Center for American Progress

Future Choices

Assisted Reproductive Technologies and the Law

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Parentage Determinations

"For most of human history... 'being a father was a matter of conjecture, and being a mother was a matter of fact.' Now nothing can be known for sure."[101]

The new reproductive technologies are so emotional and contentious precisely because they challenge our basic understanding of what it means to be a parent. Throughout history, each child has had two, and only two, biological parents. As a result, U.S. family law is built around the concept that a child will have, at most, two legal parents. Until recently, those parents were either biological or adoptive (see text box below). And it is a zero sum game—in order to adopt a child, birth parents must first relinquish their rights or have them terminated.

Now, due to the wonders of "collaborative reproduction" (the phrase used when intended parents recruit others to help them bring a child into existence), a child can have up to three biological parents—the man who provides the sperm, the woman who provides the egg, and the woman who carries the pregnancy and gives birth. Up to three more people also may be viewed under the law (and in their own eyes) as a parent of a child—the "intended" or "contracting" parent(s) who sought to create a child through assisted reproduction, and the husband of a gestational surrogate who has elected to keep the child or children to whom she gave birth.

Which of these adults, and how many of them, should qualify as the legal parents? In Pennsylvania, the answer may now be three. In April 2007, an appellate state court panel ruled that two lesbian co-parents and their sperm donor friend all are the legal parents of and financially responsible for the children they had created.[102]

So far, no other appellate court in the United States has assigned more than two legal parents to a child. In fact in a well-known surrogacy case in which the genetic/intended father, the genetic/intended mother, and the gestational surrogate all had claims as legal parents, the California Supreme Court expressly declined to expand the number of legal parents beyond two.[103]

But additional courts are likely to face this question in the coming years. And the possible parentage combinations they could encounter seem almost endless. A child could have three women vying to be its mother—the egg provider, the gestational carrier, and an intended mother—or no mother at all. Recently, a Maryland man and the surrogate he hired to carry twins created with his sperm and a donor's eggs won a court case to have no mother listed on the birth certificate.[104]

One day, technology may allow for two genetic mothers: a technique known as ooplasmic transfer involves injecting ooplasm (the material outside the cell's nucleus) from one woman's egg into another woman's egg. It was used in a handful of cases where it was thought that a woman's infertility was caused by her ooplasm. Because DNA exists in both the nucleus and the ooplasm, a child born from this process would have two genetic mothers. The Food and Drug Administration, however, currently has a moratorium on clinical trials using this procedure.[105]

All states have parentage acts that provide statutory guidelines for determining the paternity of a child when it is uncertain, but those laws are not sufficient to address the complicated circumstances that result from the use of new reproductive technologies. Slowly but surely, the states are beginning to recognize the need for legislation that explicitly governs the determination of paternity and maternity when a child has been created with assisted reproduction.

Nevertheless, the states that have moved in this direction have provided a patchwork response. The latest version of a model law known as the Uniform Parentage Act was approved by the National Conference of Commissioners of Uniform State Laws in 2002 and includes several provisions that address assisted reproduction and gestational agreements. But only seven states had enacted it by 2006, and none passed it verbatim.[106]

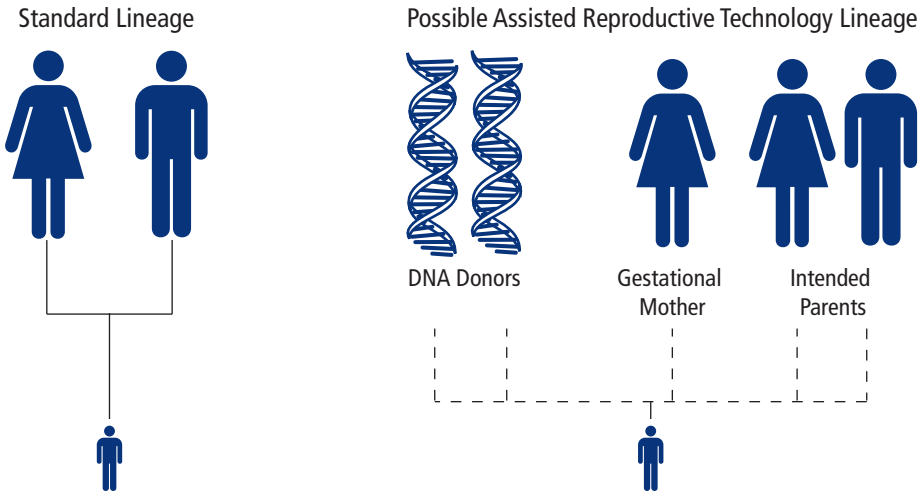
Other states have crafted their own solutions. The topics they cover and the limitations they impose vary immensely. It will be quite a while before there is any true uniformity or consensus regarding the legal presumptions that control how parentage disputes should be determined.

A child could have three women vying to be its mother or no mother at all.

Assisted Reproduction Generally

The first statutes to address assisted reproduction were those related to artificial insemination. The majority of states now

FAMILY TIES IN THE 21ST CENTURY



have laws providing that a man who consents to artificial insemination of his wife will be considered the father of any resulting child and the sperm donor will not be the father. Normally, these laws require both the husband and wife to consent to the insemination in writing and for the insemination to be done under the supervision of a physician. These statutes, however, often provide that where a husband has failed to give written consent, he can still be found to be the father if he and his wife held the child out as their own during the first years of the child's life.[107]

Some of these statutes have been broadened to cover consent to any type of assisted reproduction and/or to include unmarried people. Most of these statutes, however, are silent as to families headed by unmarried heterosexual, gay, lesbian, or trans couples, as well as single parents. For them, whether their rights as parents will be recognized is still uncertain and largely unknown.

Occasionally, where states have not updated their laws to account for new types of families, courts will apply the more conventional laws by analogy. In *Elisa B. vs. Emily B.*, for instance, the California Supreme Court applied its state Uniform Parentage Act to find that a lesbian who consented to the insemination of her partner, welcomed the twins produced into their home, and held them out as the couple's children was a legal mother of the children. Therefore, intent and consent were sufficient to establish legal parenthood absent any biological relationship to the child.[108]

In *K.M. v. E.G.*,[109] the companion case to *Elisa B.*, the court again reasoned by analogy to find that genetic consanguinity can be a basis for finding maternity just as it is for finding paternity. That case involved a woman who had donated ova to her lesbian partner, who then carried the pregnancy and gave birth. The court found that both women could establish maternity under the law because one had provided genetic material and the other had given birth. The court further found that nothing precluded a child from having two parents who both happened to be women, as long as there was no third person making a claim for parenthood.

Egg and Embryo Donation

Charles and Cindy,[110] an unmarried couple in Tennessee, decided to start a family together in their 40s. Using a donor's eggs and Charles's sperm, Cindy became pregnant and gave birth to triplets. They moved into a larger home together and began rearing their children. After some time, however, their relationship began to deteriorate. Charles became less involved with the children and began to withhold financial support.

When Cindy filed a petition to establish parentage and obtain custody and child support, Charles argued that she did not qualify as the children's mother under state law because she had no genetic connection to them. Having no statute directly on point to resolve Charles and Cindy's dispute, the Tennessee Supreme Court applied a multi-factor test that considered genetics, intent, gestation, and the fact that there was no dispute with a genetic mother to find that Cindy was indeed the legal mother. The court ended with a plea for legislative action to govern future cases.[111]

Only six states, however, have statutes that explicitly address the parental rights involved with egg or embryo donation.

They each create a presumption that the birth mother is the legal mother. They also specify when a husband's consent is or is not required for donating or using eggs or embryos.

In Colorado, a wife who uses egg donation will be treated as the natural mother if she and her husband consent in writing to assisted reproduction under a physician's supervision. But a spouse's written consent is not required when a married woman donates her eggs or a married man donates his sperm to someone outside the marriage.[112]

Texas, Utah, and Washington also do not require a married woman to obtain her husband's consent to donate her eggs.[113]

In Washington, a woman who gives birth to a child will be treated as the natural mother unless she and an egg donor have entered into a written agreement that the egg donor will be considered the natural mother (in which case the "donor" has not really donated her eggs).[114] When there are disputes, both egg donors and gestational carriers have the opportunity to assert maternity by filing an affidavit and a physician's certificate within 10 days of a child's birth.[115]

Ohio provides that a woman who gives birth pursuant to an embryo donation will be treated as a natural mother. If she is married and her husband consented to the procedure, then he will be treated as the natural father.[116]

Adoption and ART

According to Debora Spar, author of *The Baby Business,* adoption started in this country as an informal practice in which families would assume responsibility for orphaned relatives or take in abandoned children and put them to work. The practice of legally adopting a child and conferring rights and privileges on that child began in the mid-19th century and spread from related children to unrelated ones by the beginning of the 20th century. Around the same time, aid societies began to send children from overpopulated urban areas to more rural states and normalized the concept of long-distance adoption.

As the stigma of adoption lessened in the wake of legalized birth control and abortion, open adoptions became more prevalent. Advocates of open adoption argue that children have a right to know about their genetic identity and family history, and birth mothers have a right to know what happened to the children they relinquished. With additional societal changes, adoptive parents have changed as well. Although some states and agencies still impose marriage restrictions on adoptive couples, single people and lesbian, gay, bisexual, or transgender couples are increasingly becoming adoptive parents. And interracial adoption, though still controversial, is becoming more and more common.

As adoption became more regulated, public and private agencies sprung up that acted as intermediaries between parents, children, and the state. Today, public agencies primarily handle the adoption of children from foster care, while private agencies manage the adoption of domestic newborns and children from other parts of the world. All three types of adoption involve home studies and evaluations of the adoptive parents, as well as additional administrative hoops for international adoptions.

State, federal, and international laws regulating adoption are intended to protect the best interests of each child, prohibit the selling of children, and prevent the exploitation of birth mothers and adoptive parents. But their effectiveness has been called into question from time to time. Depending on the source of a child, an adoption can cost anywhere from zero to $35,000, but fees occasionally go as high as $100,000.[117]

The analogy to surrogacy and egg and sperm donation is not hard to make. Many of the same questions can be asked. Who is fit to be a parent? At what point does a fee become baby selling? Does a child have a right to know his or her origins? It will be interesting to see how the answers in one sector of the "baby market" influence the answers in another sector.

Oklahoma addresses both egg and embryo donation, but only when used by married couples. A child conceived with a donor egg is considered a legitimate child of the married couple who used the egg. The egg donor has no rights to the child.

With embryo donation, the physician performing the transfer must have the written consent of the married couple donating the embryo and the married couple receiving the embryo. Any resulting child will be treated as a naturally conceived legitimate child of the recipient couple. The statute explicitly states that embryo donation is not considered child trafficking when the embryo is donated by the biological parents, the embryo is not offered for sale or sold, and the provisions of the statute are followed.[118]

Now that new mores and technologies allow for new family structures, new laws are needed that directly address these new circumstances.

The vast majority of parentage laws that exist were enacted in order to address the issue of illegitimacy, not assisted reproduction. When passed, they reflected the mores of the times. Now that new mores and technologies allow for new family structures, new laws are needed that directly address these new circumstances. Although many of the cases that arise will be fact sensitive, so were the illegitimacy cases that preceded them; statutory guidelines would nevertheless be helpful in establishing the frameworks in which these cases can be decided.

Surrogacy

Although the market for surrogacy is still relatively small—in 2000, there were only 1,210 attempts at gestational surrogacy[119]—when problems arise, they are monumental for those involved and their societal implications can be profound.

Perhaps the most famous surrogacy case is that of "Baby M." In 1985, William Stern and Mary Beth Whitehead entered into a contract in which, for $10,000, Ms. Whitehead agreed to be inseminated with Mr. Stern's sperm, become pregnant, carry the pregnancy to term, deliver the child to Mr. Stern and his wife, and terminate her maternal rights. The payment was not to be made until the child was surrendered and Ms. Whitehead's rights were terminated.

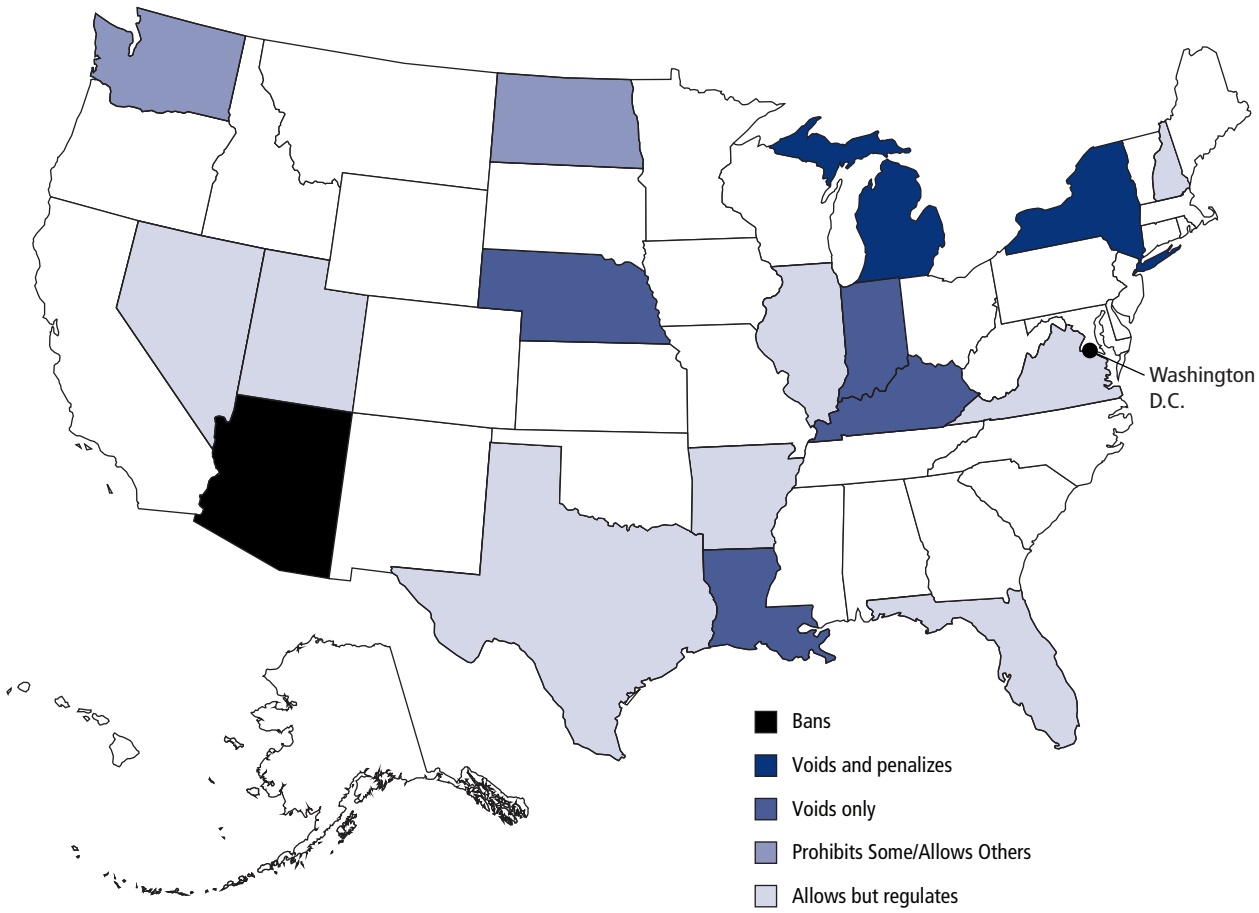
Initially, Ms. Whitehead complied with the contract and turned the child over to the Sterns. The next day, however, she returned and begged to have the child for one more week. The Sterns agreed, but after numerous unsuccessful attempts to retrieve the child over a four-month period, they obtained a court order to get the child back. Instead of turning over the child, Ms. Whitehead and her family fled to Florida. Eventually, the child was found and returned to the Sterns.

The case garnered considerable media attention and prompted several states to enact laws governing surrogacy. A review of the relevant statutes and case law reveals that the reactions to the practice of surrogacy are, literally and figuratively, all over the map.

Statutes

The approaches states have taken range from banning surrogacy agreements and penalizing the participants, to refusing to enforce surrogacy agreements, to allowing but enforcing them only if certain procedures have been followed. (For a detailed description of the state laws regarding surrogacy, see appendix on page 35.)

SURROGACY LAWS BY STATE



Arizona and the District of Columbia ban them. Washington bans contracts for compensation beyond certain expenses. Michigan and New York void surrogacy contracts and impose penalties. Indiana, Kentucky, Louisiana, Nebraska, and North Dakota void some or all types of surrogacy contracts.[120]

Ten states allow certain types of surrogacy contracts but regulate them in some fashion.[121] An additional five states take no position but specify that other laws do not apply to surrogacy arrangements.

Disincentives for surrogacy contracts span from outright bans, with or without accompanying punishments, to declaring that such contracts are void and unenforceable. The difference turns on whether the state takes a passive or active role in deterring such agreements.

States that declare the contracts void will simply refuse to enforce the agreements. If people enter such contracts and problems arise, they will have to sort out the disagreements on their own.

In contrast, the states that ban surrogacy contracts do not allow such contracts to be made and sometimes will penalize anyone involved in making the contract. Some states combine these approaches

TABLE 2: STATE SURROGACY LAWS

STATE	SURROGACY REGULATIONS						
	Court approval	*Screening*	*Residency requirement*	*Limits compensation*	*Provisions if no valid contract*	*Protects unmarried people*	*Intended mother can't bear child*
Arkansas						•	
Florida	T	•		•			G
Illinois		•			•	•	
Nevada				•			
New Hampshire	•	•	•	•	•		•
North Dakota							
Texas	•	•	•		•		•
Utah	•	•	•	•	•		•
Virginia	•	•		•	•		•
Washington				•	•		

G=Gestational

T=Traditional

by voiding the contracts and assigning penalties. Generally, where there are punishments, brokers are punished more severely than participants.

The states that allow surrogacy vary greatly in terms of whether a surrogate may receive compensation beyond necessary expenses, whether she has a period of time after the birth to change her mind about surrendering the child, whether a court must approve the agreement, and the number of requirements the parties must satisfy ranging from medical and psychological evaluations to home studies.

The vast majority of statutes require the intended parents to be married, but a few do not. If the surrogate is married, the statutes invariably require her husband to consent and be a party to the agreement. The states also vary as to whether at least one of the intended parents must be genetically related to the child and whether the surrogate may use her own eggs.

Finally, while not approving of surrogacy affirmatively, some states have made it clear that their prohibitions on selling children do not apply to surrogacy arrangements or fees related to such agreements.[122] Similarly, Tennessee does not expressly authorize surrogacy, but its adoption law does provide that an official surrender and adoption of a child born pursuant to a "surrogate birth" are not necessary in order to terminate the parental rights of the birth mother or establish the parental rights of the intended parents.[123]

Case Law

The majority of states still lack any statutory guidance on surrogacy agreements. When asked to resolve surrogacy disputes, the courts have looked to statutes related to adoption, custody, paternity determinations, termination of parental rights, and "baby selling"; the federal and state constitutions; and public policy considerations.

	At least one intended parent must contribute gametes	No surrogate eggs	Surrogate makes health decisions	Intended parents must accept child	Intended parents become parents at birth	Time period for surrogate to change mind or challenge contract
	G		G	•	G	T
	•	•			•	•
	Both	•				
	•					•
	Both	•				
		•	•			
	•	•	•			
	•		•	•		•

In *Baby M.*, described above, the Supreme Court of New Jersey ruled that "payment of money to a 'surrogate' mother [was] illegal, perhaps criminal, and potentially degrading to women."[124] The court found that paid surrogacy arrangements violated the state's statutes prohibiting the use of money in connection with adoptions, requiring proof of parental unfitness or abandonment before termination of parental rights, and making surrender of custody and consent to adoption revocable in private placement adoptions.

The court also found that the contract violated the state's public policy, namely that a child's custody should be determined by an analysis of the child's best interests; that natural parents have equal rights with regard to their child; that consent to adoption be informed, voluntary, and meaningful; and that the sale of a child is pernicious. It also noted that class disparities are a common characteristic of paid surrogacy, which also gave cause for concern.

The court acknowledged that constitutional issues were implicated for both parties—for Mr. Stern, the right to procreate; for Ms. Whitehead, the right to companionship of one's child. The court, however, determined that Mr. Stern did exercise his right to procreate and voiding the surrogacy contract did not interfere with the exercise of that right.

The court also found that there was no basis to terminate Ms. Whitehead's parental rights. Therefore she too would not suffer a constitutional deprivation. Ultimately, the court declared that both were the child's natural parents, but the child's best interest warranted granting custody to the Sterns and visitation rights to Ms. Whitehead.[125]

In stark contrast to New Jersey, the California Supreme Court has been very open to the use of assisted reproduction and has paved the way in adapting state law to technological advancements and allowing their use to flourish. With its

landmark decision of *Johnson v. Calvert*,[126] the court set forth what has come to be called the "intent" test when addressing surrogacy disputes.

In that case, Anna Johnson agreed to carry and deliver the genetic child of Mark and Crispina Calvert. Unfortunately, relations soured during the pregnancy, and by the time the child was born the parties were already in court asserting their competing rights as parents. The court determined that although the California Uniform Parentage Act did not specifically address surrogacy, it applied to any case in which parentage was in dispute. The court found that under the Act, both women had established grounds for maternity—Anna by giving birth, and Crispina by providing genetic material—yet California law recognized only one natural mother for every child.[127]

The court concluded that when the roles of genetic consanguinity and giving birth do not coincide in one woman, the one who intended from the outset to procreate and raise the child is the natural mother under California law. This holding effectively precludes a gestational surrogate from ever changing her mind about a surrogacy agreement.

The court also found that the surrogacy contract at issue was not inconsistent with public policy because, according to the court, gestational surrogacy differed in crucial respects from adoption and was not subject to the adoption statutes; it did not constitute involuntary servitude; it did not treat children as commodities; and it did not exploit or dehumanize women, including women of lower economic status. With regard to the last point, the court thought the argument that a woman could not knowingly and intelligently enter into such an agreement smacked of paternalism. Moreover, it thought the legislature, not the courts, was the proper forum for resolving such questions.

Finally, the court determined that, because Johnson was not the legal, natural mother, she had no constitutionally protected liberty interest based on her status as a "birth mother" and therefore no right to the companionship of the child. A woman who agrees to be a gestational surrogate "is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service" to a couple who are exercising their right to "procreate a child genetically related to them by the only available means."[128]

The California Court of Appeals applied this holding in *In re Marriage of Buzzanca*,[129] where the child was at risk of having too few parents rather than too many. In that case, a gestational surrogate carried a child created with gametes from anonymous donors for a married couple who were the intended parents. When the couple divorced, the husband attempted to claim no responsibility for the child because he had no biological relationship to the child. Flatly rejecting that position, the court held that both the husband and wife would be deemed the legal parents because they had initiated and consented to the assisted reproduction that brought about the birth of that child.

The California Court of Appeals has determined, though, that the intent test is only to be used when the birth mother and the genetic mother are different women. When a surrogate uses her own eggs, then she will be considered the natural, legal mother regardless of the intent of the parties. Because genetics and

birth coincide in the same woman, there is no need to use intent to break the "tie" between two mothers, as there was in the *Johnson* case. Without a formal consent to adoption, the intended mother has no right to the child.[130]

In contrast, Ohio has rejected outright the *Johnson* intent test in favor of a test that relies primarily on genetics. In *Belsito v. Clark*, the court found that the intent test was unworkable for a number of reasons, including the difficulty of proving intent. It found genetics to be a much more reliable and established method for determining parentage. Therefore, the presumption in Ohio is that the genetic mother will be the legal mother.

The court noted, however, that genetics should not be the exclusive test for determining parentage and that birth can be used as a secondary test. Under the birth test, the birth mother could still be found to be the legal parent if the genetic parents consented.[131] Of course, if that is the case, it is unlikely the parties would end up in court unless there is a problem with the birth certificate.

Legal scholar Dorothy Roberts of Northwestern University has argued that, even in *Johnson*, a major factor in these cases involves establishing the primacy of genetics over gestation, and she contends that a racial subtext often drives such decisions. For instance, in *Johnson*, Anna was African-American, Crispina was Filipina, and Mark was white. The press, however, focused much more attention on Anna's race than on Crispina's and portrayed the child as white.

Roberts fears that gestational surrogacy doubly disadvantages economically vulnerable women of color who cannot afford a court battle and who are unlikely to gain custody of a white child.[132] Debora Spar, author of *The Baby Business*, confirms that by 2000, one-third of gestational surrogacy arrangements at the largest U.S. program involved surrogates and couples of different races.[133]

One set of academics has noted that surrogacy agencies intentionally select surrogates who are primarily white, Christian, and married with children in order to give the impression that the practice does not exploit low-income women, yet the majority of surrogates fall within the lower-middle socioeconomic class. Most earn just above the poverty line, and 40 percent are otherwise unemployed, receiving financial assistance, or both.[134]

In calling for a uniform, federal law governing surrogacy agreements, these commentators argue that such a standard would prevent forum shopping for states with more favorable surrogacy laws, which reduces the bargaining power of individual surrogates, draws prospective parents from all over the country with the promise of easy risk-free transactions, and allows agencies to get around the most restrictive state laws.[135] This suggestion raises several questions, among them:

- How do we best ensure that the practice of commercial surrogacy does not exploit its participants?
- How do we balance the interests of the gestational mother against the genetic parents when they conflict?
- Do we let the states continue to experiment with a range of possible solutions, or does such a patchwork approach only lead to regulatory chaos that enables commercially savvy actors

Whatever decisions we make should be guided by our desire to balance our apprehension about exploitation with our respect for individual autonomy, our sympathy for biological and intended parents with our concern for the well-being of the children produced.

to take advantage of surrogates and intended parents?

Another option would be to encourage states to enact some version of Section 8 of the Uniform Parentage Act, which addresses surrogacy agreements.[136] Although states have the power to regulate adoption and custody, many adhere to model uniform laws on those topics. Should surrogacy follow the same route, or is it somehow different enough to warrant federal action?

In a twist that seems purely science fiction, children can now not just be born but conceived after the death of one or both of their parents, sometimes years later.

How we handle surrogacy will depend on how we answer the following questions:

- Is commercial surrogacy a repugnant practice that must be banned and punished?
- Do we simply want to discourage surrogacy by refusing to enforce contracts?
- Is surrogacy a valid and honorable form of employment that women should be free to undertake so long as they fully understand the medical and legal risks involved?
- Do intended parents have a right to procreate with the assistance of a surrogate?

If we do choose to allow but regulate surrogacy, we must then decide:

- Should we treat surrogacy more like natural conception, with minimal state interference, or like adoption, with a high level of government intervention?
- Should surrogates have time to decide whether to keep the children they bore?
- What compensation, if any, should be allowed?
- What should be the remedies, if any, when a contract is breached?
- When disputes arise, how should courts determine parentage—by genetics, by birth, by intent, or by some other test?
- Should the same rules apply to both traditional and gestational surrogates?

Again, these questions are not easy to answer, but they must be asked. Whatever decisions we make should be guided by our desire to balance our apprehension about exploitation with our respect for individual autonomy, our sympathy for biological and intended parents with our concern for the well-being of the children produced.

Posthumous Creation of a Child

Until the advent of reproductive technologies, it was possible for a child to be born after the death of a genetic parent in only one situation—when a father died while the child was still in utero. In a twist that seems purely science fiction, children can now not just be born but conceived after the death of one or both of their parents, sometimes years later. Frozen gametes and embryos are the main vehicle for this trend, but sperm (and one day eggs) also could be collected from a recently deceased body in extreme circumstances.[137]

In addition to whatever emotional fallout may occur, this new practice has created ripples in inheritance law and posed new questions for government programs that manage Social Security and other benefits. A notorious case in

the 1980s raised the issue briefly: Elsa and Mario Rios, a wealthy couple who lived in Los Angeles, had undergone IVF treatment in Australia and had two frozen embryos stored there when they died in a plane crash without a will and without any instructions as to their unused embryos.[138]

Suddenly people were faced with questions such as who gets to decide the embryos' fate and would they be entitled to inherit the money? It spurred clinics to begin asking their patients for written indications of their wishes, but 20 years later most states in the United States still have not amended their laws to address this type of situation.

This issue will become more and more pressing as families begin to learn of this reproductive option. Increasingly, soldiers who are already involved in IVF programs are storing their sperm before heading off to war, concerned that they may receive wounds in combat that affect their fertility or worried they may not come home at all. Already, one Virginia clinic has banked sperm for 500 servicemen and the Pentagon is in the process of developing a benefits policy for "postmortem conception."[139] Below is a review of the relevant statutes and case law.

Statutes

Only a handful of states have addressed whether a child created by assisted reproduction after the death of a genetic parent shall be entitled to inherit or receive government benefits from that parent. Normally they require the decedent to have demonstrated some intent to be a parent of a child that may be created after his or her death.

For instance, in Florida a child conceived from the gametes of a person who dies before placement of gametes or embryos in a woman's body is not eligible for a claim against the decedent's estate unless the decedent provided for such a child in his or her will.[140]

In Virginia, if a genetic parent dies before the implantation of an embryo, there are two ways he or she will be found to be a legal parent of a resulting child: if implantation occurred before notice of death could reasonably be communicated to the physician, or if that person consented in writing to being a parent prior to implantation.[141] It should be noted that Virginia's statute does not expressly require contemplation of posthumous implantation; it appears that general consent to assisted reproduction is sufficient.

The remaining seven states[142] that address the issue follow a provision that was originally included in the Uniform Status of Children of Assisted Conception Act and now appears as section 707 of the Uniform Parentage Act.[143] According to that section, the deceased must have specifically consented in a record to becoming a parent through assisted reproduction that might occur after his or her death in order to be considered the legal parent of any resulting child.

Case Law

When the federal government has disputed a claim to Social Security benefits by children created after a parent's death, the courts have looked to state law to determine whether they are eligible to receive the benefits. Therefore, it is particularly important for states to act in this arena or for federal government benefits

programs to adopt regulations that create predictability for families considering this reproductive option.

In *Gillett-Netting v. Barnhart*,[144] the federal government denied Social Security benefits to children conceived by IVF after their father's death because they were not his dependents at the time of his death. The Ninth Circuit, however, found that they were considered legitimate children under Arizona law. Thus, they could be deemed his dependents and did not have to demonstrate actual dependency.

Similarly, in *Stephen ex rel. Stephen v. Barnhart*,[145] a child was conceived after his father's death and again was denied Social Security benefits because he was not a dependent child at the time of the parent's death. The District Court applied the Florida law that says a child conceived after a parent's death is not eligible for a claim against the estate unless provided for in the will. Because the child in this case was not included in his father's will, he had no claim to the Social Security benefits. The court distinguished the case from *Gillett-Netting* because Florida had a statute that specifically deals with posthumous fertilization while Arizona did not.

If a wife uses her deceased husband's sperm and inherits from him directly, then perhaps regulation is not needed to protect her interests and the child's. But other questions still remain, among them:

- Should the practice of posthumous conception and/or implantation be allowed at all, and if so should counseling first be required?
- Must the deceased have consented specifically to posthumous conception and/or implantation in order for the child to have legal rights and entitlements?
- Should there be a time limit on the use of a deceased person's gametes or embryos created from their gametes?
- Who gets to use the gametes or embryos derived from a deceased person—a spouse or partner, a girlfriend or boyfriend, a parent?

This is an area where advance knowledge of a consistent set of laws would be especially helpful to the families who use assisted reproduction.

Endnotes

1 Naturally, the commercial structure of the fertility industry also has real-life ramifications, but that topic is beyond the scope of this paper. For a thorough review of the market aspects of assisted reproduction, see Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston: Harvard Business School Press, 2006).

2 Rob Stein, "First U.S. Uterus Transplant Planned; Some Experts Say Risk Isn't Justified," *The Washington Post*, January 15, 2007, p. A01.

3 "Hidden No More: What Everyone Should Know About Infertility," available at http://www.resolve.org/site/PageServer?pagename=lrn_wii_home (last accessed November 2007); "Fast Facts About Infertility," available at http://www.resolve.org/site/PageServer?pagename=fmed_mcff_ffi (last accessed November 2007).

4 "Infertility Myths and Facts," available at http://www.resolve.org/site/PageServer?pagename=lrn_ffaf_moi (last accessed November 2007).

5 "Frequently Asked Questions About Infertility," available at www.resolve.org/site/PageServer?pagename=lrn_wii_faq (last accessed November 2007).

6 *See* Liza Mundy, *Everything Conceivable: How Assisted Reproduction Is Changing Men, Women, and the World* (New York: Knopf, 2007), ch. 5-7.

7 Some have noted that people who provide eggs or sperm for a fee are "vendors," not "donors." However we will use the term "donor" in this paper because of its current widespread use.

8 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007).

9 The variation used will depend on the type of fertility problem that is in need of correction.

10 Originally, PGD and PGS were used primarily to screen for early-onset life-threatening or severely impairing diseases. However, PGD and PGS also have been used for late-onset diseases, for diseases that are not severely debilitating, or for non-therapeutic characteristics such as sex. The current and potential uses of this technology have raised criticism from some activists in the disability rights, civil rights, women's rights, and LGBT rights movements.

For an overview of the laws governing mistakes in the use of PGD, donor gametes with genetic abnormalities, and a failure to warn family member of the results of genetic tests, see Susan L. Crockin, "Overview of Court Decisions Involving Reproductive Genetics" (Washington: Genetics and Public Policy Center, 2007), available at http://www.dnapolicy.org/resources/Overviewofcourtdecisions_Crockin.pdf (last accessed November 2007).

11 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007).

12 For a more in-depth overview of reproductive and genetic technologies, see Emily Galpern, "Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework" (Oakland: Center for Genetics and Society, 2007), available at http://geneticsandsociety.org/downloads/ART.pdf (last accessed November 2007).

13 Anne Harding, "Survey belies tales of donor egg market gone awry," Reuters News Service, May 31, 2007, available at http://uk.reuters.com/article/healthNews/idUKFLE16477220070531 (last accessed November 2007).

14 Peggy Orenstein, "Your Gamete, Myself." *New York Times Magazine*, July 15, 2007, available at http://www.nytimes.com/2007/07/15/magazine/15egg-t.html?ex=1187409600&en=41cd9fb9fb0178d5&ei=5070 (last accessed November 2007).

15 Ibid.

16 Spar, *The Baby Business*, at xi, 46.

17 "ASRM Issues Guidelines For Egg Freezing To Preserve Fertility For Some Young Women," available at www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=48371 (last accessed November 2007).

18 Mundy, *Everything Conceivable*, p. 214. Multiple pregnancies also can result from the use of hormonal drugs, such as Clomid, that stimulate egg production.

19 March of Dimes, "Multiple Pregnancy and Birth: Considering Fertility Treatments" (2006), available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007); Shari Roan, "Multiple births, multiple risks; The recent news of sextuplet births isn't being celebrated by fertility experts." *Los Angeles Times*, June 25, 2007, p. F01.

20 Mundy, *Everything Conceivable*, p. 215-19; American Society of Reproductive Medicine, "Patient's Fact Sheet: Complications of Multiple Gestations" (2001), available at http://www.asrm.org/Patients/FactSheets/complications-multi.pdf (last accessed November 2007).

21 American Society of Reproductive Medicine, "Patient's Fact Sheet: Challenge of Parenting Multiples" (2003), available at http://www.asrm.org/Patients/FactSheets/challenges.pdf (last accessed November 2007).

22 Mark Henderson, "Single embryo IVF 'boosts chance of success while reducing the risk.'" *The London Times*, June 11, 2007, available at http://www.timesonline.co.uk/tol/news/uk/science/article1913144.ece (last accessed November 2007).

23 The Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, "Guidelines on number of embryos transferred" (2006), available at http://www.asrm.org/Media/Practice/NoEmbryosTransferred.pdf (last accessed November 2007).

24 Tom Rawstorne, "Are fertility treatments damaging our children?" *The Daily Mail,* June 18, 2007, available at http://www.dailymail.co.uk/pages/live/articles/health/womenfamily.html?in_article_id=462644&in_page_id=1799 (last accessed November 2007).

25 Andrea Boggio, "Italy enacts new law on medically assisted reproduction," *Human Reproduction* 20(5) (2005): 1153-1157, available at http://humrep.oxfordjournals.org/cgi/content/full/20/5/1153 (last accessed November 2007).

26 "Frequently Asked Questions About Fertility," available at www.asrm.org/Patients/faqs.html#Q6: (last accessed November 2007).

27 Spar, *The Baby Business*, p. x-xii, 46.

28 Restrictions on services imposed by insurance companies also carry policy implications, but those are beyond the scope of this paper.

29 For instance, some laws apply only to HMOs or exempt only HMOs. Each law specifies which types of health plans must cover or offer to cover infertility services. Likewise, most of the laws regulating coverage of infertility services specify which services must be included and sometimes mention which services may be excluded.

30 States that require insurers to include coverage of particular infertility treatments in their health plans include Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, and West Virginia. *See* Ark. Code Ann. §§ 23-86-118, 23-85-137 (2007); Conn. Gen. Stat. §§ 38a-509, 38a-536 (2007); Haw. Rev. Stat. §§ 431:10A-116.5, 432:1-604 (2007); 215 Ill. Comp. Stat. 5/356m, 125/5-3 (2007); Md. Code Ann., Ins. § 15-810 (2007); Md. Code Ann., Health-Gen. § 19-701 (2007); Mass. Gen. Laws ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); Mont. Code Ann.. §§ 33-31-102, 33-22-1521 (2005); N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); N.Y. Ins. Law §§ 3221(k)(6), 4303(s) (2007); Ohio Rev. Code Ann. § 1751.01 (2007); R.I. Gen. Laws §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); W. Va. Code § 33-25A-2 (2007); *see also* "States mandating infertility insurance coverage," available at www.inciid.org/article.php?cat=statemandates&id=275 (last accessed November 2007).

31 California and Texas only require health plans to offer coverage of infertility services for those who want it included in their health plan. *See* Cal. Health & Safety Code § 1374.55 (2007); Tex. Ins. Code Ann. §§ 1366.001-.007 (2007); *see also* "States mandating infertility insurance coverage," available at www.inciid.org/article.php?cat=statemandates&id=275 (last accessed November 2007).

32 La. Rev. Stat. Ann. § 22:215.23 (2007); Nev. Rev. Stat. Ann. §§ 689A.0415, 689B.0376, 695B.1916, 695C.1694, 695C.1715 (2007).

33 Arkansas, Hawaii, Maryland, Rhode Island, and Texas have marriage requirements. *See* Ark. Code Ann. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001 (2007); Haw. Rev. Stat. §§ 431:10A-116.5, 432:1-604 (2007); Md. Code Ann., Ins. § 15-810 (2007); Md. Code Ann., Health-Gen. § 19-701 (2007); R.I. Gen. Laws §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); Tex. Ins. Code Ann. §§ 1366.001-.007 (2007); 28 Tex. Admin. Code § 11.512 (2007).

34 Arkansas, Hawaii, Maryland, and Texas require couples to use their own gametes. *See* Ark. Code Ann. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001(2007); Haw. Rev. Stat. §§ 431:10A-116.5, 432:1-604 (2007); Md. Code Ann., Ins. § 15-810 (2007); Md. Code Ann., Health-Gen. § 19-701 (2007); Tex. Ins. Code Ann. §§ 1366.001-.007 (2007); 28 Tex. Admin. Code § 11.512 (2007).

35 Conn. Gen. Stat. §§ 38a-509, & 38a-536 (2007).

36 N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).

37 N.Y. Ins. Law §§ 3221(k)(6), 4303(s) (2007).

38 R.I. Gen. Laws §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007).

39 Conn. Gen. Stat. §§ 38a-509, 38a-536 (2007).

40 Haw. Rev. Stat. §§ 431:10A-116.5, 432:1-604 (2007).

41 215 Ill. Comp. Stat. 5/356m, 125/5-3 (2007).

42 Md. Code Ann., Ins. § 15-810 (2007); Md. Code Ann., Health-Gen. § 19-701 (2007).

43 N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, & 26:2J-4.23 (2007).

44 Instead of setting caps, Massachusetts requires parity for infertility services: it does not allow health plans to set benefit maximums that are more restrictive than those set for services unrelated to infertility. Mass. Gen. Laws ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); 211 Mass. Code Regs. §§ 37.00-37.12 (2007).

45 The Catholic Church, for instance, prohibits any assisted reproduction procedures that involve obtaining sperm through masturbation, adding a third party into the act of conception, or substituting a laboratory procedure for intercourse, effectively prohibiting most types of assisted reproduction. "Reproductive Technology (Evaluation & Treatment of Infertility) Guidelines for Catholic Couples," available at www.usccb.org/prolife/issues/nfp/treatment.htm (last accessed November 2007). The states with religious exemptions are California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, and Texas. *See* Cal. Health & Safety Code § 1374.55 (2007); Conn. Gen. Stat. §§ 38a-509, 38a-536 (2007); 215 Ill. Comp. Stat. 5/356m, 125/5-3 (2007); Md. Code Ann., Ins. § 15-810 (2007); Md. Code Ann., Health-Gen. § 19-701 (2007); Mass. Gen. Laws ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); Tex. Ins. Code Ann. §§ 1366.001-.007 (2007).

46 Mass. Gen. Laws ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007).

47 Conn. Gen. Stat. §§ 38a-509, 38a-536 (2007).

48 Conn. Gen. Stat. §§ 38a-509, 38a-536 (2007); N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).

49 To our knowledge, no state provides coverage of infertility treatments to recipients of public benefits. We simply mention here those states that have expressly codified the exclusions in their statutes or regulations. Several states also explicitly exclude coverage of fertility drugs or other infertility services within their state plans for medical assistance.

50 Minn. Stat. § 256B.0625, Subd. 13(a) (2006); 56 Okla. Stat. § 204 (2007).

51 Mont. Admin. R. 37.79.309, 37.85.207 (2007); N.J. Stat. Ann. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); Ohio Admin. Code §§ 5101:3-2-03, 5101:3-4-07, 5101:3-4-28 (2007); Pa. Stat. Ann. tit. 62, § 443.6 (2006); R.I. Gen. Laws § 23-13-21 (2007).

52 In contrast, for instance, the IRS allows individuals to include some infertility treatment costs in deductible health care costs, which benefits those who can afford out-of-pocket payments for services in the first place. *See, e.g.*, Sandra Block, "Individual Insurance Buyers Should Check IRS Deductions," *USA Today*, Oct. 14, 2003, available at http://www.usatoday.com/money/perfi/columnist/block/2003-10-14-ym_x.htm (last accessed November 2007).

53 Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 323 (S.D.N.Y. 2000).

54 *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996).

55 Ibid.

56 Bragdon v. Abbott, 524 U.S. 624 (1998).

57 LaPorta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001); *Saks*, 117 F. Supp. 2d at 324.

58 *Krauel*, 95 F.3d at 678; *Saks*, 117 F. Supp. 2d at 326.

59 Alexander v. Am. Airlines, 2002 U.S. Dist. LEXIS 7089, *6 (N.D. Tex.); *cf.* Niemeier v. Tri-State Fire Protection Dist., 2000 U.S. Dist. LEXIS 12621, *19 (N.D. Ill.) (noting that the PDA does not require an employer to cover every expense associated with pregnancy; it just must treat pregnancy and related conditions in a neutral way).

60 Some courts have found potential PDA or Title VII violations, however, when an employee has experienced an adverse employment action (like termination) for taking leave in order to undergo surgical impregnation. Erickson v. Bd. of Governors, 911 F. Supp. 316 (N.D. Ill. 1995), *rev'd on other grounds*, 207 F.3d 945 (7th Cir. 2000); Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994).

61 42 U.S.C. §§ 2000e to 2000e-17 (2000).

62 42 U.S.C. § 2000e(k) (2000).

63 *Krauel*, 95 F.3d at 679-80.

64 Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003).

65 The court did note that an argument could be made that the exclusion disadvantaged unmarried female employees as compared to unmarried male employees, but Saks did not make that argument.

66 *See* Justin Trent, *Health Care Law Chapter: Assisted Reproductive Technologies*, 7 Geo. J. Gender & L. 1143, at *10 (2006).

67 Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

68 Standridge v. Union Pac. R.R. Co., 479 F.3d 936 (8th Cir. 2007).

69 Relief may also be available at the state level. Connecticut, for instance, includes fertility in its definition of discrimination on the basis of sex in its human rights statute. Conn. Gen. Stat. § 46a-51 (2007).

70 *Saks*, 316 F.3d at 343-44 (discussing Congress's reaction to Gen. Elec. v. Gilbert, 429 U.S. 125 (1976)).

71 Kevin Stack, "Her Embryos or His?" *Los Angeles Times*, May 30, 2007, p. A1.

72 Ibid.

73 "Court Won't Hear Battle over Embryos," *The New York Times,* Aug. 26, 2007, available at http://www.nytimes.com/2007/08/26/us/26embryos.html?_r=2&oref=slogin&oref=slogin (last accessed November 2007).

74 Mundy, *Everything Conceivable*, p. 7.

75 *See* Cal. Health & Safety Code § 125315 (2007); Conn. Gen. Stat. § 19a-32d (2007); Md. Code Ann. art. 83A, § 5-2B-10 (2007); N.J. Stat. Ann. § 26:2Z-2 (2007); *see also* Mass. Gen. Laws ch. 111L, § 4 (2007) (similar to other statutes but no requirement of written consent for research donation).

76 Massachusetts does require that an informed consent form be executed by the patient prior to treatment, but only with regard to the nature of the treatment, not to the disposition of unused embryos. *See also* Cal. Penal Code § 367g (2007).

77 Fla. Stat. § 742.17 (2007).

78 In addition, New Mexico states that IVF will not be governed as clinical research provided that the procedure includes "provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient." But it does not appear to mandate affirmatively that every embryo created be implanted in a woman. N.M. Stat. Ann. § 24-9A-1 (2007).

79 N.H. Rev. Stat. Ann. § 168-B:15 (2007).

80 *See* La. Rev. Stat. Ann. §§ 9:121-9:133 (2007).

81 One could read the law to say that fetuses, and therefore embryos, have no rights. But there would be little purpose in enacting such a law.

82 For further analysis of the Louisiana human embryo statutes, see Jessica Arons, "Sex, Lies, and Embryos," *Science Progress*, October 16, 2007, available at www.scienceprogress.org/2007/10/sex-lies-and-embryos/ (last accessed November 2007).

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

84 Ibid. at 597.

85 Ibid.

86 Ibid. at 601.

87 Ibid.

88 Ibid. at 602.

89 Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

90 In addition to looking to the text in statutes to decide cases, courts often look to the policies that underlie or are expressed by the statutes. Some contracts are said to be against public policy if they are seen as injurious to the public good, and courts will refuse to enforce them for that reason. *See, e.g.*, Black's Law Dictionary 1041 (5th ed. 1979).

91 Kass, 696 N.E.2d at 180.

92 J.B. v. M.B., 783 A.2d 707 (N.J. 2001); In re Witten, 672 N.W.2d 768 (Iowa 2003).

93 J.B., 783 A.2d at 719.

94 In re Witten, 672 N.W.2d at 783.

95 A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000); J.B., 783 A.2d at 717-18; In re Witten, 672 N.W.2d at 781.

96 Davis, 842 S.W.2d at 604.

97 Litowitz v. Litowiz, 48 P.3d 261 (Wash. 2002).

98 Roman v. Roman, 193 S.W.3d 40, 48 (Tex. App. 2006).

99 Ibid. at 49-50.

100 Ibid. at 53.

101 Mundy, *Everything Conceivable*, p. 101 (quoting an adoption lawyer).

102 Elizabeth Marquardt, "When 3 Is Really a Crowd," *The New York Times,* July 16, 2007, available at http://www.nytimes.com/2007/07/16/opinion/16marquardt.html (last accessed November 2007).

103 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *see also* Belsito v. Clark, 644 N.E.2d 760 (Ohio Misc. 1994). Of course, these decisions are each made based upon a particular set of facts, and it is impossible to predict the extent to which prior agreements, understandings, and actions influenced each judicial outcome.

104 Andrea F. Siegel, "Ruling Alters Idea of Mother," *Baltimore Sun,* May 17, 2007.

105 Galpern, *supra* note 12, "Assisted Reproductive Technologies," available at http://geneticsandsociety.org/downloads/ART.pdf.

106 "The Uniform Parentage Act of 2002," available at http://family-law.lawyers.com/paternity/The-Uniform-Parentage-Act-of-2002.html (last accessed November 2007).

107 *See* Maria Kokiasmenos & Lori Mihalich, *Health Care Law Chapter: Assisted Reproductive Technology*, 5 Geo. J. Gender & L. 619, at *3-4.

108 Elisa B. v. Emily B., 117 P.3d 660 (Cal. 2005); *see also* In re Parentage of Robinson, 890 A.2d 1036 (N.J. Super. 2005); Chambers v. Chambers, 2002 Del. Fam. Ct. LEXIS 39. *But see* In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (lesbian non-biological co-parent did not have standing to establish parentage under Washington Uniform Parentage Act, but she did have standing under the state's common law).

109 K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

110 In order to protect the privacy of the parties and their children, the court did not divulge the couple's last names.

111 In re C.K.G., 173 S.W.3d 714 (Tenn. 2005).

112 Colo. Rev. Stat. § 19-4-106 (2006).

113 Tex. Fam. Code Ann. § 160.704 (2007); Utah Code Ann. § 78-45g-704 (2007); Wash. Rev. Code § 26.26.715 (2007).

114 Wash. Rev. Code § 26.26.735 (2007).

115 Wash. Rev. Code § 26.26.101 (2007).

116 Ohio Rev. Code Ann. § 3111.97 (2007).

117 *See* Spar, *The Baby Business*, Ch. 6.

118 10 Okla. Stat. §§ 554-556 (2007).

119 Spar, *The Baby Business*, p. 82.

120 In addition, although Maryland has not passed a law that addresses surrogacy, an Attorney General's opinion states that paid surrogacy contracts are generally illegal and unenforceable under the state law. However, the payment of a surrogacy fee will not be a bar to an adoption proceeding and may be considered with regard to the voluntariness of the birth mother's consent and other factors relevant to the adoption. 85 Op. Md. Att'y Gen. 348 (Dec. 19, 2000) (interpreting Md. Code Ann., Fam. Law § 5-362, which bars payment for children).

121 North Dakota and Washington fall into more than one category because they allow some types of contracts but void or ban others.

122 *See, e.g.,* Ala. Code § 26-10A-34 (2007); Iowa Code § 710.11 (2006); Or. Rev. Stat. § 163.537 (2005); W. Va. Code § 48-22-803 (2007).

123 Tenn. Code Ann. § 36-1-102(48) (2007).

124 In the Matter of Baby M., 537 A.2d 1227, 1234 (N.J. 1988).

125 *See also* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (finding traditional surrogacy agreement unenforceable where compensation was paid beyond pregnancy-related expenses and mother was given no reasonable period after birth in which to revoke consent to father's custody).

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

127 As noted previously, the court later clarified this position in K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

128 *Johnson*, 851 P.2d at 787.

129 In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

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

131 Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Comm. Pleas 1994); *see also* J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 2006).

132 Dorothy Roberts, "Race and the New Reproduction," in *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Press, 1997), available at http://geneticsandsociety.org/article.php?id=1993 (last accessed November 2007).

133 Spar, *The Baby Business*, p. 82.

134 Katherine Drabiak, et al., "Ethics, Law, and Commercial Surrogacy: A Call for Uniformity" J.L. Med. & Ethics, 300, 304, 306-308 (Summer 2007).

135 Ibid.

136 Due to the controversial nature of gestational agreements, the drafters made adoption of Part 8 of the 2002 Uniform Parentage Act optional for the states. *See* Unif. Parentage Act Art. 8 cmt. at 68-69 (amended 2002), available at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf (last accessed November 2007). Thus far, it appears that only Texas and Utah have enacted a version of it.

137 Arthur Caplan, "Should Kids Be Conceived after a Parent Dies?" *MSNBC.com*, June 27, 2007, available at http://www.msnbc.msn.com/id/17937817/ (last accessed November 2007).

138 Claudia Wallis, "Quickening Debate over Life on Ice," *Time*, July 2, 1984, available at http://www.time.com/time/magazine/article/0,9171,926680,00.html?iid=chix-sphere (last accessed November 2007).

139 Linda Kramer, "He Looks Just Like His Dad," *People*, September 10, 2007, p. 111-12.

140 Fla. Stat. § 742.17 (2007).

141 Va. Code Ann. § 20-158 (2007); *see also* Va. Code Ann. §§ 64.1-5.1, 64.1-8.1 (2007).

142 Colo. Rev. Stat. § 19-4-106 (2006); 13 Del. C. § 8-707 (2007); N.D. Cent. Code § 14-20-65 (2007); Tex. Fam. Code § 160.707 (2007); Utah Code Ann. § 78-45g-707 (2007); Wash. Rev. Code § 26.26.730 (2007); Wyo. Stat. Ann. § 14-2-907 (2007).

143 Unif. Parentage Act § 707, at 67 (amended 2002), available at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf (last accessed November 2007).

144 Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).

145 Stephen ex rel. Stephen v. Barnhart, 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

146 The Arizona Court of Appeals found that the presumption provision violated the Equal Protection Clause of the federal and state constitutions because it did not afford a genetic mother the opportunity to rebut a presumption of maternity. That case involved a dispute between the intended parents who had divorced. The court made no ruling as to the validity of the statute if a gestational surrogate wanted to keep the child. Soos v. Superior Court, 897 P.2d 1356 (Ariz. 1994).

147 Every state would void a contract with a person who is not competent to enter into a contract, but Washington goes a step further by penalizing those who induced the incompetent person to enter the contract. Michigan does so as well.

148 The Michigan Court of Appeals has interpreted the statute to mean that any surrogate parentage contract that requires both the impregnation of a surrogate and the relinquishment of her parental rights is void and unenforceable, and those that provide compensation are unlawful and prohibited. However, the Act does not prohibit contracts which compensate for conception or gestation services alone, meaning a commercial contract potentially could be upheld if payment is not conditioned on the surrender of the child. Jane Doe v. Atty. Gen., 487 N.W.2d 484 (Mich. Ct. App. 1992).

149 New Hampshire and Virginia's surrogacy laws are modeled after the 2000 version of the Uniform Parentage Act. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 Drake L. Rev. 605, 630 (2003).

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