CONTINUING TO RESOLVE SURROGACY UNCERTAINTIES IN A POST-*BABY M* MODERNITY

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PART 1 – INTRODUCTION

Currently in New Jersey, there is not equal protection for infertile women who use a surrogate to give birth to a child because, unlike infertile men, infertile women may not use genetic testing or intent-based testing to establish their maternal rights. One proposed solution is to enact legislation that would provide both genetic and intent-based testing when a parentage dispute arises subject to a surrogacy agreement. In a situation where the embryo implanted in the Gestational Carrier is fertilized by the Intended Mother's egg, the Intended Mother should be able to use genetic-testing to establish maternity if there is a dispute over parentage. If the embryo is formed through an Egg Donor, the Intended Mother should be able to use intent-based testing to prove her maternity.[1]

1. For the purpose of this article, the different people involved will be referred to as follows: Intended Parents: A pair or individual, married or unmarried, fertile or infertile, in a surrogacy arrangement who begin the process of surrogacy with the outcome that they be the parents. For the purposes of this Note, individuals will be referred to as Intended Mother or Intended Father. *About Surrogacy: The Surrogacy Definitions and Important Terms You Need to Know*, SURROGATE, https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/ (last visited Apr. 13, 2019). Gestational Carrier: In a surrogacy arrangement, if the carrier is not genetically related to the baby and through in vitro fertilization (IVF) the embryo—created using the sperm and egg from the Intended Parents or Sperm/Egg Donors—is implanted into the Gestational Carrier. *About Surrogacy: What is Gestational Surrogacy?*, SURROGATE, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-gestational-surrogacy/ (last visited Apr. 13, 2019). Traditional Carrier: In a surrogacy arrangement, if the carrier is genetically related to the baby, through artificial insemination, her egg is fertilized with either the Intended Father's sperm or the Sperm Donor. *About Surrogacy: What is Traditional Surrogacy?*, SURROGATE, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/ (last visited Apr. 13, 2019). Sperm Donor/Egg Donor: If in a surrogacy arrangement, the Intended Parents are unable to use their own sperm or egg and instead use donated genetic material. If that donated material is genetically unrelated to the Gestational Carrier, the law has historically found the donors, even if there is no surrogacy arrangement, do not retain potential parental rights because parental rights are terminated when the Sperm/Egg Donor makes the initial donation. N.J. STAT. ANN. § 9:17-44(b) (West 2013); *see supra About Surrogacy: The Surrogacy Definitions and Important Terms You Need to Know*. In artificial insemination, "the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child." N.J. STAT. ANN. § 9:17-44(b). Generally, the use of the term

This Note will focus on how the current New Jersey law to determine parentage violates Equal Protection.[2] Within the New Jersey Parentage Act ("the Act"),[3] men and women are treated differently through means that may no longer substantially relate to the legitimate State objectives New Jersey was trying to achieve.[4] In the past, the legitimate state objectives were to ensure that children receive adequate financial support from their natural father and thus protect women from having to support children on their own.[5] As reproductive medical technology has advanced, and methods of conception have changed for both men and women, the New Jersey courts have resisted making adjustments to account for such changes.

The Supreme Court of New Jersey decided its first surrogate dispute in 1988.[6] The case of *Baby M* attracted widespread media attention when the surrogate, Mrs. Mary Beth Whitehead (who was genetically related to Baby M), refused to relinquish her maternal rights to the couple, Mr. and Mrs. Stern, for whom she agreed to carry a child and then fled New Jersey with Baby M.[7] Eventually, the New Jersey Supreme Court declared the surrogacy contract between Mrs. Whitehead and Mr. Stern invalid.[8] In the end, Mr. Stern was granted full custody of Baby M after the court further determined that while there were not justifiable reasons to terminate Mrs. Whitehead's maternal rights, it was in Baby M's best interest to remain with the Sterns.[9] In the following decades, the New Jersey courts used that invalidation and three accompanying public policy rationales that anchored the seminal *Baby M* decision to

"surrogacy" will refer to any arrangement in which another woman carries and births a child where the pre-determined intention is for her to terminate her maternal rights and the Intended Parents raise the baby.

2. U.S. CONST. amend. XIV § 1. "No State shall . . . deny to any person within its jurisdiction equal protection of the laws."

3. N.J. STAT. ANN. § 9:17-38 (West 2019).

4. Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). *See also* Orr v. Orr, 440 U.S. 268, 279 (1979) (citations omitted); Califano v. Webster, 430 U.S. 313, 316–17 (1977) (citations omitted).

5. *See generally* Lynda Wray Black, *The Birth of a Parent: Defining Parentage for Lenders of Genetic Material*, 92 NEB. L. REV. 799, 802 (2014) ("Historically, questions surrounding the parentage of a child were limited in scope to the identity of the biological father for support or inheritance purposes.").

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

7. *Id.* at 1236–37.

8. *Id.* at 1234.

9. *Id.* at 1253, 1259.

influence and dictate two important surrogacy agreement cases: *A.H.W.*[10] and *T.J.S.*[11] In the meantime, other states have taken large, and arguably progressive, steps to address and accept the common practice of gestational carriers and surrogacy agreements;[12] whereas New Jersey has struggled to move forward ever since the disastrous case of *Baby M.*

The three fundamental steps that undergirded the argument used to invalidate surrogacy agreements or decide which woman has maternal rights are (1) biologically, men and women conceive children differently;[13] (2) the best interests of the child favor parentage to the mother that gave birth to the child;[14] and (3) surrogates are uninformed and taken advantage of throughout the agreement process.[15] These rationales were substantially related to New Jersey's objective at the time, given the state of reproductive technology, but now, such foundations may not support a substantial relationship.

One approach New Jersey may take is to enact legislation that will control surrogacy agreements and will protect all parties involved by outlining and deciding how to determine parentage at the outset of the agreement.[16] Such an approach will help courts avoid having to make case-by-case decisions by relying on the three previously identified public policy arguments and could diminish the presence of existing disadvantages. Specifically, in relation to Equal Protection, a comprehensive statute could provide more flexibility and eliminate the struggle Intended Mothers face in proving their maternal rights through genetic testing or intent-based testing. As it stands now, the decisions

10. A.H.W. v. G.H.B., 772 A.2d 948, 949–950, (N.J. Super. Ct. Ch. Div. 2000). In this case, a couple used their own sperm and egg to impregnate the wife's sister through in vitro fertilization. Immediately after the birth of the child, the couple sought to have their names recorded on the birth certificate, but could not until seventy-two hours had passed at which time the surrogate could relinquish her maternal rights. *Id.*

11. *See In re* T.J.S., 16 A.3d 386, 388–389 (N.J. Super. Ct. App. Div. 2011), *aff'd by an equally divided court*, 54 A.3d 263 (N.J. 2012). In this case, an infertile woman and her fertile husband used an anonymous egg donor and the husband's sperm to impregnate the gestational carrier through in vitro fertilization. The woman and husband sought a pre-birth order that would list their names on the child's birth certificate and become official after the seventy-two hour waiting period established in *A.H.W.* The State Registrar opposed the pre-birth order on the premise that the infertile woman did not have a valid maternal relationship with the child and that her remedy was to adopt. *Id.*

12. *See infra* Appendix C "Surrogacy Parentage and Enforceability in the United States, by State."

13. *See infra* Part 3(A), *Differences in Conception by Gender*.

14. *See infra* Part 3(B), *Best Interests of the Child*.

15. *See infra* Part 3(C), *View of Surrogates' Independence*.

16. At the time of this note, "The New Jersey Gestational Carrier Agreement Act" is moving through the state legislature. N.J. Assemb. Bill No. 1704 (Amended Official Draft Mar. 26, 2018).

reached in *Baby M, A.H.W.* and *T.J.S.*, and the language in the Act violate women's Equal Protection in determining parentage of a child born through surrogacy.

A. The New Jersey Parentage Act

The New Jersey Parentage Act ("the Act") begins:

> As used in this act, 'parent and child relationship' means the legal relationship existing between a child and the child's natural or adoptive parents . . . incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.[17]

The Equal Protection issue arises when the Act describes how a parent may prove his or her parent-child relationship. The mother only has one way to prove that she is the natural, and therefore legal, mother of the child, and it is by giving birth to the child.[18]

On the contrary, men are not required to be present at the actual birth of the child,[19] and an individual asserting to be the father may establish natural, rather than adoptive, paternity through a number of methods:

> b. The natural father, may be established by proof that his paternity has been adjudicated under prior law; under the laws governing probate; by giving full faith and credit to a determination of paternity made by any other state or jurisdiction, whether established through voluntary acknowledgement or through judicial or administrative processes; by a Certificate of Parentage . . . that is executed by the father . . . ; by a default judgment or order of the court; or by an order of the court based on *a blood test or genetic test* that

17. N.J. STAT. ANN. § 9:17-39 (West 2019).

18. N.J. STAT. ANN. § 9:17-41(a)(1) (West 2019).

19. *See In re* T.J.S., 16 A.3d 386, 394 (N.J. Super. Ct. App. Div. 2011) ("Extending the presumption to women would not further this important objective because, where a woman does not give birth to a child, there is not a strong likelihood that she is biologically related to the child."); *see* Black, *supra* note 5, at 826 ("This presumption . . . arose at a time when there were no scientific capabilities available to affirm or disavow parentage. Thus, courts' interpretations of parentage reflected the traditional family structure, including the presumption that a gestational mother will bear her own biological child.").

> meets or exceeds the specific threshold probability . . . creating a reasonable presumption of paternity.[20]

Ultimately, the Act fails to provide equal protection because it treats women and men differently in how they may determine natural legal parentage based solely on their gender. As will be discussed further, this is no longer an accurate foundation because through surrogacy, both the mother and father need not be present at the birth of the child.[21]

B. Prevalence of Surrogacy in the United States

According to data from the Centers for Disease Control and Prevention ("CDC") last updated in 2016, "About 6% of married women aged 15 to 44 years in the United States" suffer from (infertility).[22] And "about 12% of women aged 15 to 44 years in the United States" suffer from impaired fecundity (difficulty in conception and carrying to term).[23] For infertile couples that turn to assisted reproductive technology ("ART")[24], the option to use a gestational carrier has increased over time: of the 30,927 ART cycles between 1999 and 2013, the use of gestational carriers increased from 727 instances in 1999 to 3,432 in 2013.[25] "Between 1999 and 2013, gestational carrier cycles resulted in 13,380 deliveries and the birth of 18,400 infants."[26] "In 2015, 2,807 babies were born through surrogacy in the U.S."[27]

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20. N.J. STAT. ANN. § 9:17-41(b) (West 2019) (emphasis added); *see also infra* Appendix A for the presumptions of paternity.

21. *See* Black, *supra* note 5, at 810 ("The adequacy of these [paternity, adoption, and surrogacy] laws began to crumble, however, as the ever-evolving capabilities of [assisted reproductive technology] enabled nontraditional couples to conceive and give birth to children.").

22. *Infertility FAQs*, CDC, https://www.cdc.gov/reproductivehealth/Infertility/index.htm (last visited Apr. 13, 2019).

23. *Id.*

24. *What is Assisted Reproductive Technology?*, CDC, https://www.cdc.gov/art/whatis.html (last visited Apr. 13, 2019) ("ART includes all fertility treatments in which both eggs and embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman.").

25. *ART and Gestational Carriers*, CDC, https://www.cdc.gov/art/key-findings/gestational-carriers.html (last visited Apr. 13, 2019).

26. *Id*. The difference between births and number of infants born is due to the increased percent (53.4%) of "twins, triplets, or higher order multiples." *Id.*

27. Rebecca Beitsch, *As Surrogacy Surges, New Parents Seek Legal Protections*, STATELINE (June 29, 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/06/29/as-surrogacy-surges-new-parents-seek-legal-protections (citing the American Society for Reproductive Medicine).

It is difficult to calculate the exact cost of a surrogacy arrangement because some couples undergo multiple attempts for implantation if the first attempt does not result in conception. Alsom experienced surrogates may charge higher rates, but the average cost, at least in one popular state jurisdiction, "can range from $90,000 to $130,000 depending on the individual arrangements."[28] The individual costs in the arrangement consist of "agency fees, surrogate compensation and expenses, fertility clinic fees and legal fees."[29]

Comparatively, the CDC reported that between 2011–2015, 0.7% of women (about 400,000) aged between 18-44 and 1.3% of men (about 700,000) aged between 15-44 adopted children.[30] Adoption costs are significantly lower than surrogacy costs, and range from $20,000 to $45,000, consisting of "the home study, court and legal fees, preadoption and postadoption counseling for birth parents . . . ."[31]

There is an abundance of cautionary tales for surrogacy agreements gone awry from all across the country. In one instance, a same-sex couple in Minnesota used a surrogate they found online and the surrogate changed her mind one month after giving birth.[32] The detrimental mistake the couple made was using a traditional surrogate who was undeniably related by genetics and gestation.[33] Another dispute is currently pending in the Iowa Supreme Court between Intended Parents and the gestational carrier who made allegations of racism against them and cut off all communications.[34] Their gestational agreement was

28. WEST COAST SURROGACY, *West Coast Surrogacy Costs & Fees*, https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost (last visited Apr. 13, 2019). In California, surrogacy is freely practiced and contracts are enforceable so data can be more reliably collected from assisted reproductive and surrogacy agencies. *See* CAL. FAM. CODE §§ 7960–62 (2019).

29. *Id*.

30. *National Survey of Family Growth*, CDC (June 6, 2017), https://www.cdc.gov/nchs/nsfg/key_statistics/a.htm.

31. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Planning for Adoption: Knowing the Costs and Resources* 3 (2016), https://www.childwelfare.gov/pubpdfs/s_costs.pdf ("[B]irth parent medical and legal expenses, adoptive parent preparation and training, social work services needed to match a child with a prospective family, interim care for a child, and postplacement supervision until the adoption is finalized.").

32. Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

33. *Id.* A Minneapolis trial court awarded legal and physical custody to both intended fathers, but an appellate court reversed and affirmed only the legal and physical custody for the Intended Father whose sperm was used in conception, and therefore biologically related to the child. *Id.*

34. Ellen Trachman, *Extreme Surrogacy Nightmare Heads to Iowa Supreme Court*, ABOVE THE L. (June 28, 2017, 4:42 PM), https://abovethelaw.com/2017/06/extreme-

formed via Craigslist and the Gestational Carrier attempted to increase her compensation from $13,000 to $30,000 upon learning she was carrying twins.[35]

These examples serve to demonstrate that while a bright-line rule outlawing surrogacy for compensation may seem like a solution to avoid messy litigation, the ART industry is a $3-4 billion industry that will likely continue to grow.[36] Currently, New Jersey is not well equipped to handle this continued growth because the existing legislation has not changed the evolution of reproductive technology and court precedents were founded on the three public policy arguments that may no longer be applicable to modern society.

PART 2 – HISTORY OF SURROGACY IN NEW JERSEY

New Jersey was one of the first states to address the issue of enforceability of surrogacy contracts.[37] Since that decision, very few surrogacy cases have been tried in New Jersey because of the strong language the court used in *Baby M* that, although it acknowledged and left the future of surrogacy contracts up to the Legislature,[38] it ultimately held that under the law in 1988, the surrogacy contract was "illegal and invalid."[39]

To better understand the present issues of surrogacy in New Jersey and why the state remains adamantly opposed and slow to reconsider, it will be beneficial to look back at the three pinnacle New Jersey cases—

surrogacy-nightmare-heads-to-iowa-supreme-court/. She then failed to inform the Intended Parents when she went into labor. *Id.*

35. *Id.* Tragically, only one of the twins survived and it is Baby H's custody that is in dispute. The Iowa trial court awarded the Intended Parents custody. *Id.*

36. Amelia Josephson, *The Economics of Fertility*, SMARTASSET (Feb. 2, 2017), https://smartasset.com/personal-finance/the-economics-of-fertility (predicting 4% growth due to "rising obesity rates; cultural and economic factors leading women to delay childbirth; foreigners coming to the U.S. for fertility treatment; and changing norms around same-sex marriage and parenting . . . .").

37. *In re* Baby M, 537 A.2d 1227 (N.J. 1988). The first formal surrogacy contract was negotiated and drafted by Mr. Noel Keane, in 1976. Lawrence Van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, Is Dead*, N.Y. TIMES (Jan. 28, 1997), http://www.nytimes.com/1997/01/28/nyregion/noel-keane-58-lawyer-in-surrogate-mother-cases-is-dead.html. Mr. Keane would go on to be the lawyer for the Sterns in the *Baby M* case. *Id.*

38. *Baby M*, 537 A.2d at 1235 ("[O]ur holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts.").

39. *Id.*

Baby M, *A.H.W.* and *T.J.S.*[40] The next sections will focus on the different factual scenarios in each case. The analyses of each court will be discussed in more detail later in this Note.

A. Baby M – *Gestational Carrier Is Genetically Related*

In *Baby M*, William Stern and Elizabeth Stern were the Intended Fertile Father and the Intended "Infertile" Mother.[41] Mary Beth Whitehead was the Traditional Carrier pursuant to a contract between herself, her husband, and Mr. Stern.[42] Mrs. Whitehead's egg was to be fertilized by Mr. Stern's sperm via artificial insemination,[43] in exchange for $10,000.[44] After giving birth to Baby M, Mrs. Whitehead successfully returned the baby to the Sterns.[45] However, that same night, Mrs. Whitehead became distraught due to the separation from her child and out of fear of imminent harm to herself, the Sterns allowed Mrs. Whitehead to take Baby M back for a short period of time to calm down.[46]

The facts of this case became national news when Mrs. Whitehead and her husband took Baby M and fled to Florida, where they remained in Mrs. Whitehead's parents' house for three months until Baby M was forcibly removed from the house and taken back to the Sterns.[47]

Ultimately, the New Jersey Supreme Court held that the agreement between Mr. Stern and the Whiteheads was invalid and chastised the idea a woman could carry a child for money.[48] The Court awarded custody

40. *Id.*; *In re* T.J.S., 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011); A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

41. 'Infertile' is in quotes in this instance because there was uncertainty surrounding Elizabeth Stern's actual capacity to carry a child. "Mrs. Stern learned that she might have multiple sclerosis and that . . . renders pregnancy a serious health risk. Her anxiety . . . exceeded the actual risk . . . ." *Baby M*, 537 A.2d at 1235.

42. *Id.*

43. The impregnation of a female with semen from a male without sexual intercourse. *Artificial Insemination*, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1983).

44. *Baby M*, 537 A.2d at 1235.

45. *Id.* at 1236.

46. *Id.* at 1236–37.

47. *Id.* at 1237. Mrs. Whitehead and Baby M were on the run and "lived at roughly twenty differed hotels, motels, and homes in order to avoid apprehension." *Id.* At one point, Mrs. Whitehead distracted the cops and was able to hand Baby M through a window to her husband while he escaped. *Id.* Mrs. Whitehead would also call Mr. Stern and their recorded conversations demonstrated her mental and emotional deterioration. *Id.* The story of the Whiteheads and Baby M has become a miniseries, multiple books were published, and Mary Beth Whitehead was featured on Dr. Phil. *See How Are They Now?: "*Baby M,*"* DR. PHIL, https://www.drphil.com/slideshows/how-are-they-now-baby-m/ (last visited Apr. 13, 2019).

48. *Baby M,* 537 A.2d at 1240 ("[The surrogacy agreement's] use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—

to Mr. Stern only, leaving Mrs. Stern the option to adopt and act as step-mother; Mrs. Whitehead could have visitation later in the Baby M's life.[49] Unfortunately, this unsuccessful arrangement set the public tone for the next decade. Surrogacy was viewed as a cruel mechanism to rip children out of the arms of their rightful mother.[50]

The three factual assumptions that served as the basis for the New Jersey Supreme Court's decision to invalidate the surrogacy contract were as follows: First, that biologically, men and women conceive children differently and that because a man does not unavoidably have to be present for the birth of his child, the State should protect mothers from neglectful fathers by creating statutory presumptions that award parentage to a particular man, thus making him responsible for the child.[51] Second, where there are two women asserting maternal rights over one child, it is in the best interests of the child to be placed with his or her birth mother.[52] Third, surrogates should receive maternal rights because they are uninformed and taken advantage of throughout the agreement.[53] Part 2(C)(2) will reevaluate whether restricting surrogacy arrangements, rationalized through these public policies, is substantially related to achieving New Jersey's objective of ensuring adequate financial support to new mothers.

is illegal and perhaps criminal. In addition to the inducement of money, there is the coercion of contract; the natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple.").

49. *Id.* at 1259, 1263. Crucial to this determination is the court's decision to view the parentage dispute as a custody battle between Mr. Stern and Mrs. Whitehead, as if Baby M was born of an extramarital encounter. *See* Mark Strasser, *The Updating of* Baby M*: A Confusing Jurisprudence Becomes More Confusing*, 78 U. PITT. L. REV. 181, 186–87 (2016).

50. *See* Andrea B. Carroll, *Family Law and Female Empowerment*, 24 UCLA WOMEN'S L.J. 1, 7 (2017) ("Women are too hormonal, [states] say, to be held to the contracts they have formed. Women don't know their own minds, and simply cannot anticipate the trauma that will result from relinquishing a child for whom they have acted as a gestational carrier.").

51. *Baby M*, 537 A.2d at 1246–47 ("The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents."). Such a reading of the situation assumes that the surrogate will *always* be related to the child she carries.

52. *Id.* at 1248 ("Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents . . . their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.").

53. *Id.* ("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 pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary.").

B. A.H.W. – *Intended Mother Is Genetically Related*

In 2002, the Superior Court of New Jersey was faced with another surrogacy case, but with a significantly different set of facts than *Baby M*. In *A.H.W.*, the Intended Parents combined the Intended Mother's egg and the Intended Father's sperm and used ovum implantation to implant the embryo into their Gestational Carrier (the Intended Mother's sister).[54] This case already distinguishes itself from *Baby M* because the Gestational Carrier is not genetically related to the child she bore (absent the aunt-niece/nephew relationship), nor was the Gestational Carrier compensated.[55]

The Intended Parents sought a "pre-birth order" listing their names on the child's birth certificate and not the Gestational Carrier's.[56] The Intended Parents and the Gestational Carrier all supported this action, but it was the Attorney General's Office that opposed their request on the grounds that it was "contrary to the law prohibiting surrender of a birth mother's rights until seventy-two hours after birth."[57] The court denied the pre-birth order and detailed the time line from the moment the Gestational Carrier gives birth, she has seventy-two (72) hours to decide whether to terminate her parental rights and the birth certificate must be prepared within five (5) days.[58] Therefore, there is a two-day window during which the Intended Parents can file the birth certificate with only their names.[59] The court reached this compromise to appease the Intended Parents and protect the rights of the Gestational Carrier by allowing her time to think over whether she still wants to terminate her maternal rights and assuming she does, allowing the Intended Parents to be the only parents ever listed on a birth certificate without the Intended Mother having to adopt a child she was genetically related to.[60]

Based on the facts, this case differed from *Baby M* because the surrogate here was a Gestational Carrier without a genetic relation

54. A.H.W. v. G.H.B., 772 A.2d 948, 949–50 (N.J. Super. Ct. Ch. Div. 2000).

55. *Id. See also* Pasquale Guglietta, Baby M*: An Unrequited Invitation*, 8 RUTGERS J. L. & PUB. POL'Y 876, 886 (2011) ("In the wake of *A.H.W.*, many trial courts have entirely ignored the well-reasoned opinion authored by Judge Koblitz, which sought to remedy the problem highlighted in *Baby M*. These courts have instead wrongfully relied upon other, irrelevant portions of *Baby M*, despite the fact that these cases often do not involve traditional surrogacy.").

56. *A.H.W.*, 772 A.2d at 949. A pre-birth order "direct[s] a delivering physician to list the man and woman who provided the embryo carried by a third party as legal parents on a child's birth certificate." *Id.*

57. *Id.*; *see also* N.J. STAT. ANN. § 9:3-41(e) (West 1994).

58. *A.H.W.*, 772 A.2d at 949. *See also* N.J. STAT. ANN. § 26:8-28(a) (West 2019).

59. *A.H.W.*, 772 A.2d at 954.

60. *Id.*

instead of a Traditional Carrier like Mrs. Whitehead.[61] However, the court did not concede this point and rejected the argument that its view would "liken the gestational carrier's role to that of an incubator,"[62] thus reaffirming the third public policy rationale that surrogates are taken advantage. The court did not want to recognize that a woman could choose to have a child that she would not ultimately raise.[63] *A.H.W.* sidestepped this discussion because the Gestational Carrier was an uncompensated family member so the court viewed her as less likely being taken advantage of or coerced by money.[64] This case also avoided the opportunity for the court to engage in an Equal Protection analysis because there was not a dispute amongst the parties to the surrogacy agreement over maternity;[65] rather it was the Attorney General's office that intervened on public policy grounds and brought the legal action to stop the pre-birth order.[66] In fact, the court mused about a situation where the Gestational Carrier breaks the contract and asserts her maternal rights, but did not address it.[67]

The temporal three-day and five-day compromise solves the problem of reconciling the State interest to give the Gestational Carrier enough time to consider her maternal rights, but operates under the assumption

61. Guglietta, *supra* note 55, at 889 ("Baby M, by contrast, involved a wholly different focus, since the surrogate's status as mother was undeniable, given the fact that she was giving birth to a genetically related child.").

62. *A.H.W.*, 772 A.2d at 953.

63. Carroll, *supra* note 50, at 6 ("Even in the modern day and age, most states cannot seem to move past objections to women being paid for playing a role in the reproductive process . . . 'Women are too delicate, too pure, to be tainted by filthy lucre.'") (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, WIS. L. REV. 297, 380 (1990)); *cf. In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988) (finding that the problem with surrogacy is that it is "the purchase of a woman's procreative capacity, at the risk of her life" and "is caused by and originates with the offer of money.").

64. *A.H.W.*, 772 A.2d at 954 ("Further [the Gestational Carrier], as [the Intended Mother's] sister and [the Intended Father's] sister-in-law knows the biological parents intimately and is in an excellent position to know the type of home they will provide for the child. Thus almost certainly [the Gestational Carrier] will honor the contract and surrender her rights.").

65. *Id.* ("Here, [the Intended Parents and the Gestational Carrier] are closely related. The parties' detailed fifteen page agreement clearly reflects their shared intent and desired outcome for this case.").

66. *Id.* at 949, 954 (repeatedly referring to the "public policy" concerns in *Baby M*).

67. *Id.* at 954 ("It is not necessary now to determine what parental rights, if any, the gestational mother may have vis-à-vis the newborn infant. That decision will have to be made if and when a gestational mother attempts to keep the infant after birth in violation of the prior agreement.").

that the Gestational Carrier will relinquish her rights.[68] Thus there was no motivation for the court to address that the Intended Mother still would not have a remedy if the Gestational Carrier chooses *not* to relinquish or if the State refused to recognize the Intended Mother on a birth certificate.[69] Such a compromise perhaps hinders the legitimate State interest of assuring flow of financial support because a Gestational Carrier could theoretically be in the lesser economic situation to support a child.[70]

C. T.J.S. – *Intended Mother Is Not Genetically Related*

Ten years later, the Superior Court of New Jersey faced another new set of surrogacy facts that demonstrate that over time there are improvements in medical technology that result in different and new legal conflicts. In *T.J.S.*, there was an Intended Infertile Mother, an Intended Fertile Father, a Gestational Carrier, and an Egg Donor.[71] The Gestational Carrier underwent in vitro fertilization[72] and had no genetic relation to the baby.[73]

The court dealt with the issue whether the Act "recognize[d] an infertile wife as the legal mother of her husband's biological child, born to a gestational carrier," and after concluding it didn't,[74] whether that

68. *Id.* ("This solution represents a modification of the agreement between the parties to the least extent necessary to comply with current New Jersey statutes and the public policy concerns expressed by the Supreme Court in *Baby M*.").

69. Granted, the image in the media after a surrogacy agreement deteriorates fuels "[t]he popular narrative of the surrogate who regrets her decision and tries to reclaim the child" whereas in reality, the vast majority of surrogacy arrangements end with a willing relinquishment. Elly Teman, *The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychological Scholarship on Surrogate Motherhood*, 67 SOC. SCI. & MED. 1104, 1104 (2008).

70. *See* Strasser, *supra* note 49, at 195 (discussing the appellate court's holding that the Intended Mother in *T.J.S.* would have to adopt and act as step-mother. "This decision meant that the gestational surrogate was the child's legal mother, despite having no desire for the rights and responsibilities of parentage.").

71. *In re* T.J.S., 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011), *aff'd by an equally divided court*, 54 A.3d 263 (N.J. 2012).

72. "Fertilization of an egg in a laboratory dish or test tube; fertilization by mixing sperm with eggs surgically removed from an ovary followed by uterine implantation of one or more of the resulting fertilized eggs. *In vitro fertilization*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/in%20vitro%20fertilization (last visited Apr. 13, 2019).

73. In re *T.J.S.*, 16 A.3d at 388–89.

74. *Id.* at 388–89, 393 ("the child is biologically related to [Intended Father] and the anonymous ovum donor. Therefore, the presumption of maternity based on the strong likelihood of a biological relationship cannot be extended to [Intended Mother]."); *see also* N.J. STAT. ANN. § 9:17-41(a) (West 2019) ("The natural mother, may be established by . . . proof of her having given birth to the child."). It is important to note at the outset that a

"violate[d] equal protection by treating women differently than similarly-situated infertile men, whose paternity is presumed when their wives give birth during the marriage."[75] This case differs from *A.H.W.* because the donor egg made neither the Intended Mother nor the Gestational Carrier genetically related.

The first public policy foundation, that men and women conceive children differently, is present here because now neither the Intended Fertile Father nor the Intended Infertile Mother needs to be present for their child's birth. Once the Gestational Carrier says the child is not hers, the question is: who are the child's parents? Normally, men who conceive children with their wives through the use of sperm donors have a presumption of paternity, but women using a donor egg in a surrogate do not.[76] In New Jersey, the Intended Fertile Father may prove his paternity genetically, but his wife will not be afforded the same presumption that she is mother of any child born during their marriage.[77]

The second public policy foundation regarding the child's best interest is also implicated here, because as discussed above in *A.H.W.*, the court could potentially award maternal rights to a Gestational Carrier who is not financially equipped to care for a child; or worse, the Gestational Carrier terminates her rights and the child does not have a legal mother until a lengthy and expensive adoption process takes place.[78]

Returning to the facts of *T.J.S.*, the Intended Parents filed for a pre-birth order and, per the holding in *A.H.W.*, waited seventy-two hours for the Gestational Carrier to terminate her parental rights.[79] The State Registrar "learned of the pre-birth order and promptly moved to vacate" the Intended Infertile Mother being listed on the birth certificate on the grounds that she did not have a "legally cognizable parent-child

mother is *only* the woman who gave birth and this statute does not provide the option for a woman to prove her maternity by genetic testing. *Id.*

75. *T.J.S.*, 16 A.3d at 388.

76. N.J. STAT. ANN. § 9:17-44(a) (West 2019). Where a woman becomes pregnant through artificial insemination with semen from a man not her husband, "the husband is treated in law as if he were the natural father of a child thereby conceived." *Id.* Furthermore, donors of semen "have no rights or duties stemming from the conception of a child." *Id.* at (b). *See also* STAT. § 9:17-41(a).

77. STAT. § 9:17-41.

78. *See In re* T.J.S., 54 A.3d 263, 276–77 (N.J. 2012) ("The adoption process will take two to three months. During that period, the legally motherless child has none of the benefits or protections available to the non-genetic child of the infertile husband . . . .").

79. *Id.* at 388–89.

relationship" under the Parentage Act.[80] The Infertile Intended Mother was left with the option to adopt.[81]

The court determined there was not an Equal Protection violation in granting men with intent or marital status presumptions of fatherhood and not women because men face scenarios where there is a high likelihood (despite no genetic evidence) that they are the father, and because only one woman can give birth to a child, the likelihood that any woman other than the one giving birth is the mother is low.[82]

1. Equal Protection Issue Addressed in *T.J.S.*

The court in *T.J.S.* directly addressed whether the Act violated Equal Protection and held that it did not because the differences in establishing parentage by gender were not based on "archaic, invidious stereotypes about men and women," but "gender distinctions that are based on real physiological differences."[83] In conducting an Equal Protection analysis for a statute drawing distinctions based on gender, the court must use intermediate scrutiny where "the classification must be substantially related to the achievement of an important governmental objective."[84] The governmental objective for the Act is "to ensure that children receive the financial support from their parents to which they are entitled. Indeed, the Parentage Act provides the means by which to identify a

80. *Id.* at 389–90. A legally cognizable relationship as defined by statute arises if there is "(1) genetic contribution; (2) gestational primacy, i.e., giving birth; or (3) adoption." *Id.* at 390 (citations omitted).

81. *Id.* at 391 ("No alternative construction is plausible and nowhere in the statutory scheme may it be implied that maternity is established simply by the contractual or shared intent of the parties."). *But see* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that, when the gestational carrier gives birth using the zygote of the consanguineous mother and both individuals claim parentage, the mother is "she who intended to procreate the child . . .").

82. *T.J.S.*, 16 A.3d at 394 ("Extending the presumption to women would not further this important objective because, where a woman does not give birth to a child, there is not a strong likelihood that she is biologically related to the child.").

83. *Id.* at 393 (quoting State v. Chun, 943 A.2d 114, 143 (N.J. 2008)).

84. *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* United States v. Virginia, 518 U.S. 515, 565-66 (1996) (holding that the Virginia Military Institute violated the Constitutional right to Equal Protection by refusing to admit female students to the military academy on the grounds that a single-sex environment furthered the educational experience); Clark v. Jeter, 486 U.S. 456, 461 (1988) (internal citations omitted) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications . . . . Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."); Orr v. Orr, 440 U.S. 268, 279–80 (1979) (holding that an Alabama statute requiring men, but not women, to pay alimony to their former spouse violated Equal Protection).

child's parent – particularly a father – so that he fulfills his child-support duty."[85]

First, "The purpose of this provision is to address scenarios where a man is highly likely to be the *biological* father of a child,"[86] because "the presumptions are intended to facilitate the flow of benefits from the father to the child."[87] This "flow of benefits" is the state interest that the Act attempts to further. Ultimately, the Act passed Equal Protection because the end—protection of the financial well-being for the child and protection against a woman having no other option than to support her children on her own—was fulfilled by the means of statutory presumptions for paternity when men need not be present at the child's birth.

Those presumptions were substantially related to the flow of benefits in instances where the child was conceived through donated genetic material because "paternity attaches to the infertile husband because of the sperm donor's lack of temporal, physical and emotional investment in the child's creation."[88] However, the court still concluded that a child was genetically related to the anonymous ovum donor while inside the Gestational Carrier despite similar lacking from the Egg Donor and therefore the Intended Infertile Mother would need to adopt.[89] Finally, the husband is the presumed father when his wife is impregnated via artificial insemination because he consented to her pregnancy.[90]

In sum, a man can prove his paternity to a child either through his relationship to the woman giving birth, through genetic testing, or through intent-based testing. The court concludes this broader ability for men to establish paternity carries out the government objective to ensure

85. D.W. v. R.W., 52 A.3d 1043, 1051, 1059 (N.J. 2012) (The New Jersey Supreme Court reversed denial of genetic testing where plaintiff sought reimbursement for the twenty years spent raising a child that was not his biological son.).

86. *T.J.S.*, 16 A.3d at 393.

87. *Id.* (quoting ASSEMB. JUDICIARY, LAW, PUB. SAFETY & DEF. COMM. STATEMENT TO S. NO. 888 WITH ASSEMB. COMM. AMENDMENTS, S. 132-888, 1st Sess. at 2 (N.J. 1982)).

88. *Id.* at 396.

89. *Id.* at 393. While affirming the appellate division, the New Jersey Supreme Court reiterates the assertion that the child was biologically related to the egg donor and gestationally related to the gestational carrier. *In re* T.J.S., 54 A.3d 263, 264 (N.J. 2012) (Hoens, J., concurring). The court then asserts that, pursuant to N.J.S.A. § 9:17-41(a), "maternity is grounded on either a biological or genetic connection with the child." *Id.* The court seems to suggest that, had the Intended Mother in the *T.J.S.* case been related to the child, the court would have allowed the use of genetic testing to establish maternity. Yet, that was the exact factual arrangement in *A.H.W.* and the court in *A.H.W.* still required the Gestational Carrier to terminate her rights, effectively demonstrating that the gestational relationship outranks the genetic relationship. *See* A.H.W. v. G.H.B., 772 A.2d 948, 854 (N.J. Super. Ct. Ch. Div. 2000).

90. *T.J.S.*, 16 A.3d at 390–91.

children are well supported, and because men are not required to be present at the birth of the child, the State may treat men and women differently.[91]

2. Equal Protection Analysis Revisited

The three public policy foundations were originally used to substantially relate the means of surrogacy agreement prohibition to the legitimate State interest in facilitating the flow of financial support from the father to the child.[92] However, as reproductive medical technology changed, those three foundations became flaws in the logic.

The Act violates the Equal Protection Clause of the Constitution because parentage is determined differently by gender for mothers and fathers despite being similarly situated.[93] The natural mother is *only* the woman who gave birth to the child.[94] The legal father on the other hand is determined in a myriad of ways found under N.J.S.A § 9:17-43 "Presumptions."[95] If there is a question of paternity, both the father trying to establish and the man trying to disprove paternity may use genetic testing in their favor.[96] The Act does not provide any means for a woman to prove her maternity when she is not the carrier or disprove her maternity when she is the carrier for someone else. A woman can terminate her maternal rights after giving birth, but until then, maternity was automatically and irrefutably attached.

While the Act may not have violated Equal Protection prior to advancements in assisted reproductive technology, it does now. Because this law is based on differences in gender, in evaluating the constitutionality of it, the court shall apply intermediate scrutiny in

91. *See also* T.J.S., 54 A.3d at 265–66 (Hoens, J., concurring) (discussing gender-based differences and the constitutionality of statutes premised on physiological differences).

92. Black, *supra* note 5, at 802–03 ("Historically, questions surrounding the parentage of a child were limited in scope to the identity of the biological father for support or inheritance . . . . If there were a question regarding the identity of a child's father, states provided several alternative means by which a man could establish parental rights in a child.").

93. *T.J.S.*, 54 A.3d at 269 (Albin, J., dissenting). "Denying the infertile wife and her intended child, as here, the same benefits and privileges given to her male counterpart and his intended child bears no substantial relationship to a legitimate government purpose and abridges her right to the equal protection of the laws." *Id.*

94. N.J. STAT. ANN. § 9:17-41(a) (West 2019).

95. *See id.* § 9:17-43(a)(1), (a)(2)(a)–(b), (a)(3)(a)–(d), (a)(4), (a)(5), (a)(6); *see also infra* Appendix A for the full text of the statute.

96. *See* N.J. STAT. ANN. § 9:17-41(g) (West 2019).

which an important government objective is achieved through means that are substantially related to achieve that end.[97]

At the time of enactment, the legitimate government objective was to ensure that a child received financial support from the man that was the child's father.[98] Because it was not always obvious who the father was, the government built presumptions into the Act that identified the man that was most likely to be the father based on the man's marital relationship with the woman giving birth, or based on how the man treated the child, *i.e.*, if he held the child out to be his own or if he signed a document asserting his paternity over the child.[99] As the Act only recognizes one method of maternity, giving birth, women do not have presumptions or methods of proving maternity when they are the non-gestational mothers, and the ability to do so is a substantial right.[100]

Infertile men can still establish paternity when they are the non-genetic fathers despite being similarly situated to infertile women because of the presumptions and methods of asserting paternity provided to them by the Act.[101] However, through the use of Gestational Carriers, infertile men and women are similarly situated where they use a third party (donors and surrogates) to remedy their own infertility.[102]

In a situation where the embryo implanted in the Gestational Carrier is fertilized by the Intended Mother's egg, the Intended Mother should be able to overcome the gestational presumption and use genetic-testing to establish maternity if there is a dispute over parentage. If the embryo is formed through an Egg Donor, the Intended Mother should be able to use intent based-tested to prove her maternity. This proposed solution would satisfy Equal Protection because the means of granting infertile or non-gestational women genetic and intent-based testing would facilitate the flow of benefits from the Intended Mother to the child in a situation

97. Orr v. Orr, 440 U.S. 268, 279 (1979). It is worth pointing out that there is further evidence of gender bias in the way the surrender of parental rights may take place because a woman may not terminate her rights until seventy-two hours after the birth of the child and any attempt to surrender before seventy-two hours will be invalid, whereas a man may surrender the child *prior* to the birth by denying paternity. N.J. STAT. ANN. § 9:3-41(e).

98. *See* Black, *supra* note 5, at 802; *see also In re* T.J.S., 54 A.3d at 274 (Albin, J., dissenting) ("Clearly, the statute promotes important societal interests, permitting the child to enjoy the immediate benefits of having two parents legally responsible for his or her support.").

99. *See infra* Appendix A.

100. *See T.J.S.*, 54 A.3d at 276 (Albin, J., dissenting) ("The nature of the right—the right of an infertile wife to be considered a natural parent no different than an infertile husband—is substantial.").

101. *See supra* note 20 and accompanying text.

102. *See id.*

where the Intended Mother is not present and thus achieve the State's interest and protect against parental abandonment.

Critical to the flaw in the court's Equal Protection analysis is its desire to gloss over what will inevitably be a tricky dispute of parentage. The courts, since *Baby M* and up through *T.J.S.*, have declined to consider an instance where there are Infertile Intended Parents and a Gestational Carrier who does not relinquish maternal rights in the three-day window.[103] In such an instance, the Intended Father might be able to use some of the presumptions the Act affords him, but it would be difficult.[104] In *A.H.W.*, the court found a solution by pairing two New Jersey statutes where the Gestational Carrier has three days to decide whether to terminate her rights and at the end of that *assuming she does*, the Intended Parents have two days to acquire the birth certificates with only their names.[105] The court in *A.H.W.* willingly admitted that there would be a problem when the Gestational Carrier does not terminate her rights, but left that issue untouched.[106] Similarly, the appellate court in *T.J.S.*, while denying maternity to the Intended Mother who was not genetically related, reassured that in a case where the Intended Mother *was* genetically related, the outcome would follow the same timeline the *A.H.W.* court laid out.[107] The *T.J.S.* court declined to address whether there is an Equal Protection violation for refusing genetic-testing to Intended Mothers simply on the premise the Intended Mother in *T.J.S.* was not genetically related.[108] That is the exact type of avoidance that

103. *T.J.S.*, 16 A.3d at 394 n.9 ("Because [the Intended Mother] in this case has no biological connection to the child, we need not address the question of whether the constitutional guarantee of equal protection is violated by a State policy that allows the genetic father, but not the genetic mother, to be listed on the birth certificate of a child born to a gestational carrier.").

104. For example, N.J. STAT. ANN. § 9:17-43(a)(4)–(5) allows a father to "openly hold[] out the child as his natural child" while taking the child into his home or providing support for the child.

105. A.H.W. v. G.H.B., 772 A.2d 948, 953–54 (N.J. Super. Ct. Ch. Div. 2000). The court assumes that because the Gestational Carrier is the Intended Mother's sister, she will "almost certainly . . . honor the contract and surrender her rights." *Id.* at 954.

106. *Id.* at 954. "That decision will have to be made if and when a gestational mother attempts to keep the infant after birth in violation of the prior agreement." *Id.* Note here that the court fully expects to face this issue in the future.

107. *T.J.S.*, 16 A.3d at 393 n.8.

108. *Id.* at 394 n.9. This type of case-by-case determination is troubling for Intended Parents because depending on their status as fertile or infertile, they may expect the court to rule one way based on language from previous decisions. The court in *A.H.W.* assured that a non-genetic mother would be dealt with fairly when the time came, and when it did, the court in *T.J.S.* ruled in a way that required non-genetic mothers to adopt.

has stunted the development of surrogacy laws in New Jersey, because women have unequal access to genetic and intent-based testing.[109]

Given that "DNA has been widely accepted as scientifically reliable and admissible evidence by courts throughout the country, including those in New Jersey," [110] there is no reason not to extend the availability of genetic testing to Intended Mothers and Gestational Carriers to settle the same types of issues as those arising from questions of paternity. Presently, not extending genetic testing is in direct opposition to effectuating the objective of the Act.[111] In the interesting case of *Passaic County Board of Social Services v. A.S.*, the court relied heavily on DNA and the validity of genetic testing to support the rare occurrence of paternally unrelated twins.[112] The court recognized that it:

> [M]ust therefore adapt to meet changes in science and technology by broadening the scope of its inquiry. Our society continues to witness positive technological advances in a variety of disciplines. As the scientific and medical landscape continues to change, so should the courts. A medical or scientific innovation or rarity should not create judicial uncertainty. Rather, it is essential that courts fully understand and analyze the underlying issues.[113]

109. In fact, in his dissent, Justice Albin criticized the concurrence's focus on a "hypothetical plaintiff or a hypothetical situation" because the facts in *T.J.S.* involved a Gestational Carrier who voluntarily terminated her parental rights within seventy-two hours and therefore the concurrence was misguided in its analysis of protecting the rights of the Gestational Carrier. *See In re* T.J.S., 54 A.3d 263, 272 (N.J. 2012).

110. Passaic Cty. Bd. of Soc. Servs. v. A.S., 120 A.3d 978, 982 (N.J. Super. Ct. Ch. Div. 2015).

111. *See supra* note 87 and accompanying text. The court in *T.J.S.* found that, "the plain language of the Act provides for a declaration of maternity only to a biologically—or gestationally—related female." 16 A.3d at 391. However, the Act only provides the phrase "having given birth to the child" to determine the identity of the natural mother. N.J. STAT. ANN. § 9:17-41(a) (West 2019). The court continued, "and nowhere in the statutory scheme may it be implied that maternity is established simply by the contractual or shared intent of the parties." *T.J.S.*, 16 A.3d at 391. From the court's point of view, the woman who gives birth a child is the mother unless she relinquishes her rights after seventy-two hours at which point another woman may adopt the child. The court does not engage in further discussion of the use of genetics or biology.

112. Passaic Cty. Bd. of Soc. Servs., 120 A.3d at 984–86. A woman gave birth to twins and was seeking child support from the man she believed to be their father. *Id.* at 984. However, the children were fathered by two different men, due to two ova being fertilized within the same menstrual cycle. *Id.* This phenomenon known as "heteropaternal superfecundation" and is extremely rare. *Id.* at 983.

113. *Id.* at 986–87.

Additionally, the Act has recognized intent as a method for determining paternity.[114] In *Monmouth County Division of Social Services v. R.K.*,[115] R.K. was the child's father because R.K. signed a voluntary admission of paternity and a consent order agreeing to pay weekly child support.[116] Despite the fact that R.K. had significant reason to doubt his paternity of the child, he did not ask for a paternity test and held the child out as his own.[117] When he later filed to terminate child support upon the knowledge that he was not the biological father of the child, the court held that he had been equitably estopped from denying his paternity to the child because (1) he voluntarily accepted paternity for over ten years; (2) the biological father could not be found so many years later and because R.K.'s actions made searching out the biological father unnecessary; (3) R.K. had good reason to question his paternity based on his previous groin injury and the mother's marriage at the time of conception; and (4) the child would be irreparably harmed if R.K. could repudiate paternity at this stage in the child's life.[118]

Intent based-testing is triggered when either party cannot participate in the conception of a child. As discussed above, men and fathers already have intent-based testing.[119] The Act is completely silent on additional measures by which a woman may establish maternity and in fact, the court in *T.J.S.* expressly pointed that out.[120] If the end is steady child support, the current means provided by the Act and reinforced through *Baby M* prohibiting surrogacy agreements actually serve to stem the flow of benefits. One possibility is that if the Gestational

114. N.J. STAT. ANN. § 9:17-41(b) (West 2019) ("a signed voluntary acknowledgement of paternity shall be considered a legal finding of paternity . . . ."); *id.* § 9:17-43(a)(4) ("A man is presumed to be the biological father of a child if . . . [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."); *id.* § 9:17-43(a)(5) ("While the child is under the age of majority, he provides support for the child and openly holds out the child as his natural child."). None of these sections relate to the actual genetic relation to the child. In the eyes of the law, if a man purports that a child is his son or daughter, the court will accept that outward action as a legal finding.

115. 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000).

116. *Id.* at 321.

117. *Id.* The mother of the child was married at the time of R.K.'s relationship with her. *Id.* R.K. also suffered a groin injury that led him to believe that he was incapable of having children. *Id.*

118. *Id.* at 330–31.

119. *See infra* Appendix A.

120. *In re* T.J.S., 16 A.3d 386, 391 (N.J. Super. Ct. App. Div. 2011), *aff'd by an equally divided court*, 54 A.3d 263 (N.J. 2012). "Nowhere in the Act does the presumption of parentage under section 43(a) extent to a wife whose husband, while married, fathers a child with another woman, or to a wife who simply acknowledges in writing her maternity of the child." *Id.* (citations omitted).

Carrier asserts parentage, the child goes with the mother most likely in a lower economic position.[121] Or, after the Gestational Carrier terminates her rights, and before the adoption process is completed, Intended Mothers don't have maternal rights and obligations, and the child cannot receive the benefits.[122] Allowing both men and women to use genetic and intent-based testing to assert parentage would better serve to achieve the goal of assuring continued financial support to children.

D. Multiple Outcomes

The outcomes of these three cases highlight that with each different combination of eggs, the court is liable to reach a different conclusion per case.[123] This may be confusing and intimidating for Intended Parents that are dealing with a high-stakes, emotional situation and who are not well prepared for navigating legal waters. The solution that the mother can just adopt is gender biased because men are not so burdened because they can prove paternity genetically or based on intent.[124] Women are forced to incur additional legal costs that might dissuade them from officially adopting the child.[125]

121. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1046 (2015) (discussing the outcome where Intended Parents unable to conceive without assistance "will likely devote more time and resources to family planning because it requires more complex arrangements and reproductive technology.").

122. *See T.J.S.*, 54 A.3d 263, 276–77 (N.J. 2012) (Albin, J., dissenting). Without a parent-child relationship recognized under the Act, the child could miss out on "claims for workers' compensation benefits, social security benefits, and life insurance benefits" as well as the "right to inherit by intestacy." *Id.* (quoting *In re* Adoption of Baby T., 709 A.2d 1381, 1385 (N.J. Super. Ct. App. Div. 1998)).

123. In *Baby M*, the embryo was created by the husband's sperm and the Traditional Carrier's egg. 537 A.2d 1227, 1235 (N.J. 1988). In *A.H.W.*, the embryo was created by the husband's sperm and the Intended Mother's egg. 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000). In *T.J.S.*, the embryo was created by the husband's sperm and an Egg Donor's egg. 54 A.3d at 264.

124. *T.J.S.*, 54 A.3d at 269 (Albin, J., dissenting). "In the context of [the Act], no case suggests that the adoption process is a mere inconvenience. Avoiding that process was one of the obvious goals of the statute." *Id.* at 274. Even after all of the time and effort expended by an Intended Mother she is not granted "the same privilege accorded to the infertile husband—the right to be declared the natural parent without the delay and the cost of the adoption process." *Id.*

125. Michael Booth, *Court Weighs Wife's Rights to Child Born of Surrogacy and Not Genetically Hers*, 207 N.J. L.J. 1, 1 (2012). In *T.J.S.*, the couple's attorney, Donald Cofsky, argued that requiring the Intended Mother to adopt violated equal protection on the grounds that "the wait of two to six months or more for an adoption to go through can also create other problems," such as if the biological father dies before the adoption is finalized and the child has no other legal parent, or if the Intended Mother dies and the child cannot

The tension arises between the controlling past standard to declare surrogacy agreements invalid and unenforceable and award parentage to the birth mother and the modern advancement where parentage can be determined based on either genetic testing or intent-based evaluations. Therefore, because the court may no longer rely on the factual assumption that a mother was unavoidably present at the birth of her child, and that presumptions only apply to determine the man most likely to be the biological father to assure the child was well supported, denying women genetic testing and intent based presumptions violates equal protection.

PART 3 – PUBLIC POLICY FACTUAL ASSUMPTIONS

A. Differences in Conception by Gender

The court in *T.J.S.* determined that the Act passed an Equal Protection analysis by centering its analysis on the fact that men and women conceive and have children differently.[126] The underlying fundamental factual assumption to the construction of the Act was that the mother of the child, who was genetically related and giving birth, would unavoidably be present at the birth, unlike the father. Therefore, the State interest in attaching financial support responsibilities to the potentially absent father was legitimate.[127] Now however, since in vitro fertilization became a successful option for potential parents, that factual assumption has become obsolete.[128] The conclusion the court in *T.J.S.* reached was unsatisfactory in this regard because as discussed above, the court declined discussing the outcome of a situation where the Intended Mother was genetically related the child born and the Gestational Carrier did not relinquish her maternal rights within the seventy-two hour window. Currently, if that were to occur, the Gestational Carrier is the legal mother despite the fact that now men and

properly inherit her estate. *Id*. Cofsky argued those issues are more pressing and require judicial intervention instead of waiting for legislation. *Id*.

126. *T.J.S.*, 16 A.3d at 394 ("Where a woman does not give birth to a child, there is not a strong likelihood that she is biologically related to the child.").

127. Author is using the word "absent" as the opposite of present and not suggesting any type of neglectful attitude.

128. Artificial insemination has been successfully used since 1799, and doctors have been claiming a variety of success stories since then. Wendy Kramer, *A Brief History of Donor Conception*, HUFFPOST (May 10, 2016, 3:29 PM), https://www.huffingtonpost.com/wendy-kramer/a-brief-history-of-donor-conception_b_9814184.html. The first successful in vitro fertilization baby was born in 1981 in the United States. *National ART Surveillance*, CDC, https://www.cdc.gov/art/nass/index.html. (last visited Apr. 13, 2019).

women can have children in a similar fashion where one or both people contribute genetic material to the Gestational Carrier and are not required to be present for the birth of the child they, or their spouse, are genetically related to.

Consider the Kehoe Family from Michigan:[129] the Intended Infertile Mother and the Intended Father used an Egg Donor, a Sperm donor, and a Gestational Carrier.[130] In the Kehoe instance, the Gestational Carrier changed her mind one month after giving birth to twins and was given custody of the children.[131] In such an instance, Mr. Kehoe could have tried, though most likely unsuccessfully, to establish paternity through one of the presumptions afforded to him,[132] but Mrs. Kehoe would be left entirely without recourse.

Men and women can conceive children in the same way where neither must be present at the time of birth. Once the Gestational Carrier relinquishes her rights, parentage for both the mother and father need to be determined to establish the child's financial supporters.[133] As there is no longer a physiological difference between conceptions, a statute based on gender that discriminates against similarly situated infertile parents is unconstitutional.[134]

B. Best Interests of the Child

Another public policy factual assumption is that the "best interest of the child" will be served by placing that child with the mother who gave birth to him or her. Those ends are satisfied by the means of building parentage presumptions that differ by gender where only one woman has the presumption of maternity. The best interest of the child standard is

129. The Michigan statute prohibiting surrogacy "holds that surrogacy is contrary to public policy and that surrogacy agreements are unenforceable, giving the woman who gives birth a strong case if she decides to keep the babies." Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES (Dec. 12, 2009), http://www.nytimes.com/2009/12/13/us/13surrogacy.html.; MICH. COMP. LAWS § 722.855 (2018).

130. Saul, *supra* note 129. Most likely, the courts in *Baby M*, *A.H.W.*, and *T.J.S.* did not account for a child requiring five adults to bring it into being.

131. *Id.*

132. However, the presumptions may have worked against him. The Gestational Carrier was married with four of her own children. Per presumption (1), the Gestational Carrier's husband is the presumed father to any children she bears during the course of his marriage. N.J. STAT. ANN. § 9:17-43(a)(1) (West 2019).

133. *In re* T.J.S., 54 A.3d 263, 277 (N.J. 2012) (Albin, J., dissenting).

134. *Id.* at 278. "The surrogate's surrender of her rights places [the Intended Mother], if not in the same shoes, in similar shoes as the infertile husband. The State's interest in a two-parent family is advanced, not impaired . . . ." *Id.*

a well-established benchmark for decision-making; however, it may need a modern update.[135]

In *Baby M*, the New Jersey Supreme Court found:

> Worst of all however, is the contract's total disregard of the best interest of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of [the Intended Parents] as custodial parents, of [the Intended Infertile Mother] as an adoptive parent, their superiority to [the Gestational Carrier], or the effect on the child of not living with her natural mother.[136]

To terminate parental rights, a court must find that the best interests of the child will be jeopardized according to four factors:

> The division shall initiate a petition to terminate parental rights on the grounds of the "best interest of the child" . . . if the following standards are met:
>
> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child . . . Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led

135. N.J. Div. of Youth & Family Servs. v. R.L., 906 A.2d 463 (N.J. Super. Ct. App. Div. 2006) (where maternal rights were terminated because the child suffered from bruises, a broken wrist, and fractured humerus. But, because DYFS could not satisfy all four factors against the father, his rights were not terminated and the court ordered for his fitness to be reassessed); N.J. Div. of Youth & Family Servs. v. F.M., 867 A.2d 499 (N.J. Super. Ct. App. Div. 2005) (where two children were removed from their home after a police officer found them in unsanitary conditions and suffering from a rash later determined to be scabies. However, after their mother completed extensive rehabilitation and parental counseling, the children were returned to her); N.J. Div. of Youth & Family Servs. v. S.V., 826 A.2d 821 (N.J. Super. Ct. App. Div. 2003) (where the Division of Youth and Family Services (DYFS) placed five children in the care of four cousins of their mother after suffering domestic abuse and living in inadequate housing. The court found the situation satisfied all four elements, terminated the mother's parental rights, and allowed the four cousins to adopt the children).

136. *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988).

> to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) termination of parental rights will not do more harm than good.[137]

The issue with following a statutory evaluation is that the "best interests of the child" fact-finding determination is made after the child has been born and subsequently removed for cause from his or her birth mother and/or birth or legal father.[138] The best interest test is used to determine when the State should terminate the current legal parent's rights. In a surrogacy setting, the State's interference is triggered when the Intended Parents petition to have both of their names on the birth certificate,[139] or the Gestational Carrier changes her mind.[140] There, a best interest test is used to resolve a dispute between individuals both asserting concurrent parental rights. The question becomes not *whether* the parent keeps their rights, but *which* parent should receive the rights in consideration of the child's best interests.[141]

First, in a State removal instance, the parents have *already* demonstrated that there is a reasonable doubt that they cannot adequately care for the child and the child is in danger if she remains in

137. N.J. STAT. ANN. §§ 30:4C-15.1(a)(1)–(4) (West 2017).

138. *See id.*

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

140. *See, e.g.*, A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. LEXIS 3250 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

141. *Id.* In *A.G.R. v. D.R.H.*, a same-sex couple, Donald and Sean, used Sean's sperm, an Egg Donor, and a Gestational Surrogate, Angelia, who was Donald's sister. *Id.* at *1–2. Angelia signed an "Informational Summary and Consent Form – Gestational Surrogacy" prior to giving birth, and after giving birth to twins, Angelia signed a "Consent to Judgment of Adoption" whereby she terminated her legal rights and Donald could adopt. *Id.* at *2. However, after changing her mind and wishing to be the twins' mother instead of simply their aunt, Angelia sought custody of the children. In considering the children's best interests, the court found that Donald and Sean were in a better position for several reasons. Letter Opinion from Francis B. Schultz, J.S.C. (Dec. 13, 2011) (available at https://julieshapiro.files.wordpress.com/2012/01/nj-surrogacy-case-agr-v-drh-sh.pdf). First, the children were biracial and it would better serve their identity development to grow up with parents of each race. *Id.* at 12. Second, Donald is the primary "breadwinner" out of the three adults. *Id*. Sean works part time and Angelia works full-time. *Id*. With Donald and Sean, the twins benefit from a two-parent household. *Id.* at 13. And third, Angelia intended to place the girls in a religious school and there was significant evidence to support that the twins would not be raised to be supportive of homosexuality. *Id*. at 4. However, while Sean received sole legal custody of the twins, the court did not terminate Angelia's parental rights. *Id*. at 14–15. The twins' legal mother is Angelia, their legal father is Sean, and Donald is their uncle. *See* Arthur S. Leonard, *NJ Court Awards Custody in Gestational Surrogacy Dispute*, N.Y. L. SCH.: ART LEONARD OBSERVATIONS (Dec. 20, 2011), http://www.artleonardobservations.com/nj-court-awards-custody-in-gestational-surrogacy-dispute/.

their care.[142] In the surrogacy context, the child is a newborn and neither the Intended Parents nor the Gestational Carrier have demonstrated that they cannot provide a safe and stable home for the child.[143] The State is opposing the Intended Parents' names on the birth certificate because it assumes that the birth mother is the best mother for the child without considering that the Intended Parents put the time, energy, and money to achieve that child's conception, whereas the Gestational Carrier is a third party to that arrangement.[144]

It seems troubling that the Gestational Carrier, whose relationship to the Intended Parents may only exist in the context of the pregnancy and ends after conception plus nine months, could outrank the Intended Parents when the facts are viewed in isolation. The Gestational Carrier has the opportunity to evaluate the Intended Parent's qualifications before she agrees to carry the child, but she can retroactively change her mind regardless of her original approval.[145] The Gestational Carrier is a party to the relationship between the Intended Parents for a limited time, and her analysis that the parents are unfit and the best interest of the child is to stay with her is incomplete; but her status as birth mother affords her the right to raise the baby herself.

Second, if a dispute arises between the Intended Parents and the Gestational Carrier, under the birth-mother-is-best presumption in New Jersey, the Gestational Carrier would be awarded maternal rights.[146] That outcome results in legal repercussions between the Intended Parents and the Gestational Carrier and disrupts "the integrity of the

142. *See, e.g.*, N.J. Div. of Youth & Family Servs. v. C.S., 842 A.2d 215, 241–42 (N.J. Super. Ct. App. Div. 2004) (where DYFS removed a new-born child after a hospital employee reported smelling marijuana on the mother during labor. The court upheld the judgment terminating maternal rights and allowing a maternal aunt to adopt the baby. However, this process took four years to determine and the court weighed the bonding the baby had done with her aunt in that time).

143. Arguably, because Gestational Carrier's so rarely breach their agreements, one who does may be suffering from a particularly severe emotional reaction and the court should inquire as to her fitness. *See* Teman, *supra* note 69, at 1104.

144. *In re* T.J.S., 54 A.3d 263, 279 (N.J. 2012) (Albin, J., dissenting) (emphasizing the distinctions between *T.J.S.* and *Baby M* because the Gestational Carrier in *T.J.S.* was "a gestational surrogate who ha[d] no interest in raising the child she has carried for the genetic father and intended mother" as opposed to Mrs. Whitehead, who struggled to give up her own child).

145. *See, e.g.*, Saul, *supra* note 129 (The Gestational Carrier learned the Intended Mother once suffered from depression and changed her mind about terminating her maternal rights. The Gestational Carrier was awarded custody and the Intended Parents were left childless.).

146. *See, e.g.*, N.J. STAT. ANN. § 9:17-41(a)(1) (West 2019) ("The natural mother, may be established by proof of her having given birth to the child."); A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. LEXIS 3250, at *12–13 (N.J. Super. Ct. Ch. Div. 2009).

family unit"[147] because the child is then in the middle of a custody battle. Likewise, if the Gestational Carrier does terminate her maternal rights without issue and the State interferes by refusing to recognize the Intended Infertile Mother via an intent-based test or the Intended Fertile Mother via genetic testing and requires her to adopt, the State just added a layer between the Intended Mother and her child.[148]

By way of summary, in *Baby M*, the New Jersey Supreme Court did not grant any parental connection to the Intended Mother.[149] The court in *A.H.W.* allowed the Intended Mother to be listed on the birth certificate after the Gestational Carrier terminated her rights because she was genetically related.[150] The court in *T.J.S.* left the Intended Mother with the option to adopt and refused to list her on the birth certificate because she was not genetically related.[151]

It would appear that the New Jersey Supreme Court in *Baby M* stated clearly that the birth mother is best, but it then evaluated custody between the two natural parents separately and ultimately found in favor of Mr. Stern.[152] Subsequent court decisions assumed the same regardless of the fact that changes in medical technology present facts significantly different.[153] Once the question for the court is *which* parent to whom to award parental rights, the courts have not conducted full best interest of the child evaluations according to the statute. Instead, the courts will first try to enforce the *A.H.W.* compromise, in which there are three days for the Gestational Carrier to terminate her rights and five days to file a birth certificate with only the Intended Parents' names.[154] Such a solution only applies to a genetically related Intended Mother and

147. N.J. Div. of Youth & Family Servs. v. R.L., 906 A.2d 463, 466 (N.J. Super. Ct. App. Div. 2006).

148. *T.J.S.*, 16 A.3d at 397; *see also* Strasser, *supra* note 49, at 197 ("It is hard to understand how making it more difficult for the would-be mother to establish her legal relationship in [the case of *T.J.S.*] benefits the child, and it is easy to imagine situations where the child might be harmed instead.").

149. *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988). The court gave Mr. Stern custody of Baby M, did not terminate Mrs. Whitehead's parental rights, and remanded to the lower court to determine the proper visitation, if any, for Mrs. Whitehead. *Id.* Mrs. Stern acted as stepmother with no legal relationship to Baby M. *Id.*

150. A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000).

151. *T.J.S.*, 16 A.3d at 398. The court admitted "no one disputes that it is in the child's best interest to have [the Intended Mother]'s commitment legally recognized," but reasoned the Legislature chose to "create that status" through the adoption process, rather than the Act. *Id.*

152. *Baby M*, 537 A.2d at 1253, 1260.

153. A.G.R. v. D.R.H., Docket No. FD-09-001838-07, 2009 N.J. Super. LEXIS 3250, at *12–13 (N.J. Super. Ct. Ch. Div. 2009) (treating the parentage dispute between Sean and Angelia as a custody battle, even though Angelia was not genetically related to the twins).

154. *A.H.W.*, 772 A.2d at 954.

when the Gestational Carrier voluntarily terminates her rights.[155] If that isn't the case and the Gestational Carrier does not voluntarily terminate, the court will engage in a best interest evaluation to determine custody between the Gestational Carrier and the Intended Fertile or Infertile Father.[156] Regardless, the Intended Mother is undermined by the existing birth-mother-is-best stance, despite the fact that she may provide a better home for the child.

C. View of Surrogates' Independence

Arguably, the undercurrent assumption that surrogates require protection from being taken advantage of by Intended Parents is not substantially related to the Act's goal of facilitating the flow of financial benefits from the father to the child. Instead, the New Jersey Supreme Court implemented its own views on how women are affected emotionally, physically, and psychologically during a pregnancy. The court in *Baby M* found that:

> [The Gestational Carrier] 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 pre-existing 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.[157]

The New Jersey Superior Court in *A.H.W.* addressed this factual assumption as well when it concluded that "[i]n recognition of the emotional and physical changes in the mother which occur at birth, voluntary surrenders are not valid if taken within seventy-two hours after the birth of the child."[158]

In reality, there is significant evidence that women choose to be surrogates by their own free will and are motivated by a need to help families who are unable to conceive and carry a child on their own.[159]

155. *Id.*

156. *T.J.S.*, 16 A.3d at 396. ("[P]aternity attaches to the infertile husband because of the sperm donor's lack of temporal, physical, and emotional investment in the child's creation. This stands in sharp contrast to the surrogate mother whose parental rights are deemed worthy of protection and thus stand in the way of the infertile wife's claim to automatic motherhood.").

157. *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988).

158. *A.H.W.*, 772 A.2d at 954.

159. *See generally* Zsuzsa Berend, *The Social Context for Surrogates' Motivations and Satisfaction*, 29 REPROD. BIOMEDICINE ONLINE 399 (2014).

There is a distinct lack of evidence to support the *Baby M* assumption that women are singularly persuaded by the potential financial gain or that it is definitively abnormal for a woman to comfortably separate herself from the child she carries.[160]

At the outset, Elly Teman addressed the misconception that it is common for a surrogate to "regret[] her decision and tr[y] to reclaim the child."[161] Rather, she determined that "[t]he narrative of the surrogate who refuses to relinquish therefore seems to play a therapeutic function, reassuring the public that women do instinctively love and cherish their babies."[162]

Teman's analysis focused on the preconceived notions that "'normal' women do not voluntarily become pregnant with the premeditated intention of relinquishing the child for money" and "'normal' women 'naturally' bond with the children they bear."[163] Historically, psychological studies of surrogate women attempted to find the internal character flaw in these women that could explain why they would do something "unnatural" and "psychologically aberrant."[164] Such studies routinely found that surrogates were "intelligent, self-aware, stable adults," and "down to earth, practical, decent people."[165] Once psychologists were unable to find a psychological disparity between surrogates and other "normal" mothers, they began searching for a motivating factor to explain the decision to relinquish.[166] If the study was unsuccessful in pinpointing a financial motivation, psychologists turned to reparative motives such as "tragic loss or abuse in the surrogate's past."[167] Teman rejects both the financial dependency and reparative motivations as incomplete because they both ignore the possibility that a woman *could* choose to be a surrogate for reasons that are "pragmatic, financial, or based on self-interest."[168]

160. *See generally* Teman, *supra* note 69.

161. *Id*. at 1104.

162. *Id*. at 1105.

163. *Id*. at 1104, 1105 ("Accordingly, surrogates are depicted in popular representations as financially desperate, selfish, peculiar or disturbed.").

164. *Id*. at 1106.

165. *Id*. (quoting J. Einwohner, *Who Becomes a Surrogate: Personality Characteristics*, *in* GENDER IN TRANSITION: A NEW FRONTIER (J. Offerman-Zuckerberg, ed. 1989)).

166. *Id*. at 1107 ("Nearly every study of surrogates' motivations attempts to determine sufficient financial distress in the surrogate's life that might provide a reason for her need to turn to this desperate measure."); *see also In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1998) (". . . it appears that the essential evil is the same, taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree.").

167. Teman, *supra* note 69, at 1107.

168. *Id*. at 1108.

Teman also addressed the staunch belief that after giving birth, the surrogate will "display somatic or psychological signs of traumatic loss."[169] A 2003 study found that the majority of surrogates reported they had no doubts or difficulties at the time of handover, no difficulties the year following relinquishment, and felt no special bond with the child.[170] To explain the results, the researchers argue surrogates are deceiving themselves into believing the child is not theirs as a way of "dealing with anticipated loss."[171]

However, Zsuzsa Berend used surrogates' own discussions on a support website for surrogates[172] to study their motivations and found that those surrogates "assert that surrogacy is about creating babies and families and not about gaining new friends."[173] Contrary to the belief that surrogates experience pain and suffering after separating with the child, Berend concluded that the surrogates feel the most hurt by losing contact with the Intended Parents with whom they've grown close.[174] Teman found generally, that as long as the Intended Parents significantly demonstrate their gratitude towards their surrogate, the surrogate could part smoothly from both the child and the Intended Parents.[175] Ultimately, it cannot be conclusively decided that surrogates are motivated purely by financial needs or by altruistic tendencies. Instead, "Surrogacy most often is a hybrid of contractual and gift relationship . . . . Surrogates most often do not think of surrogacy as simply a business transaction that ends when the baby is born; rather, they think of it as a joint endeavor that forges a friendship."[176]

Therefore, a woman's assertion that she understands the baby she carries is not hers is not necessarily a coping mechanism, but possibly her recognition of the gift she is giving to the Intended Parent or Intended Parents.[177]

169. *Id*.

170. *Id*. Teman specifically noted that even the methodology of this study framed the questions in such a way that *assumed* the surrogate would feel a doubt, difficulty, or special bond. *Id*. (citing Vasanti Jadva et al., *Surrogacy: The Experience of Surrogate Mothers*, 10 HUM. REPROD. 2196 (2003)).

171. *Id*. at 1109 (quoting P.J. Parker, *Motivation of Surrogate Mothers—Initial Findings*, 140 AM. J. PSYCH. 117–18 (1983)).

172. *SMO Message Boards,* SURROGATE MOTHERS ONLINE, www.surromomsonline.com, (last visited Apr. 13, 2019).

173. Berend, *supra* note 159, at 400.

174. *Id*.

175. *See* Panel Discussion, 8 RUTGERS J.L. & PUB. POL'Y 934, 965 (2011) ("[S]urrogacy has the potential for exploitation, but the surrogates often see it as a very empowering and meaningful thing in their lives.").

176. Berend, *supra* note 159, at 400.

177. Elly Teman conducted a study of 26 Israeli surrogates and found they use a process called "body mapping" to recognize themselves separately from the pregnancy going on

Based on these studies, it would appear that the protective stance the New Jersey Supreme Court took in 1988 is not as necessary today, especially where a large number of states have requirements for Gestational Carriers to be of a certain age and have previously given birth so she has fully experienced carrying and delivering a child.[178] Therefore, the protections the courts are trying to give the surrogates, that restrict Intended Parents, may over-generalize to the grave harm of some.

PART 4 – NEW JERSEY

A. Current Enforceability

The culmination of *Baby M.*, *A.H.W.* and *T.J.S.* meant that a surrogacy contract between the Intended Parents and the Gestational Carrier is void and unenforceable.[179] However, surrogacy itself is not illegal, just the contract.[180] For example, when Intended Parents use a surrogacy agency, the Gestational Carrier can earn potentially $40,000-$50,000, or more depending on her experience.[181] Generally, the Intended Parents may pay the medical bills and other costs for the Gestational Carrier, such as an insurance policy for her.[182] New Jersey courts take issue when additional compensation is given to the Gestational Carrier.[183] Rhetorically, therefore, if Intended Parents find a compassionate gestational carrier who does not accept payment, the arrangement may proceed.[184] But there is no difference in legal

inside of them. They say, "'I'm only the womb. I'm only the hostess. I'm only the innkeeper. It's not my sperm and egg, so I feel nothing toward the baby.'" Panel Discussion, *supra* note 175, at 961–62.

178. *See infra* Appendix C.

179. *See State by State Surrogacy Laws*, ALL THINGS SURROGACY, https://allthingssurrogacy.org/surrogacy-laws-state-by-state/ (last visited Apr. 13, 2018).

180. *In re* Baby M, 537 A.2d at 1240 ("We have concluded that this surrogacy contract is invalid. Our conclusion has two bases: direct conflict with existing statutes and conflict with the public policies of this State, as expressed in its statutory and decisional law."). "There is no doubt that a contractual provision purporting to constitute an irrevocable agreement to surrender custody of a child for adoption is invalid." *Id.* at 1245–46.

181. *West Coast Surrogacy Costs & Fees*, WEST COAST SURROGACY, https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost (last visited Mar. 3, 2018); *Surrogate Mother Pay*, CONCEIVEABILITIES, https://www.conceiveabilities.com/surrogates/surrogate-mother-pay (last visited Apr. 13, 2019).

182. *Surrogate Mother Pay*, *supra* note 181.

183. *See generally id*. ("Additional Benefits").

184. Baby M, 537 A.2d at 1235 ("We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child.").

treatment because the Intended Parents still must wait 72-hours after the birth of the child for the Gestational Carrier to terminate her parental rights before the Intended Parents may be listed as the legal parents of the child via a Pre-Birth Order,[185] and where the Intended Mother is not genetically related, she must adopt the child.[186] This is memorialized in New Jersey Court Rule 5:14-4, titled "Gestational Carrier Matters; Orders of Parentage."[187]

Currently under the Act, the most immediate fight the interest groups of genetic or non-genetic Intended Parents are trying to win is to have both the Intended Mother's and Intended Father's names placed on the child's birth certificate before the child is born instead of the hospital placing the Gestational Carrier's on the birth certificate name at the time of birth, or without facing a waiting period.[188] In New Jersey, the pre-birth certificate would become effective if within seventy-two hours the Gestational Carrier terminates her maternal rights.[189] Or ideally, as is true in several states, the pre-birth order is effective immediately upon the birth of the child without a waiting period because of the fully enforceable surrogacy contract and a statute stating Gestational Carriers are never considered to be the child's parent.[190] At the moment, New Jersey is restrictive in how the courts and legislatures allow surrogacy. As previously mentioned, surrogacy itself is legal as long as the Gestational Carrier is compassionate and does not receive compensation.[191] Furthermore, a pre-birth certificate will not be recognized because of the *A.H.W.* finding that the window between the three-day waiting period and five-day window for a birth certificate to be issued is sufficient protection for Intended Parents.[192]

185. N.J. CT. R. 5:14-4(b).

186. In the case of an Infertile Intended Mother, the court in *T.J.S.* found "[i]ndeed, the Legislature never amended either Sections 43(a) or 44 [of the Act] after *Baby M* to eliminate the need for adoption in circumstances such as here." *In re* T.J.S., 16 A.3d 386, 394 (N.J. Super. Ct. App. Div. 2011).

187. N.J. CT. R. 5:14-4.

188. *See T.J.S.*,16 A.3d at 388–89.

189. *Id.* at 389.

190. *See* discussion *infra* Appendix C, Arkansas, Delaware, Illinois, Nevada, and North Dakota.

191. *In re* Baby M, 537 A.2d 1227, 1234–35 (N.J. 1988).

192. A.H.W v. G.H.B., 772 A.2d 948, 954. (N.J. Super. Ct. 2000); *see* N.J. STAT. ANN. § 9:3-41(e) (West 2019); N.J. STAT. ANN. § 26:8-28(a) (West 2019); *see also* Guglietta, *supra* note 55, at 891 ("The lower courts, however, have wrongly viewed *Baby M* as restrictive, failing to enter pre-birth orders on the basis of *Baby M*, even when the factual posture of the cases they are deciding bear little to no resemblance to *Baby M*.").

B. Surrogacy in Other States

The legality and enforceability of surrogacy and surrogacy contracts varies from state to state.[193] See Appendix C for a more detailed breakdown of where and how surrogacy is permitted or prohibited in all fifty states and the District of Columbia. Surrogacy is most freely practiced in the states where agreements are fully enforceable and the Intended Parents can receive a pre-birth order with *both* parent's names on the birth certificate, *regardless* of genetic relation.[194] Those states (generally) follow the precedent set out in *Johnson v. Calvert*.[195] On the other side of the spectrum, in some states surrogacy contracts with compensation are null and void and the parties are subject to criminal penalties.[196]

The holding in *Johnson v. Calvert* was unique and demonstrated a firm grasp of the influence medical reproductive technology has had on the modern world.[197] In that case, Mark, Intended Fertile Father, and Crispina, Intended Fertile Mother, entered into a compensated surrogacy agreement with Anna, the Gestational Carrier.[198] Anna was implanted a zygote made from Mark's sperm and Crispina's egg.[199] After their relationship deteriorated, Anna indicated she would keep the baby if Mark and Crispina did not pay the balance of their arrangement four months before the last payment was due.[200] Mark and Crispina went to court for a declaration "that they were the legal parents of the unborn child" while Anna also sought a declaration that she was the child's rightful mother.[201] In ruling in favor of the Intended Parents, the court found:

> They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. *But for their acted-*

193. *State by State Surrogacy Laws*, ALL THINGS SURROGACY, https://allthingssurrogacy.org/surrogacy-laws-state-by-state/ (last visited Apr. 13, 2019).

194. *See* statutes cited *infra* Appendix C.

195. 851 P.2d 776, 782 (Cal. 1993).

196. *See infra* Appendix C; WASH. REV. CODE ANN. § 26.26.250 (West 2017) ("Any person, organization, or agency who intentionally violates any provision of RCW 26.26.210 through 26.26.260 shall be guilty of a gross misdemeanor."); MICH. COMP. LAWS § 722.859(2) (2014).

197. 851 P.2d at 782–83 ("[R]ecent developments in the field of reproductive technology "dramatically extend affirmative intentionality . . . . Steps can be taken to bring into being a child who would not otherwise have existed.'" (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309 (1990)).

198. *Id*. at 778.

199. *Id*.

200. *Id.*

201. *Id*.

> *on intention, the child would not exist.* Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. *Crispina from the outset intended to be the child's mother.* Although the gestative function Anna preformed was necessary to bring about the child's birth, *it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother.* No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's real mother.[202]

This outcome differs from the New Jersey decision in *A.H.W.*,[203] because unlike in New Jersey where the Gestational Carrier has the presumption of maternity and retains maternal rights for seventy-two hours,[204] the Gestational Carrier in California does not have any presumptive right to keep the baby if a dispute arises.[205]

Here, intent is the dispositive factor because Mark and Crispina acted first to bring about the child's conception. The key phrase in the California court's analysis is "but for" because it acknowledges that Anna would not have had an active role in the arrangement if Mark and Crispina had not decided to conceive using a surrogate thus indicating the legitimacy of an intent-based determination.[206] In surrogacy arrangements, the intent is used to award custody not relieve an individual of custody. Meaning it is only appropriate to use intent-based testing to prove, not disprove, parentage. It would be an unfortunate

202. *Id*. at 93 (emphasis added).

203. A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (holding "[i]f [Gestational Carrier] does choose to surrender the infant, and she certifies that she wishes to relinquish all rights, then the original birth certificate will list the two biological parents . . . . If [Gestational Carrier] changes her mind once the baby is born, she will have a chance to litigate for parental rights to the child.").

204. N.J. CT. R. 5:14-4 (2015); *see also* N.J. STAT. ANN. § 26:8-28(a) (West 2018); N.J. STAT. ANN. § 9:3-41(e) (West 1994).

205. Johnson v. Calvert, 851 P.2d 776, 782 (Cal.1993) ("We conclude that although the [Uniform Parentage Act] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child . . . is the natural mother under California law.").

206. *Id*. at 783 (quoting Professor Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, WIS. L. REV. 297, 323 (1990) ("within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.")).

scenario where a genetically related parent was allowed to be relieved of custody in an unplanned pregnancy on the premise that he or she did not intend the child to be born.

As discussed previously, the California Supreme Court recognized that the real question in surrogacy disputes is not *whether* to terminate the Gestational Carrier's rights because she is an unfit mother, but *which* woman asserting the rights should receive them.[207] This outcome demonstrates how the end, assured financial support for the child, is achieved by affording both the father and mother an opportunity to assert parentage. The California Supreme Court could have resolved Mark and Crispina's dispute using genetic testing as the child was conceived using their sperm and egg, but used intent based-testing to legitimize surrogacy arrangements and recognize the boundaries of the role the surrogate plays.[208]

C. The New Jersey Gestational Carrier Agreement Act

At the time of writing, New Jersey fell under what could be considered one of the more restrictive categories of state regimes. Surrogacy agreements were unenforceable and void however, surrogacy is still practiced. This left Intended Parents and Gestational Carriers severely disadvantaged. Given that uncertainty, it is in the best interests of any individual or couple trying to conceive a child using alternative reproductive methods involving surrogacy that New Jersey reconsider its method of governing surrogacy agreements.

1. History of the NJGCAA

Former New Jersey Governor Chris Christie had vetoed the New Jersey Gestational Carrier Agreement Act twice.[209] The NJCGAA was first introduced on February 13, 2012 as Senate Bill No. 1599 (S.B.

207. Strasser, *supra* note 49, at 193 ("The *Johnson* court framed the dispute between Anna Johnson and Crispina Calvert as one where each woman had a legitimate basis for claiming to be the child's mother.").

208. Johnson v. Calvert, 851 P.2d 776, 782 (1993) ("[A]lthough the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of the child that she intended to raise as her on—is the natural mother under California law.").

209. Abigail Wilkinson, *Governor Christie Vetoes Gestational Surrogacy Bill in New Jersey*, CNS NEWS (July 10, 2015, 11:36 AM), https://www.cnsnews.com/news/article/abigail-wilkinson/gov-christie-vetoes-gestational-surrogacy-bill-new-jersey.

1599),[210] and Governor Christie vetoed S.B. 1599 on August 8, 2012.[211] On February 20, 2014, the bill was reintroduced as Senate Bill No. 866.[212] Again, Governor Christie vetoed it at the end of June 2015.[213] Soon after that, S.B. 1238[214] was introduced on February 8, 2016 but failed to pass the 1st chamber.[215] On January 9, 2018, A.B. 1704 was once again reintroduced and on February 15, 2018 it passed the Assembly Floor.[216]

When Governor Christie first vetoed S.B. 1599 in 2012, he expressed concerns that the Legislature had not fully addressed the effect permitting contract law to govern surrogacy agreements would have on "traditional beginnings of a family."[217] In 2015, Governor Christie vetoed S.B. 866 because of "the significant ethical and moral concerns raised by a government-enforced system of agreements to procreate."[218] He said, "I have repeatedly stated that every life is precious and every human deserving of protection . . . I take seriously the need to guard against any societal depreciation of the miracle of life."[219] Nearly thirty years since the unfortunate parental struggle leading up to the *Baby M* decision in 1988, New Jersey will again have an opportunity to address the lingering issues that were left unanswered since that decision when the court said, "Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional restraints."[220] Governor

210. SENATE HEALTH, HUMAN SERVS. AND SENIOR CITIZENS COMM., STATEMENT TO SENATE, N.J. S.B. 1599, at 1 (2012).

211. Letter from Chris Christie, Governor, State of N.J., to NJ. Senate (Aug. 9, 2012) (on file with N.J. state Legislature); Anthony Vecchione, *Christie Veto of Gestational Carrier Bill Unlikely to Affect Surrogate Parents*, NJ SPOTLIGHT (Aug. 13, 2012), https://www.njspotlight.com/stories/12/0812/2210/.

212. S.B. 866, 216 Leg. (N.J. 2014).

213. *Bills 2014–2015*, http://www.njleg.state.nj.us/bills/BillView.asp (follow "Prior Sessions" tab; then select "Bills 2014–2015" from drop down; select "Bill Number"; enter "866"; and finally select "S866").

214. S.B. 1238, 217 Leg. (N.J. 2017).

215. *Bills 2018–2019*, http://www.njleg.state.nj.us/bills/BillView.asp (select "Bills 2018–2019"; select "Bill Number"; enter "482"; and finally select "S482").

216. *Bills 2018–2019*, http://www.njleg.state.nj.us/bills/BillView.asp (select "Bills 2018–2019"; select "Bill Number"; enter "1704"; and finally select "A1704"); *Vainieri Huttle, Quijano & Jasey Gestational Carrier Agreement Bill Clears Assembly Panel*, INSIDER NJ (Feb. 12, 2018, 11:38 AM), https://www.insidernj.com/press-release/vainieri-huttle-quijano-jasey-gestational-carrier-agreement-bill-clears-assembly-panel/.

217. Letter from Chris Christie, Governor, State of N.J., to NJ. Senate (Aug. 9, 2012) (on file with N.J. state Legislature) ("Permitting adults to contract with others regarding a child in such a manner unquestionably raises serious and significant issues . . . . I am not satisfied that these questions have been sufficiently studied by the Legislature at this time.").

218. Wilkinson, *supra* note 209.

219. *Id*.

220. *In re* Baby M, 537 A.2d 1227, 1263 (N.J. 1988). The "most sensitive issue" the court is referring to is a scenario where the Gestational Carrier is compensated per a contractual

Christie said in his 2012 veto statement that he feared that New Jersey would become "one of the few states in the nation that expressly authorize[s] gestational carrier agreements"[221] and that there had not been "serious inquiry, reflection, and consensus"[222] regarding validating contracts for surrogacy agreements. Those concerns have since been alleviated in a large number of states.[223]

2. The NJGCAA Enacted

Governor Phil Murphy succeeded Governor Christie in November 2017.[224] On May 30, 2018, Governor Murphy signed the NJGCAA into law.[225] Passing the Gestational Carrier Agreement Act is one way New Jersey has diminished the fears surrounding surrogacy agreements because the Act clarifies and increases the likelihood that Intended Parents could successfully obtain full parental rights, and a Gestational Carrier would know the legal compliance expected of her.[226] An uncontrolled unregulated market with inconsistent court rulings is what has led to the unfortunate scenarios where a child is born to one set of Intended Parents, but the state or a surrogate intervene and the resolution requires inconsistently applied court intervention to determine parentage.[227] Now, the NJGCAA contains important provisions that detail the agreement requirements and how a court will interpret the agreement.[228]

To begin, the stated purpose of the act is to "(1) Establish consistent standards and procedural safeguards to promote the best interests of the children who will be born as a result of gestational carrier agreements

agreement stipulating that she could not change her mind about terminating her parental rights. *Id*.

221. Letter from Chris Christie, Governor, State of N.J., to NJ. Senate (Aug. 9, 2012) (on file with N.J. state Legislature).

222. *Id*.

223. *See infra* Appendix C (showing an estimate of twenty-four states where surrogacy is fully enforceable with pre-birth certificates granted to both parents where either one or neither parent is genetically related to the baby).

224. Nick Corasaniti, *Phil Murphy Is Elected Governor of New Jersey, in a Lift for Democrats*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/nyregion/phil-murphy-governor.html.

225. Susan K. Livio, *Here's What N.J.'s New Surrogacy Law Means for Couples and Women Willing to Give Birth to Their Child*, NJ.COM (May 31, 2018), https://www.nj.com/healthfit/index.ssf/2018/05/bill_expanding_surrogate_parenting_now_law_in_nj.html.

226. *See* New Jersey Gestational Carrier Agreement Act, NJ STAT. ANN. § 9:17-60 (2019).

227. Anthony Vecchione, *Christie Veto of Gestational Carrier Bill Unlikely to Affect Surrogate Parents*, NJ SPOTLIGHT (Aug. 13, 2012), https://www.njspotlight.com/stories/12/0812/2210/ ("[I]t's really the Wild West . . . it's all left up to interpretation and chance.").

228. N.J. STAT. ANN. § 9:17-60.

. . . (2) Protect all parties involved . . . and (3) Recognize the technological advances in assisted reproductive medicine . . . ."[229] These purposes do satisfy the need to bring New Jersey up to date and account for the public policy rationales that *Baby M* was founded on.

Next, the NJGCAA definitively states that the legal parent of the child is the Intended Parent, and it is not the gestational carrier.[230] This provision appears to relate only to the Intended Mother because the use of genetic testing is reserved exclusively for evidence relating to paternity or for establishing a parent-child relationship between the father and the child.[231] Under the NJGCAA there are two methods for a mother to establish her parent-child relationship: by giving birth herself, or by using the NJGCAA to show the child was born pursuant to a gestational carrier agreement and she is the Intended Mother.[232] Genetic testing is still unavailable for women.

In addition to the requirements for the gestational carrier herself, the gestational carrier agreement must provide, in express terms, that the gestational carrier shall "surrender custody of the child to the Intended Parent immediately upon the child's birth."[233]

Critically, the NJGCCA provides that, "In the event that any of the requirements of this section [requirements for a gestational carrier agreement] are not met, a court of competent jurisdiction shall determine parentage based on the parties' intent."[234] Further efforts to address concerns that the gestational carrier is taken advantage of are included in the NJGCAA by stating that should the intended parent breach the agreement, the Intended Parent is still responsible for all support obligations created through the parent-child relationship.[235]

PART 5 – CONCLUSION

It is evident that New Jersey needs at least two more pathways to presumptive natural mother status: genetic testing for Intended Mothers who are genetically related to the child, and intent-based testing for Intended Mothers who are not. The Act as it stands today violates Equal Protection because the State interest, insuring that children receive financial support from their parents, is no longer substantially related to gender-based presumptions because a woman is no longer unavoidably

229. *Id.* § 9:17-61(b).
230. *Id.* § 9:17-63(a)(1), (3).
231. *Id.* § 9:17-41(b).
232. *Id.* §§ 9:17-41(a)(1)–(2).
233. *Id.* § 9:17-65(b)(1)(b).
234. *Id.* § 9:17-65(d).
235. *Id.* § 9:17-66(b).

present at the birth of the child. In order to assure continued financial support to the newborn, both the mother and the father need to be identified.

The arguments from *Baby M* are not as applicable as they once were when surrogacy agreements were uncommon and Traditional Carriers were the only option for Intended Parents. First, men and women don't conceive children differently when both men and women can remedy their infertility through the use of a sperm or egg donor and a surrogate. Second, best interest of the child determinations have changed where the Intended Parents might provide the better environment for the child and the presumption the birth mother is best does not apply to Gestational Carriers. Third, a large number of surrogates do not require paternalistic protection from the courts where they make fully informed decisions that may or may not be motivated altruistically or financially.

Since the pinnacle *Baby M* decision in 1988 that set the tone New Jersey, surrogacy arrangements have not gone away. Infertility is a persistent problem for men and women, and the assisted reproductive industry is only continuing to grow. Now, with the Gestational Carrier Agreement Act, the New Jersey courts are equipped to facilitate outcomes in surrogacy agreement parentage disputes that place infertile men and women on equal ground.

APPENDIX A: N.J. STAT. ANN. § 9:17-43. "PRESUMPTIONS"

a. A man is presumed to be the biological father of a child if:

(1) He and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce;

(2) Before the child's birth, he and the child's biological mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment or divorce; or

(b) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) After the child's birth, he and the child's biological mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) he has acknowledged his paternity of the child in writing filed with the local registrar of vital statistics;

(b) he has sought to have his name placed on the child's birth certificate as the child's father, pursuant to R.S.26:8-40; or

(c) he openly holds out the child as his natural child; or

(d) he is obligated to support the child under a written voluntary agreement or court order;

(4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child;

(5) While the child is under the age of majority, he provides support for the child and openly holds out the child as his natural child; or

(6) He acknowledges his paternity of the child in a writing filed with the local registrar of vital statistics, which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the local registrar. If another man is presumed under this section to be the child's father, acknowledgment may be affected only with the written consent of the presumed father. Each attempted acknowledgment, whether or not effective, shall be kept on file by the local registrar of vital statistics and shall entitle the person who filed it to notice of all proceedings concerning parentage and adoption of the child, as provided in section 10 of P.L.1983, c.17 (C.9:17-47) and pursuant to section 9 of P.L.1977, c.367 (C.9:3-45).

APPENDIX B: 2018 BILL TEXT N.J. A.B. 1704

6. (New section) Requirements for a Gestational Carrier Agreement.

a. A gestational carrier agreement shall satisfy the following requirements:

(1) It is in writing and executed by the gestational carrier, her spouse or partner in a civil union or domestic partnership, if any, and each intended parent. If the intended parent is married or in a domestic partnership or civil union at the time the intended parent enters the agreement, both spouses or partners shall meet the requirements of subsection b. of section 5 of P.L. , c. (C.)(pending before the Legislature as this bill) and shall be required to enter into the agreement as intended parents. If the intended parent is not married or in a civil union or domestic partnership, no other person shall be deemed a legal parent of the child unless that person meets the requirements of subsection b. of section 5 of P.L. , c. (C.)(pending before the Legislature as this bill) and duly executes the agreement;

(2) It is executed after the required medical and psychological screenings of the gestational carrier and the psychological screening of the intended parent, but prior to the commencement of any other necessary medical procedures in furtherance of the implantation of the pre-embryo; and

(3) The gestational carrier and her spouse or partner, if any, and the intended parent shall have been represented by separate attorneys in all matters relating to the gestational carrier agreement and each attorney provides an affidavit of such representation.

b. A gestational carrier agreement shall provide:

(1) Express terms that the gestational carrier shall:

(a) Undergo pre-embryo transfer and attempt to carry and give birth to the child;

(b) Surrender custody of the child to the intended parent immediately upon the child's birth; and

(c) Have the right to medical care for the pregnancy, labor, delivery, and postpartum recovery provided by a physician, physician assistant, advance practice nurse, or certified nurse midwife of her choice, after she notifies, in writing, the intended parent of her choice;

(2) An express term that, if the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child's birth; and

(3) Express terms that the intended parent shall:

(a) Accept custody of the child immediately upon the child's birth; and

(b) Assume sole responsibility for the support of the child immediately upon the child's birth.

c. A gestational carrier agreement shall be presumed enforceable if:

(1) It satisfies the contractual requirements set forth in subsection a. of this section; and

(2) It contains at a minimum each of the terms set forth in subsection b. of this section.

In addition, an enforceable gestational carrier agreement shall include a provision setting forth the financial responsibilities of the parties and shall include a provision that the intended parent shall pay the gestational carrier's reasonable expenses, as defined herein, unless expressly waived, in whole or in part, in writing by the gestational carrier.

d. In the event that any of the requirements of this section are not met, a court of competent jurisdiction shall determine parentage based on the parties' intent.

APPENDIX C: SURROGACY PARENTAGE AND ENFORCEABILITY IN THE UNITED STATES, BY STATE

Alabama

Permitted because no statute or published case law prohibits it.

Alaska

Permitted because no statute or published case law prohibits it.

Arizona

Permitted. *Soos v. Superior Court*, 182 Ariz. 470, 475 (Ariz. Ct. App. 1994) (holding ARIZ. REV. STAT. ANN. § 25-218 (2017) in violation of the Equal Protection Clause and, therefore, unconstitutional).

Arkansas

ARK. CODE ANN. § 9-10-201 (West 2017). Permitted.

(c)(1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married;

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(c)(2) For birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

California

CAL. FAM. CODE §§ 7960–62 (West 2018). Permitted.

Colorado

Permitted because no statute or published case law prohibits it.

Connecticut

CONN. GEN. STAT. § 7-48a (West 2017). Permitted.

(b) If the birth is subject to a gestational agreement, the Department of Public Health shall create a replacement certificate of birth immediately upon: (1) Receipt of a certified copy of an order of a court of competent jurisdiction approving a gestational agreement and issuing an order of parentage pursuant to such gestational agreement, if such order is received by the department after the birth of the child, or (2) the filing of an original certificate of birth, if such order is received by the department prior to the birth of the child.

Delaware

DEL. CODE ANN. tit. 13 §§ 8-801–8-810 (West 2013).

§ 8-802(a) The purpose of this subchapter is to establish consistent standards and procedural safeguards for the protection of all parties to a gestational carrier agreement in this State and to confirm the legal status of children born as a result of these agreements.

§ 8-804 A gestational carrier is not a parent of a child born as a result of a gestational carrier arrangement.

District of Columbia

D.C. CODE § 16-407 (West 2018). Permitted.

(a)(1) In the case of a child born by a gestational surrogate, an intended parent or parents shall be the parent or parents of the child and have all rights under District law, regardless of whether the intended parent or parents has a genetic relationship to the child.

Florida

FLA. STAT. § 742.15 (West 2017). Permitted with restrictions.

(1) Prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate. 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.

Georgia

Permitted because no statute or published case law prohibits it.

Hawaii

Permitted because no statute or published case law prohibits it.

Idaho

Permitted because no statute or published case law prohibits it. Per case law, the non-genetic parent must adopt.

Illinois

750 ILL. COMP. STAT. § 47 / 1–47 / 75 (West 2017). Permitted.

§ 47 / 15 (b) In the case of a gestational surrogacy satisfying the requirements set forth in subsection (d) or this Section:

(1) the intended mother shall be the mother of the child for purposes of State law immediately upon the birth of the child;

(2) the intended father shall be the father of the child for purposes of State law immediately upon the birth of the child;

(3) the child shall be considered the legitimate child of the intended parent or parents for purposes of State law immediately upon the birth of the child;

* * *

(6) neither the gestational surrogate nor her husband, if any, shall be the parents of the child for purposes of State law immediately upon the birth of the child.

Indiana

IND. CODE ANN. § 31-20-1-1 (LexisNexis 2017). Prohibited.

The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:

(1) Provide a gamete to conceive a child.

(2) Become pregnant.

* * *

(6) Waive parental rights or duties to a child.

(7) Terminate care, custody, or control of a child.

Iowa

IOWA CODE § 710.11 (West 2017). Permitted.

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

Kansas

Permitted because no statute or published case law prohibits it.

Kentucky

Permitted because no statute or published case law prohibits it.

Louisiana

LA. STAT. Ann. § 9:2718 (2016). Permitted with restrictions.

§ 2718 The Legislature finds that it is desirable to assure that the intended parents of every child born through the use of assisted reproductive technology be legal and biological parents of the child. Accordingly, in regulating gestational surrogacy agreements by means of this part, the Legislature has restricted the range of enforceable gestational surrogacy agreements to those in which the parties who engage the gestational surrogate not only are married to each other, but also create the child using only their own gametes.

Maine

ME. STAT. tit. 19-A, § 1851 (2017). Permitted.

Parentage may be established by: . . . 8. Gestational carrier agreement. Consent to a gestational carrier agreement under subchapter 8 by the intended parent or parents.

Maryland

Permitted. *In re Roberto D.B.*, 399 Md. 267, 270 (2007) (reversing the Circuit Court for Montgomery County holding that "the name of a genetically unrelated gestational host of a fetus, with whom the appellant contracted to carry *in vitro* fertilized embryos to term, be listed as the mother on the birth certificate, when, as a result, children are born").

Massachusetts

Permitted. *R.R. v. M.H.*, 426 Mass. 501, 512 (1998) ("We recognize that there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife. We suspect that many such arrangements are made and carried out without disagreement.

If no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father's custody of the child unless she consents after a suitable period has passed following the child's birth, the objections we have identified in this opinion to the enforceability of a surrogate's consent to custody would be overcome."). *Culliton v. Beth Israel Deaconess Med. Ctr.*, 435 Mass. 285, 287 (2001) ("We also conclude that . . . a judgment should enter declaring the plaintiffs are the legal parents of the children, and ordering the hospital, through its reporters, to place the plaintiffs' names on all 'record[s] of birth' . . . listing the plaintiffs as the mother and father, respectively, of the children.").

Michigan

MICH. COMP. LAWS § 722.851–859. Prohibited.

§ 722.855 A surrogate parentage contract is void and unenforceable as contrary to public policy.

§ 722.859(2) A participating party other than an unemancipated minor female or a female diagnosed as being intellectually disabled or as having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment for not more than 1 year, or both.

Minnesota

Permitted because no statute or published case law prohibits it.

Mississippi

Permitted because no statute or published case law prohibits it.

Missouri

Permitted because no statute or published case law prohibits it.

Montana

Permitted because no statute or published case law prohibits it.

Nebraska

NEB. REV. STAT. § 25-21, 200 (West 2017). Prohibited.

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

Nevada

NEV. REV. STAT. §§ 126.500-126.810 (West 2017). Permitted.

§ 126.720(1)(a) If a gestational carrier agreement satisfies the requirements of NRS § 126.740 and § 126.750: The intended parent or parents shall be considered the parent or parents of the resulting child immediately upon the birth of child . . . (e) Neither the gestational carrier nor her legal spouse or domestic partner, if any, shall be considered the parent of the resulting child.

New Hampshire

N.H. REV. STAT. ANN. §§ 168-B:1–B:22 (2018). Permitted.

§ 168-B:5 Neither a gestational carrier nor her spouse or partner, if any, shall be a parent of a child conceived as a result of assisted reproduction and a gestational carrier arrangement.

§ 168-B:7 A child conceived as a result of assisted reproduction and a gestational carrier arrangement shall be the child solely of the intended parent or parents. The parental rights of physical custody shall vest with the intended parent or parents immediately upon the birth of the child.

New Jersey

N.J. STAT. ANN. §§ 9:17-38–68 (West 2019). Permitted.

A.H.W and P.W. v. G.H.B. and *In re T.J.S.* compensated gestational carrier arrangements are unenforceable.

New Mexico

N.M. STAT. ANN. § 40-11A-801 (West 2019). Neither authorized nor prohibited.

(A) The New Mexico Uniform Parentage Act does not authorize or prohibit an agreement between a woman and the intended parents:

(1) in which the woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction; and

(2) that provides that the intended parents become the parents of the child.

New York

N.Y. DOM. REL. LAW § 122 (2019). Prohibited.

Surrogate parenting contracts are hereby declared contrary to public policy of this state, and are void and unenforceable.

§ 123(2)(a) A birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars.

North Carolina

Permitted because no statute or published case law prohibits it.

North Dakota

N.D. CENT. CODE §§ 14-18-01–09 (West 2017). Permitted.

§ 14-18-08 A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any.

Ohio

Permitted. *J.F. v. D.B.*, 879 N.E.2d 740, 741–42 (Ohio 2007) ("We conclude, therefore, that Ohio does not have an articulated public policy against gestational-surrogacy contracts. Consequently, no public policy is violated when a gestational-surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman's artificially inseminated egg.").

Oklahoma

Permitted because no statute or published case law prohibits it.

Oregon

Permitted because no statute or published case law prohibits it.

Pennsylvania

Permitted because no statute or published case law prohibits it.

Rhode Island

Permitted because no statute or published case law prohibits it. All petitions are heard by the Chief Justice of Family Court in Providence.

South Carolina

Permitted because no statute or published case law prohibits it. *Mid-South Ins. Co. v. Doe*, 274 F. Supp. 2d 757 (2003) (implied parentage and enforceability).

South Dakota

Permitted because no statute or published case law prohibits it.

Tennessee

TENN. CODE ANN. § 36-1-102(50) (West 2017). Neither authorized nor prohibited.

(A)(i-ii) Defines "Surrogate birth."

(C) Nothing in this subdivision (50) shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly.

Texas

Tex. Fam. Code §§ 160.751–160.763 (West 2017). Permitted with restrictions.

§ 160.755 Requires gestational agreements be validated before a court.

Utah

UTAH CODE ANN. §§ 78B-15-801–809 (West 2017). Permitted.

§ 78B-15-807 (1) Upon birth of a child to a gestational mother, the intended parents shall file notice with the tribunal that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the tribunal shall issue an order:

(a) confirming that the intended parents are the parents of the child;

(b) if necessary, ordering that the child be surrendered to the intended parents; and

(c) directing the Office of Vital Records to issue a birth certificate naming the intended parents as parents of the child.

Vermont

Permitted because no statute or published case law prohibits it.

Virginia

VA. CODE ANN. § 20-159 (West 2017). Permitted.

(A) A surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child as provided in subsection D or E of § 20-158.

(B) Surrogacy contracts shall be approved by the court as provided in § 20-160. However, any surrogacy contract that has not been approved by the court shall be governed by the provisions of §§ 20-156 through 20-159 and §§ 20-162 through 20-165 including the provisions for reformation in conformance with this chapter as provided in § 20-162.

Washington

WASH. REV. CODE ANN. §§ 26.26.210–26.26.260 (West 2019). Prohibition of compensated agreements.

§ 26.26.230 No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.

§ 26.26.250 Any person, organization, or agency who intentionally violates any provision of RCW §§ 26.26.210 through 26.26.260 shall be guilty of a gross misdemeanor.

West Virginia

W. VA. CODE § 61-2-14h (West 2018). Permitted.

(a) Any person or agency who knowingly offers, gives or agrees to give to another person money, property, service or other thing of value in consideration for the recipient's locating, providing or procuring a minor child for any purpose which entails a transfer of the legal or physical custody of said child, including, but not limited to, adoption or placement, is guilty of a felony and subject to fine and imprisonment as provided in this section.

(e)(3) This section does not prohibit the payment or receipt of the following: Fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.

Wisconsin

Permitted unless contrary to child's best interest. *Rosecky v. Schissel*, 833 N.W.2d 634, 642 (Wis. 2013) ("Aside from the termination of parental rights provisions in the [Parentage Agreement] at issue, we conclude a

[Parentage Agreement] is a valid, enforceable contract unless enforcement is contrary to the best interests of the child.")

Wyoming

WYO. STAT. ANN. § 14-2-403 (West 2017). Neither authorized nor prohibited.

(d) This act does not authorize or prohibit an agreement between a woman and a man and another woman in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the man and the other woman become the parents of the child. If a birth results under such an agreement and the agreement is unenforceable under Wyoming law, the parent-child relationship is determined as provided in article 4 of this act.