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TAMING THE WILD, WILD WEST: SOUTH DAKOTA’S NEED FOR SURROGACY LEGISLATION

ISABELLA M. ERICKSON

South Dakota, like many states, lacks any legislation regulating gestational surrogacy. For over thirty years, South Dakota intended parents and surrogates have worked together without judicial case or controversy. Good fortune, however, cannot last forever. Despite the introduction of several bills over the years, the South Dakota Legislature has failed to pass any regulation of surrogacy. This article surveys surrogacy best practices, as well as the law of other states, focusing particularly upon eligibility to participate in a surrogacy agreement, the requirements of a valid surrogacy agreement, and the establishment of parental rights in surrogacy cases. Ultimately, this article concludes that South Dakota should pass the legislation proposed here.

I. INTRODUCTION

Family law is an area primarily created and governed by state law. Regulation of family law is a traditional police power of the states. Although federal power has expanded in this area, the states remain the primary facilitator of family law. Every state has comprehensive legislation on marriage, divorce, and child custody. Gestational surrogacy, however, lacks the robust common law history of other family law subjects. While traditional surrogacy has existed for thousands of years, gestational surrogacy is a product of the last forty years.

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† J.D. Candidate, 2024, University of South Dakota Knudson School of Law, Vermillion, South Dakota; B.A., Political Science and History, Southwest Minnesota State University, Marshall, Minnesota. Staff Writer, Volume 68, South Dakota Law Review. The title of this comment was inspired by the testimony of Senate Bill 137 proponents before the Senate Judiciary Committee. Thank you to Emilee Gehling for inspiring me to write this article, and thank you to Professor Haksgaard for your valuable feedback throughout the writing process. Lastly, thank you Katherine for your good humor, patience, and love. To all those who pursue a surrogacy journey, whether surrogate or intended parent: this article is for you.
2. Id.
3. Id. at 270-71.
4. See id. at 269.
Although surrogacy has captured the attention of the public several times in the last thirty-five years, it remains a sporadically legislated subject.\(^8\)

*In re Baby M*\(^9\) brought surrogacy to the nation’s attention in 1987.\(^10\) Since *Baby M* was decided, twenty-six states have passed laws addressing surrogacy.\(^11\) However, many states lack statutes addressing surrogacy, leaving the practice largely unregulated.\(^12\) South Dakota is among these unregulated states.\(^13\) In the last ten years, the South Dakota Legislature has considered a number of surrogacy bills, with only one (addressing abortion clauses) becoming law.\(^14\) During consideration of a permissive regulatory bill in 2022, surrogacy supporters dubbed the state of South Dakota surrogacy law as “the Wild, Wild West.”\(^15\) Despite these opportunities to address surrogacy, the state legislature has failed to provide clear guidance on the requirements, enforceability, and effect of surrogacy agreements.\(^16\) In absence of statutory guidance, intended parents, surrogates, and attorneys have used parentage, adoption, and vital records laws “to fashion ad hoc procedures to effect the parties’ intent.”\(^17\) South Dakota intended parents and surrogates primarily rely upon prebirth orders to establish proper parentage.\(^18\)

In Part II, this article describes the history of surrogacy in the United States, beginning with *Baby M* and proceeding with examples of judicial and legislative responses to *Baby M*.\(^19\) Part III offers a description of South Dakota surrogacy practice and the recent history of surrogacy bills in the South Dakota Legislature.\(^20\) Part IV outlines a proposal for surrogacy law in South Dakota while outlining the rationale for each proposed section.\(^21\) The accompanying Appendices offer

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\(^9\) 537 A.2d 1227 (N.J. 1988).

\(^10\) Scott, supra note 8, at 112-13.


\(^12\) Id. at 464-74 (compiling a list of states with laws addressing surrogacy).

\(^13\) 148 AM. JUR. TRIALS 471 § 5 (2023).


\(^15\) S.B. 137 Hearing Before the Senate Judiciary Committee, 97th Leg., Reg. Sess. (S.D. 2022) (statement of Lisa Rahja, Founder of Families From South Dakota Surrogacy, Inc.).

\(^16\) See AM. JUR. TRIALS, supra note 13.


\(^18\) See Application for Judgment, supra note 17, at 2-3 (applying for a prebirth order to establish the parentage of the intended father and the nonparentage of the gestational surrogate).

\(^19\) See discussion infra Part II (analyzing the judicial and legislative history of surrogacy in the United States since *Baby M*.)

\(^20\) See discussion infra Part III (reviewing legislative proposals in South Dakota related to surrogacy).

\(^21\) See discussion infra Part IV (recommending provisions for effective surrogacy legislation).
statutory language tracking the proposal in Part IV. 22 Ultimately, this article concludes that South Dakota should authorize and regulate surrogacy by adopting the statutory scheme proposed here. 23

II. THE HISTORY OF SURROGACY IN THE UNITED STATES

Surrogacy has existed for thousands of years. 24 Traditional surrogacy, the oldest form of surrogacy, refers to an arrangement in which the surrogate provides the ovum to be fertilized, thus making the resulting child biologically related to the surrogate. 25 By contrast, gestational surrogacy refers to an arrangement in which the gestational surrogate does not provide the ovum and is instead implanted with an embryo to which the surrogate is not related. 26 Courts and legislatures disfavor the use of traditional surrogacy, as the surrogate is a biological parent of the child and the present system of family law presupposes parentage in biological parents. 27 Today, ninety-five percent of surrogacies in the United States are gestational. 28 As the predominant practice, gestational surrogacy will be the focus of this article. 29

A. THE BEGINNING OF NATIONAL ATTENTION: BABY M

The first surrogacy case to spark nationwide coverage and controversy was In re Baby M, a traditional surrogacy case. 30 Baby M stems from a dispute between the intended parents and the traditional surrogate over the custody of the child born as a result of the surrogacy agreement. 31 Baby M is the most significant case in the history of American surrogacy law, and the New Jersey Supreme

22. See infra Appendices A-C (including a proposed legislative bill for consideration in South Dakota).

23. See discussion infra Part V (concluding that South Dakota would benefit from adopting this article’s proposed surrogacy bill provisions).


25. UNIF. PARENTAGE ACT § 801(1) (UNIF. L. COMM’N 2017). Traditional surrogacy and genetic surrogacy are different terms that refer to the same concept. Id. at art. 8, introductory cmt.

26. Id. § 801(2). “Ovum” is the medical term for the haploid gamete produced by persons assigned female at birth and which, when fertilized with sperm, results in a zygote that may become an embryo. Zygote, Britannica, https://perma.cc/PV7Y-X4AF (last visited Feb. 24, 2023).

27. See Scott, supra note 8, at 139-40. Some feminist legal scholars argue that the distinctions drawn between traditional surrogacy and gestational surrogacy are based on untenable assumptions of how genetics affects surrogates’ relationships with their pregnancies and the validity of parentage law as it stands today. See Sara L. Ainsworth, Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States, 89 WASH. L. REV. 1077, 1115 (2014). Gestational surrogacy is the focus of this article.

28. Scott, supra note 8, at 139. More recent data is unavailable.

29. Id.

30. 537 A.2d 1227, 1234 (N.J. 1988).

31. Id.
Court’s reasoning continues to form the basis for opposition to surrogacy in general, whether gestational or traditional.\textsuperscript{32}

In the early 1980s, William and Elizabeth Stern, an older couple, contracted with the Infertility Center of New York ("ICNY") to find and employ a surrogate.\textsuperscript{33} ICNY matched the Sterns with Mary Beth Whitehead, a married mother of two who had attempted once before to become a surrogate.\textsuperscript{34} Mrs. Whitehead received one hour of legal counseling on a surrogacy agreement with another couple but none for the agreement with the Sterns, and a psychological evaluation demonstrated that she was likely to have trouble giving up the child.\textsuperscript{35} The Sterns and Mrs. Whitehead were not informed of the results of the psychological evaluation and proceeded with the arrangement.\textsuperscript{36}

Shortly after their match, Mrs. Whitehead was artificially inseminated with Mr. Stern’s sperm and became pregnant.\textsuperscript{37} The surrogacy arrangement proceeded amicably until Mrs. Whitehead delivered Baby M, at which time she began to regret turning Baby M over to the Sterns.\textsuperscript{38} A dramatic turnabout ensued in which Mrs. Whitehead fled to Florida with Baby M and the Sterns commenced legal proceedings to have the baby returned to them.\textsuperscript{39} Ultimately, the New Jersey Supreme Court overturned the trial court’s decision, holding that the agreement was unenforceable, and Mrs. Whitehead was the legal mother of Baby M.\textsuperscript{40}

The dispute between the Sterns and Mrs. Whitehead caught the media’s attention.\textsuperscript{41} The dramatic story of Baby M "raised compelling questions about the uncertain impact of a novel use of reproductive technology on family structure, the nature of motherhood, the welfare of children, and the role of law in this unfamiliar terrain."\textsuperscript{42} Using classist and misogynistic arguments, the Sterns’ experts characterized Mrs. Whitehead as an unfit mother, while Harold Cassidy, Mrs. Whitehead’s attorney, utilized a similarly misogynistic argument to argue that Mrs. Stern "thought her career . . . too important to bear her own children."\textsuperscript{43} A group of feminists, in an amicus brief, objected to the characterization of Mrs.

\begin{flushleft}
32. Scott, supra note 8, at 109-10, 144-45.
34. Id.
35. Id. at 1247.
36. Id. at 1247-48.
37. Id. at 1236.
38. Id.
39. Id. at 1237.
40. Id. at 1234-35.
41. Scott, supra note 8, at 114.
42. Id.
43. Id. at 114-15. Indeed, Mrs. Whitehead and Mrs. Stern fell short of the high standards to which mothers and women are held, and the narratives presented by the parties utilized these shortcomings to their advantage. Id. Contemporary feminist groups recognized that Mrs. White was “being held to an unfair standard of motherhood[,]” but did not similarly defend Mrs. Stern for pursuing a career prior to motherhood. See id. at 116 (quoting Iver Peterson, Fitness Test for Baby M’s Mother Unfair, Feminists Say, N.Y. TIMES, Mar. 20, 1987, at B1). Although feminists were initially split on the issue of surrogacy as it relates to the rights of the surrogate, they generally considered intended mothers as exploitative and unsympathetic. See Iver Peterson, Baby M Trial Splits Ranks of Feminists, N.Y. TIMES, Feb. 24, 1987, at B1 ("It is always going to be poor women who have the babies and rich women who get them.").
\end{flushleft}
Whitehead as sexist, and argued that compensated surrogacy commodified women’s bodies. Surrogacy opposition united feminists and religious groups alike, as many feminists were concerned with the exploitation of women, while many religious groups, particularly Catholic organizations, argued that surrogacy harmed the woman, the child, and society in general.

**B. THE CROSS-COUNTRY LEGISLATIVE AND JUDICIAL RESPONSES TO Baby M**

The spectacle of Baby M invigorated legislative opposition to surrogacy across the country. In 1987, when the case was brought to the New Jersey Supreme Court, no state had statutes regulating surrogacy. Before the court decided the case, seventy surrogacy bills had been introduced in twenty-seven states. Six states banned surrogacy agreements or declared them void by the end of 1988. The focus of these laws, and the movement at large, was compensated surrogacy, not altruistic surrogacy in which the surrogate is uncompensated. Furthermore, as gestational surrogacy was not yet commonly practiced, these laws focused on traditional surrogacy. Political opposition to surrogacy cooled by the mid-1990s as the public became more comfortable with surrogacy and as gestational surrogacy became more widely available, but, at the time of Baby M, the challenges that assisted reproductive technologies presented to the traditional family structure alarmed the nation enough to induce swift action.

The reaction of New York’s political sector exemplifies the opposition compelled by Baby M. Although New York has since lifted its surrogacy ban, the story of its enactment is an informative example of the power of surrogacy opposition following Baby M. In 1987, a New York legislator introduced a bill to enforce surrogacy contracts while protecting women and children against exploitation, but the bill was withdrawn due to fierce opposition by religious groups and feminists. Governor Mario Cuomo, a vocal opponent of surrogacy, created a task force to investigate the issue. The task force referred to Baby M throughout the report, noting the New Jersey Supreme Court’s reasoning regarding the Constitution, surrogacy as a form of adoption, and the best interests

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44. Ainsworth, supra note 27, at 1082.
46. Joslin, supra note 11, at 410-12.
47. Scott, supra note 8, at 117.
48. Id.
49. Joslin, supra note 11, at 412.
50. See Scott, supra note 8, at 116-17 (describing popular concern over compensated surrogacy).
51. See id. at 140.
52. Id. at 137.
53. Id. at 118-20.
54. N.Y. FAM. CT. ACT § 581-401 (LexisNexis 2020); Scott, supra note 8, at 118-19.
55. Scott, supra note 8, at 118.
56. Id.
of children.\textsuperscript{57} As a result, the task force unanimously recommended a ban on all compensated surrogacy.\textsuperscript{58} In 1992, the New York State Department of Health published its own report critical of surrogacy, focusing particularly on the founder of the agency involved in Baby M, Noel Keane.\textsuperscript{59} Governor Cuomo’s opposition to surrogacy, his task force’s report, and the report of the New York Department of Health led to the overwhelming passage of a surrogacy ban in 1992.\textsuperscript{60} Although other bans passed more swiftly following Baby M, the anti-surrogacy movement peaked with the passage of the New York ban.\textsuperscript{61}

The enactment of Illinois’s permissive regulatory law in 2004 demonstrates the weakening of surrogacy opposition and the growing movement towards regulation in lieu of prohibition.\textsuperscript{62} Unlike prior attempts at passing permissive laws in other states, the bill faced little opposition.\textsuperscript{63} The bill passed unanimously and with little news coverage.\textsuperscript{64} Illinois’s Gestational Surrogacy Act is a regulatory law placing limits on enforcement, mandating certain requirements of surrogacy contracts, and vesting parental rights in intended parents at birth.\textsuperscript{65} Although opposition to surrogacy remains, regulation has emerged as the prevailing view among lawmakers in particular, while modern surrogacy opponents remain relatively disorganized when compared to other reproductive health issues such as abortion.\textsuperscript{66}

As the title implies, Illinois’s law concerns gestational surrogacy, not traditional surrogacy.\textsuperscript{67} The increasing availability of gestational surrogacy made surrogacy more palatable to courts and the public because a gestational surrogate has no genetic connection to the child they carry.\textsuperscript{68} The rise of gestational surrogacy is, in part, due to \textit{Johnson v. Calvert},\textsuperscript{69} a 1993 California Supreme Court case in which the court enforced a gestational surrogacy agreement.\textsuperscript{70} The court enforced the agreement because, while the surrogate gave birth to the child, she lacked a genetic connection to the child, as the intended mother had provided the egg with the intention of parenting the child.\textsuperscript{71} Both parties asserted maternity on bases recognized by law.\textsuperscript{72} The \textit{Johnson} court turned to the intent of the parties

\begin{itemize}
  \item[58.] \textit{Id.} at 138.
  \item[59.] Scott, \textit{supra} note 8, at 118-19.
  \item[60.] \textit{Id}.
  \item[61.] \textit{Id.} at 120.
  \item[62.] \textit{Id.} at 124.
  \item[63.] \textit{Id.} at 118, 124.
  \item[64.] Joslin, \textit{supra} note 11, at 420-21.
  \item[65.] 750 ILL. COMP. STAT. 47/5 (2004).
  \item[66.] Scott, \textit{supra} note 8, at 144-45.
  \item[67.] 750 ILL. COMP. STAT. 47/1 (2004).
  \item[69.] 851 P.2d 766 (Cal. 1993).
  \item[70.] NeJaime, \textit{supra} note 68, at 2302.
  \item[71.] \textit{Johnson}, 851 P.2d at 782.
  \item[72.] \textit{Id}.
\end{itemize}
to resolve the case.\textsuperscript{73} But for the actions of the intended parents, the court reasoned, the child would not have been born, thus making the intended mother’s parentage claim superior to the surrogate’s claim.\textsuperscript{74}

The California Supreme Court’s affirmation of a gestational surrogacy agreement contributed to intended parents’ turn towards gestational surrogacy.\textsuperscript{75} Not only did such arrangements allow for two intended parents to be biologically related to the child, but it was viewed, generally, as a safer method to secure parentage, as the surrogate’s claim to parentage is based entirely upon gestation.\textsuperscript{76} As the discomfort of legislatures and courts towards traditional surrogacy continues, gestational surrogacy is the primary practice to this day.\textsuperscript{77}

\section*{III. SOUTH DAKOTA’S EXPERIENCE WITH, AND LEGISLATIVE CONSIDERATION OF, SURROGACY}

Surrogacy agreements have been written and entered into in South Dakota for nearly thirty years.\textsuperscript{78} There is no appellate law on the subject; no adversarial surrogacy litigation has taken place in the state.\textsuperscript{79} Further information on surrogacy and South Dakota’s judicial system is hard to come by as the practice is private by design, and its existence has been uneventful.\textsuperscript{80} There is no South Dakota Baby M.\textsuperscript{81} Few examples of South Dakota surrogacy are available to the public, but they do exist: surrogacy advocates, including intended parents and surrogates, have spoken to the legislature on their experiences, and many South Dakotans know the story of Arlette Schweitzer, an Aberdeen woman who carried her own grandchildren in 1991.\textsuperscript{82} Other evidence of surrogacy in South Dakota includes the establishment of two surrogacy agencies in the state, one of which is still active.\textsuperscript{83} Although there is no South Dakota Baby M, the state legislature has

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Scott, supra note 8, at 122.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 139.
\item \textsuperscript{78} Austin Goss, Competing Surrogacy Bills Move Through South Dakota Legislature, DAKOTA NEWS NOW (Feb. 15, 2022), https://perma.cc/AC46-6NZR.
\item \textsuperscript{79} An Act to Establish Gestational Surrogacy Arrangements and Agreements: Hearing on S.B. 137 Before the S. Judiciary Comm., 97th Leg., Reg. Sess. (S.D. 2022) (statement of Lisa Rahja, President of Families from South Dakota Surrogacy, a pro-ART South Dakota-based nonprofit).
\item \textsuperscript{80} Id. (describing lack of litigation over surrogacy in South Dakota); Application for Judgment, supra note 17, at ¶¶ 16-17 (requesting the proceedings be sealed); see also June Carbone & Christina O. Miller, Surrogacy Professionalism, 31 J. AM. ACAD. MARRIAGE COUNSELING 1, 8-9 (2018) (“In [states without surrogacy laws], surrogacy still takes place, and the courts have had to resolve disputes, though often without producing reported opinions with precedential value.”).
\item \textsuperscript{81} See Goss, supra note 78 (describing lack of litigation over surrogacy in South Dakota).
\item \textsuperscript{82} An Act to Establish Gestational Surrogacy Arrangements and Agreements: Hearing on S.B. 137 Before the S. Judiciary Comm., 97th Leg., Reg. Sess. (S.D. 2022); Dorene Weinstein, Whatever Happened To: Surrogate Grandmother, ARGUS LEADER (July 26, 2014), https://perma.cc/U4X4-RZSM.
\end{itemize}
attempted to legislate on the subject four times in the last fifteen years.\footnote{See sources cited supra note 14 (listing statutes addressing surrogacy proposed in South Dakota).} These bills have attempted to ban surrogacy, prevent clauses addressing abortion, and permit and regulate surrogacy.\footnote{Id.}

In 2012, a bill was introduced in the South Dakota House of Representatives to ban surrogacy.\footnote{H.B. 1255, 86th Leg., Reg. Sess. (S.D. 2011).} The proponents argued that “surrogacy exploits women and hurts children . . . [and] destroys the bond between mother and child.”\footnote{Kealey Bultena, \textit{Lawmakers Kill SD Surrogacy Ban}, S.D. PUB. BROAD. (Feb. 14, 2011), https://perma.cc/FF9D-UP2F.} Surrogates, however, testified that they were not the mothers of the children they carried.\footnote{Id.} The bill passed in the House but was tabled in the Senate Health and Human Services Committee.\footnote{House Bill 1255, S.D. LEGIS. RSCH. COUNCIL, https://perma.cc/85FE-3LMC (last visited Oct. 22, 2022).}

Similarly, in 2020, House Bill 1096 sought to not only ban, but also criminalize compensated surrogacy.\footnote{Stephen Groves, \textit{SD Senate Panel Narrowly Defeats Commercial Surrogacy Ban}, AP NEWS (Feb. 26, 2020), https://perma.cc/6ZCL-4K3C.} As with the 2012 bill, surrogacy opponents argued that the practice was exploitative.\footnote{Id.} Surrogacy proponents, however, stated that the bill was “based on worst-case scenarios, mostly from other states, and that the compensated contracts protect both the women acting as surrogates and the intended parents.”\footnote{Id.} The bill, which passed the House, failed narrowly in the Senate Health and Human Services Committee.\footnote{Id.}

In 2021, a bill was proposed to make a contractual provision that “coerces, compels, or attempts to compel a pregnant woman to undergo an abortion” unenforceable.\footnote{S.B. 183, 96th Leg., Reg. Sess. (S.D. 2021).} Although the bill does not explicitly mention surrogacy, the debate focused upon surrogacy contracts, particularly the attorneys and agencies involved in them.\footnote{Hearing on S.B. 183 Before the S. Judiciary Comm., 96th Leg., Reg. Sess. (S.D. 2021).} The initial bill did not impose criminal penalties upon individuals who violate the section, but Amendment 183F did so with a primary focus on the drafters of surrogacy agreements.\footnote{Amendment 183F, S.B. 183, 96th Leg., Reg. Sess. (S.D. 2021).} The bill passed overwhelmingly and was signed into law by Governor Kristi Noem on March 25, 2021.\footnote{Senate Bill 183, S.D. LEGIS. RSCH. COUNCIL, https://perma.cc/A89G-QWVH?type=image (last visited Oct. 22, 2022).}

In 2022, a Senate bill was proposed to regulate surrogacy, while a House bill was proposed to limit voluntary termination of the relationship between a birth mother and a child, effectively ending surrogacy in South Dakota.\footnote{S.B. 137, 97th Leg., Reg. Sess. (S.D. 2022); H.B. 1311, 97th Leg., Reg. Sess. (S.D. 2022).}
prohibitive bill, which originated in the House, failed in a vote on the floor.\footnote{\textit{House Bill 1311}, S.D. LEGIS. RSCH. COUNCIL, https://perma.cc/6BJJ-QB2M?type=image (last visited Oct. 22, 2022).} During the debate, Representative Jon Hansen characterized surrogacy as a contract for manufacture and sale of a human being.\footnote{Christopher Vondracek, \textit{Bill to Dramatically Upend Surrogacy In South Dakota Fails in The House of Representatives}, MITCHELL REPUBLIC (Feb. 21, 2022), https://perma.cc/623C-PAUF.} Representative Taylor Rehfeldt, however, rejected the content of the bill and called surrogacy opponents’ characterization of surrogacy relationships as “deceitful.”\footnote{Id.} Similar characterizations were made in the Senate, where Senate Bill (“SB”) 137, a bill to regulate surrogacy, was proposed.\footnote{Goss, supra note 78.} Senator Lee Schoenbeck contended that the provisions of the bill would commodify and “[treat] kids like cars.”\footnote{Id.} By contrast, Senator Brock Greenfield argued the regulatory approach to surrogacy law, stating that gestational surrogacy had been practiced in South Dakota for thirty years and that “[i]t was time] to put restrictions and regulations in place . . .”.\footnote{Id.} SB 137 failed on the Senate floor.\footnote{Senate Bill 137, S.D. LEGIS. RSCH. COUNCIL, https://perma.cc/6A3R-7A8L (last visited Mar. 4, 2023).}

Except for the prohibition on contracting for an abortion, South Dakota lacks any laws addressing surrogacy.\footnote{SDCL § 37-23-12 (2004); SDCL § 22-17-14 (2017); SDCL § 53-9-13 (2017).} Surrogacy practice is a South Dakota reality, but there has never been a South Dakota Baby M.\footnote{See Goss, supra note 78 (describing lack of litigation over surrogacy in South Dakota).} It is time to pass this article’s proposed legislation to address the uncertain state of surrogacy in South Dakota.

IV. PROPOSAL FOR LEGISLATIVE PROVISIONS REGARDING
GESTATIONAL SURROGACY

Across the country, states enacting permissive regulatory laws have differences in law, ranging from slight to significant, that affect the process of, and the parties to, surrogacy in that state.\footnote{Compare COLO. REV. STAT. § 19-4.5-109 (2021) (excluding any requirement of use of intended parent gametes), with 750 ILL. COMP. STAT. 47/20 (2005) (amended 2017) (requiring at least one intended parent to contribute gametes). Compare COLO. REV. STAT. § 19-4.5-106(1)(g) (2021) (requiring that surrogates be allowed to make all health and welfare decisions), with 750 ILL. COMP. STAT. 47/25(d)(1) (2004) (permitting provisions restricting surrogate’s right to refuse medical procedures).} While some laws are more inclusive and comprehensive than others, the existence of law which provides clear guidance is typically of benefit to those involved in surrogacy.\footnote{Joslin, supra note 11, at 456-59.} Comprehensive surrogacy legislation covers a variety of important topics relevant to surrogacy.\footnote{See 750 ILL. COMP. STAT. 47 (2005 & Supp. 2016, 2017) (addressing rights of parenting, eligibility to participate in surrogacy agreements, enforceability of certain provisions, remedies, etc.).} This article proposes surrogacy legislation to adopt.\footnote{See infra Appendices A-C (proposing surrogacy legislation for South Dakota to adopt).} Specifically, the proposed
legislation in the Appendices addresses three subject areas addressed in all permissive regulatory surrogacy laws: eligibility requirements for prospective intended parents and surrogates (Appendix A); requirements for a valid surrogacy agreement (Appendix B); and rules governing the establishment of parentage (Appendix C). Other areas such as remedies, regulation of surrogacy agencies, and expenses are not addressed.

The debate surrounding surrogacy frequently hinges on legalization versus prohibition. Focus upon this barrier question has led to limited discussion of what appropriate surrogacy legislation should look like. An affirmative or a negative answer to enforceability fails to account for the practice itself, which tends to continue regardless of contract enforceability. Surrogacy agreements have been entered into and performed for over thirty years in South Dakota. Absent regulation, the rights of the intended parents, the surrogate, and the children born of surrogacy are uncertain. Additionally, a total ban does not prevent the practice of surrogacy entirely. The proper response to surrogacy is legislation drafted to protect the rights and interests of all involved.

There is no state or judicial oversight of surrogacy in South Dakota. Intended parents and surrogates rely on prebirth orders to effectuate their intent, but surrogacy arrangements, in general, are unregulated. The process of determining eligibility, drafting and executing the agreement, and performance are entirely at the discretion of the parties. Best practices, although utilized by the surrogacy agency and attorneys in this state, are not compulsory, and parties may pursue a surrogacy arrangement however they please.

An example of the dangers of unregulated surrogacy may be found in a 2018 case arising out of Iowa, P.M. v. T.B. The intended parents in P.M., an infertile older couple, wanted to have a child together. T.B., the surrogate, responded

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112. See discussion infra Part IV.A (addressing eligibility); Part IV.B (addressing surrogacy agreement requirements); Part IV.C (addressing parentage).
113. For topics not covered by this comment, see generally UNIF. PARENTAGE ACT, 9B U.L.A. 1 (2017) (providing a model statute for states to use when determining parentage). For an example of surrogacy agency regulation, see CAL. FAM. CODE ANN. § 7961 (West).
114. Joslin, supra note 11, at 414-16.
115. Id. at 415-16.
116. Id.
117. Goss, supra note 78.
118. Joslin, supra note 11, at 457.
119. See In re Roberto d.B., 923 A.2d 115, 130-32 (Md. 2007) (noting that surrogacy agreements are illegal under Maryland law but determining parentage in accordance with the wishes of the intended parent and the surrogate).
120. See Ainsworth, supra note 27, at 1107.
121. Goss, supra note 78.
122. Application for Judgment, supra note 17, at 1-4.
123. See Litigation of Surrogate Parenting Agreements, supra note 13, § 5 (noting South Dakota’s lack of laws addressing surrogacy).
124. Id. (noting South Dakota’s lack of laws addressing surrogacy).
125. 907 N.W.2d 522, 524 (Iowa 2018).
126. Id. at 524-25.
to the intended parents’ Craigslist advertisement for a gestational surrogate.  

The surrogate, who had previously had a life-threatening tubal pregnancy, agreed to be a surrogate to raise funds for her own in vitro fertilization. The resulting gestational surrogacy arrangement was contentious, as the parties disagreed regarding confidentiality, healthcare decisions, and money. The parties frequently argued, and the surrogacy culminated in the surrogate hiding the premature birth of the children from the intended parents, even as one of the children passed away following their birth. The Iowa district court enforced the surrogacy agreement and granted permanent legal and physical custody of the child to the intended father while terminating the presumptive parental rights of the surrogate and her husband. The Supreme Court of Iowa affirmed. This example illustrates the dangers of unregulated surrogacy agreements: without regulation, there exists no limits on who may involve themselves in surrogacy agreements and what may be done regarding the arrangements. Although South Dakota has been fortunate in terms of litigation, the private nature of surrogacy leaves the standards applied across the state unknowable with any certainty.

Furthermore, in absence of legislative direction, the question of enforceability is left to the courts. If and when the question reaches the South Dakota Supreme Court, the court will be tasked with deciding whether surrogacy agreements are enforceable. In a matter of first impression regarding surrogacy, the decision will likely hinge on how the court interprets the public policy of the state, as no law is directly violated by surrogacy agreements in general. Public policy is derived from the constitution, statutes, judicial decisions, and administrative actions. The South Dakota Supreme Court has observed that, in regards to public policy, a court’s purpose is to reveal the existence of a policy by interpretation. The South Dakota Supreme Court has declared that “[u]ntil firmly and solemnly convinced that an existent public policy

127. Id. at 525.
128. Id.
129. Id. at 526-28.
130. Id.
131. Id. at 524.
132. Id.
133. See e.g., id. at 525-29 (reciting the facts of a case of surrogacy where the parties utilized few safeguards, and the surrogacy agreement broke down).
134. See generally Application for Judgment, supra note 17 (applying for a prebirth order and including a surrogacy agreement which required psychological evaluations for the surrogate and medical testing for the intended father and surrogate). Approved birth orders are typically sealed, thus making their agreements inaccessible. Id. at 3-4.
135. See e.g., In re Paternity & Maternity of Infant R., 922 N.E.2d 59, 61 (Ind. Ct. App. 2010) (“[W]e are confronted with reproductive technologies not contemplated when our Legislature initially sought to provide for the establishment of legal parentage for biological parents.”).
136. Id.; see also In re Baby M, 537 A.2d 1227 (N.J. 1988) (confronting the enforceability of surrogacy contracts).
137. Litigation of Surrogate Parenting Agreements, supra note 13, § 22.
139. Id. (quoting Bartron v. Codington Cnty., 2 N.W.2d 337, 343 (S.D. 1942)).
is clearly revealed,” a court is expected to “maintain and enforce contracts” rather than discharge a party of its duties “on the pretext of public policy.” Courts in other states that lacked clear direction from the legislature have reached opposing public policy conclusions. The South Dakota Legislature is the appropriate solution for such uncertainty in this state, and that solution should be the adoption of the statutory proposals in this article.

A. ELIGIBILITY REQUIREMENTS FOR PROSPECTIVE INTENDED PARENTS AND SURROGATES

It is typical for permissive regulatory surrogacy laws to place requirements upon participants in a surrogacy agreement. Appendix A of the proposed statutes provides requirements for participants. While some requirements have their basis in the best practices of the medical field, others are motivated by notions of the traditional family. The Uniform Parentage Act of 2017 contains inclusive provisions for surrogacy, but few states have adopted the revised Act. However, despite the lack of universal adoption of the Uniform Parentage Act’s surrogacy section, jurisdictions that adopt a regulatory approach tend to have codified requirements similar to the Uniform Parentage Act. The American Society for Reproductive Medicine’s best practice guidelines are similar to codifications across the country, and close adherence to its guidelines, where practicable, can provide the most protections for all involved. Further guidance can be derived from jurisdictions with existing surrogacy laws, such as Illinois and Colorado. The most common and key eligibility provisions are age, the independent counsel of the parties, and mental and physical health examinations. Each is addressed in this Part and in Appendix A.

140. Law Cap., Inc. v. Kettering, 2013 SD 66, ¶ 14, 836 N.W.2d 642, 646 (quoting Bartron, 2 N.W.2d at 344).
143. E.g., D.C. CODE § 16-405 (2017) (establishing eligibility requirements).
144. See infra Appendix A (proposing eligibility requirements for surrogacy agreements).
147. See UNIF. PARENTAGE ACT, art. 8, introductory cmt. (UNIF. L. COMM‘N 2017).
151. See infra Appendix A (proposing eligibility requirements for surrogacy agreements).
1. Age.

The American Society for Reproductive Medicine recommends that surrogates be at least twenty-one years of age.152 Individuals who are twenty-one are more readily able to navigate the complexities of pregnancy, the postpartum period, and the surrogacy arrangement than individuals who have simply attained the age of majority at eighteen.153 Most states adopting a regulatory approach to surrogacy have implemented this age requirement.154

Many states also require intended parents to be twenty-one.155 Although the age of majority is generally eighteen, as it is with voting, studies have shown that the capacity of individuals to assess risk and inhibit impulses does not fully develop until the age of twenty-four.156 Twenty-one is not a magic number in terms of neurological capacity.157 However, restricting legal surrogacy to intended parents and surrogates who are at least twenty-one serves legitimate public policy goals and is neither arbitrary nor discriminatory, as it addresses capacity to contract and supports a substantial state interest in minimizing surrogacy agreement disputes.158

2. Independent Counsel

Independent legal counsel heightens the bargaining power of both parties.159 In a practice where exploitation is a major concern, ensuring the independence of counsel for both parties better safeguards the rights of all involved.160 In Baby M, Mrs. Whitehead was advised only once, briefly, on a previous surrogacy agreement.161 Surrogacy agreements are long, complex legal documents.162 Parentage law, particularly where assisted reproductive technologies are involved, can be complex.163 Additionally, the unique aspects of a surrogacy arrangement require special consideration by the parties involved to determine each side’s rights and responsibilities.164 Involvement of counsel from the outset can prevent

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152. AM. SOC’Y FOR REPRODUCTIVE MED., Consideration of the Gestational Carrier: An Ethics Committee Opinion, 110 FERTILITY & STERILITY 1017, 1019 (2018) [hereinafter ASRM Ethics Opinion].
153. Id.
155. Id.
157. See id.
158. See Ainsworth, supra note 27, at 1111 n.174.
159. Joslin, supra note 11, at 442-43.
160. See ASRM Ethics Opinion, supra note 152, at 1019.
162. See Application for Judgment, supra note 17, at Ex. B.
163. See generally Nejaime, supra note 68 (analyzing the evolution of parentage law in response to assisted reproductive technologies).
164. ASRM Ethics Opinion, supra note 152, at 1019.
later disagreements. If counsel becomes involved only at the beginning of litigation, counsel has been involved too late.

The proposed law would require an intended parent to pay for their surrogate’s counsel, as has been done in several other states, while granting the surrogate the option to pay themselves, if they wish. A potential conflict of interest arises from intended parent payment of counsel. However, the surrogate should not be required to pay for their own counsel, as access to counsel can be prohibitively expensive. The Uniform Parentage Act, as well as a minority of states and the American Society for Reproductive Medicine, propose compulsory payment of surrogate counsel by the intended parents. New York allows an uncompensated surrogate to waive their right for intended parent payment of their counsel. Taking this principle one step further, the American Society for Reproductive Medicine suggests that any surrogate be free to fund their own counsel if they so choose. The duty of the surrogate’s counsel must be distinct: the surrogate’s counsel represents the surrogate’s interests, not the intended parent’s or surrogacy agency’s interests. Attorneys are bound by their own ethical codes. Ensuring the surrogate’s access to counsel, as well as the independence of the counsel, better preserves the rights of all involved.

3. Mental Health Examination

States with permissive regulatory statutes overwhelmingly require mental health evaluations, as do the Uniform Parentage Act and the practice recommendations of the American Society for Reproductive Medicine. This requirement applies to intended parents as well as surrogates. The criteria of the mental health evaluation differ for surrogates and intended parents, but the intention is to ensure that the parties are capable of undergoing a surrogacy arrangement amicably and with stability.

165. See id.
166. See id. at 1019-20 (discussing the necessity of independent counsel at the outset of a surrogacy journey and the benefits derived as a result).
168. Joslin, supra note 11, at 443.
169. Id.
170. UNIF. PARENTAGE ACT § 803(8) (UNIF. L. COMM’N 2017); id. at art. 8, introductory cmt; ASRM Ethics Opinion, supra note 152, at 1019.
171. N.Y. FAM. CT. ACT § 581-402(a)(6) (McKinney 2021) (“[Legal counsel] shall be paid for by the intended parent or parents except that a person acting as surrogate who is receiving no compensation may waive the right . . . .”).
172. ASRM Ethics Opinion, supra note 152, at 1019.
173. Joslin, supra note 11, at 442-43.
174. Id.
175. ASRM Ethics Opinion, supra note 152, at 1019.
177. ASRM Practice Recommendations, supra note 148, at 67, 69, 71.
178. Id. at 69-71.
Requiring a mental health evaluation serves to prevent suffering by the parties, as well as reduce the amount of litigation arising out of surrogacy agreements by ensuring compatibility with the process.\textsuperscript{179} The surrogate in \textit{Baby M}, for example, underwent a mental health examination and was found to be at a high risk for having difficulty separating from the child, but neither she nor the intended parents were informed.\textsuperscript{180} For surrogates, the American Society for Reproductive Medicine recommends that practitioners conduct a psychological assessment that includes a clinic interview, psychologic testing, and implication counseling.\textsuperscript{181} This process assesses the surrogate’s mental wellbeing, as well as their motivations and ability to provide informed consent.\textsuperscript{182}

Intended parents are subject to psychosocial education and counseling.\textsuperscript{183} During this process, the intended parents are assessed for conditions that may make the surrogacy arrangement more difficult, as well as ascertaining their expectations and stability.\textsuperscript{184} Among the criteria for rejection of intended parents are problematic interactions with medical staff, disrespect for the gestational carrier, and, if there are two intended parents, relationship instability.\textsuperscript{185}

\textbf{4. Physical Health Examination}

The proposed law requires individuals to pass a physical health examination to become surrogates.\textsuperscript{186} The rigor of the American Society for Reproductive Medicine guidelines, including the mental health examination, results in fewer than two percent of applicants being accepted as surrogates.\textsuperscript{187} Health screening results are the most common cause for disqualification.\textsuperscript{188} Pregnancy carries risks, particularly if an individual has pre-existing health problems.\textsuperscript{189} By requiring a physical health examination, surrogate pregnancies are more likely to be healthy and thereby result in healthier outcomes.\textsuperscript{190} The proposed law follows the American Society for Reproductive Medicine’s recommendation that surrogates have had a previous live birth.\textsuperscript{191} This is predicated on the difficulty

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179. \textit{See id.} (listing clinical interview subjects for surrogacy parties with focus upon emotional needs, stability, and respect).
181. ASRM Practice Recommendations, \textit{supra} note 148, at 69.
182. \textit{Id.} at 70.
183. \textit{Id.} at 71.
184. \textit{Id.}
185. \textit{Id.}
188. \textit{Id.}
190. \textit{See Gestational Carrier (Surrogate)}, AM. SOC’Y FOR REPRODUCIVE MED., https://perma.cc/6Q5R-SLEM (last visited Mar. 9, 2023) (“The [gestational carrier] should have a complete history and physical examination performed to ensure that there are no reasons for her to avoid pregnancy.”).
191. ASRM Practice Recommendations, \textit{supra} note 148, at 68.
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of obtaining informed consent absent the prior experience of pregnancy, as well as increasing the likelihood of a healthy surrogate pregnancy.\textsuperscript{192} Overall, the guidelines are intended to ensure that an individual at a high-risk for complications does not become a surrogate.\textsuperscript{193}

B. REQUIREMENTS OF A VALID SURROGACY AGREEMENT

At its most basic level, the gestational surrogacy agreement must meet the other requirements of the proposed law (such as the age requirement), be in writing, be notarized, and be executed before any medical procedures related to the surrogacy are performed, except for the mental and physical health examinations required by law.\textsuperscript{194} These initial requirements place the surrogacy arrangement on a legal timeline.\textsuperscript{195} The other requirements of the statute, as described above, are met first.\textsuperscript{196} Then, the agreement is put into writing, executed, and notarized or witnessed by two disinterested parties.\textsuperscript{197} Only then may medical procedures begin.\textsuperscript{198}

Requiring that the parties put their agreement into writing can help the parties make their expectations clear and provide a court in any future proceeding a precise recantation of their agreement as well as a valuable evidentiary tool regarding intent.\textsuperscript{199} The express written agreement of the parties to assume certain obligations, at a minimum, clarify the legal rights and duties of all involved.\textsuperscript{200} The key components of a gestational surrogacy arrangement are, of course, the surrogate’s agreement to undergo procedures to transfer and carry a pre-embryo and the intended parent’s agreement to accept custody of the child.\textsuperscript{201} The gestational carrier’s partner is involved to rebut any presumption of parentage under South Dakota’s marital presumption.\textsuperscript{202} The intent of the parties—written, signed, and notarized—is made clear by the minimum requirements of the law.\textsuperscript{203}

Lastly, and most controversially, surrogacy agreements must preserve the right of the gestational surrogate to make all health and welfare decisions regarding themselves and the pregnancy.\textsuperscript{204} A surrogacy agreement, sitting at the

\textsuperscript{192} Id.; ASRM Ethics Opinion, supra note 152, at 1019.
\textsuperscript{193} ASRM Practice Recommendations, supra note 148, at 66, 68.
\textsuperscript{194} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
\textsuperscript{195} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
\textsuperscript{196} See infra Appendix B (proposing requirements for a valid surrogacy agreement); supra Part IV.A and accompanying text (recommending eligibility requirements for participants in surrogacy agreements).
\textsuperscript{197} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
\textsuperscript{198} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
\textsuperscript{199} Carbone & Miller, supra note 80, at 14.
\textsuperscript{200} Id. at 14-15.
\textsuperscript{201} See Alison A. Sconyers, 2 Cal. Transactions Forms – Fam. L. § 7:47 (June 2022) (providing an example gestational surrogacy agreement).
\textsuperscript{203} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
\textsuperscript{204} See infra Appendix B (proposing requirements for a valid surrogacy agreement).
confluence of contract law and family law, presents unique challenges. An intended parent’s desire to contract for certain behaviors and actions from the surrogate is understandable, as the intended parent has a substantial interest in the health and development of the fetus. An intended parent should, ideally, contract with a surrogate who shares similar beliefs regarding health and welfare decisions. However, the inherent rights of an individual to their body supersedes the benefits of contracting for restrictions upon the decision-making authority of the surrogate.

This is not to suggest that a surrogacy agreement cannot recite or memorialize the preferences of the intended parent regarding health and welfare decisions or that such inclusion has no value in establishing expectations. The proposed language would, rather, require an express reservation of the right of the surrogate to have the final word on those decisions. Such language has been utilized for clauses on termination of pregnancy. Absent conspicuous affirmation to the contrary, a surrogate may be led to believe that a provision requiring her to submit to certain medical procedures is enforceable. As Lori B. Andrews has astutely noted, “If a court, under traditional contract principles, is not going . . . to force an opera singer to sing, it seems highly unlikely that a court would enforce the . . . medical provisions of the surrogacy contract.” Non-lawyers presented with a contract containing unenforceable terms tend to conclude that the contract, in general, is enforceable, and thus the specific term is as well. However, individuals presented with information regarding enforceability are less likely to be adversely effected. Requiring such information within the document itself is of benefit to the surrogate.

C. ESTABLISHMENT OF PARENTAGE, PARENTAL RIGHTS, AND PARENTAL OBLIGATIONS

Establishing clear parentage procedures provides the parties legal expectations upon which they can fashion their agreement. Courts in states that lack surrogacy regulations, or in states where surrogacy is banned, will continue

206. Ainsworth, supra note 27, at 1090.
207. See id. at 1090.
208. Id. at 1110.
209. Carbone & Miller, supra note 80, at 18.
210. See infra Appendix B (proposing requirements for a valid surrogacy agreement).
211. Application for Judgment, supra note 17, at Ex. B, 12.
212. Carbone & Miller, supra note 80, at 18.
215. Id.
216. See id. (finding that providing “clear, reliable, and accurate information about applicable law” to the test group, tenants reading leases, significantly reduced “the adverse effects of misinformation”).
217. Joslin, supra note 11, at 440.
to face the results of surrogacy agreements.\textsuperscript{218} The call to action by the California Court of Appeals in \textit{In re Marriage of Buzzanca}\textsuperscript{219} describes the problem succinctly:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, [and] traditional and gestational surrogacy (in all its permutations), . . . courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child.

These cases will not go away.\textsuperscript{220}

The case further demonstrates the importance of clear legislative direction:

\textit{Buzzanca} was not a dispute between the intended parents and the surrogate.\textsuperscript{221}

Rather, the intended mother and intended father, in their divorce, disputed parentage of the child born from gestational surrogacy, to which neither had a genetic connection.\textsuperscript{222} The surrogate and her spouse disavowed parentage, and the trial court, over the objections of the intended mother, found that the child had \textit{no} legal parents.\textsuperscript{223} The appellate court reversed this extraordinary outcome, but it remains a startling example of what may happen absent clear statutory guidance.\textsuperscript{224}

Parentage laws addressing surrogacy provide security and predictability for the parties.\textsuperscript{225} Absent these laws, the parties are unable to conform their behavior to the law to achieve their intended result with any certainty.\textsuperscript{226} The use of prebirth orders has made the process reasonably predictable, but there still exists the possibility of a rejection by a court, as happened in 2017 to at least one family in Pennington County, South Dakota.\textsuperscript{227}

The proposed law would place intended parents who follow all statutory guidelines in a similar position as a parent who has their child by natural birth: the intended parent would be the parent of the child for the purposes of state law, the

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\item \textsuperscript{218} \textit{See In re Roberto} d.B., 923 A.2d 115, 130-32 (Md. 2007) (noting that surrogacy agreements are illegal under Maryland law but determining parentage in accordance with the wishes of the intended parent and the surrogate); \textit{see also} Carbone & Miller, \textit{supra} note 80, at 8-9 (noting that courts in states without surrogacy laws have had to resolve surrogacy disputes).
\item \textsuperscript{219} 61 Cal. App. 4th 1410 (Cal. Ct. App. 1998).
\item \textsuperscript{220} \textit{Id.} at 1428-29.
\item \textsuperscript{221} \textit{Id.} at 1412.
\item \textsuperscript{222} \textit{Id.} at 1412-13.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Id.} at 1429-30.
\item \textsuperscript{225} Joslin, \textit{supra} note 11, at 439-40.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} Order Denying Application for Judgment, at 1-7, Anselem v. Wiese, No. 51CIV17-001710 (S.D. 7th Cir. Dec. 22, 2017).
\end{itemize}
child would be entitled to their support, and the parental rights of the intended parent would automatically vest upon birth.228 Furthermore, although these rights would not vest until birth, the parentage result would remain regardless of marriage, divorce, or death of the intended parents.229 The rights and responsibilities of parenthood exist because the child would not have been born but-for the intended parent’s action.230

Additionally, the presumption of surrogate and surrogate partner parentage would be removed.231 In conjunction with the intended parent’s rights, this would prevent a surrogate from becoming a legal parent unexpectedly.232 Many surrogacy opponents argue that surrogacy should be treated like an adoption, with a home inspection for the intended parent and a waiting period for the surrogate.233 The process, they argue, would protect surrogates from the hardship of giving up a baby they wish to keep, as well as ensuring that the intended parent is an adequate parent.234 The experiences of surrogates differ from this characterization, as they have overwhelmingly reported no difficulty giving up the child.235 On the intended parent’s side, predictive screening of parental fitness is difficult to do with accuracy and, because surrogacy is an intentional process more similar to natural birth than adoption, application of adoption standards is not appropriate for surrogacy law.236 Furthermore, this argument fails to recognize the risks of unavoidable legal parenthood by the surrogate.237 First, it would leave the surrogate open to the risk that the intended parent will not accept the child and, therefore, not adopt the child, thereby forcing the surrogate to parent a child they did not expect to have.238 This possibility is acute in the case of a special needs child—an issue further addressed by the law.239 Second, legal parenthood carries with it responsibilities to the child that the surrogate did not intend to assume, such as medical costs and decision-making.240 Third, and finally, the adoption process

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228. See infra Appendix C (proposing establishment of parentage for children born by surrogacy).
229. See infra Appendix C (proposing establishment of parentage for children born by surrogacy).
231. Compare SDCL § 34-25-16.7 (2011) (deeming the mother to be the woman who gives birth) and SDCL § 25-5-3 (2013) (presuming parentage in the husband of a woman who gives birth), with infra Appendix C (removing the presumption of the surrogate or their partner in the case of a valid surrogacy agreement).
234. Id.
235. Scott, supra note 8, at 139. One gestational surrogate stated that they “[did not] feel that motherly bond. I feel more like a caring baby sitter.” Id. (citing Raina Kelley et al., The Curious Lives of Surrogates, NEWSWEEK, Mar. 29, 2008, at 44).
237. Joslin, supra note 11, at 440.
238. Ainsworth, supra note 27, at 1120-21.
239. Id.; infra Appendix C (proposing establishment of parentage for children born by surrogacy).
240. See Bryn & Snyder, supra note 17, at 634-36 (describing the decision-making ability of intended parents at the hospital when parenthood has been established).
is extensive and requires a minimum of six months to complete.\textsuperscript{241} An automatic
determination of parentage which accurately reflects the intentions of the parties
is to the benefit of all involved.\textsuperscript{242}

Additionally, the law proposed by this article would clarify and preserve
prebirth orders in the context of surrogacy.\textsuperscript{243} The primary purpose of the prebirth
order, parentage, is covered by the proposed automatic parentage
determination.\textsuperscript{244} However, prebirth orders serve other purposes as well.\textsuperscript{245}
Prebirth orders “formalize the intent of the parties,” granting the intended parents
clear rights to name the child and direct postnatal care at the hospital.\textsuperscript{246} For
example, a prebirth order may have “a solidifying effect” on health insurance
coverage for a child born by surrogacy.\textsuperscript{247} Where a prebirth order would be
useful, it would remain available.\textsuperscript{248} This law would ultimately allow courts to
look at the intent of the parties in noncompliant surrogacy agreements to determine
parentage.\textsuperscript{249} This would formally adopt the intent doctrine illustrated by \textit{Johnson
v. Calvert}.\textsuperscript{250}

South Dakota lacks any gamete donor protection laws.\textsuperscript{251} In 1973, the
original Uniform Parentage Act provided for the paternity of a husband whose
wife was artificially inseminated.\textsuperscript{252} Most states adopted similar provisions.\textsuperscript{253}
The 2017 update to the Uniform Parentage Act clarified that donors could not
establish parental rights or be sued for support.\textsuperscript{254} Prebirth orders typically
include a declaration of gamete donor non-parentage.\textsuperscript{255} By adopting a law
rejecting any claim to parentage for gamete donors, South Dakota would protect
all gamete donors as well as intended parents who use donor gametes from
assertions of parentage contrary to their intent.\textsuperscript{256}

\textsuperscript{241} See SDCL § 25-6-9 (2013) (requiring that a child live “within the proposed foster home for a
period of at least six months”); SDCL § 25-6-9.1 (2013) (requiring a home study for placement of a child
for adoption).
\textsuperscript{242} Joslin, \textit{supra} note 11, at 439-40.
\textsuperscript{243} See \textit{infra} Appendix C (proposing establishment of parentage for children born by surrogacy).
\textsuperscript{244} See \textit{infra} Appendix C (proposing establishment of parentage for children born by surrogacy).
\textsuperscript{245} Byrn & Snyder, \textit{supra} note 17, at 634-35.
\textsuperscript{246} \textit{Id}.
\textsuperscript{247} \textit{Id}.
\textsuperscript{248} See \textit{infra} Appendix C (proposing establishment of parentage for children born by surrogacy).
\textsuperscript{249} See \textit{infra} Appendix C (proposing establishment of parentage for children born by surrogacy).
\textsuperscript{250} See \textit{generally} \textit{Johnson v. Calvert}, 851 P.2d 776 (Cal. 1993) (giving special weight to the intent
of the parties when the surrogacy agreement was made).
\textsuperscript{251} Nejaime, \textit{supra} note 68, at 2369, 2375.
\textsuperscript{252} \textit{Id} at 2292.
\textsuperscript{253} \textit{Id}.
\textsuperscript{254} UNIF. PARENTAGE ACT, § 702 (UNIF. L. COMM’N 2017).
\textsuperscript{255} See Application for Judgment, \textit{supra} note 17, at ¶ 4-15 (containing an egg donor agreement in
an application for a prebirth order).
\textsuperscript{256} See UNIF. PARENTAGE ACT, § 702 (UNIF. L. COMM’N 2017).
V. CONCLUSION

In thirty years of gestational surrogacy practice, South Dakota courts have never been called upon to settle a dispute among intended parents and surrogates.\textsuperscript{257} There has been no South Dakota Baby M.\textsuperscript{258} Although the legislature has been presented with surrogacy bills in the past, particularly the well-crafted SB 137 in 2022, it has not passed any sort of regulatory law addressing the practice.\textsuperscript{259} Detractors refused the bill on principle or imperfection.\textsuperscript{260} Regardless of the legislature’s inaction, South Dakotans will continue to utilize surrogacy to complete their families.\textsuperscript{261}

Surrogacy laws need not be perfect to be useful.\textsuperscript{262} The legislature will likely be presented with more bills addressing surrogacy.\textsuperscript{263} A permissive regulatory approach, as proposed by this article, is most beneficial to and protective of South Dakotan families and surrogates.\textsuperscript{264} Criticism of surrogacy will continue, but surrogacy itself shall persist regardless.\textsuperscript{265} Regulation, even imperfect regulation, grants surrogates and intended parents clarity and protects the children born from surrogacy.\textsuperscript{266} The South Dakota state legislature can differ on the details of regulation, but passage of some regulation is certainly needed to protect intended parents, surrogates, and the children born from surrogacy.\textsuperscript{267} Good fortune is no basis for inaction.\textsuperscript{268}

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\item 257. Goss, supra note 78.
\item 258. See Goss, supra note 78 (describing lack of litigation over surrogacy in South Dakota).
\item 259. See supra Part II and accompanying text (describing the South Dakota Legislature’s experience with surrogacy legislation).
\item 260. Goss, supra note 78.
\item 261. Id.
\item 262. Joslin, supra note 11, at 456-59.
\item 263. See supra Part III and accompanying text (providing an overview of the South Dakota Legislature’s repeated introduction of surrogacy bills since 2011).
\item 264. Id.
\item 265. Goss, supra note 78 (“If we do nothing, gestational surrogacy still remains in South Dakota. . . It remains a legal process.”).
\item 266. Joslin, supra note 11, at 456-59.
\item 267. Goss, supra note 78 (“Is it not time to put restrictions and regulations in place as it relates to gestational surrogacy?”).
\item 268. See Ainsworth, supra note 27, at 1107 (“The potential harms of surrogacy are real, and we can address these harms—both current and predictable—by crafting responsive, progressive language.”).
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APPENDIX A

(1) To execute an agreement to act as a gestational surrogate, a person must:269
   a. Be at least 21 years of age;
   b. Have given birth to at least one live child;270
   c. Complete a medical evaluation relating to the anticipated gestational surrogacy arrangement by a health care professional licensed by the state;
   d. Complete a mental health evaluation relating to the anticipated gestational surrogacy arrangement by a mental health professional licensed by this state; and
   e. Be represented throughout the surrogacy arrangement by independent legal counsel of the surrogate’s choice who is licensed to practice law in this state and who advises the surrogate regarding the terms and potential legal consequences of the agreement. The intended parent must pay for the independent legal counsel of the surrogate, except that the surrogate may waive this right.271

(2) To execute a surrogacy agreement as an intended parent, whether or not genetically related to the child, a person must:272
   a. Be at least 21 years of age;
   b. Complete a mental health evaluation relating to the anticipated gestational surrogacy arrangement by a licensed mental health professional; and
   c. Complete a medical evaluation relating to the anticipated gestational surrogacy arrangement by a licensed health care professional; and
   d. Be represented throughout the surrogacy arrangement by independent legal counsel of the intended parent’s choice who is licensed to practice law in this state and who advises the intended parent regarding the terms and potential legal consequences of the agreement.

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269. Section 1 is modeled, generally, upon COLO. REV. STAT. § 19-4.5-104(1) (2021).

270. This language is pulled directly from the District of Columbia’s code. D.C. CODE § 16-405(a)(2) (2017).

271. The requirement that the surrogate’s legal counsel be paid for by the intended parents is derived from N.Y. FAM. CT. ACT. § 581-402(6) (2020), including the ability to waive intended parent payment of surrogate’s counsel, except that this ability to waive payment is extended to all surrogates, compensated or altruistic, in accordance with the American Society for Reproductive Medicine’s recommendation. ASRM Ethics Opinion, supra note 152, at 1019.

272. Section 2 is modeled, generally, upon COLO. REV. STAT. § 19-4.5-104(2) (2021).
APPENDIX B

A gestational surrogacy agreement must be executed in compliance with the following rules:

(1) At least one party must be a resident of this state or the birth is planned to occur in this state, or the assisted reproduction performed pursuant to the surrogacy agreement will occur in this state;273

(2) The gestational surrogate and each intended parent must meet the requirements of this chapter;

(3) The agreement is:274
   a. In writing;
   b. Executed prior to any medical procedures related to the surrogacy arrangement, other than procedures to determine eligibility in accordance with Appendix A;
   c. Signed by the intended parent, the gestational surrogate, and the gestational surrogate’s partner, if any; and notarized or witnessed by two competent adults.

(4) The agreement must provide:275
   a. The express written agreement of the gestational surrogate to:
      1. undergo all procedures related to pre-embryo transfer and attempt to carry and give birth to the child;
      2. surrender custody of all resulting children to the intended parent immediately upon birth of the children;
   b. The express written agreement of the gestational surrogate’s partner to:
      1. undertake the obligations imposed on the gestational surrogate pursuant to the terms of the gestational surrogacy agreement;
      2. surrender custody of all resulting children to the intended parent immediately upon birth of the children;
   c. The express written agreement of the intended parent to accept physical custody of the child immediately after the child’s birth, regardless of the child’s gender or mental or physical condition or the number of children;276
   d. That the gestational surrogate has the right to make all health and welfare decisions regarding themselves and the pregnancy;277 and

273. This is a jurisdictional requirement derived from COLO. REV. STAT. § 19-4.5-105 (2021).
274. Section 3 is modeled, generally, on S.B. 137, 97th Leg., Reg. Sess. § 4(3) (S.D. 2022).
275. This section is modeled, generally, on 750 ILL. COMP. STAT. 47/25(c) (2005) but excludes 750 ILL. COMP. STAT. 47/25(c)(3) (2005) (requiring a gestational surrogacy contract provide for “the right of the gestational surrogate to utilize the services of a physician of her choosing, after consultation with the intended parents, to provide her care during the pregnancy”). This section removes the requirement that the surrogate consult with the intended parents regarding physician choice, and instead adopts the position taking by Colorado. COLO. REV. STAT. § 19-4.5-106(1)(g) (2021).
277. COLO. REV. STAT. § 19-4.5-106(1)(g) (2021).
That a right created under the agreement is not assignable and there is no third-party beneficiary of the agreement other than the child.\textsuperscript{278}
APPENDIX C

(1) In the case of an agreement satisfying the requirements of Appendix B: 279
  a. An intended parent shall be the parent of the child for purposes of
     state law immediately upon the birth of the child;
  b. The child shall be the legitimate child of the parents for purposes of
     state law;
  c. Parental rights shall vest in the intended parent;
  d. Sole custody, care, and control of the child shall rest solely with the
     intended parent; and
  e. Neither the gestational surrogate nor the gestational surrogate’s
     partner, if any, shall be the parents of the child for purposes of state
     law.

(2) A party to a gestational surrogacy agreement may commence a
    proceeding in court prior to the birth of the child for an order: 280
    a. Declaring that each intended parent is a parent of the child and
       ordering that parental rights and duties vest immediately on the birth
       of the child;
    b. Declaring that the gestational surrogate and the gestational
       surrogate’s partner, if any, are not the parents of the child;
    c. Designating the content of the birth record and directing the South
       Dakota Department of Health to designate each parent as a parent of
       the child;
    d. To protect the privacy of the child and the parties, declaring that the
       court record is not open to inspection; and
    e. For other relief the court determines necessary and proper.

(3) Any person who is the parent of a child under this chapter shall be
    obligated to support the child. The breach of the gestational surrogacy
    agreement by an intended parent shall not relieve such intended parent
    of support obligations. 281

(4) Section 2 applies to an intended parent even if the intended parent died
    during the period between the transfer of an embryo and the birth of the
    child. 282

(5) The marriage of an intended parent does not affect the validity of the
    agreement. A new spouse’s consent to the agreement is not required, and

279. This is modeled on 750 ILL. COMP. STAT. 47/15(b) (2005). Changes have been made to make
    the language gender neutral.
280. Section 2 is modeled on COLO. REV. STAT. § 19-4.5-111 (2021). Changes have been made to
    make the court order of parentage only available prior to the birth of the child. This is similar to S.B. 137
    but does not require a best interests of the child determination. S.B. 137, 97th Leg., Reg. Sess. § 7 (S.D.
    2022).
the spouse is not a presumed parent of a child conceived by assisted reproduction under the agreement.\textsuperscript{283}

(6) The death, legal separation, or divorce of an intended parent after the agreement is signed by all parties does not affect the validity of the agreement. The intended parent is the parent of the child.\textsuperscript{284}

(7) The marriage, legal separation, or divorce of a gestational surrogate after the agreement is signed by all parties does not affect the validity of the agreement, their spouse’s consent to the agreement is not required, and their spouse is not a presumed parent of a child conceived by assisted reproduction under the agreement.\textsuperscript{285}

(8) A gamete donor is not a parent of a child conceived by assisted reproduction and has no rights or duties stemming from the conception of the child.\textsuperscript{286}

(9) In the event of that the requirements of this chapter are not met, a court of competent jurisdiction shall determine parentage based on evidence of the parties’ intent.\textsuperscript{287}

\textsuperscript{283} This section is modeled on COLO. REV. STAT. § 19-4.5-107(2)(a) (2021), except that it does not allow the parties to contract around it. This is similar to S.B. 137, 97th Leg., Reg. Sess. § 5(2) (S.D. 2022).

\textsuperscript{284} S.B. 137, 97th Leg., Reg. Sess. § 5(3) (S.D. 2022); COLO. REV. STAT. § 19-4.5-107(2)(b) (2021).


\textsuperscript{286} This is a combination of COLO. REV. STAT. § 19-4.5-113(3) (2021) and COLO. REV. STAT. § 19-4.5-109(5) (2021).

\textsuperscript{287} 750 ILL. COMP. STAT. 47/25(e) (2005).