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ARE YOU MY MOTHER?

DEFENDING THE RIGHTS OF INTENDED PARENTS IN GESTATIONAL SURROGACY ARRANGEMENTS IN PENNSYLVANIA

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INTRODUCTION

Danielle Bimber ("Bimber"), a twenty-nine-year-old married mother of three from Pennsylvania, gave birth again in November 2003 to triplets.[1] Bimber conceived and carried the children in her womb per an agreement she had entered into the previous spring with J.F., a sixty-two-year-old unmarried professor from Ohio.[2] Bimber conceived the triplets via in vitro fertilization,[3] using sperm from J.F. and an

1. *See* John Horton, *Legal Fight Leaves Triplets in Limbo*, THE PLAIN DEALER, July 18, 2004, *available at* http://www.intendedparents.com/News/Legal_fight_leaves_triplets_in_limbo.html (noting that Bimber, who did not graduate from college, divorced her first husband in 2000, is married to her second husband, filed for bankruptcy in July of 2003, and currently lives in a low-income community). Bimber attributes her decision to become a surrogate mother to the ease of her past pregnancies and her sympathy for those who are incapable of having children. *Id.*

2. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 4 (2004) (stating that Bimber applied to serve as a surrogate mother online with a group called Surrogate Mothers, Inc. ("SMI"), which matched her with J.F. and his girlfriend).

3. *See* Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 681 (2000) (explaining that in vitro fertilization occurs in a Petri dish, after which a doctor implants the resulting embryo into a woman's uterus).

ovum from an egg donor in Texas.[4] The agreement between Bimber and J.F. stipulated that once Bimber had the babies, she would transfer legal custody of the babies to J.F.[5]

After the birth of the babies, Bimber had a change of heart and decided to sue for custody of the triplets in Pennsylvania.[6] J.F. argued that Bimber did not have legal standing to sue for custody because she was not the children's legal mother.[7] In the case, *J.F. v. D.B.*, the judge did not have any legal precedent to guide his decision because Pennsylvania does not have any statutes or case law addressing gestational surrogacy.[8] As a result, the judge relied on contract law and public policy goals to conclude that Bimber was in fact the triplets' legal mother, despite the absence of a genetic relationship.[9] Because of this status as their legal mother, Bimber had automatic standing to seek custody of the triplets.[10] This finding is significant because it gave J.F., the genetic and intended father, and Bimber, a gestational surrogate, equal status in seeking custody of the children.[11]

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4. *See J.F.*, 66 Pa. D. & C.4th at 4 n.4 (noting that the egg donor was not a party to the matter because she was like a sperm donor, who courts often recognize as having forfeited their parental rights to any child resulting from his donation).

5. *See* Lillian Thomas, *Triplets' Surrogate Mom Fights to Keep Baby Boys*, PITTSBURGH POST-GAZETTE, Apr. 13, 2004, *available at* http://www.surrogacylaw.net/acrobatfiles/triplets-surrogate.PDF (stating that, after the birth, Bimber anticipated returning home without the babies).

6. *See J.F.*, 66 Pa. D. & C.4th at 7-8 (noting that Bimber did not attempt to rescind her agreement until she became concerned about the intended parents' apparent lack of interest in the triplets during the six days following their birth).

7. *See, e.g.*, T.B. v. L.R.M., 753 A.2d 873, 882 (Pa. Super. Ct. 2000) (declaring that only individuals with a prima facie right to custody of a child, such as legal parents, have standing to sue for custody).

8. *See J.F.*, 66 Pa. D. & C.4th at 12-13 (relying on the legislative histories of Pennsylvania bills that failed to become law to infer that the state prefers for courts to identify the surrogate mother as the legal mother in cases where the surrogacy contract was void).

9. *See id.* at 22-24 (finding that in the absence of any competing claims of motherhood, Bimber's actions of conceiving, carrying, and caring for the children since birth established her status as their legal mother).

10. *See id.* (noting the possibility that even if the court ruled that Bimber was not the triplets' legal mother, she still might have had standing to sue for custody under the legal doctrine of *in loco parentis*); *see also* Commonwealth v. Cameron, 179 A.2d 270, 272 (Pa. Super. Ct. 1962) (finding that *in loco parentis* confers the legal rights and responsibilities of a legal parent on a third party who has intentionally assumed the obligations of parenthood in relation to that child); Barbara White Stack, *Surrogate Mother Gets Custody of [Three]*, PITTSBURGH POST-GAZETTE, Jan. 8, 2005, at *1, *available at* http://www.post-gazette.com/pg/05008/439189.stm (noting that when the custody dispute occurred, the Judge did, in fact, award custody to Bimber).

11. *See generally* Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 637 (Pa. 1977) (declaring that Pennsylvania courts decide custody disputes between two legal parents by looking solely at which custody scenario serves the best interests of the child); J.A.L. v. E.P.H., 682 A.2d 1314, 1319 (Pa. Super. Ct. 1996) (indicating that in a custody dispute between a parent *in loco parentis* and a legal parent, the court

This Comment argues that the outcome of the Bimber case does not indicate a preference for a gestational motherhood standard in surrogacy cases in Pennsylvania. Part I explains gestational surrogacy, beginning in Part IA with a brief overview of the three most prominent parentage standards that courts have applied to determine legal parentage in gestational surrogacy cases. Part IB highlights the various approaches state legislatures have adopted in addressing gestational surrogacy arrangements. Part IC examines existing parentage doctrines in Pennsylvania. Next, Part II argues that applying a gestational motherhood standard in surrogacy cases in Pennsylvania would conflict with the language of *J.F.*, existing Pennsylvania parentage laws, and the United States Constitution. Part III recommends a legislative course of action for Pennsylvania by comparing Pennsylvania's needs with the Uniform Parentage Act and statutes from other states. This Comment concludes that Pennsylvania should adopt a parentage standard that favors intended parents in gestational surrogacy situations.

I. BACKGROUND

There are two distinct types of surrogacy arrangements.[12] The first, referred to as "traditional surrogacy," exists when a woman ("surrogate") contracts with a couple ("intended parents") to become pregnant through artificial insemination and the use of her own egg.[13] By contrast, in gestational surrogacy arrangements, the surrogate is not genetically related to the child.[14] Instead, the surrogate becomes pregnant via in vitro fertilization using another woman's egg.[15] Typically, the intended parents provide the egg and

considers the parent *in loco parentis* a non-parent). A non-parent must meet a higher burden of proof to gain custody because the courts favor placing children with legal parents (who are also, in most cases, biological parents). *Id.*

12. *See* ROBERT BLANK & JANNA MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 109 (1995) (noting that advancements in reproductive technology have made gestational surrogacy possible and have created an attractive alternative to traditional surrogacy).

13. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 603-04 (2002) (identifying the distinguishing factor between traditional and gestational surrogacy as the surrogate's use of her own egg).

14. *See* Belsito v. Clark, 67 Ohio Misc. 2d 54, 60 (1994) (defining a "genetic relationship" as one involving individuals who share blood derived from a common ancestor).

15. *See* Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 131-32 (2000) (asserting that infertility renders over six million women of childbearing age incapable of carrying a child to term and reporting that gestational surrogacy is becoming a popular solution for many of those women).

sperm.[16] Sometimes intended parents may use donor eggs and/or sperm, which can result in as many as five individuals contributing to the creation of the child.[17] With the role of parent divided among so many parties,[18] courts often struggle to identify new standards of legal parentage that can address these confusing possibilities.[19] Thus far, courts have applied three different approaches.[20]

A. The Judicial Response to Surrogacy: Three Standards to Determine Legal Parentage in Gestational Surrogacy Situations

1. The Legacy of In re Baby M.*: A Gestational Motherhood Standard*

In 1989, the New Jersey Supreme Court decided *In re Baby M.*, the first major case concerning surrogacy contracts, and laid the foundation for the first judicial approach to surrogacy.[21] The court voided a traditional surrogacy contract as contrary to public policy, and declared the surrogate the legal mother of the child she bore.[22] More than a decade later, the New Jersey Superior Court applied this gestational motherhood standard articulated in *In re Baby M.* to a gestational surrogacy situation.[23] The gestational motherhood

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16. *See* John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 677 (1993) (explaining that the prospect of creating a child that is genetically related to one or both parents is what makes gestational surrogacy so appealing to infertile couples).

17. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (recognizing legal parentage in the intended parents of a child who a gestational surrogate conceived using donor sperm and eggs).

18. *See* Storrow, *supra* note 13, at 602 (identifying eight potential parents in a gestational surrogacy situation: the egg donor and her spouse, the sperm donor and his spouse, the surrogate and her husband, and the intended mother and father).

19. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781-82 (Cal. 1993) (creating an intent-based test of parentage to "break the tie" between the genetic and gestational mothers, both of whom had a legal claim to motherhood under California law and were seeking custody of the child).

20. *See generally* Valerie L. Baker, *Surrogacy: One Physician's View of the Role of Law,* 28 U.S.F. L. REV. 603, 607 (1994) (identifying gestation, genetics, or intention as three ways to determine legal parenthood). *But see Johnson*, 851 P.2d at 789 (Kennard, J., dissenting) (arguing for recognition of a fourth standard of parentage, the "best interest of the child" standard); Hurwitz, *supra* note 15, at 171 (supporting the recognition of the "best interests of the child" standard of determining parentage).

21. *See* 537 A.2d 1227, 1264 (N.J. 1989) (settling a custody dispute between a traditional surrogate and the intended parents).

22. *See id.* at 1247-50 (equating traditional surrogacy contracts to selling a child, and finding that such agreements are contrary to the best interests of the mother, the child, and society).

23. *See* A.H.W. v. G.B.H., 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (relying on New Jersey's adoption statute to conclude that the gestational and legal mother cannot surrender her parental rights until seventy-two hours after the birth). However, the court also noted that because the state allows five days for completion of the birth certificate, the intended parents' names can appear on the birth certificate

standard states that any woman who gestates and gives birth to a child is that child's legal mother, regardless of whether she is also the child's genetic mother.[24] Proponents of this standard typically rely on both the traditional notions of motherhood and the significance of the gestational mother's contribution to the fetus growing inside her to justify the gestational surrogate's claim to motherhood.[25]

2. The Johnson v. Calvert *Intent-Based Approach to Parentage*

In 1993, the California Supreme Court articulated a new, intent-based standard of parentage in *Johnson v. Calvert*.[26] This standard considers the couple who initiated the creation of a child, the "intended parents," to be that child's legal parents.[27] However, as originally articulated in *Johnson*, intent alone did not govern.[28] Instead, the court ruled that when more than one woman has a valid claim of motherhood under California law the intent element "break[s] the tie" between the two women.[29]

However, a California court has since found a valid claim of motherhood in an intended mother who neither supplied genetic material, nor gave birth to the child.[30] Although, in that case, the intended mother was the only party seeking custody of the child, the

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if they complete it after the seventy-two hours have passed. *Id.*

24. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 524-25 (1996) (arguing that despite the continued support of some commentators, the gestational motherhood standard is outdated because it limits the reproductive choices available to infertile couples).

25. *See A.H.W.*, 772 A.2d at 953 (claiming that a gestational mother "contributes an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life").

26. *See* 851 P.2d 776, 782 (Cal. 1993) (holding that in order to apply the intent test, the two women involved must have statutorily recognized claims to motherhood). *But see* John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as a Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 414 (1991) (advocating a pure intention test that determines parentage based solely on who conceptualized and implemented the procreation from the outset).

27. *See* Hurwitz, *supra* note 15, at 140 (noting that while courts apply contract law principles in the intent-based parentage analysis, their true concern is not adherence to contract law, but identifying the factors that motivated the creation of the child).

28. *See* 851 P.2d at 781 (arriving at the intent test only after analyzing both the birth mother's and the genetic mother's claims to maternity and finding them both valid).

29. *See id.* at 782 (finding that, under California law, motherhood can be established by either giving birth to a child or by supplying the genetic material for that child). When different women perform these two functions, the one who intended to create the child is that child's legal mother. *Id.*

30. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 1998) (invoking an artificial insemination statute that declared a husband the legal father of children born to his artificially inseminated wife because of his consent to the medical procedure and applying it to a gestational surrogacy situation).

court still had to circumvent the "tie breaker" rule to arrive at her status as legal mother.[31] Therefore, as applied, the test appears to be one of pure intention that confers parental rights on parties who affirmatively seek to create a child.

3. The Belsito v. Clark *Genetic Provider Standard*

The Ohio Supreme Court articulated the final judicial approach to gestational surrogacy disputes in *Belsito v. Clark*, in holding that the legal and natural parents of a child born to a gestational surrogate were those who had provided the genetic material for that child.[32] The court relied heavily on the historic notion that parentage stems from a "common ancestry of genetic traits."[33] In addition, the court found that the genetic provider standard of parentage was ultimately easier to apply, more aligned with public policy concerns, and more respectful of the rights of a genetic provider than the intent test.[34] However, because the surrogate did not seek custody, the court did not address the more complex gestational surrogacy questions that the genetic provider test would fail to resolve.[35]

B. The Legislative Response to Surrogacy

Despite these complicated arrangements, many state legislatures, including Pennsylvania's, have failed to address the gestational surrogacy situation.[36] The states that have enacted surrogacy statutes

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31. *See id.* at 288-89 (finding the legal mother to be the woman who intended to bring about the creation of the child even though she was not the child's gestational or genetic mother). *But see* Storrow, *supra* note 13, at 621 (arguing that the analogy the *Buzzanca* court drew between artificial insemination and intended parenthood is "strained" and future courts are unlikely to apply it because society and the law both view gestation as more emotionally involved and more complicated than sperm donation).

32. *See* 67 Ohio Misc. 2d 54, 66 (1994) (concluding that under Ohio law, the genetic providers would be the legal parents of any child produced by their genetic material unless they have waived their parental rights). In this case, the genetic and intended parents sought a declaratory judgment that they were the legal parents of the child and would be listed on the birth certificate, contrary to existing Ohio law. *Id.* The surrogate did not contest and did not seek custody. *Id.*

33. *See id.* at 64 (relying on societal precedent to adopt the genetic provider standard of parentage in gestational surrogacy cases).

34. *See id.* at 62-63 (identifying the relevant public policy concerns as prohibiting the forced surrender of parental rights and preserving adoption law guidelines). The relevant adoption statutes include the mandatory waiting period before a birth mother can relinquish parental rights and court approval of prospective parents. *Id.*

35. *See id.* at 65 (noting that under the genetic provider test, the outcome of custody disputes in surrogacy arrangements that involve donated eggs and sperm remains uncertain because the genetic providers may maintain anonymity).

36. *See* J.F. v. D.B, 66 Pa. D. & C.4th 1, 13 (2004) (stating that nineteen states lack surrogacy laws); *see also* Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U REV. L. & SOC. CHANGE 571, 584 (1992) (attributing the absence of statutes dealing with surrogacy in these states to

have taken a variety of approaches.[37]

Several states have adopted laws declaring surrogacy contracts unenforceable.[38] Most of these statutes do not differentiate between traditional and gestational surrogacy arrangements.[39] However, declaring surrogacy contracts unenforceable does not stop surrogacy arrangements from occurring; it merely creates a presumption of maternity in the birth mother.[40] In an effort to prevent surrogacy arrangements from occurring altogether, Michigan enacted a surrogacy statute that criminalizes participation in surrogacy arrangements that compensate the surrogate in excess of expenses incurred.[41]

Some states take a more flexible approach to surrogacy laws by enacting statutes that permit enforcement of surrogacy contracts that adhere to certain guidelines. For example, some states prohibit payment to the surrogate in excess of expenses incurred,[42] some require medical validation of the intended mother's inability to gestate a child,[43] and still others require the intended parents to obtain a mandatory pre-birth court order.[44]

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the "simple certainty of unitary motherhood" that existed prior to the advent of in vitro fertilization).

37. *See infra* notes 43-49 and accompanying text (describing these various approaches to surrogacy regulation and citing laws from several states); *see also* Sara K. Alexander, *Who Is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature*, 38 GA. L. REV. 395, 398 (2003) (explaining that, unless Congress passes national legislation regulating surrogacy arrangements, the states have complete autonomy to regulate the issue).

38. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218 (2004) (prohibiting surrogacy arrangements and granting custody of a child born by a surrogate to the surrogate); IND. CODE ANN. § 31-20-1-1 (West 2004) (holding surrogate agreements void as "against public policy"); N.Y. DOM. REL. LAW §§ 122, 123 (Gould 2004) (providing for civil penalties if parties enter into surrogacy contracts); UTAH CODE ANN. § 76-7-204 (1999) (declaring that any woman acting as a surrogate is the legal mother of any child born to her).

39. *See* Havins & Dalessio, *supra* note 3, at 686 (identifying Florida, New Hampshire, and Virginia as the only three states to have statutorily distinguished between gestational and traditional surrogacy).

40. *See, e.g.*, Soos v. Super. Ct., 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994) (demonstrating that surrogacy arrangements continue to occur in Arizona despite the existence of a law that prohibits enforcement of surrogacy contracts).

41. *See* MICH. COMP. LAWS ANN. § 722.857 (West 2004) (assigning penalties of up to five years in prison for participants in a gestational surrogacy arrangement involving compensation).

42. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(4) (West 2004) (voiding surrogacy contracts that provide compensation for a woman's termination of her parental rights). *But see* ALA. CODE § 26-10A-34 (1991) (prohibiting payment in exchange for placing children up for adoption and stating that the prohibition of payment does not apply to surrogacy situations).

43. *See, e.g.*, FLA. STAT. § 742.15 (2003) (permitting couples to enter into surrogacy contracts only if the woman is incapable of carrying a child to term or if doing so would risk the health of mother or child).

44. *See, e.g.*, VA. CODE ANN. § 20-158 (2004) (granting the intended parents legal

Additionally, the Uniform Parentage Act ("UPA") proposes a statutory scheme that would hold surrogacy contracts enforceable[45] as long as the intended parents meet certain contractual criteria[46] and acquire court approval of the contract prior to conception.[47] Four states have adopted the newest version of the UPA.[48]

Finally, Arkansas upholds surrogacy contracts to a degree greater than all other states. Arkansas is the only state to enforce a surrogacy contract completely and award legal parentage to one or both intended parents upon birth of the child.[49]

C. Pennsylvania: Existing Notions of Parentage that May Impact the State's Approach to Surrogacy

Neither Pennsylvania statutes nor caselaw define the term "mother."[50] As a result, Pennsylvania recognizes any woman who gives birth as the legal mother of the child she delivers.[51] Courts can vest a birth mother's maternal rights in another woman only if the birth mother voluntarily relinquishes those rights or upon a showing of extreme neglect or wrongdoing.[52] Neither mothers nor fathers

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parent status as long as at least one parent can prove a genetic tie to the child and where a court approves the surrogacy contract prior to the child's birth). Otherwise, the gestational mother remains the legal mother unless the genetic mother is also the intended mother, in which case the genetic mother is the legal mother. *Id.*

45. *See* UNIF. PARENTAGE ACT § 801 cmt. (amended 2002), 9B U.L.A. 360-361 (2000 & Supp. 2004) (expressing concern about laws that render surrogacy contracts void or unenforceable because they create uncertainty in the legal status of children born to surrogacy).

46. *See id.* § 801, 9B U.L.A. 362 (requiring both an intended mother and intended father be parties to the contract and reserving the gestational surrogate's right to make decisions regarding her health and that of the fetus).

47. *See id.* § 803 cmt., 9B U.L.A. 365 (attributing the purpose of the court's pre-conception order to the state's interest in ensuring that the parties are well suited to a gestational surrogacy agreement, that they understand the significance of the agreement, and that the interests of the child are addressed before conception).

48. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIF. PARENTAGE ACT LEGISLATIVE FACT SHEET (2004), *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (identifying Delaware, Texas, Washington, and Wyoming as the states that have thus far adopted the 2000 version of the Uniform Parentage Act).

49. *See* ARK. CODE. ANN. § 9-10-201 (2003) (declaring that in surrogacy arrangements, the biological father and the intended mother are the child's legal parents if they are married; the biological father alone is the legal parent if unmarried; and the intended mother is the legal mother if she used anonymously-donated sperm).

50. *See* Bahl v. Lambert Farms, Inc., 819 A.2d 534, 540 (Pa. 2003) (noting that no one has ever contested a woman's parentage in Pennsylvania and, as a result, there are no maternity counterparts to the paternity statutes).

51. *See* Hill, *supra* note 26, at 371 (noting that the presumption of biology grants legal motherhood to the birth mother in states where no case law or statute exists to the contrary).

52. *See* 23 PA. CONS. STAT. § 2511 (2004) (identifying continued and permanent

can relinquish their parental rights voluntarily unless another intends to assume those rights by adoption.[53]

In stark contrast to Pennsylvania's approach to maternity, the state's determination of paternity does not depend on biology.[54] Instead, Pennsylvania adheres to the "presumption of paternity" doctrine, which holds that a man is the natural and legal father of any children born to his wife during their marriage.[55] If another man wants to claim paternity of the child or the existing father wants to deny paternity, he must show by clear and convincing evidence that, at the time of conception, the husband did not have access to his wife or was incapable of procreation.[56] Only by demonstrating one of these two things can an individual rebut the presumption of paternity.[57] Therefore, even if another man offers proof that he is the child's biological father, Pennsylvania courts will not permit him to assert his parentage against the husband in an existing marriage.[58]

In addition, the doctrine of paternity by estoppel applies to paternity disputes where a child's mother is not married.[59] Paternity by estoppel prohibits a father from denying his parentage if, after treating a child like his own, he discovers that another man is actually

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incapacity, abuse, and neglect as reasons for termination of parental rights, and requiring that the court consider the development, physical and emotional needs, and welfare of the child above all other considerations in deciding whether to terminate the parent's rights).

53. *See* Varner Petition, 68 Pa. D. & C.2d 552, 555 (1973) (noting that a parent may not voluntarily relinquish parental rights unless someone intends to adopt that child because the court cannot deprive the child of his rights vis-a-vis the parent).

54. *See, e.g.*, Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 76 (2000) (asserting that the paternity presumptions actually ignore biological facts in order to protect rigid social values).

55. *See* Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999) (noting that the purpose of the presumption of paternity doctrine is to protect the sanctity of the family unit and, where that unit does not exist, there is no justification for its application).

56. *See* Brinkley v. King, 701 A.2d 176, 179 n.4 (Pa. 1997) (defining the "no access" doctrine as the inability of the husband to have sexual relations with his wife); *see also* Commonwealth *ex rel.* Savruk v. Derby, 344 A.2d 624, 626-27 (Pa. Super. Ct. 1975) (declaring that courts can admit the testimony of the husband and wife as evidence of "no access").

57. *See* Woy v. Woy, 663 A.2d 759, 760-61 (Pa. Super. Ct. 1995) (holding that where a married woman engaged in an extramarital affair and became pregnant, her extramarital boyfriend could not assert paternity because he failed to overcome the presumption of paternity even where he proved that the wife resided with him at the time of conception).

58. *See* John M. v. Paula T., 571 A.2d 1380, 1388 (Pa. 1990) (declaring that genetic testing could not overcome the presumption of paternity when the third party, who was seeking to establish paternity, failed to prove that the husband had no access to his wife or was biologically incapable of fathering the child).

59. *See Fish*, 741 A.2d at 724 (justifying application of paternity by estoppel on the child's interest in knowing the identity of his parents and avoiding the pain of discovering that someone believed to be his father is not his father).

the child's biological father.[60] The doctrine applies any time a man acts as a father to a child and holds that child out as his own, regardless of whether or not the father is aware that he is not the child's biological father.[61] However, despite these paternity policies that disregard biology, Pennsylvania courts accept the existence of a genetic relationship as proof of paternity when a child is born to an unmarried mother and no father is present.[62]

Furthermore, Pennsylvania courts have conferred some parental rights, namely the right to seek custody or visitation, to third parties standing *in loco parentis*.[63] Courts permit third parties to intrude on the rights of natural parents when the third party's actions create a relationship with a child that is sufficient to warrant visitation or custody rights.[64] Recently, courts have applied this doctrine to establish visitation and custody rights for gay and lesbian partners.[65]

Finally, although Pennsylvania has no laws concerning surrogacy, the Department of Health has adopted a gestational surrogacy policy.[66] The policy permits hospitals to issue a child's birth certificate bearing the names of the intended parents.[67] However, the

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60. *See id.* (finding that paternity by estoppel also holds a mother to her own actions regarding the paternity of a child by precluding her from challenging the paternity of the man she has held out as the child's father or seeking to establish paternity in another man).

61. *See* J.C. v. J.S., 826 A.2d 1, 3-5 (Pa. Super. Ct. 2003) (precluding a father from denying paternity where he believed he was the child's biological father for eight years and, after learning the truth, continued to act as the father of the child). *But see* Doran v. Doran, 820 A.2d 1279, 1285 (Pa. Super. Ct. 2003) (permitting a father to deny parentage where a mother fraudulently told him that he was the child's father and the father could prove that he would have ceased to act as a father to the child had he known the truth).

62. *See* 23 PA. CONS. STAT. § 4343 (2004) (stating that at the request of any party to an action to establish paternity, the court can order genetic testing to establish paternity).

63. *See supra* notes 10-11 and accompanying text (explaining *in loco parentis* and the elevated burden of proof a non-parent must meet to receive custody over the claims of a parent).

64. *See* J.A.L. v. E.P.H., 682 A.2d 1314, 1321-22 (Pa. Super. Ct. 1996) (finding that a third party had standing *in loco parentis* where she consented to the pregnancy, participated in the pregnancy beginning immediately after conception, lived with the child after birth, and acted as a parenting partner to the child's mother).

65. *See* T.B. v. L.R.M., 753 A.2d 873, 882 (Pa. Super. Ct. 2000) (finding that the birth mother's lesbian lover had standing to seek custody based on her actions *in loco parentis*).

66. *See* PA. DEP'T OF HEALTH, POLICY & PROCEDURE FOR ASSISTED CONCEPTION BIRTH REGISTRATIONS (2003) [hereinafter PA. SURROGACY POL'Y] (on file with author) (explaining that the intended parents must complete the assisted birth form and take it to a judge who, if willing, will sign the order and send it to the Division of Vital Records so that all certified copies of the birth certificate will reflect the intended parents' legal parentage).

67. *See id.* (indicating that the intended parents are the mother and father who will have legal custody of the child, regardless of whether the intended parents

state did not enact this procedure by statute and therefore it is not binding on the courts.[68]

II. ANALYSIS

The outcome of *J.F.* appears to establish a preference for a gestational motherhood standard in Pennsylvania because the court held that the gestational surrogate was the triplets' legal mother.[69] However, the court's analysis, existing parentage constructs, and constitutional scrutiny all pose problems to that interpretation of the case's outcome.[70] In fact, a much stronger case exists for arguing that the court's application of law and public policy actually comports with adoption of an "intended parents" standard.[71]

A. The Court's Reliance on Contract Terms Demonstrates that a Gestational Motherhood Standard in Pennsylvania Would Violate the Court's Desire to Recognize the Intended Parents as Legal Parents Where Possible

The court's reliance on contract law principles in *J.F.* strongly contradicts any interpretation of the outcome that would encourage adoption of a gestational motherhood standard.[72] In surrogacy situations, when courts apply a gestational motherhood standard of parentage, the contract terms are irrelevant.[73] The state relies on its presumptive standards of motherhood and thereby renounces the contract terms.[74]

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donated genetic material for the child).

68. *See* Lawrence Kalikow, Esq., *Surrogacy and the Law of Pennsylvania* (Apr. 1999), *available at* http://www.opts.com/penn.htm (observing that despite the fact that the courts are not bound to approve this procedure, judges in fifteen counties have issued the requisite pre-birth orders).

69. *See* Christopher Lilienthal, *Surrogate Wins Standing in Erie Custody Dispute: Contract to Carry Children Rejected on Policy Grounds*, PA. L. WKLY., May 5, 2004, at *1 (quoting Pittsburgh attorney Thomas M. Mulroy as suggesting that the birth mother is presumptively entitled to custody of the triplets).

70. *See id.* (noting that attorney Mark Momjian speculated whether the outcome would have differed if J.F.'s girlfriend had donated her own eggs or if J.F. had been married).

71. *See id.* (quoting Pennsylvania surrogacy law attorney Lawrence Kalikow as suggesting that because of the unusual facts of the case, it likely will have little precedential value).

72. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 17-19 (2004) (analyzing the surrogacy contract, and noting that problems in the contract and the contract's failure to identify the triplets' legal mother posed a barrier to enforcement of the contract).

73. *See* Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 271-72 (1995) (noting that the gestational standard of maternity arises from the historically strong presumption of maternity and that this precludes the contractually recognized mother from any claim to maternity).

74. *See* Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New*

In *J.F.*, although the court named the surrogate as the triplets' legal mother, it did not renounce the contract.[75] In fact, the court closely inspected the contract terms and, pursuant to the contract, identified J.F. as the triplets' legal father.[76] One can reconcile this apparent inconsistency by interpreting the court's decision as favoring an "intended parents" standard.[77]

First, the "intended parents" standard is the only surrogate parentage standard that looks to the contract as evidence of parentage.[78] In this respect, the court's analysis comports with the "intended parents" standard.[79] Furthermore, while the court voided the contract in *J.F.* as contrary to public policy, it did not hold all surrogacy contracts void as contrary to public policy.[80] Holding so probably would have created a bias in favor of the gestational or genetic mother, because courts would not feel at liberty to rely on a prohibited contract to prove intent.[81] The court, therefore, declined the simplest and most direct method of creating a gestational standard.[82]

Instead, the court invalidated the contract in *J.F.* because it contained one fatal flaw—it failed to identify the triplets' legal

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Reproductive Technologies, 96 YALE L.J. 187, 202 (1986) (arguing that once the embryo is implanted in the surrogate, a surrogate's fundamental right to privacy shields the pregnancy and resulting child from the contract requirements).

75. *See J.F.*, 66 Pa. D. & C.4th at 17 (opting to look at and analyze the contract terms).

76. *See id.* at 18 (noting that J.F. is, by contract, the children's father and legally responsible for the children unless a paternity test proves that they are not his).

77. *See* John M. v. Paula T., 571 A.2d 1380, 1385-89 (Pa. 1990) (demonstrating that where a married woman gives birth to the child, her husband is the presumptive father of the child, and only by proving the husband's non-access or infertility can a third party overcome that presumption). *But see* Commonwealth *ex rel.* Savruk v. Derby, 344 A.2d 624, 626-27 (Pa. Super. Ct. 1975) (announcing that a wife's testimony can serve as evidence of non-access).

78. *See* Hill, *supra* note 26, at 415-16 (arguing for application of a parentage standard that relies on contract principles and holds participating parties to their promises because the intended parents rely to their financial and emotional detriment on the promises of the surrogate).

79. *See J.F.*, 66 Pa. D. & C.4th at 17 (describing the contract terms).

80. *See id.* at 33 (voiding one surrogacy contract as contrary to a public policy concern that requires two identifiable parents for each child).

81. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 289 (Cal. Ct. App. 1998) (noting that, even where a court declines to specifically enforce a surrogacy contract, the parentage claim of the intended parents still relies on the intent expressed in the contract); *see also* Hurwitz, *supra* note 15, at 140-41 (arguing that courts do not necessarily look to the specific contract terms as much as they look to the contract for evidence of preconception intent).

82. *Cf. In re* Baby M., 537 A.2d 1227, 1250 (N.J. 1989) (voiding the surrogacy contract and declaring that in all birth situations the woman who gives birth is the legal mother).

mother.[83] Had the contract named a legal mother, the surrogate would never have had any rights to "bargain away."[84] Therefore, the court would have been unable to invalidate the contract on the grounds that permitting a parent to bargain away her parental rights was contrary to public policy.[85]

The public policy rationale behind prohibiting a parent to bargain away his or her parental rights is that doing so denies the child his or her right to seek parental custody or support from two individuals.[86] Pennsylvania courts have, however, permitted the enforcement of contracts that release a parent from his or her parental obligations when the contract "is fair and reasonable, made without fraud or coercion, and without prejudice to the welfare of the child."[87] In these cases, courts have held that where a natural parent bargains away his or her parental responsibilities and another contractually assumes those responsibilities, there is no prejudice to the welfare of the child.[88] Therefore, had the contract in *J.F.* provided for two identifiable parents instead of only one, the public policy concern would not have applied.[89]

Additionally, the court explicitly identified J.F. as the child's father based on the contract terms.[90] The court failed to acknowledge any

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83. *See J.F.*, 66 Pa. D. & C.4th at 19-20 (noting that J.F.'s girlfriend was not a party to the action because the contract did not name her as legal mother and she was not genetically related to the children).

84. *See id.* at 23-24 (declaring Bimber the legal mother only after noting that the contract failed to identify a legal mother and no other viable claim of motherhood existed in this particular case).

85. *See, e.g.*, T.B. v. L.R.M., 753 A.2d 873, 882 (Pa. Super. Ct. 2000) (declaring that legal parents have a prima facie right to custody); *see also* Johnson v. Calvert, 851 P.2d 776, 786 (Cal. 1993) (noting that where a court identifies the gestational surrogate as something other than the legal mother, she cannot have the constitutional rights of a legal mother).

86. *See* Mallinger v. Mallinger, 175 A.2d 890, 891 (Pa. Super. Ct. 1961) (declaring that courts need not enforce contracts to bargain away child support or custody obligations because children are not property); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 191 cmt. a (1981) (noting that a court will not enforce agreements on the custody of a child unless the agreement is consistent with the child's best interest).

87. *See* Commonwealth v. Cameron, 179 A.2d 270, 272 (Pa. Super. Ct. 1962) (holding a contract enforceable where a father bargained away his parental duty to support because the contract provided that the natural mother and a third party would accept financial responsibility for the child).

88. *See id.* at 273 (guarding the welfare of the child by explaining that if the two people who contracted to assume parental responsibilities no longer can provide the necessary financial support to the child, then the court will revive the natural parent's obligations).

89. *See J.F.*, 66 Pa. D. & C.4th at 4 (noting that Bimber contacted SMI of her own volition and volunteered her services as a surrogate prior to meeting J.F., which strongly indicates a lack of coercion or fraud).

90. *See id.* at 23 (stating that the contract identified J.F. as the legal father of the triplets, but it left the triplets with no means of identifying a legal mother).

claim of legal motherhood in favor of Bimber that relied on gestation, only mentioning her role as gestator in tandem with her role as nurturer in the days after the babies' birth.[91] This suggests that the court placed equal emphasis on her roles during the babies' gestation and after. Therefore, even though the court named Bimber as the legal mother, the court's reliance on the contract terms strongly indicates that it did not do so solely based on the gestational motherhood standard or her status as the gestational mother.

B. The State's "Paramount" Interest: A Gestational Surrogacy Standard Would Violate Pennsylvania's Judicially Recognized Interest in Preserving the Family Unit

1. Application of the Rationale Behind Paternity by Presumption

In *J.F.*, the court noted the relevance of the paternity by estoppel doctrine without expressly adopting a maternity by estoppel rule.[92] However, Pennsylvania courts have noted that the presumption of paternity supercedes the doctrine of paternity by estoppel; paternity by estoppel only should apply where the presumption of paternity cannot.[93]

Courts have acknowledged that the presumption of paternity is one of the strongest presumptions in Pennsylvania law due to the "paramount" state interest in supporting and encouraging the continuance of stable family units.[94] Because the court in *J.F.* applied the reasoning of paternity by estoppel, future courts likely would apply the reasoning behind the state's stronger paternity doctrine, the presumption of paternity, where possible.[95] Therefore, if J.F. had been married to his girlfriend, the court likely would not have named Bimber as the legal mother and would have applied the rationale behind the paternity presumption to identify the triplets' mother as

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91. *See id.* at 23-24 (emphasizing that Bimber carried the children in her womb, took them home, and cared for them after birth).

92. *See id.* at 21 (noting that if paternity by estoppel exists because a child should know his father, then the idea that a child should know his mother would also support a theory of maternity by estoppel).

93. *See, e.g.*, Brinkley v. King, 701 A.2d 176, 180 (Pa. 1997) (noting that the legal analysis in paternity cases is twofold: first, the court must look to see if the presumption of paternity applies and second, if the presumption does not exist or has been rebutted, the court examines the possibility of paternity by estoppel).

94. *See id.* at 180 n.7 (stating that the presumed father, the institution of marriage, and the state of Pennsylvania all have a "paramount" interest in the continued application of the paternity by estoppel doctrine).

95. *See* Freedman v. McCandless, 654 A.2d 529, 533 (Pa. 1995) (identifying the justification for applying paternity by estoppel as "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of child." (*quoting* Gulla v. Fitzpatrick, 596 A.2d 851, 856 (1991))).

J.F.'s wife.[96]

Additionally, had the court truly desired to adopt a gestational surrogacy standard, the court would have named Bimber as the children's legal mother and her husband as their father due to the presumption of paternity.[97] Instead, the court first recognized J.F. as the legal father based on the contract terms and his genetic contribution, then sought to identify a legal mother.[98] The court did not apply the presumption of paternity to Bimber's husband, because it did not recognize her legal status as mother based on her role as gestator.[99] Rather, the court derived her legal status as mother from principles of estoppel.[100] Therefore, the outcome of the court's analysis should not be interpreted as establishing a gestational motherhood standard. Such an interpretation would contradict Pennsylvania's "paramount" public policy goals.

Furthermore, not only does application of the presumption of paternity doctrine indicate that the court did not apply a gestational motherhood standard, it also supports the adoption of an intended parents standard.[101] The presumption of paternity derives its strength from Pennsylvania's interest in preserving existing family units.[102] Pennsylvania courts recognize this interest as "paramount" and the presumption is extremely difficult to overcome.[103] Commentators

96. *See J.F.*, 66 Pa. D. & C.4th at 24 (asserting that J.F.'s girlfriend could not be the children's legal mother because she was not genetically related to them nor was she married to their father). *But see* Lilienthal, *supra* note 69, at *1 (quoting James H. Richardson, a managing partner at the firm representing J.F. and his girlfriend, stating that the girlfriend clearly had intended to parent the triplets and had planned on adopting them).

97. *See Brinkley*, 701 A.2d at 179 (declaring that in situations where a child is born into an intact marriage and the marriage remains intact, the presumption of paternity applies).

98. *See J.F.*, 66 Pa. D. & C.4th at 23-24 (stating that the contract clearly provides a legal father for the triplets, but that the court must determine the identity of the triplets' mother).

99. *See id.* (noting that Bimber's actions form the basis for her motherhood more so than her biological connection to them as their surrogate mother).

100. *See id.* (comparing Bimber's actions, such as carrying the triplets, birthing them, and taking them home and caring for them, to similar post-birth actions that give rise to paternity by estoppel).

101. *See* Lori Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2344 (1995) (arguing that contract law principles can "bend to accommodate" intangible interests that come into play in surrogacy situations).

102. *See Brinkley*, 701 A.2d at 179 (declaring that the presumption of paternity no longer applies in situations where the marriage is no longer intact).

103. *See supra* notes 58-60 and accompanying text (explaining that a person can defeat the presumption of paternity only by proving that the presumed father did not have access to his wife at the time of conception or that he was incapable of procreation). *But see Brinkley,* 701 A.2d at 182 (Nigro, J., dissenting) (arguing for a less strict application of the presumption of paternity that would permit rebuttal of the presumption based on blood test results).

have noted that one of the weaknesses in a gestational surrogacy standard is that it recognizes legal parentage in two people who are, in almost every case, not members of the same family unit.[104] In fact, sometimes they are virtual strangers who may live in different states.[105] When an existing family unit seeks to create a child, prepares financially and emotionally for the child, and provides a home for the child, splitting custody between two households would contradict Pennsylvania's stated public policy interest in preserving family units.[106] The most direct way to avoid the risk of splitting custody between two families (which almost always occurs when courts apply a gestational motherhood standard) is for Pennsylvania to apply an "intended parents" standard.[107]

Application of the rationale behind Pennsylvania's strongest presumptions indicates that a gestational surrogacy standard would violate the state's interests.[108] In this case, the court could not apply the presumption because the intended father was not married.[109] Therefore, the court likely would have relied on the presumption to hold J.F. and his wife, had he been married, as the children's parents to keep within the state's statutory presumptions.[110]

2. Paternity by Estoppel and In Loco Parentis*: Recognition of Parentage Based on Action Rather Than Biology*

A gestational motherhood standard also would run afoul of Pennsylvania's application of two additional doctrines, paternity by

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104. *See* Baker, *supra* note 20, at 608 (noting that conferring parental rights on a gestational surrogate and a genetic father creates a "confusing situation" that conflicts with Supreme Court precedent that recognizes the sanctity of the family above the rights of genetic parents).

105. *See J.F.*, 66 Pa. D. & C.4th at 1-6 (explaining that J.F. resides in Ohio, Bimber resides in Pennsylvania, and that SMI, an Indiana corporation, connected them).

106. *See Brinkley*, 701 A.2d at 180-81 (failing to recognize non-married couples as part of a "family unit," and insisting that if the couple is not married, the presumption of paternity cannot apply).

107. *See In re* Baby M., 537 A.2d 1227, 1235 (N.J. 1989) (demonstrating that some courts also may uphold a presumptive father's contractual promise to rebut the presumption in surrogacy contracts). The New Jersey Supreme Court accepted the surrogate's husband's rebuttal of the presumption and recognized the legal paternity of the genetic father. *Id.*

108. *See* Larry Gostin*, A Civil Liberties Analysis of Surrogacy Arrangements*, 17 J. CONTEMP. HEALTH L. & POL'Y 432, 446-47 (2001) (acknowledging the likelihood that, where policy deems the gestational mother and biological father as legal parents, custody battles will ensue and the court will have to decide where the child's best interests lie).

109. *See supra* note 106 (explaining that the presumption of paternity only applies when an intact marriage exists).

110. *See* Lilienthal, *supra* note 69, at *1 (referring to Pennsylvania surrogacy expert Lawrence Kalikow's suspicion that the marital status of J.F. and his girlfriend was a significant factor in the court's analysis).

estoppel and *in loco parentis,* because both of these doctrines focus on parental actions rather than biology to determine parentage.[111] First, the rationale behind paternity by estoppel is not directly applicable to gestational surrogacy situations because the situations in which courts apply paternity by estoppel are significantly different from the facts of a gestational surrogacy dispute.[112] In paternity by estoppel cases, the court prohibits a father, who has developed a relationship with a child, from denying the rights and responsibilities arising from that relationship.[113] In gestational surrogacy, however, the court denies intended parents the chance to develop a relationship with the child by declaring the gestational surrogate the legal mother.[114] However, the rationale behind paternity by estoppel does not apply in gestational surrogacy situations, because the dispute in gestational surrogacy arises at the moment the surrogate gives birth; there is no time for the child to develop expectations or emotional ties that would cause the child to suffer if severed.[115]

Paternity by estoppel is relevant, however, as it indicates Pennsylvania's willingness to recognize the limitations of biology in terms of defining parentage.[116] This applies to gestational surrogacy because the intended parents may not have a genetic tie to the child, but the surrogate will have gestated the child, which creates a traditionally recognized biological link.[117] In other cases, the

111. *See* L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (declaring that the relationship between *in loco parentis* and paternity by estoppel is such that where a third party asserts that she has established a relationship with a child *in loco parentis* for the purpose of pursuing custody or visitation, she is thereby estopped from denying her duty to support the child).

112. *See* Fish v. Behers, 741 A.2d 721, 724 (Pa. 1999) (noting that the underlying concern in paternity by estoppel cases is preventing children from experiencing the trauma associated with discovering that one "parent" that a child loved, trusted, and relied upon is not his parent).

113. *See id.* (estopping a mother from seeking child support from her son's biological father where the son continued to believe that her ex-husband was his father).

114. *See, e.g.*, A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. 2000) (holding that, because New Jersey has no statute dealing with maternity and holds surrogacy contracts unenforceable, the hospital should place the gestational surrogate's name on the birth certificate to keep with the state's maternity laws).

115. *See* Hill, *supra* note 26, at 402-03 (arguing that the child suffers no harm when separated from the gestational surrogate after birth); *see also* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 913 (2000) (asserting that claims of parentage based on doctrines such as the presumption of paternity and paternity by estoppel do not apply to the surrogate in gestational surrogacy situations, because she has not had the time to develop a relationship with the child).

116. *See* Brinkley v. King, 701 A.2d 176, 179-80 (Pa. 1997) (holding that paternity by estoppel prohibits parents from making paternity claims based on biology that would trump paternity claims based on actions).

117. *See* Hurwitz, *supra* note 15, at 157-58 (noting that the surrogate mother makes a biological contribution to the child, but recognizing that the strength of the

intended parents will be the genetic parents of a child, but still will lack the traditionally recognized "birth" factor.[118] In both situations, the rationale behind paternity by estoppel suggests that Pennsylvania is prepared to recognize that the actions of the intended parents form the basis for their parentage.[119]

Second, the doctrine of *in loco parentis* also expresses the state's readiness to look beyond mere biology to establish parental rights.[120] This reflects the court's recognition of parental rights in individuals not genetically related to the child.[121] Applied to gestational surrogacy, this willingness to look beyond the out-dated constraints of biology favors the intended parents.[122] In *J.F.*, the judge applied the doctrine of *in loco parentis* to Bimber, noting that even if the court refused to identify her as the triplets' legal mother, she still would have had standing *in loco parentis* to seek custody.[123] Because a parent *in loco parentis*, by definition, is not a biological parent, this further establishes that the outcome of this case did not create a gestational motherhood standard.[124]

3. Assisted Conception Birth Procedure: Acceptance of an Agency Policy that Already Recognizes the Rights of Intended Parents

Finally, at least one state agency in Pennsylvania already recognizes the rights of intended parents.[125] Through a Department of Health

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contribution is insufficient to establish legal motherhood).

118. *See supra* notes 14-17 and accompanying text (explaining different gestational surrogacy arrangements).

119. *See* Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999) (relying on actions rather than biology to define legal parentage, and prohibiting a man who acted like a father to a child from denying his paternity).

120. *See* J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. Super. Ct. 1996) (acknowledging that courts often find that step-parents have standing *in loco parentis* because they develop a parent-like relationship with the child through the course of living with that child).

121. *See* Laurence Nolan, *Legal Strangers and the Duty to Support: Beyond the Biological Tie—But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 20 (2000) (characterizing the *in loco parentis* relationship as voluntarily created, and arguing that the existence of a marital tie is insignificant).

122. *See J.A.L.*, 682 A.2d at 1322 n.5 (finding that third parties can establish a relationship *in loco parentis* in as short a period of time as ten months because it is relative to the circumstances of the case, such as the amount of time that has passed since the child's birth).

123. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 24 (2004) (stating that Bimber likely would have standing *in loco parentis* based on her role in gestating and caring for the triplets).

124. *See* BLACK'S LAW DICTIONARY 803 (8th ed. 1999) (noting that a parent *in loco parentis* is someone other than a natural parent who acts in place of a natural parent).

125. *See* PA. SURROGACY POL'Y, *supra* note 66 (noting that the Pennsylvania Department of Health's Assisted Birth Policy allows for the placement of the intended parents' names on the birth certificate).

policy, the state permits the Department of Vital Records to issue birth certificates bearing the names of the intended parents.[126] This program is the most direct evidence so far of the state's willingness to recognize parentage based on something other than gestation or biology, namely intent.[127]

C. Adoption of a Gestational Motherhood Standard Would Not Withstand Constitutional Scrutiny

1. Unconstitutionality on Due Process Grounds

Aside from offending Pennsylvania state laws and policy goals, a gestational motherhood standard in gestational surrogacy cases would also run contrary to the Due Process Clause of the Fourteenth Amendment.[128] The Due Process Clause prohibits the government from arbitrarily infringing upon people's rights.[129] Furthermore, in interpreting the Due Process Clause, the Supreme Court has classified certain rights as "fundamental" and afforded those rights a heightened level of protection from government intrusion.[130]

One right that the Supreme Court deems fundamental is the right to privacy.[131] While the Court has never defined the outer limits of this right, the Court has ruled that the right to privacy protects decisions regarding marriage,[132] procreation,[133] contraception,[134]

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126. *See* Letter from Stephen Tompkins, Senior Counsel, Office of Legal Counsel, Pennsylvania Department of Health (Oct. 28, 2004) (on file with author) (asserting that Pennsylvania courts have issued orders directing Vital Records to recognize intended parents as the legal parents in 167 gestational surrogacy cases since 1994).

127. *But see id.* (noting that because the policy is not mandatory, several judges in various counties refuse to issue the assisted conception birth orders recognizing intended parents as legal parents on birth certificates).

128. See U.S. CONST. amend. XIV, § 1 (providing that no state shall deprive any person of life, liberty, or property without due process of the laws).

129. *See generally* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L., § 14.6 (6th ed. 2000) (explaining the history and significance of the Due Process Clause).

130. *See* Powell v. Alabama, 287 U.S. 45, 67 (1932) (defining fundamental rights as those rights that, if denied, would "violat[e] the fundamental principles of liberty and justice which lie at the base of all our political and civil institutions" (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))); *see, e.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (declaring freedom of speech a fundamental right); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (identifying the right to privacy as a fundamental right); Shapiro v. Thompson, 394 U.S. 618, 639 (1969) (recognizing the right to travel as a fundamental right).

131. *See Griswold*, 381 U.S. at 485.

132. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that state law prohibiting interracial marriage violates the right to privacy).

133. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that forced sterilization violates the fundamental right to procreate).

134. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (declaring that a ban on

and abortion.[135] Evidently, within the right to privacy, courts have recognized a right to use medical and technological advances to prevent pregnancy.[136] Therefore, it follows that the Court also should recognize an individual's right to use similar advances in creating a pregnancy.[137] As one federal district court has noted, "[i]t takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[138] Although infertile couples need to take additional steps in order to become parents such as securing a medical center, potentially procuring eggs or sperm, and identifying a surrogate, these steps are simply part of the procreative process that the right to privacy protects.[139] Therefore, the state cannot infringe on an infertile couple's right to become parents any more than it can on a fertile couple's right to do so.[140] Yet, a gestational motherhood standard would deny infertile couples the opportunity to become parents by presumptively bestowing their right to legal parentage on the surrogate and, if married, on her husband.[141]

In order to infringe on a right that the Court recognizes as

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the sale of contraceptives to unmarried couples violates an individual's right to privacy).

135. *See* Roe v. Wade, 410 U.S. 113 (1973).

136. *See* SCOTT RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? 16-17 (1994) (recognizing both the freedom to procreate, which involves birth control decisions made prior to conception, and freedom in procreation, which involves "pregnancy management decisions," such as abortion).

137. *See id.* at 17 (arguing that the broad language that the Supreme Court used in its decisions such as *Eisenstadt* supports the argument that these decisions also protect non-coital reproduction).

138. *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (invalidating an Illinois law that would prohibit one particular type of fertility treatment on the grounds that the law interfered with the constitutionally protected right to freedom from government interference in matters of childbearing).

139. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 428 (1983) (arguing that "because fertile married persons have the right to add children to the family, infertile married persons must have it as well: a legal distinction based on the natural lottery of physical equipment is not reasonable").

140. *See* RAE, *supra* note 136, at 18 (arguing that it would constitute discrimination based on gender if the courts denied infertile couples the same rights afforded fertile couples).

141. *See* J.R. v. Utah, 261 F. Supp. 2d 1268, 1289 (D. Utah 2003) (striking down a statute that declared a gestational surrogate the legal mother of any child born to her on the grounds that it burdened an infertile woman's ability to make procreative choices and thereby infringed on her constitutional right to privacy); *see also* Gary N. Skoloff & Edward J. O'Donnell, *Is Surrogate Parenting the "Cure" for Society's Infertility "Epidemic"?*, NAT'L. L.J., Nov. 2, 1987, at 18 (asserting that parentage statutes that do not address surrogacy arrangements specifically infringe upon the infertile couple's constitutional right to procreate).

fundamental, the state must meet the very high burden of strict scrutiny.[142] To survive strict scrutiny, a state's regulation must be narrowly tailored to further a compelling state interest.[143] Therefore, even if Pennsylvania sought to establish a gestational motherhood standard, it is doubtful that the state could prove that a gestational surrogacy standard for motherhood serves a compelling state interest.[144] For example, the state could argue that protecting the best interests of the child is a sufficiently compelling interest.[145] However, it is unlikely that the Court would consider this a "compelling" interest because there is no identifiable harm in placing children with intended parents.[146] Therefore, the state's ability to infringe on parental rights begins only after a court deems that parent "unfit."[147] It is even less likely that a court would recognize a state's interest in protecting the surrogate because adults retain the responsibility of making their own choices.[148] Additionally, a court likely would not recognize the state's compelling interest in protecting the family unit in this context because the government permits behavior that is at odds with society's accepted values.[149]

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142. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (stating that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

143. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring) (explaining that a law that prevents people from using birth control pills or devices is unconstitutional, because the state's interest in preventing extra-marital relations is too slight to be considered "compelling" and the law, which also affects married couples, sweeps too broadly in its prohibition).

144. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 767 (2d ed. 2002) (noting that while the Supreme Court has never defined what criteria are necessary for an interest to qualify as "compelling," the Court traditionally has only recognized interests that are truly vital as sufficient to withstand strict scrutiny).

145. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that the state may infringe on a parent's right to make decisions regarding his or her child in order to protect the child's well being); *see also* Commonwealth v. Nixon, 761 A.2d 1151, 1156 (Pa. 2000) (identifying the health and welfare of minors as a compelling state interest sufficient to overcome the right to privacy in matters of childrearing).

146. *See* RAE, *supra* note 136, at 23 (noting the lack of evidence of potential harm to children resulting from gestational surrogacy situations in which an intended or genetic mother, rather than a gestational mother, raises the child); *see also* Troxel v. Granville, 530 U.S. 57, 68-69 (2000) (noting that where a "fit" parent exists, the state cannot infringe on that parent's right to make determinations of the child's best interests, even if it disagrees with those determinations).

147. *See* MARCIA MOBILIA BOUMIL, LAW, ETHICS AND REPRODUCTIVE CHOICE 55 (1994) (distinguishing surrogacy cases from "best interest of the child" determinations on the ground that the former involve identifying parents while the latter involve deciding between the desires of two parties with competing interests as to the child).

148. *See* RAE, *supra* note 136, at 19-20 (noting that the state has no responsibility to protect adults from "the folly of their choices" and no justification for restricting an adult's ability to engage in risky behavior).

149. *See* RICHARD T. HULL, ETHICAL ISSUES IN THE NEW REPRODUCTIVE TECHNOLOGIES 14 (1990) (asserting that the state cannot prevent the exercise of

Furthermore, arguments for regulating non-coital reproduction on religious, moral, or societal grounds due to concerns about biology, technology, or reproduction also would not suffice as a compelling state interest because, in the case of surrogacy, none of those concerns are justified by harm to another individual.[150] One scholar has noted that the Supreme Court established, in the same cases that espouse the existence of a fundamental right to procreate, that the state's ability to "enforce or impose morality stops at the threshold of another person's fundamental rights."[151]

Even if a court recognized the state's interest as sufficiently compelling, a gestational motherhood standard is, by no means, narrowly tailored.[152] The gestational mother would be identified as the legal mother in each and every case, without due regard to which potential parent would serve the best interests of the child.[153] Therefore, a gestational motherhood standard would be unconstitutional because it would restrict the rights of infertile couples to engage in procreation in situations where the infertile couple could better serve the needs of the child than the surrogate.[154]

2. Unconstitutionality on Equal Protection Grounds

Even if the Court failed to recognize the procreative rights of the intended parents as a fundamental right, a gestational motherhood standard in a gestational surrogacy situation likely would still fail constitutional review on Equal Protection grounds.[155] The Equal

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rights just because the outcome of the exercise would conflict with recognized social values).

150. *See id.* (noting that state concerns that do not pose a tangible threat of harm to others cannot justify the government's intrusion on fundamental rights).

151. *See id.* (arguing that *Griswold*, *Roe v. Wade*, and *Eisenstadt* stand for the proposition that disagreement with or disapproval of another's moral choices cannot justify intrusion on fundamental rights).

152. *See* CHEMERINSKY, *supra* note 144, at 762 (noting that, generally, in order for a regulation to qualify as "narrowly tailored," a less restricted means must not exist).

153. *See* Clapper v. Harvey, 716 A.2d 1271, 1273 (Pa. Super. Ct. 1998) (declaring that, in making a determination of the best interest of the child, the court must consider any relevant factors that may affect the child's physical, intellectual, moral, and spiritual well being).

154. *See* HULL, *supra* note 149, at 14 (asserting that a gestational motherhood standard may violate the rights of intended couples). The Constitution, however, may permit certain restrictions on non-coital reproductions, specifically laws that would require disclosure of the gamete donor's identity if requested and laws that would assure "free, informed entry" into reproductive contracts. *Id.*

155. *See infra* Part IIC2 (arguing that a gestational motherhood standard in a gestational surrogacy situation would violate the Fourteenth Amendment); U.S. CONST. amend. XIV, § 1 (providing that the states cannot deny any person equal protection of the laws); *see also* Christina DeJong & Christopher E. Smith, *Equal Protection, Gender, and Justice at the Dawn of a New Century*, 14 WIS. WOMEN'S L.J. 123, 126-29 (1999) (noting that Congress originally passed the Fourteenth Amendment to protect recently emancipated slaves from racial prejudice, but, in

Protection Clause requires that courts examine any law that treats men and women differently under a heightened level of scrutiny, known as intermediate scrutiny.[156] To survive intermediate scrutiny, the state must prove that the law serves an important governmental objective and that there is a substantial relation between the law and that objective.[157]

A gestational motherhood standard treats men and women who are similarly situated differently, which triggers an Equal Protection analysis.[158] In traditional birth situations, mothers and fathers are not similarly situated because of biological differences between the sexes.[159] In contrast, in some gestational surrogacy arrangements where the intended parents each supply the genetic material for the child and neither parent bears the child, mothers and fathers are similarly situated.[160] Each parent contributes only genetic material to the production of an embryo, which a third party gestates.[161]

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recent decades, the Court has expanded the doctrine of Equal Protection to protect against discrimination based on gender).

156. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a law that prohibited the sale of "near beer" to men under twenty-one and women under eighteen); *see also* ROTUNDA & NOWAK, *supra* note 129, at § 14.3 (explaining that, aside from intermediate scrutiny, which applies to gender-based distinctions, the Supreme Court has also articulated two other standards of review: strict scrutiny and rational basis). Strict scrutiny is the most difficult standard to meet and the Court applies it to laws that draw distinctions based on race or national origin, whereas the Court applies rational basis review, the lowest standard, to general economic laws. *Id.*

157. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70-75 (1981) (finding that a law that required men but not women to register for the draft survived intermediate scrutiny because the differential treatment of men and women substantially served a sufficiently important goal—the raising and deploying of armies capable of combat); *Craig*, 429 U.S. at 200-10 (striking down a law that prohibited men under twenty-one from buying an alcoholic beverage that women under twenty-one could buy because the differential treatment of men and women was not substantially related to the state's goal of improving traffic safety).

158. *See* Storrow, *supra* note 13, at 634-35 (suggesting that the genetic provider standard may also offend the Constitution in states where the presumption of paternity exists because it would permit genetics to determine motherhood while genetics could not override the presumption to determine fatherhood).

159. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 316 (noting that historically, the act of giving birth provided clear proof of motherhood, while no similarly conclusive means existed to prove paternity).

160. *See* Soos v. Super. Ct., 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (overturning an Arizona surrogacy statute that deemed the surrogate the legal mother of any child born to her on Equal Protection grounds because it permitted a genetic father to rebut the presumption of paternity with proof of genetic relationship, but offered no rebuttal to a genetic mother); *see also* Hofheimer, *supra* note 36, at 597 (arguing that the Equal Protection Clause is triggered in situations absent pregnancy as the distinguishing factor between expectant fathers and mothers).

161. *See* RAE, *supra* note 136, at 17-18 (noting that in traditional birth situations, fertile couples are differently situated because fertile women have two aspects of fertility, the genetic component and the gestational component, while fertile men have only the genetic component).

Applying a gestational surrogacy standard in Pennsylvania would permit a genetic father a slim but legitimate claim of legal parentage by rebutting the presumption of paternity if the surrogate is married[162] or by establishing paternity based on a genetic relationship if she is not married.[163] However, no such opportunity exists for a genetic mother to establish legal motherhood as against a gestational mother.[164] Therefore, a gestational motherhood standard, as applied in Pennsylvania, would treat men and women differently.[165]

Thus, in order for its surrogacy standard to survive a court's heightened scrutiny, Pennsylvania must have an important state interest that is substantially related to a gestational motherhood standard.[166] Pennsylvania could argue that the state has an important interest in furthering the bond between gestator and child or that gestation, rather than genetics, creates motherhood.[167] However, the Supreme Court has adamantly rejected arguments based on sex stereotyping.[168] Since there is no evidence that a child benefits more from his relationship with a non-genetically-related surrogate than with his own genetic parents, that justification hinges on sex-based stereotypes.[169] Therefore, a court likely would reject that argument

162. *See* Brinkley v. King, 701 A.2d 176, 181 n.9 (Pa. 1997) (holding that the presumption of paternity can be rebutted by proof that the husband had no access to the wife at the time of conception or that he was infertile); *see also* Commonwealth *ex rel.* Savruk v. Derby, 344 A.2d 624, 627 (Pa. Super. Ct. 1975) (recognizing that courts can consider the husband's and wife's testimonies as to whether or not there was "access" at the time of conception).

163. *See* 23 PA. CONS. STAT. § 4343 (2004) (stating that genetic testing can establish paternity if the woman who gives birth is not married and no man has acted as a father to the child).

164. *See supra* notes 50-52 and accompanying text (proving that Pennsylvania's presumption of maternity is currently irrebuttable).

165. *See* Hofheimer, *supra* note 36, at 596-97 (noting that a standard that favors the gestational mother and the genetic father is discriminatory and requires heightened scrutiny).

166. *See id.* (noting that the states that fail to meet the burden of intermediate scrutiny cannot provide certain rights to genetic fathers and deny those same rights to genetic mothers).

167. *See* Garrison, *supra* note 115, at 914-15 (noting that arguments in favor of recognizing the legal parentage of a gestational mother do not rest on contract or procreative liberty analysis; instead, they focus on the significance of the gestational bond).

168. *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (invalidating a statutory scheme that provided for benefits to all wives of military men, but conditioned the receipt of benefits by husbands of military women because the law's justification rested on stereotypes of the sexes); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (overturning a child support law that required child support payments for boys until age twenty-one but for women only until eighteen, because the law relied on sex stereotypes to justify disparate treatment of men and women).

169. *See* Hill, *supra* note 26, at 393-94, 403 (noting that, while parental bonding within the first year is tantamount to a child's development, research has failed to show that a child benefits more from bonding with a gestational mother than with a non-biologically-connected one).

and find that Pennsylvania lacks an interest sufficiently important and substantially related to the motherhood standard to overcome the court's heightened scrutiny.[170] As a result, a gestational motherhood standard would likely fail Equal Protection analysis.

III. THE FUTURE OF SURROGACY IN PENNSYLVANIA

Pennsylvania should codify its approach to surrogacy contracts in order to protect the rights of intended parents.[171] Some commentators believe that Pennsylvania's current system is adequate, but the emergence and outcome of *J.F.* suggests otherwise. As it stands, the state fails to protect the rights of intended parents.[172] The legislature should enact guidelines to govern surrogacy arrangements and to guide future courts in their surrogacy analyses.[173]

A. Enactment of a Modified Version of the Uniform Parentage Act

Pennsylvania's statute should resemble the UPA in several ways.[174] First, it should recognize the intended parents as the legal parents of a child born through a surrogacy arrangement.[175] To avoid situations like that seen in *J.F.*, the statute specifically should require the identification of two parents.[176] However, the statute should differ from the UPA in that it should recognize intended parents whether or not the intended parents are married.[177] Requiring marriage of

170. *See* Hofheimer, *supra* note 36, at 597 (arguing that it would be nearly impossible for the government to meet the heightened level of scrutiny without relying on sex stereotyping to justify the disparate treatment of men and women).

171. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 32 (2004) (recommending that the legislature take action to enact surrogacy legislation and prevent cases like this one from appearing before the courts).

172. *See supra* notes 66-68 and accompanying text (noting that because the legislature has not codified the Department of Health's assisted birth procedure, it is not binding on the courts). Although courts can choose to apply it, the Department of Health cannot require them to do so nor can it require them to uphold its application during a surrogacy dispute. *Id.*

173. *See* Lilienthal, *supra* note 69, at *1 (acknowledging the assertions of notable Pennsylvania attorneys that the facts of the Bimber case are such that the case will not affect the outcome of future surrogacy cases in Pennsylvania).

174. *See* UNIF. PARENTAGE ACT § 801 prefatory cmt. (amended 2002), 9B U.L.A. 360-61 (2000 & Supp. 2004) (advocating for a law that favors intended parents and recognizes a surrogacy contract as enforceable as long as a court pre-approves it).

175. See *id.* § 801 cmt., 9B U.L.A. 362 (asserting that, because the advancement of science virtually guarantees that gestational surrogacy agreements will continue, a standard that enforces pre-approved surrogacy contracts will promote the public policy goals of stability and fairness).

176. *See J.F.*, 66 Pa. D. & C.4th at 19-23 (refusing to enforce the surrogacy contract where it only provided for one legal parent of the triplets).

177. *See* UNIF. PARENTAGE ACT § 801(b), 9B U.L.A. 362 (requiring that the intended parents be married and parties to the contract); *see also* RAE, *supra* note 136, at 19 (concluding that there are no compelling reasons to recognize the rights of procreative freedom only in married couples).

intended parents would conflict with Pennsylvania's recent willingness to circumvent marital requirements in family law issues.[178] For example, Pennsylvania has recognized exceptions to marital requirements for gay couples, who are not legally permitted to marry.[179] Simply requiring the identification of two parents would coincide with Pennsylvania's expanding perception of the "family unit."[180] Further, this requirement would still protect the rights of the child because it would ensure two legal parents from whom the child could seek emotional and financial support.[181]

Additionally, the Pennsylvania statute should require the receipt of a pre-conception order recognizing the contract as valid.[182] This would permit the state to safeguard the interest of the child by predetermining the ability of the parties to fulfill their contractual roles and obligations.[183] It also will deflect arguments centered on concerns about the rights of the gestational mother.[184] The court in *J.F.* held that the contract conflicted with public policy because it allowed Bimber to sign away her parental rights without adequate

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178. *See generally* Maureen Cohon, *Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 DUQ. L. REV. 495 (2003) (noting that while Pennsylvania does not officially recognize same sex unions, some Pennsylvania courts permit gay couples to avail themselves of family law benefits such as second-parent adoption, custody and visitation rights, and domestic violence protection).

179. *See In re* Adoption of R.B.F, 803 A.2d 1195, 1202-03 (Pa. 2002) (permitting an exception to a statutory requirement that where one person seeks to adopt his or her domestic partner's child, the parent and the person who wishes to adopt must be married to each other). The court permitted a gay male to adopt his partner's child because the state prohibited them from marrying, which the court found fell within a statutory exception involving a showing of "good cause" as to why the adopting couple had not met the statutory requirements. *Id.*

180. *See* Shultz, *supra* note 159, at 344 (acknowledging the evolution of the "traditional family unit" due to divorce, remarriage, gay relationships, and unmarried cohabitation).

181. *See* Storrow, *supra* note 13, at 663 (asserting that a marital requirement is irrelevant because intended parents assume legal obligations to support their child through their status as legal parents, not through marriage).

182. *See* UNIF. PARENTAGE ACT § 803 cmt., 9B U.L.A. 364-65 (noting that the court-approved pre-conception validation guards the interest of any potential child by ensuring that intended parents meet the requirements of adoptive parents); *see also* VA. CODE ANN. § 20-160 (2004) (requiring the court to make twelve independent findings, including the intended parents' fitness, prior to issuing the necessary pre-conception court order).

183. *See* VA. CODE ANN. § 20-160(B) (requiring that the court find that intended parents meet the standard of fitness required of adoptive parents, that the parties entered the contract voluntarily, and that the surrogate has endured at least one prior pregnancy).

184. *Cf.* Surrogate Parenting Assocs., Inc. v. Kentucky, 704 S.W.2d 209, 211-12 (Ky. 1986) (noting that where a court approves a pre-conception surrogacy contract, the court will necessarily have concluded that no one induced the surrogate into agreeing to surrender a child, but instead that the surrogate agreed to conceive and carry a child for others who will have parental rights).

time to consider them.[185] However, a court's validation of a surrogacy agreement prior to conception will effectively constitute a waiver of the surrogate's parental rights.[186] Furthermore, a pre-conception contract will defend against accusations that surrogacy contracts manipulate or exploit women.[187] The pre-conception validation order also would require the court to conclude that all parties entered into the contract knowingly and without coercion.[188] Such an order would demonstrate the surrogate's ability to make knowing and rational decisions regarding her own body.[189]

Finally, the UPA also suggests that, where there is no court-validated surrogacy agreement, traditional parentage statutes should prevail.[190] In Pennsylvania, this would result in the court identifying the birth mother as the legal mother and her husband or the genetic father as the legal father.[191] This would serve to encourage parties to surrogate agreements to seek court approval and would thereby protect the interests of all parties.[192] In order to bypass any potential Equal Protection issues, however, the state should enact a maternity law that would allow a rebuttal of the birth mother presumption.[193]

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185. *See* J.F. v. D.B., 66 Pa. D. & C.4th 1, 22 (2004) (applying the public policy concerns behind the creation of mandatory waiting periods in adoption situations).

186. *See* Alexander, *supra* note 37, at 425-26 (arguing that a court's pre-conception validation prevents the surrogate from ever acquiring rights and thereby shields her from any existing baby-selling statute).

187. *See generally* Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205 (1992) (summarizing arguments against surrogacy that focus on potential harms to the perception of women and to the feminist movement altogether, and ultimately concluding that a statute should address these concerns).

188. *See* UNIF. PARENTAGE ACT § 803(b)(4) (amended 2002), 9B U.L.A. 364 (2000 & Supp. 2004) (requiring a court to find that all parties to the contract entered it freely and knowingly prior to certifying a pre-conception agreement).

189. *See* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 155-56 (1989) (asserting that arguments focusing on the surrogate's welfare and rights ignore women's "faculty of self-determination" and their ability to make informed, binding decisions about their bodies); *see also* Shultz, *supra* note 159, at 384 (arguing that if courts permit surrogates to shirk their contractual obligations, they will reinforce stereotypes of women as "unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions").

190. *See* UNIF. PARENTAGE ACT § 809(c), 9B U.L.A. 369 (indicating that even where a court finds a contract unenforceable, the intended parents may still be liable for support of the resulting child).

191. *See supra* Part IC (explaining that, under Pennsylvania law, a gestational mother and her husband are the legal parents of a child born to her, and if the gestational mother is not married, the genetic father has the opportunity to establish parentage).

192. *See* UNIF. PARENTAGE ACT § 809 cmt., 9B U.L.A. 362 (noting that even though this provision does not protect the intended parents, the provision does not prohibit surrogacy agreements). The UPA seeks only to "regularize the parentage aspects of the science, not to regulate the practice of assisted reproduction." *Id.*

193. *See* Soos v. Super. Ct., 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994) (declaring that where a parentage rebuttal is available to a genetic father but not to a

B. Rejection of Commodification Concerns

Pennsylvania's statute should not prohibit payment to the surrogate for her services.[194] States that prohibit payment to the surrogate cite concerns about baby-selling and commodification.[195] Upon closer examination, permitting payment to surrogates in Pennsylvania would not conflict with Pennsylvania's law against baby-selling.[196] As previously mentioned, where a court approves a contract pre-conception, the surrogate has no right to the child and therefore no ability to sell the child.[197] As a result, the cited concerns do not apply.

Furthermore, the argument against commodification relies on the notion that there are some goods or services that people should never exchange for money.[198] However, commentator Richard Epstein dismisses this argument by stating that one person should not impose his or her moral belief about commodification onto others.[199] Indeed, the Supreme Court has noted that the government cannot justify the passage of laws on morality alone.[200]

The commodification argument generally rests on the notion that surrogacy exploits women.[201] However, proving exploitation would require showing that the alleged victims all possessed a particular

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genetic mother, the state has violated the Equal Protection Clause).

194. *Cf.* UNIF. PARENTAGE ACT § 801(e), 9B U.L.A. 362 (permitting payment to the surrogate as consideration).

195. *See* 1980-1981 Ky. Op. Atty. Gen. 2-588 (1981) (declaring payments to a surrogate contrary to Kentucky's strong public policy against the buying and selling of children).

196. *See* 18 PA. CONS. STAT. § 4305 (2004) (declaring that it is a misdemeanor to trade, barter, buy, sell, or deal in infant children); *see also* Ingram, *supra* note 16, at 682 (explaining that the public policy concern against baby-selling stemmed from situations in which a single woman found herself unexpectedly pregnant and felt that she had no choice but to sell her baby).

197. *See* Surrogate Parenting Assocs., Inc. v. Kentucky, 704 S.W.2d 209, 211-12 (Ky. 1986) (distinguishing surrogacy from baby-selling by arguing that baby-selling statutes protect baby buyers from manipulating vulnerable mothers into surrendering their children, whereas court approved surrogacy agreements recognize that the surrogate does not risk such inducement because she has not yet conceived a child).

198. *See* Alan Wertheimer, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law: IV. Trans-substantive Themes: Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215, 1218 (1997) (indicating that other goods or services to which states have applied the commodification argument are citizenship, human beings, and marriage rights).

199. *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2326 (1995) (dispelling the commodification argument and advocating for full enforcement of surrogacy contracts).

200. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) (acknowledging that the law should protect universal liberties rather than mandate on the basis of individual moral codes).

201. *See* Hill, *supra* note 26, at 409 (noting that a common exploitation argument rests on the notion that women are somehow not free to make decisions regarding surrogacy).

vulnerability that rendered them incapable of turning down the exploitative offer.[202] Women who become surrogates do not possess the same characteristics and they opt to become surrogates for a variety of different reasons.[203] Therefore, it is extremely unlikely that all surrogates possess the same vulnerability. Without a shared vulnerability, surrogacy contracts cannot be exploitative.[204] Without the baby-selling or commodification arguments to support a restriction on payment to the surrogate, there remains no viable justification for prohibiting a gestational surrogate from receiving compensation for her valuable services.[205]

CONCLUSION

Last year, Pennsylvania courts addressed a gestational surrogacy dispute for the first time in *J.F. v. D.B.* This case likely indicates the increasing popularity of surrogacy arrangements, as well as the need for guidelines in deciding these disputes. The case possessed a complicated set of facts and represented the messy disputes that can arise from gestational surrogacy arrangements. The judge in this case ultimately ruled that the gestational surrogate was the mother of the triplets she bore.

However, neither future courts nor the Pennsylvania legislature should interpret the outcome of *J.F.* as favoring the adoption of a gestational motherhood standard for surrogacy situations in Pennsylvania. The court named Bimber as the legal mother because of a fatal contract flaw unique to this case, not because of her role as gestator. In addition, a gestational motherhood standard in Pennsylvania would conflict with the existing justifications behind the state's paternity laws and existing policies. Furthermore, a gestational surrogacy standard likely would fail constitutional analysis as applied in Pennsylvania because it would deny infertile parents their right to procreate. It also would violate the Equal Protection Clause by

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202. *See* Havins & Dalessio, *supra* note 3, at 689 (noting that commercial surrogacy contracts are not exploitative because there is no evidence that a surrogacy contract exploits a given weakness in the surrogate).

203. *See* HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 54-57 (1994) (describing the varying characteristics of surrogates interviewed and noting that they perceived their choice as an informed one, even where class inequities existed between intended parents and surrogates).

204. *See* Johnson v. Calvert, 851 P.2d 776, 785 (Cal. Rptr.2d 1993) (acknowledging an absence of significant data to indicate that surrogacy contracts lead to the exploitation of women); *see also* Andrews, *supra* note 101, at 2349-50 (concluding after interviewing over eighty parties to surrogacy agreements that the exploitation concerns were "rashly speculative").

205. *See* Ingram, *supra* note 16, at 689-90 (arguing for compensation to the surrogate for considerations such as the surrogate's discomfort, pain, and risk during pregnancy and birth, as well as the interruption of her own sexual activity).

denying genetic and intended mothers the same rights granted to genetic and intended fathers.

Pennsylvania should adopt a surrogacy statute to prevent situations like that in *J.F.* from occurring in the future. That statute should recognize intended parents as the legal parents of children born to surrogacy contracts. However, because the state does have an interest in protecting the welfare of its children, the legislation should include specific regulations, such as court approval of pre-conception agreements. Additionally, the statute should permit payment to the surrogate for her services.

Ultimately, while *J.F.* was the first surrogacy case to reach Pennsylvania courts, it is unlikely that it will be the last.[206] Whatever route the legislature chooses to take, it is vital that Pennsylvania implement a statute as soon as possible to protect future intended parents from the heartbreak associated with watching someone else raise their child.

206. *See* Ingram, *supra* note 16, at 675 (noting the increasing popularity of gestational surrogacy arrangements).