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Family Law—Breach Baby: An Argument for Equal Enforcement of Traditional and Gestational Surrogacy Contracts

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FAMILY LAW—BREACH BABY: AN ARGUMENT FOR EQUAL ENFORCEMENT OF TRADITIONAL AND GESTATIONAL SURROGACY CONTRACTS

I. INTRODUCTION

In 2008, doctors diagnosed Marcia Rosecky with leukemia for the second time.[1] At the same time, Marcia and her husband David wanted to become parents and start a family.[2] However, because of the disease and its treatment, Marcia's eggs were no longer viable.[3] This prompted the Roseckys to turn to longtime friend Monica Schissel, who offered to become a surrogate and carry a child for the couple.[4] Monica and the Roseckys obtained the advice of attorneys and executed a surrogacy contract styled a "Parentage Agreement."[5] Soon after, Monica was artificially inseminated with David's sperm and became pregnant.[6] Unexpectedly, a few weeks prior to the birth of the child, Monica changed her mind and informed the Roseckys that she intended to keep the baby.[7] The Roseckys had chosen Monica because she was a childhood friend of Marcia, and she had offered to be Marcia's surrogate multiple times.[8] Even that close relationship did not prevent the arrangement from souring.[9]

The outcome of the resulting dispute was anything but certain. Wisconsin courts had to decide if the state would enforce the contract between the Roseckys and Monica Schissel.[10] The issue was the genetic relationship between Monica and the baby.[11] Nationally, enforcement of a surrogacy agreement like the Roseckys' is less certain than enforcement of one involv-

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1. Scott Bauer, *Supreme Court Upholds Surrogate Mother Agreements*, STARTRIBUNE (July 11, 2013, 4:20 PM), http://www.startribune.com/supreme-court-upholds-surrogate-mother-agreements/215086311/.

2. *Id*.

3. Joshua J. Bryant, *A Baby Step: The Status of Surrogacy Law in Wisconsin Following* Rosecky v. Schissel, 98 MARQ. L. REV. 1729, 1741 (2015).

4. *Id*.

5. Rosecky v. Schissel, 833 N.W.2d 634, 637, 640 (Wis. 2013). The parentage agreement covered all the details of the surrogacy arrangement, including financial responsibilities, a custody agreement and a parental rights termination clause. *Id*.

6. Bauer, *supra* note 1.

7. *Rosecky*, 833 N.W.2d at 637–38.

8. *Id.* at 638.

9. *Id*. at 639.

10. *Id.* at 639; Bryant, *supra* note 3, at 1740 (noting that the Roseckys' case was one of first impression in Wisconsin).

11. *Rosecky*, 833 N.W.2d at 646.

ing a surrogate not genetically related to the child.[12] Thus, the young couple faced the real possibility that they might lose custody rights to the child they had spent months thinking was theirs.[13]

Surrogacy law varies greatly from state to state.[14] States that allow surrogacy still might not enforce the Roseckys' contract, particularly with respect to the parental rights termination clause.[15] Even states that allow surrogacy may distinguish between gestational surrogacy and traditional surrogacy. A gestational surrogate is not genetically related to the child she carries. In contrast, a traditional surrogate donates her own egg and is therefore the child's genetic mother, as was the case in *Rosecky*.[16] In *Rosecky*, the court ruled that it was against the state's public policy to enforce a parental rights termination clause against a surrogate who was genetically related to the child.[17] However, the court resolved the dispute in the Roseckys' favor by relying on the custody and placement provisions and the severability clause.[18] Had the dispute happened in another state, the court might not have reached the questions of the custody and placement provision because of the type of contract involved.[19]

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12. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 296 (2013).

13. *See Rosecky*, 833 N.W.2d at 646.

14. *See* Joseph F. Morrissey, *Surrogacy: The Process, The Law, and The Contracts*, 51 WILLAMETTE L. REV. 459, 487–503 (2015). *See also, e.g.*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18 (codified in part at N.J. STAT. ANN. §§ 9:17-60 to -68 (2020) and amending other scattered sections of N.J. STAT. ANN. Title 9 and N.J. STAT. ANN. § 26:8-28); MICH. COMP. LAWS § 722.859 (2019); N.D. CENT. CODE § 14-18-05 (2019); N.Y. DOM. REL. Law § 122 (Consol. 2019).

15. Morrissey, *supra* note 14, at 497–98 (describing North Dakota's statute, "unique" in distinguishing explicitly between traditional and gestational surrogacy; *see also Rosecky*, 833 N.W.2d at 652. The parental rights termination clause purported to control who, among the parties to the contract, was to be the legal parent(s). *Rosecky*, 833 N.W.2d at 651. This issue is probably the most important to the parties at the time of contracting. *Id*. However, it is also the clause most often challenged when parties breach the agreement. *Id*.

16. Morrissey, *supra* note 14 at 472.

17. *Rosecky*, 833 N.W.2d at 652, 654.

18. *Id.* at 651, 653. The "parentage agreement" in *Rosecky* included a custody and placement clause separate from the parental rights termination clause. *Id.* at 651. It also contained a severability clause. *Id*. The severability clause allowed the court to enforce remaining provisions in the contract in the event it found any clause unenforceable. *Id.* at 649. The custody and placement clause were found to be enforceable even though the parental rights could not automatically be terminated. *Id.* at 653.

19. *See In re* Baby M, 537 A.2d 1227, 1246–47 (N.J. 1987) (finding that the entire contract violated public policy), *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18.

Courts and legislatures are generally moving toward enforcing the parties' will in a gestational surrogacy contract.[20] However, many of those same states are hesitant to legitimize traditional surrogacy contracts.[21] This note argues that courts should enforce traditional surrogacy contracts in the same manner as gestational surrogacy contracts. Part II provides a background of the different genetic configurations that parties to surrogacy contracts can enter into, including case examples where possible. Part III provides an overview of the historical rationale for prohibiting surrogacy contracts generally and explores how these arguments apply with equal force to all four possible permutations of the agreements. Part IV explains how courts have departed from prior case law to enforce gestational surrogacy contracts while still refusing to enforce all the provisions of traditional surrogacy contracts, then addresses the problems this approach creates. Part V argues that courts should not treat traditional surrogacy contracts less favorably than gestational surrogacy contracts. Part VI articulates three possible methods for equal treatment of surrogacy contracts and argues for an intent-based model for determining parentage that can work for all permutations of these contracts.

II. THE FOUR TYPES OF SURROGACY CONTRACTS

There are four types of surrogacy contracts based on the genetic relationship of the parties to the intended child. The types as presented below represent the possible configurations of genetic relationships between the surrogate, one or both of the intended parents, and the child. This note will first give an overview of possible genetic relationships among parties to gestational contracts. It will then compare parties' relationships in traditional contracts to their more readily enforceable gestational counterparts.

A. Type 1 Gestational Contracts

Perhaps the archetype of gestational surrogacy is where both intended parents are genetically related to the child. Such was the case in *Johnson v. Calvert*.[22] In *Calvert*, the intended mother had undergone a hysterectomy, but her ovaries remained capable of producing viable eggs.[23] Likewise, her

20. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); 2018 N.J. Laws 18. N.Y. DOM. REL. LAW § 122. This note assumes that the trend of enforcing the will of the parties in gestational surrogacy arrangements is generally a good thing.

21. *See In re Baby M*, 537 A.2d at 1234, *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18. The holding barring enforcement of traditional surrogacy contracts is still good authority.; N.Y. DOM. REL. LAW § 122

22. *Calvert*, 851 P.2d at 777–78.

23. *Id*. at 778.

husband was fertile.[24] They only needed someone to provide gestational services for a zygote fertilized in a lab using each of their genetic material.[25] Another possibility with this first permutation of gestational contracts is that only one intended parent may be genetically related to the child. Such was the case in *C.M. v. M.C.*[26] In *C.M.*, a single intended father had the sole genetic connection with the resulting children.[27] The court enforced the agreement because the intended father substantially complied with the statutory scheme governing surrogacy contracts.[28]

B. Type 2 Gestational Contracts

The second type of gestational contract is one where no party to the contract is genetically related to the resulting child.[29] In *In re Marriage of Buzzanca*, after the dissolution of the intended parents' marriage, a trial court took the extraordinary step of declaring that the child had no legal parents.[30] *Buzzanca* saw a surrogacy contract with no genetic relationship between the child and any party to the contract fall apart when the Buzzanca marriage dissolved. [31] Neither the intended father nor the surrogate wanted the child.[32] The courts confronted this issue: absent any genetic connection between the child and any party to the contract, who is the legal parent?[33] The appellate court ruled legal parentage belonged to the intended parents.[34] The intent of the parties governed this case even in the absence of a genetic connection between the intended parents and the child.[35]

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24. *Id*.
25. *Id*.
26. *See* C.M. v. M.C., 213 Cal. Rptr. 3d 351, 354 (Cal. Ct. App. 2017). California's statutory scheme recognizes all gestational surrogacy contracts without regard to which intended parent(s) are genetically linked to the child and enforces them as long as they substantially comply with the procedures required by the law. *See* CAL. FAM. CODE § 7962 (Deering 2020).
27. *Id.*
28. *Id.* at 360–61.
29. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).
30. *Id*. (*In re Buzzanca* was decided prior to the passage of the statutory scheme codifying the enforcement of gestational surrogacy. The trial court reasoned that the lack of any genetic connection to either the surrogate or the intended parents left the child legally parentless).
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*. at 293–94.
35. *In re Buzzanca*, 72 Cal. Rptr. 2d at 293.

C. Type 1 Traditional Surrogacy Contracts

As with gestational contracts, there are two types of traditional contracts with respect to genetic relationships. The facts of *Rosecky* describe the first type: the child born pursuant to the contract was genetically related to both the surrogate and the intended father.[36] The court remanded the case to the trial court to give custody to the intended parents unless enforcement would be against the best interest of the child, resulting in an outcome similar to the expected result in a gestational surrogacy contract dispute.[37] However, there was no termination of parental rights pursuant to the contract.[38] It may be best to think of this as a form of substantial performance.[39] In the context of a surrogacy contract, the material term may be the one providing for legal custody, not termination of parental rights. If the point of the contract is for the intended parents to gain the opportunity to raise a child, then legal and physical custody become the most important terms of the contract. It is therefore possible to accomplish the goal of the intended parents by enforcing the custody and placement clauses, even with the surrogate retaining her claim as a legal parent.

While substantial performance by enforcing the custody provision might be possible under a traditional surrogacy contract, it is by no means guaranteed.[40] Consider the case of *In re Marriage of Moschetta*. Robert Moschetta occupied essentially the same position as David Rosecky.[41] Like in *Rosecky*, Mr. Moschetta was genetically related to the child and so was the surrogate.[42] Upon dissolution of the Moschetta marriage, the surrogate attempted to have the court declare her to be the child's mother.[43] The trial court found the legal parents to be the surrogate and Robert Moschetta.[44] The trial court awarded essentially a 50/50 split in the custody arrangement on a best-interest-of-the-child rationale.[45] In The decision, the appellate court recognized that as a consequence of its holding, it is difficult to know

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36. *See* Rosecky v. Schissel, 833 N.W.2d 634, 637 (Wis. 2013).

37. *Id*. at 653.

38. *Id*. at 651 (reasoning the contractual termination of parental rights in this way was against public policy.).

39. *See* CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW CASES AND MATERIALS 815–16 (8th ed. 2016). Substantial performance is where a deviation from the terms of a contract exists, but the deviation is relatively minor and therefore not a material breach. *Id*.

40. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 895 (Cal. Ct. App. 1994).

41. *Id.* at 895; *Rosecky*, 833 N.W.2d at 637.

42. *In re Moschetta*, 30 Cal. Rptr. 2d at 895.

43. *Id.*

44. *Id.*

45. *Id*. at 901 (awarding joint custody despite some concerns regarding the surrogate's home).

the outcome of a potential dispute when a traditional surrogacy contract is involved.[46]

D. Type 2 Traditional Surrogacy Contracts

Type 2 traditional surrogacy contracts involve a surrogate using her own egg and the sperm of an anonymous donor. There does not appear to be any published case law addressing this possible combination. Given the uncertainty surrounding a type 1 traditional surrogacy,[47] the intended parents in a type 2 traditional surrogacy contract may face even less certain parental rights.[48] If that is the case, it is unsurprising that these fact patterns are rare.[49]

III. HISTORICAL REASONS FOR INVALIDATING SURROGACY AGREEMENTS AND HOW THEY APPLY TO EACH KIND OF CONTRACT

Anytime a new technology develops, the legal system must answer the question, *does the technology fit into our current legal scheme*? With respect to surrogacy agreements, courts have wrestled with this issue on several grounds.[50] Historically, courts have found surrogacy contracts invalid because (1) they are against the public policy of the state, (2) there is concern that inherent coercion undermines the surrogate mothers' voluntary consent, (3) there is a perception that the surrogate mother is unable to understand the full extent of the contract, and (4) they violate existing adoption or baby-selling statutes.[51]

A. The Public Policy Argument

Courts have historically considered public policy when deciding the validity of a contract.[52] The first court to address the validity of a surrogacy

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46. *Id.* at 903. While what the court says here is true, the circumstances that are highlighted for the trial court to consider implicate a problem that will be discussed in detail later in this paper. Specifically, the appellate court noted the trial court should consider the surrogate's son's potential involvement with drugs and gangs when it reviews the best interest of the child. *Id.* at 902–03. Resolving parentage disputes arising from surrogacy agreements in this way raises the specter of exploitation that is addressed in Section III.

47. *In re Moschetta*, 30 Cal. Rptr. 2d at 903.

48. Absent a statute that gives intended parents relief, they may occupy a position as a third party and lack standing to even challenge a surrogate's decision to keep the child.

49. The use of genetics as a presumption instead of enforcing the will of the parties may result in unappealing consequences should this fact pattern come before the court. *See infra* Section IV.

50. *See* Jessica H. Munyon, Note, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U.L. REV. 717, 719 (2003).

51. *See id*.

52. KNAPP, *supra* note 39, at 661.

agreement decided the case on public policy grounds.[53] *In re Baby M* involved a traditional surrogacy contract not unlike the one at issue in *Rosecky*.[54] The intended parents (the Sterns) paid the surrogate (Whitehead) to be artificially inseminated and to carry a child that would be theirs.[55] After the child was born, Whitehead initially surrendered the child but then reconsidered. After gaining the Sterns' permission to spend a week with the child, Whitehead announced she was keeping the baby.[56] The court invalidated the contract for the dual reasons of conflicting with the laws and public policy of the state.[57]

In determining that public policy weighed against the validity of the contract, the *Baby M* court noted that the interests in the contract extended beyond those of the parties to the agreement.[58] Additionally, the court concluded that New Jersey's statutory scheme showed a clear preference that a child be "brought up with both natural parents."[59] The *Baby M* court determined the parties acted in their own self-interest and did not (nor could they) adequately consider the child's interests at the execution of the contract.[60] Moreover, the court reasoned that money was Ms. Whitehead's primary motive for entering into the agreement giving up her parental rights.[61] The court asserted that such an agreement was against the public policy of keeping natural parents with their children.[62]

Public policies of keeping children with their "natural parents" and determining the best interest of the child are no less relevant to a gestational surrogacy contract than to the traditional surrogacy contract at issue in *Baby M*.[63] In *A.H.W. v. G.H.B.*, the court confronted a situation where both in-

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53. *In re* Baby M, 537 A.2d 1227, 1246–47 (N.J. 1987), *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18.

54. *Id*. at 1234; Rosecky v. Schissel, 833 N.W.2d 634, 637 (Wis. 2013).

55. *In re Baby M*, 537 A.2d at 1234–35.

56. Steven M. Recht, Note, *"M" is for Money: Baby M and the Surrogate Motherhood Controversy*, 37 AM. U. L. REV. 1013, 1035 (1988).

57. *In re Baby M*, 537 A.2d at 1234. The court stated that the purpose of the adoption statutes that bar paying money to a child's mother was to protect both the child and mother. *Id.* at 1241–42.

58. *Id*. at 1248; *see also* Munyon, *supra* note 50, at 732–33. A child conceived pursuant to a surrogacy contract can, and probably should, be viewed as a third-party beneficiary.

59. *In re Baby M*, 537 A.2d at 1246–47.

60. *Id*. at 1248 (viewing the contract more as one for goods, i.e. "the baby," than one for the services of gestation).

61. *Id*.

62. *Id*. at 1246–47.

63. A.H.W. v G.H.B., 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000). The court opines on the importance not just of genetics, but the process of carrying a baby itself. *Id.* The "endocrine cascade" and nutrient exchanges, among other things, appear to support that there is an interest that the state's public policy is meant to protect beyond the genetic connection of a natural mother and child. *Id.*

tended parents were genetically related to the child.[64] Unlike the traditional surrogate in *Baby M*, the gestational carrier in *A.H.W.* was not fighting for the child and instead joined the intended parents in a motion to terminate her own parental rights in a pre-birth order.[65] However, the court cited important developments that happen at birth to support the policy that a woman could not be forced to surrender her child and that she must wait seventy-two hours after birth to voluntarily do so.[66]

B. The Possibility of Exploitation: *Baby M* and Feminists Agree

Another argument against surrogacy contracts is the potential for exploitation of the would-be surrogates.[67] Proponents of this argument fear compensation paid to surrogates will be a coercive force ushering women into a situation where their bodies become commodities.[68] Some liken the surrogacy contract to prostitution of the womb.[69] Feminist scholar Andrea Dworkin argues that the surrogate is not able to express her own will adequately due to power structures inherent in surrogacy agreements that favor the male party.[70] Taken to its logical conclusion, Dworkin's argument implies that enforcing surrogacy agreements reduce women to nothing more than their reproductive capacity.[71]

Dworkin's argument carries equal force with both traditional and gestational surrogacy contracts. It stands to reason that a primary concern (if not the determining factor) when choosing a surrogate is her ability to carry the child to term, whether or not she supplies the egg.[72] Additionally, from a socioeconomic standpoint, the type of surrogacy contract likely has little bearing on who becomes a surrogate.[73] No matter the type of contract, intended parents have an incentive to find someone not only willing to perform the service, whether or not for money, but also least likely to keep the child. Given the possibility of a dispute arising with a surrogate claiming

64. *Id*. at 949.

65. *Id.* at 953.

66. *Id.* at 954 (The term "natural parent" as used in *Baby M*. and the public policy concerns raised in that case are therefore relevant even when the surrogate lacks a genetic connection to the child.).

67. Recht, *supra* note 56, at 1024–25.

68. Connor Cory, Note, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. POVERTY L. & POL'Y 133, 146 (2015).

69. ANDREA DWORKIN, RIGHT WING WOMEN 182–88 (1983) (articulating two economic models of male control over women, the farming model and the prostitution model, surrogacy fitting into the latter and, at least arguably, both models).

70. *Id*. at 182–83.

71. *See id.* at 187.

72. *See id*. at 187–88.

73. *See* Recht, *supra* note 56, at 1024 (discussing role of class in surrogacy arrangements).

parenthood under presumptions of birth, genetics, or both, intended parents may seek potential surrogates that would be at a severe disadvantage in a determination of the best-interests-of-the-child.[74]

Scholars have also advanced comparisons to human trafficking as an argument against surrogacy contracts.[75] Their premise is that surrogacy is no more than black market adoption.[76] However, this argument ignores the fact that the intent of the parties is different with a surrogacy contract than it is with an adoption.[77] In a surrogacy contract, the parties are contracting not for a fully formed baby but the services to create one.[78] Therefore, the concerns are wholly different than those present in an adoption.

Similar to the prostitution argument, the human trafficking argument applies equally to all surrogacy contracts, regardless of the genetic relationship between the child and the parties. The purpose of the transaction is important here.[79] No matter the genetic relationship of the parties to the child, the purpose of the contract is to secure the services required to bring the child into existence, not the child itself.[80]

C. The Impossibility of Informed Consent

Opponents argue that a surrogate mother cannot give informed consent because she cannot predict how strong her bond with the resulting child will be.[81] At least one court has explicitly viewed hormonal and emotional changes during pregnancy and shortly after birth as a justification not to enforce a surrogacy contract.[82] The court in *A.H.W.* confronted a situation where the surrogate had previously given birth to a child of her own and was actually willing to surrender the child under the surrogacy contract.[83] However, the court held she could not surrender the child until seventy-two hours

74. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 902–03 (Cal. Ct. App. 1994). The surrogate's family issues in *Moschetta* may be used against her. Knowing this, intended parents may intentionally seek out people who are likely to lose should they challenge custody.

75. Jennifer S. White, *Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance*, 2 BELMONT L. REV. 269, 295 (2015).

76. *Id*.

77. *Id*.

78. *Id.*

79. *Id*.

80. *Id*.

81. *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1987), *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18; Munyon, *supra* note 50, at 719.

82. A.H.W. v. G.H.B., 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (discussing the endocrine cascade and its importance not just to the child but to the mother's bond as well).

83. *Id*.

after birth.[84] The court justified its decision in part because, at birth, the mother may still develop a bond with the child.[85] Though the *A.H.W* surrogate had previously been pregnant and likely knew and understood the emotional attachments involved, the court fashioned its rule to protect a woman who had no idea what the process would be like.[86]

A.H.W. concerned a gestational contract.[87] However, there is little difference in the concerns the court noted when a traditional surrogacy contract is at issue. This is because the biological processes are identical regardless of the genetic connection.[88] No matter what the source of the genetic material, the womb provides the same function.[89] The surrogate does not serve as a mere incubator.[90] The surrogate provides the nutrients, proper hormones for brain development, and a protective immune system during critical stages in development.[91] The surrogate's body, by supplying all the necessary building materials to create the baby, provides at least implicit support for the holding in *A.H.W.*, no matter the genetic relationship between surrogate and baby.[92]

D. Statutory Barriers to Enforcement

Finally, statutory barriers to the enforcement of surrogacy contracts exist in many states.[93] The courts in *Baby M*, *A.H.W.*, and a host of other cases were not working off a blank slate, even when the issue was one of first impression.[94] Adoption statutes often state that a mother cannot terminate her parental rights by agreeing to adoption until a certain time after the birth.[95]

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84. *Id*. at 954.

85. *Id.* at 953–54 (denying a pre-birth order to terminate the parental rights of the surrogate on the basis of endocrine changes that happen up to and immediately following birth).

86. *See id*.

87. *Id*. at 953.

88. *See* R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 389 (1993).

89. *See id*. at 394.

90. *Id.*; *A.H.W.*, 772 A.2d at 953. The court acknowledges Oxman's point. *Id.* The gestational mother contributes significantly to the development of the child such that two genetically identical zygotes carried in different women would develop to be different human beings. *Id. See also* Oxman, *supra* note 88, at 394.

91. Oxman, *supra* note 88, at 395.

92. *See id.*; *see also A.H.W.*, 772 A.2d at 953.

93. Munyon, *supra* note 50, at 719.

94. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1240 (N.J. 1988), *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18; *A.H.W.*, 772 A.2d at 954.

95. *See, e.g.*, *A.H.W.*, 772 A.2d at 954 (discussing New Jersey adoption statute allowing parental rights terminations no sooner than seventy-two hours after birth).

Likewise, statutes prohibiting the exchange of money in exchange for a termination of parental rights may invalidate surrogacy agreements.[96]

The primary goals of adoption statutes are consistency and security of the minor children.[97] However, adoption statutes provide inadequate guidance in dealing with any type of surrogacy contract. Unlike in an adoption, in surrogacy situations the child in question would not exist but for the intent of the parties to enter the contract, regardless of the genetic relationship between the child and the parties to the contract.[98] Likewise, statutes that prohibit selling children do not directly apply to any type of surrogacy contract because the payments are expressly not for the child but to reimburse for expenses and pain and suffering during pregnancy.[99]

IV. STATES DIFFERENTIATE BETWEEN TRADITIONAL AND GESTATIONAL SURROGACY, CREATING PROBLEMS

The opposition to enforcing surrogacy contracts stems from the context of a traditional surrogacy,[100] but gestational surrogacy contracts have been better received in some courts.[101] Gestational surrogacy is different because the child is not genetically related to the surrogate.[102] However, this approach creates additional problems, such as how to apply competing presumptions of parentage in potential mothers.[103]

A. The *Calvert* Rule: The Inefficiency of Competing Presumptions

California was the first state to recognize a surrogacy contract as enforceable in *Johnson v. Calvert*.[104] In *Calvert*, the court applied the presump-

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96. *In re Baby M*, 537 A.2d at 1240. If one views the transaction as the purchase of a human being, the statute will apply regardless of genetic consanguinity. Likewise, if the contract is seen as one not for a human being but for gestational services, such a statute would not apply regardless of consanguinity. The purpose of the contract really matters here.

97. *See* Susanna Birdsong, Comment, *Voiding Motherhood: North Carolina's Shortsighted Treatment of Subject Matter Jurisdiction in* Boseman v. Jarrell, 21 AM. U.J. GENDER SOC. POL'Y & L. 109, 122–23 (2012).

98. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998).

99. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

100. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994).

101. *See, e.g.*, *Calvert*, 851 P.2d at 777. *But see A.H.W.*, 772 A.2d at 953 (refusing to enforce gestational surrogacy contract).

102. *Calvert*, 851 P.2d at 784.

103. Presumptions of parentage are legal fictions created to assist in determining paternity. Normally these would not apply to mothers because it is obvious who the mother is. With surrogacy, however, there are often two competing claims of motherhood. Applying a set of presumptions on the surface is an easy way to settle the dispute.

104. *Calvert*, 851 P.2d at 784–85.

tions of birth and genetics as stated in California's parentage act.[105] The court explains the act was passed to determine parent-child relationships when such relationships are in dispute.[106] The act states maternity may be established by giving birth.[107] The act also allows for provisions applicable to fathers to be used in determining maternity where practicable.[108] The court reasoned that the genetic presumption of paternity was relevant to determining maternity as well.[109] The Johnsons had the genetic presumption in their favor, and their surrogate naturally had the birth presumption.[110] The statute did not expressly say which presumption to weigh more heavily, so the court weighted each equally and looked for a tiebreaker.[111] The court settled on the parties' intent as the tiebreaker that determined legal parenthood when genetic relationship and the birth presumption are not vested in the same woman. Thus, the court enforced the agreement against the surrogate.[112]

Using the intent of the parties as a tiebreaker only when the genetic presumption and birth presumption are not present in the same woman can only resolve disputes in two out of the four types of surrogacy contacts. As California courts have noted, the rule can resolve conflicts in both possible types of gestational contracts.[113] However, the rule is not applicable to either type of traditional surrogacy contract.[114] With traditional surrogacy, the surrogate will always possess both presumptions.

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105. *Id*. at 781–82.
106. *Id.* at 779.
107. *Id.* at 780.
108. *Id.*
109. *Id.* at 781.
110. *Calvert*, 851 P.2d. at 779–81.
111. *Id.* at 789 (Kennard, J., dissenting). The dissent criticized the majority by characterizing their solution as an "ill-advised" tiebreaker, rather than considering the best interests of the child. *Id.* However, the majority noted that the intent of the parents as evidenced by such contracts will often be coterminous with the best interest of the child. *Id.* at 783.
112. *Id.* at 786.
113. *Id.*; *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998) *In re Buzzanca* confronts the possibility that no one is genetically related to the child, and therefore no competing presumption exists. However, the decision stands for the proposition that when the child is created pursuant to a contract and that child is not genetically related to the surrogate, intent controls.
114. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994). The court construed the holding in *Calvert* to limit it to gestational contracts because California's Parentage Act expressly covers a traditional surrogacy. *Id*. This creates its own problem where intended parents have an incentive to find a traditional surrogate who could not win a custody dispute on a best-interest-of-the-child standard.

B. The *Calvert*/*Moschetta* Dichotomy and Inadequate Legislative Efforts

There are two potential problems a court could face using the *Calvert* rule. First, a surrogate may decide to keep the child and the intended parents would have no claim to parentage unless the intended parents are genetically related to the child. Second, the *Calvert* rule leaves open the possibility of intended parents doing precisely what the intended parents in *Buzzanca* attempted to do, leaving the surrogate as the only legal parent.[115]

California seems to have recognized this possibility and added a provision to their family code to address the weakness left open in *Calvert*.[116] However, while the provision does establish a claim to a parent-child relationship for all types of intended parents, the provision does nothing to clarify what the ultimate outcome of a dispute should be.[117] California's surrogacy statute codifies that the intended parents are the sole legal parents of a gestational contract, but it does not address traditional surrogacy, likely leaving the reasoning in *Moschetta* to control the outcome of traditional contracts in dispute.[118]

Other legislatures have distinguished the gestational carrier agreement and passed bills to enforce such contracts.[119] Yet some of these same states either have laws specifically outlawing traditional surrogacy[120] or case law that still prevents the enforcement of a traditional surrogacy contract.[121] Many other states have legislation and case law that fail to articulate clearly if or how courts should distinguish between the two types of surrogacy contracts.[122] This situation creates uncertainty for both intended parents and

115. *In re Buzzanca*, 72 Cal. Rptr. 2d at 284. Because all the usual presumptions of parentage are vested in the surrogate and potentially her spouse, the intended parents may occupy a position of a third party. With no genetic connection between the intended parents and the child, the court would need to fashion a rule specific to this type of surrogacy contract.

116. CAL. FAM. CODE § 7613 (Deering 2020).

117. *See id*.

118. *Id.* § 7962; *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994) (holding intent only governed in a gestational contract). Because the statute does not factor in intent for traditional surrogacy the way it does with gestational surrogacy, the reasoning of the *Moschetta* court is likely still good law.

119. N.D. CENT. CODE § 14-18-08 (2019); New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18 (codified in part at N.J. STAT. ANN. §§ 9:17-60 to -68 (2020) and amending other scattered sections of N.J. STAT. ANN. Title 9 and N.J. STAT. ANN. § 26:8-28).

120. *See, e.g.*, N.D. CENT. CODE § 14-18-05.

121. *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988), *superseded in part by statute*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18 (Holding has been superseded only with respect to gestational surrogacy contracts where surrogate is not genetically related to the child.).

122. 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, 454 (2009).

potential surrogates. States can easily avoid this uncertainty if they determine their surrogacy policy and provide a clear statement on how the enforcement should be adjudicated.

V. SURROGACY CONTRACTS SHOULD BE ENFORCED EQUALLY WITHOUT REGARD TO GENETICS

The enforcement, or lack of enforcement, of both traditional and gestational surrogacy contracts should be equal. Courts should adjudicate disputes without regard to the genetic connection between the parties and the resulting children. Doing so will better address the government's interest than the current regime of treating the contracts differently based upon the parties' genetic relationship to the child.

A. Public Policy Is Best Served by Treating Traditional and Gestational Contracts Equally

Distinguishing enforcement of surrogacy contracts based on genetics might seem appropriate for a public policy that seeks to ensure children are kept with their "natural parents."[123] However, this legislative and judicial scheme ignores the fact that a gestational surrogate is more than an Easy-Bake Oven.[124] The child gets integral parts of its structure, brain development and other features not just from the genes encoded at conception, but also from the endocrine cascade from the gestational carrier.[125] From the perspective of biology, traditional and gestational surrogacy contracts are more alike than courts admit.

Additionally, the disfavored treatment of traditional surrogacy contracts relative to their gestational counterparts minimizes an important aspect of considering the best interest of the child as compared to a gestational carrier.[126] Protecting equally the interests of parties to traditional and gestational surrogacy contracts recognizes that the interest of the child is the same whether that child is born pursuant to a traditional or gestational surrogate, and that this interest is best served by clear rules regarding equal

123. *See In re Baby M*, 537 A.2d at 1246–47.

124. Oxman, *supra* note 88, at 394.

125. *Id*. at 398. The endocrine cascade is the series of hormones, vital to a baby's development, which is provided by a pregnant woman.

126. Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (noting the importance of intentionally entering into the creation of a child.); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (discussing importance of intent to parent). Interests of the child and the interests of parents who intend from the outset to conceive and raise that child are often significantly correlated. *Calvert*, 851 P.2d at 783.

enforcement.[127] It follows that if courts enforce the intent of a gestational contract as good public policy, the enforcement of the intent of a traditional surrogacy contract would likewise be good public policy.

B. Equal Enforcement of Surrogacy Contracts Would Reduce Exploitation

One criticism of surrogacy is that the power difference between the parties is so great that the contracts are exploitative by their very nature.[128] As noted earlier, surrogacy is sometimes compared to prostitution.[129] While this criticism is perhaps not unfounded, equal enforcement will decrease the possibility of exploitation, reducing both the coercive impact of surrogacy contract and the incentive to seek disadvantaged surrogates.

1. Reducing the Coercive Impact of Surrogacy Contracts

Equal enforcement of surrogacy contracts will reduce the possibility of exploitation of surrogate mothers. Money, not the genetic connection to the child, makes the contract potentially exploitative.[130] Poorer women are most susceptible to the promise of potentially large fees (relative to their assets or earning power).[131] The burdens placed on the surrogate are nearly identical whether the egg is theirs or not.[132] If any difference is present, it is that gestational surrogacy, the more acceptable type of surrogacy contract, requires more extensive medical procedures.[133] Equal enforcement of traditional and gestational surrogacy contracts will reduce the coercive aspects of the contracts by giving surrogates some choice in the type of arrangement they enter. If the surrogate knows what she can expect when considering whether to assist the intended parents, she is free to choose between using her own egg or submitting to more extensive medical intervention.

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127. Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard*, 63 VILL .L. REV. TOLLE LEGE 1, 18 (2018) (Allowing a surrogate to change her mind until sometime after the birth of the child is not in the best interest of the child; rather it is in the child's best interest that parentage is known at birth.).

128. *See* Dworkin, *supra* note 69, at 182–88.

129. *Id.* at 187–88.

130. Cory, *supra* note 68, at 155.

131. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 1028 (1986).

132. Recht, *supra* note 56, at 1025 (noting behavioral restrictions, medical visits, and the risk of complications, all common to every surrogacy.).

133. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994) (noting that traditional surrogacy is easier and less expensive); *see also* Boardwine v. Bruce, 88 Va. Cir. 218, 219 (Va. Cir. Ct. 2014) (describing an "artificial insemination" performed at home with no medical intervention whatsoever). Such a simple approach is not possible with a gestational surrogate.

2. Reducing the Incentive to Seek Disadvantaged Surrogates

Equal enforcement reduces the incentive to seek out disadvantaged women who are likely to lose in a custody battle. The less enforceable traditional surrogacy contracts still result in the birth of a child, and courts must consider that child's best interest.[134] If traditional surrogacy contracts are unenforceable, or enforceable only after a period of time post-birth,[135] intended parents have an incentive to seek out a surrogate who is less able to care for the resulting child even if she wanted to. Courts would then need to conduct a best-interest-of-the-child analysis absent considerations stemming from the contract, like the court did in *Moschetta*.[136] The primary caretaker doctrine[137] is pertinent here because an infant needs a much greater degree of care by the parent for its development than an older child.[138] This means that intended parents would be best served by seeking out women who would have difficulty providing the care that an infant needs. If courts enforced intent in traditional surrogacy as they enforce it in gestational contracts, the incentive to exploit disadvantaged women would be largely reduced, if not altogether eliminated. Additionally, the surrogate is protected because she knows that the contract is enforceable against the intended parents.

C. Equal Enforcement of Surrogacy Contracts Promotes Judicial Efficiency

Equal enforcement of traditional surrogacy contracts will streamline the judicial process and provide better guidance to both intended parents and potential surrogates. Such streamlining is in the best interest of the children born of these agreements.[139] As litigation ensues, the child is bonding with

134. *See In re Moschetta*, 30 Cal. Rptr. 2d at 902–03 (remanding to trial court to determine the best interest of the child without considering the surrogacy contract).

135. *See, e.g.*, UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. LAW COMM'N 2017).

136. *See In re Moschetta*, 30 Cal. Rptr. 2d at 903; *In re* Baby, 447 S.W.3d 807, 828 (Tenn. 2014).

137. *See* Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 5 (1998) ("The primary caretaker standard focuses on and awards custody to the parent who provided the physical care and socialization for the child, provided he or she is a fit parent.").

138. *See id*. With a newborn, a surrogate who would require greater degrees of assistance with the daily needs of the child would be at a severe disadvantage in a custody battle with intended parents who are more able to care for the child's needs themselves.

139. Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993) (noting children born pursuant to any type of surrogacy contract are not served by potentially protracted litigation to determine parentage). One additional consideration: by signing the agreement, the surrogate has at least arguably conceded that granting custody to the intended parents is in the best interest of the child. *Id.*

someone.[140] That person is becoming the child's psychological parent in the midst of what may be a long litigation process.[141] If a court later determines that the child's best interest would be best served by a party other than the primary custodian who took care of the child during the dispute, it follows that at least some harm will come to the child due to being removed from that psychological parent.[142]

Equal enforcement benefits the parties to the contract as well. Forum shopping is an unfortunate side-effect of inconsistent surrogacy laws.[143] The inconsistencies that exist from one state to another are somewhat outside the scope of this note, other than to suggest that states can address a significant part of the forum-shopping problem by creating a policy that treats gestational and traditional surrogacy contracts equally.

VI. THE THREE POSSIBLE SOLUTIONS TO THE EQUAL ENFORCEMENT PROBLEM

Equal enforcement of traditional and gestational surrogacy contracts is appropriate because the contracts contain little factual difference in their terms and implicate the same policy considerations. Enforcing them differently creates additional problems the court must solve. Equal enforcement could take one of three possible models: (1) states could declare all surrogacy contracts unenforceable or illegal;[144] (2) states could enforce the parties' intent to its full extent;[145] or (3) states could substantially enforce the surrogacy agreements by enforcing the intent of the parties with respect to the custody and placement provisions but not terminate parental rights as an operation of law.[146]

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140. Mercer, *supra* note 137, at 6.

141. *Id*.

142. *Id*. at 7.

143. Brett Thomaston, Comment, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155, 1178 (2016).

144. *See* N.D. Cent. Code § 14-18-05 (Lexis Advance through all acts approved by the governor through the end of the 2019 Regular Legislative Session); *See* N.Y. DOM. REL. LAW § 122 (Consol. 2019). New York amended its surrogacy law to allow for only gestational surrogacy contracts beginning February 15, 2021. This invites the very confusion this note has pointed out exists in other states. It is at least arguable that this is not an improvement because of the issues discussed earlier in this note.

145. *See* Johnson v. Calvert, 851 P.2d 776, 777–78 (Cal. 1993) (upholding the trial court's termination of parental rights pursuant to the agreement).

146. *See* Rosecky v. Schissel, 833 N.W.2d 634, 653–54 (Wis. 2013).

A. Declaring Surrogacy Unenforceable or Illegal: The Least Beneficial Approach

Of the three options, not enforcing the contracts is the most problematic. States that merely declare the contracts unenforceable will still have to decide custody, placement, and parentage for surrogate-born children.[147] Determining the best interest of the child on a case-by-case basis, with no other guidance, may result in a child being removed from his or her psychological parent. A state using this approach must accept that it will harm some children by litigating this way.

It is within a state's right to criminalize entering into surrogacy contracts under its police power.[148] While that certainly is a deterrent, this approach does not account for the children of those that choose to enter into these agreements anyway, and it may arguably may do more harm by imposing criminal sanctions on the child's parents. Although likely the least beneficial option, criminal sanctions for entering surrogacy contracts do provide the kind of clear statement of policy that is so needed in this area of the law.[149]

B. Full Enforcement: Terminating Surrogates' Parental Rights as an Operation of Law

Any intended parent would prefer full enforcement of surrogacy agreements, including the parental rights termination clause. This approach has the advantage of ensuring the child is with the party who intended to raise it.[150] Additionally, it is the most judicially efficient in that intended parents should be able to obtain a pre-birth order so long as the procedures are followed.[151]

While this approach is the most advantageous for the intended parents, enforcing the contracts in this way does little to protect a surrogate's unique interests. While protections could be in place to limit the possibility of unin-

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147. NEB. REV. STAT. § 25-21,200 (2020); MICH. COMP. LAWS §722.861 (2019). The language of both statutes indicates the courts would engage in the typical custody dispute proceedings.

148. *See, e.g.*, MICH. COMP. LAWS § 722.859 (2019).

149. *See* Hofman, *supra* note 122, at 454.

150. *See Calvert*, 851 P.2d at 782 (quoting John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991)) ((noting that the "prime mover" is the intended parent in surrogacy). At the preconception stage, the surrogate has no intent to raise the child absent the possibility of deception that would amount to fraud.

151. *See* CAL. FAM. CODE § 7962(f)(2) (Deering 2020).

tended emotional attachments,[152] the process all surrogates go through, regardless of genetic connection to the child, has profound influence on both child and surrogate.[153] Enforcing the contracts equally in this way is a step in the right direction, but it may not present the proper balance of interests.

C. Substantial Performance: The Balanced Approach

What this note describes as substantial performance, if applied equally, presents the most desirable balance of considering the best interest of the children, the expectation interest of the intended parents, and the interests of the surrogates. Substantial performance in this context recognizes that the point of a surrogacy contract is to allow the intended parents the opportunity to raise a child. This goal can be accomplished without an automatic termination of the surrogate's parental rights so long as custody is placed with the intended parents from birth. By giving automatic effect to the custody and placement provisions of both types of contracts, the court preserves the intended parents' goal of raising a child.[154] Such a solution likewise respects the best interest of the children by placing them in the custody of the party who always wanted them.[155] The *Rosecky* case provides a template for how the approach should work.[156]

Moreover, the court's reluctance to automatically terminate the surrogate's parental rights will protect the surrogate's interest. This also goes toward the best interest of the child by giving the surrogate standing, not only in contract law but also in family law, to pursue increased visitation[157] or even gain an award of primary custody.[158] Giving the surrogate the ability to seek visitation or custody advances the best interest of the child in at least two ways. First, visitation exposes the child to another adult who will love and care for them. Second, it acknowledges the possibility of the occasional

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152. *See, e.g.*, New Jersey Gestational Carrier Agreement Act, 2018 N.J. Laws 18 (codified in part at N.J. STAT. ANN. §§ 9:17-60 to -68 (2020) and amending other scattered sections of N.J. STAT. ANN. Title 9 and N.J. STAT. ANN. § 26:8-28).

153. A.H.W. v G.H.B., 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000); s*ee generally* Oxman, *supra* note 88.

154. *See generally* Rosecky v. Schissel, 833 N.W.2d 634 (Wis. 2013). The point of a surrogacy contract is for a couple to have a child that they can raise as their own. At minimum, the expectation of the intended parents is to have physical and legal custody.

155. *Calvert*, 851 P.2d at 782.

156. *See generally Rosecky*, 833 N.W.2d 634.

157. *See* Troxel v. Granville, 530 U.S. 57, 67 (2000). If parental rights are terminated, whether voluntarily or by operation of law, the surrogate would occupy the position of a third party and thus lack standing to sue for visitation.

158. Such an award should only be available if the surrogate can make a showing of unfitness of the intended parents. By placing the burden on the surrogate to show not her fitness but the unfitness of the intended parents, there would be little reason to seek out a surrogate that might be judged unfit if a dispute arose.

intended parent turning out to be unfit. It gives the surrogate a chance to obtain custody instead of having the child either stay in the unfit home or end up in the foster system.

The substantial enforcement approach also has the advantage of being similar to an approach courts already accept.[159] Under this approach the surrogacy contract functions as an agreement akin to one agreed upon in a custody dispute. If two potentially fit parents can agree that it is best for the child if primary custody is vested in a particular person, it should not matter that such an agreement is reached prior to birth or even conception of that child.

VI. CONCLUSION

Parenthood is the single most life-changing event most people will experience. It is fundamentally unfair that some are incapable of experiencing the birth of their own child. Surrogacy provides a partial solution to the problem. By choosing a method of enforcement for surrogacy contracts and applying it equally, no matter the type, states go a long way toward assisting their citizens in preparing for and eventually having families. Recognizing that there is no perfect solution that will eliminate all problems associated with surrogacy contracts, states should take the balanced approach of substantial enforcement articulated in *Rosecky*. By utilizing the substantial enforcement method described in this note, courts can safeguard the interests of the child and protect the unique interests of the surrogate, while still giving effect to the intent of the parties and the expectation of the intended parents. However, states can only accomplish these goals if they enforce traditional and gestational contracts equally.

Equal enforcement of both traditional and gestational surrogacy contracts under the substantial enforcement model as applied by the *Rosecky* court safeguards the interest of the child by not terminating the surrogate's parental rights automatically, leaving a final determination for the court. A presumption in favor of the intended parents adds stability for the child in early life by shortening litigation and awarding custody to the intended parents who desired the child from the beginning. Finally, the surrogate will retain standing to challenge the intended parents if she believes they are unfit.

Equal enforcement protects the surrogate by increasing her choice in how invasive a procedure she desires and providing a greater knowledge of

159. Wesley Mack Bryant, *Solomon's New Sword: Tennessee's Parenting Plan, The Role of Attorneys, and the Care Perspective*, 70 TENN. L. REV. 221, 227 (2002) (noting that courts in Tennessee usually accept agreed parenting plans without much review because they assume an agreed plan is in the best interest of the child).

how courts will adjudicate a potential dispute. If both types of contracts are enforceable, then she may choose what she is willing to put her body through for the sake of the surrogacy agreement. Additionally, the intended parents no longer have an incentive to seek out overly disadvantaged women to serve as surrogates if the jurisdiction enforces both types of contracts equally. Under the substantial enforcement model, the surrogate in both types of contracts would not lose parental rights as an operation of law and could retain those rights if desired.

Finally, the equal enforcement helps intended parents by clearing up the tangled mess of rules across the various states, or even within their own state. Intended parents would no longer need to fear losing custody of the child merely because their DNA is different than the child's. Even substantial enforcement protects the primary expectation interest of the intended parents—the ability to take their child home to raise.

It is time for states to decide where they stand on surrogacy generally. Courts and legislatures must recognize genetics are not a significant enough factor to warrant treating the contracts differently. Substantial enforcement as articulated in this note provides a solution that addresses the problems associated with surrogacy. This approach would allow states to fashion a rule that enforces both kinds of contracts while balancing the interests of all parties involved.

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