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Surrogate or “Mother”? The Problem of Traditional Surrogacy

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Cover Page Footnote

Frank J. Bewkes is an LL.M. candidate at the New York University School of Law. He has a Bachelor’s degree in Political Science from Yale University and a Juris Doctor from The George Washington University Law School. Mr. Bewkes would like to thank his professors, Stephanie Ridder and Karen Thornton, for shepherding him through the writing process. He is also grateful to his parents for their unwavering support, and he would like to dedicate this article to his mother, Susan Frank Kelley.

**SURROGATE OR “MOTHER”? THE PROBLEM OF
TRADITIONAL SURROGACY**

Frank J. Bewkes*

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"[T]he moment the child is born, the mother is also born. [She] never existed before. The woman existed, but the mother, never. And a mother is something absolutely new." — Osho, Indian Philosopher¹

I. INTRODUCTION

The practice of surrogate motherhood has existed since ancient times. In the Bible, when Sarah found herself infertile, she asked her husband, Abraham, to impregnate her slave, Hagar, so that they might “build a family through her.”² This was not surrogacy as we think of it today because it involved sexual intercourse, but the idea of having a child gestated by a woman other than the father’s wife existed even back then. Conflict grew between Sarah and Hagar, which led Abraham to send Hagar and the child away.³ Conflict between intended mothers and surrogates⁴ still happens today,⁵ and, when it does, the results can be disastrous.

What would you do if someone took your child? Imagine that you entered into a surrogacy contract with a woman to have her inseminated with your own, your partner’s, or a donor’s sperm. The contract stated that the resulting child would be yours, and she would merely be carrying the child for you as a surrogate. You waited with excitement for this child. You picked out his or her name, decorated his or her room, and read books on parenting. You went to the doctor

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¹ OSHO, BE OCEANIC 9 (Ma Prem Maneesha & Swami Prem Amrito eds., 2007).

² *Genesis* 16:2-4 (New International Version).

³ *Genesis* 21:9-14 (New International Version).

⁴ There is some debate about the proper terminology to use when referring to a woman who gestates a baby for others. The National Conference of Commissioners on Uniform State Laws, for example, has adopted the term “gestational mother” because it is supposedly more precise. See JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 452-53 (2d ed. 2013). “Mother” is a loaded term in the world of assisted reproductive technology; therefore, the term “surrogate” will be used throughout this paper to describe a woman who gestates a child for others without intent to be the child’s mother.

⁵ Conflict is not common, and one estimate puts the percentage of surrogacy arrangements that have resulted in legal disputes at a hundredth of a percent. *Id.* at 422 (citing Elly Teman, *The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood*, 67 *SOC. SCI. & MED.* 1104 (2008)).

appointments and saw the sonograms. You already love this child. And yet, when the time came to surrender the child, the surrogate changed her mind. She claimed that she could not and would not give up the baby. She fled the state, or perhaps the country. She called herself the child's mother. Such is the danger of surrogacy. And yet, the practice continues.

This paper addresses the fact that traditional surrogates are considered mothers of the children they carry in almost every state. Traditional surrogacy is not often addressed in current scholarship because it is disfavored for putting intended parents on unsteady legal ground. The recognition of maternity in traditional surrogates empowers them to change their minds after the birth and keep the child, an outcome unacceptable to intended parents. Changing how traditional surrogates are viewed would rectify the situation. Traditional surrogates should not be seen as mothers.

Part II is an exploration into how gestational and traditional surrogacy are treated differently, or similarly, in several states based upon whether traditional surrogates are presumed to be mothers. Part III discusses the fact that sperm and egg donors are almost never considered the parents of children resulting from their donations. Part IV discusses the concept of parenthood by intent, embracing California's view of surrogacy and taking it a step further. Traditional surrogates should not have parental rights because they are simply egg donor and gestational surrogate combined in one person. If each separately should not give rise to motherhood, then both together should not give rise to motherhood. Issues of autonomy and feminism are also addressed in Part IV. Part V discusses the best interest of the child, and why best interest is irrelevant in a surrogacy framework embracing parenthood by intent. Finally, Part VI discusses two model policy recommendations that come close to embodying the spirit of motherhood by intent and prohibiting traditional surrogates from changing their minds.

There are two types of surrogacy agreements, each defined by whether or not the surrogate is the egg donor.⁶ In traditional surrogacy, the surrogate is artificially inseminated with the semen of the intended father or a donor, which combines with her own egg to form an embryo.⁷ The traditional surrogate is, therefore, also the genetic mother of the resulting child.⁸ Meanwhile, in gestational

⁶ CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 152 (2d ed. 2011).

⁷*Id.* at 152-53.

⁸ *Id.*

surrogacy, in vitro fertilization is used.⁹ The egg of a donor, or of the intended mother, is fertilized with sperm outside of the womb and the resulting embryo is implanted in a gestational surrogate.¹⁰ Thus, a gestational surrogate has no genetic connection to the child she carries.¹¹

In re Baby M was the first case to address the issue of surrogacy, and it presented facts much like the nightmare scenario previously mentioned.¹² William and Elizabeth Stern wanted a child, but Mrs. Stern had a condition that made pregnancy risky.¹³ They entered into a traditional surrogacy contract with Mary Beth Whitehead, and Mrs. Whitehead was artificially inseminated with Mr. Stern's sperm.¹⁴ The arrangement progressed smoothly at first, as most do.¹⁵ Mrs. Whitehead wanted to give the Sterns the "gift of life."¹⁶ Unfortunately, "Mrs. Whitehead realized, almost from the moment of birth, that she could not part with [Baby M],"¹⁷ and she fled the state, leading to a now-famous court battle over custody of the child.¹⁸ Though the Sterns were ultimately granted custody, the New Jersey Supreme Court stated that Mrs. Whitehead was the "natural mother" of Baby M.¹⁹ Therefore, any contract where she irrevocably surrendered her rights to the child prior to birth was unenforceable because the law allowed for only voluntary post-birth surrender and subsequent adoption.²⁰

Twenty-five years later, views have changed little with regard to traditional surrogates like Mary Beth Whitehead and their status as legal mothers. In the wake of *In re Baby M*, several states moved to

⁹ *Id.*

¹⁰ *Id.* at 91.

¹¹ *Id.* at 153.

¹² See *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹³ *Id.* at 1235.

¹⁴ *Id.*

¹⁵ See Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 94 (2007) ("[O]nly a handful of the hundreds of traditional surrogacy agreements brokered in the United States since Noel Keane wrote the first some thirty years ago have resulted in litigation."); see also Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 138 (2009) (citing Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 31-32 (2005)) ("[F]ew surrogates report reluctance to relinquish the child, and a very small percentage express regret about having served in the role.").

¹⁶ *In re Baby M*, 537 A.2d at 1236.

¹⁷ *Id.*

¹⁸ *Id.* at 1237.

¹⁹ *Id.* at 1240.

²⁰ *Id.*

regulate, ban, and, in a few cases, even criminalize surrogacy.²¹ Today, there are still many states that lack clear statutes or case law regarding surrogacy, particularly traditional surrogacy.²² Despite this, there is a strong trend towards recognizing traditional surrogates as mothers of the children they bear.²³ For intended parents this is, understandably, a cause for concern.

The first traditional surrogacy contract was written by Noel Keane, “the undisputed father of surrogate motherhood,”²⁴ in 1976.²⁵ It was not until 1980, however, that the first traditional surrogacy was carried out.²⁶ Gestational surrogacy came later in 1985 as in vitro fertilization technology improved.²⁷ It would be several years before gestational surrogacy really caught on.²⁸ Today, gestational surrogacy is the more popular option of the two, with an estimated ninety-five percent of surrogacy agreements involving gestational surrogacy.²⁹ In fact, “thirty percent of surrogacy agencies in the U.S. now offer only gestational surrogacy.”³⁰ This is unsurprising given that traditional surrogacy agreements are likely unenforceable because courts are unwilling to force surrogates to give up their biological children.³¹

²¹ Andrew H. Malcolm, *Steps to Control Surrogate Births Rekindle Debate*, N.Y. TIMES (June 26, 1988), <http://www.nytimes.com/1988/06/26/us/steps-to-control-surrogate-births-rekindle-debate.html?pagewanted=all&src=pm>.

²² Diane S. Hinson, *State-by-State Surrogacy Law: Actual Practices*, 34 FAM. ADVOC. 36 (2011).

²³ See discussion *infra* Part II.

²⁴ Sanger, *supra* note 15, at 83 (citing James S. Kunen, *Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane--He Delivers*, TIME, Mar. 30, 1987, at 93).

²⁵ Lawrence van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, is Dead*, N.Y. TIMES (Jan. 28, 1997), <http://www.nytimes.com/1997/01/28/nyregion/noel-keane-58-lawyer-in-surrogate-mother-cases-is-dead.html>.

²⁶ See *The History of Surrogacy*, MOD. FAM. SURROGACY CENTER, http://www.modernfamilysurrogacy.com/page/surrogacy_history (last visited Dec. 30, 2014) (discussing a basic history of surrogacy in America).

²⁷ *Id.*; see also Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, 34 FAM. ADVOC. 32, 32-33 (2011).

²⁸ See Sanger, *supra* note 15, at 79 (citing *Direct Testimony of William Stern (Jan. 5, 1987)*, in 1 BABY M CASE: THE COMPLETE TRIAL TRANSCRIPTS 82-83 (1988)) (“[A]t that time nobody in this country was doing it, it was strictly experimental.”).

²⁹ Hinson & McBrien, *supra* note 27, at 32-33. See also Sanger, *supra* note 15, at 79 (citing *Fact Sheet 56: Surrogacy (Gestational Carrier)*, RESOLVE: THE NAT’L INFERTILITY ASS’N, 2 (2004), <http://www.resolve.org/family-building-options/surrogacy/>).

³⁰ Sanger, *supra* note 15, at 79 n.56 (citing Mhairi Galbraith et al., *Commercial Agencies and Surrogate Motherhood: A Transaction Cost Approach*, 26 HEALTH CARE ANALYSIS 11 (2005)).

³¹ KINDREGAN & MCBRIEN, *supra* note 6, at 153.

Surrogacy is important because it is the only way for many individuals to produce offspring to whom they are genetically related. With surrogacy, at least one of the intended parents is able to have a genetic link to the child.³² Many people desire this link.³³ As John Hill put it, “while adoption may satisfy one's desire to provide nurturance for a child, adoption cannot satisfy the yearning to create the child and to watch as a version of oneself unfolds and develops.”³⁴ One could feasibly accomplish this with either gestational or traditional surrogacy, but the high costs of in vitro fertilization place gestational surrogacy out of reach for many individuals.³⁵ Thus, for low income individuals, traditional surrogacy may be the only way to have a genetic link to their child.

The problem with traditional surrogacy is that, in most states, the traditional surrogate is presumed to be the mother of the child she carries, either because she birthed the child or because of the confluence of gestation and genetics.³⁶ Thus, the arrangement is treated as a post-birth adoption, leaving the surrogate free to change her mind after the birth.³⁷ This would not be an issue, however, if traditional surrogates were not presumed to be the mothers of the children they carry.

The moral issues of surrogacy are unquestionable, but they are not the concern here. The concern here is with motherhood. The fact of an occurrence or status is, or at least should be, unaffected by its morality. Becoming a mother is a fact, regardless of whether it is through surrogacy or not. This paper tries to redefine the current

³² There are some cases of gestational surrogacy where neither intended parent is genetically related to the child. *See, e.g., In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). One could also imagine a traditional surrogacy scenario where donor sperm is used.

³³ *See* 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, 389-90 (1991) (discussing the desire to have a genetic connection to one's child and why so many choose assisted reproductive technology over adoption).

³⁴ *Id.* at 389.

³⁵ *See The "Surrogacy Parenting Agreement Act of 2013": Hearing on Bill 20-32 Before the Comm. on the Judiciary & Pub. Safety* (2013) (statement of Nancy Polikoff, Professor, Am. Univ. Wash. Coll. of Law), available at http://lims.dccouncil.us/_layouts/15/uploader/Download.aspx?legislationid=29188&filename=B20-0032-HearingRecord1.pdf (“Gestational surrogacy, whose costs easily exceed \$100,000, is limited to the richest among us.”); *see also* Kristen Fischer, *Little Miracles Can Cost Big: The Economics of In-Vitro Fertilization*, HEALTHLINE NEWS (Oct. 16, 2013), <http://www.healthline.com/health-news/women-the-high-cost-of-in-vitro-fertilization-101613>.

³⁶ Hill, *supra* note 33, at 372.

³⁷ *See* discussion *infra* Part II.

understanding of the genesis of motherhood to encompass intended mothers who enter traditional surrogacy agreements.

II. A SURVEY OF SURROGACY AND THE VESTING OF “MOTHERHOOD” UPON BIRTH

In discussing the question of who is rightfully a mother of a child born through traditional surrogacy, it is necessary to first mention what motherhood means in a legal sense. Without this understanding, the dispute between intended mothers and traditional surrogates has no context. The Supreme Court of the United States summarized the importance of parental rights in *Stanley v. Illinois*:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious . . . than property rights. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.³⁸

In short, the right of motherhood is one of the most important rights there is.

It is also important to note that assisted reproductive technology, such as surrogacy, occupies a fast-changing and somewhat obscured legal area. Most surrogacy cases occur in family court, and the records are sealed.³⁹ As such, the law “as it is practiced” can be entirely different than what a jurisdiction’s statutes and published case law might suggest.⁴⁰ As such, this paper will focus on statutes and published case law to explore how different jurisdictions view

³⁸ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted) (internal quotation marks omitted).

³⁹ Hinson & McBrien, *supra* note 27, at 32.

⁴⁰ *Id.* In Arizona, for example, both traditional surrogacy and gestational surrogacy are prohibited by statute and unenforceable, but surrogacy is still practiced. Hinson, *supra* note 22, at supp. 2; *see also Surrogacy in Phoenix, AZ*, FERTILITY AUTHORITY, <http://www.fertilityauthority.com/articles/surrogacy-phoenix-az> (last visited Dec. 30, 2014).

surrogates and how gestational and traditional surrogates are treated differently. For the purposes of this analysis, we will look at three types of jurisdictions: those that presume both types of surrogate are mothers, those that presume only traditional surrogates are mothers, and those that do not presume surrogates of any type are mothers. Typing is done by looking to whether the surrogate is permitted to change her mind and refuse to relinquish the baby after the birth. This is based on the understanding that a mother cannot be forced to relinquish a baby in such a way, but a non-mother can.

A. *All Surrogates Are Mothers*

i. New Jersey

New Jersey was one of the first United States jurisdictions to address surrogacy in its courts.⁴¹ As mentioned above, in the *Baby M* case, the Supreme Court of New Jersey held that the surrogacy contract between the Sterns and the Whiteheads was invalid because it conflicted with both the statutes and the public policies of the state.⁴² The court's decision spells out the arguments against traditional surrogacy, mainly that a traditional surrogate is a mother.⁴³ The statutory reasons given for finding the contract unenforceable were that the compensation aspect made it comparable to baby-selling, the proper procedure for termination of parental rights had not been followed, and "surrender of custody and consent to adoption" is "revocable in private placement adoptions."⁴⁴ All three of these reasons are only issues if the traditional surrogate is considered a mother.

Indeed, the court refers to Mary Beth Whitehead as the "natural mother" of Baby M throughout the opinion.⁴⁵ Under New Jersey law, "[t]he natural mother, may be established by proof of her having given birth to the child."⁴⁶ Presumably, this statute originates from the legal principle of *mater semper certa est*, or "the mother is always certain," meaning that whoever gives birth to a child is that child's mother.⁴⁷

⁴¹ Scott, *supra* note 15, at 112-13 n.19.

⁴² *In re Baby M*, 537 A.2d at 1240.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See generally id.*

⁴⁶ N.J. STAT. ANN. § 9:17-41 (West 2013).

⁴⁷ *See Mater Semper Certa Est*, WORLD HERITAGE ENCYCLOPEDIA, http://www.worldheritage.org/articles/Mater_sempert_certa_est (last visited Dec. 30, 2014); *see also* GERDA A. KLEIJKAMP, FAMILY LIFE AND FAMILY INTERESTS: A COMPARATIVE STUDY OF THE INFLUENCE OF THE EUROPEAN CONVENTION ON

For the vast majority of human history this was true. In fact, Aristotle once commented that “mothers are fonder of their children than fathers” because they are surer they are their own, having birthed them.⁴⁸ Indeed, in the *Baby M* case, Mary Beth Whitehead’s genetic connection to the child was only mentioned once, so that was likely not the basis for the court’s opinion.⁴⁹

The court also took issue with the termination of Mary Beth Whitehead’s parental rights.⁵⁰ Under New Jersey law, termination of parental rights can only occur through “an action by an approved agency, an action by [the Division of Youth and Family Services], or an action in connection with a private placement adoption.”⁵¹ But none of those actions occurred.⁵² Because the court saw Mary Beth Whitehead as the mother of the child, they essentially viewed the arrangement as an adoption gone wrong.⁵³ Of particular concern to the court was the fact that the contract claimed to embody the best interests of the child, the standard used in custody disputes in almost every jurisdiction, as if parents can simply decide what those best interests are without reference to any standard.⁵⁴ Rather, the court stated:

The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents The impact of failure to follow that policy is nowhere better shown than in the results of this surrogacy contract. A child, instead of starting off its life with as much peace and

HUMAN RIGHTS ON DUTCH FAMILY LAW AND THE INFLUENCE OF THE UNITED STATES CONSTITUTION ON AMERICAN FAMILY LAW 159-60 (1999) (discussing the concept of *mater semper certa est*); K. ZWEIGERT & K. DROBNIG, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 28 (1991) (discussing the same).

⁴⁸ARISTOTLE, NICHOMACHEAN ETHICS bk. IX, at 7 (W.D. Ross trans.) (c. 384 B.C.E.).

⁴⁹ *In re Baby M*, 537 A.2d at 1248.

⁵⁰ *Id.* at 1240.

⁵¹ *Id.* at 1242.

⁵² *Id.*

⁵³ *Id.* at 1234.

⁵⁴ *Id.* at 1246 (“The contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody.”).

security as possible, finds itself immediately in a tug-of-war between contending mother and father.⁵⁵

In other words, Baby M was being separated from the person the court saw as her mother, which courts generally do not believe is in a child's best interest.⁵⁶ According to the court, both Mary Beth Whitehead and William Stern had an equal right to the child, and the surrogacy contract by which Mary Beth disposed of her rights was, therefore, invalid.⁵⁷

Gestational surrogates have been treated the same as traditional surrogates in New Jersey.⁵⁸ In *A.H.W. v. G.H.B.*, a heterosexual couple combined the woman's egg with the man's sperm to create an embryo that would be implanted in and gestated by the woman's sister because the woman was unable to carry a child.⁵⁹ The couple then sought a pre-birth order declaring themselves the legal parents of the child.⁶⁰ The court denied the petition for the pre-birth declaration of parentage, holding that the voluntary surrender of the child by the gestational surrogate is only valid if executed seventy-two hours after birth.⁶¹ The gestational surrogate was seen as a mother and the surrogacy arrangement, while allowed, was treated like an adoption.⁶² The gestational surrogate was treated as the mother of the child, even though the intended mother was also the genetic mother.⁶³

The seventy-two hour requirement was reaffirmed in *A.G.R. v. D.R.H.*, when a sister serving as a gestational surrogate for her brother and his partner changed her mind and retained her maternal rights, since their pre-birth surrender agreement was unenforceable.⁶⁴ In that case, the Court further held gestational and traditional surrogacy to be

⁵⁵ *Id.* at 1246-47.

⁵⁶ Hill, *supra* note 33, at 364 (citing Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 587, 622 (1989)) (“[A]ll states apply a presumption that placement of the child with its natural parent is in the best interests of the child.”).

⁵⁷ *In re Baby M*, 537 A.2d at 1247.

⁵⁸ *New Jersey, State-by-State Surrogacy Law*, CREATIVE FAM. CONNECTIONS, <http://www.creativefamilyconnections.com/state-map/new-jersey-surrogacy-laws> (last visited September 27, 2014).

⁵⁹ *A.H.W. v. G.H.B.*, 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000).

⁶⁰ *Id.* at 950.

⁶¹ *Id.* at 954; *see also* N.J. STAT. ANN. § 9:3-41 (West 2013).

⁶² *A.H.W.*, 772 A.2d at 954.

⁶³ *Id.*

⁶⁴ *A.G.R. v. D.R.H.*, No. FD-09-001838-07, slip op. at 2-6 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

indistinguishable, recognizing both types of surrogates as mothers regardless of genetics.⁶⁵

ii. New Hampshire

Unlike New Jersey, New Hampshire has a statutory scheme specifically allowing surrogacy.⁶⁶ The New Hampshire statutes define “birth mother” as “a woman who gestates an embryo conceived by natural or artificial insemination, in vitro fertilization, preembryo transfer or as a result of a surrogacy contract.”⁶⁷ In other words, both traditional and gestational surrogates are considered mothers by virtue of their gestation of the child.⁶⁸ Meanwhile, “surrogate” is defined as “a woman who agrees, pursuant to a surrogacy contract, to bear a child for intended parents.”⁶⁹

The New Hampshire statutes provide for the automatic transfer of parental rights to the intended parents, provided that all the proper procedures have been followed.⁷⁰ These procedures require judicial preauthorization of the surrogacy contract,⁷¹ and the contract must allow the surrogate seventy-two hours in which she may change her mind and keep the baby.⁷² In fact, despite the statutory scheme and judicial preauthorization of the surrogacy contract, the intended parents are not vested with parenthood until after the seventy-two hours have passed at which point they may be recorded on the child’s birth certificate.⁷³ If extenuating circumstances exist that “prevent the surrogate from making an informed decision” within the seventy-two hour window, the decision window may be extended up to one week.⁷⁴

iii. Louisiana

Louisiana also presumes both types of surrogate to be mothers, though the law is mostly silent on the issue of surrogacy.⁷⁵ Only traditional surrogacy for compensation is addressed explicitly, with all

⁶⁵ *Id* at 5.

⁶⁶ N.H. REV. STAT. ANN. § 168-B:1 (2013).

⁶⁷ *Id.* § 168-B:1(II).

⁶⁸ *See also id.* § 168-B:2 (“A woman is the mother of a child to whom she has given birth, except as otherwise provided in this chapter.”).

⁶⁹ *Id.* § 168-B:1 (XIV).

⁷⁰ *Id.* § 168-B:4.

⁷¹ *Id.* § 168-B:23.

⁷² *Id.* § 168-B:25(IV).

⁷³ *Id.* § 168-B:26.

⁷⁴ *Id.* § 168-B:25(IV)(b).

⁷⁵ *See* Hinson, *supra* note 22, at supp. 4.

such contracts being declared void.⁷⁶ In that statute, traditional surrogacy is referred to as “surrogate *motherhood*.”⁷⁷ Uncompensated traditional surrogacy occurs, but is treated like an adoption, with the traditional surrogate having the right to refuse to relinquish the child after the birth.⁷⁸ Louisiana, with few exceptions, defines motherhood by whoever births the child.⁷⁹ This is made more apparent when one considers Louisiana’s proposed 2013 legislation, which would have made all traditional surrogacy agreements void, regardless of whether they were compensated or not.⁸⁰ A comment on that portion of the bill read, “A surrogacy arrangement that would allow a mother to agree to relinquish her biological child in advance of its birth violates the public policy of this state and is, therefore, unenforceable, whether the contract is gratuitous or onerous.”⁸¹

Meanwhile, “Louisiana law is silent as to gestational surrogacy agreements between non-relatives...,”⁸² though such agreements do occur and, being unenforceable, are treated as adoptions.⁸³ The exception is when a gestational surrogacy agreement involves a gestational surrogate “who is related by blood or affinity to a biological parent” of the child.⁸⁴ In those cases, “the biological parents proven to be the mother and father by DNA testing shall be considered the parents of the child.”⁸⁵ This is the only exception to the statutory rule that the woman who gives birth to a child is its mother.⁸⁶ Despite this, it remains unclear what happens if custody is disputed between the intended or biological parents and their related gestational surrogate. Likely, the agreement would be unenforceable, and the gestational surrogate would be allowed to change her mind.⁸⁷

⁷⁶ LA. REV. STAT. ANN. § 9:2713(A) (2013).

⁷⁷ *Id.* § 9:2713(B) (emphasis added).

⁷⁸ Hinson, *supra* note 22, at supp. 4.

⁷⁹ LA. CIV. CODE ANN. art. 184 (2013).

⁸⁰ See H.R. 433, 39th Reg. Sess. (La. 2013); S.R. 162, 39th Reg. Sess. (La. 2013).

⁸¹ LA. CIV. CODE ANN. art. 184.

⁸² Katherine S. Spaht, *Who’s Your Momma, Who Are Your Daddies? Louisiana’s New Law of Filiation*, 67 LA. L. REV. 307, 335 (2007).

⁸³ See Hinson, *supra* note 22, at supp. 4.

⁸⁴ LA. REV. STAT. ANN. § 40:34(B)(1)(j) (Supp. 2013). The intended parents in this case must be a married couple and must submit both the sperm and the egg used for the procedure, making them the genetic parents. *Id.* § 40:32.

⁸⁵ *Id.* § 40:34(B)(1)(j); see also *id.* § 40:34(B)(1)(i).

⁸⁶ LA. CIV. CODE ANN. art. 184 (2013).

⁸⁷ See Hinson, *supra* note 22, at supp. 4 (stating that surrogacy contracts are not enforceable in Louisiana).

iv. Florida

Florida is unique among the states in having a statutory scheme specifically allowing traditional surrogacy.⁸⁸ However, traditional surrogates are seen as mothers.⁸⁹ Not only are the surrogacy agreements treated as adoptions, but they are explicitly called “pre-planned” adoptions.⁹⁰ According to Florida law,

A preplanned adoption agreement must include, but need not be limited to, the following terms: . . . That the *volunteer mother* agrees...to bear the child, and to terminate any parental rights and responsibilities to the child she might have through a written consent executed at the same time as the preplanned adoption agreement, subject to *a right of rescission by the volunteer mother any time within 48 hours after the birth of the child, if the volunteer mother is genetically related to the child* That the intended father and intended mother acknowledge that they *may not receive custody* or the parental rights under the agreement if the volunteer mother terminates the agreement or if the volunteer mother rescinds her consent to place her child for adoption within 48 hours after the birth of the child, if the volunteer mother is genetically related to the child.⁹¹

Even if the traditional surrogate relinquishes the child to the intended parents, a court must still review and approve the adoption.⁹²

Gestational surrogates in Florida are also seen as mothers, though this is less obvious.

A gestational surrogacy contract in Florida must contain a provision stating that the surrogate will relinquish her parental rights upon the birth of the child.⁹³ Although the intended parents, so long as one of them is the genetic parent, are “presumed to be the natural parents of the child,” they are not vested with parental rights upon the birth of the child.⁹⁴ Rather, the intended parents must file a petition for a court

⁸⁸ FLA. STAT. ANN. § 63.213 (West Supp. 2013).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* § 63.213(2) (emphasis added).

⁹² *Id.* § 63.213(1)(a).

⁹³ *Id.* § 742.15(3)(c).

⁹⁴ *Id.* § 742.16(7).

hearing within three days of the birth, and at the hearing a judge enters a final post-birth order declaring the child's parentage.⁹⁵ Thus, before the order, the gestational surrogate is legally the mother.

B. Only Traditional Surrogates Are Mothers

Even states that are willing to allow gestational surrogacy, but deny gestational surrogates parental rights in favor of the intended parents, still see traditional surrogacy as different.⁹⁶ Traditional surrogates are seen as mothers, even when gestational surrogates are not. Nowhere is this as clear as it is in North Dakota. In one statute, North Dakota explicitly declares the intended parents to be the parents of children born through gestational surrogacy arrangements.⁹⁷ Then, in another statute, North Dakota explicitly declares traditional surrogacy agreements void, and names traditional surrogates as the mothers of the children they carry.⁹⁸ The following two examples of California and Massachusetts further emphasize the difference that many states see between the maternity claim of a gestational surrogate, and the maternity claim of a traditional surrogate.

i. California

California is extremely friendly towards gestational surrogacy by denying gestational surrogates maternal rights.⁹⁹ For example, in *Johnson v. Calvert*, Mark and Crispina Calvert entered into a contract with Anna Johnson, who agreed to gestate a child created from their egg and sperm.¹⁰⁰ The relationship between the two parties soured, and Anna Johnson brought an action to have herself declared the mother of the child she gestated.¹⁰¹ The court then faced the fact that California law recognized both genetics and birth as two means of determining motherhood.¹⁰² Ultimately the court concluded that “when the two means [of determining motherhood] do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as

⁹⁵ *Id.* § 742.16(1).

⁹⁶ See Hinson & McBrien, *supra* note 27, at 33-34.

⁹⁷ N.D. CENT. CODE § 14-18-08 (2013).

⁹⁸ *Id.* § 14-18-05.

⁹⁹ See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

¹⁰⁰ *Johnson*, 851 P.2d at 778.

¹⁰¹ *Id.*

¹⁰² *Id.* at 782.

her own—is the natural mother under California law.”¹⁰³ When faced with two seemingly legal mothers, the court used intent to tip the scale in favor of the intended and genetic mother.¹⁰⁴

The California Court of Appeals took this holding one step further by eliminating the need for intended parents to even be genetically related to the child.¹⁰⁵ The case involved a dispute between intended parents, in which one disavowed parentage and the other claimed parentage.¹⁰⁶ Ultimately, both intended parents were declared parents.¹⁰⁷ The court reasoned that intended parents are similarly positioned to the husband of a woman being artificially inseminated with donor sperm: “In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.”¹⁰⁸ The lack of a genetic connection to the child was deemed irrelevant in this case, as genetics and giving birth are cited as only two of several ways by which parentage may be proven or presumed.¹⁰⁹

Despite this progressive view towards gestational surrogacy, traditional surrogates are still considered mothers in California, and traditional surrogacy arrangements are treated as adoptions.¹¹⁰ California courts first addressed the issue in *In re Adoption of Matthew B.*, where a traditional surrogate tried to withdraw her consent to the adoption after the fact.¹¹¹ The court noted that she had already given her “full and free consent” to the adoption.¹¹² The validity of the “allegedly illegal” traditional surrogacy contract was deemed irrelevant, since the parties followed the proper adoption procedures,¹¹³ and the intended parents retained their status as adoptive parents.¹¹⁴ Later, in *In re Marriage of Moschetta*, a California court reaffirmed the notion that traditional surrogacy agreements must be treated as adoptions, granting the traditional surrogate parental rights because “[u]nder Family Code section 8814, an adoption statute, ‘birth

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 285.

¹¹⁰ See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994); *In re Adoption of Matthew B.*, 284 Cal. Rptr. 18 (Cal. Ct. App. 1991).

¹¹¹ *In re Matthew B.*, 284 Cal. Rptr. at 23.

¹¹² *Id.* at 28.

¹¹³ *Id.* at 25 (“[Intended mother]’s adoption action relies not on the allegedly illegal contract, but on [traditional surrogate]’s signed consent.”).

¹¹⁴ *Id.* at 37.

parents' must specifically consent to an adoption in the presence of a social worker. There was no such consent here."¹¹⁵ When "the two usual means of showing maternity—genetics and birth—coincide in one woman," as they do in traditional surrogacy, California sees the surrogate as the mother.¹¹⁶

ii. Massachusetts

Like California, traditional surrogates in Massachusetts are seen as mothers, and traditional surrogacy is treated as adoption.¹¹⁷ The traditional surrogate, as the legal mother, must give consent to the adoption, but not before four days after the birth.¹¹⁸ In *R.R. v. M.H.*, a traditional surrogate changed her mind before the birth and wished to keep the child.¹¹⁹ The traditional surrogacy agreement she signed was not enforceable because her consent to relinquish the child could not be valid prior to four days after the birth, much less prior to birth.¹²⁰

Gestational surrogacy agreements have been upheld in Massachusetts because gestational surrogates are not seen as mothers, but rather as "gestational carriers."¹²¹ It is highly relevant in Massachusetts that a gestational surrogate is not genetically related to the child she carries.¹²² Intended parents who are also genetic parents may have their rights affirmed via a pre-birth order due to "the importance of establishing the rights and responsibilities of parents as soon as is practically possible."¹²³

C. Neither Type of Surrogate Is The Mother: Arkansas?

Arkansas is arguably the most progressive state with regard to surrogacy and maternal rights.¹²⁴ In Arkansas, "a child born by means of artificial insemination to a woman who is married at the time of the

¹¹⁵ *In re Moschetta*, 30 Cal. Rptr. 2d at 900.

¹¹⁶ *Id.* (emphasis omitted).

¹¹⁷ *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001) ("In such an arrangement, the surrogate is both the genetic mother of the child and the mother who carries the child through pregnancy and delivery. The child is thus, undisputedly, 'her' child to be surrendered for adoption.")

¹¹⁸ *R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998); see also MASS. GEN. LAWS ANN. ch. 210, § 2 (West 2013).

¹¹⁹ *R.R.*, 689 N.E.2d at 793.

¹²⁰ *Id.* at 796.

¹²¹ *Culliton*, 756 N.E.2d at 1135.

¹²² See generally *id.* (mentioning "genetic" seventeen times throughout the opinion).

¹²³ *Id.* at 1139.

¹²⁴ Terrence T. Griffin, *Surrogacy Agreements: Permitting Americans to Structure Work and Home*, 53 WAYNE L. REV. 1063, 1070-71 (2007).

birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband *except in the case of a surrogate mother.*"¹²⁵ In the case of a surrogate mother,

[T]he child shall be that of: (1) The biological father and the woman intended to be the mother if the biological father is married; (2) The biological father only if unmarried; or (3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.¹²⁶

At first glance, it seems that, in Arkansas, traditional surrogates are not presumed to be the mothers of the children they carry. However, this is tempered by the fact that in surrogacy cases, the woman giving birth is still "presumed to be the natural mother and shall be listed as such on the certificate of birth," though a new birth certificate may be issued upon a court order declaring the intended parents the legal parents of the child.¹²⁷

The Arkansas Supreme Court has treated a traditional surrogacy arrangement like an adoption at least once before in *In re Adoption of K.F.H.*¹²⁸ In that case, however, a Michigan court had already declared the surrogacy contract void under Michigan law and gave physical custody to the genetic and intended father.¹²⁹ The dispute in that case was about adoption by the intended mother against the will of the traditional surrogate.¹³⁰ The adoption was ultimately upheld because the traditional surrogate had not been in contact with the children for a year and a half.¹³¹ If the children in that case had been born in Arkansas, one wonders if adoption by the intended mother would have even been necessary, given the statutory presumptions in her favor. However, the fact remains that the traditional surrogate is still seen as the default mother.¹³² Whether a pre-birth court order in favor of the intended parents could negate this (or even be granted) is an open question, though pre-birth orders for

¹²⁵ ARK. CODE ANN. § 9-10-201 (West 2013) (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *In re Adoption of K.F.H.*, 844 S.W.2d 343 (Ark. 1993).

¹²⁹ *Id.* at 344.

¹³⁰ *Id.*

¹³¹ *Id.* at 345-46.

¹³² ARK. CODE ANN. § 9-10-201(c)(2) (West 2013).

gestational surrogacy are routinely granted in Arkansas.¹³³ Thus, even in the state where statutes are seemingly most welcoming to traditional surrogacy, there is ambiguity allowing for maternal rights to vest in traditional surrogates.

III. EGG DONORS ARE NOT PARENTS

A traditional surrogate is essentially an egg donor and a gestational surrogate combined in one woman.¹³⁴ The traditional surrogate, like a donor, intends at the outset of the agreement to “donate” her ova for use by other intended parents.¹³⁵ So from where do the traditional surrogate’s maternal rights, recognized to varying degrees by essentially all fifty states, supposedly arise? Certainly they do not arise from her mere genetic connection, nor should they. A donor shares approximately the same amount of genetic material with any resulting child as would a full sibling of that child.¹³⁶ As one scholar put it, “[I]f genetic similarity alone were sufficient for ascribing parental rights, an identical twin would possess a greater claim than the parent.”¹³⁷ Genetic material, being a part of us, belongs to us, but this ownership does not extend to resulting children because “children are not property.”¹³⁸ Additionally, a donor has presumably given up his or her ownership of his or her donated sperm or eggs prior to conception, so the ownership has already transferred prior to in vitro fertilization.¹³⁹

Many state legislatures have agreed that donors are not parents of children produced from their donated sperm or eggs. As of this writing, Alabama, Delaware, Florida, New Mexico, North Dakota, Oklahoma, Texas, Utah, Virginia, Washington, and Wyoming

¹³³ *Arkansas, State-by-State Surrogacy Law*, CREATIVE FAM. CONNECTIONS, <http://www.creativefamilyconnections.com/state-map/arkansas-surrogacy-laws> (last visited September 27, 2014); *see also* Hinson, *supra* note 22, at supp. 2.

¹³⁴ KINDREGAN & MCBRIEN, *supra* note 6, at 152.

¹³⁵ *But see* R.R. v. M.H., 689 N.E.2d 790, 795 (Mass. 1998) (“[S]urrogate motherhood is never anonymous and her commitment and contribution is unavoidably much greater than that of a sperm donor.”); Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 117 (1998) (“[T]he surrogate is different—not because she gestates the egg, which by itself gives her no rights, but because the egg never leaves her body. The legal effect of a surrogacy contract thus turns on the alienability of property within the body.”).

¹³⁶ Hill, *supra* note 33, at 391.

¹³⁷ *Id.*

¹³⁸ *Id.* at 392.

¹³⁹ *Id.* at 391-92.

explicitly clarify that egg donors are not the parents of children conceived using their donated eggs.¹⁴⁰ Most of these states derive their language directly from the Uniform Parentage Act of 2002, which reads that “a donor is not a parent of a child conceived by means of assisted reproduction.”¹⁴¹ An additional ten states¹⁴² have adopted some form of the 1973 Uniform Parentage Act, which had similar language, but only addressed sperm donors.¹⁴³ A few other states have also adopted their own sperm donor non-parentage statutes¹⁴⁴ without adopting the full Uniform Parentage Act.¹⁴⁵ The Uniform Probate Code, adopted by almost forty percent of states,¹⁴⁶ also excludes donors from parenthood, though it is only meant to apply to issues of inheritance.¹⁴⁷ Most recently, the American Bar

¹⁴⁰ See ALA. CODE § 26-17-702 (2013); DEL. CODE ANN. tit. 13, § 8-702 (West 2013); FLA. STAT. ANN. § 742.14 (West 2013); N.M. STAT. ANN. § 40-11A-702 (West 2013); N.D. CENT. CODE ANN. § 14-20-60 (West 2013); OKLA. STAT. ANN. tit. 10, § 555 (West 2013); TEX. FAM. CODE ANN. § 160.702 (West 2013); UTAH CODE ANN. § 78B-15-702 (West 2013); VA. CODE ANN. § 20-158(A)(3) (West 2013); WASH. REV. CODE ANN. § 26.26.705 (West 2013); WYO. STAT. ANN. § 14-2-902 (West 2013).

¹⁴¹ UNIFORM PARENTAGE ACT § 702 (2002), available at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf; see also *id.* § 702 cmt. (“[T]his section shields all donors, whether of sperm or eggs, from parenthood in all situations in which either a married woman or a single woman conceives a child through [assisted reproductive technology] with the intent to be the child’s parent, either by herself or with a man”).

¹⁴² Those additional states are California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Montana, New Jersey, Ohio, and Rhode Island. See *Legislative Fact Sheet: Parentage Act (1973)*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20> (last visited Dec. 15, 2013).

¹⁴³ UNIFORM PARENTAGE ACT §5(b) (1973), available at <http://www.uniformlaws.org/shared/docs/parentage/upa73.pdf> (“The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”).

¹⁴⁴ “Donor non-parentage statute” is used here to refer to any statute that both refers to the parental status of a donor in relation to children born from his or her gametes and specifically excludes said donor from being the legal parent of such children.

¹⁴⁵ See, e.g., CONN. GEN. STAT. ANN. § 45a-775 (West 2013).

¹⁴⁶ *Legislative Fact Sheet: Probate Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code> (last visited Dec. 15, 2013).

¹⁴⁷ UNIFORM PROBATE CODE § 2-120(b) (2010), available at <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>.

Association adopted the Model Act Governing Assisted Reproductive Technology, which similarly excludes donors from parenthood.¹⁴⁸

Generally, where “[t]he language of the statute is clear and unambiguous,” courts will not grant parental rights to sperm or egg donors.¹⁴⁹ Courts even seem willing to enforce donor non-parentage statutes in situations where the letter of the law was not followed. In one case, the Supreme Court of Kansas construed the donor non-parentage statute somewhat loosely, glossing over a requirement that sperm be provided to a licensed physician, saying it was mere semantics.¹⁵⁰ It seems that drawing clear lines for how a sperm or egg donation is supposed to occur is less important than upholding donor non-parentage statutes that give certainty to parents using artificial reproductive technology to conceive.¹⁵¹

This interest in not “disturb[ing] the lives of the many expectant parties to anonymous, institutional sperm donation” was made explicit by the Supreme Court of Pennsylvania in *Ferguson v. McKiernan*.¹⁵² The court in that case upheld a verbal agreement between a sperm donor and an intended mother who relieved him of child support duties in exchange for him not seeking parental rights.¹⁵³ The agreement and the parties’ initial adherence to it was deemed almost indistinguishable from “institutional sperm donation,” with the court noting “a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.”¹⁵⁴

¹⁴⁸ ABA. MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 602 (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf> (“A donor is not a parent of a child conceived by means of assisted reproduction.”).

¹⁴⁹ *In re K.M.H.*, 169 P.3d 1025, 1042 (Kan. 2007); see also *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005) (“The statute does not make an exception for *known* sperm donors, who will be denied a paternity claim so long as the semen was provided to a licensed physician for insemination of an unmarried woman.”); *In re H.C.S.*, 219 S.W.3d 33, 36 (Tex. App. 2006) (holding that pursuant to the statute a sperm donor does not have standing to pursue an action to establish paternity).

¹⁵⁰ See *In re K.M.H.*, 169 P.3d at 1042 (holding that the relevant donor non-parentage statute is satisfied when sperm is provided to intended mother who then provides it to a licensed physician).

¹⁵¹ But see *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534-35 (Cal. Ct. App. 1986) (holding that a donor is not barred from seeking parentage by statute when the sperm was not provided to a licensed physician). Despite the strict interpretation of the statute, the court in *Jhordan C.* acknowledged a clear public policy interest in not recognizing paternity claims from donors. *Id.* at 537.

¹⁵² *Ferguson v. McKiernan*, 940 A.2d 1236, 1247 (Pa. 2007).

¹⁵³ *Id.* at 1245-46.

¹⁵⁴ *Id.* at 1246.

Occasionally, courts will grant parental rights to sperm and egg donors in unusual cases, such as when the egg donor is the lesbian partner of the intended mother. In *K.M. v. E.G.*, for example, the egg donor signed forms that ostensibly waived her rights to any resulting children.¹⁵⁵ The egg donor contended, however, that she only agreed to donate her eggs because she understood that the couple would be raising the resulting children together, something the intended mother disputed.¹⁵⁶ Ultimately, the Supreme Court of California held that:

A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.¹⁵⁷

Essentially, the majority made an exception to the statutory rule of donor non-parentage for donor arrangements between lesbian couples.¹⁵⁸ As one dissenter points out, the majority ignores the initial intent of the parties, calling into question all donor agreements.¹⁵⁹ The majority limits the ability of lesbian partners “to create, before conception, settled and enforceable expectations about who would and would not become parents.”¹⁶⁰

The Supreme Court of Florida recently held similarly in another case involving a lesbian couple. In *D.M.T. v. T.M.H.*, the court held that enforcement of the donor non-parentage statute in that case would unconstitutionally infringe upon the donor’s right to maintain a parent relationship with a child for whom she had already assumed full parental responsibilities until the custody dispute arose.¹⁶¹ The court analogized to a situation where an unmarried man impregnates an unmarried woman.¹⁶² Though the man in such a case “does not automatically have a fundamental right to be a parent to the child, his right to be a parent develops substantial constitutional

¹⁵⁵ *K.M. v. E.G.*, 117 P.3d 673, 675-77 (Cal. 2005).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 682.

¹⁵⁸ *See id.* at 687 (Werdegarr, J., dissenting); *see also* Heather A. Crews, *Women Be Warned, Egg Donation Isn't All It's Cracked Up to Be: The Copulation of Science and the Courts Makes Multiple Mommies*, 7 N.C. J.L. & TECH. 141, 154-55 (2005).

¹⁵⁹ *K.M.*, 117 P.3d at 685 (Kennard, J., dissenting).

¹⁶⁰ *Id.* at 688 (Werdegarr, J., dissenting).

¹⁶¹ *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013).

¹⁶² *Id.* at 337.

protection as a fundamental right if he assumes responsibility for the care and raising of that child.”¹⁶³ It was not the donor’s genetic connection to the child that made her a parent, rather her genetic connection merely gave her the opportunity to assume a parental role.¹⁶⁴ The Supreme Court of Virginia applied a similar logic in *L.F. v. Breit*, ruling that donors cannot claim parentage through genetics alone, but may do so when they formally acknowledge their paternity or maternity and assume parental responsibilities for the child.¹⁶⁵

IV. PARENTHOOD BY INTENT

If the cases of *K.M. v. E.G.*, *D.M.T. v. T.M.H.*, and *L.F. v. Breit* teach us anything, it is that parenthood is based on action and intent rather than biology.¹⁶⁶ One of the earliest cases in which a court entertained the idea of parenthood by intent was in 1968, when the Supreme Court of California held in *People v. Sorenson* that the husband’s consent to his wife’s artificial insemination with a donor’s sperm made him a parent.¹⁶⁷ As the court said, it was “safe to assume that without [the husband]’s active participation and consent the child would not have been procreated.”¹⁶⁸ The concept of parenthood by intent was not really expanded beyond egg and sperm donations, however, for many years.

Legal scholar, Marjorie Shultz, was one of the first to argue for its application to surrogacy.¹⁶⁹ Drawing on John Stuart Mill and Immanuel Kant, Shultz stressed the importance of autonomy and respect for the life choices of private parties.¹⁷⁰ She argued that contractual agreements of surrogacy should be upheld because doing otherwise “denies the need for diversity and individual choice in the most intimate areas of life, and imposes the standardized conventional morality of particular groups and classes in the name of ‘privacy.’”¹⁷¹ She also noted that “biological connection will not guarantee love or

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 328 (citing *In re Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989)).

¹⁶⁵ *L.F. v. Breit*, 736 S.E.2d 711, 719 (Va. 2013).

¹⁶⁶ See also Hill, *supra* note 33, at 414 (“What is fundamental in rendering a biological progenitor a parent is not the biological tie itself, however, but the preconception intention and the preconception and post-conception acts which the biological relation evinces.”).

¹⁶⁷ *People v. Sorensen*, 437 P.2d 495, 498-500 (Cal. 1968).

¹⁶⁸ *Id.* at 499.

¹⁶⁹ Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (1990).

¹⁷⁰ *Id.* at 328.

¹⁷¹ *Id.* at 348.

adequate care,” whereas children “conceived and born because their parents chose to bring them into being . . . will start life with parents who wanted and prepared for their advent.”¹⁷² Such children owe their existence to their “progenitors’ individual intentions, their reciprocal decisions, and their behavior and expectations in the wake of such decisions.”¹⁷³ Furthermore, but for the intent-driven actions of the intended parents, other parties, *e.g.* gamete donors and/or surrogates, would not be involved.¹⁷⁴ Based on these principles, traditional surrogates should not be given maternal rights.

Recognizing intended parents as the parents of children at birth could eliminate all of the policy issues and moral conundrums presented by traditional surrogacy. As John Hill wrote:

If the intended parents are recognized as the parents of the child, then it is difficult to see how they could be guilty of buying their own baby. Similarly, if the surrogate is deemed not to be the mother of the child, she cannot, as a logical matter, be culpable for baby-selling.¹⁷⁵

Most important, perhaps, is that if intended parents are the parents of their child at the moment of that child’s birth, then there is no need for adoption, and the possibility of the traditional surrogate changing her mind is eliminated. It is time for intent to matter.¹⁷⁶ While seemingly parentless under this system, unintended children would be the children of their genetic parents by default.¹⁷⁷ Intent could simply be used to trump the interests of other parties such as a traditional surrogate.

A. California and Beyond

The California Supreme Court has already embraced parenthood by intent, though they have not yet extended this reasoning to preclude traditional surrogates from being parents.¹⁷⁸ The court in

¹⁷² *Id.* at 343.

¹⁷³ *Id.* at 376.

¹⁷⁴ Hill, *supra* note 33, at 415.

¹⁷⁵ *Id.* at 356 (citation omitted).

¹⁷⁶ *Cf. id.* at 414-15 (noting that many other areas of law already include mental state as a relevant factor).

¹⁷⁷ *Cf. In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 292 (Cal. Ct. App. 1998) (“[A] deliberate procreator is as responsible as a casual inseminator.”).

¹⁷⁸ See discussion *supra* Part II.B.1.

Johnson v. Calvert stressed the importance of “[t]he mental concept of the child” and giving “credit” to the “initiating parents” as “conceivers” of the concept.¹⁷⁹ Such a concept “creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.”¹⁸⁰ The court also made a point that the entire surrogacy process was initiated by, organized by, and would not have happened but for the intending parents.¹⁸¹ The key to intended parenthood is that the intended parents are the instigators. According to *In re Buzzanca*, this concept can be used to determine the parents of a child in any situation where the child would not exist were it not for the actions of his or her intended parents.¹⁸² Intent can be the deciding factor in such cases, even when the intended mother neither gestates nor has a genetic link to the child.¹⁸³

States that treat the two types of surrogacy differently¹⁸⁴ are inherently inconsistent. As already discussed, genetic contribution is not enough to give rise to parentage.¹⁸⁵ Noting that, Nancy Polikoff pointed out that the only factor left to give a traditional surrogate a claim to parentage is gestation.¹⁸⁶ However, recognizing such a claim undermines gestational surrogacy, which often denies the parentage claims of gestational surrogates.¹⁸⁷ Taken a step further, gestation should not be a relevant factor in determining parentage in surrogacy cases.

A claim to parentage based on gestation arises from alleged physical and emotional ties to the child carried. There is some argument to be made that whoever gestates the child should be its mother because of an alleged bond formed in the womb.¹⁸⁸ The existence of a bond between gestating women and the babies they

¹⁷⁹ *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (citing Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 *YALE L.J.* 187, 196 (1986)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 782; see also Hill, *supra* note 33, at 356 n.12 (“(1) [T]he intended parents must plan to have a child before the conception of the child; (2) they must take morally permissible measures, not limited to biological procreation, to bring a child into the world; and (3) they must meet certain minimally adequate conditions to be able to raise and care for the child.”).

¹⁸² *In re Buzzanca*, 72 Cal. Rptr. 2d at 291.

¹⁸³ *Id.* at 290.

¹⁸⁴ See discussion *supra* Part II.B.

¹⁸⁵ See discussion *supra* Part III.

¹⁸⁶ See Polikoff, *supra* note 35.

¹⁸⁷ *Id.*; see also discussion *supra* Parts II.B-C.

¹⁸⁸ Hill, *supra* note 33, at 397 (“[W]omen often report feelings of loyalty toward the fetus early in pregnancy, sometimes as early as the end of the first trimester.”).

carry is far from universal, however, as one study revealed that “[o]nly 41% first felt love [for their babies] during pregnancy.”¹⁸⁹ Furthermore, the degree to which a surrogate, of any type, bonds with the child she carries may be a function of the expectations of the surrogate, and knowing that she has no claim to parenthood could “mitigate” feelings of attachment.¹⁹⁰ The physical connection argument is perhaps more concrete, as actions of the surrogate during gestation can have lasting effects on the child she carries.¹⁹¹ One court mentioned the crucial role that a gestating woman’s endocrine system plays in the development of the child she carries.¹⁹² However, as this is a normal part of gestation, this could be seen as simply part of a surrogate’s job. She is just doing what she agreed to do.

B. *Autonomous Decisions*

Currently, a traditional surrogate may change her mind and keep the child she carried in all states.¹⁹³ This is because traditional surrogacy agreements are treated as adoptions.¹⁹⁴ But traditional surrogates should not be treated as mothers. A traditional surrogate should not be able to give up for adoption a child that is not hers. More importantly, the agreement that the traditional surrogate and the intended parents entered into should be honored. This is true for three reasons: deontological, consequential, and feminist. First, “people generally should be held to their promises simply because promise-keeping is a good in itself.”¹⁹⁵ Second, intended parents rely on the surrogate to keep her promise.¹⁹⁶ Third, not allowing a woman to voluntarily agree to give up her child irrevocably before its birth

¹⁸⁹ *Id.* at 398 (citing J.H. Kennell & M.H. Klaus, *Mother-Infant Bonding: Weighing the Evidence*, 4 DEV. REV. 275, 281 (1984)).

¹⁹⁰ *Id.* at 398-99; *see also id.* at 398 (stating that studies have shown that expectations shape how a woman feels towards a child she carries).

¹⁹¹ Fetal alcohol syndrome, for example, can occur when a woman drinks alcohol while she is pregnant. *Fetal Alcohol Syndrome: Causes*, MAYO CLINIC, <http://www.mayoclinic.com/health/fetal-alcohol-syndrome/DS00184/DSECTION=causes> (last visited Dec. 15, 2013).

¹⁹² *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000).

¹⁹³ *See generally* discussion *supra* Part II.

¹⁹⁴ *See generally* discussion *supra* Part II.

¹⁹⁵ Hill, *supra* note 33, at 415.

¹⁹⁶ *Id.* at 416.

implies a lack of belief in her ability to make such decisions.¹⁹⁷ As one scholar put it:

[I]f a surrogate is released from her agreement because she could not assess what her emotions would be at the end of the pregnancy, how can any person be held to any agreement when their emotions may change over time? What does this rationale for validating breach of the surrogacy agreement say about women's capabilities and trustworthiness?¹⁹⁸

Allowing surrogates to change their minds after birth “reinforces stereotypes of women as unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions.”¹⁹⁹ As Margaret Sanger said, “No woman can call herself free until she can choose consciously whether she will or will not be a mother.”²⁰⁰ We must respect the ability of traditional surrogates to irrevocably relinquish parental claims on the child they carry before the child’s birth.

V. BEST INTERESTS OF THE CHILD

No discussion of who should be a parent can be complete without at least mentioning the best interests of the child. In all fifty states, courts decide custody disputes between parents based on their assessment of the best interests of the child.²⁰¹ However, such custody

¹⁹⁷ Cf. Shultz, *supra* note 169, at 384 (“[Allowing] revocability expresses the idea that the biological experience of motherhood necessarily ‘trumps’ all other considerations.”).

¹⁹⁸ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717 (2003); see also Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 110 (1991) (“[I]f each individual woman is a mature, free moral agent, then she is capable of making this decision based on the circumstances of her own life . . .”).

¹⁹⁹ Shultz, *supra* note 169, at 384.

²⁰⁰ Margaret Sanger, *A Parents' Problem or Woman's?*, 3 BIRTH CONTROL REV. 3, 6 (1919), available at <http://birthcontrolreview.net/Birth%20Control%20Review/1919-03%20March.pdf>.

²⁰¹ See generally *Child Welfare Information Gateway: Determining the Best Interests of the Child*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last visited Dec. 14, 2013); *Child Custody*, 50 STATE STATUTORY SURVEYS, 0080 SURVEYS 3 (West 2007).

disputes only affect parental rights after the birth of the child, and they have no effect on parentage at birth.

In Illinois, for example, “there is a rebuttable presumption that a parent is unfit” if her second newborn’s “blood, urine, or meconium” contains traces of controlled substances at birth when this is that parent’s second child with such results.²⁰² In such cases, the woman who gave birth to the child may have her parental rights terminated,²⁰³ and custody will be decided based on the child’s best interests.²⁰⁴ Such a ruling, however, does not change the fact that, at the time of the child’s birth, that woman was the child’s mother.²⁰⁵ Intended parents, rather than traditional surrogates, should be automatically recognized as legal parents upon the birth of their child in a similar way. As such, a custody ruling on best interests should have no bearing on whether the intended parents are the original parents of the child.²⁰⁶

Even if the best interests of a child are relevant in determining parentage of children born as a result of surrogacy agreements, the best interests *are* served. As one court put it, it is in a child’s best interest to have established legal parents upon his or her birth because:

Delays in establishing parentage may, among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly after birth; may hinder or deprive a child of inheriting from his legal parents should a legal parent die intestate before a postbirth action could determine parentage; may hinder or deprive a child from collecting Social Security benefits . . . ; and may result in undesirable support obligations as well as custody disputes.²⁰⁷

²⁰² 750 ILL. COMP. STAT. ANN. 50/1(D)(k) (West 2013); 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 2013).

²⁰³ 705 ILL. COMP. STAT. ANN. 405/2-23 (West 2013).

²⁰⁴ As defined by ILL. ADMIN. CODE tit. 89, § 315.30 (2013).

²⁰⁵ 750 ILL. COMP. STAT. 45/4 (West 2013); *cf.* Shultz, *supra* note 169, at 341 (“Even under conventional legal rules, children do not get a say in who their parents will be, or for that matter, in whether they will be conceived or born.”).

²⁰⁶ Of course, if the intended parents abuse or neglect their child, they could have their parental rights terminated later, just as any parent could. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-22 (West 2013).

²⁰⁷ *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1139 (Mass. 2001); *cf.* Hill, *supra* note 33, at 414 (mentioning “important policy considerations in assuring the identity of the parents of the child from the time of conception”). *But cf. id.* at 364 (citing Russell, *supra* note 56, at 622) (“[A]ll states apply a presumption

Despite this, as already stated, best interests should not apply in a framework where intended parents simply *are* the legal parents upon their child's birth.

VI. UNIFORM POLICY ATTEMPTS: NOT FAR ENOUGH

So what should a statute that embraces traditional surrogacy look like? First, it needs to allow surrogacy generally. Second, it should not recognize surrogates of any type (traditional or gestational) as mothers of the children they carry. Finally, it should rely on intent when determining parentage at birth in cases involving assisted reproductive technology (*e.g.* surrogacy). The distinction made between traditional and gestational surrogacy, whereby some states recognize intended parents as parents in cases of gestational surrogacy and not in cases of traditional surrogacy, needs to disappear. A surrogate is a surrogate. Two promulgated model acts come close to satisfying these criteria: Article 8 of the Uniform Parentage Act of 2002,²⁰⁸ and Article 7 of the American Bar Association Model Act Governing Assisted Reproductive Technology of 2008.²⁰⁹

A. *Uniform Parentage Act*

Under the Uniform Parentage Act, “[g]estational mother” means an adult woman who gives birth to a child under a gestational agreement.”²¹⁰ This definition encompasses both traditional and gestational surrogates. Under the Uniform Parentage Act, a surrogacy agreement requires the surrogate to relinquish her parental rights and bestows them instead upon the intended parents.²¹¹ Such surrogacy agreements must be validated by a court of competent jurisdiction.²¹² Prior to this validation, intended parents must undergo a home study and must be evaluated according to the same standards by which prospective adoptive parents are evaluated.²¹³ This is somewhat problematic because it treats surrogacy like adoption, seemingly

that placement of the child with its natural parent is in the best interests of the child.”).

²⁰⁸ See UNIFORM PARENTAGE ACT, art. 8 (2002).

²⁰⁹ See ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, art. 7 (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

²¹⁰ UNIFORM PARENTAGE ACT § 102(11) (2002).

²¹¹ *Id.* § 801(a)(2)-(3).

²¹² *Id.* §§ 802-803.

²¹³ *Id.* § 803(b)(2).

involving a best interests of the child analysis.²¹⁴ However, once the agreement is validated, the surrogate may only terminate the agreement prior to pregnancy.²¹⁵

One other possibly problematic aspect of the Uniform Parentage Act's proposed surrogacy framework is that the intended parents must seek a court order confirming their parentage after the birth of their child,²¹⁶ which raises a possibility that a surrogate could change her mind and try to seek and/or enforce parental rights to the child. However, section 807(c) implies that this order will be granted automatically upon a showing that the surrogacy agreement was previously validated by a court.²¹⁷ While there is perhaps too much government oversight under the Uniform Parentage Act system, it takes steps in the right direction.

B. ABA Model Act Governing Assisted Reproductive Technology

Like the Uniform Parentage Act, the American Bar Association Model Act Governing Assisted Reproductive Technology includes both traditional surrogates and gestational surrogates under the same framework, calling them both "gestational carriers."²¹⁸ Alternative A of Article 7 describes a surrogacy agreement procedure involving judicial validation that is almost identical to that described by the Uniform Parentage Act.²¹⁹ Alternative B, however, merely involves an administrative procedure of filing the surrogacy agreement with the relevant state agency before or within twenty-four hours of the birth.²²⁰ Under Alternative B, the intended parents are considered the parents of the child and vested with parental rights and responsibilities from the moment of the child's birth, while the surrogate is specifically excluded from being a parent of the child.²²¹ The only downside to Alternative B is that it requires at least one of the intended parents to contribute a gamete towards the creation of their child.²²² As it requires a genetic link to the child in order to recognize parentage, Alternative B does not go far enough in recognizing intended families.

²¹⁴ *Id.* § 802 cmt.

²¹⁵ *Id.* § 806.

²¹⁶ *Id.* § 807(a).

²¹⁷ *Id.* § 807(c).

²¹⁸ ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY §102(16) (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

²¹⁹ *Id.* Alt. A §§ 701-709.

²²⁰ *Id.* Alt. B § 705.

²²¹ *Id.* Alt. B § 701(2).

²²² *Id.* Alt. B § 702(2)(a).

It also raises a question of policy consistency: if the genetic connection to the intended parents matters, why does the genetic connection to a traditional surrogate not matter? Such an inconsistency in an area as controversial as surrogacy could be an opening for judges to pick apart the statute and erode the certainty that intended parents should have in their irrevocable parental rights.

VII. CONCLUSION

In conclusion, traditional surrogates are not mothers, and they should not be given maternal rights. If neither gestation nor genetics alone give rise to motherhood, then combining them in one person should not make that person a mother. It is true that genetics and gestation combined have been the very definition of motherhood since time immemorial, but assisted reproductive technology has changed that. We now enter an era where babies may soon be gestated without need of a surrogate's uterus.²²³ As technology advances, however, traditional surrogacy will remain a cheaper and less medically complicated option. It should not be ignored. Thus, intended parents who elect traditional surrogacy should be protected from their surrogate changing her mind.

A traditional surrogate is different from a mother in one important respect: intent. This intent to create the child should vest the intended parents with parental rights upon the child's birth. If the traditional surrogate is never the mother, the worry of her changing her mind is removed. Intended parents do not need consent to take a child if the child is already theirs.

²²³ Soraya Chemaly, *What Do Artificial Wombs Mean for Women?*, RH REALITY CHECK (Feb. 23, 2012, 8:11 AM), <http://rhrealitycheck.org/article/2012/02/23/what-do-artificial-wombs-mean-women/>.