"There's No Wrong Way to Make a Family"[1]: Surrogacy Law and Pennsylvania's Need for Legislative Intervention

SaraAnn C. Bennett*

Abstract

Surrogacy is an alternative reproductive technology that provides persons unable to have children of their own the means to create life. The use of surrogacy arrangements has skyrocketed over the past 20 years. The law, however, has not advanced as quickly. Because of the ethical implications of having a mother gestate a child for another person, along with the challenge surrogacy arrangements provide to traditional notions of parentage, the majority of state legislatures have shied away from taking a clear position on this controversial issue. As such, many courts are left to decide the legal parentage of children born from surrogacy arrangements without any legislative or judicial guidance, resulting in uncertainty for the parties hoping to participate in and the children created from surrogacy arrangements.

This Comment discusses the current state of surrogacy law in the United States and the need for legislative intervention in Pennsylvania, specifically. The Comment recommends that Pennsylvania adopt a statute that treats surrogacy arrangements as enforceable contracts and provides a procedure through which surrogate contract parties can vest parentage rights and custody in the intended parents. The adoption of such a statute would protect the best interests of the surrogate carriers, the intended parents, and, most importantly, the children.

1. BABY MAMA (Universal Pictures 2008).

* J.D. Candidate, The Pennsylvania State University, The Dickinson School of Law, 2014; B.A., Columbia University, 2009. I would like to thank my friends and colleagues on the *Penn State Law Review* who helped me throughout this process, my family—particularly my mother and father—who have been my biggest and most encouraging fans, and my friends who have kept me grounded and self-aware in the most positive way. I would not have been able to do this without their support and encouragement.

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In 2002, Danielle Bimber entered into a surrogacy contract with James Flynn in which she agreed to gestate a child for Flynn and his infertile partner.[2] Pursuant to the contract, Bimber was impregnated through in vitro fertilization[3] with a donor's egg and Flynn's sperm.[4] Bimber bore a set of triplet boys ("the triplets") on November 19, 2003.[5]

2. J.F. v. D.B., 897 A.2d 1261, 1266 (Pa. Super. Ct. 2006).

3. In vitro fertilization is "the procedure whereby an egg is fertilized by sperm outside of a woman's body and the resulting embryo is then implanted into a woman's uterus for gestation." *In re* Parentage of a Child by T.J.S. & A.L.S., 16 A.3d 386, 388 n.1 (N.J. Super. Ct. App. Div. 2011) (quoting STEDMAN'S MEDICAL DICTIONARY 573 (25th ed. 1990)) (internal quotation marks omitted).

4. *J.F.*, 897 A.2d at 1266.

5. *Id.* at 1267.

In violation of the surrogacy agreement, however, Bimber refused to transfer custody of the triplets to Flynn due to a change of heart.[6]

In December 2003, Flynn initiated a custody dispute against Bimber in the Court of Common Pleas of Erie County, Pennsylvania, seeking sole custody of the triplets.[7] Bimber filed an answer and counterclaimed for custody.[8] The Superior Court did not settle the custody dispute until 2006, when it awarded custody to Flynn and declared him the legal parent of the triplets.[9]

The Bimber-Flynn agreement and subsequent litigation highlight serious deficiencies in Pennsylvania law with regard to how the Commonwealth addresses the validity and enforceability of surrogacy contracts. The difficulties associated with enforcing surrogacy agreements, however, are not unique to Pennsylvania.

Surrogacy is an alternative reproductive technology ("ART") that gives persons unable to bear children of their own the means to achieve parenthood.[10] The use of surrogacy arrangements as an effective means of ART has almost doubled over the past ten years.[11] The law governing surrogacy contracts, however, has not advanced as quickly. There is no federal regulation of surrogacy arrangements; instead, such regulation has been left to the states.[12] Nonetheless, few states have unambiguously addressed the validity of surrogacy arrangements despite the complexity of parentage issues that arise from surrogacy contracts,[13] the interstate

6. *Id.* at 1268–69.

7. J.F. v. D.B., 66 Pa. D. & C.4th 1, 3 (C.P. 2004).

8. Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1, 9 (2008).

9. *See J.F.*, 897 A.2d at 1281.

10. *See* Nolo's Plain-English Law Dictionary, *Alternative Reproduction Technology (Art) Definition*, NOLO, http://bit.ly/VFxEa8 (last visited Nov. 4, 2013) (defining ART as "[a] general term for a collection of methods for conceiving children through medical technology, including in vitro fertilization, ovum donation, donor insemination, and other techniques"). ART provides infertile couples and single persons who want to become parents with "new and unique" ways to do so. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567, § 2a (2000).

11. *See* MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), *available at* http://bit.ly/T5wEy3.

12. Federal regulation of surrogacy arrangements is ideal in that it would create clarity on the issue and uniformity between jurisdictions. That topic, however, is beyond the scope of this Comment and previously has been addressed. *See generally* Emily Gelmann, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159 (2011).

13. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 859–66 (2000) (explaining that technological advancements in baby-making, particularly with respect to surrogacy, have made parentage determinations increasingly difficult because of the

commercial nature of these transactions,[14] and the growing popularity of these contracts.[15] In states where a statutory void exists, courts are left to determine in whom parentage rights vest.[16] In Pennsylvania, however, though the General Assembly has left such a void, the courts have refused to address the validity of surrogacy contracts absent a clear legislative mandate.[17] Therefore, the Pennsylvania General Assembly needs to enact a statute that clearly addresses the validity of surrogacy contracts and, more specifically, in whom parentage rights vest in surrogacy arrangements.

This Comment will provide an in-depth examination of the current status of surrogacy law in the United States to illustrate the need for reform in Pennsylvania. Part II will discuss the legislative approaches to surrogacy arrangements and the judicial interpretations of parentage rights resulting from surrogacy arrangements. Part III will discuss Pennsylvania's common law, legislative, and jurisprudential framework that bears on parentage rights arising from surrogacy arrangements. Part IV will explain why Pennsylvania should adopt a statute which (1) validates and enforces surrogacy contracts and (2) provides a procedure by which legal parentage of the children born pursuant to surrogacy

contractual nature of such arrangements vis-à-vis competing principles of parentage law that originate from the traditional means of conception through sexual intercourse). The differing ways in which courts have addressed surrogacy arrangements demonstrate the tension between contract law and family law principles. *Compare* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (implementing contract law principles to hold that the intent of the parties at the time they entered the surrogacy agreement determined who were the children's legal parents), *with In re* Baby M, 537 A.2d 1227, 1243 (N.J. 1988) (declining to allow a carrier to abandon her parental rights in a surrogacy contract by claiming contractual obligations because doing so violated New Jersey's public policy that prohibits parents from bargaining away their parental obligations).

14. *See* Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 301 (2007) (explaining that the "severity of discrepancies in each state's legislative scheme and the absence of state statutory systems" paired with the ability to utilize the Internet as a means to match surrogates, donors, and intended parents living across the United States "creates business across state boundaries and causes direct jurisdictional conflicts").

15. *See* COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:2 (2012), *available at* Westlaw LGFAMLAW.

16. *See, e.g.*, *Johnson*, 851 P.2d at 784–85 ("We are all too aware that the proper forum for resolution of this issue is the Legislature . . . . However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences."); Belsito v. Clark, 644 N.E.2d 760, 763–64 (Ohio Ct. Com. Pl. 1994) (explaining that because Ohio's legal framework did not address parentage rights resulting from surrogacy arrangements and because of the technological advancements that made surrogacy a commonly used form of ART, the court needed to create precedent that addressed the issue).

17. J.F. v. D.B., 897 A.2d 1261, 1265 (Pa. Super. Ct. 2006) (refusing to rule on the validity of gestational surrogacy contracts because "[t]hat task is for the legislature[,]" and instead ruling on other grounds).

contracts vests in the intended parents. Part V will provide a conclusion to the issues presented in this Comment.

II. THE WHOS, WHATS, WHYS, AND WHERES OF SURROGACY LAW IN THE UNITED STATES

For the purposes of this Comment, the relevant parties in a typical surrogacy arrangement are: (1) the intended parent or parents;[18] (2) the providers of genetic material,[19] meaning the egg donor and/or sperm donor; and (3) the surrogate carrier ("carrier").[20] These parties can participate in either traditional or gestational surrogacy arrangements.[21] A traditional surrogacy arrangement occurs when the carrier's own egg is fertilized by sperm provided by a donor or the intended father through artificial insemination.[22] In this relationship, the carrier and the sperm provider are genetically related to the child produced.[23] Even though the carrier is genetically related, however, as a traditional surrogacy carrier, she will give the child to the intended parents upon the child's birth.[24] Gestational surrogacy arrangements, on the other hand, are those in which a carrier conceives via in vitro fertilization using genetic materials provided by donors and/or the intended parents.[25] Unlike the children produced from a traditional surrogacy where the carrier's own egg is

18. An intended parent is a party who enters into a surrogacy agreement "with the intention of becoming the legal parent of any resulting child." Raftopol v. Ramey, 12 A.3d 783, 784 n.1 (Conn. 2011). Intended parents can be single, *see, e.g.*, 750 ILL. COMP. STAT. 47/10 (West, Westlaw through 2013 Pub. Act No. 98-589) (defining "intended parent" as "a *person* or persons who enter into a gestational surrogacy contract . . ." (emphasis added)), or in heterosexual or homosexual relationships. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005) (holding that under California's Uniform Parentage Act, a child may have two parents, both of whom are women).

19. The donor's genetic material is also known as a "gamete." A gamete is "[a] cell that participates in fertilization and development of a new organism . . . ." *Johnson*, 851 P.2d at 777 n.2 (Cal. 1993) (citing MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 2087 (4th ed. 1989)).

20. *See generally* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) (noting the potential for eight possible legal "parents" in a gestational surrogacy arrangement, including the intended mother and father, the carrier and her spouse, the egg donor and her spouse, and the sperm donor and his spouse).

21. Gelmann, *supra* note 12, at 160–61.

22. Campbell, *supra* note 10, § 2a.

23. Gelmann, *supra* note 12, at 161.

24. *Id.* In *In re Baby M*, 537 A.2d 1227 (N.J. 1988), the carrier entered into a traditional surrogacy arrangement with the intended parents wherein the carrier's own egg was fertilized by the intended father's sperm through in vitro fertilization. *In re Baby M*, 537 A.2d at 1235. Upon the child's birth, the carrier refused to give up the child to the intended parents. *Id.* at 1237. As the Comment will later discuss, the *Baby M* court determined that the carrier was the legal mother of the child. *Id.* at 1234; *see also infra* Part II.B.1.

25. Campbell, *supra* note 10, § 2a.

fertilized, gestational surrogacy offspring are not genetically related to the carrier.[26] Three variations of gestational surrogacy arrangements exist:[27] (1) a carrier is impregnated with the intended parents' genetic materials;[28] (2) a carrier, who also can be the intended mother,[29] is impregnated with a donor's egg that has been fertilized with the intended father's sperm;[30] or (3) a carrier gestates an embryo made from donors' egg and sperm for genetically unrelated intended parents.[31]

Today, due to "society's moral outcry"[32] against the idea of intended parents paying biological mothers to sacrifice the parentage and custody rights to their genetically related children,[33] gestational surrogacy arrangements are more prevalent than traditional ones.[34]

Regardless of whether there is a traditional or gestational surrogacy arrangement, a commercial element to the transaction often exists. A commercial surrogacy arrangement is "a contractual relationship where compensation is paid[35] to a surrogate [by the intended parent(s)] . . . in exchange for the surrogate's gestational services."[36] In such contracts, carriers typically agree to surrender their parentage and custody rights of

26. *See id.*

27. *Id.*

28. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

29. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 478 (App. Div. 1994) (explaining that the carrier, who was also the intended mother, was impregnated through in vitro fertilization with the zygote made from the carrier's husband's sperm and an anonymous donor's egg).

30. *See, e.g.*, J.F. v. D.B., 897 A.2d 1261, 1266 (Pa. Super. Ct. 2006).

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

32. Gelmann, *supra* note 12, at 161.

33. *See* Newtothis, *Comment to How Are the OLDER CHILDREN of Traditional Surrogacy Doing??*, SURROGATEMOTHERSONLINE.COM (July 27, 2010, 8:17 AM), http://bit.ly/VFNHEY. In response to criticism of traditional surrogacy, a traditional carrier stated the following: "I didn't give 'MY' kids away for money, I created a child for someone else. I never have looked at my TS [traditional surrogacy] babies as 'just eggs' and I also don't pretend they aren't biologically related to me. . . . I see only love, not a commodity or sale." *Id.* Another traditional surrogacy carrier described traditional surrogacy as "incredibly painful" and proposed a list of ways intended parents could alleviate the suffering of traditional carriers after the child's birth. HopefulSM, *Comment to For the IP's via TS*, SURROGATEMOTHERSONLINE.COM (Jan. 18, 2009, 10:46 AM), http://bit.ly/ZpDmCO. *But see* Brian C., THE SON OF A SURROGATE (Aug. 9, 2006), http://bit.ly/1bgrJl0 (explaining that as a product of a traditional surrogacy arrangement, he felt betrayed by his genetic mother (the traditional carrier) and believed that he was treated as a commodity and not as a human being).

34. *See* Gelmann, *supra* note 12, at 161. Some courts have rejected the validity of traditional surrogacy arrangements on public policy grounds. *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988); *see also infra* Part II.B.1.

35. *But see, e.g.*, WASH REV. CODE § 26.26.230 (2013) ("No person, organization, or agency shall enter into, into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.").

36. Drabiak et al., *supra* note 14, at 301.

the children to the intended parents upon birth of the children.[37] Disputes arise when parties to surrogacy contracts challenge the legal parentage of the children produced pursuant to the contracts.[38] Courts must determine legal parentage in other contexts as well, including in such circumstances when the carrier does not seek legal parentage.[39]

States address the regulation of surrogacy arrangements in one of three ways: (1) by statute; (2) through state court adjudication; or (3) absent legislative mandate, by courts refusing to address the issue. The following discusses the existing ways in which states address surrogacy arrangements.

A. Legislative Approaches to Surrogacy Arrangements

Despite the growing popularity of surrogacy as an alternative means of reproduction,[40] only 18 state legislatures have enacted statutes that explicitly address surrogacy arrangements.[41] The 18 different statutes can be separated into three basic approaches[42]: prohibition,[43] inaction,[44]

37. *See, e.g.*, J.F. v. D.B., 897 A.2d 1261, 1266 (Pa. Super. Ct. 2006) (explaining that the gestational carrier and egg donor agreed to relinquish all custody rights to the intended father).

38. *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (discussing how the intended parents, who were also the genetic parents, sought a declaration from the court stating that they were the legal parents of the unborn child when disputes arose between them and the gestational carrier); *J.F.*, 897 A.2d at 1270 (discussing how the gestational carrier attempted to terminate parentage rights of the biological mother after birth of triplets).

39. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (holding that intended but genetically unrelated parents were legal parents for purposes of the child support payments required as a result of the intended parents' divorce); McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (App. Div. 1994) (holding that the intended mother, although genetically unrelated to the children, was their legal mother and her claim in the custody dispute was equal to that of her ex-husband, who was genetically related to the children).

40. *See* Kate Zernike, *Court's Split Decision Provides Little Clarity on Surrogacy*, N.Y. TIMES, Oct. 24, 2012, http://nyti.ms/Wcu1wv. Gestational surrogacy has become so mainstream that over 1,100 children are born from these arrangements each year, and celebrities such as Sarah Jessica Parker and Mitt Romney's son, Tagg, have spoken publicly about utilizing this form of ART. *Id.*

41. JOSLIN & MINTER, *supra* note 15, § 4:2.

42. A fourth approach exists, known as "contractual ordering." Contractual ordering uses contract law to resolve disputes arising from surrogacy contracts. Gelmann, *supra* note 12, at 166. This approach, however, will not be discussed further for purposes of this Comment. This Comment characterizes contractual ordering as the intent-based judicial approach in Part II.B.3 *infra*.

43. *See, e.g.*, N.Y. DOM. REL. LAW § 122 (Consol. 2009).

44. *See, e.g.*, LA. REV. STAT. ANN. § 9:2713 (West, Westlaw through 2013 Reg. Sess.).

and status regulation.[45] The following discusses these three approaches and the various legal challenges that have been made to these laws.

1. How Have Legislatures Addressed Surrogacy Arrangements?

The first and most restrictive legislative approach to surrogacy arrangements is a prohibition statute. A prohibition statute expressly invalidates all forms of surrogacy contracts.[46] Specifically, traditional and gestational contracts are deemed void and unenforceable even if the intended parents do not compensate the carrier.[47] Thus, in a custody dispute arising from a surrogacy contract in a prohibition state, the contract has no legal effect and courts will refuse to enforce its terms.[48] The courts then determine legal parentage status based on the best interests of the child.[49]

The next, more permissive approach is an inaction statute. Unlike jurisdictions that void all types of surrogacy contracts, states that have inaction statutes expressly prohibit *some* types of surrogacy contracts, but leave open the possibility that courts will uphold others if challenged.[50] Three states have inaction statutes: Kentucky,[51] Nebraska,[52] and Louisiana.[53] Louisiana and Nebraska prohibit all types of compensated surrogacy arrangements.[54] Alternatively, Kentucky

45. *See, e.g.*, FLA. STAT. §§ 742.11–.17 (2013).

46. Gelmann, *supra* note 12, at 166. Some prohibition statutes impose civil and/or criminal penalties on those persons who participate in the formation of surrogacy arrangements. *See, e.g.*, D.C. CODE § 16-402(b) (2013) (imposing a maximum penalty of $10,000 or one year in jail or both on anyone who violates the prohibition statute).

47. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(A) (West, Westlaw through 2013–2014 Reg. Sess. & 1st Spec. Sess.) ("No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract."), *declared unconstitutional by* Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994); D.C. CODE § 16-402(a) ("Surrogate parenting contracts are prohibited and rendered unenforceable in the District."); MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through 2013 Reg. Sess.) ("A surrogate parenting contract is void and unenforceable as contrary to public policy.").

48. *See* sources cited *supra* note 47.

49. IND. CODE § 31-20-1-3 (2013) (prohibiting the court from using the carrier's involvement in the disputed surrogacy arrangement against her in a parenthood determination based on the best interests of the child); MICH. COMP. LAWS ANN. § 722.861 (West, Westlaw through 2013 Pub. Act No. 119) ("The circuit court shall award legal custody of the child based on a determination of the best interests of the child."); N.Y. DOM. REL. LAW § 124 (West, Westlaw through 2013 Ch. 340) (commentary).

50. *See* JOSLIN & MINTER, *supra* note 15, § 4:2.

51. KY. REV. STAT. ANN. § 199.590 (West, Westlaw through 2013 Reg. Sess.).

52. NEB. REV. STAT. § 25-21,200 (2008).

53. LA. REV. STAT. ANN. § 9:2713 (West, Westlaw through 2013 Legis. Sess.).

54. *See* LA. REV. STAT. ANN. § 9:2713 (Westlaw) (stating that any surrogacy whereby "valuable consideration" is paid to a carrier is void and unenforceable); NEB. REV. STAT. § 25-21,200 (stating that any contract that compensates a woman for bearing

invalidates only compensated traditional surrogacy arrangements.[55] Unlike prohibition statutes, no inaction statute imposes civil or criminal penalties on those who violate it; instead, the statutes only void the contract.[56]

The most permissive category of legislative approaches is the status regulation statute. Status regulation statutes explicitly allow at least one type of surrogacy contract.[57] Similar to inaction jurisdictions, however, status regulation statutes can also expressly void other types of surrogacy contracts.[58] Ten states have status regulation statutes,[59] and there are various ways in which those states' legislatures have chosen to restrict the surrogacy alternatives permitted.[60] Some states limit enforceable surrogacy contracts to situations in which the intended parents are married.[61] Others require that at least one intended parent[62] provide the genetic material for the surrogacy. Although the majority of states that regulate surrogacy have status regulation statutes, little uniformity exists between these statutes.[63]

2. Are the Legislatures' Actions Constitutional?

Statutory regulations of surrogacy arrangements have been challenged on constitutional grounds with varying degrees of success. In *Soos v. Superior Court*,[64] the Arizona Court of Appeals declared the state's prohibition statute[65] unconstitutional on equal protection

a child of a man who is not her husband and sacrificing her parental rights is void and unenforceable).

55. *See* KY. REV. STAT. ANN. § 199.590(4) (Westlaw) (prohibiting persons from participating in contracts that compensate mothers who agree to be artificially inseminated and subsequently to terminate their parental rights to the resulting child).

56. *See* Gelmann, *supra* note 12, at 166.

57. *See* JOSLIN & MINTER, *supra* note 15, § 4:2.

58. *See, e.g.*, N.D. CENT. CODE ANN. §§ 14-18-01, -05, -08 (West, Westlaw through 2013 Reg. Sess.); VA. CODE ANN. §§ 20-156 to -165 (West, Westlaw through 2013 Reg. Sess. & 1st Spec. Sess.) (allowing uncompensated surrogacy arrangements but prohibiting compensated ones). The North Dakota legislature voided traditional surrogacy contracts but explicitly established parental rights in the intended parents when a child produced from the intended parents' gametes is born to a carrier in a gestational surrogacy arrangement. *See* N.D. CENT. CODE ANN. §§ 14-18-05, -08 (Westlaw).

59. *See, e.g.*, ARK. CODE ANN. § 9-10-201 (2009).

60. JOSLIN & MINTER, *supra* note 15, § 4:2.

61. *See, e.g.*, FLA. STAT. § 742.15(1) (2013).

62. *See, e.g.*, *id.* § 742.13(6); 750 ILL. COMP. STAT. 45/6(a)(1)(E) (West, Westlaw through 2013 Pub. Act No. 98-450); N.H. REV. STAT. ANN. § 168-B:17(III) (West, Westlaw through 2013 Reg. Sess.); UTAH CODE ANN. § 78B-15-801(5) (2013); VA. CODE ANN. § 20-160(B)(9) (Westlaw).

63. *See* JOSLIN & MINTER, *supra* note 15, § 4:2.

64. Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994).

65. ARIZ. REV. STAT. ANN. § 25-218 (West, Westlaw through 2013–2014 Reg. Sess. & 1st Spec. Sess.). Arizona's prohibition statute voided surrogacy contracts and

grounds.[66] Noting that the statute made a gender-based distinction that affected fundamental liberty interests,[67] the court used a strict scrutiny analysis[68] to hold that the statute "denied . . . equal protection of the laws" to birth mothers by allowing husbands to rebut the presumption of paternity but not providing gestational mothers any means to prove maternity.[69] Similarly, in *J.R. v. Utah*,[70] the U.S. District Court for the District of Utah found Utah's prohibition statute[71] unconstitutional as applied to intended parents who were genetically related to the child born of a gestational surrogacy arrangement.[72] The court dertermined that the statute denied the genetic parents legal recognition of their "fundamental rights as parents to raise the children they ha[d] conceived."[73] Further, the *J.R.* court drew upon the reasoning in *Soos* to hold that it was unconstitutional on equal protection grounds[74] to conclusively establish legal motherhood in the carrier.[75] The disputed statute in *J.R.* has since been repealed[76] and replaced with a status regulation statute that permits some types of gestational surrogacy arrangements in Utah.[77]

established the birth mother as the legal mother of any children who resulted from a surrogacy contract. *Id.* § 25-218(B). If the carrier was married at the time of birth, the statute created a rebuttable presumption that her husband was the legal father. *Id.* § 25-218(C).

66. *Soos*, 897 P.2d at 1361.

67. *Id.* at 1360 (explaining that the matters of procreation and childbearing are fundamental liberty interests guaranteed by federal and state constitutions).

68. *Id.* A government can abridge fundamental rights only when the government demonstrates that a "compelling state interest" is achieved through the restriction and the "means are closely tailored" to achieve that interest. Doe v. Attorney General, 487 N.W.2d 484 (Mich. Ct. App. 1992) (citing Eisenstadt v. Baird, 405 U.S. 438, 463–64 (1972) (White, J., concurring)).

69. *Soos*, 897 P.2d at 1361.

70. J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002).

71. UTAH CODE ANN. § 76-7-204(3)(a) (repealed 2005) (stating that in any surrogate parenthood arrangement, "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes").

72. *See J.R.*, 261 F. Supp. 2d at 1296.

73. *Id.*

74. *Id.* at 1294 (explaining that the statute, as applied to the facts of the case, allows "M.R. [the genetically related father to] be listed as the father on the birth certificates of the children born to W.K.J. [the carrier], an unmarried woman, but J.R. [the genetically related mother] cannot be listed as their mother").

75. *Id.* ("This court is satisfied that *Soos* is well reasoned and that its conclusion is sound. The State may not close its eyes to the fact of a parental relationship simply because the parent happens to be a woman.").

76. *See* UTAH CODE ANN. § 76-7-204 (repealed 2005).

77. *See* UTAH CODE ANN. § 78B-15-801 (West, Westlaw through 2013 1st Spec. Sess.).

Despite the fact that Florida's legislature expressly permits gestational and traditional surrogacy arrangements,[78] in *T.M.H. v. D.M.T.*,[79] the Florida Court of Appeals deemed unconstitutional a provision of the gestational surrogacy statute that required all gamete donors to relinquish their parental rights to any children produced from gestational surrogacy arrangements.[80] Channeling the reasoning in *Soos*, the Florida court deemed the provision unconstitutional as applied to the facts of the case[81] because it impermissibly abridged the appellant's fundamental right to bear and raise children of her own.[82]

On the other hand, in *Doe v. Attorney General*,[83] the Michigan Court of Appeals held the Surrogacy Parenting Act[84] constitutional.[85] Michigan's Surrogacy Parenting Act prohibits all types of surrogacy arrangements.[86] The Michigan Court of Appeals determined that the statute regulated the fundamental right to procreate, but found that the Michigan legislature had "compelling government interest[s][87] sufficient to justify intrusion into [infertile couples' and prospective surrogate mothers'] right to procreate in the surrogacy context[.]"[88] As a result, Michigan courts are constitutionally permitted to invalidate surrogacy arrangements.[89] Due to the many variations of relationships to

78. *See* FLA. STAT. §§ 742.13-.15 (2013) (relating to gestational surrogacy); *id.* § 63.213 (relating to traditional surrogacy).

79. T.M.H. v. D.M.T, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011). A lesbian couple entered a gestational surrogacy arrangement wherein the appellant, one woman in the relationship, provided the ova that were used to gestate a child by the appellee, the other woman in the relationship. *Id.* at 788. Through this arrangement, the appellant was related to the child by genetics and the appellee was related to the child by birth. *See id.* The two women "intended to raise the child as a couple . . . ." *Id.* After the birth of their child, the mothers separated and a custody dispute ensued. *Id.* at 789.

80. *See id.* at 793 ("Interpretation and application of [FLA. STAT. § 742.14] by the trial court to deny Appellant parental rights to her child cannot withstand strict scrutiny and violates Appellant's constitutional rights to equal protection and privacy under the United States and Florida Constitutions." (footnotes omitted)).

81. *Id.* at 788. Application of FLA. STAT. § 742.14 would have required the appellant egg donor to sacrifice all of her parental rights to the child, despite the fact that not only was she genetically related to the child, but she had raised the child together with the appellee for two years before they separated. *Id.* at 789.

82. *Id.* at 792–93.

83. Doe v. Attorney General, 487 N.W.2d 484 (Mich. Ct. App. 1992).

84. MICH. COMP. LAWS ANN. §§ 722.851–.855 (West, Westlaw through 2013 Pub. Act No. 119).

85. *Doe*, 487 N.W.2d at 486.

86. MICH. COMP. LAWS ANN. §§ 722.851–.855 (Westlaw).

87. *Doe*, 487 N.W.2d at 486–87 (noting three compelling interests for the state's statutory prohibition of surrogacy: (1) to prevent children from being treated as commodities; (2) to maintain the best interests of the child; and (3) to prevent the exploitation of women).

88. *Id.* at 486.

89. *See id.*

which surrogacy statutes can apply and the varying court interpretations of what constitutes "compelling state interest[s]" sufficient to justify restrictions on constitutional guarantees,[90] these cases demonstrate the inherent difficulty legislatures encounter in addressing the validity of surrogacy arrangements.

Although these surrogacy statutes are a start to facilitating the ease with which courts deal with disputed contracts and the determination of parentage rights, states must provide greater clarity and consistency to withstand scientific advancements. Some courts have sought to fill the gaps created by the legislatures, but with mixed results.

B. Judicial Approaches to Parentage Rights in Surrogacy Arrangements

When legislatures do not address the validity of surrogacy contracts, and legal parentage resulting from such arrangements is in doubt, courts will often step in to provide guidance. Courts typically use one of three different standards to determine in whom parentage rights vest: (1) gestational motherhood;[91] (2) genetic relationship;[92] or (3) intent-based.[93]

1. Gestational Motherhood Standard

The gestational motherhood standard deems the woman who carries and gives birth to a child as that child's legal mother, regardless of any contract entered into stating otherwise.[94] Courts applying the gestational motherhood standard emphasize the traditional definition of mother[95] and the "gestational mother's contribution to the fetus growing inside her."[96]

The seminal case that brought surrogacy to the national spotlight is *In re Baby M*.[97] In *Baby M*, the New Jersey Supreme Court voided a compensated traditional surrogacy contract where the carrier's own egg

90. *Id.* at 437 (citing Eisenstadt v. Baird, 405 U.S. 438, 463 (1972) (White, J., concurring)).

91. *See generally, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

92. *See generally, e.g.*, Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).

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

94. Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 135–36 (2006).

95. *See* Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 605 (2009) (explaining that there is a "presumption of biology" in the mother who births a child, which the "ancient maxim *mater est quam demonstrat* (by gestation the mother is demonstrated)" illustrates (citation omitted) (internal quotation marks omitted)).

96. Sirola, *supra* note 94, at 136.

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

was fertilized with the intended father's sperm to produce a child for the intended father and his infertile wife.[98] The court invalidated the traditional surrogacy arrangement as contrary to public policy[99] and a violation of New Jersey's statutory framework.[100] In so doing, the court determined that parentage rights could not be relinquished through contract and thus declared the carrier the legal mother of the child.[101]

In *A.H.W. v. G.B.H.*,[102] the New Jersey Court of Appeals applied the gestational motherhood standard provided by the *Baby M* court to a gestational surrogacy arrangement where a carrier gestated a child created from the genetic materials of the intended parents.[103] The intended parents and the carrier sought a pre-birth order from the court that would allow the doctor to put the intended parents' names on the child's birth certificate.[104] The New Jersey Attorney General's Office opposed the request, claiming that a pre-birth order in this circumstance contradicted the public policy of the State of New Jersey.[105] Despite the unanimous support between the intended parents and the carrier for the pre-birth order, the New Jersey Court of Appeals determined that a carrier could not abdicate her parental rights to a child to whom she was genetically unrelated until 72 hours after the child's birth.[106] States that prohibit all forms of surrogacy justify this harsh invalidation approach on public policy grounds similar to those highlighted in the *Baby M* case.

98. *Id.* at 1234–35.

99. *Id.* at 1247–50 (equating compensated traditional surrogacy arrangements to baby-selling, and finding that these agreements completely disregard the best interests of the child, will be used for the benefit of the rich at the expense of the poor, and are "directly contrary" to New Jersey's laws).

100. *Id.* at 1240.

> The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

Id.

101. *Id.* at 1243–44.

> [I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract.

Id.

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

103. *Id.* at 949.

104. *Id.*

105. *Id.*

106. *Id.* at 953–54 (relying on New Jersey's adoption statute and the carrier's biological contribution "that determines how the child will grow" to come to this conclusion).

2. Genetic Relationship Standard

The genetic relationship standard states that those persons who are genetically related to the children born of a surrogacy arrangement are the natural and legal parents of those children.[107] This standard emphasizes that the traditional ideas of parenthood come from "common ancestry of genetic traits."[108] In *Belsito v. Clark*,[109] for example, the intended parents provided the genetic materials to the intended mother's sister who agreed to be the gestational carrier.[110] The Ohio court held that the genetic providers would be the legal parents of any child produced by their genetic material, unless the genetic providers expressly waived their parental rights to the child.[111]

Custody disputes between intended parents and carriers are not the only context in which courts utilize the genetic relationship approach in recognizing parentage rights.[112] A New York court found this standard persuasive in determining what parties would be named on the birth certificate of a child produced from a gestational surrogacy contract.[113] Following the *Baby M* decision, the New York legislature deemed surrogacy contracts void and unenforceable as a matter of public policy.[114] In 1998, however, the New York legislature's "Task Force in Life and Law" issued an Executive Summary stating that "the rights and responsibilities in gestational surrogacy arrangements should reflect both the genetic and gestational contributions to motherhood."[115] The Task Force recommended that "if both the genetic mother and the [carrier] mother agree, after the child is born, that the genetic mother should be recognized as the child's sole legal mother, the law should provide a mechanism for achieving that result efficiently, without the need for a formal adoption proceeding."[116] In evaluating the Task Force's

107. Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio Ct. Com. Pl. 1994).
108. *Id.* at 766.
109. Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).
110. *Id.* at 761.
111. *Id.* at 767 (noting that the parentage law recognizes that someone other than the natural parent may assume the same legal status as the genetic parent, which is an idea that should be applied when the gestational carrier wishes to raise the child she birthed, but only with the knowing relinquishment of rights by the genetic parents).
112. *See generally, e.g.*, T.V. v. N.Y. State Dep't of Health, 929 N.Y.S.2d 139 (App. Div. 2011).
113. *Id.* at 150 (holding that the trial court had authority to issue orders of maternity to the genetic mother in gestational surrogacy arrangements when the birth mother and genetic mother agreed that the genetic mother should hold legal parent status).
114. N.Y. DOM. REL. LAW § 122 (Consol. 2009); *see also T.V.*, 929 N.Y.S.2d at 144.
115. *T.V.*, 929 N.Y.S.2d at 144 (quoting STATE OF N.Y. DEP'T OF HEALTH, EXECUTIVE SUMMARY OF THE TASK FORCE ON LIFE AND LAW (1998), *available at* http://bit.ly/YJF0vp) (internal quotation marks omitted).
116. *Id.* (internal quotation marks omitted).

recommendations, the New York appellate court applied this variation of the genetic provider standard as an alternative means to establish legal parentage in undisputed surrogacy arrangements where the carrier agrees the genetic mother should be the only legal mother.[117]

Because the genetic motherhood standard determines parentage rights based on who is genetically related to the child in a surrogacy arrangement, it has significant shortcomings. Namely, in situations where children are produced from the gametes of anonymous donors, in a genetic relationship jurisdiction, the intended parents have no claim of parentage rights to those children other than through adoption because they did not contribute genetic material.[118] The following approach attempts to resolve these deficiencies.

3. Intent-Based Standard

The intent-based standard considers the persons who initiated the creation of a child to be the child's legal parents.[119] The California Supreme Court in *Johnson v. Calvert*[120] held this standard to be determinative of parentage in a disputed gestational surrogacy arrangement.[121] In *Johnson*, the intended parents were married to one another and entered into a gestational surrogacy agreement with a woman who agreed to gestate a child created from the intended parents' sperm and egg.[122] The carrier refused to relinquish custody of the child after the child's birth, and the intended parents sued.[123] The *Johnson* court found that, under California law, motherhood can be established by either giving birth to a child or by supplying the genetic material for that child.[124] Because there were two legitimate legal mothers under California law, the court found it necessary to consider the parties' intentions as manifested in the surrogacy agreement.[125] In so doing, the court explained that "[b]ut for [the intended parents'] acted-on intention, the child would not exist," and vested legal parentage with the child's intended parents.[126]

Another California court applied the intent-based standard to resolve a similar dispute where the intended parents had no genetic

117. *Id.*
118. *See* Gelmann, *supra* note 12, at 179–80.
119. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
120. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
121. *Id.* at 782.
122. *Id.* at 778.
123. *Id.*
124. *Id.* at 782.
125. *Johnson*, 851 P.2d at 782.
126. *Id.*

relationship to the child.[127] In *In re Buzzanca*,[128] the intended parents entered into a gestational surrogacy agreement that provided for a carrier to be impregnated with an embryo created from the gametes of two anonymous donors.[129] Prior to the child's birth, the intended parents divorced.[130] The intended father disclaimed any parental rights and argued that because he was not the legal father, he did not have to pay child support.[131] The court disagreed, however, and applied the intent-based test to hold that the intended father was the legal father and, thus, required to make child support payments.[132] The court examined the state's artificial insemination statute, which makes the husband the lawful father of a child born because of his consent to the artificial insemination of his wife,[133] and concluded that "[j]ust as a husband is deemed to be the father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf."[134] Thus, the intent-based approach resolves those situations in which intended parents have no genetic relation to children born of surrogacy arrangements.

Although few states' legislatures or courts have taken a stand on surrogacy arrangements, the vast majority of jurisdictions provide no explicit legislative or judicial guidance. The Commonwealth of Pennslvania is an example of such a jurisdiction.

III. THE WHOS, WHATS, WHYS, AND WHERES OF SURROGACY LAW IN PENNSYLVANIA

Although Pennsylvania's statutory and common law have not provided any guidance as to the validity of surrogacy contracts, practitioners nonetheless consider the Commonwealth a surrogacy-friendly state.[135] When dealing with surrogacy, there are three

127. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).
128. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).
129. *Id.* at 282.
130. *Id.*
131. *Id.*
132. *Id.* at 293 ("Even though [the intended parents] are [not] biologically related to [the child], they are still her lawful parents given their initiating role as the intended parents in her conception and birth.").
133. CAL. FAM. CODE § 7613 (West, Westlaw through Ch. 526 of 2013 Reg. Sess. and all 2013–2014 1st Exec. Sess. laws).
134. *In re Buzzanca*, 72 Cal. Rptr. 2d at 282.
135. *See, e.g.*, *Pennsylvania—A Great Surrogacy State*, M. LAWRENCE SHIELDS III, ATTORNEY AT LAW, http://bit.ly/XUiSC6 (last visited Nov. 4, 2013) ("If one is a prospective intended parent or potential [carrier] looking to become involved in a surrogacy arrangement . . . Pennsylvania is an excellent state in connection with which to do so for many reasons . . . .").

mechanisms in Pennsylvania that can influence in whom parentage vests: (1) the common law's traditional notions of parentage;[136] (2) Pennsylvania practice, which includes the Commonwealth's Assisted Conception Birth Registrations procedure[137] and the Pennsylvania Adoption Act;[138] and (3) Pennsylvania jurisprudence.[139]

A. Pennsylvania's Traditional Notions of Parentage

Pennsylvania's common law notions of parentage demonstrate the Commonwealth's emphasis on the best interests of the child in determining parentage. These traditional notions are: (1) the presumption of paternity, (2) paternity by estoppel, and (3) *in loco parentis*.[140]

The first notion, the presumption of paternity, presumes "that a child conceived or born during a marriage is a child of the marriage."[141] It is one of the strongest presumptions in Pennsylvania law.[142] The Pennsylvania Supreme Court has held, however, that this presumption should apply only in those instances where the underlying policy of preserving marriage would be promoted by its application.[143] Although the presumption's application to surrogacy arrangements likely would not affect parentage determinations,[144] it relates to the Commonwealth's interest in preserving families regardless of genetic ties.[145]

Paternity by estoppel is another common law means by which the Commonwealth has sought to protect the best interests of children by preserving family units.[146] It is a legal determination that denies a man

136. *See* Sirola, *supra* note 94, at 139–42.

137. PA. DEP'T OF HEALTH, POLICY & PROCEDURE FOR ASSISTED CONCEPTION BIRTH REGISTRATIONS (2003) [hereinafter DOH ASSISTED CONCEPTION PROCEDURE LETTER].

138. 23 PA. CONS. STAT. ANN. § 2312 (West 2010) ("Any individual may become an adopting parent.").

139. *See infra* Part III.C.

140. *See* Sirola, *supra* note 94, at 139–42.

141. Vargo v. Schwartz, 940 A.2d 459, 463 (Pa. Super. Ct. 2007) (holding the presumption of paternity inapplicable because the parties did not have an intact marital relationship at the time of judicial review).

142. Brinkley v. King, 701 A.2d 176, 179 (Pa. 1997).

143. *Vargo*, 940 A.2d at 463 (citing Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999)).

144. *See, e.g.*, Lynn v. Powell, 809 A.2d 927, 930 (Pa. Super. Ct. 2002) (determining that the presumption did not apply where the husband knew the child had been conceived as a result of his wife's extramarital affair but remained married to her).

145. *Brinkley*, 701 A.2d at 180 ("[T]he presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents . . . .").

146. *Id.* ("[T]he doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has cared for the child is the parent."). Courts consider paternity by estoppel in paternity disputes only when it has been

the ability to disclaim paternity if he has held himself out to be the father of the child to the community and the child, regardless of whether he is genetically related to the child.[147] The policy aim of estoppel emphasizes that "children should be secure in knowing who their parents are."[148] Similar to the presumption of paternity, this notion of parentage encourages a putative parent to maintain the established parent-child relationship regardless of the genetic relation to the child.[149]

Finally, *in loco parentis* status grants third parties standing to assert custody disputes against natural parents of children.[150] It is true that natural or biological parents have a prima facie right to custody in disputes and Pennsylvania law considers all other persons "third parties."[151] Similar to the presumption of paternity and paternity by estoppel, however, the legal concept of *in loco parentis* gives legal parentage status to a genetically unrelated person if that person has put "oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of legal adoption."[152] The purpose is to allow a person who has served the role as parent to have a legitimate claim to custody if it would be in the best interests of the child.[153] Third parties cannot put themselves *in loco parentis* in defiance of the natural parents' wishes, however, because it would reward conduct that contradicts the prima facie right to custody the Commonwealth grants biological parents.[154]

While these three notions of parentage are important, they are only one piece of the Pennsylvania puzzle.

established that the presumption of paternity is inapposite due to the circumstances. *Vargo*, 940 A.2d at 464.

147. *Vargo*, 940 A.2d at 464.

148. *Fish*, 741 A.2d at 724 (quoting *Brinkley*, 701 A.2d at 180).

149. *See id.* at 723 (quoting Jones v. Trojak, 634 A.2d 201, 206 (Pa. 1993)) (discussing that where the principle of paternity by estoppel applies, blood tests determining with certainty a child's paternity may be irrelevant).

150. J.F. v. D.B., 897 A.2d 1261, 1274 (Pa. Super. Ct. 2006).

151. *Id.* at 1273 (internal citations omitted).

152. *Id.* at 1274 (quoting Liebner v. Simcox, 834 A.2d 606, 609 (Pa. Super. Ct. 2003)).

153. *See* Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000) (holding that upon the mother's death, the stepfather had *in loco parentis* status to assert a legitimate custody claim against the child's biological father and that, after a detailed review of the circumstances, the biological father's right to custody did not outweigh the child's best interests).

154. *J.F.*, 897 A.2d at 1275–76 ("The requirement of a natural parent's participation and acquiescence is critical to the determination of whether to accord a third party *in loco parentis* status. . . . The law simply cannot permit a third party to act contrary to the natural parent's wishes in obtaining custody and then benefit from that defiant conduct in a subsequent custody action." (internal citation omitted)). The *J.F.* court denied the carrier *in loco parentis* status because she withheld the triplets against the express wishes of their biological father. *Id.* at 1274.

B. Pennsylvania Practice

In addition to Pennsylvania's traditional notions of parentage, there are two means for intended parents to achieve legal parentage status in the Commonwealth.[155] First, intended parents of gestational surrogacy arrangements can achieve legal parentage through the Pennsylvania Department of Health's Policy and Procedure for Assisted Conception Birth Registrations ("DOH Procedure").[156] Second, intended parents of traditional surrogacy arrangements,[157] as well as those parents who did not prevail under the DOH Procedure,[158] can achieve legal parentage under Pennsylvania's Adoption Act.[159]

The DOH Procedure applies only to gestational surrogacy arrangements where at least one intended parent is genetically related to the child.[160] It allows the intended parents in such an arrangement to acquire an original birth certificate before the child's birth that identifies the intended parents as the child's legal parents.[161] The procedure requires: (1) the intended parents to complete and submit a Supplemental Report of Assisted Conception, and (2) a judge of competent jurisdiction to issue an order stating that any certified copies of the child's birth certificate will contain the names of the intended parents.[162] Despite the non-binding nature of the DOH Procedure,[163] more than 30 Pennsylvania counties have issued such pre-birth orders.[164]

155. *See* Lawrence A. Kalikow, *Surrogacy and the Law of Pennsylvania*, PASURROGACY.COM, http://bit.ly/URbwKN (last visited Nov. 4, 2013).

156. *Id.*; *see also* DOH ASSISTED CONCEPTION PROCEDURE LETTER, *supra* note 137, at 1–2.

157. *See* DOH ASSISTED CONCEPTION PROCEDURE LETTER, *supra* note 137, at 1 (defining the "Assisted Conception" to which the DOH Procedure applies as "[t]he implantation of *a* woman's fertilized egg into *another* woman (the gestational carrier) who carries the child during gestation and delivers the child," necessarily implying that the gestational carrier and child born bear no genetic tie (emphasis added)).

158. Kalikow, *supra* note 155. Because the DOH Procedure is not prescribed through regulation or statute, it does not bind the courts. Sirola, *supra* note 94, at 142. Instead discretion lies with the individual judges to decide whether to validate the parentage requests. Kalikow, *supra* note 155.

159. Kalikow, *supra* note 155.

160. *Id.*

161. *Id.*; *see also* DOH ASSISTED CONCEPTION PROCEDURE LETTER, *supra* note 137, at 1–2.

162. DOH ASSISTED CONCEPTION PROCEDURE LETTER, *supra* note 137, at 1–2. Court orders issued pursuant to the DOH Procedure are known as "pre-birth orders." *See Lesbian Couples and Assisted Reproduction in Pennsylvania, Pre-Birth Orders*, JERNER & PALMER, P.C., http://bit.ly/11RCDGR (last visited Nov. 4, 2013).

163. *See* sources cited *supra* note 158 and accompanying text.

164. *See* Kalikow, *supra* note 155. Although courts have issued the majority of pre-birth orders to intended parents who were both genetically related to the children produced, more than 20 Pennsylvania counties have validated orders where the intended mother was genetically unrelated to the child. *Id.*

Moreover, the Pennsylvania Superior Court recognized and supported the DOH Procedure in *In re I.L.P.*[165] The Superior Court noted that the "law has not yet caught up with the science that makes conception by *in vitro* fertilization . . . possible," and the DOH Procedure provides a means to guarantee that a child born of a gestational surrogacy will have at least one intended parent's name on the birth record.[166] Nevertheless, the decision to enter a pre-birth order is within the individual judge's discretion and a court can deny the order, requiring the parties to pursue alternative options.[167]

When intended parents who either were denied a pre-birth order pursuant to the DOH Procedure or are parties to a traditional surrogacy arrangement seek to establish legal parentage status, they must proceed under the Pennsylvania Adoption Act.[168] Pennsylvania allows those intended parents who are genetically related to the child to initiate stepparent adoption proceedings after the child's birth.[169] Stepparent adoption is a far less onerous process than a typical adoption proceeding.[170] Unlike in an adoption initiated by intended parents unrelated to the child, the stepparent adoption does not require a report of intention to adopt to be filed with the court, nor does it mandate a preplacement investigation and home inspection before a court approves the adoption.[171] Instead, the genetically related parties only need to file a petition for adoption with the court.[172]

Similar to pre-birth orders, the decision to grant or deny any adoption rests within the discretion of the court overseeing the proceedings.[173] If a court grants the adoption decree, the Pennsylvania DOH will reissue a birth certificate that sets aside the original and identifies the intended parents as the child's legal parents without reference to the surrogacy or adoption.[174]

165. *In re* I.L.P., 965 A.2d 251 (Pa. Super. Ct. 2009).

166. *Id.* at 252. The Superior Court held that it was, and is, within the Orphans' Court's jurisdiction to "alter, amend, and modify" the children's birth records, including declaring that the gestational carrier and her husband have no parental rights to the child. *Id.* at 258.

167. *See* sources cited *supra* note 158 and accompanying text.

168. *See* Kalikow, *supra* note 155. In 2002, the Supreme Court of Pennsylvania expressly ruled that the Adoption Act does not preclude same-sex partners (or unmarried heterosexual partners) from adopting. *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002).

169. Kalikow, *supra* note 155.

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* 23 PA. CONS. STAT. ANN. § 2902(b) (2010).

174. Kalikow, *supra* note 155. Courts must treat their files relating to adoptions as confidential and protected from public disclosure. PA. O.C. RULE 15.7.

That both the DOH Procedure and the Pennsylvania Adoption Act provide a means for intended parents to gain legal parentage is informative. The DOH Procedure, although not legally enforceable, demonstrates that the Commonwealth is not ignorant to the growing use of surrogacy as an alternative means of reproduction and the legal implications that stem from such arrangements. Further, in both the DOH Procedure and the Pennsylvania Adoption Act, courts of the Commonwealth legally validate and enforce the contractual nature of the arrangement by granting legal parentage to the intended parents.[175] These procedures evidence the Commonwealth's inclination to permit surrogacy and vest parentage and custody rights in the parties who initiate the arrangement.

C. Relevant Pennsylvania Jurisprudence

Although Pennsylvania courts have refused to expressly rule on the validity of surrogacy contracts,[176] there is a practice of accepting them,[177] and relevant jurisprudence suggests that the courts may be more favorable to honoring the intentions of the parties who enter ART arrangements.[178]

The Superior Court of Pennsylvania first addressed a disputed surrogacy arrangement in *J.F. v. D.B.*,[179] which is the lawsuit filed by Flynn, the biological father, against Bimber, the gestational carrier.[180] The Superior Court refused to rule on the validity of surrogacy contracts in general and on the disputed Bimber-Flynn contract specifically, claiming that to be the responsibility of the Pennsylvania General Assembly.[181] Notably, however, the court held that a gestational carrier could never have standing to sue for custody of a child she birthed pursuant to a gestational arrangement if there is at least one genetically

175. *See* Kalikow, *supra* note 155.

176. J.F. v. D.B., 897 A.2d 1261, 1278 n.22 (Pa. Super. Ct. 2006) ("We offer no comment on the validity of surrogacy contracts in this state or any other."); *id.* at 1280 ("We also decline to rule on the propriety of surrogacy contracts generally. That is a task for our legislators.").

177. *See, e.g.*, *In re* I.L.P., 965 A.2d 251, 258 (Pa. Super. Ct. 2009); Kalikow, *supra* note 155; *see also* discussion *supra* Part III.B.

178. *See generally* Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (holding that the agreement between the birth mother and sperm donor absolving the sperm donor of liability for child support so long as he agreed never to seek custody of any children born to the birth mother was a valid and enforceable contract).

179. J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006).

180. *See generally id.*; *see also supra* notes 2–9 and accompanying text.

181. *J.F.*, 897 A.2d at 1265. The Superior Court limited its holding by determining that Bimber, the gestational carrier, did not have standing to seek custody or challenge the father's custody. *Id.*

related parent involved.[182] The court reasoned that as a third party who was not genetically related to the triplets, the gestational carrier could have standing to sue the biological father for custody only if she held *in loco parentis* status.[183] The carrier in *J.F.* did not have *in loco parentis* status because she withheld custody of the triplets against the will of their biological father.[184] As discussed above,[185] a natural parent's participation in and support of such arrangement is a "critical" factor in determining whether to accord *in loco parentis* standing to a third party.[186] Additionally, in a brief but significant footnote, the Superior Court rejected the idea of granting standing to the carrier on the gestational motherhood theory that declares the legal mother the woman who bore the child.[187] Although this holding effectively bars a genetically unrelated carrier from ever asserting custody against the will of a genetically related intended parent, it is unclear how the court would rule if a custody dispute arose from a traditional surrogacy arrangement or how this holding would affect a custody dispute between a gestational carrier and genetically unrelated intended parents.

The *J.F.* court further held that the trial court erred in declaring Bimber the "legal mother" of the triplets.[188] The trial court failed to acknowledge that not only was the egg donor the biological mother to the triplets, but she was also an indispensable party to the contract, and the trial court provided her no notice or opportunity to be heard before arbitrarily declaring Bimber the triplets' "legal mother."[189] Although the decision failed to definitively rule on the validity of surrogacy arrangements, it provides guidance regarding how the Commonwealth's courts may treat them in the future, particularly where a gestational carrier attempts to dispute custody based on her status as birth mother.

One argument against permitting surrogacy arrangements in the Commonwealth asserts that surrogacy contracts allow parties to "bargain away" children's rights in violation of Pennsylvania's long-standing public policy.[190] The Supreme Court of Pennsylvania, however, found

182. *See id.* at 1273–79.

183. *See id.*

184. *Id.* at 1276 ("Here, the manner in which gestational carrier [Bimber] obtained custody of the children was fraught with impropriety . . . .").

185. *See supra* Part III.A.3 (discussing *in loco parentis* status and how Commonwealth courts apply this notion of parenthood).

186. *J.F.*, 897 A.2d at 1275.

187. *Id.* at 1280 n.25. The *J.F.* court "expressly decline[d]" to "rely on public policy and conclude that gestational carrier should be granted standing simply because she carried the children to birth." *Id.*

188. *See id.* at 1277.

189. *Id.* at 1277–79.

190. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 21 (C.P. 2004) ("[A] contract is void if it is used to bargain away rights belonging to children." (citations omitted)). The trial court

the same objection unavailing with respect to an artificial insemination pursuant to an in vitro fertilization agreement (the "AI Agreement") wherein the sperm donor agreed to never seek custody of the children produced so long as the mother never sought child support from the donor.[191] In *Ferguson v. McKiernan*,[192] the Supreme Court reiterated that for a Pennsylvania court to void a contract on public policy grounds, a very high burden must be met.[193] The Supreme Court did not find the AI Agreement "contrary to the sort of manifest, widespread public policy" that generally supports invalidating a contract.[194] In fact, the court stated that "[t]he absence of a legislative mandate coupled to the constantly evolving science of reproductive technology" demonstrated a complete lack of unanimous opposition to ART that would support contract invalidation.[195] Although the Pennsylvania Supreme Court rejected review of the *J.F.* case the year prior to the *Ferguson* decision,[196] in light of *Ferguson*'s dicta, it is likely that the Supreme Court would not void surrogacy arrangements on public policy grounds if confronted with the question in the future.[197]

Ferguson's reasoning, if applied within the context of a disputed surrogacy agreement, indicates that future courts may enforce such

originally voided the Bimber-Flynn contract because to do otherwise would allow Bimber "to sign away her custodial rights without a time period to consider them or a court hearing to address them," in violation of Pennsylvania's public policy. *Id.* at 22. Because of its resolution of standing, the Superior Court of Pennsylvania did not find it necessary to resolve the issue of whether the surrogacy agreement could constitute a bargaining away of the triplet's rights. *J.F.*, 897 A.2d at 1279 n.24.

191. Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (noting that this was not a typical anonymous sperm donation, but that the two parties were friends prior to making the arrangement).

192. Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).

193. *Id.* at 1245 n.16 ("'In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy.'" (quoting Hall v. Amica Mut. Ins. Co., 648 A.2d 755, 760 (Pa. 1994))).

194. *Id.* at 1248.

195. *Id.*

196. J.F. v. D.B., 909 A.2d 1290 (Pa. 2006).

197. *Cf.* Commonwealth v. Cameron, 179 A.2d 270 (Pa. Super. Ct. 1962). In *Cameron*, the Superior Court of Pennsylvania upheld an agreement wherein a biological father agreed to bargain away his duty to support his child because the contract provided that the natural mother and adoptive father, who had achieved *in loco parentis* status through care of the child, would accept financial responsibility for the child. *Id.* at 272. The court stated that when one parent agrees to release the other from support, "the bargain will be enforced so long as it's fair and reasonable, made without fraud or coercion, and without prejudice to the welfare of the child." *Id. But see, e.g.*, Sams v. Sams, 808 A.2d 206, 213 (Pa. Super. Ct. 2002) (holding the post-nuptial agreement as to father's child support payments to the mother to be unfairly made and, thus, unenforceable because the mother was in desperate need of money when she agreed to the terms of the contract and had no reasonable alternative to provide for her children).

agreements. The *Ferguson* court echoed the intended parent standard described in *Johnson v. Calvert*[198] when it stated that "[a]bsent the parties' [ART] agreement, . . . the twins would not have been born at all."[199] In other words, had the parties not acted on their intentions,[200] there would be no children. The court discussed how although Pennsylvania courts "narrowly focus" on the best interests of the child,[201] such focus is not without limitation, and the competing policy of contract enforcement should be given due regard where appropriate.[202] Because there was no overriding public policy reason to invalidate the AI Agreement, and because the trial court found that the AI Agreement had been "bindingly formed," the Supreme Court held the contract valid and enforceable.[203]

Pennsylvania cases not only indicate a lack of clear and overwhelming public opinion against surrogacy, but they demonstrate that Pennsylvania's common law, statutory, and jurisprudential composition favors a practice of validating rather than nullifying such contracts. Moreover, the framework supports adopting a statute that emphasizes the intentions of the parties at the time they entered a surrogacy contract in determining parentage. The following section discusses how the General Assembly can best encompass the Commonwealth's current framework and secure a consistent approach to surrogacy contracts moving forward.

IV. A LEGISLATIVE RESPONSE TO PENNSYLVANIA'S SURROGACY DILEMMA

Although Pennsylvania permits surrogacy arrangements and, when deemed appropriate, legally validates such arrangements by vesting legal parentage with the intended parents, the current framework still poses significant uncertainty. That uncertainty can have devastating consequences.[204] Unless state legislatures begin to address the multiple issues involved in surrogacy contracts, it will be the children who are "caught in a continual tug of war" between the parties who contracted to

198. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("But for [the intended parents'] acted-on intention, the child would not exist.").

199. *Ferguson*, 940 A.2d at 1248.

200. *See Johnson*, 851 P.2d at 782.

201. *Ferguson*, 940 A.2d at 1248 & n.23 (acknowledging that by ruling in favor of the sperm donor, the court effectively denies the children another source of support).

202. *Id.* at 1248 n.23 (noting that the best interests of the child focus does not "operate to the absolute exclusion of all competing policies").

203. *Id.* at 1248.

204. *See* Rains, *supra* note 8, at 32 (discussing the extreme financial and emotional hardship that resulted from the disputed surrogacy agreement in *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006)).

have those children brought into the world.[205] To prevent disputes, such as the one presented by the Bimber-Flynn agreement, from recurring, Pennsylvania should adopt a statute that: (1) recognizes surrogacy as a legally permissible alternative means of reproduction; (2) provides a procedure by which surrogate contract participants can establish legal parentage in the intended parents; and (3) implements the intent-based standard to resolve any material disputes that arise. Due to Pennsylvania's existing framework, Pennsylvania is in a better position than most states to adopt a statute that encompasses these requirements.

Despite the absence of any law addressing the issue, the Pennsylvania General Assembly has not ignored the increased use and growing relevance of ART procedures. In March 2005, the Pennsylvania General Assembly established the Joint State Government Commission Subcommittee on Assisted Reproductive Technologies ("Commission") to review the state of ART law in Pennsylvania and provide recommendations for how the Commonwealth should proceed with respect to such arrangements.[206] The Commission, comprised of ART experts and legislators alike, created The Proposed Pennsylvania Assisted Reproductive Technologies Act ("Proposed Act"[207]).[208] In developing the Proposed Act, the Commission scrutinized the Uniform Parentage Act,[209] statutory law, jurisprudence, Pennsylvania practice, and the Pennsylvania Department of Health's procedures to conclude that the General Assembly should recognize the validity of gestational and traditional surrogacy arrangements,[210] and in doing so, vest legal parentage with the intended parents.[211] The Commission also

205. J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio Ct. App. 2006) (Slaby, J., concurring).

206. SUBCOMM. ON ASSISTED REPROD. TECHS., JOINT STATE GOV'T COMM'N, THE PROPOSED PENNSYLVANIA ASSISTED REPRODUCTIVE TECHNOLOGIES ACT 1 (2008) [hereinafter PROPOSED ART ACT], *available at* http://bit.ly/WzIP72.

207. The PROPOSED ART ACT contains five subchapters: Subchapter A: General Provisions; Subchapter B: Gestational Agreements and Prepregnancy Validation Process; Subchapter C: Gestational Agreements and Legal Parentage Through Postpregnancy Process; Subchapter D: Child of Assisted Reproduction; and Subchapter E: Records. For purposes of this Comment, "Proposed Act" will collectively refer to Subchapters A, B, and C, which are the three portions that specifically address surrogacy arrangements.

208. PROPOSED ART ACT, *supra* note 206, at 1.

209. UNIF. PARENTAGE ACT (amended 2002), *available at* http://bit.ly/XiGJXC.

210. *See* PROPOSED ART ACT, *supra* note 206, at 28 ("The definition of 'gestational carrier' applies under Subchapters B and C regardless of whether the adult woman's eggs are used to conceive the child. Therefore, under both subchapters, the adult woman may be genetically related to the child.").

211. *See id.* at 44. So long as the surrogate contract parties meet all of the procedural requirements outlined in the Proposed Act, a "court shall issue a decree validating a gestational agreement and declaring that each intended parent will be a legal parent of a child born pursuant to the agreement . . . ." *Id.*

recommended that in the event of a contractual dispute between the parties, the court should make its decision after giving "due regard" to the parties' intentions at the time they entered the agreement.[212] The following discusses why adopting the Proposed Act, with one suggested addition, would protect the best interests of all parties involved in surrogacy arrangements; how the Proposed Act codifies the current Pennsylvania framework discussed in Part III; and whether the Proposed Act would withstand judicial scrutiny.

A. Adoption of the Proposed Act Would Serve the Commonwealth's Best Interests

Enacting the Proposed Act would ensure uniformity in how the Commonwealth addresses surrogacy arrangements.[213] It would provide security and stability to intended parents, carriers, and the resulting children by guaranteeing a means by which the intended parents can establish legal parentage.[214] Due to the constantly evolving nature of reproductive technologies and the contract and family law issues that attach to the use of surrogacy arrangements, the Pennsylvania General Assembly should enact the Proposed Act, but with one minor change.

The purpose of the Proposed Act is to "protect the interests of children" born from surrogacy agreements.[215] Although the best interests of the child should motivate parties to follow the Act's guidelines, the General Assembly should not depend on this. To achieve this purpose and encourage parties to adhere to the Proposed Act's extensive procedures,[216] the Proposed Act should impose a civil penalty on parties

212. *Id.* at 33.

213. *See* Drabiak et al., *supra* note 14, at 302 ("[G]reater specificity, uniformity, and enforcement of legislation would reduce the necessity and frequency of adjudication and provide clearer more consistent guidance for courts that are called upon to render decisions on the fate of surrogate contract participants.").

214. *See* PROPOSED ART ACT, *supra* note 206, at 36–55.

215. *Id.* at 28.

216. The Proposed Act includes two routes by which the intended parents can establish legal parentage of any child born from a gestational carrier. The parties can obtain a decree establishing parentage rights in the intended parents either before the carrier becomes pregnant, see *id.* at 36–47 (Subchapter B), or after the carrier becomes pregnant and up to 90 days after the child's birth. *See id.* at 48–55 (Subchapter C). For each route, however, the process is generally the same. The parties must create an agreement stating that the carrier agrees to relinquish all parental rights and surrender custody to the intended parents, and the intended parents agree to become a legal parent of the child and accept custody of the child. *Id.* at 39. The gestational agreement must be notarized. *Id.* at 38. The intended parents may petition a court to commence a proceeding to validate the agreement. *Id.* at 43. The parties must then attend a hearing in front of the court. *Id.* at 44. After the hearing, the court should issue a decree validating the agreement as long as the parties have met the Proposed Act's requirements, the parties entered into the agreement voluntarily, and "[a]dequate provision has been made

to contracts that are not court approved. Without any sort of deterrence mechanism, "intended parents would have little incentive to diligently comply with statutory requirements."[217] By imposing a punishment for non-compliance, the Pennsylvania General Assembly takes a more affirmative step toward securing the best interests of children born from surrogacy arrangements.[218]

B. The Proposed Act Implements Aspects of the Current Pennsylvania Framework

Pennsylvania's current common law, procedural, and jurisprudential framework supports the Commission's conclusions to recognize the validity of surrogacy arrangements, vest legal parentage in intended parents, and adopt the intent-based standard to resolve contractual disputes that arise from surrogacy arrangements.

Pursuant to the DOH Procedure, if a court chooses to grant a pre-birth order, the court implicitly endorses the validity and enforceability of the surrogacy contract.[219] The Commission utilized the DOH Procedure as a starting point. The Proposed Act makes binding the DOH Procedure's recommendation that courts implicitly recognize the validity of surrogacy arrangements. Moreover, the Proposed Act provides a detailed process[220]—more onerous than that required by the DOH Procedure—that the parties must follow to create a legally binding surrogacy agreement.[221] Once a court validates an agreement, the intended parents become the legal parents and the surrogate child's birth certificate will bear the names of the intended parents.[222] Unlike the DOH Procedure,[223] however, the Proposed Act allows courts to validate both gestational *and* traditional surrogacy agreements.[224]

Further, the Pennsylvania Supreme Court has recognized the importance of the parties' intentions in deciding disputes that arise from ART procedures.[225] The *Ferguson* court explained that in light of the ever-evolving state of ART and the contract-like properties that

for all reasonable health care expenses associated with the gestational agreement." *Id.* at 44–45.

217. Gelmann, *supra* note 12, at 191 n.304 (advocating for a criminal punishment imposed on persons who fail to enter into a valid surrogacy contract pursuant to statutory requirements).

218. *See id.* at 191.

219. *See* DOH ASSISTED CONCEPTION PROCEDURE LETTER, *supra* note 137, at 1–2.

220. *See supra* note 216.

221. *See* PROPOSED ART ACT, *supra* note 206, at 36–55.

222. *See id.* at 45.

223. *See supra* notes 160–67 and accompanying text.

224. *See supra* note 210.

225. Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007).

necessarily attach to the use of such technologies, it would produce absurd results if courts did not honor the intent of the parties when they entered into the contract.[226] The Proposed Act implements this reasoning in the provision that requires a court to decide disputes that arise from a surrogacy agreement by first considering the parties' intentions when they entered the contract.[227] Notably, the Proposed Act does not mandate that a reviewing court consider *only* the parties' intent, leaving it within a court's discretion to void the agreement if enforcing it would be contrary to the best interests of the child.[228]

That the Proposed Act heavily relies on the Commonwealth's current framework demonstrates that adopting the Act would not significantly alter that framework. Instead, it would provide more stability and predictability to the procedures, thereby protecting the best interests of all parties involved in a surrogacy arrangement.

C. The Proposed Act Would Likely Survive Judicial Scrutiny

If enacted in full, the Proposed Act would likely withstand judicial scrutiny. More specifically, it is unlikely that courts would find any portion of the Proposed Act unconstitutional or in violation of Pennsylvania's public policy against allowing parents to "bargain away" their children's rights.

The Proposed Act is similar to the Florida statute at issue in *T.M.H. v. D.M.T.* that required donors to sacrifice all parental rights or obligations to the resulting children.[229] Unlike the Florida statute, however, the Proposed Act explicitly states that its definition of donor does not include intended parents.[230] Thus, intended parents can donate their gametes without fear that they will lose their legal parentage status if their marriage dissolves.[231]

226. *Id.* at 1247–48.

227. PROPOSED ART ACT, *supra* note 206, at 33.

228. *Id.*

229. *See generally* T.M.H. v. D.M.T, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011) (describing FLA. STAT. § 742.14 (2013)).

230. *Compare* FLA. STAT. § 742.14 (2013) ("The donor of any egg, sperm, or preembryo, . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."), *with* PROPOSED ART ACT, *supra* note 206, at 24 ("An individual who produces eggs or sperm used for assisted reproduction . . . . The term does not include: (1) A husband who produces sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife. (2) An intended parent of the child.").

231. *See supra* Part III.C.3 (discussing Pennsylvania's common law principle of *in loco parentis* as a means to establish legal parentage). If a Pennsylvania court encountered a situation similar to the one described in *T.M.H.*, regardless of whether the Legislature had passed the Proposed Act, the appellant egg donor would likely have had *in loco parentis* status due to the two years she spent raising the child.

It is also unlikely that a court would invalidate the Proposed Act on the basis that it violates Pennsylvania's public policy against allowing parents to bargain away their children's rights. The Commission specifically acknowledges that the Proposed Act should not be construed to permit "dealing in infant children[,]"[232] which overtly violates Pennsylvania public policy. Moreover, as the *Ferguson* court explained, there exists a notable absence of opposition to the use of ART that would justify invalidating an ART contract, let alone a statute enacted by elected officials.[233]

Further, the Pennsylvania Superior Court held that when one parent agrees to release another from support, "the bargain will be enforced so long as it is fair and reasonable, made without fraud or coercion, and without prejudice to the welfare of the child."[234] The detailed process that the Proposed Act requires participants to complete before a legally enforceable contract is created ensures that no parties impermissibly bargain away their children's rights.[235]

The Bimber-Flynn surrogacy dispute in *J.F. v. D.B.* exemplifies the exact situation that the Proposed Act is designed to prevent. For the first two-and-a-half years of their lives, the *J.F.* triplets did not have any legal parents.[236] They traveled back and forth between two families that each gave them different names, and despite Bimber, the carrier, having raised them for the majority of that time, the triplets currently have no contact with her.[237] Had there existed legislation that enforced surrogacy contracts made in the Commonwealth and clearly determined legal parentage rights in such arrangements, the harm could have been significantly diminished, if not eliminated.

232. PROPOSED ART ACT, *supra* note 206, at 35–36 ("Subsection [5905](c)(1) allows for reasonable compensation and is intended to shield agreements that include payment to the gestational carrier from challenge under 18 Pa.C.S. § 4305 (dealing in infant children), which prohibits the dealing 'in humanity, by trading, bartering, buying, selling, or dealing in infant children.'").

233. Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007).

234. Commonwealth v. Cameron, 179 A.2d 270, 272 (Pa. Super. Ct. 1962).

235. *See generally* PROPOSED ART ACT, *supra* note 206, at 23–55. Courts cannot validate a surrogacy agreement made pursuant to the Proposed Act unless the parties fully understand the legal implications that will result from the contract's enforcement. *See id.* at 44. The intended parents must declare that they will assume "sole responsibility for the support of the child" to ensure the child's welfare is protected. *Id.* at 39. Although the courts cannot validate an agreement unless the facts show that the parties entered the agreement voluntarily, *id.* at 44, the Proposed Act provides a separate section that allows parties to challenge the validity of an agreement based on fraud or duress. *Id.* at 34.

236. *See* Rains, *supra* note 8, at 32.

237. *Id.*

V. CONCLUSION

Surrogacy continues to be an ever-growing alternative means of reproduction to which states cannot turn a blind eye without potentially injuring children and interested persons alike. Because federal regulation is unlikely, states need to take steps to delineate a clear position on the issue.

Pennsylvania is well-suited to validate and enforce surrogacy contracts through legislation. The Commonwealth is in a unique position because not only does it already have a surrogacy-friendly common law, practice, and jurisprudential framework in place, but a subcommittee of the Pennsylvania General Assembly has drafted legislation that is tailored perfectly to fit the Commonwealth's needs. For all practical purposes, however, the Commission completed the easy part. The difficulty now remains in enacting the Commission's recommendations.

Regardless of how states decide to address surrogacy—whether it be through prohibition, inaction, or status regulation statutes—the case of the Erie, Pennsylvania, triplets sheds light on the devastating repercussions that a state's complacency can cause.