THE USE OF THE INTENT DOCTRINE TO EXPAND THE RIGHTS OF INTENDED HOMOSEXUAL MALE PARENTS IN SURROGACY CUSTODY DISPUTES

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INTRODUCTION

On October 4, 2006, after a difficult emergency cesarean section,[1] Angelia Robinson gave birth to her brother's twins.[2] Donald Robinson Hollingsworth and Sean Hollingsworth are a gay couple from New Jersey registered as domestic partners in New Jersey and legally married in California.[3] The couple entered into a gestational contract agreement with Angelia, Donald's sister, to have her carry an embryo from an anonymous donated egg and sperm from her brother's partner, Sean Hollingsworth. Angelia had signed three forms prior to the embryo transfer into her womb that would give adoption rights to Donald.[4] Despite these agreements, and despite her lack of biological connection to the children, Angelia sued for custody of the twins after she gave birth.[5]

Judge Francis B. Schultz of the Superior Court of New Jersey ruled in December that Angelia had parental rights to the child and that the gestational carrier agreement that the parties had entered into was void as against the public policy of New Jersey.[6] Sean Hollingsworth was held to have rights as the biological father, but Donald was left with no parental rights at all.[7]

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1 *See* Associated Press, *N.J. Judge Rules Surrogate Legal Mother of Twins Despite not Being Genetically Related*, NJ.COM (Dec. 31, 2009), http://www.nj.com/news/index.ssf/2009/12/nj_judge_rules_surrogate_legal.html.

2 *See* Ashby Jones, *Medical Technology and the Law*: *On the Rights of Surrogate Mothers*, WALL ST. J. L. BLOG (Jan. 15, 2010, 9:46 AM), http://blogs.wsj.com/law/2010/01/15/medical-technology-and-the-law-on-the-rights-of-surrogate-mothers.

3 *See* A.G.R. v. D.R.H. & S.H., No. FD-09-001838-07 at *2, N.Y. TIMES, (N.J. Super. Ct. Ch. Div., Dec 23, 2009), http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf [hereinafter A.G.R.].

4 *See id*. These forms included: (1) "Information Summary and Consent Form - Gestational Surrogacy," (2) "Contract between a Genetic Father, and Intended Father, and a Gestational Carrier," and (3) "Consent to Judgment of Adoption."

5 *See id*.

6 *See id*.

7 *See id*.

In *Johnson v. Calvert*,[8] the Supreme Court of California took a different approach. The case involved a heterosexual couple whose sperm and egg were implanted into a gestational surrogate using in vitro fertilization. The court held that the intended parents in a gestational surrogacy agreement should be recognized as the natural and legal parents.[9] It reasoned that but for the acts of the intended parents, the child in question would not exist.[10] Some courts have followed *Johnson*'s "intent doctrine," under which those who intend to bring about the birth of a child are the legal parents of that child, and those who did not have that original intent, such as sperm and egg donors, do not have legal parental rights to that child.[11] Under this doctrine, if a homosexual couple enters into a surrogacy agreement, they are the legal parents, as they are the intended parents. Yet, many courts still refuse to uphold surrogacy agreements of any kind, whether or not they involve homosexual couples.

Those opposed to surrogacy contracts believe that surrogacy tends to exploit women, particularly lower class women who are motivated by the fees associated with surrogacy.[12] Proponents, on the other hand, argue that everyone should have the opportunity to be a parent, and that two consenting adults should be able to contract in the way that they choose.[13] Nevertheless, surrogacy has become increasingly relevant in our society.[14] "[T]he number of babies born to gestational surrogates grew 89% in *just four years*, from 2004 to 2008."[15] The numbers rose from 738 in 2004 to 1,400 infants born to gestational surrogates in 2008.[16] This increase can be attributed to many factors, such as rising rates of infertility, new reproductive technologies, and changes in society's understanding of the meaning of "family" and "mother."[17]

The rising number can also be attributed to gays and lesbians seeking increased rights and desiring families.[18] Surrogacy fills an important and growing

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

9 *See id*.

10 *Id*. at 782.

11 *See* Lainie M. C. Dillon, *Conundrums with Penumbras: The Right to Privacy Encompasses Non-Gamete Providers Who Create Preembryos with the Intent to Become Parents*, 78 WASH. L. REV. 625, 641-642 (2003) (citing UNIF. PARENTAGE ACT §§ 702-03 (amended 2002)).

12 *See* Nathan Koppel, *Surrogacy Battles Expose Uneven Legal Landscape*, WSJ.COM (Jan. 15, 2010), http://online.wsj.com/article/SB10001424052748704362004575000974247846294.html (some surrogate mothers receive a fee for the process).

13 *See id*. for the proposition supporting the statement.

14 Melanie Thernstrom, *Meet the Twiblings*, N.Y. TIMES (Dec. 29, 2010), http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?_r=1&pagewanted=2.

15 Magdalina Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 3 (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf.

16 *See id*. at 4.

17 SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 9 (Univ. of California Press 2007).

18 *See* Thernstrom, *supra* note 14, at 2. *See also Surrogacy Law: Conn. Gives Non-Genetic Parents Legal Rts*., ABC NEWS (Jan. 20, 2011), http://abcnews.go.com/Health/connecticut-surrogacy-law-genetic-parents-legal-rights/story?id=12662224&page=2 (describing a "'gaybe' boom among gay and

need for homosexual couples in particular.[19] Gay men often have more legal difficulties involving surrogacy than lesbian women. Lesbian women have options available to them to reproduce with their own genes. They can carry babies themselves via in vitro fertilization. Homosexual men, on the other hand, must use a surrogate to reproduce.[20] Therefore, gay men are often involved in surrogacy disputes and have greater legal challenges when it comes to surrogacy. While custody battles may exist between two lesbian partners, there is no third party that can fight for the child when lesbian partners are involved in surrogacy, as any rights of an anonymous sperm donor are severed.[21] However, gay men must confront the fear that the gestational surrogate could fight for custody of the child they desired. Therefore, outlawing surrogacy and refusing to enforce surrogacy contracts allows lesbian women to reproduce using their own genetic makeup but does not allow the same for homosexual men.

This Note will demonstrate why courts should follow the *Johnson v. Calvert* approach in solving surrogacy disputes by awarding custody to the intended parents. This approach would aid homosexual men in their search for parenthood. In adopting this approach, courts should follow California's trend and expand the intent doctrine from *Johnson* to allow homosexuals to be considered the intended parents. This would ensure that homosexual men are able to reproduce using their own genes, just as lesbian women are. Part I of this Note will provide background information on assisted reproduction and introduce the different contexts of surrogacy. It will also discuss policy reasons for upholding surrogacy agreements. Part II will discuss the current legal landscape of surrogacy laws through the use of charts and a discussion of case law.

Part III will explain solutions for state legislatures that are hesitant to enact laws upholding surrogacy agreements, while recognizing that upholding these agreements and allowing intended parents to be the legal parents is the best solution. If the best solution is not yet possible in a given state, legislatures should consider a three parent model, which allows a child to have three legally recognized parents, and a prior pregnancy requirement, requiring surrogate mothers to have had a prior pregnancy before participating in surrogacy. This Note will conclude

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lesbian couples who want to have children.").

[19] *See* Thernstrom, *supra* note 14, at 2.

[20] *See* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rts. of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 11 (Dec. 2006) (stating "[m]ale same-sex couples face even more hurdles, as they must always use a gestational surrogate to give birth, even if one of the members of the same-sex relationship is genetically related to the child.").

[21] *See* In the Matter of the Adoption of Sebastian, 25 Misc.3d 567, 577 (N.Y. Sur. Ct. 2009) (citing N.Y. DOM. REL. LAW § 73 (McKinney 2008)). DRL § 73 states, "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes." N.Y. DOM. REL. LAW § 73 (McKinney 2008). This effectively terminates any rights of a sperm donor to the child.

that in a surrogacy custody dispute, courts should award custody to the intended parents and that this practice should be expanded to homosexual parents.

I. BACKGROUND ON ASSISTED REPRODUCTION

A. Assisted Reproductive Technology

Assisted Reproductive Technology ("ART") "[i]ncludes a range of methods used to circumvent human infertility, including in vitro fertilization (IVF), embryo transfer (ET), gamete intra-fallopian transfer (GIFT), artificial insemination (AI), [and] all manipulative procedures involving gametes and embryos and treatment to induce ovation or spermatogenesis when used in conjunction with the above methods."[22] Traditionally, adoption was the only option for infertile or homosexual couples. Today, ART provides various reproductive options for infertile couples, heterosexual or homosexual. Couples may prefer to use ART rather than adoption because adoption does not allow either parent to have a biological connection to the child. Additionally, in some states, it is still difficult for a homosexual couple to adopt, and other states such as Florida completely ban adoption by lesbians and gay men.[23] There are also often long delays involved in adoption and the process can be lengthy.[24]

Therefore, many couples seek alternatives that allow a biological connection to their children. Lesbians may use artificial insemination, using a known sperm donor or purchasing the sperm of an anonymous donor through a sperm bank.[25] They may also use in vitro fertilization, "using the eggs from one woman to create an embryo with donor sperm and then implant[ing] the embryo into the other woman."[26] Gay men, on the other hand, have no other option than a gestational carrier if they wish to have a biological connection with their children.[27]

B. Surrogacy as a Form of ART

1. Forms of Surrogacy

Surrogacy is a form of ART commonly utilized by gay men as well as other couples to ensure a biological connection with their children. There are different forms of surrogacy. Traditional surrogacy is when the surrogate uses her own eggs and is impregnated by artificial insemination using either the sperm of the intended

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22 Assisted Reproductive Technology (ART) Glossary, REPRODUCTIVE TECHNOLOGY COUNCIL (2010), *available at* http://www.rtc.org.au/glossary/index.html.

23 *See* Joyce Kauffman, *Protecting Parentage with Legal Connections*, 32 WTR-FAM. ADVOC. 24, 24-25 (Winter, 2010).

24 *See In re* Matter of Baby M, 109 N.J. 396, 413 (1988).

25 *See* Kauffman, *supra* note 23, at 24.

26 *Id.*

27 *See id.*

father or a sperm donor.[28] The surrogate, then, despite her biological connection to the child, surrenders the child to the person or people with whom she entered into the surrogacy contract.[29] This is typically either the biological father who donated the sperm or the intended father from the contract and his wife or partner.[30] A gestational carrier, on the other hand, has no biological connection to the child, yet carries the child following an IVF procedure using donor eggs and sperm.[31] A donor egg and donor sperm are implanted into the surrogate, who carries the child to term.[32] Surrogacy can take many forms, including: (1) a surrogate serving as a gestational mother who is impregnated with an intended parent's sperm and an intended parent's egg; (2) a gestational mother using genetics from one intended parent with help from a donor; (3) a gestational mother who has genetics from two donors but has two intended parents who will not be biologically related to the child; (4) a traditional surrogate mother who is both genetically related as well as a carrying a child who has genetics from an intended father; and (5) a traditional surrogate who uses donor sperm but is giving the child up to a different intended father and intended mother.[33] With so many variations of surrogacy and so many individuals involved, litigation as well as social and moral issues are likely to arise.

2. Policy Arguments for Upholding Surrogacy Agreements

States cite to different reasons for allowing or refusing to uphold surrogacy agreements. Common issues that have created the disparity in surrogacy views include the compensation of the surrogate beyond medical expenses[34] and the exploitation of women.[35] Yet, many of these concerns are grounded in views on adoption. Instead of focusing on adoption concerns, courts should recognize the striking differences between the practices of adoption and surrogacy. Further, courts should focus on the fact that surrogacy is a gift to another individual who cannot create a family without it.

Compensation of surrogate mothers has been greatly criticized. "Baby-selling"—the practice of a parent giving up their child for money—[36] is seen by many as immoral and is even criminalized in many states. Thirty-two states prohibit baby-selling and many other states have laws against the practice.[37]

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28 *See* Farrell, et. al, 2 AM. JUR. 2D *Adoption* § 55 (2011).

29 *See id*.

30 *See id*.

31 *See* Kauffman *supra* note 23, at 24.

32 *See* Farrell, *supra* note 28.

33 *See* Darra L. Hofman, "*Mama's Baby, Daddy's Maybe": A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 451 (2009).

34 *See id*. at 460.

35 *See* MARKENS, *supra* note 17, at 80.

36 *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 17 (Harvard Univ. Press 1988).

37 *See* Andrea B. Carroll, *Reregulating the Baby Market: A Call For a Ban on Payment of Birth-mother Living Expenses,* 59 U. KAN. L. REV. 285, 290-291 (2011) (citing ALA. CODE § 26-10A-34 (2009); CAL. PENAL CODE § 273(a) (West 2008); COLO. REV. STAT. ANN. § 19-5-213 (West 2005 &

Opponents of surrogacy argue that attorneys and surrogacy centers participating in surrogacy contracts may be in violation of these baby-selling laws.[38] However, proponents of surrogacy perceive the payments involved as being for the service of renting a woman's womb rather than for the baby itself.[39] In the adoption context, the woman is already pregnant herself, whereas a surrogate becomes pregnant in order to fulfill the obligation from the surrogacy contract, entering into the agreement prior to becoming pregnant.[40] Thus, surrogates are being paid to create the child, not to sell one they have already created.[41] Further, compensation is provided for certain behaviors in which the surrogate agrees to engage during pregnancy, such as good eating and drinking habits or refraining from smoking.[42] The distinction between baby-selling statutes and compensation for surrogacy is one that some courts, but not all, have been willing to make. Yet, it is a distinction that should be made, as surrogacy and adoption differ in these important aspects.

Critics of surrogacy also point to the exploitation of women as a reason to oppose the practice. They argue that compensated surrogacy agreements may appeal to low-income women who have few other opportunities for making a living.[43] Some suggest that poor women who would never normally enter surrogacy contracts would do so solely for the fees involved, forcing a class distinction of low-income women providing their bodies for women of means.[44] Similarly, women—even those who have been pregnant before—may not fully understand the surrogacy process and may not be prepared to be pregnant and give up a child because they may not recognize the connection they will have with this

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Supp. 2009)).

[38] *See* FIELD, *supra* note 36, at 17; *see also In re* Matter of Baby M, 109 N.J. 396, 423 (1988) (stating surrogacy contracts conflict with laws "prohibit[ing] paying or accepting money in connection with any placement of a child for adoption") (citation omitted).

[39] *See* FIELD, *supra* note 36, at 17-18.

[40] *See* Jennifer L. Watson, Note & Comment, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated For Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 547 (2007) (citing Surrogate Parenting Assoc. v. Kentucky, 704 S.W.2d 209, 211 (1986), concluding that there is a fundamental difference between surrogate parenting and baby-selling).

[41] *See id*.

[42] *See id*. at 547-48; *see also* Johnson v. Calvert, 851 P.2d 776, 784(Cal. 1993) (concluding that compensation for surrogacy is different from compensation for adoption: "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] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring . . . [The surrogate] was not the genetic mother of the child. The payments to [the surrogate] under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child."); *but see Baby M*, 109 N.J. 396 at 437-38 (stating "[t]his is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.").

[43] *See* FIELD, *supra* note 36, at 26.

[44] *See* Watson, *supra* note 40, at 544.

child.[45] However, little evidence exists that shows that women are exploited, and in fact, many women feel that surrogacy is a fulfilling and positive experience.[46]

Not only is it paternalistic to prohibit women from being compensated for their surrogacy services, but it also sends the message that although women are capable of being surrogates for free, they are not competent and do not deserve to collect a fee for these services.[47] In one sense, payment for surrogacy makes these agreements less exploitive, compensating surrogates for something they rightly deserve.[48] Critics also compare surrogacy to prostitution, taking the position that both surrogates and prostitutes use their reproductive organs to earn money.[49] However, the underlying purpose is different: the purpose of prostitution is physical pleasure whereas that of surrogacy is helping a couple that cannot bring a child into the world.[50]

Some surrogacy contracts are unpaid, and the surrogate is simply reimbursed for medical expenses for the pregnancy.[51] The surrogacy contracts may explicitly include a provision stating that no compensation is to be paid.[52] Some feel that these provisions are suspect and may have only been included to avoid accusations of baby-selling and that often compensation is made anyway.[53] Though some argue that unpaid surrogacy contracts may eliminate any suspect exploitation of women, there may not be enough women who will serve as unpaid surrogates to satisfy the demand.[54] A surrogate's nonmonetary incentives may include guilt from a past experience such as abortion, a desire for love and affection, a love for pregnancy, and pure love and generosity.[55] But without payment, surrogacy may be limited.[56] Often, the nonmonetary incentives will not be present or will be insufficient to justify being a surrogate. Therefore, it is important to allow surrogates to receive compensation.

Overall, some feel that the practice of surrogacy is illegal and immoral. However, it is a compassionate way to help a couple that is infertile, giving it the blessing of procreation.[57] These issues not only greatly divide individuals on a social and political level, but also divide the states, causing them to enact

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[45] *See id*.

[46] *See id*. at 545.

[47] *See id*. at 546.

[48] *See* FIELD, *supra* note 36, at 26.

[49] *See* Watson, *supra* note 40, at 546; *see also* FIELD, *supra* note 36 at 28.

[50] *See* Watson, *supra* note 40, at 546.

[51] *See* FIELD, *supra* note 36, at 19.

[52] *See id*.

[53] *See id*.; *see also In re* Matter of Baby M, 109 N.J. 396, 438 (1988) (stating "[A]ll parties concede that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few.").

[54] *See* FIELD, *supra* note 36, at 22.

[55] *See id*. at 20.

[56] *See id*. at 21.

[57] *See* MARKENS, *supra* note 17, at 81.

drastically different laws regarding surrogacy. It is necessary for states to separate their views on adoption and surrogacy in order to look at surrogacy individually and recognize that the concerns involved in adoption, such as baby-selling and the exploitation of women, do not exist in the use of surrogacy.

II. CONFUSION: THE CURRENT LEGAL LANDSCAPE OF SURROGACY

A. State by State Analysis

The United States is one of the few industrialized nations that does not have national laws regulating surrogacy.[58] Despite glamorized media stereotypes of surrogacy in shows such as "Friends"[59] and movies such as "Baby Mama,"[60] the current landscape of surrogacy is chaotic.[61] There is an unregulated framework of surrogacy throughout the country, with different states having enacted vastly different laws, leaving surrogacy in "legal limbo."[62] The chart in Appendix A at the end of this Note provides a meaningful analysis of the different state views on surrogacy.[63]

B. Baby M and its Progeny

In 1988, the publicized New Jersey case *In re Matter of Baby M* exposed the topic of surrogacy to the United States.[64] In 1985, William Stern and Mary Beth Whitehead entered into a traditional surrogacy agreement whereby Mrs. Whitehead would become pregnant using her own egg and Mr. Stern's sperm through artificial insemination.[65] The two parties were brought together by an infertility center, where Mrs. Whitehead had been involved as a potential surrogate mother before the Sterns were involved at all.[66] The contract between the Sterns and Mrs. Whitehead stated that after Mrs. Whitehead carried the child to term, her rights as the mother

58 *See id*. at 23 (suggesting that this may be attributed to our firm belief in individual rights, our laissez-faire economy, our view of the family, and the politics surrounding abortion).

59 In the 1998 season of the television series "Friends," a character named Phoebe Buffay agrees to be the gestational carrier for her brother and his wife. *See* http://www.imdb.com/title/tt0108778/episodes#year-1998.

60 "Baby Mama" is a 2008 movie in which Tina Fey plays a single successful businesswoman who learns she is infertile and hires a working class woman, played by Amy Poehler, to be her gestational surrogate. *See* http://www.imdb.com/title/tt0871426/.

61 *See* Symposium, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466 (2006) ("Because domestic relations law is generally reserved for the states—unless the parties raise federal constitutional issues—a fractured, state-by-state approach to the subject has arisen, thus raising problems of national harmonization.").

62 Nathan Koppel, *Surrogacy Battles Expose Uneven Legal Landscape,* WALL ST. J., http://online.wsj.com/article/SB10001424052748704362004575000974247846294.html.

63 Other charts have organized the information in different ways and may be of help. *See* MARKENS, *supra* note 17, at 28; *see also* Hofman, *supra* note 33, at 454.

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

65 *See id*. at 1234-35.

66 *See id*. at 1236.

would be terminated so that Mrs. Stern—Mr. Stern's infertile wife—[67] could adopt the child.[68] The contract further provided for Mr. Stern to pay Mrs. Whitehead $10,000 upon the baby's delivery to him.[69] Mrs. Whitehead was motivated by the desire to help an infertile couple as well as the $10,000 fee for her family.[70] After the birth of the child, although Mrs. Whitehead did give the baby to the Sterns for a momentary period, she threatened suicide and regained the baby immediately thereafter.[71] She found herself in a state of despair and sadness, expressing that she could not part from her child and that she felt an instant connection with the baby even during pregnancy.[72] When Mr. and Mrs. Stern regained possession of the child four months after her birth, Mr. Stern filed an action seeking to enforce the surrogacy contract.[73]

The Supreme Court of New Jersey invalidated the traditional, compensated surrogacy contract on two theories.[74] First, it stated that the surrogacy contract conflicted with statutory provisions that make it illegal to pay for the adoption of a child.[75] The court also concluded that surrogacy contracts are in conflict with the public policies of New Jersey.[76] The court then concluded that Mary Beth Whitehead, the surrogate, was the natural mother of the child.[77] Yet, the court also emphasized that the question of motherhood is different from the question of custody. After determining that the surrogacy contract was unenforceable and that Mary Beth Whitehead was the mother of the child, the court looked at the best interests of the child for custody purposes,[78] determining that custody should be

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[67] *See id*. at 1237-38. Mrs. Stern suffered from multiple sclerosis and believed that pregnancy could be a serious health risk for her. *See id*. at 1235. The couple considered adoption, but declined to adopt for two reasons: (1) there was a delay involved in adoption, and (2) Mr. Stern desired his genetics to live on, particularly because most of his family had been killed in the Holocaust. *See id*. at 1236.

[68] *See id*. at 1237.

[69] *See id*. at 1241.

[70] *See In re* Baby M, 537 A.2d 1227, 1241 (N.J. 1988).

[71] *See id*. at 1236.

[72] *See id*. at 1236-37.

[73] *See id*. at 1237.

[74] *See id*. While stating that surrogacy is not criminal, the court also concluded that a surrogacy contract will not be enforced against the surrogate's will: "We have found that our present laws do not permit the surrogacy contract used in this case. *Id*. at 1264. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights." *Id*. at 1264.

[75] *See id*. at 1240 (citing N.J. STAT. ANN. § 9:3-54 (West) (repealed 1994) (making it a misdemeanor to "make or assist or participate in any placement for adoption and in connection therewith (1) pay, give or agree to give any money or any valuable consideration or assume or discharge any financial obligation or (2) take, receive, accept, or agree to accept any money or any valuable consideration.")). The court also cited to other laws in conflict with the surrogacy contract, such as N.J. STAT. ANN. § 9:2-16 (West 1955) (setting forth requirements for a voluntary surrender of a child to an approved adoption agency). *Id*. at 1242.

[76] *See In re* Baby M, 537 A.2d. 1227, 1246 (N.J. 1988). NJ policies require that a mother has consent in giving up a child. In this instance, there was no counseling or warning to the mother that would allow for this consent. *Id*. at 1247.

[77] *See id*. at 1234.

[78] *See id*. The best interest standard is used for many determinations regarding the well being of a

awarded to the Sterns.[79] The court based its decision on testimony about the family life of the Whiteheads versus the family life of the Sterns.[80] Mary Beth Whitehead was ultimately granted visitation rights.[81]

In 2009, the Superior Court of New Jersey took *Baby M* one step further in the case of Angelia Robinson, holding that even where the surrogate has no biological connection to the child—gestational surrogacy—she is still the natural mother.[82] Unlike Mary Beth Whitehead in the Baby M case, Angelia Robinson had no biological relation to the child. Whitehead carried her own egg—traditional surrogacy—but Robinson carried a donor egg—gestational surrogacy. Finding that a genetic connection with the child was not determinative, the court again invalidated the surrogacy contract despite the fact that it was gestational. The court reasoned that the genetic makeup in relation to the birth mother was unimportant and that proof that a woman is the natural mother of a child can be established by virtue of the fact that she gave birth to the child.[83] It concluded that surrogacy violates the public policy of New Jersey, as according to *Baby M*, and that this does not change in the case of gestational surrogacy. The *Baby M* court stated,

> [t]he surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness.[84]

The *Robinson* court then added, "[w]ould it really make any difference if the word 'gestational' was substituted for the word 'surrogacy' in the above quotation? I think not."[85] Both courts concluded that the term surrogate for the two women is

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child but is not a factor in defining parenthood under the Parentage Act. *See In re* The Parentage of a Child by T.J.S. and A.L.S., 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011); N.J. STAT. ANN. § 9:2-4 (West 1948) (providing, "In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order which may include: . . . [a]ny . . . custody arrangement as the court may determine to be in the best interests of the child. In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any other history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.").

[79] *See id*. at 1261.

[80] *Id*. at 1257.

[81] *See In Re* Matter of Baby M, 225 N.J. Super. 267, 269 (Ch. Div. 1988).

[82] *See* A.G.R. v. D.R.H & S.H., No. FD-09-1838-07 at *2 (N.J. Super. Ct. Ch. Div., Dec 23, 2009).

[83] *See id*. at *4 (citing *Baby M*., 537 A.2d at 1248).

[84] *Id*. at *5 (citing *Baby M*., 537 A.2d at 1250).

[85] *Id*. at *5.

inappropriate, and that if a woman gives birth to a child, she is the mother, despite a lack of biological connection.[86]

In *Robinson*, the intended non-biological parent, Donald Hollingsworth, was left with no rights to the child.[87] After determining that Angelia Robinson was the mother of the child, despite her lack of genetic relation to the child, the court concluded that she had parental rights to the child and that the gestational agreement was void.[88] The sperm donor parent, Sean Hollingsworth, was granted rights as the child's father. But his partner, Donald, was left without any parental rights.[89] Many courts in New Jersey and other states continue to use this reasoning to invalidate surrogacy contracts, leaving the intended parents with no rights and the gestational carriers with full parental rights.[90]

C. Johnson v. Calvert: The Intent Doctrine

Despite some courts' adamant refusals to uphold surrogacy agreements, other courts have taken the opposite view by upholding the agreements and providing that the intended parents are the natural and legal parents. California, in particular, has been the most accepting of surrogacy agreements and has a variety of case law on the issue. In 1993, the California Supreme Court in *Johnson v. Calvert* declared a surrogacy contract enforceable and not contrary to public policy for the first time in United States history.[91] The court held that the intended parents in a gestational surrogacy agreement should be recognized as the natural and legal parents.[92] In 1984, Crispina Calvert had a hysterectomy, leaving her ovaries capable of producing eggs but her body incapable of carrying a child.[93] When Crispina and her husband, Mark, thought about starting a family, they considered surrogacy.[94] Anna Johnson heard through a coworker that the couple was in need of a surrogate,

86 *See* Hofman, *supra* note 33, at 453.

87 *See* A.G.R. v. D.R.H & S.H., No. FD-09-1838-07 at *2 (N.J. Super. Ct. Ch. Div., Dec 23, 2009).

88 *Id*. at *6.

89 *See* A.G.R. v. D.R.H. & S.H., No. FD-09-001838-07 at *2, N.Y. TIMES, (N.J. Super. Ct. Ch. Div., Dec 23, 2009), http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf [hereinafter A.G.R.].

90 *See* In the Matter of the Parentage of a Child by T.J.S and A.L.S., 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011) (concluding that a pre-birth order naming the intended mother—who bore no biological relationship to the child—was invalid. Regarding the intended mother's rights, the court stated, "the substantive right she is asserting is to be legally declared the mother of T.D.S based solely on the parties' shared intent and by the most convenient, expedient and immediate means possible. Such a 'right,' we find, is neither enshrined in our Constitution nor so rooted in "the traditions and [collective] conscience of our people . . . as to be ranked as fundamental." *Id*. at 392 (citations omitted)). *See also* Doe v. Attorney General, 487 N.W.2d 484 (Mich. Ct. App. 1992); In the Matter of Adoption of Paul, 550 N.Y.S.2d 815 (1990); A.L.S. v. E.A.G., No. A10-443, 2010 WL 4181449 (Minn. Ct. App. Jan. 18, 2011) (concluding the surrogate was the legal mother and the sperm donor's partner was not a parent yet awarding custody to the homosexual couple based on the best interests of the child standard and the surrogate's unfitness).

91 *See* MARKENS, *supra* note 17, at 46.

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

93 *See id*. at 778.

94 *See id*.

and on January 15, 1990, Mark, Crispina, and Anna signed a surrogacy contract.[95] The contract provided that Anna would serve as the gestational carrier and that Crispina's eggs and Mark's sperm would be implanted into Anna.[96] Anna would then give up any parental rights in exchange for $10,000.[97] During Anna's pregnancy, the relationship between Anna and the Calverts deteriorated, and in July 1990 Anna filed a suit, seeking to be declared the mother of the child.[98]

The court recognized that both Anna and Crispina had set forth sufficient evidence that they were the child's mother: Anna because she gave birth to the child[99] and Crispina because she was genetically related to the child.[100] Yet, California law only recognizes one natural mother for each child.[101] Therefore, the court concluded that when the woman giving birth to the child and the woman that is genetically related to the child are not the same, "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 her own—is the natural mother under California law."[102] In the instant case, without Mark and Crispina's intention to bring the child into the world, the child would not exist.[103] Further, they did not intend to donate an egg and sperm to Anna.[104] Rather, they intended for Anna to carry their child and for that child to be theirs after birth.[105] The court did not accept Anna's arguments that surrogacy is against public policy and contrary to California's laws, stating that surrogacy differed in many respects from laws preventing payment for an adoption.[106] The payments to Anna were meant to compensate her for her gestational services and were not intended for Anna to give up her parental rights,[107] as she possessed none to begin with.[108] While the court declined to engage in a best interest of the child analysis,[109] it recognized that the best interests of the child are likely to be with the people who chose to bring the child into existence.[110] It further declined to follow Anna's suggestion that surrogacy

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95 *See id*.
96 *See id*.
97 *See id*.
98 *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).
99 *See id*. at 780 (California "Civil Code section 7003 provides, in relevant part, that between a child and the natural mother a parent and child relationship may be established by proof of her having given birth to the child, or under [the Act].").
100 *See id*. (California Civil Code section 7015 provides "Any interested part, presumably including a genetic mother, may bring an action to determine the existence . . . of a mother and child relationship.").
101 *See id*. at 781.
102 *Id*. at 782.
103 *See id*.
104 *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).
105 *See id*.
106 *See id*. at 783.
107 *See id*. at 784. *See* discussion, *supra* p. 7.
108 *See id*. at 786.
109 *See id*. at 782 n.10.
110 *See* Johnson v. Calvert, 851 P.2d 776, 798 (Cal. 1993) (citing Marjorie M. Shultz, *Reproductive*

exploits women, citing to the fact that there is little data to suggest such a conclusion.[111] Mark and Crispina, the egg and sperm donors, were declared the child's natural parents at the expense of Anna, the gestational surrogate.[112]

D. Expansion of the Johnson Intent Doctrine

Though *Johnson v. Calvert* involved a heterosexual couple and broke the tie between two "equal legal claims—gestational and genetic motherhood,"[113] its idea of intended parenthood was novel and enlightening with respect to surrogacy contract disputes. Many courts used the intent doctrine to expand to other situations and many cases have advanced the opportunities for homosexual men to use surrogacy. Opponents of surrogacy have raised a number of legal arguments to limit the ability of gay men to have children. First, these opponents argue that the non-biological father has no rights to the child because he lacks a biological connection. Second, they believe surrogacy should be limited to married couples. Third, they believe that a child cannot have two parents of the same sex. However, courts have refuted these arguments, making surrogacy opportunities for gay men more promising in the future.

1. Expansion of the Intent Doctrine to Where the Intended Parent has no Biological Connection to the Child

In 1998, the California Supreme Court decided *In re Marriage of Buzzanca*, extending the *Johnson* intent doctrine to where the intended parents to the surrogacy contract had no biological connection to the child.[114] In *Johnson*, the court was breaking a tie between two legal parental claims: genetics and gestation. However, in *Buzzanca*, the intended mother did not have either of these legal claims. Married couple Luanne and John Buzzanca decided to have a gestational carrier impregnated using an anonymous egg and anonymous sperm, unrelated to the Buzzancas.[115] Therefore, there were six individuals who could have sought parental rights: the egg donor, the sperm donor, the intended mother, the intended father, the gestational mother, or the husband of the gestational mother.[116] Following *Johnson*, the court based its decision on the intent of the parties, finding that the intended parents—Luanne and John—were the lawful parents.[117] The

Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality 1990 WIS. L. REV. 297, 397 (1990)).

111 *See id*. at 784.

112 *See id*. at 778.

113 MARKENS, *supra* note 17, at 46.

114 *See* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). *See also In re* Nicholas H., 47 P.3d 932 (Cal. 2002) (holding that a person with no biological relationship to a child can be considered the natural parent).

115 *See id*. at 282.

116 *See California Surrogacy Law,* HUMAN RIGHTS CAMPAIGN (Sept. 09, 2009), http://www.hrc.org/issues/parenting/surrogacy/8694.htm.

117 *See Buzzanca,* 72 Cal. Reptr. 2d at 282 ("[A] husband and wife [should] be deemed the lawful

court concluded that *Johnson* is not limited to situations where the intended parents have a genetic link to the children.[118] The *Buzzanca* court stated that the intent doctrine is "not limited to just Johnson-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born 'but for the efforts of the intended parents.'"[119] Luanne and John caused and intended the child's conception, birth, and gestation.[120] Therefore, the court held that they were the natural and lawful parents, despite their lack of a biological connection to the child.[121] This argument can be used to help advance the rights of a non-biological homosexual father to a gestational agreement, as the court eliminated the argument that a biological connection is necessary for an intended parent to be declared the legal parent.

2. Expansion of the Intent Doctrine to Where the Intended Parents are Unmarried

The California Court of Appeals' decision in *Dunkin v. Boskey* in 2000 stands for the proposition that the *Buzzanca* decision should be extended to all ART forms and to unmarried couples.[122] Raymond Dunkin and Lisa Boskey cohabitated for five years but were not married.[123] Because Raymond suffered from testicular cancer and was infertile,[124] the couple decided to use a sperm donor to impregnate Boskey.[125] They entered into a contract stating that Boskey and Dunkin would be the legal parents of the child despite the anonymous sperm donor.[126] The relationship later deteriorated and Boskey left Dunkin, refusing him visitation or custody of their child.[127] The court, citing to *Johnson*[128] and *Buzzanca*,[129] held that the unmarried couple should be treated the same as a married couple in this respect and that Boskey had a breach of contract claim against his domestic partner

parents of a child after a surrogate bears a biologically unrelated child on their behalf . . . [A] child is procreated because a medical procedure was initiated and consented to by intended parents.").

118 *See id*. at 291.

119 *Id*. at 291.

120 *See id*. at 291-292.

121 *See id*. at 293.

122 *See* Thomas M. Pinkerton, *Surrogacy and Egg Donation Law in California*, THE AMERICAN SURROGACY CENTER, INC. (Feb. 26, 2005), http://www.surrogacy.com/articles/news_view.asp?ID=99.

123 Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 48 (2000).

124 *See id*.

125 *See id*.

126 *See id*. at 48 (noting that the agreement set forth between Dunkin and Boskey acknowledged their "obligation to care for and support and educate and otherwise treat and consider any child born as the result of such artificial insemination in all respects as though it were [their] natural child." Dunkin was told "he would be treated by the law as the acknowledged and legal parent of the child to be born through the artificial insemination procedure, and that he need take no further action to have full rights of visitation, custody and other parental rights as to the child.").

127 *See id*.

128 *See id*. at 55.

129 *See* Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (2000) (citing Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993)) (noting that the purpose behind the Uniform Parentage Act was "to eliminate the legal distinction between legitimate [born to married parents] and illegitimate [born to unmarried parents] children."). *See also* Elisa B. v. Superior Court, 117 P.3d 660, 664 (Cal. 2005).

based on breach of the custody contract.[130] Though this case involved IVF and not surrogacy, it can be used to support the idea that an unmarried homosexual man—who may also have a domestic partnership with the biological father—may have rights to the child in a surrogacy case.

3. A Child Born to Surrogacy Can Have Two Parents of the Same Sex

In 2005, the California Supreme Court extended the idea that a child can have two parents of the same sex to a lesbian couple in *Elisa B. v. Superior Court*, in which the court held that two women could be the legal parents of a child produced through surrogacy.[131] Elisa and Emily entered into a relationship in 1993 and decided to have a family.[132] They both wished to give birth, so they decided that Elisa and Emily would both be impregnated using artificial insemination using the same sperm donor so that their children would be biologically related to each other.[133] They further decided that Elisa would support the family while Emily stayed home with the kids.[134] Elisa gave birth to a child named Chance in 1997, and Emily gave birth to twins named Ry and Kaia in 1998.[135] They never adopted the children born to each other, never registered as domestic partners, and never created a written document regarding the children.[136] The couple then decided to end their relationship, and Elisa refused to give Emily child support, arguing that she was not a parent to the children.[137] The court concluded that the comment in *Johnson* that "for any child California law recognizes only one natural mother"[138] was inapplicable in this context.

According to the court, instead of three parents fighting for a child, here there were only two parents involved, even though the two parents were both female.[139] Therefore, the children could have two mothers as legal parents.[140] Further, Elisa had to pay child support to Emily and the court found her financially responsible

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130 *See* Thomas M. Pinkerton, *Surrogacy and Egg Donation Law in California*, THE AMERICAN SURROGACY CENTER, INC. (Feb. 26, 2005), http://www.surrogacy.com/articles/news_view.asp?ID=99.

131 *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005). *See also* K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (concluding both lesbian partners—she who donated her ovum and she who carried the children—were the children's natural parents). *See also* Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

132 *See Elisa B.*, 117 P.3d at 663.

133 *See id*.

134 *See id*.

135 *See id*.

136 *See id*. at 663.

137 *Id*. at 664.

138 Elisa B. v. Superior Court, 117 P.3d 660, 665 (Cal. 2005) (citing Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)).

139 "[J]ohnson's one-natural-mother comment cannot be thoughtlessly interpreted to deprive the child of same-sex couples the same opportunity as other children to two parents and to two sources of child support when only two parties are eligible for parentage." *Id*. at 665 (quoting Opening Brief of Attorney General Bill Lockyer).

140 *See Elisa B.*, 117 P.3d at 665.

for the children, though she never formally adopted them.[141] The court stated, "Elisa actively assisted Emily in becoming pregnant, with the understanding that they would raise the resulting children together. Having helped the children to be born, and having raised them as her own, Emily should not be permitted to later abandon the twins simply because her relationship with Emily dissolved."[142] In recognizing that an intended, non-genetic lesbian woman has responsibilities for the child, this perspective also infers that she has rights to that child. This perspective should apply to both sexes equally and should be extended to homosexual men as well, recognizing two men as parents of a child.

In the recent February 10, 2011 decision of *Berwick v. Wagner*, the Texas Court of Appeals was called upon to interpret and classify a parentage judgment from California that recognized a homosexual couple as the intended parents to a surrogacy agreement.[143] Berwick and Wagner, a homosexual couple, were registered as domestic partners in California in 2005 and entered into a gestational surrogacy agreement there using Berwick's sperm and an anonymous egg donor.[144] A California district court signed a proposed judgment ("the California Judgment") stating that Berwick and Wagner were the child's legal parents and had sole responsibility for the child.[145] After later moving to Texas with the child, Berwick and Wagner ended their relationship.[146] Wagner, seeking standing to sue for custody of the child as the non-biological intended father, argued that the California Judgment should be registered as a "child custody determination" establishing that he was the child's father.[147] Berwick argued that the decree was not a custody determination, did not mention custody directly, and that it did not involve custody at all.[148]

Though the decision did not address the substantive pending issue of custody, it rejected Berwick's argument that Wagner had no standing to seek a court order from the Texas court to continue his legal relationship with the child.[149] The Texas court recognized the California decree under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), a statute adopted in both California and Texas.[150] The UCCJEA, adopted by forty-eight states, "is a set of rules for determining which state has jurisdiction to determine custody

[141] *See id*. at 670.
[142] *Id*.
[143] *See* Berwick v. Wagner, 336 S.W.3d 805 (Tex. App. 2011).
[144] *See id*. at 807.
[145] *See id*. at 807-08.
[146] *See id*. at 808.
[147] *Id*. at 809.
[148] *See id*. at 6.
[149] *See* Arthur S. Leonard, *Texas Appeals Court Approves Registration of California Same-Sex Custody Decree*, LEONARD LINK, (Feb. 18 2011), http://newyorklawschool.typepad.com/leonardlink/2011/02/texas-appeals-court-approves-registration-of-california-same-sex-custody-decree.html.
[150] *See* Berwick v. Wagner, 336 S.W.3d 805, 806 (Tex. 2011).

disputes."[151] Under the act, the state that has jurisdiction for the custody dispute is the child's home state, or where they have lived six months prior to the proceeding.[152] In the court's determination, it focused on the fact that the Decree granted parental rights to Berwick and Wagner and also terminated any parental rights of the surrogate and her husband.[153] Therefore, the court found the decree should be issued as a "child custody determination"[154] and that it would be used in settling the issue of custody of the child.[155] The court stated, "[b]ecause the California order both terminates the [surrogate's] presumptive parental rights and grants exclusive parental rights and—by implication—custody to Berwick and Wagner, the trial court correctly concluded it qualifies as a 'child custody determination.'"[156] The case means that Berwick and Wagner will both be recognized as the legal parents of the child in the Texas custody determination and that they will have equal status to seek custody using the same standard as would any two adults with equal parental status.[157] Both men are recognized as the legal parents.

While the issue of whether or not a homosexual couple's rights would prevail over a gestational surrogate has not explicitly come up in the California courts, these cases provide insight and suggest that the homosexual couple's rights can and should prevail. Through the expansion of the intent doctrine to cases where there is no biological connection to the child, where the intended parents are unmarried, and where the child born to surrogacy has two intended parents of the same sex, the future for homosexual men seems promising. The intent doctrine should be extended to homosexual men to ensure their rights as parents to the children that they bring into the world.

D. Further Support for the Johnson Intent Doctrine

1. The Uniform Parentage Act

The Uniform Parentage Act ("UPA") looks to the intent of the parties in upholding gestational surrogacy agreements.[158] It allows parties to enter into a compensated surrogacy agreement "providing that the intended parents become the parents of the child."[159] The UPA was created by the National Conference of

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[151] *Id*. at 807 n.1.

[152] *See* Shirley F. Keisler*, Child Custody Jurisdiction in a Global Society*, THE MATRIMONIAL STRATEGIST (2010).

[153] *See id*. at 19; *see also* Leonard, supra note 149.

[154] *Berwick*, 336 S.W.3d at 816.

[155] *See* Leonard, *supra* note 149.

[156] Berwick v. Wagner, 336 S.W.3d 805 (Tex. 2011).

[157] *See* Leonard, *supra* note 149.

[158] *See* UNIF. PARENTAGE ACT § 801(a) (amended 2002).

[159] *See id*. § 801(a)(3). The term "gestational mother," according to the U.P.A, includes both a traditional and gestational surrogate mother. *Id*. § 801 cmt.

Commissioners on Uniform State Laws as model legislation to promote uniformity among states seeking to adopt similar legislation.[160] The UPA defined a parent as someone who has established a legal relationship with a child, with the hope that states would adopt the same definition.[161] It attempts to harmonize the states on the topic of parentage as new reproductive technologies develop.[162]

The UPA was first adopted in 1973 and was amended in 2000 and 2002.[163] In 2000, Article 8, which concerns gestational agreements, was added and in 2002 it was amended.[164] The 2002 UPA has been adopted in part in only nine states,[165] and it has evolved to keep up with the changing times and the emerging forms of ART. The 1973 UPA did not include a surrogacy provision at all.[166] The 1988 version—The Uniform Status of Children of Assisted Conception Act ("USCACA")—provided two alternatives: one declaring surrogacy agreements void and the other enforcing agreements if certain procedural requirements were met.[167] In 2000, when the UPA added Article 8, Gestational Agreements, it required that the intending couple be married in order for the surrogacy agreement to be upheld.[168] However, the 2002 amendment eliminated this requirement.[169] The relevant section is 801(b), which reads, "[t]he man and the woman who are the intended parents must both be the parties to the gestational agreement."[170]

Amending the UPA to apply to a man and a woman, whether married or unmarried, was an attempt to treat children from nonmarital as well as marital relationships equally.[171] The change eliminates the requirement that the intended couple be married. Yet, some interpret this language to exclude gay men as the intended parents due to the insertion of the words "man and the woman" as the intended parents.[172] No state has explicitly adopted the language in Section 801(b). Texas and Utah, for example, have adopted the 2000 UPA and require the

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160 *See* Lindsy J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 712-13 (2009).

161 *See* UNIF. PARENTAGE ACT, Refs & Annos (amended 2002).

162 *See* Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466 (2006); *See also* Rohlf, *supra* note 160, at 712-13.

163 *See* Shapo, *supra* note 162, at 466.

164 *See id*.

165 *See* UNIF. PARENTAGE ACT, Refs & Annos (amended 2002); ALA. CODE §§ 26-17-101 to 26-17-905 (1975); DEL. CODE ANN. tit. 13 §§ 8-101 to 8-904 (1983); N.M. STAT. ANN. §§ 40-11A-101 to 40-11A-903 (1978); N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (1989); OKLA. STAT. ANN. tit. 10 §§ 7700-101 to 7700-902 (1969); TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (2003); UTAH CODE ANN. 78B-15-101 to 78B-15-902 (1953); WASH. REV. CODE §§ 26.26.011 to 26.26.914 (1989); WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (1980).

166 *See* Shapo, *supra* note 162, at 474.

167 *See id*.

168 *See id*. at 475.

169 *See id*.

170 UNIF. PARENTAGE ACT § 801(b) (amended 2002).

171 *See id*. § 801 cmt.

172 Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent In Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L. J. 171, 178 (2008).

parents to be married.[173] The fact that the UPA specifically chose to eliminate this language shows its progression and creates hope that it will adopt an even more progressive view in the future. Hopefully, the UPA will at some point address the issue of same-sex intended parents explicitly. Removing the phrase "the man and the woman" would be ideal.[174]

The Comments to the UPA suggest that an amendment removing the language concerning a man and a woman may be promising. They state, "Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public—or legislators."[175] The comments cite *Buzzanca*, noting that "[t]hese cases will not go away."[176] The UPA is meant to change with and even dictate the times. It acknowledges the controversial nature of the subject and the current medical and social landscape. While surrogacy disputes "will not go away," neither will homosexual surrogacy disputes, and it seems promising that the UPA may support rights for homosexuals in such situations in the future. The UPA should adopt a more progressive view, giving rights to homosexual intended fathers, to serve as a meaningful model legislation that state legislatures may follow.

2. The Connecticut Supreme Court in *Raftopol v. Ramsey*

The recent Connecticut decision of *Raftopol v. Ramey* has expanded upon the UPA view of gestational agreements, upholding a surrogacy agreement in which the intended parents were homosexual men.[177] This watershed decision was the first of its kind in the nation, declaring the partner of the biological father of children born to surrogacy the natural father, with no adoption necessary.[178] It is no longer necessary in Connecticut for the non-genetic parent to a surrogacy agreement to go through adoption proceedings as the *Raftopol* court established legal parental rights based on a person being an intended parent under a valid gestational agreement.[179]

Anthony Raftopol and Shawn Hargon, homosexual domestic partners living together in Romania, entered into a gestational agreement with Karma Ramey, whereby Raftopol's sperm and an anonymous third party egg donor were to be implanted into Ramsey.[180] Plaintiffs brought an action seeking a declaratory

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173 *See* UNIF. PARENTAGE ACT § 801 cmt. (amended 2002).

174 *Id.*

175 UNIF. PARENTAGE ACT, Refs & Annos (amended 2002).

176 *Id.* (citing Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

177 *See* Raftopol v. Ramey, 12 A.3d 783 (2011).

178 *See* Thomas B. Scheffey, *Special Delivery*, CONN. LAW TRIBUNE, http://www.ctlawtribune.com/getarticle.aspx?ID=39424.

179 *See* Vicki Ferrara, CONN. SURROGACY BLOG, http://ctsurrogacy.blogspot.com/2011/02/we-won-raftopol-v-ramie.html.

180 *See Raftopol*, 12 A.3d at 787.

judgment that the gestational agreement was valid and enforceable and that both Hargon and Raftopol were the legal parents of the child.[181] When the couple tried to obtain a replacement birth certificate naming both of them as the parents, the state department of public health refused, stating that Hargon had no legal parental rights to the child.[182] The couple was concerned because Hargon, who traveled often with the children, could be accused of trafficking children across the border.[183] Similarly, the couple feared that Hargon would be unable to make medical decisions if an emergency ensued.[184] The court held that Hargon's name should be on the birth certificate and that under a valid gestational agreement, an intended parent is a legal parent without first having to adopt the child, without respect to the parent's genetic relationship to the children.[185] It based its decision on Section 7-48a of a Connecticut statute, which evidences a legislative recognition of intended parents as legal parents.[186] The court stated that the parent-child relationship is created by a valid gestational agreement and then accurately reflected by including both intended parents as the legal parents on a replacement birth certificate.[187] Therefore, in Connecticut, two partners to a valid gestational agreement can now both be declared the legal parents, without the non-genetic intended parents having to adopt that child. Intended parents, no matter their sexual orientation, can obtain a declaration that they are in fact the legal parents.[188] The Connecticut court further looked to the UPA requirements for a valid gestational agreement, while recognizing that though it provides guidance, Connecticut has not yet adopted the UPA and urged the legislature to take action.[189] Other courts should follow Connecticut's lead and extend the intent doctrine to homosexual male intended parents.

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[181] *See id.*

[182] *See id.*

[183] *See* Susan Donaldson James, *Surrogacy Law: Conn. Gives Non-Genetic Parents Legal Rights,* ABC NEWS, Jan. 20, 2011, http://abcnews.go.com/Health/connecticut-surrogacy-law-genetic-parents-legal-rights/story?id=12662224&page=1.

[184] *See id.*

[185] *See* Raftopol v. Ramey, 12 A.3d 783, 804 (2011).

[186] *See* CONN. GEN. STAT. § 7-48a (2002) ("each birth certificate shall be filed with the name of the birth mother recorded. If the birth is subject to a gestational agreement, the Department of Public Health shall create a replacement certificate in accordance with an order from a court of competent jurisdiction not later than forty-five days after receipt of such order or forty-five days after the birth of the child, whichever is later. Such replacement certificate shall include all information required to be included in a certificate of birth of this state as of the date of birth.").

[187] *See Raftopol*, 12 A.3d at 793.

[188] *See* James, *supra* note 183.

[189] *See Raftopol*, 12 A.3d at 804.

III. SOLUTIONS: THE USE OF THE THREE PARENT MODEL AND THE PRIOR PREGNANCY REQUIREMENT TO GIVE SAME-SEX MALE COUPLES MORE EXPANSIVE RIGHTS AS PARENTS

The current legal status of surrogacy is unworkable and in desperate need of uniformity. As it stands, "statistics show high rates of noncompliance paired with low enforcement of existing [surrogacy] law."[190] Much needs to be done to change the current landscape of surrogacy law. The ideal would be for state legislators to enact legislation recognizing that the intended parents of a child are the legally recognized parents, following the principles from the Connecticut and California case law discussed above. Further, the UPC should change its language to include any intended parent as the legal parent, notwithstanding whether they are a man and a woman. This practice would recognize that surrogacy is a growing movement that is here to stay and in need of regulation. However, many states are reluctant to regulate surrogacy. While the ideal may be unrealistic in some states, a middle ground may be reached which would allow surrogacy agreements to be enforced while acknowledging the hesitations of state legislators.

A. Prior Pregnancy Requirement for Surrogate Mothers

One way state legislatures may feel more comfortable awarding custody to intended parents may be to have a prior pregnancy requirement for surrogate mothers. In *Baby M*, the New Jersey Supreme Court was concerned that the surrogate mother, Mary Beth Whitehead, did not and could not have full informed consent when entering into her surrogacy contract. The court stated,

> [t]he policies expressed in our comprehensive laws governing consent to the surrender of a child . . . stand in stark contrast to the surrogacy contract and what it implies. Here there is no counseling, independent or otherwise, of the natural [surrogate] mother, no evaluation, no warning. . . . Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a preexisting contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction.[191]

State legislators who are similarly concerned with the emotional state and informed consent of the surrogate mother may still impose legislation for surrogacy, and rather than banning surrogacy altogether, may impose a prior pregnancy requirement for the surrogate mother. The fact that a woman has had

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[190] Gugacheva, *supra* note 15, at 4.

[191] *In re* Matter of Baby M, 109 N.J. 396, 436-37 (1988).

one prior pregnancy cannot ensure that she will not have a significant bond with her child in a subsequent pregnancy, or that she will not contest custody of the child. However, a prior pregnancy requirement will provide the woman with useful information in making an informed decision to enter into the agreement. The woman will be able to make a more informed decision regarding her emotions and how she personally reacts towards pregnancy. She may also understand the joys of having a child from her own experiences and wish to share that joy with another.

In *Johnson v. Calvert*, the fact that Anna Johnson—the gestational carrier—had been pregnant before gave the court some comfort. In response to the argument that a woman cannot fully and knowingly agree to gestate someone else's child, the court stated, "[c]ertainly 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."[192] The court acknowledged that this fact added to Anna's informed consent and made her more able to enter into the contract with full knowledge of what was to come.

Many feminists oppose this requirement, arguing that women can give informed consent without having ever had a baby.[193] Further, they argue that informed consent does not usually require that one have the experience before partaking, citing to abortions, sex change operations, and heart surgery as examples.[194] Though women may be able to provide informed consent to surrogacy without previously having a baby, having a baby adds to their understanding of pregnancy and childbirth. While many feel that all women should be allowed to contract freely and enter into surrogacy contracts if they so desire, a prior pregnancy requirement may quiet the concerns of courts as expressed in *Baby M*.

Prior pregnancy requirements have recently been advanced in many surrogacy clinics. Rotunda, a commercial surrogacy clinic in India, has been involved in surrogacy since 1963.[195] One requirement specified at Rotunda is that the surrogate has had a prior normal delivery of a healthy baby.[196] Many American clinics also impose this requirement.[197] One blog website reads, "[n]o clinic will allow a woman to carry a child for someone else who has not proven that

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[192] Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (emphasis added).

[193] *See* MARY BECKER, CYNTHIA GRANT BOWMAN, & MORRISON TORREY, FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY; CASES AND MATERIALS 455 (American Casebook Series, West Group 1994).

[194] *See id*.

[195] *See Rotunda - Surrogacy Clinic India*, MEDICAL TOURISM CORPORATION, http://www.medicaltourismco.com/india-hospitals/rotunda-center-for-human-reproduction.php.

[196] *See id*.

[197] *See Surrogate Mother Wanted: Medical Qualifications for Surrogate Pregnancy*, INFORMATION ON SURROGACY: HELPING SURROGATE MOTHERS AND INTENDED PARENTS, http://www.information-on-surrogacy.com/surrogate-mother-wanted.html.

she is able to carry."[198] There are three reasons cited.[199] First, surrogacy is expensive, and intended parents do not want to go through the entire process and find that the surrogate cannot carry a child.[200] Second, a woman may have emotional attachment issues, such as postpartum depression.[201] Last, there are risks involved in any pregnancy, and the woman should know going into surrogacy that she can have a successful pregnancy.[202]

The state of Washington is also considering a prior pregnancy requirement. Legislation has been proposed that would allow for surrogacy contracts with certain requirements for enforcement.[203] The bill is presently on second reading by the Rules Committee.[204] It provides that "[t]he woman acting as a surrogate must . . . have given birth to at least one child."[205] New Hampshire already adopts such a provision, stating, "[n]o woman may be a surrogate, unless she has a documented history of at least one pregnancy and viable delivery."[206] If a state adopts this option, a homosexual couple may still choose to use a surrogate who has never been pregnant, but they may do so at their own risk. If that woman later petitions for parental rights, a court may be less willing to uphold the contract if that woman had never been pregnant prior to acting as a surrogate.

B. Three Parent Model

If courts are unwilling to uphold surrogacy agreements to their full extent, even under the prior pregnancy model, severing any legal rights between the gestational carrier and the child, then a three-parent model may be the next best option for an intended parent who is not genetically related to the child. Three-parent structures have recently gained recognition in the United States.[207] An article from the Hastings Women's Law Journal provides for a discussion on legally recognizing three parents in the context of same-sex couples creating families.[208] The article limits the situation to "where the parents want a family structure consisting of three parents, with two parents performing the full panoply of parenting duties and a third parent providing limited social parenting."[209] It demonstrates that under the UPA, a child may have two parents of the same

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198 *Id.*
199 *See id.*
200 *See id.*
201 *See id.*
202 *See id.*
203 *See* Wash. State H. Rep. H.B. 1267.
204 *See* WASH. STATE LEGISLATURE, Bill Information, H.B. 1267 (2011-12), *available at* http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1267.
205 Wash. State H. Rep. H. B. 1267.
206 N.H. REV. STAT. ANN. §168-B:17 (V) (2011).
207 *See* Althouse, *supra* note 172, at 173 (citing Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (a Pennsylvania Superior Court awarding three parents custody rights including same sex parents)).
208 *See id.*
209 *Id.*

gender.[210] Same sex male parents may therefore desire to include a third parent in their child's lives, if that parent is related to the child or contributed substantially to the child's well being.

The Pennsylvania Superior Court in *Jacob v. Shultz-Jacob* "upheld a custody order granting shared physical custody of a lesbian couple's two children to three parents involved in their lives: their biological mother, their non-biological mother, and their biological father, a sperm donor who had acted as a third social parent to the children at the request of the mothers."[211] The Hastings article argues that it is essential that custody and "social parenting" be separated from economic parenting and obligation.[212] While the same sex couple in *Jacob v. Shultz-Jacob* was female, this theory provides a framework for three-parent modeling that should be extended to gay male couples and their surrogate mothers.

The three-parent model has also been recognized in British Columbia.[213] The legislation under consideration would state

> [a] donor of sperm or eggs, or a surrogate mother, can make a written agreement prior to assisted conception that the child will have three parents. In the case of a sperm or egg donor, the parents would be the donor, the birth mother, and the birth mother's partner. In the case of a surrogate mother, the parents would be the intended parents and the birth mother.[214]

This model would clarify the rights of the parties so as to avoid litigation. A surrogate mother, gestational or traditional, would not have to fight for parental recognition of the child she carried; she would automatically be granted it. This would eliminate uncertainties in surrogacy agreements, and all parties would know upon entering the agreement where they stand.

However, homosexual couples may not desire a third party impeding on their parenting. Homosexual parents deserve the same right as heterosexual couples to become parents. This concern was expressed in *Johnson v. Calvert*, as the court declined to recognize three parents as the legal parents.[215] When pressed by the American Civil Liberties Union to find that the child has two mothers and a father, the court declined, stating

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[210] *See id.* at 176 (quoting CAL. FAM. CODE § 7611(d) (West. 2005) ("a man is presumed to be the natural father of a child if '[h]e receives the child into his home and openly holds out the child as his natural child.'")).

[211] Althouse, *supra* note 172, at 187.

[212] *See id.*

[213] *See* Nancy Polikoff, *British Columbia Attorney General's White Paper proposes explicit recognition of three parents*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Sept. 20, 2010), http://beyondstraightandgaymarriage.blogspot.com/2010/09/british-columbia-attorney-generals.html.

[214] *Id.* *See also Ontario Court of Appeal: Child Can Have Three Parents*, WISE LAW BLOG: THE TORONTO LAWYERS' LEGAL AND POLITICAL BLOG (Jan. 2, 2007), http://wiselaw.blogspot.com/2007/01/ontario-court-of-appeal-boy-can-have.html.

[215] *See* Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993).

> [e]ven though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as a mother.[216]

In the *Johnson* case, this worked in favor of the intended parents. However, in the *Johnson* case, the court was applying the intent doctrine, and therefore severing ties with the gestational carrier. Yet, in a state that would uphold the gestational carrier's rights and sever the rights of a non-genetic intended parent, the three-parent model may be useful. While the gestational carrier's rights would still be intact, the non-genetic intended parent would be granted rights as well, where they would not have them otherwise. The *Johnson* court sought to give the intended parents as many rights as possible, which is what the three-parent model can provide if a state recognizes rights of a gestational carrier.

In the past, courts have been unwilling to recognize the non-biological homosexual spouse as a parent. Under the three-parent model, they may be more willing to do so. For example, in the *Robinson* case, not only would Sean Hollingsworth—the sperm donor—and Angelia Robinson—the gestational surrogate—have custody rights to the child, Donald Robinson—the sperm donor's partner—would also have those rights. Though this framework may not be ideal for homosexual couples seeking full rights, it will help the movement in creating rights for the non-biological parent and upholding that part of the surrogacy contract that provides those rights. Many feel that "caring for a fetus in utero is a form of parenting and the law should recognize that."[217] This method would solve that concern while also allowing the non-biological intended parent rights to the child. Though this solution may not be ideal for homosexual males, it will ensure that both homosexual male partners also have those rights and may be the first necessary step in the rights of homosexual male parents.

CONCLUSION

In some states, homosexual men may utilize adoption in order to raise a family. However, other states outlaw adoption by homosexual men. Further, many homosexual men desire to raise a family that is biologically related to them. For this, it is necessary that these men use a surrogate mother to carry their children. Many state laws make this impossible, outlawing surrogacy altogether, leaving homosexuals fearful that the surrogate will fight for custody. Homosexual women, on the other hand, are able to utilize sperm donors and carry children themselves in

216 *Id.*
217 Polikoff, *supra* note 213.

order to procreate and have children that are biologically related to them. With certain reforms, and by allowing surrogacy, homosexual intended parents would have the same rights to their children.

The *Johnson* intent doctrine should be expanded to give full rights to homosexual intended parents. This would mean that homosexuals entering into a surrogacy contract as intended parents would be the legal parents to that child. This change should begin with model legislation, such as the UPA, to ensure that individuals intending to bring about a family would not later be forced to surrender their child to a third party. It would alleviate the fears of homosexual men that their children may be one day taken from them.

Legislatures and courts cannot ignore the fears of homosexual men and their families. It is important to recognize that someone such as Sean Hollingsworth, who so desperately wants a child, deserves one and deserves to not live in fear that that child will be taken away. Until state legislatures are willing to uphold surrogacy agreements where the intended parents are homosexuals, they may be more willing to provide alternative options to individuals who desire to utilize surrogacy. Providing increased rights to the non-genetic intended parent of the child may decrease litigation, and guarantee rights to that parent. Proposing a prior pregnancy requirement for surrogate mothers may protect women in the surrogacy process. Until surrogacy agreements are enforced to the full extent, these alternatives may solve some of the concerns that have emerged.

APPENDIX A

Table One: Alabama – Georgia

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA
Statute			X[218]	X[219]					X	X	
Case Law					X[220]		X				
Criminalizes Surrogacy									X[221]		
Uncertain	X[222]	X[223]				X[224]		X[225]			X[226]
Bans Contracts			X						X		
Voids Compensated Contracts			X						X	X[227]	
Voids Uncompensated Contracts			X						X		
Allows Time										X[228]	

218 *See* ARIZ. REV. STAT. ANN. § 25-218. This statute was held unconstitutional by the case *Soos v. Superior Court*. The court found that a provision stating that the gestational surrogate was the legal mother was unconstitutional. The Arizona Court of Appeals found that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the intended and biological father was able to establish parentage but the intended and biological mother was not. Yet, the Arizona Supreme Court declined to hear the case, so the scope of the case is unclear. The case stands for the proposition that the intended mother is entitled to rebut the presumption of the surrogate's legal motherhood. *See* Soos v. Superior Court *ex rel*. County of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994). *See also* ARIZ SURROGACY LAWS, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/828.htm. There is also a proposed bill, H.B. 2117, to amend the statute. However, the amendment is for a typographical error and does not change the statute in substance. H.B. 2117, 50th Leg., 1st Sess. (Ariz. 2011), http://e-lobbyist.com/gaits/text/95820.

219 *See* ARK. CODE ANN. § 9-10-201 (West 2008).

220 *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *see also* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); *see also In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

221 *See* D.C. CODE §§ 16-401, 402 (2009) (criminalizing compensated and uncompensated and traditional and gestational surrogacy). The penalty is not to exceed $10,000 and/or imprisonment for more than one year.

222 *See* Brasfield v. Brasfield, 679 So.2d 1091, 1095 (Ala. Civ. App. 1996) (concluding "baby-buying" did not pertain to surrogacy). Here, a woman getting divorced was awarded custody of her child that was conceived and born through a traditional surrogate.

223 There have been no reported cases that have touched on this issue substantially. *See* ALASKA SURROGACY LAW, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/1000.htm. The only case touching upon surrogacy was decided based on procedural grounds that it had run the statute of limitations. *See id.*

224 There is no statute and have been no reported cases in Colorado regarding surrogacy. *See* COLO. SURROGACY LAW, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/816.htm. Statute 19-4-106 deals with parental rights for children of assisted reproduction but explicitly excludes surrogacy agreements, addressing women who want to conceive for themselves and not as surrogates. *See id.*

225 There is no statute governing surrogacy in Delaware and no pertinent case law. *See* Hawkins v. Frye, 1988 Del. Fam. Ct. LEXIS 31 (Del. Fam. Ct. 1988) (regarding contracts terminating parental rights). However, this case did not involve surrogacy.

226 No reported cases or statutes. *See* GA. SURROGACY LAW, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/889.htm.

227 *See* FLA. STAT. ANN. § 742.15 (LexisNexis 2011).

228 For traditional surrogacy only. *See* FLA. STAT. ANN. § 742.16 (LexisNexis 2011). The intended parents are the legal parents, but in the case of traditional surrogacy the mother has time to

for Surrogate to Change her Mind											
Intended Parents are Legal Parents				X	X		X			X[229]	
LGBT Enforceability				X[230]	X[231]		X[232]			X[233]	

Table Two: Hawaii – Massachusetts

	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA
Statute			X	X				X			
Case Law		X									
Criminalizes Surrogacy											
Uncertain	X[234]	X[235]			X[236]	X[237]	X[238]		X[239]		X[240]

change her mind; *see* MARKENS, *supra* note 17, at 29.

229 For gestational purposes only.

230 Though the court has not yet considered upholding surrogacy contracts in the same-sex context, Arkansas approved a ballot measure in 2008 making it illegal for unmarried, cohabitating people to adopt or provide foster care and was clearly aimed at restricting LGBT rights. This makes the state's stance on LGBT surrogacy unclear though their surrogacy laws otherwise are extremely liberal. ARK. SURROGACY LAW, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/822.htm.

231 *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kristina H. v. Lisa R. 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

232 Prior case law specifically stated that it was declining to decide the validity of surrogacy contracts. *See* Doe v. Roe, 717 A.2d 706 (Conn. 1998). However, in the recent decision of Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011), the Supreme Court of Connecticut upheld a surrogacy agreement between a homosexual couple and a gestational couple.

233 Not enforceable for LGBT or unmarried couples. *See* FLA. STAT. ANN. § 742.15 (LexisNexis 2011) ("[a] contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older."). Since homosexual couples may not legally marry, they are unable to enter into a gestational surrogacy agreement.

234 No reported cases or statutes. *See* HAW. SURROGACY LAW, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/906.htm.

235 Surrogacy contracts are probably enforceable according to DeBarnardi v. Steve B.D., 723 P.2d 829, 835 (Idaho 1986). A traditional surrogate mother who gives up her child to the intended parents through adoption must abide by that adoption if it was not made under fraud or duress. The court used the best interests of the child standard.

236 IOWA CODE § 710.11 (2008) makes it illegal to purchase or sell another person. However, the statute specifies that it does not apply to surrogate mother arrangements. Therefore, the state has decriminalized surrogacy, but has not specifically ruled on the status of surrogacy. *See* Raftopol v. Ramey, 12 A.3d 783, 804 n.36 (Conn. 2011).

237 There are no reported statutes or cases. However, two Attorney General opinions indicate surrogacy agreements are against public policy. *See* 29 Op. Kan. Att'y Gen. No. 96-73 (1996); *see also* 54 Op. Kan. Att'y Gen. No. 82-150 (1982).

238 Probably unenforceable. *See* KY. REV. STAT. ANN. § 199.590 (LexisNexis 2011) which states that a person shall not "be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void." *See also* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (holding that this statute overruled a Kentucky Supreme Court case, Surrogate Parenting Assoc., v. Com. *ex rel*. Armstrong, 704 S.W.2d 209 (Ky. 1986) in which the court held that compensated surrogacy did not violate a state statute). *See also* Op. Ky. Att'y Gen. No. OAG 81-18 (1981).

Bans Contracts				X[241]							
Voids Compensated Contracts				X				X[242]		X[243]	
Voids Uncompensated Contracts				X							
Allows Time for Surrogate to Change her Mind											X
Intended Parents are Legal Parents			X[244]								
LGBT Enforceability											

Table Three: Michigan – New Mexico

	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM
Statute	X					X	X	X		
Case Law									X	
Criminalizes Surrogacy	X[245]									
Uncertain		X[246]	X[247]	X[248]	X[249]					
Bans Contracts	X									
Voids Compensated Contracts	X					X[250]	X		X[251]	X[252]
Voids	X									

239 No reported cases or statutes. *See Maine Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 09, 2009), http://www.hrc.org/issues/parenting/surrogacy/896.htm.

240 *See* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998). Uncompensated surrogacy agreements will likely be upheld, but the surrogate will have four days to change her mind after birth. *See* Hofman, *supra* note 33, at 454 n.31.

241 IND. CODE § 31-20-1-1 (2008) ("The general assembly declares that it is against public policy to enforce any term of a surrogate agreement . . .").

242 Does not address gestational surrogates, but voids compenstated traditional surrogacy. *See* LA REV. STAT. ANN. § 9:2713 (2005).

243 No specific law. However, their current laws and Attorney General's statement seem to indicate that compensated contracts are void. *See* MD. CODE. ANN. CRIM. LAW § 3-603 (LexisNexis 2011); 85 Op. Md. Att'y Gen. 348 (2000).

244 Illinois laws only cover gestational surrogacy, making them valid and the intended parents the natural parents. *See* 750 ILL. COMP. STAT. 47/1 – 47/75 (2005). It does not address traditional surrogacy.

245 A surrogacy contract of any kind is void and unenforceable, while compensated surrogacy is criminalized. *See* MICH. COMP. LAWS ANN. § 722.851-863 (2002).

246 No statutes or published cases. *See Minnesota Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 09, 2009), http://www.hrc.org/issues/parenting/surrogacy/1074.htm.

247 No statutes or published cases. *See Mississippi Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 09, 2009), http://www.hrc.org/issues/parenting/surrogacy/1094.htm.

248 No statutes or published cases. However, surrogacy contracts could be in conflict with Missouri law banning trafficking children. *See* MO. ANN. STAT. § 568.175 (West 1999).

249 No statutes or case law. *See Montana Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 09, 2009), http://www.hrc.org/issues/parenting/surrogacy/1197.htm.

250 *See* NEB. REV. STAT. § 25-21, 200 (2004).

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

252 *See* N.M. STAT. ANN. § 32A-5-34 (LexisNexis 2011).

Uncompensated Contracts										
Allows Time for Surrogate to Change her Mind								X[253]		
Intended Parents are Legal Parents							X	X		
LGBT Enforceability							X[254]	X[255]		

Table Four: New York – South Dakota

	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD
Statute										
Case Law										
Criminalizes Surrogacy										
Uncertain		X[256]		X[257]	X[258]	X	X[259]	X[260]	X[261]	X[262]
Bans Contracts	X[263]		X[264]							
Voids Compensated Contracts						X[265]	X			
Voids Uncompensated Contracts										
Allows Time for Surrogate to Change her Mind										
Intended			X[266]							

253 *See* N.H. REV. STAT. ANN. § 168-B:25 (LexisNexis 2011).

254 Only enforceable for married couples. *See* NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2011).

255 Only enforceable for male and female married couples. *See* N.H. REV. STAT. ANN. § 168-B:1 (LexisNexis 2011).

256 There is no statute or case law on surrogacy. However, N.C. GEN. STAT. ANN. § 48-10-102 (2011) prohibits payment in connection with adoption.

257 Probably enforceable. *See* J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007) (holding that gestational agreements are not against the public policy of Ohio). *See also* S.N. v. M.B., 935 N.E.2d 463 (Ohio Ct. App. 2010).

258 There is no statute or case law on surrogacy. *See* OKLA. STAT. ANN. tit. 10, § 552 (West 1967). *Cf.* Okla Op. Att'y Gen. No. 83-162 (Sept. 29, 1983) (suggesting that compensation is illegal for surrogacy).

259 *See* Huddleston v. Infertility Ctr. of Am., Inc., 700 A.2d 453 (Pa. Super. Ct. 1997); Ruth F. v. Robert B., Jr., 690 A.2d 1171 (Pa. Super. Ct. 1997).

260 *See Rhode Island Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 10, 2009), http://www.hrc.org/issues/parenting/surrogacy/1761.htm.

261 Mid-South Ins. Co. v. Doe, 274 F.Supp.2d 757 (S.C. 2003) (finding surrogacy agreements enforceable, yet assuming they were not contrary to the state law).

262 No statute or case law on surrogacy. *See South Dakota Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 10, 2009), http://www.hrc.org/issues/parenting/surrogacy/1806.htm.

263 *See* N.Y. DOM. REL. § 122 (Consol. 2009).

264 *See* N.D. CENT. CODE § 14-18-05 (2005).

265 *See* 46 Or. Op. Att'y Gen. 221 (1989); *see also In re* Adoption of Baby A, 877 P.2d 107, 107-08 (Or. Ct. App. 1994).

266 *See* N.D. CENT. CODE § 14-18-08 (2009).

Parents are Legal Parents										
LGBT Enforceability										

Table Five: Tennessee - Wyoming

	TN	TX	UT	VT	VA	WA	WV	WI	WY
Statute		X	X		X	X			
Case Law									
Criminalizes Surrogacy									
Uncertain	X[267]			X[268]			X[269]	X[270]	X[271]
Bans Contracts			X[272]						
Voids Compensated Contracts						X[273]			
Voids Uncompensated Contracts									
Allows Time for Surrogate to Change her Mind					X[274]				
Intended Parents are Legal Parents	X	X	X						
LGBT Enfor.	X[275]	X[276]	X[277]		X[278]				

267 As it stands now, surrogacy is legal but only for married couples. *See* TENN. CODE ANN. § 36-1-102(48) (2009). However, there is proposed legislation. *See* Tenn. S.B. No. 287 (2011).

268 No case law or statute dealing explicitly with issue, but it is likely that it would be upheld. *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (indicating acceptance of these agreements indirectly).

269 No statute explicitly addresses surrogacy. *But see* W. VA. CODE ANN. § 48-22-803(e)(3) (West 2004) (stating that fees and expenses associated with surrogacy are not prohibited by adoption laws).

270 *See* WIS. STAT. ANN. § 69.14(1)(h) (West 2008) (providing what should be put on the birth certificate and allows for a new birth certificate to be ordered in the case of surrogacy. This shows that a surrogacy agreement would probably be enforced.).

271 *See Wyoming Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 10, 2009), http://www.hrc.org/issues/parenting/surrogacy/1115.htm.

272 *See* UTAH CODE ANN. § 78B-15-801(7) (West 1953).

273 *See* WASH. REV. CODE ANN. § 26.26.2010 (West 2010). One is guilty of a misdemeanor if they enter into a compensated surrogacy agreement. For uncompensated surrogacy disputes between the surrogate mother and intended parents, a court should look to a balancing test based on the child's relationship with the parents to determine custody. *See Washington Surrogacy Law*, HUMAN RIGHTS CAMPAIGN (Sept. 10, 2009), http://www.hrc.org/issues/parenting/surrogacy/1168.htm. There is currently proposed legislation that would make surrogacy for compensation allowed and would expand upon the rights of LGBT individuals. It would establish standards for surrogacy contracts including requirements that the intended parents and the surrogate must meet. *See* H.R. 1267, 62nd Leg. (Wash. 2011).

274 *See* VA. CODE ANN. § 20-162 (West 1991) (especially if the intended parents are not the biological parents). *See* MARKENS, *supra* note 17, at 29.

275 Only enforceable for married couples.

276 Only enforceable for married couples. *See* TEX. FAM. CODE ANN. § 160.754(b) (West 2007); TEX FAM. CODE ANN. § 160.751 (West 2007).

277 Only enforceable for married couples. *See* UTAH CODE ANN. § 78B-15-801(3) (West 1953).

278 Only enforceable for married couples. *See* VA. CODE ANN. § 20-156 (West 1991).