IN THE SUPREME COURT OF IOWA

No. 17–0376

Filed February 16, 2018

P.M. and **C.M.,**

Appellees,

vs.

T.B. and **D.B.,**

Appellants.

Appeal from the Iowa District Court for Linn County, Christopher L. Bruns, Judge.

Surrogate mother and her husband appeal rulings of district court enforcing gestational surrogacy contract, terminating their presumptive parental rights, and awarding legal and physical custody of the child to the biological father. **AFFIRMED.**

Caitlin L. Slessor of Shuttleworth & Ingersoll, Cedar Rapids (until withdrawal); Harold J. Cassidy of The Cassidy Law Firm, Shrewsbury, New Jersey; and Andrew B. Howie of Shindler, Anderson, Goplerud & Weese P.C., West Des Moines, for appellants.

Philip J. De Koster of De Koster & De Koster, PLLC, Hull, and Kevin C. Rigdon of Howes Law Firm, P.C., Cedar Rapids, for appellees.

WATERMAN, Justice.

In this appeal, we must decide a question of first impression: whether gestational surrogacy contracts are enforceable under Iowa law. The plaintiffs, the intended parents, are a married couple unable to conceive their own child. They signed a contract with the defendants, the surrogate mother and her husband, who, in exchange for future payments of up to $13,000 and medical expenses, agreed to have the surrogate mother impregnated with embryos fertilized with the plaintiff-father's sperm and the ova (eggs) of an anonymous donor. The defendants agreed to deliver the baby at birth to the intended parents. The surrogate mother became pregnant with twins, but after demanding additional payments, refused to honor the agreement. The babies were born prematurely, and one died. The intended parents sued to enforce the contract and gain custody of the surviving child. The district court, after genetic testing, ruled the contract is enforceable, terminated the presumptive parental rights of the surrogate mother and her husband, established paternity in the biological father, and awarded him permanent legal and physical custody. The defendants appealed, and we retained the case.

For the reasons explained below, we affirm the rulings of the district court. We hold this gestational surrogacy contract is legally enforceable in favor of the intended, biological father against a surrogate mother and her husband who are not the child's genetic parents. The intended parents would not have entrusted their embryos to the surrogate mother, and this child would not have been born, without their reliance on the surrogate's contractual commitment. A contrary holding invalidating surrogacy contracts would deprive infertile couples of the opportunity to raise their own biological children and would limit the

personal autonomy of women willing to serve as surrogates to carry and deliver a baby to be raised by other loving parents. The district court properly established paternity in the biological father based on the undisputed DNA evidence and terminated the presumptive parental rights of the surrogate mother and her husband. The district court correctly awarded permanent custody of the child to the biological, intended father.

I. Background Facts and Proceedings.

P.M. and C.M. were high school sweethearts but parted ways when P.M. joined the Navy upon graduation. After marrying and divorcing other spouses, they reconnected and married each other in 2013. They now live in Cedar Rapids. P.M. had two children from his first marriage, and C.M. had four children from hers. The Ms were nearing age fifty and wanted to have a child together. C.M. was no longer able to conceive, so the Ms placed an advertisement on Craigslist in 2015 seeking a woman willing to act as a surrogate mother.

T.B. and D.B. married each other in January 2009 and live in Muscatine. T.B. has four children from a prior marriage; D.B. has no children and had never been married. The Bs want to have children together. In 2010, T.B. had a tubal pregnancy which was life-threatening and incapable of leading to the birth of a viable child, so she surgically terminated the pregnancy. T.B. and D.B. continued to try to conceive without success. The Bs realized they would need the services of a reproductive endocrinologist in order to have a child. T.B. learned that the Bs' insurance would not cover infertility treatment or in vitro fertilization (IVF). They decided they needed to supplement D.B.'s income to pay for assisted reproduction procedures.

T.B responded to the Ms' Craigslist advertisement. The four met for dinner in Coralville and got along well at first. They agreed that T.B. would gestate two embryos fertilized in vitro with P.M.'s sperm and the eggs of an anonymous donor. The Ms selected Midwest Fertility Clinic (Midwest) in Downers Grove, Illinois, to perform the IVF and embryo transfers. Midwest required a written contract between the parties, so the Ms hired a lawyer to draft the agreement. Its stated purpose was "to enable the Intended Father [P.M.] and the Intended Mother [C.M.] to have a child who is biologically related to one of them." In exchange for the gestational service, the Ms agreed to pay up to $13,000 for an IVF procedure for T.B. to enable her and D.B. to conceive their own child. This payment was conditioned upon T.B. surrendering custody of a live child upon birth.

> The Intended Parents [the Ms] agree that after the Gestational Carrier [T.B.] has delivered a live child pursuant to this contract for the Intended Parents, the Intended Parents will pay for an IVF (Invitro Fertilization) cycle for the Gestational Carrier and her husband up to the amount of $13,000.

The contract also provided that the Ms would pay T.B.'s pregnancy-related medical expenses. At T.B.'s request, an additional term was included stating that "[i]n the event the child is miscarried or stillborn during the pregnancy, the amount of $2,000 will be paid to the Gestational Carrier." The four adults signed the final "Gestational Carrier Agreement" (the Surrogacy Agreement) on January 5, 2016.

The Surrogacy Agreement provided that T.B.

> understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may carry to term and give birth to pursuant to this agreement.

T.B. and D.B. "agree[d] to surrender custody of the child to the Intended Parents immediately upon birth" and "agree[d] that the Intended Parents are the parents to be identified on the birth certificate for this child." The Surrogacy Agreement further provided,

> In the event it is required by law, the Gestational Carrier and her husband agree to institute and cooperate in proceedings to terminate their respective parental rights to any child born pursuant to the terms of this agreement . . . .

The Surrogacy Agreement also stated that

> each party has been given the opportunity to consult with an attorney of his or her own choice concerning the terms [and] legal significance of this agreement, and the effect it has upon any and all interests of the parties.

T.B. and D.B. did not exercise their right to consult a lawyer before the Surrogacy Agreement was signed by all four parties. But each person acknowledged in writing

> that he or she has carefully read and understood every word in this agreement and its legal effect, and each party is signing this agreement freely and voluntarily and that neither party has any reason to believe that the other party or parties did not understand fully the terms and effects of this agreement, or that the other party did not freely and voluntarily execute this agreement.

On March 27, Midwest implanted two embryos into T.B.'s uterus. The embryos were the ova of an anonymous donor fertilized with P.M.'s sperm. On April 4, blood testing confirmed T.B.'s pregnancy. The parties' relationship soon began to break down over their disagreement as to payment of medical expenses.[1] All four attended the first

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[1]The Surrogacy Agreement provided,

> The Intended Father and the Intended Mother will pay expenses incurred by the Gestational Carrier, more specifically defined as follows:
>
> . . . .

ultrasound, which D.B. videotaped. The Ms later objected to his videotaping and to T.B. posting information about the baby on social media.

Their relationship worsened after the women exchanged text messages on April 13. They were discussing whether T.B. could attend a doctor's appointment scheduled by the IVF coordinator when C.M. wrote, "Well we have to go next Thursday [because the coordinator] made the [appointment] and this is our journey not anyone else's. She said you have to end with [a doctor's] exam in Chicago and [a] couple more ultrasounds . . . ." T.B. replied, "I'm not going through this with you today. She just called me." C.M. replied, "We are in charge we hired you so just let us be parents and enjoy this ok!"

A second ultrasound confirmed that T.B. was carrying viable twins. T.B. shared that news with the Ms, but the relationship remained rocky. In late April, C.M. texted this to T.B.:

> Every time we question you or try to make a decision (as we should be able to) we are paying you, we hired you, and we are in charge, you get mad and upset and blow up. A carrier shouldn't act like that as the doctors told me they should be saying yes ma'am Whatever you guys want to do. But you can't stand not being in charge and you have some mental disorder for sure but yet you blame everything on us. . . . So if you wanna say u have it bad try feeling how we feel. This is our baby not yours and imagine how U would feel. I know u don't care but just for a moment stop blaming us and look what U have done to us only cuz we have ask[ed] u to do

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> B. Pregnancy-related medical care received by the Gestational Carrier or the minor person during the pregnancy or delivery of the minor person and for medically necessary postpartum care for the Gestational Carrier and the minor person.

The Agreement gave the Ms the option "to pay expenses from time to time during the course of the pregnancy and delivery" while requiring them to pay all consideration for services and expenses "upon surrender of custody of the child to the Intended Parents and termination, if any, of parental rights of the Gestational Carrier and her husband."

> something. Compare the two and u will see we have NEVER did u wrong. This is a nightmare.

When T.B. replied, "You're crazy," C.M. wrote back, "Oh really that's what everyone says about u[.]" T.B. then stated that "everything can be handled through attorneys from here[.]" The Bs retained an attorney to speak for them and cut off direct communication with the Ms, who nevertheless persisted in trying to reach them for updates on the pregnancy.

In a May 20 letter from her attorney, T.B. sought more money from the Ms beyond the $13,000 agreed to in their contract so she could use a costlier clinic for her own IVF. T.B. wanted to replace Midwest because it insisted she use her own medical insurance and because C.M. told her Midwest employees said T.B. was crazy. The clinic T.B. wanted to use charged over twice as much—$30,000—for IVF. T.B. insisted that the Ms pay the higher cost for her to continue to serve as a gestational carrier.

On August 19, P.M. sent Facebook messages to D.B.'s sister, using racial slurs and profanity to insult D.B. D.B.'s sister shared the communication with T.B. On August 24, C.M. sent an email to T.B. and T.B.'s attorney, triggering a lengthy exchange, during which C.M. called T.B. the "N" word. That statement, along with the comments P.M. sent to D.B.'s sister, convinced T.B. that the Ms were racist. T.B. then called the Ms' attorney. When T.B. expressed concern that the Ms would not pay her, the Ms' attorney assured T.B. that the money for the Bs had already been set aside. The Ms' attorney attempted to make payment arrangements with T.B. and arrange P.M.'s listing on the birth certificate, but those matters remained unresolved. Later that day, T.B. decided that she would not turn over the babies to the Ms.

Twin babies were born thirteen weeks prematurely on August 31. T.B. did not tell the Ms about the birth. The babies were placed in the neonatal intensive care unit. One died eight days after birth. T.B. did not inform the Ms about the baby's illness or death. The Bs unilaterally arranged for the deceased baby's cremation.

On October 24, the Ms, still unaware of the birth, filed a petition for declaratory judgment and temporary and permanent injunction. On October 31, the Ms filed a motion for an emergency ex parte injunction, alleging their belief that the babies had been born. The same day, the district court entered an order granting a temporary injunction that ordered T.B. and D.B. to surrender custody of "Baby H" to the Ms. The order prohibited T.B. and D.B. from acting inconsistently with the terms of the Surrogacy Agreement. The Ms have had physical custody of Baby H since that date.

On November 1, the Bs informed the court they would be filing an answer and counterclaim. The next day, the hospital filed a motion to appoint an interim medical decision-maker for Baby H. The Ms joined the hospital's motion, arguing that P.M., as the biological father, should make the medical decisions. The Bs filed a resistance and cross-motion requesting that the court vacate the October 31 injunction. The district court conducted an emergency hearing on November 4 and ruled the temporary injunction would remain in effect. The court appointed a guardian ad litem (GAL) to represent Baby H's interests and to make medical decisions for the child. The court ordered all parties to undergo genetic testing.

The Ms filed an amended petition, requesting a declaratory judgment enforcing the Surrogacy Agreement and a temporary and permanent injunction barring the Bs from interfering with the Ms' right

to raise Baby H. The Ms also requested that the court disestablish D.B.'s paternity and T.B.'s maternity and establish P.M. as Baby H's father and C.M. as Baby H's mother. The Bs responded by filing an answer and counterclaim. The Bs sought a declaration that T.B. is the biological and legal mother of the babies and that D.B. is the legal father of the babies. The Bs also sought a declaration that P.M. has no legal right to a relationship with the surviving baby and that the Surrogacy Agreement is unenforceable under Iowa law and the United States Constitution.

The next hearing was held on November 16. The Bs filed a request to dissolve the temporary injunction and requested an order awarding temporary custody of the baby during the litigation and permanent custody to the Bs. The Ms resisted. On the same day, the Bs filed a motion to dismiss and motion for summary judgment. The Bs claimed T.B. was the mother of the baby and the legal mother on the baby's birth certificate. They supported their motion for summary judgment with expert medical affidavits describing T.B.'s biological connection with the child from gestating and giving birth. The Bs argued that the Surrogacy Agreement is unenforceable as violating the constitutional rights of T.B. and the baby and Iowa statutes and public policy. The Bs sought permanent physical and legal custody of the baby.

The Ms filed a notice with the results of the genetic testing, which indicated a 99.99% probability that P.M. is the baby's biological father, excluded D.B. as the biological father, and excluded T.B. as the biological mother.

The district court denied the Bs' motion to vacate the injunction, which precluded the Bs from contact with the baby. The Ms resisted the Bs' dispositive motions and filed their own cross-motion for summary

judgment, arguing that the Surrogacy Agreement is enforceable and that Iowa law favors biological (genetic) parents.

After an evidentiary hearing on November 28, the district court entered a ruling on December 7 denying the Bs' application for temporary custody. At the hearing, the GAL expressed hesitation about agreeing to a shared care arrangement based on her inability to learn more about one of T.B.'s children aging out of foster care and the lack of a custodial arrangement with T.B.'s other children. The district court concluded that P.M., as the biological father, has the superior constitutional right to raise the baby. The court awarded sole legal custody to P.M. pending final resolution of the case. The court also determined this was in the best interest of Baby H, stating,

> [P.M.] is divorced from his first wife but has successfully parented children from his prior marriage. He has a good relationship with his minor son. He has a somewhat strained relationship with an adult daughter. That strained relationship is primarily a product of his divorce. [P.M.] is gainfully employed and has stable employment. The GAL reported that all indicators pointed toward [P.M.] being a good, able father and a suitable parent for Baby H.

The Bs resisted the Ms' motion for summary judgment. The Bs argued that T.B. is the biological and legal mother of Baby H, having given birth to her. The Ms responded, arguing that P.M. is the only genetic parent the law recognizes. The Ms also claimed that Iowa public policy supports gestational carrier agreements. The Ms argued that the Bs should be estopped from stating a constitutional claim on the basis of the emotional bond established between T.B. and Baby H because the Bs hid the birth of Baby H from the Ms in violation of their contract.

On December 28, the Ms filed an application to establish birth certificates. The Bs resisted the application. The court delayed ruling on

the application because dispositive motions were pending and could impact the resolution of the birth certificate issues.

The Bs filed a petition for writ of certiorari or, alternatively, an application for interlocutory review with this court. On January 11, 2017, we denied the petition for writ of certiorari and the application for interlocutory appeal. We issued procedendo on January 28 directing the district court to proceed as if there had been no appeal.

The district court then issued its ruling on the dispositive motions and on Ms' request for an order regarding the babies' birth certificates. The court found that T.B. is *not* the biological or legal mother of the babies and that D.B. is not the legal father. The court found that P.M. has a legal right to a relationship with Baby H and is entitled to permanent custody. The court concluded that the Surrogacy Agreement was enforceable as a matter of law. The court denied the Bs' motion to dismiss and motion for summary judgment and granted the Ms' cross-motion for summary judgment. The court ruled that P.M. is the biological father of the babies and directed the Iowa Department of Public Health (DPH) to amend the babies' birth certificates accordingly.

The Bs appealed, and we retained the case.

II. Standard of Review.

We review an order granting summary judgment for correction of errors at law. *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451, 455 (Iowa 2016). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 398 (Iowa 2017) (quoting *Barker v. Capotosto*, 875 N.W.2d 157, 161 (Iowa 2016)). "We . . . view the record in the light most favorable to the nonmoving party and will grant that party all reasonable

inferences that can be drawn from the record." *Id.* (quoting *Baldi*, 880 N.W.2d at 455). "Summary judgment is appropriate if the only conflict concerns the legal consequences of undisputed facts." *Id.* (quoting *Peppmeier v. Murphy*, 708 N.W.2d 57, 58 (Iowa 2005)).

"We generally review . . . termination of parental rights proceedings de novo." *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014). But our review of issues of statutory interpretation on parental rights is for correction of errors at law. *Id.* "Our review of constitutional claims is de novo." *Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999).

III. Analysis.

We must decide whether the district court erred by enforcing the gestational surrogacy contract, terminating the presumptive parental rights of the surrogate mother and her husband, and placing permanent custody of Baby H with the biological father. We begin with an overview of the law governing gestational surrogacy arrangements. We next determine whether this gestational surrogacy contract is enforceable under Iowa law. We then address the respective legal rights of the parties. We conclude the district court correctly enforced the contract.

A. Overview of Gestational Surrogacy Arrangements. "In general terms, surrogacy 'is the process by which a woman makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else.' " *In re Paternity of F.T.R.*, 833 N.W.2d 634, 643 (Wis. 2013) (quoting Thomas J. Walsh, *Wisconsin's Undeveloped Surrogacy Law*, 85-Mar. Wis. Law. 16, 16 (2012) [hereinafter Walsh]). The woman who carries the child is the "surrogate mother." An "intended parent" is "an individual . . . who manifests the intent . . . to be legally bound as the parent of a child resulting from assisted or collaborative reproduction." *Id.* (quoting Model

Act Governing Assisted Reprod. Tech. § 102(19) (Am. Bar Ass'n Proposed Act Feb. 2008)). Surrogacies are categorized as "traditional" or "gestational." *Id.*

> In a traditional surrogacy, the surrogate is the genetic mother of the child and is artificially inseminated with the sperm of the intended father or a sperm donor. In a gestational surrogacy, the surrogate is not genetically related to the child; instead, "sperm is taken from the father (or from a donor) and an egg is taken from the mother (or from a donor), fertilization happens outside the womb (called *in vitro* fertilization), and the fertilized embryos are then implanted into the surrogate mother's uterus."

Id. (citation omitted) (quoting Walsh, 85-Mar. Wis. Law. at 17). This case involves a gestational surrogacy because T.B. is not genetically related to the child. T.B. is the surrogate mother, while P.M. and C.M. are the intended parents.

The law regarding surrogacy agreements has evolved with advances in medically assisted reproductive science.

> IVF, egg donation, and gestational surrogacy are decidedly modern phenomena. Indeed, not all that long ago, IVF was still (literally) the stuff of science fiction. *See* Aldous Huxley, *Brave New World* 1 (1932) (" 'And this,' said the Director opening the door, 'is the Fertilizing Room.' "). The first IVF-assisted human birth didn't occur until 1978, and it wasn't until the mid to late 1980s that doctors began to use gestational surrogates in conjunction with IVF procedures.
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> To be sure, IVF and other assisted reproductive technologies represent revolutionary biomedical advances; they have enabled countless couples to conceive who otherwise couldn't have had children biologically. But these advances are not without their complexities. IVF-assisted reproduction involving (as it does here) third-party egg donors and gestational surrogates "raise moral and ethical issues" that can affect multiple, and often divergent, interests—among them, those of biological fathers, egg donors, surrogate mothers, and the resulting embryos. Not surprisingly, the States have tackled IVF- and surrogacy-related issues in very different ways.

Morrissey v. United States, 871 F.3d 1260, 1269 (11th Cir. 2017) (citations omitted); *see generally* George L. Blum, Annotation, *Validity of Surrogate Parenting Agreement*, 19 A.L.R.7th 179 (2017) (describing how different states have addressed the validity of surrogacy agreements). "The ability to create a family using [assisted reproductive technology] has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage." *In re Paternity of F.T.R.*, 833 N.W.2d at 644.

A majority of states lack statutes addressing surrogacy. *Id.* As a result, "cases often involve ad hoc procedures attempting to effectuate the parties' intent by analyzing surrogacy issues under the state's statutes for [termination of parental rights], adoption, custody and placement, and the like." *Id.* Courts adjudicating disputes over the legality of surrogacy agreements in such states "are forced to confront issues of the most difficult nature." *Id.* at 645.

In the minority of states with statutes specifically addressing surrogacy, the enactments generally impose greater restrictions on traditional surrogacies, and most of the statutes can be grouped into three categories:

> First, some states have legislatively prohibited all surrogacy contracts, declaring their terms unenforceable and, in some instances, imposing criminal penalties for those who attempt to enter into or assist in creating such a contract. *See, e.g.*, D.C. Code §§ 16–401(4)(A)–(B),–402(a) (prohibiting all "[s]urrogate parenting contracts" as defined by statute); Mich. Comp. Laws Ann. §§ 722.851–.863 (declaring surrogate parentage contracts, as defined by statute, to be "void and unenforceable" and imposing criminal penalties for participation in a "surrogate parentage contract for compensation" or a surrogacy contract involving a surrogate who is an unemancipated minor or who has "a mental illness or developmental disability"). A second category of states prohibit only certain types of surrogacy contracts—typically those involving a traditional surrogacy. *See, e.g.*, Ky. Rev. Stat. Ann. § 199.590(4) (prohibiting traditional surrogacy

> contracts, as defined by statute, without addressing gestational surrogacies); N.D. Cent. Code §§ 14–18–05, –08 (declaring traditional surrogacy agreements void but allowing gestational surrogacies by providing that "[a] child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any"). Finally, states in the third category authorize both traditional and gestational surrogacy contracts, subject to regulation and specified limitations. *See, e.g.*, N.H. Rev. Stat. Ann. §§ 168–B:1 to –B:32 (generally permitting traditional and gestational surrogacy agreements subject to certain conditions, including a traditional surrogate's right to revoke the agreement within seventy-two hours of birth); Va. Code Ann. §§ 20–156 to 20–165 (generally permitting surrogacy contracts, as defined by statute, and providing a multi-step process for judicial pre-approval of such contracts); Wash. Rev. Code Ann. §§ 26.26.210–.260 (generally permitting traditional and gestational surrogacy agreements but prohibiting compensation beyond reasonable expenses and agreements involving a surrogate who is "an unemancipated minor female or a female diagnosed as having an intellectual disability, a mental illness, or developmental disability").

In re Baby, 447 S.W.3d 807, 819–20 (Tenn. 2014).[2] "Tennessee has a unique surrogacy statute" that defines surrogacy for adoption purposes but states, "Nothing [herein] shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the [G]eneral [A]ssembly." *Id.* at 820–21 (quoting Tenn. Code Ann. § 36-1-102(48)(C) (2014)). The Tennessee Supreme Court held that the public policy of that state "does not prohibit the enforcement of traditional surrogacy contracts" yet concluded many contract terms were unenforceable, including compensation "contingent upon the termination of the surrogate's parental rights." *Id.* at 840

[2] *See also* Cal. Fam. Code § 7962 (West, Westlaw current through ch. 2 of 2018 Reg. Sess.) (enacted by 2012 Cal. Legis. Serv. ch. 466 (A.B. 1217) (West)) (regulating surrogacy contracts); N.Y. Dom. Rel. Law § 122 (McKinney, Westlaw current through L. 2018, ch. 1) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260 app. at 2376 (2017) (cataloging statutes addressing gestational surrogacy).

(adjudicating claim of surrogate birth mother who was the biological, genetic mother). The *In re Baby* court called for the state "General Assembly to follow the lead of other state legislatures that have enacted statutes to address the fundamental questions related to surrogacy." *Id.*

There are two "commonly cited model acts dealing with surrogacy agreements[:] the American Bar Association Model Act Governing Assisted Reproductive Technology (2008) and article 8 of the Uniform Parentage Act (2002), drafted by the National Conference of Commissioners on Uniform State Laws." *Id.* at 820 n.6.

> Both of these model acts fall into the third category of surrogacy statutes, allowing traditional and gestational surrogacy contracts subject to extensive regulation that includes judicial pre-approval, limits on compensation, and provisions concerning the revocation rights of the parties to the agreement.

Id. The 2017 Uniform Parentage Act (UPA) imposes greater restrictions on traditional surrogacy agreements based on the birth mother's status as a genetic parent:

> As was true of UPA (2002), Article 8 of UPA (2017) regulates and permits both genetic (often referred to as "traditional") and gestational surrogacy agreements. But UPA (2017) differs in the way that it regulates these two types of surrogacy agreements. UPA (2002) set forth a single set of requirements that applied equally to genetic and gestational surrogacy agreements. While UPA (2017) continues to permit both types of surrogacy, UPA (2017) imposes additional safeguards or requirements on genetic surrogacy agreements. . . . This differentiation between genetic and gestational surrogacy is intended to reflect both the factual differences between the two types of surrogacy as well as the reality that policy makers view these two forms of surrogacy as being quite different. Of the states that permit surrogacy, most permit *only* gestational surrogacy agreements.

Unif. Parentage Act art. 8 cmt. at 72 (Unif. Law Comm'n 2017).

The Ohio Supreme Court held *gestational* surrogacy contracts are enforceable in the absence of enabling legislation. *J.F. v. D.B.*, 879 N.E.2d 740, 741–42 (Ohio 2007) ("[N]o public policy is violated when a gestational-surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman's artificially inseminated egg."). And the California Supreme Court enforced a gestational surrogacy contract in favor of the biological parents and rejected constitutional challenges by the gestational surrogate before that state enacted legislation regulating surrogacy contracts. *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (en banc). The *Calvert* court concluded,

> It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.

Id. at 787; *see also In re Baby S.*, 128 A.3d 296, 306–07 (Pa. Super. Ct. 2015) ("The legislature has taken no action against surrogacy agreements despite the increase in common use . . . . Absent an established public policy to void the gestational carrier contract at issue, the contract remains binding and enforceable against [the intended mother]."). The Wisconsin Supreme Court held that a traditional surrogacy contract was enforceable without enabling legislation "unless enforcement is contrary to the best interests of the child." *In re Paternity of F.T.R.*, 833 N.W.2d at 638. But the New Jersey Supreme Court held that a traditional surrogacy contract was unenforceable without legislative authorization. *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988).

The only Iowa legislation specifically mentioning surrogacy exempts traditional "surrogacy arrangements" from the criminal statute that prohibits selling babies. *See* Iowa Code § 710.11 (2017). Against this backdrop, we turn to the issue of whether the Surrogacy Agreement at issue is enforceable under Iowa law.

B. Whether the Surrogacy Agreement Is Enforceable Under Iowa Law. T.B. argues the Surrogacy Agreement is unenforceable under Iowa law as inconsistent with statutory provisions and public policy. We first examine whether this contract between consenting adults is "prohibited by statute, condemned by judicial decision, [or] contrary to the public morals." *Dier v. Peters*, 815 N.W.2d 1, 12 (Iowa 2012) (quoting *Claude v. Guar. Nat'l Ins.*, 679 N.W.2d 659, 663 (Iowa 2004)). We find no such statutory or judicial prohibition in our state. To the contrary, the Iowa legislature tacitly approved of surrogacy arrangements by exempting them from potential criminal liability for selling children. "Also, we need to consider the public policy implications of an opposite ruling." *Id.* Banning gestational surrogacy contracts would deprive infertile couples of perhaps the only way to raise their own biological children and would limit the contractual rights of willing surrogates. We join the better-reasoned cases from other jurisdictions rejecting arguments that gestational surrogacy contracts are void against public policy.

1. *Whether the Surrogacy Agreement is inconsistent with statutory provisions.* Iowa Code section 710.11 expressly exempts surrogacy arrangements from criminal liability for selling children and provides,

> A person commits a class "C" felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section *does not apply to a surrogate mother arrangement.* For purposes of this

> section, a "*surrogate mother arrangement*" means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple.

Iowa Code § 710.11 (first emphasis added). This provision was enacted in 1989, 1989 Iowa Acts ch. 116, § 1, one year after extensive national publicity over the decision of the New Jersey Supreme Court invalidating a surrogacy contract as contrary to that state's adoption statutes, including its "baby selling" prohibition on payment of money to adopt a child. *In re Baby M*, 537 A.2d at 1250 & n.10. Importantly, the *Baby M* court stated, "[O]ur holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts." *Id.* at 1235. The Iowa legislature did just that for our state in its next session—expressly exempting surrogacy arrangements from the criminal prohibition on selling babies. The Iowa enactment tracked the surrogacy arrangement at issue in *Baby M*.

In *Baby M*, a married couple, William and Elizabeth Stern wanted to raise a child, but Elizabeth feared her medical condition rendered pregnancy a serious health risk. *Id.* Mr. Stern's family had perished in the Holocaust, and as the "only survivor, he very much wanted to continue his bloodline." *Id.* He responded to the advertisements of a fertility clinic. *Id.* at 1236. So did Mary Beth Whitehead, who was motivated by "her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the 'gift of life'); she also wanted . . . $10,000 to help her family." *Id.* Stern and Whitehead entered into a surrogacy contract. *Id.* "The contract provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, . . . [and] deliver it to the Sterns" for $10,000 to be paid after the child's

birth. *Id.* at 1235. Whitehead agreed in the contract to "do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child." *Id.* The artificial insemination was successful, and Whitehead gave birth to Baby M after an uneventful pregnancy. *Id.* at 1236. Whitehead, however, had developed a strong emotional attachment. *Id.* When the Sterns arrived at hospital to see the baby, Whitehead "broke into tears and . . . talked about how the baby looked like her other daughter." *Id.* She made clear to the Sterns that she was unsure she could give up the child. *Id.* Three days after the birth, she turned the baby over to the Sterns, who "were thrilled with their new child." *Id.* But their legal battle ensued over custody and contract rights, with the New Jersey Supreme Court ultimately invalidating the surrogacy contract, awarding custody of the child to the Sterns, and allowing Whitehead visitation. *Id.* at 1234, 1263. While concluding that New Jersey's "present laws do not permit the surrogacy contract used in this case[,]" the court held "the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional restraints." *Id.* at 1264.

We conclude, based on the timing of the enactment of Iowa Code section 710.11, the very next legislative session, that our state's general assembly chose in 1989 to allow surrogacy arrangements, not prohibit them. Section 710.11 specifically mentions artificial insemination of the birth mother (who is the genetic or biological mother, as in *Baby M*), but we decline to infer the legislature intended to allow only traditional surrogacy when the birth mother is the genetic mother and yet criminalize gestational surrogacy arrangements. IVF, allowing implantation in the surrogate mother of embryos from donor eggs, was then in its infancy and had not been the subject of a court decision of

national prominence. As other courts have noted,[3] a gestational surrogacy in which the birth mother lacks a genetic connection to the child raises fewer concerns than the traditional surrogacy expressly mentioned in section 710.11. The legislature's decision to allow traditional surrogacy arrangements can be taken as a signal that it would also allow gestational surrogacy arrangements. We conclude that neither traditional nor gestational surrogacy contracts are prohibited under section 710.11.

Our conclusion is reinforced by the regulations adopted by the DPH that specifically contemplate IVF gestational surrogacy agreements. The regulations are entitled "Establishment of new certificate of live birth following a birth by gestational surrogate arrangement." *See* Iowa Admin. Code r. 641—99.15. These regulations enjoy a presumption of validity with the force of law. *See Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 533 (Iowa 2017) (noting that "[a]n agency rule is 'presumed valid unless the party challenging the rule proves "a 'rational agency' could not conclude the rule was within its delegated authority." ' " (quoting *Meredith Outdoor Advert., Inc. v. Iowa Dep't of Transp.*, 648 N.W.2d 109, 117 (Iowa 2002))); *Davenport Cmty. Sch. Dist. v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 909 (Iowa 1979) (stating "[t]he valid

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[3]*See In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (pointing out that for a "traditional" surrogacy, "[t]he resulting offspring . . . is genetically related to the 'intended' father and the '*un*intended' mother" and acknowledging that problems arise because "the so-called 'surrogate' mother is not *only* the woman who gave birth to the child, but the child's *genetic* mother as well"); *J.F.*, 879 N.E.2d at 742 ("[W]e would be remiss to leave unstated the obvious fact that a gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate, whose pregnancy does involve her own egg. This case does not involve, and we draw no conclusions about, traditional surrogates and Ohio's public policy concerning them."); *cf.* Unif. Parentage Act art. 8 cmt. at 72 (imposing greater restrictions on traditional surrogacy contracts based on the birth mother's status as the genetic mother of the child).

rule of an authorized agency has the force and effect of law" and recognizing "the burden of proof lies on the person or entity challenging the administrative rule due to the presumption of validity supporting such rules").

The DPH regulations provide for establishment of a new certificate of live birth following a birth by gestational surrogate arrangement. Iowa Admin. Code r. 641—99.15(2). When a child is born pursuant to a gestational surrogacy agreement, the person who files the record for registration must indicate that the birth mother does not have custody of the child and must inform the intended parents of the procedures to obtain a new birth certificate with their information. *Id.* r. 641—99.15(3). These regulations expressly provide for court orders disestablishing the surrogate mother and her legal spouse as the legal parents and establishing the intended father and mother as the legal parents. *Id.* r. 641—99.15(4)–(10). When the intended mother is not the egg donor, she may replace the birth mother on a new certificate of live birth through a formal adoption. *See id.* r. 641—99.15(6)(*f*) ("Adoption laws shall be followed to reestablish the certificate of live birth by establishing the nonbiological parent on the certificate of live birth pursuant to Iowa Code chapter 600."). The DPH presumably would not have promulgated these regulations if gestational surrogacy agreements were illegal. *See In re Baby S.*, 128 A.3d at 306–07 (relying in part on regulations of department of health placing intended parents on birth certificate to reject claim that gestational surrogacy contract was void as against public policy).

Another reason the Surrogacy Agreement does not violate Iowa Code section 710.11 is because the Ms' payment was for T.B.'s

gestational services rather than for her sale of a baby. The Surrogacy Agreement states,

> The consideration of this agreement is compensation for services and expenses as limited by law and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for consent to surrender the child for adoption.

The California Supreme Court held under equivalent circumstances that the contractual payment is for gestational services, not for the sale of a baby. *See Calvert*, 851 P.2d at 784 (explaining that the payments to the surrogate mother "were meant to compensate her for her services in gestating the fetus and undergoing labor"). We reach the same conclusion.

T.B. relies on Iowa Code section 600A.4, which requires parents to wait seventy-two hours after a child's birth before signing a release of custody for an adoption. *See* Iowa Code § 600A.4(2)(*g*) ("[A release of custody s]hall be signed, not less than seventy-two hours after the birth of the child to be released, by all living parents. The seventy-two-hour minimum time period requirement shall not be waived."). T.B. claims that the safeguards established in section 600A.4 are violated by the Surrogacy Agreement. We disagree because T.B. is not the genetic mother of Baby H, and section 600A.4 is therefore inapplicable. We agree with other courts that recognize the difference between surrogacy arrangements and giving up one's own genetic child for adoption:

> There is no doubt but that [the statute prohibiting baby selling] is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child. But the central fact in the surrogate parenting procedure is that the agreement to bear the child is entered into *before* conception. The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are *not* avoiding the consequences of an unwanted pregnancy or fear

> of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.

Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 211–12 (Ky. 1986), *superseded by statute*, Ky. Rev. Stat. Ann. § 199.590(4) (West, Westlaw through 2017 Reg. Sess.); *see also Calvert*, 851 P.2d at 784 ("Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when [the surrogate mother] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring."); *In re Paternity of F.T.R.*, 833 N.W.2d at 646 ("[A]doption is distinctly different than surrogacy. Adoption often occurs in circumstances where the parent cannot or will not care for the child. Substantial court oversight is necessary in a voluntary-[termination-of-parental-rights]-and-adoption scenario to ensure that the biological parents have consented to the [termination of parental rights] after being informed of the consequences thereof. In contrast, surrogacies are planned, and the intended parents want the child and are willing and able to care for the child." (Citation omitted.)).

When a child is born under a surrogacy agreement, the intended parents "affirmatively intended the birth of the child[] and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist." *Calvert*, 851 P.2d at 782.[4]

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[4]The California legislature subsequently enacted statutory provisions regulating gestational surrogacy agreements. *See* Cal. Fam. Code § 7962 (enacted by 2012 Cal. Legis. Serv. ch. 466 (A.B. 1217) (West)).

This is not a situation in which T.B. is choosing to give up her own genetically related child in order to avoid the consequences of an unwanted pregnancy or the burdens of childrearing. Instead, T.B. agreed to carry a child for the Ms after responding to their advertisement on Craigslist. But for the acted-on intention of the Ms, Baby H would not exist. *See id.* The Ms would not have entrusted their embryos fertilized with P.M.'s sperm to T.B. if they thought she would attempt to raise the resulting child herself.[5]

We hold that the adoption statute is inapplicable and the Surrogacy Agreement is not inconsistent with Iowa statutes on termination of parental rights.

2. *Whether the Surrogacy Agreement is against public policy.* T.B. also claims enforcement of the Surrogacy Agreement violates Iowa's public policy. We disagree based on the freedom of contract enjoyed by consenting adults. We start with the presumption that under Iowa law a "contractual agreement is binding on the parties." *Water Dev. Co. v.*

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[5]The legislature is free to impose conditions on gestational surrogacy contracts or ban them altogether. Such policy choices are for the elected branches. As the Kentucky Supreme Court concluded in *Armstrong*, courts should defer to the legislature "to articulate public policy regarding health and welfare." 704 S.W.2d at 213. As that court elaborated,

> The courts should not shrink from the benefits to be derived from science in solving these problems simply because they may lead to legal complications. The legal complications are not insolvable. Indeed, we have no reason to believe that the surrogate parenting procedure in which SPA participates will not, in most instances, proceed routinely to the conclusion desired by all of the parties at the outset—a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child.
>
> We agree with the trial court that if there is a judgment to be made outlawing such a procedure, it is a matter for the legislature. The surrogate parenting procedure as outlined in the Stipulation of Facts is not foreclosed by legislation now on the books.

Id. at 213–14 (rejecting challenges to traditional surrogacy contract).

Lankford, 506 N.W.2d 763, 766 (Iowa 1993). "The power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Thomas v. Progressive Cas. Ins.*, 749 N.W.2d 678, 687 (Iowa 2008) (quoting *Grinnell Mut. Reins. v. Jungling*, 654 N.W.2d 530, 540 (Iowa 2002)). The party claiming the contract is contrary to public policy bears the burden of proof. *Walker v. Gribble*, 689 N.W.2d 104, 111 (Iowa 2004). We reiterate that "[t]o strike down a contract on public policy grounds, we must conclude that 'the preservation of the general public welfare . . . outweigh[s] the weighty societal interest in the freedom of contract.' " *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003) (alteration in original) (quoting *Jungling*, 654 N.W.2d at 540).

In *Witten*, we addressed the enforceability of a contract executed by a married couple, Trip and Tamera Witten, and the University of Nebraska Medical Center that stored their frozen embryos. *Id.* at 772–73. "Because Tamera was unable to conceive children naturally, they had eggs taken from Tamera artificially fertilized with Trip's sperm." *Id.* at 772. The couple later divorced, and the contract "did not explicitly deal with the possibility of divorce." *Id.* at 772–73. Tamera sought "custody" of the embryos to have them "implanted in her or a surrogate mother in an effort to bear a genetically linked child." *Id.* at 772. Trip argued the district court should enforce the contract, which required mutual consent of the parties for any use of the embryos. *Id.* at 773. The district court ruled the contract controlled and enjoined both parties from using the embryos without the written approval of the other party. *Id.* Tamera appealed, and we affirmed, holding that neither party could use the embryos without the contemporaneous consent of the other. *Id.* at 773, 783.

Our decision was consistent with the terms of the contract signed by the Wittens. But we stated a broader holding

> that agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo."

Id. at 782 (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)). We concluded that "judicial enforcement of an agreement between a couple regarding their future family and reproductive choices would be against the public policy of this state." *Id.* (emphasis omitted). But we concluded the embryo dispositional agreement remains enforceable as between the donors and the medical facility. *Id.* ("Within this context, the medical facility and the donors should be able to rely on the terms of the parties' contract.").

We see important differences between an embryo disposition agreement signed by the egg and sperm donor during their marriage and the gestational surrogacy agreement at issue here. The former addresses disposition of the parties' own genetic material and assumed the marriage will continue. *See id.* (noting "embryos are originally created as 'a mutual undertaking by [a] couple to have children together,' " but the mutual undertaking may end upon their divorce (alteration in original) (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 83 (1999))). We noted the judicial reluctance to compel procreation of a biological son or daughter after one donor changed his mind. *See id.* at 777–78 (surveying authorities). By contrast, the surrogate mother, T.B., is not the genetic or biological mother of Baby H. All parties sought the birth of Baby H. We conclude the public policy

limitations in play in that case are inapposite. We turn to cases specifically adjudicating challenges to gestational surrogacy contracts.

T.B. argues a surrogacy agreement violates public policy against the exploitation of women, and contends,

> Surrogacy agreements, if enforced embody deviant societal pressures, the object of which is to use the woman, and destroy her interests as a mother to satisfy the desires of third parties. Surrogacy exploits women by treating the mother as if she is not a whole woman. It assumes she can be used much like a breeding animal and act as though she is not, in fact, a mother.

Yet T.B. entered into the Surrogacy Agreement voluntarily. She had given birth to four children of her own before signing the Surrogacy Agreement and was no stranger to the effects of pregnancy. T.B. does not allege she signed the Surrogacy Agreement under economic duress or that its terms are unconscionable.

The California Supreme Court rejected a similar exploitation argument in *Calvert*:

> Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. . . .
>
> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience

> necessary to make an informed decision to enter into the surrogacy contract.

851 P.2d at 785. California courts continue to reject the view that surrogacy agreements unfairly exploit women. *See C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 370 (Ct. App. 2017) (relying on *Calvert*, 851 P.2d at 785). We reach the same conclusion.

T.B. alternatively argues the Surrogacy Agreement violates the state's public policy favoring families. We have repeatedly acknowledged Iowa's public policy "promoting the sanctity and stability of the family." *Tyler v. Iowa Dep't of Revenue*, 904 N.W.2d 162, 168 (Iowa 2017) (quoting *Callender,* 591 N.W.2d at 191). T.B. characterizes surrogacy agreements as deliberately destroying the surrogate mother–child relationship (a relationship, we note, that would not exist but for the Ms' contribution of their embryos in reliance on T.B.'s willingness to serve as a gestational carrier). We conclude that gestational surrogacy agreements *promote* families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers. We agree with the Wisconsin Supreme Court that

> [e]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life.

In re Paternity of F.T.R., 833 N.W.2d at 649–50. T.B. has failed to show the Surrogacy Agreement violates the public policy of our state.

For these reasons, we hold the Surrogacy Agreement is enforceable under existing Iowa law. We emphasize that T.B.'s legal attack is on surrogacy agreements in general. We do not foreclose the possibility that

a surrogacy agreement in a particular case could be subject to specific contract defenses, such as fraud, duress, or unconscionability.

C. Whether T.B. Is the "Biological" Mother of Baby H Under the Iowa Code. T.B. claims that as the birth mother she is the legal and biological mother of Baby H and that she therefore is entitled to custody of Baby H unless and until she is proven unfit by clear and convincing evidence. Iowa law establishes a rebuttable presumption that the birth mother who delivered the infant and her spouse are the legal parents of the child. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 344 (Iowa 2013); *see also* Iowa Code § 144.13(2), *held unconstitutional in part on other grounds under Gartner*, 830 N.W.2d at 354; Iowa Admin. Code r. 641—99.15(1). As noted, the DPH regulations governing births by surrogacy arrangements provide for court orders disestablishing the gestational surrogate and her spouse as lawful parents and establishing the intended father/sperm donor as the lawful father of the child. Iowa Admin. Code r. 641—99.15(9). The district court, relying on genetic tests, ruled that T.B. is not the genetic or biological mother of Baby H and disestablished her presumptive parental rights. We must determine T.B.'s parental rights as a gestational surrogate birth mother. This is a question of statutory interpretation.

"[O]ur starting point in statutory interpretation is to determine if the language has a plain and clear meaning within the context of the circumstances presented by the dispute." *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). "We give words in statutes their common, ordinary meaning in the context within which they are used unless the words are defined in the statute or have an established legal meaning." *In re J.C.*, 857 N.W.2d at 500. "When the legislature has defined words in a statute—that is, when the legislature has opted to 'act as its own

lexicographer'—those definitions bind us." *Id.* (quoting *State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010)).

Iowa Code chapter 232 defines "parent" as

> a *biological or adoptive mother or father* of a child; or a father whose paternity has been established by operation of law due to the individual's marriage to the mother at the time of conception, birth, or at any time during the period between conception and birth of the child, by order of a court of competent jurisdiction, or by administrative order when authorized by state law. "Parent" does not include a mother or father whose parental rights have been terminated.

Iowa Code § 232.2(39) (emphasis added). Chapter 600A governing private actions to terminate parental rights defines "parent" as "a father or mother of a child, whether by birth or adoption." *Id.* § 600A.2(14). "Biological parent" is defined as "a parent who has been a biological party to the procreation of the child." *Id.* § 600A.2(3). Chapter 600 governing adoptions incorporates the definitions in chapter 600A. *See id.* § 600.2(1).[6] T.B. argues that "biological parent" should include a gestational carrier as "a biological party to the procreation of the child." That is a question of law. Chapter 600A fails to separately define "biological party" or "procreation." It is undisputed that P.M. (not D.B.) is the biological father of Baby H, as confirmed by DNA testing; and it is undisputed that the embryos implanted in T.B. came from the ova of an

[6]A "putative father" is "a man who is alleged to be or who claims to be the biological father of a child born to a woman to whom the man is not married at the time of birth of the child." Iowa Code § 600A.2(16). While the legislature has not expressly defined "established father," the statutes make clear that "it refers to paternity which has been established by some means authorized by law." *Callender*, 591 N.W.2d at 185 (citing Iowa Code § 600B.41A(1)); *see, e.g.*, Iowa Code § 144.13(2) ("If the mother was married at the time of . . . birth, . . . the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.").

anonymous woman, not T.B., as confirmed by DNA testing. We agree with the district court's interpretation.

> [I]n using the term biological party, the Iowa Legislature was referencing a party connected by direct genetic relationship. In using the term procreate, the legislature was referencing the act of begetting a child. Thus, a biological parent is a parent whose egg or whose sperm was used to beget a child. Only such a person would have a direct genetic relationship to procreation of the child.

This interpretation fits with the dictionary definitions of "biological" and "procreate." *See Biological*, *Black's Law Dictionary* (10th ed. 2014) (defining "biological" as "genetically related" in the context of biological parents); *Biological father*, *Black's Law Dictionary* (defining "biological father" as "the man whose sperm impregnated the child's biological mother"); *Biological mother*, *Black's Law Dictionary* (defining "biological mother" as "[t]he woman who provides the egg that develops into an embryo"); *Procreate*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (defining "procreate" as "to beget or bring forth offspring").

We hold the statutory definition of "biological parent" of Baby H does not include a surrogate birth mother who is not the genetic parent. The ordinary meaning of "biological parent" is a person who is the genetic father or mother of the child. That is also the established legal meaning of "biological parent." It makes sense that the legislature and department of health used the term "biological parent" in the commonly understood and established legal meaning of those terms.

As noted, our interpretation is supported by the regulations for birth certificates following a birth pursuant to a gestational carrier agreement. *See* Iowa Admin. Code r. 641—99.15. Subsection 4 addresses the situation in which "the intended mother is the egg donor and the intended father is the sperm donor to the child being carried by

the gestational surrogate." *Id.* r. 641—99.15(4). This subsection refers to the intended parents—not the surrogate mother—as the biological parents of the child. *Id.* Nowhere in the regulations or Iowa Code is "biological parent" defined to include a gestational surrogate who is not the genetic mother.

T.B. also mischaracterizes these regulations by stating that "when the husband of the 'intended couple' donated sperm, but the 'intended' wife is not genetically related, it is possible for the 'intended' husband to disestablish the mother's husband as father *only* if the mother agrees and voluntarily completes a parenting affidavit." The regulations are mandatory, not permissive. The regulations provide,

> If the surrogate birth mother is married and the intended father is the sperm donor, the married surrogate birth mother and the intended father *shall* by court order disestablish the surrogate birth mother's legal spouse as the legal parent and may complete a Voluntary Paternity Affidavit form pursuant to Iowa Code section 144.13.

Id. r. 641—99.15(6)(*b*); *see also Kopecky v. Iowa Racing & Gaming Comm'n*, 891 N.W.2d 439, 443 (Iowa 2017) (explaining that "shall" implies a mandatory duty while "may" is usually permissive). Under this regulation, the district court correctly disestablished D.B. as Baby H's legal father.

T.B. argues her emotional bond formed from acting as Baby H's mother for the two months she had physical custody after birth gives her greater legal rights than Baby H's biological father, P.M. We rejected an established father's emotional bond argument in *In re J.C.*, 857 N.W.2d at 508. Daniel married Khrista while she was incarcerated and pregnant. *Id.* at 498. They both knew Daniel was not the child's biological father, but Daniel cared for the child on his own for over two years until Khrista was paroled. *Id.* Despite his involvement in raising

the child, we concluded that Daniel, who was the child's "established father" based on his marriage to the birth mother, was not a necessary party to either the child-in-need-of-assistance proceedings involving the child or termination proceedings involving Khrista and the child's biological father. *Id.* at 508. Similarly, the emotional bond formed while T.B. took care of Baby H does not give her legal status superior to P.M., the child's biological father.

We next address T.B.'s constitutional claims.

D. Whether Enforcement of the Surrogacy Agreement Violates T.B.'s Substantive Due Process and Equal Protection Rights. T.B. claims that she has a fundamental liberty interest in the parent–child relationship. "The United States Supreme Court has consistently recognized that a parent's 'care, custody, and control' of a child is a fundamental liberty interest given the greatest possible protection." *F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801, 808 (Iowa 2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S. Ct. 2054, 2060 (2000)). That liberty interest belongs to P.M., the only party in this case who is a biological parent of Baby H. By contrast, T.B.'s constitutional claims rest on an incorrect premise—that she has parental rights in Baby H without being the child's genetic mother. Any constitutionally protected interest she may have as the surrogate birth mother is overcome by P.M.'s undisputed status as the biological and intended father of Baby H. *See In re J.C.,* 857 N.W.2d at 506 (noting due process rights of biological parents); *Callender*, 591 N.W.2d at 190 (same).

T.B. relies on *Lehr v. Robertson*, in which the United States Supreme Court stated, "The mother carries and bears the child, and in this sense her parental relationship is clear." 463 U.S. 248, 260 n.16, 103 S. Ct. 2985, 2992 n.16 (1983) (quoting *Caban v. Mohammed*, 441

U.S. 380, 397, 99 S. Ct. 1760, 1770 (1979) (Stewart, J., dissenting)). In *Lehr*, the Court adjudicated whether an unmarried biological father who never supported the child and had rarely seen the child since her birth had "an absolute right to notice and an opportunity to be heard before the child [could] be adopted." *Id.* at 249–50, 103 S. Ct. at 2987. *Lehr* dealt not with a surrogate mother but, rather, with a "traditional" mother—the child's genetic parent. *Lehr* is distinguishable for that reason. The same is true for *Tuan Anh Nguyen v. I.N.S.*, in which the Court stated,

> The first governmental interest to be served is the importance of assuring that a biological parent–child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

533 U.S. 53, 62, 121 S. Ct. 2053, 2060 (2001). Again, the United States Supreme Court was considering the respective rights of an unwed father and mother who conceived a child by traditional means and were the child's genetic parents. *Id.* at 57, 121 S. Ct. at 2057. We agree with the California Supreme Court that such cases "do not support recognition of parental rights for a gestational surrogate." *Calvert,* 851 P.2d at 785. To the contrary, those cases based the constitutional rights on the father's biological connection to the child, which here is superior to any parental interest claimed by the gestational surrogate. *See id.* at 786.

T.B. claims she has a fundamental liberty interest in not being exploited. As discussed above, we are not persuaded by this argument. T.B. also raises an equal protection claim, claiming she is treated differently from other women in Iowa who promise to surrender their parental rights before birth. She relies on provisions of the Iowa Code

governing the voluntary release of parental rights. *See, e.g.*, Iowa Code § 600A.4. Again, this argument fails because T.B. is not a biological (genetic) or adoptive parent and therefore lacks parental rights as to Baby H.

T.B. was provided sufficient procedural due process. She cannot claim lack of notice. She was provided with several evidentiary hearings and an adequate opportunity to develop a factual record.

In any event, based on the Surrogacy Agreement, we conclude T.B. waived any parental rights she may have had as a gestational surrogate. The California Court of Appeal recently rejected a gestational surrogate's constitutional challenges:

> M.C. argues that the termination of her claimed parental rights . . . violates the Children's liberty interest in: (1) their relationship with their mother; and (2) freedom from "commodification." . . .
>
> M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children.

C.M., 213 Cal. Rptr. 3d at 367. We reach the same conclusion here. In the Surrogacy Agreement, T.B. specifically agreed to:

> not form or attempt to form a parent-child relationship with any child or children she may carry to term and give birth to pursuant to this agreement[,]
>
> . . . .
>
> . . . to surrender custody of the child to the Intended Parents immediately upon birth[, and] to institute and cooperate in proceedings to terminate [her] parental rights to any child born pursuant to the terms of this agreement.

T.B. acknowledged that

> each party has been given the opportunity to consult with an attorney of his or her own choice concerning the terms [and] legal significance of this agreement, and the effect it has upon any and all interests of the parties.

Further, she acknowledged that

> she has carefully read and understood every word in this agreement and its legal effect, and each party is signing this agreement freely and voluntarily and that neither party has any reason to believe that the other party or parties did not understand fully the terms and effects of this agreement, or that the other party did not freely and voluntarily execute this agreement."

T.B. thereby contractually waived her right to raise her own constitutional claims or claims on the child's behalf.

E. Whether Enforcement of the Surrogacy Agreement Violates Baby H's Substantive Due Process and Equal Protection Rights. T.B. claims that enforcement of the Surrogacy Agreement would violate the substantive due process and equal protection rights of Baby H. T.B. relies on third-party standing, claiming her status as a surrogate birth mother confers standing to assert Baby H's constitutional rights because the child has no ability to assert her own rights.

> When a person . . . seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations . . . point to permitting the litigant to advance the claim? . . .
>
> . . . To answer [the second] question, [we look] at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests.

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3, 109 S. Ct. 2646, 2651 n.3 (1989). T.B. asserts her standing based on the relationship between her and Baby H. We assume without deciding that T.B., as Baby H's birth mother, would have had standing to raise constitutional claims of Baby H. But as noted above, T.B. waived her

rights to assert claims on behalf of Baby H in the Surrogacy Agreement. *See C.M.*, 213 Cal. Rptr. 3d at 367.

IV. Disposition.

For these reasons, we affirm the rulings of the district court.

AFFIRMED.