jersey	Surrogacy is prohibited by case law.	--	Surrogacy contracts violate public policy (<i>Matter of Baby M</i> , 537 A.2d 1227 (NJ 1988)).
New York	Surrogacy is a banned as a violation of public policy, under NY Dom. Rel. Law § 122.	Surrogacy is banned under NY Dom. Rel. Law § 122.	--

A.2. Statutory Provision Comparison In States Where Surrogacy is Regulated

Model Act Governing Assisted Reproductive Technology

Statutory Provision	MAGART
Type of surrogacy	Both. MAGART uses "gestational mother" but this can cause confusion with existing case law and also fails to distinguish between partial and full surrogacy.
Adopts the Uniform Parentage Act in some part	N/A
Payment allowed	Consideration allowed if negotiated in good faith; no payment allowed for phenotypic or genotypic characteristics
Binding prior agreement required	Yes
Agreement void without informed consent	Yes, requires written and oral consent; provides also for informed consent of partner of surrogate (can challenge arrangement within 2 years if didn't grant informed consent) agreeing to surrender child upon birth
Independent counsel required for all parties	N/A
Surrogate requirements	N/A
Intended parent regulation	One of the intended parents must have donated gamete (alt. b)
Donor regulation	Can donate anonymously and unused embryos can be donated.
Agreement validation	Court hearing (alt. a); file with admin agency (alt. b)
Mandatory mental health consultation for all participants	Yes
Residency requirement	90 days for all parties
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Alabama

Statutory Provision	Alabama (§ 26-17-801)
Type of Surrogacy	The statute addresses both full and partial surrogacy.
Adopts the Uniform Parentage Act in some part	Wholly adopts
Payment Allowed	N/A
Binding Prior Agreement Required	Yes, but not having one won't preclude finding of parentage in the instance of dispute
Agreement void without informed consent	N/A
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	N/A
Intended Parent Regulation	N/A
Donor Regulation	N/A
Agreement Validation	Agreement must be validated by a judge
Mandatory mental health consultation for all participants	N/A
Residency Requirement	90 days
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	N/A

California

Statutory Provision	California (Fam. Code §§ 7960-7962)
Type of Surrogacy	The statute addresses full surrogacy only.
Adopts the Uniform Parentage Act in some part	In part
Payment Allowed	Consideration is allowed, but it is unclear if the amount of payment or the purpose of the payment is limited. See Cal. Fam. Code §7960
Binding Prior Agreement Required	Yes
Agreement void without informed consent	Not explicit, but presumably the agreement is not valid if independent counsel does not sufficiently advise each side
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	N/A
Intended Parent Regulation	N/A
Donor Regulation	N/A
Agreement Validation	Court hearing required; intended parents must file a complaint for parental rights and notice of birth after birth
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Colorado

Statutory Provision	Colorado (19-4-106)
Type of Surrogacy	The statute addresses partial surrogacy only
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Does not address
Binding Prior Agreement Required	An agreement is encouraged, but a court will look to the surrounding situation if agreement isn't effectuated or if there are problems with it
Agreement void without informed consent	N/A
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	N/A
Intended Parent Regulation	N/A
Donor Regulation	Donors are legally not the parents of the child resulting from an ART arrangement by law
Agreement Validation	N/A
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	N/A

Delaware

Statutory Provision	Delaware (13 § 8-807)
Type of Surrogacy	The statute addresses full surrogacy only.
Adopts the Uniform Parentage Act in some part	In part
Payment Allowed	Can generally pay consideration - no good faith requirement, but must be "reasonable"; reasonable expenses may also be covered.
Binding Prior Agreement Required	An agreement is required, and there must be two witnesses.
Agreement void without informed consent	Yes, written consent required for both intended parents and surrogate; partner of surrogate must agree to conditions and agree to surrender child upon birth if married.
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	Must be at least 21; must have given birth to at least one child; must undergo medical examination; must have health insurance policy that covers major medical treatments and hospitalization and lasts at least 8 weeks after expected due date -- can be paid for by intended parents.
Intended Parent Regulation	Intended parents must undergo a mental health evaluation and obtain independent legal representation.
Donor Regulation	N/A
Agreement Validation	N/A
Mandatory mental health consultation for all participants	Yes
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Florida

Statutory Provision	Florida § 742.15 and § 63.213
Type of Surrogacy	FLA. STAT. §742.15 covers full surrogacy agreements and FLA. STAT. §63.213 covers partial surrogacy agreements under what the law calls pre adoption agreements.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Can only pay reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods. For partial surrogacy all reasonable legal, medical, psychological, or psychiatric expenses of the volunteer mother related to the preplanned adoption arrangement and the reasonable living expenses and wages lost due to the pregnancy and birth of the volunteer mother and reasonable compensation for inconvenience, discomfort, and medical risk can be covered.
Binding Prior Agreement Required	Yes
Agreement void without informed consent	N/A
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	Must be older than 18.
Intended Parent Regulation	For a gestational surrogacy agreement Intended parents must be married; must be older than 18; and the commissioning mother must (as determined by a licensed physician) be (a) unable to physically gestate a pregnancy to term, (b) in a situation where the gestation will cause a risk to the physical health of the commissioning mother; or (c) the gestation will cause a risk to the health of the fetus. For a partial surrogacy agreement no requirements are listed, but presumably the intended parent(s) must be eligible to adopt under Florida law.
Donor Regulation	N/A
Agreement Validation	For a gestational surrogacy agreement the intended parents shall file a petition within 3 days of the child's birth for expedited affirmation of parental status. The court will then hold a hearing to see if a valid gestational surrogacy agreement was executed. In a preplanned adoption agreement if the surrogate is biologically related to the child she may rescind her consent to the agreement until up to 48 hours after the birth of the child.
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	Yes
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Illinois

Statutory Provision	Illinois (750 ILCS 47)
Type of Surrogacy	The statute addresses full surrogacy only.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	The gestational surrogacy agreement will still be enforced even if there is a provision for reasonable compensation.
Binding Prior Agreement Required	Yes. Agreement must be filed on forms from IL Dept of Public Health.
Agreement void without informed consent	Yes
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	Must: (1) be at least 21 years of age; (2) have given birth to at least one child; (3) have completed a medical evaluation; (4) have completed a mental health evaluation; (5) have undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy; and (6) have obtained a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for 8 weeks after the birth of the child; provided, however, that the policy may be procured by the intended parents on behalf of the gestational surrogate pursuant to the gestational surrogacy contract.
Intended Parent Regulation	(1) he, she, or they must contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term; (2) he, she, or they must have a medical need for the gestational surrogacy as evidenced by a qualified physician's affidavit attached to the gestational surrogacy contract and as required by the Illinois Parentage Act of 1984; (3) he, she, or they must have completed a mental health evaluation; and (4) he, she, or they must have undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy.
Donor Regulation	N/A
Agreement Validation	No court hearing is required. Attorneys on both sides file a certification with the Illinois Department of Public Health.
Mandatory mental health consultation for all participants	Yes
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	Yes
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	If any of the requirements for a gestational surrogacy

	agreement is not met the court will use the intent of the Parties.
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Indiana

Statutory Provision	Indiana § 31-20-1-1
Type of Surrogacy	No agreements that require a surrogate to "become pregnant" are allowed.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	N/A
Binding Prior Agreement Required	N/A
Agreement void without informed consent	N/A
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	N/A
Intended Parent Regulation	N/A
Donor Regulation	N/A
Agreement Validation	N/A
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Maine

Statutory Provision	Maine (19-A §§ 1931, 1932) going into effect in 07/2016)
Type of Surrogacy	The statute addresses full surrogacy only.
Adopts the Uniform Parentage Act in some part	In part
Payment Allowed	Consideration is allowed if it is reasonable and negotiated in good faith, but no payment for genotypic material is allowed; reasonable expenses may also be covered.
Binding Prior Agreement Required	An agreement is required. It must be notarized, and cannot limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus.
Agreement void without informed consent	Yes; partner of surrogate must agree to conditions and agree to surrender child upon birth if married.
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	Must be at least 21; must have given birth to at least one child; must undergo medical examination. Has no more than one year to achieve pregnancy in the contract.
Intended Parent Regulation	Must obtain a medical evaluation and mental health consultation; must obtain independent legal representation.
Donor Regulation	N/A
Agreement Validation	N/A
Mandatory mental health consultation for all participants	Yes
Residency Requirement	At least one party must be resident of state
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	Yes
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	N/A

Nevada

Statutory Provision	Nevada (Nev. Rev. Stat. §§ 126.500-126.810)
Type of Surrogacy	The statute addresses full surrogacy only.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Consideration payment allowed, but there is a ban on payment for genotypic or phenotypic characteristics; reasonable expenses may be covered.
Binding Prior Agreement Required	Yes
Agreement void without informed consent	Written consent required for both intended parents and surrogate; also provides for informed consent of any partner of surrogate (can challenge arrangement within 2 years if didn't grant informed consent).
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	N/A
Intended Parent Regulation	N/A
Donor Regulation	N/A
Agreement Validation	Court hearing required; intended parents must file a complaint for parental rights and notice of birth after birth.
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	In the event of noncompliance, a court of competent jurisdiction shall determine the respective rights and obligations of the parties to the gestational agreement based solely on the evidence of the original intent of the parties. In the event of noncompliance, a court of competent jurisdiction shall determine the respective rights and obligations of the parties to the gestational agreement based solely on the evidence of the original intent of the parties.

New Hampshire

Statutory Provision	New Hampshire (N.H. Rev. Stat. § 168-B)
Type of Surrogacy	The statute applies to full surrogacy only.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Reasonable compensation is allowed, including, but not limited to, payment of the gestational carrier's reasonable medical, counseling, legal, and/or other expenses
Binding Prior Agreement Required	An agreement is required, and it must be signed prior to any procedures attempting to impregnate
Agreement void without informed consent	Not explicit, but presumably the agreement is not valid if independent counsel does not sufficiently advise each side
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	Must be at least 21; must have given birth to at least one child; must undergo medical examination; must have mental health consultation.
Intended Parent Regulation	Must complete a mental health consultation and undergo legal consultation with independent counsel regarding the terms and consequences of the gestational agreement.
Donor Regulation	Donor is not a parent once there is an agreement
Agreement Validation	Court hearing required; any party can petition to give parentage to the intended parent and change the names on the birth certificate.
Mandatory mental health consultation for all participants	Yes
Residency Requirement	No
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	Except as otherwise provided in this chapter, in the event of a party's noncompliance with the requirements of this chapter and/or with a provision of the gestational carrier agreement, the court shall determine the respective rights and obligations of the parties, unless the gestational carrier agreement provides otherwise

New Jersey (Proposed)

Statutory Provision	New Jersey (A910 proposed)
Type of Surrogacy	The statute applies to full surrogacy only.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Reasonable expenses covered
Binding Prior Agreement Required	An agreement is required, and it must state what will happen in the event of marriage, dissolution, or death of one of the intended parents.
Agreement void without informed consent	Not explicit, but presumably the agreement is not valid if independent counsel does not sufficiently advise each side.
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	N/A
Intended Parent Regulation	Must complete a psychological evaluation approving the intended parent's suitability to participate in a gestational carrier agreement; must be represented by an attorney who consulted with the intended parent(s) about the terms of the gestational carrier agreement and the potential legal consequences of the agreement.
Donor Regulation	Donor has no parental rights or duties unless there is a written agreement stipulating otherwise.
Agreement Validation	Court hearing required; intended parents must file a complaint for parental rights and notice of birth after birth.
Mandatory mental health consultation for all participants	Yes
Residency Requirement	No
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	Yes
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	In the event that any of the requirements of this section are not met, a court of competent jurisdiction shall determine parentage based on the parties' intent.

New York (Proposed)

Statutory Provision	New York (proposed) A 04319
Type of Surrogacy	The statute applies to full surrogacy only.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Any compensation must be placed in escrow before the start of any procedures, and must be reasonable and negotiated in good faith. Compensation can cover reimbursement for economic losses and insurance premiums, as well as for services rendered, expenses that have been or will be incurred, time, and inconvenience. Under no circumstances may compensation be paid to purchase gametes or embryos, or to pay for the relinquishment of a parental interest in a child. Said payments to a gestational carrier shall not exceed the duration of the pregnancy, and a recuperative period of up to eight weeks after the birth of the child.
Binding Prior Agreement Required	Yes. Agreement must be signed and verified by both the intended parents and the gestational carrier, as well as the spouse of the intended carrier if applicable.
Agreement void without informed consent	Not explicit, but presumably the agreement is not valid if independent counsel does not sufficiently advise each side.
Independent Counsel Required for All Parties	Yes
Surrogate Requirements	Must be at least 21; must undergo medical examination
Intended Parent Regulation	Must have independent legal counsel discuss the terms; must be an adult person who is not in a spousal relationship, or adult spouses together, or any two adults who are intimate partners together.
Donor Regulation	Donor is not a parent
Agreement Validation	Court hearing required; any party can petition for parentage determination; the court will amend the birth certificate or notify the department of health to direct the hospital to put the intended parents on the birth certificate.
Mandatory mental health consultation for all participants	N/A
Residency Requirement	Must certify that you have been a resident for 90 days or that the child was born in NY state.
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	Yes
Right to health care provider of carrier's choosing	Yes
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	Any dispute which is related to a gestational agreement other than disputes as to parentage shall be resolved by the supreme court, which shall determine the respective rights and obligations of the parties. If a gestational agreement does not meet the requirements of this article, the agreement is not enforceable. There shall be no specific performance remedy available for a breach by the gestational carrier of a gestational agreement term that requires her to be impregnated.

Texas

Statutory Provision	Texas TFC Chapter 160
Type of Surrogacy	The statute addresses full surrogacy only. Partial surrogacy is specifically void. .
Adopts the Uniform Parentage Act in some part	In part
Payment Allowed	N/A
Binding Prior Agreement Required	An agreement is required. A gestational agreement that is not validated as provided by Subchapter I of Chapter 160 is unenforceable, regardless of whether the agreement is in a pre-birth record. The agreement must be entered into before the 14th day preceding the date of the transfer of eggs, sperm, or embryos for the purposes of implantation or conception. See further "Agreement Validation" below.
Agreement void without informed consent	The gestational agreement must state that the physician who will perform the procedure has informed the parties as to the rate of successful conceptions, potential risks and possible multiple births, nature of and expenses related to the procedure, health risks, psychological effects.
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	Must relinquish all parental rights and duties with respect to a child conceived through assisted reproduction; must have had at least one previous pregnancy and delivery; must be assured that carrying another to term and giving birth to another child would not pose an unreasonable risk to the child's health or the woman's physical or mental health.
Intended Parent Regulation	Must be married to each other, and each intended parent must be a party to the gestational agreement; must have medical evidence showing that the intended mother is unable to carry the pregnancy to term and give birth to the child or is unable to do so without unreasonable risk to her physical or mental health or to the health of the child; must have conducted a home study which determines that the intended parents meet the standards of fitness applicable to adoptive parents.
Donor Regulation	N/A
Agreement Validation	The intended parents and prospective gestational mother under a gestational agreement may commence a proceeding to validate the agreement; a court may only validate the agreement if: (1) parties submitted to jurisdiction, (2) medical evidence shows the intended mother is unable to carry pregnancy without unreasonable risk to her physical or mental health or to the health of the child, (3) a home study determined intended parents meet the standards of fitness, (4) there is a voluntary agreement, (5) gestational mother has experienced at least one prior pregnancy, (6) the agreements determines who is responsible for all reasonable health care expenses; a court may validate at its discretion, and determination is only subject to

	review for abuse of discretion; upon birth, the intended parents must file a notice of birth not later than the 300th day after date of assisted reproduction - the court will then issue a notice confirming that the intended parents are the parents and requiring the gestational mother to surrender the child if necessary.
Mandatory mental health consultation for all participants	N/A
Residency Requirement	Yes - The prospective gestational mother or the intended parents must have resided in the state for the 90 days prior to the proceeding
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A - however the legislation does provide that the agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of the embryo.
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	The parent-child relationship of a child born under a gestational agreement that is not validated as provided by the subchapter is determined as otherwise provided by Chapter 160. A court that conducts a proceeding under this subchapter has continuing, exclusive jurisdiction of all matters arising out of the gestational agreement until the date a child born to the gestational mother during the period covered by the agreement reaches 180 days of age.

Utah

Statutory Provision	Utah § 78B-15-801 to 78B-15-809
Type of Surrogacy	The statute addresses full surrogacy only. Partial surrogacy is specifically void, and a gestational agreement does not apply to the birth of a child if neither intended parent is a donor.
Adopts the Uniform Parentage Act in some part	In part
Payment Allowed	A gestational agreement may provide for payment of consideration, but consideration must be reasonable.
Binding Prior Agreement Required	An agreement is required, and a copy of the gestational agreement must be attached to the petition to the tribunal. A gestational agreement is enforceable only if validated as provided in § 78B-15-803.
Agreement void without informed consent	All parties must have voluntarily entered into the agreement and understand its terms in order for it to be validated by the Court.
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	Must have had at least one prior pregnancy; must be assured that delivery and bearing another child will not pose an unreasonable health risk to her or the unborn child; must be 21 years of age or older; may not currently be receiving Medicaid or any other state assistance; agreement may not limit the right of the gestational mother to safeguard her health or that of the embryo or fetus.
Intended Parent Regulation	Intended mother must be unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child; a home study must be conducted unless waived by the tribunal; intended parents must meet the standards of fitness applicable to adoptive parents; intended parents must be 21 years of age or older.
Donor Regulation	N/A
Agreement Validation	The intended parents and the prospective gestational mother must file a petition in the district tribunal to validate a gestational agreement. Validation is within the discretion of the tribunal and only subject to review for abuse of discretion. Upon the birth of the child, the intended parents must then file notice with the tribunal that a child has been born within 300 days, and the tribunal will then issue an order confirming that the intended parents are the parents of the child. A gestational agreement which is not validated by a tribunal is not enforceable. Parties to a non validated agreement as intended parents may be held liable for support of the resulting child even if the agreement is otherwise unenforceable.
Mandatory mental health consultation for all participants	Yes
Residency Requirement	Yes - the petition to validate a gestational agreement may not be maintained unless either the mother or intended parents have been residents of the state for at

	least 90 days
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	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 and Child Relationship.

Virginia

Statutory Provision	Virginia § 20-156 to 20-165.
Type of Surrogacy	The statute addresses full and partial surrogacy.
Adopts the Uniform Parentage Act in some part	Yes, it adopts part of the precursor to the United Parentage Act, the USCACA
Payment Allowed	Consideration is not allowed. It is also unlawful for any person or entity to accept compensation for recruiting or procuring surrogates or to accept compensation for otherwise arranging or inducing intended parents and surrogates to enter into surrogacy contracts. Any person who acts as a surrogate broker is liable to all the parties to the purported surrogacy contract in a total amount equal to three times the amount of compensation to have been paid to the broker pursuant to the contract.
Binding Prior Agreement Required	Prior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court of the county or city in which at least one of the parties resides.
Agreement void without informed consent	Yes. In order for the court to validate the agreement all the parties must have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable.
Independent Counsel Required for All Parties	Yes - the court shall appoint a guardian ad litem to represent the interests of any resulting child and shall appoint counsel to represent the surrogate
Surrogate Requirements	Must have had at least one previous pregnancy, and experienced at least one live birth; must be assured that bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child, as supported by medical evidence; must have received counseling concerning the effects of the surrogacy by a qualified healthcare professional or social worker.
Intended Parent Regulation	Home study of intended parents must be conducted and a report filed report with the court; intended parents must meet the standards of fitness applicable for adoptive parents; intended mother must be infertile, unable to bear a child, or unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child, a finding which shall be supported by medical evidence; must have received counseling concerning the effects of the surrogacy by a qualified healthcare professional or social worker.
Donor Regulation	N/A
Agreement Validation	Agreement validation is required. Prior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged

	before an officer or other person authorized by law to take acknowledgments. A copy of the contract shall be attached to the petition. Within 7 days of the birth of any resulting child, the intended parents shall file a written notice with the court that the child was born to the surrogate within 300 days after the last performance of assisted conception. Upon the filing of this notice and a finding that at least 1 of the intended parents is the genetic parent of the resulting child as substantiated by medical evidence, the court shall enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended parents as the parents of the child.
Mandatory mental health consultation for all participants	Yes- All parties must submit to physical examinations and psychological evaluations.
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A - however the agreement must contain adequate provisions to guarantee the payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties.
Provisions for death and/or separation of intended parents	Yes
Dispute resolution mechanism	In the case of a surrogacy contract that has not been approved by a court, the gestational mother is the parent unless the intended mother is a genetic parent, in which case the intended mother is the parent. If either of the intended parents is a genetic parent, the intended father is the child's father, unless the surrogate is married and her husband is a party to the contract. If neither of the intended parents is a genetic parent of the resulting child, the surrogate is the mother and her husband is the father if he is a party to the contract. The intended parents may only obtain parental rights through adoption.

Washington

Statutory Provision	Washington § 26.26.210–26.26.260
Type of Surrogacy	Only uncompensated, full surrogacy contracts are allowed.
Adopts the Uniform Parentage Act in some part	N/A
Payment Allowed	Consideration is not allowed. No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a contract for compensation. Any contract for compensation is void and unenforceable as contrary to public policy and any person, organization, or agency who enters into a contract for compensation is guilty of a gross misdemeanor.
Binding Prior Agreement Required	N/A
Agreement void without informed consent	N/A
Independent Counsel Required for All Parties	N/A
Surrogate Requirements	Must not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as having an intellectual disability, a mental illness, or developmental disability is the surrogate mother.
Intended Parent Regulation	N/A
Donor Regulation	N/A
Agreement Validation	N/A
Mandatory mental health consultation for all participants	N/A
Residency Requirement	N/A
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	N/A
Right to health care provider of carrier's choosing	N/A
Provisions for death and/or separation of intended parents	N/A
Dispute resolution mechanism	If a child is born to a surrogate mother pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the superior court orders otherwise. The superior court shall award legal custody of the child based upon the factors listed in RCW § 26.09.187(3) and § 26.09.191; if a birth results under a surrogate parentage contract that is unenforceable under the law of this state, the parent-child relationship is determined as provided in RCW § 26.26.101 through § 26.26.116 and applicable case law

A.3. Possible Provisions List

Issue	Statutory Options
Type of surrogacy contracts to address by law	<ol style="list-style-type: none"> 1. Regulate full and partial surrogacy in the same manner 2. Regulate full and partial surrogacy differently 3. Only address full surrogacy 4. Only address partial surrogacy
Payment Allowed	<ol style="list-style-type: none"> 1. Amount or purpose of payment not explicitly limited; 2. Reasonable expenses may be covered; 3. Reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods to be paid; 4. Wages lost due to the pregnancy and birth to be paid; 5. Reasonable compensation for inconvenience, discomfort, and medical risk can be covered; 6. Reasonable compensation or consideration (distinct from reasonable expenses) to be paid; 7. Consideration / payment is not allowed. <p>Additional legislative relating to payments:</p> <ol style="list-style-type: none"> 8. No payment allowed for genotypic or phenotypic characteristics; 9. Must be negotiated in good faith; 10. Any compensation must be placed in escrow before the start of any procedures; 11. Payments to a gestational carrier shall not exceed the duration of the pregnancy, and a recuperative period of up to eight weeks after the birth of the child; 12. Unlawful for any person or entity to accept compensation for recruiting or procuring surrogates or to accept compensation for otherwise arranging or inducing intended parents and surrogates to enter into surrogacy contracts.
Binding Prior Agreement Required	<ol style="list-style-type: none"> 1. Yes 2. Yes, but not having one will not preclude a finding of parentage in a dispute 3. Not required under statute
Agreement void without informed consent	<ol style="list-style-type: none"> 1. Yes explicitly 2. Independent counsel must sufficiently advise each side 3. Not required under statute
Independent Counsel Required for All Parties	<ol style="list-style-type: none"> 1. Yes 2. Not required under statute 3. Court appoints counsel for the surrogate and a guardian ad litem to represent the interests of the resulting child
Surrogate Requirements	<ol style="list-style-type: none"> 1. Must be at least 21 or 18; 2. Must have given birth to at least one child; 3. Must undergo medical examination; 4. Must have health insurance policy that covers major medical treatments and hospitalization and lasts at least 8 weeks after expected due date -- can be paid for by intended parents; 5. Must achieve pregnancy in the contract within one year; 6. May not currently be receiving Medicaid or any other state assistance; 7. Must have received counseling concerning the effects of the surrogacy

	<p>by a qualified health care professional or social worker;</p> <p>8. Cannot be diagnosed as having an intellectual disability, a mental illness, or developmental disability</p>
Intended Parent Regulation	<p>1. One of the intended parents must have donated gamete</p> <p>2. Intended parents must be married;</p> <p>3. Must be at least 18 or 21;</p> <p>4. The commissioning mother must (as determined by a licensed physician) be (a) unable to physically gestate a pregnancy to term, (b) in a situation where the gestation will cause a risk to the physical health of the commissioning mother; or (c) the gestation will cause a risk to the health of the fetus;</p> <p>5. Must complete a psychological evaluation approving the intended parent's suitability to participate in a gestational carrier agreement;</p> <p>6. Must undergo a home study which determines that the intended parents meet the standards of fitness applicable to adoptive parents</p>
Donor Regulation	<p>1. Can donate anonymously and unused embryos can be donated.</p> <p>2. Donors are legally not parents</p> <p>3. Not required under statute</p>
Agreement Validation	<p>1. Court hearing required;</p> <p>2. No hearing required, attorneys for both sides file a certification with the Department of Public Health;</p> <p>3. Not required under statute</p>
Mandatory mental health consultation for all participants	<p>1. Yes</p> <p>2. Not required under statute</p>
Residency Requirement	<p>1. N/A</p> <p>2. One party</p> <p>3. One party or certify that the child was born in the state</p> <p>4. All parties</p>
Parents sign written agreement to accept legal custody and sole responsibility for child upon birth	<p>1. Yes</p> <p>2. Not required under statute</p>
Right to healthcare provider of carrier's choosing	<p>1. Yes</p> <p>2. Not required under statute</p>
Provisions for death and/or separation of intended parents	<p>1. Yes</p> <p>2. Not required under statute</p>
Dispute resolution mechanism	<p>1. Intent of the Parties;</p> <p>2. Other state law;</p> <p>3. No specific performance requiring a gestational carrier to become impregnated;</p> <p>4. The gestational mother is the parent unless the intended mother is a genetic parent, in which case the intended mother is the parent. If either of the intended parents is a genetic parent, the intended father is the child's father, unless the surrogate is married and her husband is a party to the contract. If neither of the intended parents is a genetic parent of the resulting child, the surrogate is the mother and her husband is the father if he is a party to the contract. The intended parents may only obtain parental rights through adoption;</p> <p>5. Not required under statute</p>

Appendix B – International Laws Comparison Table

B.1 - Countries that Prohibit Surrogacy

	France	Germany	Italy	Spain	Sweden	Switzerland
Summary	Surrogacy is illegal.	Surrogacy is illegal.	Surrogacy is illegal.	All surrogacy agreements are legally considered null and void.	Currently unaddressed in Swedish law. Parliament expected to implement changes following a governmental inquiry in 2016 which recommended that all surrogacy should be banned.	All surrogacy is illegal.
Type of surrogacy allowed	Both illegal: Civil Code, arts. 16-17.	Both illegal: Embryo Protection Act (Embryonenschutzgesetz) of 1990, amended in 2011.	Both illegal: Law 40.	Both illegal: 2006 Assisted Reproduction Law.	Both would be illegal under proposed law change.	Both illegal: Art. 4, Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizin gesetz) of 1998.
Criminal and/or civil penalties	Surrogacy punishable with significant fines and imprisonment: arts. 227-12, 227-13, 511-24 Penal Code.	Criminal penalties of up to 3 years' imprisonment or a fine.	3 months to 2 years in jail and/or €600,000 to €1 million fine for anyone who organizes, promotes, or advertises donation in Italy: Law 40.	N/A	N/A	Criminal penalties of imprisonment or a fine for any person who uses an assisted reproductive technique in a surrogate, or acts as an intermediary.
Recognition of inter-national surrogacy	In a <i>Cour de cassation decision</i> on July 3, 2015, surrogate children born abroad were recognized as French citizens.	Although surrogacy within Germany is prohibited, in 2014 the German Federal Court of Justice recognized the parental rights of a German same-sex couple who had a child through a surrogate in California: <i>Case XII ZB 463/13</i> .	Foreign surrogacy arrangements are not officially recognized, but it also is not illegal for Italian citizens to go abroad for surrogacy: Law 40.	Foreign arrangements are recognized, but DGRN's Circular establishes that in order to get citizenship for the child, the parents must produce a court ruling from the country of origin confirming that the surrogate mother gave up her rights to the	N/A	In 2015, the Swiss Federal Court overturned the ruling of a local Swiss court which had recognized the parental rights of a Swiss same-sex couple who had a child through a surrogate in California.

Court Decisions	<i>Cour de cassation</i> decision, July 3, 2015.	<i>Bundesgerichtshof, decision of 10 December 2014</i> (No XII ZB 463/13)	<i>Paradiso and Campanelli v. Italy</i> (ECtHR, no. 25358/12)	N/A	N/A	<i>Case 5A_748/2014.</i>
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B.2. Countries that Allow and Regulate Surrogacy

	Australia	Canada	Israel	South Africa	UK
Summary	All states and the ACT permit altruistic surrogacy and allow some reimbursement of costs. While some states have standalone legislation, others have amended wider legislation to include surrogacy. Regulation of ART must also be met. Government is currently conducting an inquiry into surrogacy.	Under federal law, commercial surrogacy is prohibited. All other aspects of surrogacy are regulated on a provisional level. Only 3 provinces have enacted legislation regulating surrogacy. In Quebec, surrogacy contracts are legally unenforceable, although there is public debate about law reform.	Gestational surrogacy agreements are legal: <i>Surrogacy Agreement Law (Ratification of Agreement and status of the Infant) 5756-1996.</i>	Altruistic surrogacy is legal: <i>Children's Act</i> , s 295(c)(v).	Altruistic surrogacy is permitted and commercial surrogacy is prohibited. Surrogacy agreements are unenforceable.
Type of surrogacy allowed	Does not distinguish between full and partial surrogacy.	Federal law and British Columbia do not distinguish between full and partial surrogacy; Ontario only allows full surrogacy.	Partial surrogacy.	Both permitted, if at least one of the intended parents is a biological parent. 298(1).	Both are unenforceable: <i>Surrogacy Arrangements Act 1985.</i>
Criminal and/or civil penalties	Compensated surrogacy is prohibited in all jurisdictions (except the NT where surrogacy is not regulated). In ACT, NSW and Qld the prohibition has extraterritorial application. Advertising of surrogacy arrangements is also generally prohibited.	The payment of compensation is prohibited: <i>Assisted Human Reproduction Act</i> . Advertising payment and payments to arrange surrogacy are also illegal. Counseling, inducing, or performing a medical procedure on a woman under 21 years with a view to having her act as a surrogate, regardless of consideration, is prohibited.	None.	N/A	Fine of up to £ 5,000 and/or imprisonment of up to 3 months for anyone who participates in or advertises commercial surrogacy.

Payment	Reimbursement of some of the surrogacy costs (which may include medical, legal and/or counseling) is allowed, although what is included in such costs varies between states. There is a federal ban on commercial trade in eggs, sperm & embryos: <i>Prohibition of Human Cloning for Reproduction Act 2002</i> (Cth), s 21.	No. The payment of compensation, advertising payment, and compensation for arranging services are prohibited. However, the <i>Assisted Human Reproduction Act</i> does permit compensation for a surrogate's expenditures, including surrogacy-related expenditures and under certain conditions, work-related loss of income.	Yes. The state appointed committee supervises the payment of expenses, which take the form of monthly payments to cover medical, insurance and legal costs as well as loss of time and income.	No.	Yes. Reasonable expenses of the surrogate can be covered.
Counseling, & legal advice	Requirements for extensive counseling before the arrangement is made, and sometimes after the pregnancy before a parentage order is granted. The surrogate must receive legal advice from a lawyer who is independent to the intended parent/s.	N/A	Surrogacy agreements are approved the committee, which requires that all parties enter into the agreement voluntarily.	N/A	N/A
Criteria for surrogate	The surrogate must be at least 18 years in SA and NSW or 25 years in Qld, Tas, Vic and WA.	The surrogate must be 21 years under federal law.	The surrogate must be: an Israeli resident; over 18; unmarried; same religion as the designated mother; not be a relative of the intended parents; undergo medical and psychological consultation.	The surrogate must have at least 1 natural child living with her; must be a suitable person to act as a surrogate; must not use surrogacy as a source of income: s 295.	N/A
Criteria for intended parent/s & donors	In NSW, Qld, Tas & Vic intended parent/s can be married, heterosexual or same-sex de facto or single. Most jurisdictions require a medical need but NSW, Tas, Qld and Vic allow surrogacy when there is a social reason. The ACT does not require there to be a medical or social need. WA specifically excludes age as a suitable medical reason.	N/A	The intended mother must demonstrate that she is infertile or a pregnancy would be a danger to her health. The intended parents must undergo a medical and psychological consultation.	Intended parent/s must be unable to give birth to the child, and this condition must be permanent and irreversible: s 295(a).	Intended parents must be over 18; married, civil partners or in an 'enduring relationship'; one of the intended parents must be the biological parent.
Process & validation	All States provide that the surrogate is the child's legal parent at the birth of the child unless and until the intending parent/s apply for a transfer of legal parentage after birth. State legislation creates a formal legal process. The prerequisites for transfer of parentage vary greatly between states. Applications must be made not less than 4	In Ontario, birth registration happens after a court order is obtained. In Alberta, the initial registration will show the surrogate as the child's mother and then the initial registration is then amended to recognize the court order. In British Columbia,	All agreements must be approved by the state appointed committee.	A formal agreement required that is executed according to an order from the high court: s 293(2).	Surrogacy agreements are not enforceable. UK courts will look to the best interests of the child even if there is a surrogacy agreement. The intended parents must apply for a parental order no earlier than 6 weeks after the birth of the child.

	weeks after birth in Qld and SA, and not more than 6 months after birth in all other states.	intended parents can be recognized without a court order if the parties entered into a surrogacy agreement pre-conception. In Quebec, the Civil Code provides that a surrogacy agreement is null and void and cannot be enforced, although some judges have granted parental orders on the grounds that it is in the best interests of the child.			
Residency	Yes, the intended parent/s must be living in the state concerned. The ACT, SA and Vic also require that a child conceived as a result of ART be conceived in the relevant state if there is an application for an order transferring legal parentage.	N/A	Yes, all parties must be Israeli residents.	One or more of the intended parents must be permanent residents; surrogate must be a citizen and permanent resident: s 292(1)(b)-(e).	Yes, the <i>Adoption and Children Act 2002</i> makes it illegal for anyone to take a child out of the UK with a view to adopting it in a non-UK country.
Recognition of international surrogacy	Applications for parenting and other orders are made to the Family Court under the <i>Family Law Act 1975</i> (Cth) arising from foreign surrogacy arrangements.	A child born outside Canada is a Canadian citizen at birth if they have a genetic link with a parent who was a Canadian citizen born or naturalized in Canada at the time of the child's birth.	Foreign surrogacy is recognized in Israel. Because homosexual couples are not allowed to pursue surrogacy in Israel, they go to other countries.	N/A	Yes, the Government has issued a guidance for British nationals seeking to enter surrogacy agreements in foreign countries.
Judicial decisions	<i>Ellison v Karnchanit</i> [2012] FamCA 602; <i>Dudley & Chedi</i> [2011] FamCA 502; <i>Fisher-Oakley & Kittur</i> [2014] FamCA 123; <i>Green-Wilson & Bishop</i> [2014] FamCA 1031.	<i>Adoption – 1445</i> [2014] QCCA 1162, 10 June 2014.	<i>Nahmani v. Nahmani</i> CA 5587/93 (ISR 1995).	<i>Ex parte matter between WH, UVS, LG and BJS</i> (case no. 29936/11, October 2011).	<i>Re X (A child) (Surrogacy: Time limit)</i> [2014] EWHC 3135; <i>Re WT</i> [2014] EWHC 1303; <i>Re G and M</i> [2014] EWHC 1561; <i>CC v. DD</i> [2014] EWHC 1307.