

A CHILD WITHOUT A COUNTRY: DISSOLVING THE STATELESSNESS OF CHILDREN BORN THROUGH SURROGACY

*Brittany M. Nichol**

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ABSTRACT

An American couple desperate to have a child turns to surrogacy in order to begin their family. For financial reasons, they decide to find a surrogate who is in another country. The child is carried by a surrogate woman and is conceived by both a donor sperm and egg. Once the child is born in the foreign nation, the couple intends to bring the child back to the United States. Because the sperm and egg are donated, the child has no connection to those biological donors. Further, the surrogate mother surrenders all her parental rights to the child, and so the child is unable to gain citizenship from her. The Department of State's current approach does not recognize the intended couple as parents of the child because they do not have any biological connection to child. Thus, the child is born without any legal parents and without a country of citizenship. Unfortunately, the Department of State's current approach to parentage in surrogacy cases makes outcome all too common.

With the increase of technology, surrogacy has become a solution to individuals' and couples' desire to have child. However, this new alternative has not come without many political and legal debates. Traditionally, parentage was determined based on biology. Surrogacy has challenged this traditional notion. The Uniform Parentage Act and many states have instead taken a different approach in determining parentage by instead using intentional parentage. In addition, many states recognize surrogacy agreements

* Managing Editor, *Michigan State Law Review*; J.D. 2017, Michigan State University College of Law; B.A. 2013, Michigan State University. I would like to thank Dean David Thronson and Professor Melanie Jacobs for their guidance and support while writing this Note. I would also like to thank the entirety of the *Michigan State Law Review* for their time and effort spent reviewing and editing this Note. Lastly, I would like to thank my husband, Kyle, my parents, Jim and Lori, and my sister, Emily, for their unwavering support and constant encouragement.

and have set strict requirements in order for those agreements to be valid. In contrast, the Department of State only recognizes parentage based on biology. The Hague Conference, which is one of the most prominent international groups that address issues of children crossing international borders, also recognizes a need for a more uniformed and updated approach.

To combat the risk of stateless children, the Department of State should determine legal parentage based on intent. The Department of State should continue to act as the central agency for international surrogacy cases, should approve all international surrogacy cases before any medical procedure takes place by requiring state court approval of the surrogacy agreements, should implement requirements for the intentional parents, should implement written agreements, and should require accredited agencies. By implementing these steps, intentional parentage will alleviate cases of stateless children and will be in compliance with standards set forth by the international community.

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INTRODUCTION

“[E]very child has a right to acquire a name and nationality.”¹

A and B are a loving couple. Both have a successful career with stable incomes. They are ready to take the next step in their lives and begin a family. Unfortunately, after years of trying to conceive, A and B have come to the realization that they are unable to have a child. Desperate for a family, the couple looks into adoption; however, with the high costs and the length of time associated with adoption, the couple is left feeling frustrated and hopeless. Then the couple is inspired by a new solution: surrogacy. However, because prices in the United States are extremely high,² the couple decides to look into having a woman in India be the carrier of their baby.

Neither A nor B contributes to the genetic makeup of the child, but instead, anonymous donors donate the egg and sperm. Both donors contracted away and relinquished any parental rights to the child. The Indian woman who plans to carry the child contracted away her legal right as well. When the child is born, the child has no legal ties to an Indian citizen because the gestational carrier has no legal right as a parent; thus, the child is not an Indian citizen.³

1. Brad K. Blitz, *Neither Seen nor Heard: Compound Deprivation Among Stateless Children*, in CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE 43, 45 (Jacqueline Bhabha ed., 2011).

2. See *infra* Subsection I.A (discussing the high costs surrounding surrogacy).

3. In *Jan Balaz v. Anand Municipality*, the Indian court took away surrogate children’s passports “because the children had no relation to an Indian citizen.” Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2275 (2012). See *Jan Balaz v. Anand Municipality*, 2010 AIR 21 (Guj.).

However, the United States does not recognize this child as a U.S. citizen because the child does not have any biological connection to A or B.⁴ Now the child is neither an Indian citizen nor a U.S. citizen. Furthermore, because the donors were completely anonymous, the child is also unable to gain a status of citizenship through either of the donors.⁵ The question now becomes what citizenship does the child have? Does the child even have a citizenship? If the child is not recognized as a citizen of any country, A and B now have no way to adopt “their” child.⁶ The next practical question is what happens to the child. Does this child have to remain in India, or is the child able to come to the United States?

Unfortunately, issues resulting from stateless children plague international surrogacy due to the rise in Assisted Reproductive Techniques (ART).⁷ In 1978, the first successful in vitro fertilization (IVF) took place.⁸ This gave couples another opportunity to create a family, besides having children “naturally” or adopting.⁹ Eager couples negotiate artificial reproductive contracts at high prices, with the current average ranging from \$100,000 to \$150,000.¹⁰ These soaring prices opened the door for an international ART market because of the cheaper prices available in foreign countries.¹¹

4. See Bureau of Consular Affairs, *Information for U.S. Citizens Considering International Surrogacy*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> [https://perma.cc/52LY-8JQQ] (last visited Oct. 7, 2016) [hereinafter DEPARTMENT OF STATE].

5. Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, KENAN INST. FOR ETHICS AT DUKE UNIV. 2 (2009), <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf> [https://perma.cc/QYF7-TWTV].

6. See, e.g., *id.*

7. See Mortazavi, *supra* note 3, at 2275-76 (discussing the case of *Jan Balaz v. Union of India* that resulted in a German couple struggling for the legal citizenship of their twin boys who were born out of surrogacy in India).

8. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 350 (2011).

9. See *id.*

10. See Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT’L L. 1, 4 (2015); *Anticipated Costs for Gestational Surrogacy*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/costs?gclid=Cj0KEQjwqsyxBRCIXtminsmwkMABEiQAzL34PQKW0A4Mwy4avmPysIC83a0FRiG2bwFzyBUATJqb60AaAtF8P8HAQ> [https://perma.cc/C7R3-WE4W] (last visited Oct. 7, 2016); *Agency Fees & Surrogate Mother Costs*, FERTILITY SOURCE COMPANIES, http://www.thesurrogacysource.com/ip_fees.htm?type=Intended%20Parent.html [https://perma.cc/E4SK-93UR] (last visited Oct. 7, 2016).

11. See Choudhury, *supra* note 10, at 4.

However, the international surrogate market did not come without drastic legal ramifications.¹²

One of the most challenging issues with regard to surrogacy is identifying the legal parent of a child born through surrogacy.¹³ Historically, two biological parents were considered the legal parents of the naturally born child.¹⁴ Surrogacy challenges the historically traditional view of parentage because of the various parties involved with varying roles different than the traditional creation of a child from one female and one male.¹⁵ Currently, states are split on how to identify the legal parent in a surrogacy contract.¹⁶ Many states have abandoned the biological interpretation.¹⁷ Instead, these states identify legal parentage based on the intent of the party commissioning the gestational agreement.¹⁸ In addition, parties with a biological connection that are not the intended parents are required to relinquish any sort of parental rights in a future child born through the gestational agreement.¹⁹ However, this view is not without criticism.²⁰ Although states have begun to change the ways in which they identify legal parents when a surrogacy contract exists, there is no one distinct or unified view.²¹ State law is crucial to examine in the context of international surrogacy because surrogacy is part of family law, which is a subject matter left to states.²² In addition, the way various states interpret who is deemed the legal parents in surrogacy agreements gives insight as to the various positive and negatives impacts of the different interpretations.²³ Not only have states interpreted parentage in gestational cases, but the United States Department of State has as well.²⁴

12. See *infra* Part I.

13. Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 309-10 (2007); Mortazavi, *supra* note 3, at 2255.

14. See Jacobs, *supra* note 13, at 309-10; *infra* Part II.

15. See *infra* Part II.

16. See, e.g., ARK. CODE ANN. § 9-10-201 (2016); FLA. STAT. ANN. § 742.15 (West 2016); MICH. COMP. LAWS ANN. § 722.859 (West 2014); NEV. REV. STAT. § 126.710 (2015); N.Y. DOM. REL. LAW § 122 (McKinney 2016); VA. CODE ANN. § 20-158 (West 2016).

17. See, e.g., FLA. STAT. ANN. § 742.15; NEV. REV. STAT. § 126.710.

18. See, e.g., FLA. STAT. ANN. § 742.15; NEV. REV. STAT. § 126.710.

19. See, e.g., FLA. STAT. ANN. § 742.15; NEV. REV. STAT. § 126.710.

20. See, e.g., MICH. COMP. LAWS ANN. § 722.859; N.Y. DOM. REL. LAW § 122.

21. See *infra* Part II.

22. U.S. CONST. amend. X.

23. See *infra* Part II.

24. See DEPARTMENT OF STATE, *supra* note 4.

The Department of State has also interpreted legal parentage in international surrogacy cases.²⁵ The Department of State will only recognize a child born out of surrogacy as a U.S. citizen if the intended father is a U.S. citizen who provided the sperm for the child or if the intended mother is an U.S. citizen who provided the egg and was the gestational carrier of the child.²⁶ Thus, the Department of State has limited its interpretation of legal parentage based on biology.²⁷ Unfortunately, this biological interpretation has left many holes because it leaves the chance for a child to be born without any sort of citizenship.²⁸ As a result of this interpretation, there is a risk for U.S. citizens looking to engage in surrogacy, as well as the children born through surrogacy, outside of U.S. borders.²⁹

To combat the result of a stateless child, the Department of State needs to expand its legal parentage interpretation in surrogacy cases.³⁰ The Department of State should not limit the approval of citizenship based on biology, but instead should determine citizenship based on intentional parentage. By expanding the determination of legal parentage to intent, children born through surrogacy to U.S. parents would be able to gain citizenship. In order to apply intentional parentage, the Department of State should continue to act as the central agency for dealing with international surrogacy cases. Furthermore, the Department of State should take steps to approve all international surrogacy cases before any medical procedures by requiring state court approval of gestational agreements, requirements for the intentional parents, written agreements, and accredited agencies. By implementing these steps, intentional parentage will alleviate cases of stateless children and will be in compliance with standards set forth by the international community.³¹

Part I of this Note discusses the history and development of surrogacy along with the current terminology and related concepts of ART. Part II discusses differing views of determining a legal parent in a surrogate agreement. Part III looks at the Department of State's

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*; *see also infra* Part III.

29. *See* DEPARTMENT OF STATE, *supra* note 4.

30. *See infra* Part IV.

31. *See infra* Part IV (discussing certain international standards that should be in place with surrogacy because of the standards that are currently in place for intercountry adoption).

current interpretation in comparison to the international community's interpretation of a legal parent in an international surrogacy case. Lastly, Part IV analyzes the Department of State's interpretation of a parent through a biological standard and argues that the Department of State should instead base parentage on intent by acting as the Centralized Agency, requiring state approval of surrogacy contracts, setting forth strict requirements for gestational agreements, and requiring gestational agreements to go through an accredited agency.

I. THE HISTORY OF SURROGACY

Surrogacy developed as a result of an increase in technology while Americans were striving to maintain the perfect family.³² These technological advances paved the way for medically-assisted reproductive technology.³³ However, surrogacy came with many policy debates and decisions.³⁴ These decisions created a strong legal impact on the children and parents involved in surrogacy contracts.³⁵

A. The Development of Surrogacy

In the 1950s, U.S. society pressured citizens to strive for the "perfect" American family.³⁶ Those who did not conform faced social stigmatism and disadvantage.³⁷ To combat that social stigmatism, infertile couples sought to adopt children.³⁸ Specifically, couples wanted to adopt children whom they could pass off as their own "natural" children, which led to "baby shortages."³⁹ The supply

32. See DiFonzo & Stern, *supra* note 8, at 350.

33. See *id.*

34. See, e.g., MICH. COMP. LAWS ANN. § 722.859 (West 2014); Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117 (2013); Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113 (1997).

35. See Mortazavi, *supra* note 3, at 2262; see also *In re Baby M*, 537 A.2d 1227, 1234-35 (N.J. 1988).

36. DiFonzo & Stern, *supra* note 8, at 350. See, e.g., J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. L. 1, 3 (2008) [hereinafter *History of Contemporary Marriage*].

37. *History of Contemporary Marriage*, *supra* note 36, at 7.

38. DiFonzo & Stern, *supra* note 8, at 350.

39. Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 404 (2004).

of healthy white babies, the type of children “in demand” for adoption, was not enough to satisfy the number of parents seeking to adopt.⁴⁰ This created a push for medical advances in order to treat infertility, as well as other methods of ART.⁴¹ ART quickly began to gain relevance in the United States.⁴²

Although artificial insemination started to become relevant in the 1930s, it did not begin to gain momentum until after World War II.⁴³ In 1978, the first successful IVF took place.⁴⁴ The IVF success brought on the concept of surrogacy, which began in the 1980s.⁴⁵ With the increase in technology, surrogacy became a new chance for those desiring to fill that parental role.⁴⁶ Specifically, surrogacy gave an alternative to adoption and an additional opportunity for single men and women, same-sex couples, and infertile couples to become parents, who would not have otherwise been able to fill that parental role.⁴⁷ In 1999, there were 30,000 healthy infants available for adoption, while there were 76,000 successful ART births annually.⁴⁸

Even with significant attendant costs, surrogacy continued to grow.⁴⁹ Surrogacy was not only occurring in the United States but also gained relevance around the globe.⁵⁰ In addition, advances in ART did not come without a steep price.⁵¹ This created an opportunity for Americans to look to other nations, which offered surrogacy at a much lower cost⁵² and which left the possibility of complicated emotional residue more than an ocean away.⁵³ Many

40. *Id.* at 405.

41. *Id.*

42. *Id.* at 405-06.

43. See DiFonzo & Stern, *supra* note 8, at 350.

44. See *id.*

45. *Id.*

46. *Id.* “[S]urrogate motherhood practices” emerged in the 1980s after the first successful IVF. *Id.*

47. See Appleton, *supra* note 39, at 406-07.

48. See *id.* at 428-29.

49. See Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013, 5:40 PM), <http://www.reuters.com/article/us-parent-surrogate-idUSBRE92H11Q20130318> [<https://perma.cc/YQ6A-H6DR>].

50. DiFonzo & Stern, *supra* note 8, at 353.

51. Choudhury, *supra* note 10, at 4 (“Those who desire a genetic child often undertake private contracts through agencies with costs that can reach up to \$100,000.”).

52. *Id.*

53. ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5, 15-16 (2010), http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf [<https://perma.cc/GCH9-V4AN>].

couples around the world chose to look to foreign nations with less-strict surrogacy regulations.⁵⁴ Specifically, India became “the destination of choice” by providing an opportunity for surrogacy at a significantly lower cost than the cost of surrogacy in the United States.⁵⁵ By 2005, the number of children born globally through surrogacy was estimated to be close to 10,000.⁵⁶ Although international surrogacy seems to provide a solution for couples or individuals seeking to become a parent, crossing international borders for surrogacy leads to numerous issues.⁵⁷ One of the biggest issues revolves around citizenship of children born from a surrogate mother, which demonstrates a hole in the current regulations governing international surrogacy in relation to American citizens.⁵⁸

B. Definition of ART and Related Concepts

In order to understand the issues related to transnational ART, and specifically surrogacy, it is necessary to gain a background for understanding some of the basic concepts of ART.⁵⁹ ART is any sort of fertility treatment handling both eggs and sperm that is assisted through medical technology.⁶⁰ The process of fertilization of an egg outside of the woman’s body is called in vitro fertilization.⁶¹ Placing the fertilized egg into another woman’s body is gestational surrogacy,⁶² and the woman who is physically carrying the child in her womb is called a gestational carrier.⁶³

Depending on the situation, there can be a varying number of parties involved in the birth of a surrogate child.⁶⁴ The minimum

54. *Id.* at 15.

55. *Id.* Recently, India has placed a ban on international surrogacy. *Despair Over Ban in India’s Surrogacy Hub*, BBC NEWS (Nov. 22, 2015), <http://www.bbc.com/news/world-asia-india-34876458>. [<https://perma.cc/AB8V-8K3Z>]. “India recently announced a ban on surrogate services for foreign couples and notices have been sent to fertility clinics to not accept any more overseas clients.” *Id.*

56. Mortazavi, *supra* note 3, at 2250.

57. *See infra* Part III.

58. *See id.*

59. *What Is Assisted Reproductive Technology?*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/whatis.html> [<https://perma.cc/K5Z8-BDQM>] (last updated Nov. 14, 2014).

60. *Id.*

61. *See* Mortazavi, *supra* note 3, at 2253.

62. *Id.*

63. *Id.*

64. *See* Jacobs, *supra* note 13, at 309.

amount of parties involved in a surrogacy will be two; however, the amount of parties involved could reach up to six, not including stepparents or situations involving grandparents or other legal guardians and caregivers.⁶⁵ The possibility of involved parties includes the intended parents, a donor sperm, a donor egg, the gestational carrier, and the gestational carrier's husband, creating a possibility of up to six different parties.⁶⁶ As a result of these differing parties, issues surrounding the legal parents of children and the children's national citizenship have arisen.⁶⁷

C. Surrogacy Contracts that Resulted in a Question of the Legal Parent

One of the most prominent international cases that revolved around surrogacy and the child's citizenship was the case of *Baby Manji*.⁶⁸ Ikufumi and Yuki Yamada, a Japanese couple, met with an Indian gynecologist in November 2007 and arranged a surrogacy contract.⁶⁹ A donor egg was implanted with Ikufumi Yamada's sperm and placed in the gestational carrier's womb.⁷⁰ In June of 2008, the Yamadas divorced.⁷¹ The surrogate mother gave birth to Baby Manji on July 25, 2008.⁷² Ikufumi Yamada still wanted to raise the child as his own; however, Yuki Yamada wanted nothing to do with the child.⁷³ Legally, the donor egg surrendered her rights to the child, and the gestational carrier surrendered any legal rights once the child was born.⁷⁴ There was not a current law that covered the situation, and it

65. *Id.* at 309, 322 n.74.

66. *See id.* Again, this number of six parties only takes into consideration if there are two intended parents. *Id.* at 309. This number could be much higher if stepparents, grandparents, legal guardians, or other caretakers are involved. *See id.*

67. Marcy Darnovsky, *Complications of Surrogacy: The Case of Baby Manji*, BIOPOLITICAL TIMES (Sept. 18, 2009), <http://www.biopoliticaltimes.org/article.php?id=4923> [<https://perma.cc/9G9W-H92T>]. There are also different types of "payments" that result from a surrogacy agreement, which are either commercial or altruistic. *Types of Surrogacy Arrangements*, FIND SURROGATE MOTHER, <https://www.findsurrogatemother.com/surrogacy/information/types> [<https://perma.cc/HBN5-LRCM>] (last visited Oct. 7, 2016). However, this Note will not address the varying policy debates surrounding these issues.

68. Mortazavi, *supra* note 3, at 2274.

69. *See Points, supra* note 5, at 2.

70. *Id.* at 4.

71. *Id.* at 5.

72. *Id.*

73. *Id.*

74. *Id.* at 2.

became impossible to determine the legal parentage of the baby.⁷⁵ To further complicate the matter, Indian law prohibited single men from adopting babies on their own, preventing Mr. Yamada from adopting the baby.⁷⁶ Thus, the citizenship of Baby Manji was in question.⁷⁷ The baby was unable to be adopted and eventually returned to Japan with her father until the Indian courts created an exception for temporary citizenship.⁷⁸ A lack of citizenship creates both social and legal issues.⁷⁹ In order to take a step in solving the lack of citizenship of a child born through surrogacy, the legal parentage of the child born through surrogacy must first be determined.⁸⁰

II. WHAT IS A PARENT?

For a child born outside of the United States, the child's citizenship is determined based on the parents of the child.⁸¹ A parent is someone who has responsibilities for the child yet also receives benefits because of the legal status as a parent.⁸² The traditional approach in determining parentage is based on biology.⁸³ However,

When Yamada's ex-wife (the intended mother) refused to travel with him to take possession of Manji, he flew to India alone. The anonymous egg donor (the genetic mother) had neither rights nor responsibilities toward the baby. The responsibility of Mehta (the gestational mother) had ended when the baby was born. It turned out none of the three mothers was legally responsible for Baby Manji, because the contract was not legally binding with regard to parental responsibilities.

Id. at 5.

75. *Id.* at 2. Indian law required both the mother's and father's names on the birth certificate. *Id.* at 5. However, authorities were unsure if Yuki Yamada, the gestational carrier, or the egg donor's name should appear as the mother. *Id.*

76. *Id.*; Darnovsky, *supra* note 67.

77. Points, *supra* note 5, at 2.

78. See Mortazavi, *supra* note 3, at 2275.

79. See *infra* Part III.

80. See *infra* Part II.

81. *Citizenship Through Parents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-parents> [https://perma.cc/3CKC-P39K] (last visited Oct. 7, 2016).

82. Jacobs, *supra* note 13, at 325. The Supreme Court held in *Troxel v. Granville* that the Fourteenth Amendment protects parents' rights, which includes the "right to make decisions concerning the care, custody, and control of [their children]." 530 U.S. 57, 75 (2000). This gives the legal parent the right to make decisions regarding the child's education, medical procedures, disciplinary decisions, and guardianship decisions regarding his or her child. See *id.* at 65-66.

83. See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (2006).

surrogacy cases have challenged the idea of the traditional biological view.⁸⁴ Because biology does not fit neatly within surrogacy cases, the Uniform Parentage Act (UPA) and some states have used intent to determine legal parentage instead of biology.⁸⁵ Since intentional parentage deviates from the comfort of traditional parentage, states have set strict requirements in order to validate a gestational agreement recognizing intentional parentage.⁸⁶

A. A Parent Because of Biology

A parent defined by biology means determining a child's legal parent based solely on who contributed to the actual genetic makeup of the child, which would be the male who contributed the sperm and the female who contributed the egg.⁸⁷ Determining a child based on genetics and biology was the historical presumption.⁸⁸ The woman who physically gave birth to the child was the mother, and this was generally straightforward.⁸⁹ If the child was born into a marriage, then the presumption was that the baby was the child of the husband and wife.⁹⁰ This presumption was rebuttable if the husband was away from his wife for an extended time, making it impossible to impregnate her.⁹¹ With the advancement of technology, DNA and blood-typing became the avenue for rebutting this presumption.⁹² If a child was born out of wedlock, then the child was legally the child of the mother.⁹³ Until the Supreme Court's decision in *Stanley v. Illinois* in 1972,⁹⁴ the father of a child born out of wedlock had limited legal rights.⁹⁵ This decision created a more practical approach because of varying types of families that deviate from the traditional approach.⁹⁶

84. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

85. UNIF. PARENTAGE ACT art. 8 (UNIF. LAW COMM'N 2002).

86. See TEX. FAM. CODE ANN. §§ 160.755-756 (West 2003); VA. CODE ANN. § 20-158 (West 2016).

87. See Meyer, *supra* note 83, at 125.

88. See *id.*; Jacobs, *supra* note 13, at 309-10.

89. Meyer, *supra* note 83, at 127.

90. Jacobs, *supra* note 13, at 309-10.

91. Meyer, *supra* note 83, at 127.

92. *Id.*

93. Jacobs, *supra* note 13, at 309-10.

94. 405 U.S. 645 (1972).

95. See *id.* at 649; Meyer, *supra* note 83, at 128 (showing that *Stanley* "recogniz[ed] that at least some unmarried fathers have constitutionally protected interests in relationships with their children").

96. See Meyer, *supra* note 83, at 132.

There are numerous types of families today that do not conform to the traditional married female mother and male father.⁹⁷ With the current variety of family structures, courts have felt constrained by only looking to biology for the definition of a parent.⁹⁸ Often in surrogacy, the biological party who actually contributes to the genetic makeup of the child is a donor.⁹⁹ These donors often contract away any sort of legal parental rights.¹⁰⁰ Additionally, the gestational carrier also often contracts away any sort of legal parental rights.¹⁰¹ Because of this lack of traditional biological connection to the woman who physically births the child, courts have felt constrained to base parentage on biology in gestational agreements.¹⁰² Instead, courts and states have begun to lean toward intentional parentage.¹⁰³

B. A Parent Because of a Contractual Intent

With the changing landscape of parentage and the increase in technology, another approach to determine parentage is based on intent.¹⁰⁴ California courts recognized intentional parentage as the legal basis for determining parentage in the landmark cases *Johnson v. Calvert* and *In re Marriage of Buzzanca*.¹⁰⁵ The parent or parents are considered the intentional parents because “[b]ut for their acted-on intention, the child would not exist.”¹⁰⁶ Not only has California recognized intentional parentage as the legal standard, but the UPA has also determined that legal parentage should be based on intent.¹⁰⁷

97. See *id.*

98. Jacobs, *supra* note 13, at 310.

99. Mortazavi, *supra* note 3, at 2254.

100. Choudhury, *supra* note 10, at 13-14 (discussing how most birth mothers of surrogate children do not see themselves as mothers of the children, nor do they want to be the children’s mother); Mortazavi, *supra* note 3, at 2274 (discussing how in the *Baby Manji* case the egg donor did not have parental rights because she “contractually terminated [her] parental rights”).

101. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

102. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

103. See *id.*; see *In re Buzzanca*, 72 Cal. Rptr. 2d at 282.

104. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (1990) (“[I]ntentions should govern the legal assignment of parental rights and responsibilities.”).

105. See *Johnson*, 851 P.2d at 778; see also *In re Buzzanca*, 72 Cal. Rptr. 2d at 282.

106. *Johnson*, 851 P.2d at 782.

107. UNIF. PARENTAGE ACT art. 8 (UNIF. LAW COMM’N 2002).

In addition, many states have adopted the UPA to make intentional parentage the legal determination in parenthood decisions.

1. *Judicial Decisions that Determine Intent as the Legal Approach to Parenthood*

The California Supreme Court's landmark case on gestational agreements in 1993 held that the intentional parents in a gestational agreement are considered the child's natural and legal parents.¹⁰⁸ In *Johnson*, Mark and Crispina Calvert were a married couple who desired to have a child but were unable to for medical reasons.¹⁰⁹ The couple eventually met Anna Johnson, who offered to act as the surrogate.¹¹⁰ The agreement entailed that Mark's sperm and Crispina's egg would be implanted in Anna.¹¹¹ Anna agreed to relinquish all rights to the child, and it was understood that once the child was born, Mark and Crispina would take the child "home 'as their child.'"¹¹² Unfortunately, the relationship between the Calverts and Anna deteriorated, resulting in a lawsuit over the legal parentage of the child.¹¹³

The California Supreme Court was constrained when using the typical biological approach to determine parentage because the child's genetic makeup was from the Calverts; however, Anna physically gave birth to the child.¹¹⁴ The Court stated that the proof of blood relations by Crispina and the proof of physical birth by Anna were both acceptable methods to prove maternity.¹¹⁵ Because of this, the Court turned to intent to make its final decision on legal parentage, holding that the Calverts were the legal parents.¹¹⁶ The Court reasoned that the intent of the parties when creating the surrogacy agreement determined that the party "who intended to bring about the birth of [the] child" and the party "that . . . intended

108. *Johnson*, 851 P.2d at 778.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* "Anna agreed she would relinquish 'all parental rights' to the child in favor of Mark and Crispina." *Id.*

113. *Id.*

114. *Id.* at 781 ("We see no clear legislative preference . . . as between blood testing evidence and proof of having given birth.").

115. *Id.* at 782.

116. *Id.*

to raise [the child] as her own—[was] the natural mother.”¹¹⁷ Thus, the Court determined legal parentage not based biology, but based on the intent of the parties that entered into the gestational agreement.¹¹⁸

In *In re Marriage of Buzzanca*, the California Court of Appeals clarified that intentional parentage is the legal determination in surrogacy cases even when the intended parents did not contribute any sort of biological makeup to the child.¹¹⁹ Luanne and John Buzzanca agreed to a surrogacy contract in which both the sperm and egg that was placed in the gestational carrier were from donors.¹²⁰ Upon the divorce of Luanne and John, John claimed that he was not the legal father of the child, Jaycee.¹²¹ He further contended that Luanne was not the mother of the child.¹²² Luanne argued that she was the legal mother of the child.¹²³ Neither the gestational carrier nor the donors claimed any sort of legal parental claims over the child.¹²⁴ Ultimately, the court held that Luanne and John were the legal parents of the child because they intended to be the parents and set in motion the opportunity for the child’s birth.¹²⁵ Furthermore, the court determined that it would be against principles of estoppel to allow someone to cause an action, such as the birth of a child, and then attempt to deny any sort of responsibility.¹²⁶ Although the court looked at this estoppel argument, the court’s ultimate decision in determining legal parentage was based on intentional parentage.¹²⁷

117. *Id.* “[W]hile all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents* . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship.” *Id.* (quoting John Lawrence Hill, *What Does It Mean to Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991)).

118. *Johnson*, 851 P.2d at 782.

119. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (1998).

120. *Id.*

121. *Id.*

122. *Id.* at 284.

123. *Id.* at 282.

124. *Id.* at 290-91. “Neither the woman whose ovum was used nor the woman who gave birth have come forward to assume custody of the child after birth.” *Id.* at 290.

125. *Id.* at 282. “Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.” *Id.* “Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth.” *Id.* at 293.

126. *Id.* at 288.

127. *Id.* “There is no need in the present case to predicate our decision on common law estoppel alone, though the doctrine certainly applies.” *Id.* The court

2. *The Uniform Parentage Act*

In 1973, the Uniform Law Commission¹²⁸ created the Uniform Parentage Act (UPA).¹²⁹ An important original feature of the UPA was to establish equality for children who were born out of wedlock, which enabled the expansion of the definition of a parent.¹³⁰ The UPA first began to move away from the traditional biological standards by allowing a parentage determination based on a parent-child relationship.¹³¹ The UPA has been amended, and the current 2002 Act is “the official recommendation of the Conference on the subject of parentage.”¹³² Article 8 of the UPA addresses parentage of children born through surrogacy.¹³³ The UPA recognized the growth of gestational agreements and the need to provide children of those agreements with a legal parent or parents.¹³⁴ The UPA determined that the parents that entered into the gestational agreement as the intended parents are the legal parents and that the donors; gestational carriers; and the gestational carrier’s husband, if applicable, must agree to relinquish all parental rights.¹³⁵

The UPA approaches these surrogate agreements by requiring that the court, similar to an adoption proceeding, approve each agreement.¹³⁶ The agreement is ratified through a petition commenced by the intended parents and then approved by the court.¹³⁷ If the agreement is not approved, then it is an unenforceable

ultimately concluded that intentional parentage—the parent or parents who initiated the birth of the child—determined legal parentage. *Id.* at 293.

128. See UNIF. LAW COMM’N, <http://www.uniformlaws.org> [<https://perma.cc/C85E-6JDH>] (last visited Oct. 7, 2016) (“The Uniform Law Commission provides states with non-partisan, well conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law.”).

129. *Parentage Act Summary*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> [<https://perma.cc/X32S-V8GM>] (last visited Oct. 7, 2016).

130. See Jacobs, *supra* note 13, at 318; UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM’N 2002).

131. See Jacobs, *supra* note 13, at 318.

132. See UNIF. PARENTAGE ACT, prefatory note.

133. See *id.* art. 8.

134. See *id.* art. 8 cmt. (“Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified.”).

135. See *id.* at § 801(a)(2).

136. See § 801(c).

137. See § 802.

contract but is not void.¹³⁸ Because the contract is not considered void, a party who enters into the gestational agreement can still be held liable for support of the child.¹³⁹ Thus, the UPA broadens who is considered a legal parent in surrogacy by not only looking at biology but also by considering the intention of the parties involved.¹⁴⁰ Some states have taken a similar approach to the UPA and have begun to consider the intended parents as legal parents in surrogacy cases.¹⁴¹ Texas,¹⁴² Nevada,¹⁴³ and Virginia all recognize intended parents, to some extent, as the legal parents in a gestational agreement.¹⁴⁴

3. State Application

Although Texas, Nevada, and Virginia all recognize intentional parentage in gestational agreements,¹⁴⁵ in order for the gestational agreement to be valid, each state requires the agreements comply with certain standards.¹⁴⁶ Specifically, the gestational agreements are required to be in writing.¹⁴⁷ In addition, Texas and Virginia require court approval of all gestational agreements before the agreements are legally valid.¹⁴⁸

a. Written Requirements for Gestational Agreements

Each state that recognizes gestational agreements requires that the gestational agreement comply with certain statutory standards.¹⁴⁹ Texas law allows for the intended parents, or the commissioning parents, to become the sole legal parents of the child and for the

138. See § 809.

139. See § 809(c).

140. See § 801; Jacobs, *supra* note 13, at 322-23.

141. See, e.g., ARK. CODE ANN. § 9-10-201 (2016); NEV. REV. STAT. § 126.590 (2015).

142. See TEX. FAM. CODE ANN. § 160.754 (West 2003).

143. See NEV. REV. STAT. § 126.590.

144. See VA. CODE ANN. § 20-158 (West 2016).

145. See, e.g., NEV. REV. STAT. § 126.590; TEX. FAM. CODE ANN. § 160.754; VA. CODE ANN. § 20-158.

146. See, e.g., NEV. REV. STAT. § 126.750; TEX. FAM. CODE ANN. § 160.754; VA. CODE ANN. § 20-160.

147. See, e.g., NEV. REV. STAT. § 126.750(3)(a); TEX. FAM. CODE ANN. § 160.754(a); VA. CODE ANN. § 20-160(A).

148. See TEX. FAM. CODE ANN. §§ 160.755-756; VA. CODE ANN. § 20-158.

149. See, e.g., NEV. REV. STAT. § 126.720; TEX. FAM. CODE ANN. § 160.752; VA. CODE ANN. § 20-158.

gestational carrier to relinquish all parental rights.¹⁵⁰ Similar to Texas, Nevada allows for the intended parents to be the legal parents at the birth of the child.¹⁵¹ This state's statute defines intended parents as those who intend "to be legally bound as the parent of a child resulting from assisted reproduction."¹⁵² Furthermore, in a gestational agreement, the donor must relinquish all parental rights while the intended parents must agree to all legal parental rights of the child.¹⁵³ Virginia also allows for intentional parentage upon court approval of the gestational agreement.¹⁵⁴

Although all three states recognize intentional parentage through gestational agreements, each state sets strict requirements for the gestational agreements.¹⁵⁵ Texas requires that the agreement must state the physician performing the surrogacy procedure, as well as associated potential risks.¹⁵⁶ In addition, Texas requires a home study of the intended parents.¹⁵⁷ Similarly, Virginia requires a home study and appropriate counseling to ensure the intended parents are educated in relation to issues that can arise in surrogacy.¹⁵⁸ To ensure that all parties are cognizant and knowledgeable about the parties' legal rights, obligations, and risks associated with entering into a gestational agreement, Nevada requires a separate signed writing

150. See TEX. FAM. CODE ANN. § 160.752(a). "[T]his subchapter authorizes an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child." *Id.*

151. See NEV. REV. STAT. § 126.720. Nevada states that as long as the statutory requirements are satisfied, then "[t]he intended parent or parents shall be considered the parent or parents of the resulting child immediately upon the birth of the child." § 126.720(1)(a).

152. See § 126.590.

153. See § 126.750(4)(a)(2).

154. See VA. CODE ANN. § 20-158(D). However, if there is not court approval then Virginia falls back on the biological approach for determining parentage. See § 20-158(E). Florida also recognizes the intended parents as the legal parent. See FLA. STAT. ANN. § 742.15 (West 1993). However, Florida only recognizes a binding gestational agreement if one of the parents is biologically related to the child. See § 742.15(3)(e). Thus, Florida's interpretation is based on both intent and biology. See § 742.15.

155. See NEV. REV. STAT. § 126.750; TEX. FAM. CODE ANN. § 160.754; VA. CODE ANN. § 20-158.

156. See TEX. FAM. CODE ANN. § 160.754. However, this provision does not apply if the intended mother is a married woman who donated the eggs to the married gestational carrier. See *id.*

157. § 160.756(b)(3).

158. See VA. CODE ANN. § 20-160(B)(2).

from each party acknowledging each party's "legal, financial and contractual rights, expectations, penalties, and obligations of the gestational agreement."¹⁵⁹ In order for the gestational agreement to be valid, the Nevada statute requires that the gestational carrier and the intended parent or parents have both undergone legal consultation.¹⁶⁰ In addition, the gestational carrier must have undergone medical evaluations.¹⁶¹

Texas law requires that both intended parents must be part of the gestational agreement and that the intended parents be married.¹⁶² Additionally, the state requires that if the gestational carrier is married, then the gestational carrier's husband must also be a party to the agreement.¹⁶³ In Nevada, the gestational agreement must "[b]e in writing"; "[b]e executed before the commencement of any medical procedures"; and "[b]e notarized and signed by all parties with attached declarations of the independent attorney of each party."¹⁶⁴ For a valid gestational agreement in Virginia, the statute requires evidence of the voluntariness of the contract, the details of the payment, and that the surrogacy has had at least one pregnancy.¹⁶⁵

Not only does the Nevada statute specifically address the terms and conditions of a gestational agreement, but the statute also addresses what to do in the case of breach.¹⁶⁶ The statute provides that a parent recognized by this statute as the legal parent is required to support the child even if the intended parents breach the gestational agreement.¹⁶⁷ In the event that either party is in noncompliance, the court will determine the obligations of the parties "based solely on the evidence of the original intent of the parties."¹⁶⁸ Although the statute does not address court approval of the gestational agreement, the statute sets out clear guidelines for a

159. See NEV. REV. STAT. § 126.750(3)(d). The statute continues to outline express agreements that the intended parents, gestational carrier, and gestational carrier's husband must meet. § 126.750.

160. See § 126.740(1)(b).

161. See § 126.740(1)(a).

162. See TEX. FAM. CODE ANN. § 160.754(b).

163. See *id.*

164. See NEV. REV. STAT. § 126.750(3).

165. See VA. CODE ANN. § 20-160(B) (West 2016).

166. See NEV. REV. STAT. § 126.780.

167. See § 126.760. "The breach of the gestational agreement by the intended parent or parents does not relieve such an intended parent or parents of the obligation to support a resulting child." *Id.*

168. See § 126.780.

gestational agreement and determines the parties' obligations in the case of a breach.¹⁶⁹

b. Court Approval

Not only do Texas and Virginia have certain requirements for gestational agreements, but the states also require that a court of competent jurisdiction approve the gestational agreements.¹⁷⁰ In order for the gestational agreement to be approved, Texas requires a petition to validate the gestational agreement followed by a validation hearing.¹⁷¹ The court will then ensure that the requirements set forth in the statute have been met and then "may validate the gestational agreement at the court's discretion."¹⁷² Once court proceedings have commenced surrounding this surrogacy agreement, the court retains jurisdiction over the gestational agreement until the child born from the agreement reaches the age of 180 days.¹⁷³ In order for Virginia to recognize the intended parents as the legal parents of the child, the court must have approved of the surrogacy contract.¹⁷⁴ Similar to Texas,¹⁷⁵ there must be a petition filed followed by an approval hearing.¹⁷⁶ Although states make decisions of parentage in cases of domestic surrogacy, the United States Department of State makes determinations of parentage in cases of international surrogacy.¹⁷⁷

III. CURRENT RECOGNITION OF PARENTS IN INTERNATIONAL SURROGACY

The Department of State makes the determination of a child's citizenship that is born abroad by interpreting the Immigration and Nationality Act.¹⁷⁸ Currently in cases of surrogacy, this interpretation is based on a biological approach.¹⁷⁹ The Hague Conference is the

169. See §§ 126.740, -.750, -.780.

170. See TEX. FAM. CODE ANN. §§ 160.755-.756 (West 2003); VA. CODE ANN. § 20-159 (West 2016).

171. See TEX. FAM. CODE ANN. §§ 160.755-.756.

172. § 160.756(c).

173. § 160.758.

174. See VA. CODE ANN. § 20-158(D).

175. See TEX. FAM. CODE ANN. §§ 160.755-.756.

176. See VA. CODE ANN. § 20-160.

177. See DEPARTMENT OF STATE, *supra* note 4.

178. See *id.*; 8 U.S.C § 1401 (2012).

179. See DEPARTMENT OF STATE, *supra* note 4.

most prominent international group addressing issues of children crossing international borders.¹⁸⁰ Although the Hague Conference has only addressed intercountry adoption, the Conference recognizes a need for a uniform approach to surrogacy that protects children.¹⁸¹

A. The Department of State

The Immigration and Nationality Act §§ 301 and 309 determine whether or not a child who is born abroad is a U.S. citizen.¹⁸² A child born through surrogacy is only considered a U.S. citizen if both biological parents are citizens or if one of the parents is a resident of United States or a U.S. citizen.¹⁸³ Even still, a child is considered a U.S. citizen if one parent is a U.S. citizen that has lived in the United States or its territory continually for one year prior to the child's birth.¹⁸⁴ Thus, in order to determine if a child from surrogacy is a U.S. citizen, the question boils down to how the Department of State identifies the parent of the child.¹⁸⁵

If the child was born through ART, then in order to be a U.S. citizen, "a U.S. citizen father must be the genetic parent or a U.S. citizen mother must be either the genetic or the gestational and legal mother of the child at the time and place of the child's birth."¹⁸⁶ Thus, the Department of State has interpreted these sections by using the biological approach in determining legal parents.¹⁸⁷ In order to obtain citizenship, DNA testing is the best evidence to show the biological connection between the parents and child.¹⁸⁸ However, the Department of State will not do any DNA testing until after the child is born.¹⁸⁹ The biological approach limits whom the Department of State considers to be the legal parent of a child born abroad.¹⁹⁰

180. See *infra* Section III.B.

181. *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> [<https://perma.cc/45ML-LRUS>] (last visited Oct. 7, 2016) [hereinafter *Parentage Surrogacy Project*].

182. DEPARTMENT OF STATE, *supra* note 4; 8 U.S.C § 1401.

183. 8 U.S.C. § 1401(c).

184. § 1401(d).

185. See DEPARTMENT OF STATE, *supra* note 4.

186. *Id.*

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.* "Children who are born abroad to foreign surrogates and who are not biologically related to a U.S. citizen parent can have trouble entering the

Additionally, the Department of State has determined only U.S. law applies in international surrogacy contracts and does not take the local laws of the surrogacy location into consideration because even if a foreign country recognizes the child as a citizen, the Department of State still may not.¹⁹¹ This leaves many holes in international surrogacy, which the Department of State recognizes.¹⁹² The Department of State admits that this interpretation creates a gap that results in cases where a child is born without a citizenship.¹⁹³ Additionally, the Hague Conference, a world-wide cross-border organization, also recognizes the need for a uniform approach to international surrogacy.¹⁹⁴

B. The Hague Conference

In 1993, the Hague Convention created a legal standard regarding children crossing international borders.¹⁹⁵ The Convention recognized this need to protect children in order to try to prevent international child abduction and trafficking.¹⁹⁶ Another aspect the Convention addressed was intercountry adoption by emphasizing the protection and best interest of the adoptive children.¹⁹⁷ Numerous nations signed the treaty in an international effort to implement safeguards for children.¹⁹⁸ There are currently eighty states that are Hague members.¹⁹⁹ The United States signed the treaty in 1994, but it

United States. If the child is not biologically related to a U.S. citizen parent, the child will not acquire U.S. citizenship automatically at birth.” *Id.*

191. *See id.*

192. *See id.* (noting how there can be situations that leave “a child stateless or otherwise unable to leave the country of birth”).

193. *See id.* The Department of State suggests interested parents to first consult with an immigration attorney. *Id.*

194. *See Parentage Surrogacy Project, supra* note 181.

195. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> [<https://perma.cc/6MGZ-RBU5>] [hereinafter Hague Convention].

196. *See id.*

197. *See id.*

198. *See id.*

199. *See HCCH Members, HAGUE CONF. ON PRIV. INT’L L.*, <https://www.hcch.net/en/states/hcch-members> [<https://perma.cc/7BFW-SCBN>] (last visited Oct. 7, 2016).

did not go into force until April 2008.²⁰⁰ Because the Hague Treaty is enacted, the United States must comply with certain standards set forth by the treaty.²⁰¹ Although the Hague Treaty was established at the convention by the Hague Conference in 1993, the Hague Conference continues to play a major role and is influential in the international community with regard to children crossing national borders.²⁰²

1. *International Adoption*

For international adoptions, or intercountry adoptions, the Hague Convention requires that the countries involved have a Central Authority.²⁰³ The Central Authorities of the countries are in place to ensure that regulations are followed and to assist in the prevention of the exploitation of human rights.²⁰⁴ In addition, the Central Authorities of each country are required to work together to ensure that each nation is in compliance with Treaty standards in an adoption proceeding.²⁰⁵ There are different compliance standards set forth for the receiving State, which is the country where the parent or parents live who are adopting the child.²⁰⁶ In addition there are different compliance standards for the State of origin, which the country from where the child is currently being adopted.²⁰⁷

200. See *Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/hague-convention.html> [<https://perma.cc/FZ27-73KA>] (last visited Oct. 7, 2016).

201. See *Understanding the Hague Convention*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/hague-convention/understanding-the-hague-convention.html> [<https://perma.cc/MV5V-8WSZ>] (last visited Oct. 7, 2016).

202. See *id.* Adoption processes of international children must conform with Hague standards. *Id.* Furthermore, the United States has established standards for adoptions that involve children from countries that are not members of the Hague Convention. *Id.* These standards try to mimic and uphold the Hague convention standards, which demonstrates the influence of these standards on the United States. *Id.*

203. See *id.*

204. See *id.*

205. See Hague Convention, *supra* note 195, at art. 7. ("Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.").

206. See *id.* at art. 17.

207. See *id.*

In the United States, the Central Authority in place is the Department of State.²⁰⁸ Based on the Hague Convention regulations, the Department of State created certain standards and safeguards that must be followed in order to obtain a legal international adoption.²⁰⁹ First, the, adoption must go through an “accredited or approved adoption agenc[y].”²¹⁰ These agencies are accredited through prior approval by the Department of State.²¹¹ Second, the adoption agreement must be completely transparent through itemized writing of all expected fees and expenses.²¹² In addition, the Department of State requires an adoptive parent home study, which “[m]ust meet both State and Federal requirements,” and ten hours of parent education for the adoptive parents.²¹³ The adoptive parents must also file all the correct visas and immigration paperwork necessary for the child to obtain citizenship.²¹⁴ Not only are there standards set for the adoptive parents in the receiving state, but there are also certain standards that the country of origin must comply with in order for the adoption to be in compliance with Hague standards.²¹⁵

The Department of State clearly states that in order for an intercountry adoption to be approved, the country of origin must also approve the adoption.²¹⁶ The state of origin must be satisfied that the child is adoptable and then provide a report on the necessary information pertaining the child’s background and identity.²¹⁷ The state of origin also must ensure that the parent or guardian of the child has given the necessary and correct consents to give the child

208. *Understanding the Hague Convention, supra* note 201.

209. *Id.*

210. *Id.* (“Only adoption service providers that have been accredited or approved on a Federal level may offer certain key adoption services for Convention adoptions.”).

211. *Id.*

212. *Id.*

213. *See Hague vs Non-Hague Adoption Process*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/hague-convention/hague-vs-non-hague-adoption-process.html> [<https://perma.cc/6T8R-ESPW>] (last visited Oct. 7, 2016) [hereinafter *Hague vs. Non-Hague*].

214. *Id.*

215. *See Hague Convention, supra* note 195, art. 4.

216. *See id.* The “Country of Origin must determine the child is adoptable with Convention consents and other protections.” *Hague vs. Non-Hague, supra* note 213.

217. *See Hague Convention, supra* note 195, art. 16. Such information includes: “information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child’s family, and any special needs of the child.” *Id.*

up for adoption.²¹⁸ Although these are a few of the safeguards provided,²¹⁹ the provisions of the Hague Convention include numerous steps, having both countries work together to ensure that adoption is in the child's best interest.²²⁰ Furthermore, the Hague Convention is concerned not only with human rights and protection against exploitation in adoption, but in any situation in which people are crossing international lines.²²¹

2. *The Hague Convention on ART*

Although the Hague Convention is still internationally prevalent, the current Hague Treaty focuses on adoption and does not neatly apply to international ART issues.²²² Recognizing that international surrogacy is growing,²²³ along with the legal parenting issues surrounding international surrogacy,²²⁴ the Hague has established a committee, the Permanent Bureau of the Hague Conference on Private International Law, to examine current international issues on surrogacy.²²⁵ In addition, an Experts' Group was created in 2015 to "explore the feasibility of advancing work in this area."²²⁶ The Experts' Group is set to meet in 2016; however, the Permanent Bureau has created a background note for the meeting.²²⁷

The background note recognizes that there are current international legal holes in relation to international surrogacy.²²⁸ One

218. *See id.*

219. *See id.*

220. *See id.*

221. *See Parentage Surrogacy Project, supra* note 181.

222. *See* Mortazavi, *supra* note 3, at 2254.

223. *See Parentage Surrogacy Project, supra* note 181 ("[A] particularly 'burning issue' has come to light in recent years: a brief internet search of 'surrogacy' and in today's world one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques and surrogacy. It is now a simple fact that surrogacy is a booming, global business.").

224. THE PERMANENT BUREAU, THE PARENTAGE / SURROGACY PROJECT: AN UPDATING NOTE (Feb. 2015), <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf> [<https://perma.cc/LN8J-CFSF>].

225. *See Parentage Surrogacy Project, supra* note 181.

226. *Id.*

227. THE PERMANENT BUREAU, HAGUE CONF. ON PRIV. INT'L L., BACKGROUND NOTE FOR THE MEETING OF THE EXPERTS' GROUP ON PARENTAGE 4 (Jan. 2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf> [<https://perma.cc/N3YH-7RR8>] [hereinafter *Experts' Group Background Note*].

228. *See id.* at 11.

of the biggest issues is that there is not a consistent approach to determining parentage.²²⁹ In addition, one nation may not recognize or accept another nation's determination of parentage.²³⁰ Thus, there can be a dispute on who is the legal parent of the child.²³¹ The Permanent Bureau determined some possible safeguard areas.²³² Although the Hague Convention has not determined or set a standard of the interpretation of parentage, there are certain safeguards the Hague Convention will likely put in place in the future.²³³ These safeguards revolve around the protection of child and the prevention of exploitation.²³⁴ In addition, the Hague Conference recognizes that children born through the surrogacy process have the basic right to be born with a citizenship, which the Department of State's current approach does not fulfill.²³⁵

IV. INTENTIONAL PARENTAGE IN INTERNATIONAL SURROGACY

Within the past thirty years, the number of individuals and couples seeking to have children through surrogacy has soared.²³⁶ Not only are those surrogacy numbers likely to continue to increase,²³⁷ but also the amount of children crossing international borders through surrogacy is likely to increase.²³⁸ The Department of

229. *See id.* at 15-16.

230. *See id.*

231. *See id.*

232. These areas include:

[D]ue diligence obligation of States; free and informed consent of surrogate mothers; appropriate information and education for all parties with regard to the legal, medical and psychological issues; suitability of the intending surrogate mother; suitability of the intending parents; a child's ability to know his or her origins (including the collection and preservation of information); standards for intermediaries, *e.g.*, clinics; medical safeguards – standards for ART procedures; provisions in case of breakdown of the ISA, and child abandonment; the financial aspects of the arrangements, including ensuring that financial terms do not constitute sale of a child; preventing child trafficking in the guise of ISAs; ensuring that intending surrogate mothers are not trafficked for purposes of ISA; whether a pre-conception agreement on the arrangements should be required; and securing the child's legal status prior to or post conception.

Id. at 16-17.

233. *See id.*

234. *See id.*

235. *See id.* at 16.

236. *See* Appleton, *supra* note 39, at 429.

237. *See* Cohen, *supra* note 49.

238. *See* DiFonzo & Stern, *supra* note 8, at 353-54.

State has determined that parentage is based solely on biology; thus, a child born through surrogacy is only a U.S. citizen if the child has biological ties to one or both of the intended U.S. parents.²³⁹ Unfortunately, this outdated approach to determine parentage does not neatly apply to surrogacy, causing children to be born without a state or citizenship.²⁴⁰ If the child is born without a citizenship in a state, then the intended U.S. citizen parents will have a difficult time bringing the child back home to the United States.²⁴¹

Instead, the Department of State should make legal parentage determinations through an intentional parentage policy.²⁴² The intended parents in a gestational agreement are the party or parties that intend to raise the child.²⁴³ This policy is based on the fact that but-for the intended parents' efforts, the child would not have been brought into the world.²⁴⁴ The Department of State would implement this by acting as a Centralized Agency.²⁴⁵ Acting as the Centralized Agency, the State Department should require that state courts approve all gestational agreements, enact guidelines for the intended parents, specify terms in gestational agreements, and require that the gestational agreement go through an accredited agency.²⁴⁶ This approach would give deference to each state's public policy on surrogacy, while complying with international standards determined by the Hague Treaty.²⁴⁷

A. The Holes in the Current Biological Approach

Regardless of the social, moral, cultural, or political debates surrounding surrogacy,²⁴⁸ the numbers clearly indicate that surrogacy

239. DEPARTMENT OF STATE, *supra* note 4.

240. *See id.*; *supra* Section III.A.

241. *See* DEPARTMENT OF STATE, *supra* note 4.

242. *See supra* Section II.B. This approach would be similar to Nevada's statute, which determines parents are those who intend "to be legally bound as the parent of a child resulting from assisted reproduction." NEV. REV. STAT. § 126.590 (2015).

243. *See Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

244. *See id.*

245. DEPARTMENT OF STATE, *supra* note 4. "The determination of citizenship of children born abroad to a U.S. citizen parent is the responsibility of the U.S. Department of State and is governed by U.S. law." *Id.* Because the citizenship determination is governed by the Department of State, it is acting as centralized agency regarding this subject matter. *Id.*

246. *See infra* Section IV.B.

247. *See infra* Section IV.B.

248. *See supra* Section I.B.

is on the rise.²⁴⁹ With the increase in technology and the numerous types of families that are found in the United States,²⁵⁰ surrogacy is likely only to continue to increase.²⁵¹ Just as states have updated the determination for legal parentage in gestational agreements,²⁵² the Department of State should also update its approach.²⁵³ The Department of State's current approach to citizenship for a child born through surrogacy is based on biology.²⁵⁴ The male father must contribute his sperm, or the female mother must contribute her egg.²⁵⁵ The Department of State takes this even one step further by requiring the female mother to also give birth to the child.²⁵⁶ This approach has resulted in the possibility of children to be born without any sort of citizenship.²⁵⁷

Citizenship of a child born abroad is based on parentage,²⁵⁸ thus, it is essential to understand how the State Department determines legal parentage.²⁵⁹ If the male and female donors and gestational carrier each relinquish their parental rights, then the child is left without a biological connection to any person.²⁶⁰ If biology is the only way the United States recognizes citizenship, then the United States does not recognize that the child has any sort of legal parent because the United States will not recognize the U.S. citizens as parents if they lack a biological connection.²⁶¹ Lacking a legal parent means the child is unable to gain citizenship through his or her parents, creating the risk for a child to be born without a

249. See Appleton, *supra* note 39, at 429; Cohen, *supra* note 49; Mortazavi, *supra* note 3, at 2250.

250. See *supra* Section I.A.

251. See *supra* Section I.A.

252. See Meyer, *supra* note 83, at 133.

253. See *supra* Section III.A (identifying the holes in the current Department of State's interpretation); *supra* Introduction (describing a hypothetical where a child would be born stateless due to the Department of State's current interpretation); DEPARTMENT OF STATE, *supra* note 4.

254. See DEPARTMENT OF STATE, *supra* note 4.

255. See *id.*

256. See *id.*

257. See *id.* Where there is a lack of genetic material, either purposefully or accidentally, those "situations can have the unfortunate consequence of leaving a child stateless or otherwise unable to leave the country of birth." See *id.*

258. *Citizenship Through Parents*, *supra* note 81.

259. See DEPARTMENT OF STATE, *supra* note 4.

260. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 290-91 (Cal. Ct. App. 1998).

261. See DEPARTMENT OF STATE, *supra* note 4.

citizenship.²⁶² In addition, the Department of State will not take into consideration local laws.²⁶³ Thus, even if a foreign local law determined that the intended parents were the legal parents, the Department of State would not accept the foreign country's determination.²⁶⁴ Furthermore, some foreign countries, like India, require a parental relationship to the child in order for the child to be considered a citizen.²⁶⁵ Thus, by the donors and gestational carrier relinquishing all parental rights, the child is unable to gain Indian citizenship either because there is not an established relationship with an Indian citizen.²⁶⁶ The State Department's current approach is flawed because a child born through surrogacy may be born without any sort of legal citizenship.²⁶⁷

B. A Modernized Intended Parent

Instead of making a parentage determination based on biology, the Department of State should determine legal parentage through intentional parentage.²⁶⁸ This approach would eliminate the criteria that biology is necessary in determining the legal parentage of a child and thus, would fill in the "gaps" that result by simply looking at biology.²⁶⁹ By recognizing the legal parentage through intent, issues of a child being left without citizenship would be solved because the child would be able to gain citizenship through the intended U.S. parents.²⁷⁰

The Department of State should continue to act as the Central Authority, which is required by the Hague Convention.²⁷¹ Currently, the State Department acts as the Central Authority by looking at each international surrogacy case.²⁷² However, the Department of State should change its analysis in determining and approving parentage and thus, who is considered a U.S. citizen by determining parentage

262. *Id.*

263. *Id.*

264. *Id.*

265. *See* Mortazavi, *supra* note 3, at 2275.

266. *See id.*

267. *See* DEPARTMENT OF STATE, *supra* note 4.

268. *See* Johnson v. Calvert, 851 P.2d 776, 782 (1993) (discussing that the parents whose intentional actions resulted in the birth of the child through surrogacy should be considered the legal parents).

269. *See infra* Section IV.A.

270. *See* DEPARTMENT OF STATE, *supra* note 4.

271. *Understanding the Hague Convention, supra* note 201.

272. *See* DEPARTMENT OF STATE, *supra* note 4.

based on intent.²⁷³ The Department of State should do this by approving all gestational agreements before any sort of medical procedure takes place.²⁷⁴ The first step toward approval of gestational agreements should be requiring state court approval of the gestational agreement.²⁷⁵ Second, the Department of State should create specific requirements that must be completed by the intended parents; both the Hague Treaty and state statutes address many of these requirements.²⁷⁶ Third, the Department of State should create express standards for each surrogate agreement, including a provision for breach of contract.²⁷⁷ Lastly, the Department of State, acting as the Central Authority, should require all gestational agreements go through an accredited agency that ensures the compliance of all regulations.²⁷⁸ Upon certifying that all the proceeding steps have been taken, the Department of State should either approve or deny the surrogate agreement,²⁷⁹ with citizenship being granted upon the birth of the child.²⁸⁰

Not only would this approach eliminate citizenship gaps, but these steps for determining parentage through intent fall into compliance with the current goals of the Hague Convention, which the current biological approach fails to do.²⁸¹ Advocates of traditional family structure may resist the definition of a parent as someone who is biologically unconnected.²⁸² However, because of the changing dimensions of families and the increase in technology, “traditional” biological families are not the only type of families recognized by society and the courts.²⁸³ Additionally, the UPA has recognized a parent not based on biology, but through a parent-child relationship,

273. See *Johnson*, 851 P.2d at 782.

274. See DEPARTMENT OF STATE, *supra* note 4. Currently, the Department of State only looks at surrogacy cases after the child has been born. *Id.* The Department of State will look at each gestational agreement “after carefully considering the specific facts surrounding the child’s birth and his or her parents’ situation.” *Id.*

275. See TEX. FAM. CODE ANN. §§ 160.755-.756 (West 2003); VA. CODE ANN. § 20-158 (West 2016).

276. See *Understanding the Hague Convention*, *supra* 201; see, e.g., VA. CODE ANN. § 20-158.

277. See, e.g., NEV. REV. STAT. § 126.770 (2015).

278. *Understanding the Hague Convention*, *supra* note 201.

279. See VA. CODE ANN. § 20-158 (requiring all gestational agreements must be approved before any medical procedures commence).

280. See DEPARTMENT OF STATE, *supra* note 4. The Department of State will not grant citizenship before a child is born. *Id.*

281. THE PERMANENT BUREAU, *supra* note 224, at 9.

282. Jacobs, *supra* note 13, at 322.

283. See *supra* Section II.B.

which is already socially recognized in adoption.²⁸⁴ Furthermore, this would create a more predictable approach surrounding citizenship because the Department of State would approve all gestational agreements beforehand.²⁸⁵

1. *Department of State as the Central Authority*

The Hague Convention calls for a Central Authority in each country.²⁸⁶ This authority oversees all international adoptions to ensure that each is in compliance and to minimize the risk of child abduction.²⁸⁷ The United States already has a Central Authority for adoption: the Department of State.²⁸⁸ The Department of State also currently acts as a Central Authority in surrogacy cases because the Department of State looks at every individual case of surrogacy.²⁸⁹ Currently, the Department of State does not approve the actual gestational agreements.²⁹⁰ It only determines the citizenship of the child born through surrogacy by looking at facts surrounding the child's birth once the child has been born.²⁹¹ Instead, the Department of State, through acting as the Central Authority, should require valid gestational agreements before any sort of medical procedure begins.²⁹² The Department of State must approve each gestational agreement in order for the contract to be valid.²⁹³ When taking into consideration the validation of gestational agreements, the Department of State should consider state court approval of the agreement;²⁹⁴ requirements for intended parents;²⁹⁵ the contract terms,

284. See Jacobs, *supra* note 13, at 318.

285. See Mortazavi, *supra* note 3, at 2287-90 (discussing that centralized agency would approve all surrogacy contracts beforehand). This type of approval beforehand would insert safeguards and create a standardized, predictable process. *See id.*

286. See *Parentage Surrogacy Project*, *supra* note 181.

287. See Mortazavi, *supra* note 3, at 2287-90.

288. See DEPARTMENT OF STATE, *supra* note 4.

289. *See id.* "The Department determines the citizenship of each child who applies for documentation as a U.S. citizen individually, on a case by case basis, after carefully considering the specific facts surrounding the child's birth and his or her parents' situation." *See id.*

290. *Id.*

291. *Id.*

292. See, e.g., NEV. REV. STAT. § 126.590 (2015); see Mortazavi, *supra* note 3, at 2288 (discussing that Israel's model for surrogacy approval includes an approval committee that must "approve each surrogacy arrangement").

293. See, e.g., Mortazavi, *supra* note 3, at 2288.

294. See *infra* Subsection IV.B.2.

including a provision for contract breach;²⁹⁶ and whether or not the abroad agency is accredited.²⁹⁷ Upon looking at these factors, the Department of State would then use its discretion to determine the validation of the gestational agreement.²⁹⁸

a. State Court Approval

The first step that the Department of State should require when looking to a valid surrogacy contract is whether or not a state court has approved the agreement, which is similar to the requirements set forth by Texas and Virginia.²⁹⁹ The intending parent or parents should petition for approval in that parent's or parent(s)' state of residence.³⁰⁰ The state court should then approve or deny the gestational agreement based on whether or not the agreement meets the standards set by the Department of State and the state's statute.³⁰¹ This state court approval of the surrogate agreement should be taken only as the first step to the approval of an international surrogate case and should not be considered the final approval.³⁰² Instead, this state court approval should be considered a completed requirement that is considered by the Department of State when it ultimately approves or denies an international surrogate agreement.³⁰³

Although citizenship is an international issue, surrogacy is a matter that is determined by the states.³⁰⁴ Family law, such as gestational agreements, is traditionally left to the states.³⁰⁵ In addition, each state has its own approach to surrogacy and gestational agreements.³⁰⁶ By first requiring state approval, the Department of State is respecting the state's sovereignty and policy

295. See *infra* Subsection IV.B.2.

296. See *infra* Subsection IV.B.2.

297. See *infra* Subsection IV.B.2.

298. See DEPARTMENT OF STATE, *supra* note 4.

299. See TEX. FAM. CODE ANN. §§ 160.755-.756 (West 2003); VA. CODE ANN. § 20-158 (West 2016).

300. This is similar to the Texas requirement, which requires that "the prospective gestational mother or the intended parents have resided in this state for the 90 days preceding the date the proceeding is commenced." TEX. FAM. CODE ANN. § 160.755(b)(1).

301. See § 160.756(d).

302. See DEPARTMENT OF STATE, *supra* note 4.

303. *Id.*

304. See, e.g., NEV. REV. STAT. § 126.750 (2015).

305. See U.S. CONST. amend. X.

306. See *id.*

regarding surrogacy.³⁰⁷ However, the Department of State still makes the final determination in regards to citizenship because state approval of the agreement is one factor in the determination of surrogacy contract approval by the State Department.³⁰⁸ Because of the Immigration and Nationality Act, the Department of State makes final decisions of citizenship to children born abroad.³⁰⁹ Not only must the state court approve the surrogate agreement, the Department of State should look to create certain requirements for the intended parents as well.³¹⁰

b. Intended Parent Requirements

International surrogacy involves the children crossing international borders.³¹¹ Because the Hague Treaty is currently the law meant to address the subject matter of children crossing international borders, the Hague Treaty is useful in understanding basic international standards for children crossing international borders.³¹² Unfortunately, because the Hague Treaty applies to adoption,³¹³ the Treaty principles do not fit neatly for gestational agreements.³¹⁴ However, numerous states have addressed rights and regulations surrounding domestic surrogacy.³¹⁵ Thus, laws from both the Hague Treaty and applicable state laws should be combined in order to address surrogacy in an international context.³¹⁶

Due to the Hague Treaty, the Department of State requires a home study for parents seeking intercountry adoption.³¹⁷ Both Virginia and Texas require that a home study occur, and that the study is taken into consideration when determining whether the

307. *See id.*

308. DEPARTMENT OF STATE, *supra* note 4.

309. 8 U.S.C § 1401 (2012). “The determination of citizenship of children born abroad to a U.S. citizen parent is the responsibility of the U.S. Department of State and is governed by U.S. law.” DEPARTMENT OF STATE, *supra* note 4.

310. *See, e.g.*, Tex. FAM. CODE ANN. § 160.756; VA. CODE ANN. § 20-160.

311. *See* DEPARTMENT OF STATE, *supra* note 4. The Department of State discusses a child born abroad who then must cross into the United States. *Id.*

312. *See Parentage Surrogacy Project, supra* note 181.

313. Intentional parentage determines that the intended parents are the legal parents at the moment the child is born without any sort of adoption process. *See* NEV. REV. STAT. § 126.750(d).

314. *See supra* Subsection III.B.2; Mortazavi, *supra* note 3, at 2275.

315. *See supra* Subsection II.B.3.

316. *See Experts’ Group Background Note, supra* note 227, at 4 (recognizing a need for an international solution to surrogacy).

317. *Hague vs. Non-Hague, supra* note 213.

gestational contract should be validated.³¹⁸ Because this is applied to children crossing international borders and in domestic gestational agreements, this standard should also be applied to international gestational agreements.³¹⁹ The Department of State already has procedures implemented for intercountry adoption home studies.³²⁰ Therefore, the procedures necessary for a home study in surrogacy could simply transfer over from current home study procedures.³²¹

In addition, the Department of State should require that the intended parents obtain education relating to surrogacy. The Department of State currently requires ten hours of education for intercountry adoption.³²² In regards to surrogacy, the Virginia statute requires a similar provision in that the parties are to receive “counseling concerning the effects of the surrogacy by a qualified health care professional or social worker.”³²³ Although the subject matter of education may vary, education of the medical procedure along with risks associated with the surrogate procedure creates more awareness of the involved risks to the intending parents.³²⁴ This added requirement for counseling and education creates an additional safeguard in the contract procedure.³²⁵

Although it could be argued that this creates additional work for the Department of State, the Department of State already has these measures in place for international adoption.³²⁶ It is simply expanding these measures to surrogacy.³²⁷ In addition, the State Department currently investigates and looks at each surrogate case individually.³²⁸ Thus, this recommended approach preempts the State Department’s current approach because this approach looks at each

318. See Tex. FAM. CODE ANN. § 160.756; VA. CODE ANN. § 20-160.

319. See TEX. FAM. CODE ANN. § 160.756; VA. CODE ANN. § 20-160; *Hague vs. Non-Hague*, *supra* note 213.

320. Because the Department of State already requires home studies, it already has both experience and procedures in place for home studies. See *Home Study Requirements*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T. OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/adoption-process/who-can-adopt/home-study-requirements.html> [<https://perma.cc/AZ3F-UFRL>] (last visited Oct. 7, 2016).

321. *Id.*

322. *Hague vs. Non-Hague*, *supra* note 213.

323. VA. CODE ANN. § 20-160(B).

324. Virginia requires that the parties seek counseling so that the parties are knowledgeable on the health risks associated with surrogacy. *Id.*

325. *Id.*

326. See *Hague vs. Non-Hague*, *supra* note 213.

327. See *id.*

328. See DEPARTMENT OF STATE, *supra* note 4.

surrogacy agreement before any medical procedures take place, instead of waiting until later on in the process.³²⁹ A proactive approach helps create predictability and diminishes the likelihood that problems will arise in the future.³³⁰

Unlike the Virginia and Florida statutes, the requirements should not take into consideration whether or not the intended parents are biologically related.³³¹ This reliance falls back on biology as an interpretation and would continue to leave children stateless because the agreement would not be valid unless there was a biological relationship between the intended parent and the child.³³² This requirement is similar to what the Department of State has in place now because biology determines parentage.³³³ Not only should the State Department require state court approval and set requirements for intended parents, but it should also require a contractual written agreement.³³⁴

c. Contractual Written Agreement

In addition to taking into consideration the requirements for the intended parents, the gestational contracts should be an express written agreement that adheres to certain standards set by the Department of State.³³⁵ Similar to the Nevada statute, the obligation of rights of each party should be expressly defined and spelled out.³³⁶ These surrogacy contracts must clearly state that one or both of the intended parents intend to be the legal parents of the child who was born from surrogacy.³³⁷ The contract should also clearly state that the donor or donors and the gestational carrier are willingly giving up all legal parental rights.³³⁸ As is the requirement in some state statutes, if

329. *See id.*

330. *See id.*

331. *See* FLA. STAT. ANN. § 742.15(d) (West 2003); VA. CODE ANN. § 20-158(E).

332. *See* FLA. STAT. ANN. § 742.15(d) (West 2003); VA. CODE ANN. § 20-158(E).

333. *See* DEPARTMENT OF STATE, *supra* note 4.

334. *See, e.g.,* NEV. REV. STAT. § 126.750.

335. *See id.* The Nevada statute requires a written gestational agreement that must comply with provisions set forth by the statute. *Id.*

336. *See id.*

337. *See, e.g., id.* Similarly, this approach is taken by Nevada in that it requires the intended parents to agree to all legal parental rights. *Id.*

338. *See, e.g., id.* Again, Nevada's statute requires donors and gestational carriers to relinquish all legal parental rights. *Id.*

the gestational carrier has a husband, he should also be a party to the contract.³³⁹ In addition, the intending parent or parents should sign a separate affidavit declaring his, her, or their legal rights and obligations.³⁴⁰

As with any contract, there is a potential for a party to breach.³⁴¹ Nevada's statute sets a clear approach in the case that a gestational agreement is breached.³⁴² There is potential for the intended parent to breach the gestational agreement by backing out and attempting to no longer claim parental responsibilities.³⁴³ However, the Nevada statute clearly states that even if the intended parent or parents breach a gestational agreement, the intended parent or parents are still obligated to support the child.³⁴⁴ This follows the logical thinking that the intentional parents caused the child's birth and therefore, should be responsible for his or her actions.³⁴⁵ Applying this principle, the California Court of Appeals stated that estoppel prevents a potential parent from "consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility."³⁴⁶ By still recognizing the intentional parentage as the determination for legal parentage in a breach, the child is still able to gain citizenship.³⁴⁷

Not only is there a possibility that the intended parents may breach, but the gestational carrier may breach as well.³⁴⁸ If the gestational carrier attempted to claim parentage over the child, the child would still have guaranteed citizenship through the intentional parents.³⁴⁹ The child would not be without a state, and issues regarding the breach of contract or parentage could be sorted out

339. See, e.g., TEX. FAM. CODE ANN. § 160.704(b); VA. CODE ANN. § 20-158; see also UNIF. PARENTAGE ACT § 801(a) (UNIF. LAW COMM'N 2002).

340. See NEV. REV. STAT. § 126.750(4)(d).

341. See Points, *supra* note 5, at 2 (noting how the intended mother, Yuki Yamada, determined she no longer wanted anything to do with the baby after she divorced the intended father).

342. See NEV. REV. STAT. §§ 126.760, .780.

343. This is what occurred in the Baby Manji case, which caused the child to be born without citizenship. See Points, *supra* note 5, at 2.

344. See NEV. REV. STAT. § 126.760(2).

345. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 287 (Cal. Ct. App. 1998).

346. *Id.*

347. *Citizenship Through Parents*, *supra* note 81.

348. See NEV. REV. STAT. § 126.780 (addressing the possibility of the gestational carrier or her husband breaching the gestational agreement).

349. See *supra* Section II.B.

without the child being in limbo and stateless.³⁵⁰ The Nevada statute calls for a “court of competent jurisdiction” to determine the parentage based on the best interest of the child.³⁵¹ Although this analysis does not fit neatly in an international surrogacy case, the Department of State should work with the foreign country in order to determine the best interest of the child.³⁵² The Department of State is in the best position to work with foreign nations to resolve issues with foreign parties.³⁵³ Furthermore, by creating a proactive approach, the risk of these issues occurring diminishes. While this solution cannot perfectly protect intended American parents, it successfully ensures citizenship of the child.

d. Accredited Agencies

The Department of State should require each case of surrogacy to go through an accredited agency, just as in the case of an intercountry adoption proceeding.³⁵⁴ This gives both the United States and the foreign state control over the agencies that perform the medical procedures.³⁵⁵ In addition, it ensures that the Department of State is aware of the conditions relating to the medical procedure and the surrogate’s environment.³⁵⁶ To be an accredited agency for an adoption proceeding, the agency and the Department of State must have a written agreement.³⁵⁷ This type of written agreement should be executed as well in international surrogacy cases.³⁵⁸ By going through an accredited agency, the Department of State is able to ensure the agency is in compliance with its standards.³⁵⁹

350. *See supra* Section II.B.

351. *See* NEV. REV. STAT. § 126.780(2).

352. Because the gestational agreement should be required to go through an accredited agency, the Department of State should be able to work closely with foreign nations in order to remedy all breaches. *See infra* Subsection IV.B.1.d.

353. *See* DEPARTMENT OF STATE, *supra* note 4.

354. *The Role of the Accrediting Entity*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/hague-convention/agency-accreditation/the-role-of-the-accrediting-entity.html> [<https://perma.cc/ZFV3-DBYH>] (last updated Jan. 17, 2014).

355. *See id.*

356. *See id.* An accredited agency also addresses concerns regarding the exploitation of gestational carriers because the Department of State would be aware of the agency’s conditions. *See id.*

357. *See id.*

358. *See id.*

359. *See id.*

2. Compliance with Hague Conference Standards

There are currently no clear guidelines on international surrogacy; however, the Hague Treaty has set clear standards for children crossing international borders in adoption cases.³⁶⁰ In addition, the Hague Conference is currently examining and studying possible solutions for international surrogate cases through an Experts' Group.³⁶¹ The Department of Bureau, part of the Hague Conference, did mention certain standards to the Experts' Group that it would like to see implemented with the constant focus being what is in the best interest for the child.³⁶² The current State Department's interpretation of biology does not meet these standards because it leaves the possibility for a child to be born without a citizenship.³⁶³ A child born without any legal parents or citizenship is clearly not in the best interest of the child and denies a child a basic right of citizenship.³⁶⁴ Unlike the current biological approach, the intentional parentage approach is in the best interest of the child because it ensures the child will be born with a citizenship.³⁶⁵

Not only is the intentional approach consistent with the best interest of the child, but the steps in approving a surrogate agreement would create certainty and do not leave intended parents wondering if their child will be able to gain U.S. citizenship.³⁶⁶ Lastly, the intentional approach respects state sovereignty in the United States, while still providing a national uniform approach.³⁶⁷ The biological approach is not in line with the Hague Conference standards because it has the chance to leave children stateless.³⁶⁸ This biological approach and result is exactly the reason the Hague Conference nominated an Experts' Group to investigate international surrogacy.³⁶⁹ Instead, parentage by intent solves the problem of statelessness and conforms to the Hague standards by the Department of State approving gestational agreements before any sort of medical procedure begins.³⁷⁰ The Department of State would

360. See *supra* Subsection III.B.1.

361. See *supra* Subsection III.B.2.

362. *Experts' Group Background Note*, *supra* note 227, at 15-16.

363. See *supra* Section IV.A.

364. See *supra* Section IV.A.

365. See *supra* Subsection IV.B.1.

366. See DEPARTMENT OF STATE, *supra* note 4.

367. See *supra* Subsection IV.B.1.

368. See DEPARTMENT OF STATE, *supra* note 4.

369. See *generally* *Experts' Group Background Note*, *supra* note 227.

370. See *id.* at 16-17.

approve gestational agreements by requiring state court approval, standards for the intended parents, written agreements, and the medical procedures to go through an accredited agency.³⁷¹

CONCLUSION

In recent years, international surrogacy has gained momentum.³⁷² The Department of State has determined that biology is the deciding factor on whether or not a parent is able to claim a legal status over the child and thus, over whether the child is able to claim a U.S. citizenship.³⁷³ The current interpretation leaves a hole for children born to intended parents who are U.S. citizens but who lack any sort of genetic connection to the child.³⁷⁴ This hole creates a risk of children being born without any sort of citizenship, leaving both the parents and child in limbo.³⁷⁵

Instead of taking a traditional biological approach, the Department of State should move toward a more expansive interpretation to determine legal parental status based on intent.³⁷⁶ In order to combat the potential risks, the Department of State should continue to act as the Centralized Authority for all surrogacy cases and should require approval of all gestational agreements before any medical procedures commence. Approval of gestational agreements should be based on state-court approval, requirements set for intended parents, written agreements, and the use of an accredited agency. After these gestational agreements are approved and the surrogacy procedure commences, citizenship would be granted to the child at birth. This approach ensures that children will have guaranteed citizenship once he or she is born, instead of retroactively trying to figure out how to create citizenship for a stateless child.

371. See *supra* Subsection IV.B.1.

372. Mortazavi, *supra* note 3, at 2250.

373. See DEPARTMENT OF STATE, *supra* note 4.

374. See *id.*

375. See *id.*

376. See *supra* Part IV.