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Comments: Whose Baby Is It Anyway? The Current and Future Status of Surrogacy Contracts in Maryland

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WHOSE BABY IS IT ANYWAY? THE CURRENT AND FUTURE STATUS OF SURROGACY CONTRACTS IN MARYLAND

I. INTRODUCTION

"What had not been fathomed exists today."[1] The use of assisted reproductive technologies (ART) has become increasingly prevalent in the last fifty years,[2] although artificial insemination was used as early as 1799.[3] As of 2002, approximately 8% of women of childbearing age in the United States had made an infertility-related medical visit at some point in the past.[4] Recently, the Court of Appeals of Maryland had the opportunity to decide a case of first impression regarding the ability of a gestational surrogate and the intended father of the babies to remove the surrogate's name from the babies' birth certificates.[5] While the court's decision was not strongly contested because both the intended father and the surrogate wanted the surrogate's name removed from the birth certificate, the court's decision has both opened the door to the upholding of surrogacy contracts and also left many unanswered questions about the current state of surrogacy contracts in Maryland.

The objective of this Comment is not to discuss whether surrogacy arrangements should be allowed in Maryland. Although the Court of Appeals of Maryland has not expressly ruled on this issue, dicta in *In re Roberto d.B.* suggests that the court will uphold surrogacy contracts where a woman is merely acting as a gestational carrier and is not biologically related to the child she has contracted to carry to term.[6] The main goal of this Comment is to delve into a more narrow issue: In Maryland, when surrogacy arrangements "go bad" and the surrogate wants to keep the baby, what should the outcome be?

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1. *In re* Roberto d.B., 399 Md. 267, 279, 923 A.2d 115, 122 (2007).
2. CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 60 (1989).
3. *Id.* at 59. An English surgeon, Dr. John Hunter, is credited with performing the first artificial insemination in a human being after others had previously experimented on animals. *Id.*
4. Centers for Disease Control and Prevention, Assisted Reproductive Technology: Home, http://www.cdc.gov/ART/index.htm (last visited Aug. 19, 2008).
5. *In re Roberto d.B.*, 399 Md. at 270, 923 A.2d at 117.
6. *Id.* The court does not similarly discuss traditional surrogacy arrangements where the egg donor is also the gestational carrier of the child. *Id.*

Because the decision to uphold or not uphold a surrogacy contract in this situation leads to the placement of a child, it is important to acknowledge not only legal contract principles, but also public policy implications. These implications can include the psychological effects on the surrogate mother and the intended parents; the potential medical, social, and psychological impact on the children; and general values of the population with regard to whose interests are the strongest. All of these complicated factors must be taken into consideration before a decision can be made on the issue. Additionally, existing laws on adoption may be applicable.[7] This Comment attempts to examine and analyze these factors using real examples of surrogacy arrangements, other states' approaches, and statistical data in order to answer this troublesome and perhaps unanswerable question.

Part II.A of this Comment discusses the background and different types of surrogacy arrangements, particularly noting the difference between traditional and gestational surrogacy. Part II.B examines various approaches taken by other states with regard to surrogacy contracts. Part III looks at Maryland's history, both legislative and judicial, regarding surrogacy decisions and laws. Part IV analyzes the court of appeals' decision in *In re Roberto d.B.* and how it affects and will affect current and future surrogacy laws. Part V discusses the public policy implications discussed above. Finally, Part VI analyzes the ultimate question of whether a surrogacy contract should be upheld when the surrogate wants to keep the baby, particularly noting the difference between traditional and gestational surrogacy arrangements.

II. BACKGROUND

A. History of Assisted Reproductive Technology and Surrogacy and Types of Surrogacy Arrangements

The term assisted reproductive technology (ART) means "all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and such other specific technologies . . . ."[8] The procedure commonly known as "artificial insemination" was the first form of ART used.[9] Artificial

7. *Id.* at 293–94, 923 A.2d at 130–31.
8. 42 U.S.C. § 263a-7 (2000).
9. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 29 (2006).

insemination is the "[i]nsertion of sperm into female reproductive organs by any means other than sexual intercourse with the intent to cause a pregnancy."[10] The first documented use of artificial insemination in a human in the United States took place in 1866.[11]

Historically, surrogacy was first defined as a type of assisted artificial insemination, where a married or single woman would be injected with the sperm of a married man who was not her husband, and she would bear a child for the couple.[12] This is now called "traditional surrogacy."[13] More commonly used today is gestational surrogacy, which "involves using a woman who agrees to carry a child for intended parents (who may or may not also be the genetic parent or parents), conceived by the gametes of others, with a result that she gives birth to a child with whom she has no genetic connection."[14] These types of surrogates are usually used "when the woman of a married couple has viable eggs but cannot carry a child to term."[15] This allows an infertile couple to have children to whom they are genetically related.[16] The first reported baby born using gestational surrogacy was in January 1984.[17]

It is important to distinguish between these two types of surrogacy. In a traditional surrogacy arrangement, the woman who carries the baby to term (the surrogate) is the biological mother of the child, while in a gestational surrogacy arrangement, the surrogate is not the biological mother[18] and thus has less of a right to the child.

There are many variations on gestational surrogacy. In one form, "a woman's ova are retrieved and fertilized in vitro with the sperm of her husband or partner" and "any resulting embryos are transferred to the uterus of another woman for gestation."[19] In another variation, egg donation is used, "producing the embryo for the intended parents using the sperm of the intended father and donated ova," and "any resulting embryos are transferred into a gestational surrogate for

10. *Id.* at 323.
11. Johnson v. Super. Ct., 101 Cal. App. 4th 869, 881 (Ct. App. 2002) (citing Karen M. Ginsberg, Note, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM, 823, 826 (1997)).
12. KINDREGAN & MCBRIEN, *supra* note 9, at 129.
13. *Id.*
14. *Id.* at 132.
15. *Id.* at 133.
16. *Id.*
17. MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 36 (1990).
18. KINDREGAN & MCBRIEN, *supra* note 9, at 132.
19. *Id.* at 132–33.

implantation and gestation."[20] A third variation uses both egg donation and sperm donation, "in which the embryos are entirely created from donor gametes" and then transferred into a gestational surrogate who bears the children for the intended parents.[21] This last situation is the most complicated with the greatest likelihood of competing interests among the various parties involved, such as the surrogate and her possible husband; the intended parents who have no genetic or legally presumptive relationship to the child; the egg donor and her potential husband; and the sperm donor and his potential wife.[22] Surrogacy arrangements can lead to a child having too many parents, as in the scenario above, but other surrogacy arrangements can lead to a child having just one parent, as Judge Cathell points out in his dissenting opinion in *In re Roberto d.B.*: "At the end of this manufacturing process, the result is a child who, according to the majority, is to have no mother at birth."[23]

B. Overview of Various States' Standards for Surrogacy Contracts

1. California

California holds the distinction of being the state with the most surrogacy cases.[24] In addition, California was the first state to determine the outcome of surrogacy cases by focusing on intention, rather than on biology or gestation alone.[25] In *Johnson v. Calvert*,[26] the court ruled that the intended parents, who were also the genetic parents, were the legal parents of a child who was carried by a gestational surrogate.[27] The court stated that gestation and genetics were each a sufficient basis for parenthood, but that a child could only have one natural mother.[28] The court held that when there is no one woman who is both the genetic and birth mother of the child,

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20. *Id.* at 133.
21. *Id.*
22. *See generally id.*
23. *In re* Roberto d.B., 399 Md. 267, 296, 923 A.2d 115, 132 (2007) (Cathell, J., dissenting).
24. KINDREGAN & MCBRIEN, *supra* note 9, at 149.
25. *Id.*
26. 851 P.2d 776 (Cal. 1993).
27. *Id.*
28. *Id.* ("Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.").

then the legal mother is the woman who intended to cause the birth and raise the child as her own.[29]

California's "intended parent test" has been not only used by other courts,[30] but also analyzed extensively in many law review articles and books around the country.[31] State courts have trended "towards honoring the intent of the parties" at the time that they entered into the surrogacy arrangement to decide the controversy.[32]

However, after *Johnson*, in *In re Marriage of Moschetta*,[33] the California high court declined to enforce a surrogacy agreement made between the intended parents and a surrogate because it was a traditional surrogacy arrangement, not gestational.[34] The court said that "enforcement of a traditional surrogacy contract *by itself* is incompatible with the parentage and adoption statutes already on the books."[35] The court also likened traditional surrogacy to adoption, stating,

> In traditional surrogacy the so-called "surrogate" mother is not *only* the woman who gave birth to the child, but the child's *genetic* mother as well. She is, without doubt, the "natural" parent of the child, as is the father. This fact is critical if the "surrogate" changes her mind before she formally consents to an adoption. In such a case, only the

29. *Id.*
30. *See, e.g., In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).
31. *See generally* Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother":* Johnson v. Calvert, *851 P.2d 776 (Cal. 1993)*, 17 HARV. J.L. & PUB. POL'Y 907 (1994) (concluding that a test based on genetic parentage is preferable to the "intended parent" test); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379 (2007); Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321 (2006).
32. KINDREGAN & MCBRIEN, *supra* note 9, at 145.
33. 30 Cal. Rptr. 2d 893.
34. *Id.* at 894–95.
35. *Id.* The Court distinguished this case from *Johnson v. Calvert* because in *Johnson*, both the surrogate and the biological mother had equal claims to the child under the Uniform Parentage Act, but the biological mother prevailed because she was the *intended* parent. *See* 851 P.2d 776, 782 (Cal. 1993). In *Moschetta*, both women did not have equal claims to the child because the traditional surrogate was also the biological mother of the child, so there was no need to use the intent test. 30 Cal. Rptr. 2d at 896.

initial agreement itself can arguably defeat her claim to parenthood.[36]

Since there was no formal consent to an adoption in this case, the court was forced to look solely at the surrogacy contract, which it refused to enforce because of its incompatibility with the parentage and adoption statutes.[37]

California reaffirmed its use of the "intent" test in *In re Marriage of Buzzanca*.[38] In this case, a husband and wife agreed to have an embryo genetically unrelated to either of them implanted into a woman, a gestational surrogate also unrelated to the embryo, who would carry and give birth to the resulting child.[39] After the surrogate became pregnant, the husband and wife filed for divorce.[40] The question of who baby Jaycee's legal parents were came to the court because the husband wanted to avoid paying child support.[41] The father wanted to avoid responsibility to the child, and the trial court, in an extraordinary decision, ruled that Jaycee had no legal parents because the only people biologically related to her were the sperm and egg donors.[42] The appellate court reversed, stating, "Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate."[43] The court used the body of law holding that parenthood could be established based on conduct separate from giving birth or being biologically related to the child.[44] The California appellate court ultimately held that "a husband *and* wife [should] be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf."[45] The husband and wife are legally responsible as parents because the procreation of the child resulted from "a medical procedure [that] was initiated and consented to by intended parents."[46]

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36. *Moschetta*, 30 Cal. Rptr. 2d at 894.
37. *Id.*
38. 72 Cal. Rptr. 2d 280, 292 (Ct. App. 1998).
39. *Id.* at 282.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* The court stated further,

> Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. . . . Indeed, in

2. Massachusetts

Massachusetts also has a substantial number of surrogacy decisions.[47] In *R.R. v. M.H.*,[48] a married couple entered into a traditional surrogacy agreement with a woman who agreed to be inseminated with the sperm of the intended father.[49] Although the contract provided that the surrogate would surrender custody of the child to the intended parents upon its birth, during the pregnancy, the surrogate informed the intended parents that she had changed her mind and wanted to keep the child.[50] In holding that this traditional surrogacy agreement was unenforceable, the Massachusetts court ruled that, because the child was the genetic child of the surrogate, the policies behind adoption statutes should be used as guidance in determining the validity of the agreement.[51] In Massachusetts, an adoption requires the written consent of the mother and father.[52] However, consent of the mother cannot be given until four days after the birth of the baby.[53] Although the court held this particular surrogacy contract unenforceable, it also said in dicta:

> If no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father's custody of the child unless she consents after a suitable period has passed following the child's birth, the objections we have identified in this opinion to the enforceability of a surrogate's consent to custody would be overcome.[54]

> both the most famous child custody case of all time, and in our Supreme Court's *Johnson v. Calvert* decision, the court looked to *intent to parent* as the ultimate basis of its decision. Fortunately, as the *Johnson* court also noted, intent to parent 'correlate[s] significantly' with a child's best interests.

Id. at 293.

47. KINDREGAN & MCBRIEN, *supra* note 9, at 159.
48. 689 N.E.2d 790 (Mass. 1998).
49. *Id.* at 792.
50. *Id.* at 793. The intended parents agreed to compensate the surrogate for her services, in the amount of $10,000, which was an express provision of the contract. *Id.* at 792.
51. *Id.* at 796.
52. MASS. GEN. LAWS ANN. ch. 210, § 2 (West 2005).
53. *Id.*
54. *R.R.*, 689 N.E.2d at 797. The court also articulated several factors which would alleviate its concerns with regard to enforcing a traditional surrogacy arrangement: (1) that the surrogate have time after the child's birth to decide whether to surrender the

One year later, in *Smith v. Brown*,[55] the Massachusetts court established a protocol that would allow parties to a gestational surrogacy arrangement to seek a judgment of maternity and paternity.[56]

3. New Jersey

New Jersey is home to one of the first and most famous surrogacy cases, *In re Baby M.*[57] In this controversial case, a married couple, the Sterns, made an agreement with a married woman, Mrs. Whitehead, to have Mr. Stern's sperm artificially inseminated into Mrs. Whitehead, so the Sterns could have a child that was biologically related to Mr. Stern.[58] When baby Melissa was born, Mrs. Whitehead realized that she was unable to part with the child.[59] Despite her feelings, Mrs. Whitehead gave baby Melissa to the Sterns pursuant to the contract.[60] Later that night, "Mrs. Whitehead became deeply disturbed, disconsolate, [and] stricken with unbearable sadness."[61] Afraid that Mrs. Whitehead might commit suicide, the Sterns gave the baby to her, and Mrs. Whitehead took her and escaped to Florida, where she was not found until four months later when the baby was forcibly taken from her.[62] The court ultimately found that the surrogacy contract was unenforceable because the compensation given to Mrs. Whitehead and her financial need made the contract seem involuntary, and because the surrogate did not have the ability to change her mind and assert her parental rights.[63] However, because Mr. Stern was the biological father of the baby, and because of the greater stability of the Sterns, as compared with

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child for adoption; (2) that the surrogate's husband consent; (3) that all parties be evaluated for their soundness in judgment and capacity; (4) that the intended mother not be able to safely bear a child herself; (5) that the intended parents be suitable parents; (6) that all parties have legal representation. *Id.*

55. 718 N.E.2d 844 (Mass. 1999).

56. *Id.* at 846.

57. 537 A.2d 1227 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 30:4C-15.1(a) (West 2007); *see also* KINDREGAN & MCBRIEN, *supra* note 9, at 167 n.163.

58. *In re* Baby M, 537 A.2d at 1235. Mrs. Whitehead was to be paid $10,000 for her services. *Id.*

59. *Id.* at 1236. Mrs. Whitehead also claimed to feel a bond with the child even during the pregnancy. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1237. When Mrs. Whitehead originally went to the Sterns, she told them that she had to have the child, even just for one week. *Id.*

63. *Id.* at 1264. Additionally, the court believed it was within the legislature's power, and not the court's, to make laws regarding these types of surrogacy arrangements. *Id.*

the Whiteheads, the court made a custody determination using the best interests of the child standard and decided to give custody of the baby to Mr. Stern.[64]

In *A.H.W. v. G.H.B.*,[65] a New Jersey trial court held that the genetic parents of an unborn child being carried by a gestational surrogate were not entitled to have their names on the child's birth certificate immediately after its birth because under New Jersey's adoption law, a mother cannot voluntarily surrender her parental rights until seventy-two hours after the baby's birth.[66] However, New Jersey law also provides for a five-day period after the birth to issue and file the birth certificate.[67] Therefore, the court decided that after the seventy-two-hour period from the baby's birth, which is before the end of the five-day limitation on filing the birth certificate, the surrogate could surrender her parental rights, and the birth certificate could be filed with the intended parents' names on it.[68]

4. New York

New York has a somewhat contradictory set of laws on surrogacy.[69] Although it has a statute expressly stating that surrogacy contracts are void and unenforceable,[70] trial courts will on occasion enforce them anyway.[71]

In *Andres A. v. Judith N.*,[72] a New York court dismissed a genetic mother's petition for a declaration of maternity.[73] A couple had used their gametes to create embryos that were then implanted in a gestational surrogate.[74] Upon the children's birth, the intended and biological parents sought to establish their legal parentage.[75] The court dismissed the mother's petition for declaration of maternity

64. *Id.* at 1260–61.
65. 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).
66. *Id.* at 954; *see also* N.J. STAT. ANN. § 9:3-41(e) (West 2007).
67. § 26:8-28(a).
68. *A.H.W.*, 772 A.2d at 954.
69. *See* KINDREGAN & MCBRIEN, *supra* note 9, at 170.
70. N.Y. DOM. REL. LAW § 122 (McKinney 1999) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.").
71. *See* KINDREGAN & MCBRIEN, *supra* note 9, at 171 (citing McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994)); *see also, e.g.*, *In re* Doe, 793 N.Y.S.2d 878 (Sur. Ct. 2005).
72. 591 N.Y.S.2d 946 (Fam. Ct. 1992).
73. *Id.* at 950.
74. *Id.* at 947–48.
75. *Id.* at 947.

because there was no statutory authority permitting the court to grant the requested relief.[76] The court noted that the intended mother could seek to adopt the children, and therefore, was not without remedy.[77]

In *McDonald v. McDonald*,[78] a New York appellate court used the *Johnson v. Calvert* "intent" test to determine the children's natural mother.[79] In *McDonald*, the wife gave birth to twin daughters who were conceived from the sperm of her husband and the eggs of a female donor.[80] In divorce proceedings, the husband argued that since he was the only biological parent, he should have sole custody.[81] The court held that "in the instant 'egg donation' case, the wife, who is the gestational mother, is the natural mother of the children, and is, under the circumstances, entitled to temporary custody of the children with visitation to the husband."[82]

III. MARYLAND'S APPROACHES TO SURROGACY CONTRACTS IN THE COURTS AND LEGISLATURE BEFORE *IN RE ROBERTO D.B.*

In order to have a complete understanding of the Court of Appeals of Maryland's decision in *In re Roberto d.B.* and to analyze the future of surrogacy arrangements in Maryland, it is necessary to have an understanding of the history of surrogacy laws in this state.

A. Legislative and Executive Authority

After *In re Baby M* was decided in 1988, the Maryland legislature attempted to pass several laws on surrogacy.[83] The first bill, Senate

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76. *Id.* at 950. The court stated, "The Family Court is a court of limited jurisdiction and must adhere to its statutorily enunciated powers. . . . The statute makes no provision for declarations of maternity." *Id.* at 949.

77. *Id.* at 950.

78. 608 N.Y.S.2d 477 (App. Div. 1994).

79. *Id.* at 479–80.

80. *Id.* at 478.

81. *Id.* at 478–79.

82. *Id.* at 480. The court cited extensively to *Johnson v. Calvert*, specifically stating that the test formulated in that decision applied to the instant case: "Thus, under our analysis, in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law." *Id.* (quoting Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993)).

83. Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 511 (1995).

Bill 795, would have banned surrogacy arrangements completely.[84] The bill was passed by the Senate but was defeated in the House Judiciary Committee.[85] During the 1988 session, the General Assembly considered House Bill 649, which would have established minimal protection for parties involved in surrogacy agreements and would have required that certain terms be included in the contract for it to be enforceable.[86] However, this regulation attempt was also defeated in the House Judiciary Committee.[87]

In 1992, the Maryland General Assembly passed a complete ban on surrogacy contracts.[88] However, then-Governor Schaefer vetoed the bill, explaining that the Maryland Attorney General's Office advised him that a Maryland state court would most likely hold a surrogate contract invalid based on Maryland's prohibition on baby-selling.[89] In addition, Governor Schaefer noted that public opinion in Maryland was deeply divided on surrogacy. His veto was also based on his personal view that "[t]he creation of a family is a personal decision . . . best left to the individuals involved."[90] In 1993, another bill banning surrogacy was introduced by Senator Norman Stone Jr.[91] This bill passed in the Senate but was rejected by the House and received unfavorable treatment by the House Judiciary Committee.[92] Stone's bill was the final attempt to pass legislation on surrogacy.

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84. *Id.* at 511 n.191. The bill would have subjected violators to "a fine not exceeding $10,000, or imprisonment not exceeding one year, or both." S.B. 795, 1988 Leg., 394th Sess. (Md. 1988).
85. Brandel, *supra* note 83, at 511 n.191.
86. H.B. 649, 1988 Leg., 394th Sess. (Md. 1988); *see also* Brandel, *supra* note 83, at 511–12.
87. Brandel, *supra* note 83, at 512.
88. S.B. 251, 1992 Leg., 404th Sess. (Md. 1992); *see also* Brandel, *supra* note 83, at 512. The bill stated that "[a] surrogate parentage contract is void and unenforceable as against state policy." S.B. 251, 1992 Leg., 404th Sess. (Md. 1992).
89. Letter from W. Donald Schaefer, Governor of Md., to Thomas V. "Mike" Miller, Jr., President of the Senate (May 26, 1992) (outlining his rationale for vetoing Senate Bill 251); *see also* MD. CODE ANN., FAM. LAW § 5-362(a) (LexisNexis 2006) ("Except as otherwise provided by law, a person may not charge or receive, from or for a parent or prospective adoptive parent, any compensation for a service in connection with: (1) placement of an individual to live with a preadoptive parent, as defined in § 3-823(i)(1) of the Courts Article; or (2) an agreement for custody in contemplation of adoption.").
90. Letter from W. Donald Schaefer, Governor of Md., to Thomas V. "Mike" Miller, Jr., President of the Senate, *supra* note 89.
91. Barry F. Rosen & Lynn S. Slawson, *Surrogacy Contracts in Transition*, MD. B.J., July/Aug. 1993, at 32, 35 (citing S.B. 369, 1993 Leg., 407th Sess. (Md. 1993)).
92. *Id.*

B. Surrogacy in the Courts

Prior to *In re Roberto d.B.*, the Maryland judicial system addressed the topic of surrogacy only twice, both times in circuit courts.[93] In *Ex Parte Petition for the Adoption of a Minor Child*, Howard County Master Bernard Raum ruled that a surrogacy contract that provided for compensation to the surrogate mother was void and unenforceable, in violation of the baby-selling statute.[94] The court did not make a determination as to whether surrogate adoptions were also in violation of Maryland public policy.[95] Rather, the court noted that "the public policy on the general subject of surrogacy contracts was in a 'state of turmoil,' and was best left to the Legislature."[96]

In 1993, in *Ex Parte M.S.M. and G.M. for Adoption of an Infant Minor*, Judge Peter J. Messitte for the Circuit Court of Montgomery County stated that surrogacy contracts do not violate Maryland's baby-selling statute because it would be almost impossible to prove that the parties to a surrogacy contract had the required criminal intent.[97] Contrary to the earlier Howard County Circuit Court decision, Judge Messitte expressed doubt that "a court in an adoption proceeding could fairly conclude that surrogacy parenting contracts otherwise violate Maryland's public policy."[98]

In an article authored by Abby Brandel in 1995, entitled "Legislating Surrogacy: A Partial Answer to Feminist Criticism,"[99] Ms. Brandel stated, "[i]n light of Maryland's experience with surrogacy, it seems likely that the General Assembly will take decisive action in the near future."[100] Despite Ms. Brandel's prediction of quick legislative action on surrogacy arrangements, the Maryland General Assembly has not taken further action. As a result, the legality of surrogacy in Maryland remained in question until the *In re Roberto d.B.* decision, with the exception of the general prohibition on baby-selling.[101] Up until *In re Roberto d.B.*,

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93. Brandel, *supra* note 83, at 513.
94. 85 Md. Op. Att'y Gen. 348 (2000) (summarizing *Ex Parte* Petition for the Adoption of a Minor Child, No. 91-AD-1681).
95. *Id.*
96. *Id.*
97. 85 Md. Op. Att'y Gen. 348 (2000) (discussing *Ex Parte* M.S.M. and G.M. for Adoption of an Infant Minor, No. 11171).
98. *Id.*
99. Brandel, *supra* note 83.
100. *Id.* at 514–15.
101. *See* MD. CODE ANN., FAM. LAW § 5-362(a) (LexisNexis 2006); MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002) ("A person may not sell, barter, or trade, or offer to sell, barter, or trade, a minor for money, property, or anything else of value. . . . (b) A

no Maryland appellate court had decided any case relating to surrogacy, thus *In re Roberto d.B.* was a matter of first impression in Maryland.[102]

IV. *IN RE ROBERTO D.B.* AND ITS IMPLICATIONS FOR SURROGACY IN MARYLAND

A. Facts

An unmarried male, Appellant Roberto d.B. (Roberto), utilized in vitro fertilization, in which his sperm was used to fertilize eggs from an egg donor, which resulted in two fertilized eggs.[103] He contracted with a woman, the putative appellee in the case,[104] to be the gestational surrogate and have the fertilized eggs implanted into her, so she could carry and give birth to any resulting children.[105] The fertilized eggs were implanted into the surrogate on December 21, 2000, and she delivered twins, with whom she had no biological connection, on August 23, 2001, at Holy Cross Hospital in Silver Spring.[106]

According to the Maryland Health Code, the medical records department of a hospital is obliged to submit information regarding births to the Maryland Division of Vital Records (MDVR).[107] When

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person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both for each violation.").

102. *In re* Roberto d.B., 399 Md. 267, 270, 923 A.2d 115, 117 (2007) ("The law is being tested as these new techniques become more commonplace and accepted; this case represents the first challenge in Maryland.").

103. *Id.* at 271, 923 A.2d at 117.

104. The gestational surrogate is the "putative appellee" because she joined the appellant's petition requesting the court to issue an accurate birth certificate—one that did not reference her as the children's mother; thus, her position was not adverse to the appellant's. *Id.* at 273, 923 A.2d at 118–19.

105. *Id.* at 271, 923 A.2d at 117.

106. *Id.* at 271, 273, 923 A.2d at 117–18.

107. *Id.* at 271, 923 A.2d at 117; MD. CODE ANN., HEALTH-GEN. § 4-208(a)(4)(iii) (LexisNexis 2002 & Supp. 2007). Section 208(a) of the Health-General article provides:

> (1) Within 72 hours after a birth occurs in an institution, or en route to the institution, the administrative head of the institution or a designee of the administrative head shall: (i) Prepare, on the form that the Secretary provides, a certificate of birth; (ii) Secure each signature that is required on the certificate; and (iii) File the certificate. (2) The attending physician shall provide the date of birth and medical information that are required on the certificate

the MDVR receives this information from the hospital, it issues the birth certificate.[108] "Unless a court order otherwise provides, the hospital will report the gestational carrier as the 'mother' of the child to the MDVR."[109]

Holy Cross Hospital followed this procedure, and the MDVR issued birth certificates listing the gestational surrogate as the mother of the children.[110] However, neither the father nor the gestational

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> within 72 hours after the birth. (3) The results of the universal hearing screening of newborns shall be incorporated into the supplemental information required by the Department to be submitted as a part of the birth event. (4) Upon the birth of a child to an unmarried woman in an institution, the administrative head of the institution or the designee of the administrative head shall: (i) Provide an opportunity for the child's mother and the father to complete a standardized affidavit of parentage recognizing parentage of the child on the standardized form provided by the Department of Human Resources under § 5-1028 of the Family Law Article; (ii) Furnish to the mother written information prepared by the Child Support Enforcement Administration concerning the benefits of having the paternity of her child established, including the availability of child support enforcement services; and (iii) Forward the completed affidavit to the Department of Health and Mental Hygiene, Division of Vital Records. The Department of Health and Mental Hygiene, Division of Vital Records shall make the affidavits available to the parents, guardian of the child, or a child support enforcement agency upon request. (5) An institution, the administrative head of the institution, the designee of the administrative head of an institution, and an employee of an institution may not be held liable in any cause of action arising out of the establishment of paternity. (6) If the child's mother was not married at the time of either conception or birth or between conception and birth, the name of the father may not be entered on the certificate without an affidavit of paternity as authorized by § 5-1028 of the Family Law Article signed by the mother and the person to be named on the certificate as the father. (7) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court. (8) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

108. MD. CODE ANN., HEALTH-GEN. § 4-208(b),(e); *see, e.g., In re Roberto d.B.*, 399 Md. at 271–72, 923 A.2d at 118.

109. *In re Roberto d.B.*, 399 Md. at 272, 923 A.2d at 118. *See also* MD. CODE ANN., HEALTH-GEN. § 4-208.

110. *In re Roberto d.B.*, 399 Md. at 272, 923 A.2d at 118.

surrogate wanted her name to be on the birth certificates.[111] The surrogate had no expectation or intention of being a "mother" to the twins to whom she gave birth.[112] Thus, the surrogate joined the father's petition asking that the surrogate's name be removed from the twins' birth certificates and that Roberto be declared the father.[113]

B. The Circuit Court's Decision and Rationale

The Circuit Court for Montgomery County rejected the appellant's petition to have the surrogate's name removed from the children's birth certificates.[114] The court gave two reasons for refusing the petition.[115] First, "no Maryland case law exists that would give a trial court the power to remove the mother's name from a birth certificate."[116] Second, "removing the name of the surrogate from the birth certificate is inconsistent with the 'best interests of the child' standard ('BI C') [sic], citing, generally, 'health reasons.'"[117] The circuit court expressed the opinion that even if the gestational surrogate were to give up her parental rights, her name should remain on the birth certificates for health reasons.[118] The court also indicated that "[t]his is not an appropriate issue for adoption," without providing any rationale for this statement.[119]

The circuit court's best interests of the child reasoning stemmed from its belief that "[t]here are a lot of public policy reasons why it is not in the best interests of the child not to have the mother's name on the birth certificate,"[120] and "[t]here are health reasons why you might want to have, and it would be good to have the mother's name on the birth certificate, and have that information available."[121]

As discussed in the following section, the Court of Appeals of Maryland did not find the circuit court's reasoning persuasive, and reversed its decision.[122]

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111. *Id.* at 272, 923 A.2d at 118.
112. *Id.* at 273, 923 A.2d at 118.
113. *Id.* at 273, 923 A.2d at 118–19.
114. *Id.* at 273, 923 A.2d at 119.
115. *Id.* at 274, 923 A.2d at 119.
116. *Id.*
117. *Id.*
118. *Id.* at 274 n.4, 923 A.2d at 119 n.4.
119. *Id.*
120. *Id.* at 285, 923 A.2d at 126.
121. *Id.*
122. *Id.* at 295, 923 A.2d at 132.

C. *The Court of Appeals' Decision and Rationale*

The Court of Appeals of Maryland rendered three holdings: (1) under the Equal Rights Amendment, the paternity statutes apply equally to both men and women, and therefore the process by which men can challenge paternity can also be used by women to challenge maternity;[123] (2) the best interests of the child standard did not apply;[124] and (3) the surrogate was not required to be listed on the children's birth certificates.[125]

1. The Equal Protection Analysis

Roberto argued that because Maryland's parentage statutes allow men to deny paternity, but not women to deny maternity, the statutes violated the Equal Rights Amendment.[126] The court first examined the paternity statutes[127] and determined that "Maryland law currently accommodates . . . a birth certificate on which the mother is not identified."[128] Specifically, the court noted that Section 4-211 of the Health-General Article provides:

> Except as provided in subsection (c) of this section, the Secretary shall make a new certificate of birth for an individual if the Department receives satisfactory proof that: . . . (2) Regardless of the location, one of the following has occurred: . . . (ii) A court of competent jurisdiction has entered an order as to the *parentage,* legitimation, or adoption of the individual.[129]

The court reasoned that because the statute contained a neutral word—"parentage"—the statute "does not preclude the courts from issuing an order authorizing a birth certificate that does not list the mother's name."[130]

The court also noted that it has held in the past that "a statute will be construed to avoid a conflict with the Constitution" whenever

123. *Id.* at 282–84, 923 A.2d at 124–25.
124. *Id.* at 285, 923 A.2d at 126.
125. *Id.*
126. *Id.* at 275, 923 A.2d at 120.
127. *Id.* at 275–78, 923 A.2d at 120–22. *See generally* MD. CODE ANN., FAM. LAW §§ 5-1001 to 5-1048 (West 2006).
128. *In re Roberto d.B.*, 399 Md. at 278, 923 A.2d at 121.
129. *Id.* at 278, 923 A.2d at 121–22 (quoting MD. CODE ANN., HEALTH-GEN. § 4-211(a) (West 2006) (emphasis added)).
130. *Id.* at 278, 923 A.2d at 122; *see also* § 4-211(a)(2)(ii).

possible.[131] Therefore, the court held that the language of the paternity statutes did not need to be rewritten; the court needed only to interpret the statutes to give the same rights to women challenging maternity as were already given to men challenging paternity.[132]

2. The Best Interests of the Child Standard Analysis

The court held that the best interests of the child standard did not apply in this case.[133] The court stated that in general, courts will use the best interests of the child standard *when there is a disagreement* between two parents or a parent and a third party concerning custody of the child.[134] Additionally, when there is a dispute between a parent and a non-parent, the best interests of the child standard is not utilized unless the parent is first found to be unfit.[135] In this case, a third party wanted to *relinquish* her parental rights, rather than *assert* them; as a result, the issue of custody was not disputed. Also, there was no issue of the father being unfit.[136] Therefore, the court determined that the best interests of the child standard was inappropriate for the trial court to use and did not apply in this case.[137]

3. Authorization of the Court to Remove Surrogate's Name from Birth Certificates

The court noted that the MDVR had no objection to the removal of the surrogate's name from the birth certificates in response to a court order.[138]

> If a biological parent is unmarried, and is the only intended parent (usually the father); and the surrogate, her husband, and the biological father were to execute an Affidavit of

131. *In re Roberto d.B.*, 399 Md. at 283, 923 A.2d at 125; *see, e.g.*, Deems v. W. Md. Ry. Co., 247 Md. 95, 102, 231 A.2d 514, 518 (1967).
132. *In re Roberto d.B.*, 399 Md. at 284, 923 A.2d at 125.
133. *Id.* at 285, 923 A.2d at 126.
134. *Id.* at 285–86, 923 A.2d at 126 (citing Taylor v. Taylor, 306 Md. 290, 301, 508 A.2d 964, 969 (1986)).
135. *Id.* at 289, 923 A.2d at 129 (citing McDermott v. Dougherty, 385 Md. 320, 325, 869 A.2d 751, 754 (2005)).
136. *Id.* at 292, 923 A.2d at 130.
137. *Id.* at 292-93, 923 A.2d at 130. The court also noted, "Moreover, there is nothing with which to measure the father's ability to be a parent against, in order for a trial court to rule that it is *not* in the best interests of the child to grant the father the relief he seeks." *Id.* at 292, 923 A.2d at 130 (emphasis added).
138. *Id.* at 294, 923 A.2d at 131.

> Parentage indicating that the biological father is the father, the surrogate's husband agrees and relinquishes all parental rights that he may have, if any, the registrar would report that information. The Division would issue a birth certificate for the child with the surrogate as the mother and the biological father as the father. Or if the surrogate were unmarried and she and the biological father executed the Affidavit of Parentage, the registrar would report that information. The Division would issue a birth certificate for the child with the surrogate as the mother and the biological father as the father. *Then if the biological parent and/or surrogate wanted all information regarding the mother removed from the birth certificate, the father could institute an action in Court to obtain an Order specifying the information to be removed. Such an order may be obtained, perhaps, through adoption or a proceeding to determine parentage. After receiving such a Court Order, the Division would issue a new birth certificate removing the information in accordance with the Court's directions.*[139]

Because of the MDVR's approval of removing the name of the surrogate from the birth certificates, the court of appeals ruled that the circuit court has the authority to approve and order this action.[140]

D. *Analysis of the* In re Roberto d.B. *Decision and Its Implications for Surrogacy in Maryland*

In hindsight, the Court of Appeals of Maryland's decision in *In re Roberto d.B.* did not carry many implications for surrogacy law in Maryland, except that gestational surrogacy arrangements will be acknowledged by the court *if* both parties agree.[141] However, the court expressly stated that this is a case where the surrogate wanted to *relinquish* her parental rights, not *assert* them.[142] Therefore, Maryland is still left with important questions that have already been decided in other states. What happens when the surrogate wants to

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139. *Id.* at 294–295, 923 A.2d at 131–32 (quoting Letter from James A. Shrybman, Attorney, Law Offices of James A. Shrybman, P.C., to Kathryn A. Morris, Birth Section Chief, Md. Dep't of Mental Hygiene, Div. of Vital Records (Apr. 21, 2001) (on file with author) (emphasis added)).

140. *Id.*

141. *See id.* at 270–71, 923 A.2d at 117. The court also noted that surrogacy contracts for the payment of money are illegal under the Maryland baby-selling statutes. *Id.* at 293, 923 A.2d at 130.

142. *Id.* at 292, 923 A.2d at 130.

keep the baby for herself? Under what circumstances, if any, will the court enforce these surrogacy contracts? And is there an important difference between traditional and gestational surrogacy arrangements in making these decisions?

The court expressly stated in a footnote, responding to Judge Cathell's dissent, "[t]his opinion does not create an 'intent' test for women."[143] The court specifically noted that it rejected the intent test employed in *Belsito v. Clark*.[144] However, throughout its opinion, the court used language that contemplates that it may have factored in the intent of the parties in its decision, and that perhaps it would use the intent test in a future surrogacy dispute:

> The gestational surrogacy context can involve anonymous sperm and egg donors, with the result that the child has no genetic relation to the gestational carrier or the *intended* parents;. . .[i]t is the appellant's and the appellee's contention that the appellee was merely acting as a gestational carrier for children that were never *intended*, by either party, to be hers, and to whom she has no genetic relationship. . . . As it exists, the paternity statute serves to restrict, rather than protect, the relationships the *intended*

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143. *Id.* at 284 n.15, 923 A.2d at 125 n.15. Judge Cathell expressed concern in his dissenting opinion that as a result of the majority's opinion, if a woman does not *intend* to be a mother, she should not be responsible for the child. *Id.* at 298, 923 A.2d at 134 (Cathell, J., dissenting).

> With the majority's decision today, if a genetic and/or birth mother does not intend to act as a mother during this manufacturing process—they have no responsibility as a mother. Presumably, now both fathers and mothers . . . can claim that no one should be responsible for the rearing and support of the child(ren).

Id.

144. *Id.* at 274 n.4, 923 A.2d at 119 n.4 (discussing Belsito v. Clark, 67 Ohio Misc. 2d 54, 65 (C. P. 1994)).

> The [*Belsito*] court resolved the dispute by employing a newly formed 'intent' test to determine who the 'mother' should be. Because we do not attempt to redefine what a 'mother' is in this case, *Belsito* has little applicability. In any event, we reject its rationale for determining who a 'mother' is, that intent is the dispositive factor in the parentage determination.

Id. (discussing *Belsito*, 67 Ohio Misc. 2d at 65) (citation omitted).

> *parents* wish to have with children conceived using these new processes.[145]

Although the court expressly disavowed adopting the intent test,[146] the language the court used suggests that it allowed the surrogate's name to be removed from the birth certificate because *she did not intend* to be the children's mother.[147] Judge Cathell highlighted this point in his dissent, claiming that the majority took the position in its opinion that "if you do not intend to be the mother, you should not be responsible as a mother."[148] However, Judge Cathell took that position further, suggesting that the majority's decision hypothetically would allow a man to deny paternity because he did not intend to be the father.[149]

What does this mean for the future of surrogacy contracts in Maryland? There are a few options. First, a court could use the *In re Roberto d.B.* opinion to enforce a surrogacy contract and allow the intended parents to assert their parental rights. One could argue, as Judge Cathell points out in the dissent, that the court allowed a surrogate to relinquish her parental rights on the implied basis that she did not intend to be the children's mother.[150] Alternatively, a court could abide by the court of appeals' statement that it did not adopt the intent test in *In re Roberto d.B.*,[151] and it could refuse to enforce a surrogacy contract and award parental rights to a surrogate. Lastly, the Maryland General Assembly could pass a bill, in response to Judge Cathell's appeal for legislative guidance,[152] either restricting or allowing surrogacy contracts, as was attempted several times after the *In re Baby M* decision was rendered.[153]

The court of appeals' decision seems to encourage surrogacy contracts on the one hand, by allowing the surrogate in this case to

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145. *Id.* at 270, 272–73, 279, 923 A.2d at 117–18, 122 (emphasis added).
146. *Id.* at 274 n.4, 923 A.2d at 119 n.4.
147. *Id.* at 270, 272–73, 279, 923 A.2d at 117–18, 122 (emphasis added).
148. *In re Roberto d.B.*, 399 Md. at 298, 923 A.2d at 134 (Cathell, J., dissenting).
149. *Id.* at 299–300, 923 A.2d at 135 (Cathell, J., dissenting). While Judge Cathell's reasoning as to the majority adopting an "intent" test may be correct, the implication for paternity challenges is somewhat far-fetched, as the majority's holding could be limited to the context of surrogacy arrangements, not extended to natural births.
150. *Id.*
151. *Id.* at 274 n.4, 923 A.2d at 119 n.4 (majority opinion).
152. *Id.* at 295, 923 A.2d at 132 (Cathell, J., dissenting) ("The issues present in this case, going as they do to the very heart of a society, are, in my view, a matter for the Legislative Branch of government and not initially for the courts.").
153. *See supra* notes 83–92 and accompanying text.

remove her name from the children's birth certificates,[154] but it may also leave lawyers and future parents confused about whether intent will be acknowledged in enforcing surrogacy contracts. Whether the Court of Appeals of Maryland renders a clearer decision in the future, or the Maryland General Assembly passes legislation, it is imperative that something be done to inform the public as to whether surrogacy contracts will be enforceable when they are challenged.

V. PUBLIC POLICY IMPLICATIONS

Because of the very personal and sensitive nature of surrogacy arrangements, it is extremely important, if not absolutely necessary, for the legislature and judiciary to consider all the potential public policy implications in making decisions about its legality. There are many aspects to consider, particularly, how the children of surrogacy arrangements generally fare,[155] the medical and psychological concerns for the parties,[156] as well as the various legal contract principles.[157]

A. How Do the Children of Surrogacy Arrangements Fare?

When deciding whether to award custody to an intended parent or a surrogate, it is vital to know if children conceived by ART have more complications than those who are conceived naturally.[158] One of the most difficult problems with determining how the children in surrogacy arrangements are doing socially, emotionally, and academically is that not much research has been completed on this topic, particularly because the large majority of children studied do not know that they are "donor babies."[159] Additionally, "most of the research is based on parent self-reports and global quantitative measures, rather than systematic outside observations or in-depth clinical investigations. And none to date have followed children from birth all the way to maturity . . . ."[160]

However, the research that does exist seems to deliver good news to intended parents wanting to have children using ART.[161]

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154. *In re Roberto d.B.*, 399 Md. at 285, 923 A.2d at 126.
155. *See infra* Part V.A.
156. *See infra* Parts V.B.1-3.
157. *See infra* Part V.C.
158. DIANE EHRENSAFT, MOMMIES, DADDIES, DONORS, SURROGATES: ANSWERING TOUGH QUESTIONS AND BUILDING STRONG FAMILIES 223, 225-26 (2005).
159. *Id.* at 228.
160. *Id.*
161. *See id.*

According to several studies, children raised in surrogate families, sperm-donor families, and egg-donor families were functioning at the same level as children in control groups with regard to several categories, including the parent-child relationship and different measures of development.[162] In fact, donor-insemination children were found to be more advanced than other children with respect to "intellectual, psychomotor, and language development."[163] Studies of egg-donor babies are uncommon; however, the few that exist do not record any issues with eating or sleeping and report no evidence of behavioral or emotional problems.[164] A study on surrogacy discovered no evidence of speech or motor impairment in children born after in vitro fertilization (IVF) surrogacy.[165] Other studies have found no difference between surrogacy, egg-donor, and natural conception children with regard to psychological functioning.[166]

Only one study to date has given "disturbing news about the psychological adjustment of children conceived by donor insemination."[167] According to a survey of Dutch children, donor-insemination children exhibited more behavioral problems than naturally conceived children.[168] The discrepancy could be potentially explained by the small sample size used in the study or the fact that the educational level of the fathers in the donor-insemination group was lower than that of the naturally conceived group.[169]

Overwhelmingly, the evidence seems to indicate that children conceived via ART are not any different from naturally conceived children when it comes to academics and behavioral, social, and emotional adjustment, except that these children may actually be more intelligent because of the quality of the genes from the donor egg or sperm.[170]

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162. *Id.* (citing Susan Golombok & Fiona MacCallum, *Practitioner Review: Outcomes for Parents and Children Following Non-Traditional Conception*, 44 J. CHILD PSYCHOL. & PSYCHIATRY 300, 305 (2003)).

163. *Id.* at 229. Researchers use the "strong genetic load" of the typical donor profile to explain this outcome, as the donor is often a student or working professional. *Id.*

164. *Id.* (citing Golombok & MacCallum, *supra* note 162, at 309).

165. *Id.* (citing Paulo Serafini, *Outcome and Follow-Up of Children Born After IVF-Surrogacy*, 7 HUM. REPROD. UPDATE 23, 26 (2001)).

166. Golombok & MacCallum, *supra* note 162 at 305.

167. EHRENSAFT, *supra* note 158, at 229.

168. *Id.* (citing A. Brewaeys et al., *Donor Insemination: Dutch Parents' Opinions About Confidentiality and Donor Anonymity and the Emotional Adjustment of Their Children*, 12 HUM. REPROD. 1591, 1593-96 (1997)).

169. Brewaeys et al., *supra* note 168, at 1593.

170. EHRENSAFT, *supra* note 158, at 229.

Anecdotally, Melissa Stern, the famous "Baby M" from *In re Baby M*,[171] spoke briefly about herself in a New Jersey magazine article.[172] Melissa, now twenty-one-years old, is a junior at George Washington University.[173] She is a religion major and a sorority member, and she discussed her reaction to reading about *In re Baby M* in her bioethics class.[174] She wants to be a minister and says she is open to having children of her own someday.[175] With regard to Melissa's relationship with her parents, the Sterns, who, despite losing the surrogacy argument in court won custody of Melissa, she said, "I love my family very much and am very happy to be with them . . . . I'm very happy I ended up with them. I love them, they're my best friends in the whole world."[176] When she turned eighteen, Melissa initiated the process for Elizabeth Stern to adopt her, which terminated Mary Beth Whitehead Gould's parental rights.[177]

All of the research suggests that children born by ART, including surrogacy arrangements, fare just as well, if not better, than children conceived naturally.[178] While the research is still not complete by any means, this evidence could help legislators and judges when making determinations about whether to enforce surrogacy contracts. The research and anecdotal evidence demonstrates that the child carried by a surrogate will grow and develop just as well being raised by the intended parents as by being raised by the child's birth or biological mother.[179]

B. Medical and Psychological Concerns for All Parties

In addition to knowing how the children fare developmentally, there are other interests that should be considered, including the health concerns of the children, and the psychological effects on the surrogate and the intended parents.

1. Health Concerns for the Children

On January 11, 2008, BBC News reported an extremely disturbing story about a couple who married, and then later discovered they

171. 537 A.2d 1227 (N.J. 1988).
172. Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY MAG., Mar. 2007, at 70.
173. *Id.* at 70, 72.
174. *Id.* at 72.
175. *Id.*
176. *Id.*
177. *Id.*
178. EHRENSAFT, *supra* note 158, at 228–29.
179. *Id.*

were twins separated at birth.[180] While this sounds like something out of a soap opera, it provided a platform for people concerned about how ART can lead to problematic situations when children do not know who their biological parents are.[181] While this case did not involve the use of ART, as the children were separated at birth by adoption, it has implications for surrogacy.[182] Apparently, the couple was unaware that they were related to each other until after getting married, and the marriage was annulled immediately by a court.[183] Children born into surrogacy arrangements, like adopted children, may not know where they come from, so similarly tragic situations like this could happen if surrogacy contracts are enforced.[184] In *In re Roberto d.B.*, the circuit court, in holding that the court did not have the power to remove the surrogate mother's name from the birth certificate, cited "health" as one of its main reasons.[185] In fact, one of the main arguments cited by parties against upholding surrogacy contracts is the potential problem that a child may have because he or she does not know his or her biological mother, which can be crucial to predicting cancer, heart disease, and other medical conditions.[186]

Aside from a child not knowing where he or she came from, there are other medical concerns with using ART to create children.[187] Recently, a group of scientific reports have been released notifying the public of potential developmental or neurological problems in babies born using various forms of ART.[188] "These studies have concentrated on two specific procedures—IVF, when fertilization takes place in a petri dish, and intracytoplasmic sperm injection (ICSI), when a single sperm is injected into an egg and then implanted in the womb."[189] These procedures apply to some, but not all, surrogacy arrangements, and the reports give people a good basis to assess potential risks when deciding whether or not to conceive a child using a surrogate.[190]

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180. *Parted-at-Birth Twins 'Married,'* BBC NEWS, Jan. 11, 2008, http://news.bbc.co.uk/2/hi/uk_news/7182817.stm.
181. *Id.*
182. *Id.*
183. *Id.*
184. One politician shared with BBC News how this situation highlighted "the wider issue of the importance of strengthening the rights of children to know the identities of their biological parents." *Id.*
185. *In re* Roberto d.B., 399 Md. 267, 274, 923 A.2d 115, 119 (2007).
186. *See, e.g., id.* at 285, 923 A.2d at 126.
187. EHRENSAFT, *supra* note158, at 226.
188. *Id.*
189. *Id.*
190. *Id.*

At the 2003 European Society of Reproductive and Embryology meetings, a study of IVF and ICSI babies concluded that, "[o]verall, the results are reassuring and lay to rest fears about the health and welfare of children conceived through IVF and ICSI."[191] However, when it came to physical health, there were greater risks for malformations, mostly minor genital defects.[192] A study in Australia determined that babies conceived with either IVF or ICSI "were at a higher risk for being delivered by cesarean section, had lower birth weights, and were more likely to be born before term" than naturally conceived infants.[193] A study in Sweden discovered that 2% of children born through IVF were treated for neurologically related problems, which was double the rate of such problems in the control group of babies conceived naturally.[194]

In summary, children conceived using ART may have a higher risk of health problems by a very narrow margin.[195] Studies show that the risks are extremely small or the diseases extremely rare, and the vast majority of these children were normal.[196] Ultimately, courts and legislators should realize that, while there are risks that a child conceived by ART could be affected medically or emotionally (in the future, by, for example, marrying a sibling), these chances are so

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191. *Id.* (quoting Martin Hutchinson, *Public Reassured on IVF Safety*, BBC NEWS, July 2, 2003, http://news.bbc.co.uk/z/hi/health/3037400.stm).

192. *Id.* (citing Hutchinson, *supra* note 191); *see also IVF, ICSI Babies as Healthy as Others*, WEBMD, July 2, 2003, http://www.webmd.com/infertility-and-reproduction/news/20030702/ivf-icsi-babies-as-healthy-as-others ("The rate of birth defects was 6.2% for ICSI children, 4.1% for ISCI and IVF babies, respectively, compared with 2.4% among naturally conceived children.").

193. EHRENSAFT, *supra* note 158, at 226 (citing Michele Hansen et al., *The Risk of Major Birth Defects After Intracytoplasmic Sperm Injection and In Vitro Fertilization*, 346 NEW ENG. J. MED. 725, 725, 727 (2002)). "They were also more than twice as likely to have a major birth defect diagnosed by one year of age—in their urinary and genital systems, their muscles and bones, their vascular systems, or their chromosomes." *Id.* (citing Hansen et al., *supra*, at 725, 727-28). A United States study reported similar results. *Id.* (citing Laura Schieve et al., *Low and Very Low Birth Weight in Infants Conceived With Use of Assisted Reproductive Technology*, 346 NEW ENG. J. MED. 731 (2002)).

194. *Id.* at 227 (citing B. Stromberg et al., *Neurological Sequelae in Children Born After In-Vitro Fertilization*, 359 LANCET 461, 462 (2002)). The study cited a high percentage of twins, low birth weights, and preterm births as likely cause for the higher incidence of neurological problems. *Id.* (citing Stromberg et al., *supra*, at 463).

195. *Id.* at 228.

196. *Id.*

"infinitesimally small" that the benefits of allowing and enforcing surrogacy contracts may outweigh the potential costs.[197]

2. Psychological Concerns for the Surrogate

In determining which party should be ruled the child's legal parent in surrogacy disputes, the courts tend to weigh the competing interests of the two parties.[198] Particularly, they examine the detrimental psychological effects on the surrogate, who would have to give up a child she carried for nine months, against the detrimental psychological effects on the intended parents, who would have to give up the child they wanted so badly.[199] Although it seems as though only the child's best interests should be considered, it is very difficult to make determinations based on possible future events. Additionally, unlike normal custody disputes, there are usually not many factors for a judge to examine when choosing which parents will be the best for the child.[200]

Mary Beth Whitehead, the traditional surrogate who lost custody of Melissa Stern in the famous *In re Baby M* case, wrote a book about her experience in having to give up her child.[201] In the beginning of Chapter Three, entitled "The Loss," she quotes a doctor's letter to the editor in *The New York Times* that stated:

> Probably the most stressful and anxiety-provoking act in human existence is the separation of a woman from her newborn infant. The response to this, which humans share with most of the animal kingdom, is an overwhelming combination of panic, rage, and distress. Who can dare judge the psychological acts and responses of a woman put to such a test?[202]

After losing Melissa in the custody dispute between herself and the Sterns, Mrs. Whitehead experienced extreme emotional distress:

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197. *See id.*

198. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 786 (Cal. 1993).

199. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1259 (N.J. 1988).

200. *See, e.g.*, *In re* Roberto d.B., 399 Md. 267, 292, 923 A.2d 115, 132 (2007) ("Moreover, there is nothing with which to measure the father's ability to be a parent against, in order for a trial court to rule that it is *not* in the best interests of the child to grant the father the relief he seeks.").

201. *See generally* MARY BETH WHITEHEAD WITH LORETTA SCHWARTZ-NOBEL, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE (1989).

202. *Id.* at 17 (quoting D. Ruskin, Letter to the Editor, *The Most Stressful Act*, N.Y. TIMES, Apr. 20, 1987, at A26).

> As the month of April drew to a close, I realized that the old feelings of grief, self-hatred, and worthlessness, which I had experienced when I let the Sterns take the baby home the first time, had returned. There were days when my chest ached as if my heart had ruptured inside me.[203]

Many surrogates, particularly in traditional surrogacy arrangements, may suffer feelings of loss and post-partum depression following pregnancy.[204] Some surrogates are also faced with stress caused by criticism for their participation in the surrogacy arrangement.[205] Therefore, when awarding custody, particularly in traditional surrogacy arrangements, it is important to consider the potential for negative psychological effects on the surrogate.[206]

3. Psychological Concerns for the Intended Parents

Intended parents may also experience detrimental psychological effects if they lose the child they worked so hard for and waited so long to have. While there is not much research dedicated specifically to the psychological effects on intended parents who have lost a child this way, there is anecdotal evidence of the "hurt and anguish" that couples feel when the surrogate changes her mind.[207] When a surrogate wants to keep the baby, the potential litigation "is likely to be a lengthy, expensive and painful battle that—at best—awards them custody of a child who is sought by his/her birthmother."[208]

There has been a significant amount of research written about the psychological effects of infertility in general.[209] One husband wrote about his and his wife's challenges of infertility:

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203. *Id.* at 171–72.

204. SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL & ETHICAL CONSIDERATIONS 286 (1998).

205. *Id.*

206. In states where the statutes prohibit compensation for surrogates, a surrogate may be less likely to experience negative psychological effects since she may altruistically agree to help others such as a friend or family member. FIELD, *supra* note 17, at 20–21. It follows that there may be less pressure on the surrogate and a greater chance that the surrogate will seek psychological counseling before the process to ensure she is prepared to handle the emotional aspect of the experience.

207. COOPER & GLAZER, *supra* note 204, at 284.

208. *Id.*

209. *See, e.g.*, Andrew J. Geller, *Facing the Challenge of Infertility*, AM. SURROGACY CTR., Aug. 29, 2006, http://www.surrogacy.com/articles/news_view.asp?ID=47; JAMES MCGUIRK & MARY ELIZABETH MCGUIRK, FOR WANT OF A CHILD: A PSYCHOLOGIST AND HIS WIFE EXPLORE THE EMOTIONAL EFFECTS OF INFERTILITY (1991); DEBBY

> As a result, we may come to know a range of responses including, but not limited to, fearfulness, dread, rage, sadness, grief, confusion, shame, resentment, and numbness.
> . . . One of the areas of uncertainty that can lead to a crazy-making roller coaster ride (during in vitro treatment) is wondering whether the end result will be, God forbid, no pregnancy at all or, almost as overwhelming, twins or triplets!
> . . . Infertility challenges our belief, faith and hope in the normal workings of our body, and may leave us feeling broken and defective.[210]

Because uncertainty is one of the key factors contributing to the detrimental psychological effects on infertile couples, going through the incredibly uncertain surrogacy arrangement process can worsen those effects. Infertile couples who put a tremendous amount of hope into one person to give up her child seem to face the ultimate uncertainty, which could lead to serious psychological problems if the couple loses the child they intended to raise as their own. As Maryland law now stands, this uncertainty in surrogacy contracts acts as a disincentive to enter into surrogacy arrangements and also increases the likelihood of psychological problems for intended parents who do choose to use a surrogate.

C. Legal Contract Principles[211]

According to a 1987 *New York Times/CBS News* poll, the American public supported the decision in *In re Baby M*, agreeing that custody of the child should be awarded to the father instead of the surrogate mother.[212] Seventy-four percent of 1045 adults interviewed by telephone said that the baby should go to the intended father, while only 15% believed that the surrogate mother should get custody of the child.[213] Furthermore, when the public was asked

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PEOPLES & HARRIETTE ROVNER FERGUSON, EXPERIENCING INFERTILITY (1999); BOBBIE REED, LONGING FOR A CHILD: COPING WITH INFERTILITY (1994).

210. Geller, *supra* note 209.

211. This section is only intended to be a broad overview of the basic legal contract principles involved in surrogacy contracts. For a more detailed account of this topic, *see, e.g.*, Janet L. Dolgin, *Status and Contract in Surrogate Motherhood*, 38 BUFF. L. REV. 515 (1990).

212. *Poll Shows Most in U.S. Back Baby M Ruling*, NYTIMES.COM, Apr. 12, 1987, http://www.nytimes.com (search for "Poll Shows Most in U.S. Back Baby M Ruling").

213. *Id.*

about custody issues in general, the support for fathers in such cases which involve a signed contract was again very high.[214] Sixty-nine percent of the public indicated that a surrogate mother should be bound by the signed agreement, and only 19% expressed that the surrogate should be free to change her mind.[215]

The public's opinion may reflect a respect for the traditional contract elements contained in a surrogacy contract: offer, acceptance, and consideration.[216] Even when no payment or compensation is allowed by the intended parents to the surrogate, the consideration may be found in the giving of sperm, paying medical expenses, and promising to adopt the child.[217] Under contract law principles, surrogacy agreements should be upheld and enforced.[218] Therefore, the court should award custody of the child to the intended parents according to the terms of the contract.

However, several contract defenses have been used to hold surrogacy contracts unenforceable, the most prominent being in *In re Baby M*, where the contract was held to be void as contrary to public policy.[219] A second defense, similar to public policy, is unenforceability on the basis of illegality.[220] In states where statutes prohibit baby-selling, as in Maryland, surrogacy contracts for compensation can be invalidated since the consideration would be deemed illegal.[221] Finally, the doctrine of unconscionability has been used to declare a surrogacy contract void when the contract encouraged the parties to sign away the legal rights of triplets born to

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214. *Id.*

215. *Id.*

216. *See* FIELD, *supra* note 17, at 76; JEFFREY FERRIELL & MICHAEL NAVIN, UNDERSTANDING CONTRACTS 149 (2004) (stating that a contract is formed once there is an offer and an acceptance, supported by consideration).

217. FIELD, *supra* note 17, at 77.

218. *Id.* at 15, 76.

219. *In re* Baby M, 537 A.2d 1227, 1240, 1246–47 (N.J. 1988) ("The surrogacy contract's invalidity . . . is further underlined when its goals and means are measured against New Jersey's public policy. . . . The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.").

220. *See, e.g., id.* at 1234 (holding that payment of money to a surrogate is illegal, and possibly criminal, and therefore a surrogacy contract is unenforceable); *In re* Roberto d.B., 399 Md. 267, 293, 923 A.2d 115, 130 (2007) (noting that payment of money for a child is illegal, and therefore surrogacy contracts are illegal as well).

221. *See* MD. CODE ANN., FAM. LAW § 5-362(a) (LexisNexis 2006); MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002).

the surrogate and failed to provide for a legal mother for the children.[222]

Aside from these contract defenses, the law governing contracts seems favorable to upholding surrogacy contracts, as all of the necessary elements are present.[223] However, several states have expressly held that surrogacy contracts are unenforceable, and their courts will not allow the intended parents to enforce their rights under the contract.[224] However, the question of whether a surrogacy contract will be upheld is still open in Maryland because there are no statutes expressly prohibiting or allowing surrogacy contracts.

VI. ANALYSIS AND RECOMMENDATIONS

This Comment's analysis and recommendations are based upon an important distinction between the types of surrogacy arrangements—traditional and gestational.[225] Three states have statutes which distinguish between these two types of arrangements: Florida, New Hampshire, and Virginia.[226] All three states have comprehensive statutory schemes that provide specific requirements that must be followed in a surrogacy arrangement.[227] Additionally, through case law, California also distinguishes between traditional and gestational surrogacy.[228]

The essential inquiry thus becomes twofold: (1) What type of surrogacy arrangement is involved, and (2) what should be the result in each type of arrangement if the surrogate wants to rescind the contract and keep the child?

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

223. *See* discussion *supra* Part V.C.

224. The following jurisdictions expressly prohibit surrogacy contracts regardless of payment: Indiana, Michigan, New York, Arizona, North Dakota, and the District of Columbia. *See* KINDREGAN & MCBRIEN, *supra* note 9, at 146, 153, 157, 163, 169, 172.

225. *See* discussion *supra* Part II.A.

226. FLA. STAT. ANN. §§ 742.15-.16 (West 2005); N.H. REV. STAT. ANN. §§ 168-B:1 to :32 (LexisNexis 2001); VA. CODE ANN §§ 20-156 to 165 (2004).

227. FLA. STAT. ANN. §§ 742.15-.16; N.H. REV. STAT. ANN. §§ 168-B:16; VA. CODE ANN §§ 20-156 to 165.

228. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that when one woman is not the biological mother and birthmother, "she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother"); Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893 (1994) (distinguishing *Johnson* because that case involved gestational surrogacy, while this case involved a traditional surrogacy arrangement).

A. Traditional Surrogacy Arrangements

Traditional surrogacy arrangements, when the surrogate is both the biological mother and the birth mother of the child, are generally much more controversial than gestational surrogacy arrangements.[229] Society, legislators, and courts have a difficult time allowing a woman to sign a binding contract relinquishing her rights to her biological child before the child is born.[230] Obviously, if the surrogate voluntarily gives up the child when it is born, there are not usually problems with granting the intended parents custody.[231] The problem arises when a traditional surrogate wants to keep the child, despite her promises in the contract that she will give the child to the intended couple.

The Court of Appeals of Maryland's decision in *In re Roberto d.B.* does not speak to these types of surrogacy arrangements,[232] and therefore, there is no way to ascertain how the court would rule if it had the opportunity to decide whether a traditional surrogacy contract was valid. An examination of Maryland's adoption statutes and public policy, as discussed in Part V, is vital to this determination.

Maryland's adoption laws provide that for an independent adoption, consent of a parent is only valid if given after the prospective adoptee is born.[233] Also, the consent must contain an express notice of "the right to revoke consent, at any time within 30 days after the consent is signed."[234] Since a biological parent is the legal and natural parent, under Maryland's adoption laws, a traditional surrogate would not be able to give valid consent until the baby is born.[235] Thus, if the surrogate decides to rescind the contract before she has the baby or within thirty days of having given consent, the contract would violate Maryland's adoption laws.[236] Because of Maryland's stance against allowing a biological mother to give up her child before it is born,[237] the Maryland legislature should not allow, and the courts should not enforce, traditional surrogacy contracts

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229. *See* discussion *supra* Parts II.B.1-3.
230. *See* discussion *supra* Parts II.B.1-4.
231. *Cf.* discussion *supra* Parts II.B.1-4 (All of the discussed cases and statutes involve surrogates who rescinded their contracts.).
232. *See In re* Roberto d.B., 399 Md. 267, 271, 923 A.2d 115, 117 (2007) (describing *In re Roberto d.B.*'s gestational surrogacy arrangement).
233. MD. CODE ANN., FAM. LAW § 5-3B-21(a)(2)(i) (LexisNexis 2006).
234. *Id.* § 5-3B-21(a)(2)(iv)(1).
235. *See id.* § 5-3B-21(a)(2)(i).
236. *See supra* notes 233–34 and accompanying text.
237. § 5-3B-21(a)(2)(i).

until after the child has been born and the biological mother has given valid consent.

The legislature should create a statutory scheme to this effect, but without criminalizing traditional surrogacy contracts. The problem that needs to be addressed in legislation is when the surrogate changes her mind and wants to keep the baby, not when everything goes well and the intended parents are given the child. This may seem harsh for the intended parents, because they could enter into an agreement without knowing whether the traditional surrogate will change her mind, but it is consistent with the current adoption laws.[238] Furthermore, the arguably more important policy justification—the negative psychological effects on the surrogate in giving up her child without being able to change her mind—is satisfied by this outcome.

There is one remedy for the intended parents in this situation. If the traditional surrogate was artificially inseminated with the intended father's sperm, then a situation like *In re Baby M* could occur, where the court would decide a custody dispute between the surrogate and the biological father.[239] In this "best interests of the child" analysis, a court could examine various factors, including the existence of a surrogacy contract and the circumstances under which it was entered into, possibly leading to the intended parents receiving legal and physical custody of the child anyway.[240] The disadvantage to this result is the potential for the surrogate to get visitation or partial custody, which could be a difficult situation for these two sets of parents.[241]

In *In re Baby M*, the New Jersey court declined to enforce a traditional surrogacy arrangement. In comparison to the increasing use of gestational surrogacy, traditional surrogacy arrangements are becoming less popular due to technological advances and because the nature of the contract runs contrary to public policy.[242] Current adoption laws in Maryland reveal a negative view toward allowing

238. *See id.* § 5-3B-21.

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

240. *Id.* at 1256, 1259.

241. *Id.* at 1261–63.

242. *Id.* at 1246–50 (citing several public policies violated by the surrogacy contract including the following: that children should be raised by both of their natural parents; that rights of natural parents are equal concerning their child, with father's right being no greater than mother's; policies governing consent to surrender of the child; policies regarding concern for the best interests of the child; and policies against the degradation of women).

pre-birth consent,[243] and surrogacy laws should follow suit because the same policy implications exist. Additionally, because baby-selling is prohibited in Maryland,[244] there is less of an incentive for traditional surrogates to enter into these arrangements unless they are acting purely altruistically, which then decreases the chance they will renege on the deal. There should be a disincentive to entering into traditional surrogacy arrangements because of the unpredictability of what the surrogate will do and the inability to give consent before the child is born.

Therefore, in traditional surrogacy cases, if a surrogate chooses to rescind the contract and keep her baby, the court should not uphold the contract because it is against public policy and violates the adoption statutes already in place. If the intended father's sperm was used to conceive the child, the court should use the "best interests of the child" standard to determine custody.[245] Finally, if a traditional surrogate abides by the contract and gives up the child, she and the intended parents should follow standard adoption procedures, the MDVR should allow the birth certificate to be amended, and the court should recognize this decision.

B. Gestational Surrogacy Arrangements

Gestational surrogacy contracts are distinguishable from traditional surrogacy contracts[246] and, therefore, should be treated differently by the courts and legislature in Maryland. There is no need to provide a disincentive for entering into gestational surrogacy contracts, because in these arrangements, a surrogate is merely acting as a carrier for the child and is not genetically related to it.[247] Since parentage is almost always determined through biological ties (barring exceptional circumstances),[248] a gestational surrogate does not have the requisite standing to argue that she is the legal mother.

In order to maintain consistency in gestational surrogacy law, it is important to follow basic contract principles. As long as the surrogate and intended parents entered into a valid contract, the contract should be upheld, and the surrogate should not be allowed to

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243. *See* § 5-3B-21(a)(2)(i).
244. *See id.* § 5-3B-32.
245. *See, e.g., In re* Baby M, 537 A.2d 1227, 1256 (N.J. 1988).
246. *In re* Roberto d.B., 399 Md. 267, 270, 923 A.2d 115, 117 (2007).
247. *Id.* at 270, 923 A.2d at 117.
248. *See In re* Adoption/Guardianship No. A91-71A, 334 Md. 538, 561, 640 A.2d 1085, 1096 (1994).

revoke her promise. This is especially true since compensation is not allowed, and there are no arguments for the contract being void as against public policy or because it is unconscionable. There is no real potential for coercion of the surrogate because she cannot be compensated.

Additionally, because the research done on children born through surrogate arrangements concludes that these children do not fare any worse than children conceived naturally,[249] there is no reason to invalidate these contracts. Infertility is a significant problem and couples attempting to have children using ART should not be faced with even more unpredictability and inconsistency, which could have adverse psychological effects on them.[250] While there are potential adverse effects on gestational surrogates because they are giving up a child they carried for nine months, it is not as severe as the impact on traditional surrogates because the child carried by the gestational surrogate is not biologically related.[251]

While the court in *In re Roberto d.B.* expressly denied adopting any sort of "intent" test,[252] its language suggests an implicit adoption of such a test[253] as in *Belsito v. Clark*[254] and *Johnson v. Calvert*.[255] Therefore, in a disputed gestational surrogacy case, a court should look at the intent of the parties and uphold the contract.

Instead of waiting until the court of appeals hears a case involving surrogacy again, it would be helpful to couples, surrogates, and their lawyers for the General Assembly to pass legislation that not only expressly allows gestational surrogacy contracts, but also provides a means and method of what is required to enter into a surrogacy contract and how they can get a court to enter an order of parentage in favor of the intended parents. Virginia has a comprehensive and thorough statutory scheme that could serve as a model for Maryland legislators.[256]

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249. *See supra* Part V.A; *see also* European Society for Human Reproduction & Embryology, *Families with Children Without a Genetic or Gestational Link to Their Parents Are Functioning Well*, EUREKALERT!, July 5, 2008, http://www.eurekalert.org/pub_releases/2008-07/esfh-fwc070208.php.

250. COOPER & GLAZER, *supra* note 204, at 284.

251. *Cf. id.* at 288.

252. *In re Roberto d.B.*, 399 Md. at 284 n.15, 923 A.2d at 125 n.15.

253. *See supra* note 145 and accompanying text.

254. Belsito v. Clark, 67 Ohio Misc. 2d 54, 65 (C.P. 1994).

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

256. *See* VA. CODE ANN. § 20-159 (2004).

In Virginia, it is legal for a surrogate, her husband, and the intended parents to enter into a surrogacy arrangement.[257] Before a surrogate is impregnated, the parties must request to have their surrogacy arrangement judicially approved.[258] The parties can thus be certain that the court approves of the arrangement and their intentions *before* they begin any procedures, which provides security to the parties. Virginia law is explicit in its requirements for the surrogacy contract.[259] The intended parents, the surrogate, and the surrogate's husband (if any) must sign and have the surrogacy contract acknowledged.[260] Then, they must join in filing a petition to the circuit court in a county or city where at least one of them resides, with their contract attached.[261] Before a hearing on the petition, the court appoints a *guardian ad litem* to represent the interests of any potential child(ren), appoints an attorney to represent the surrogate, and orders a home study of all parties—the surrogate, the surrogate's husband, and the intended parents.[262] The court retains exclusive and continuing jurisdiction over all matters "arising under the surrogacy contract until all provisions of the contract are fulfilled."[263] The exclusive and continuing jurisdiction requirement is helpful because the parties will be dealing with the same court, which provides consistency and predictability. At the hearing on the petition, the court will enter an order approving the contract and authorizing the surrogacy arrangement for twelve months from the issuance.[264] After the parties have met certain requirements, the court will discharge the *guardian ad litem* and the surrogate's attorney.[265] Within seven days

257. *Id.* § 20-159(A).
258. *Id.* §§ 20-159(B), 20-160(B).
259. KINDREGAN & MCBRIEN, *supra* note 9, at 176.
260. § 20-160(A).
261. *Id.*
262. *Id.* § 20-160(A), (B)2.
263. *Id.* § 20-160(A).
264. *Id.* § 20-160(B).
265. *Id.* The conditions required to discharge the *guardian ad litem* and surrogate's attorney are as follows:

> (1) the court has jurisdiction; (2) a home study of the intended parents, the surrogate, and the husband has been filed with the court; (3) the parties meet the standards of fitness applied to adoptive parents; (4) all parties have voluntarily entered into the contract and understand its meaning, provisions, and effect, and understand there can be no compensation involved; (5) the agreement addresses the payment of medical and ancillary costs associated with the pregnancy; (6) the surrogate is married and has had at least one pregnancy with a live birth, and there is no

of the resulting child's birth, the intended parents must submit written notice with the court that the baby was born to the surrogate within 300 days after the last performance of assisted conception.[266] The court will enter an order directing the State Registrar of Vital Records to issue a new birth certificate for the child naming the intended parents as the parents of the child, upon a finding that at least one of the intended parents is the genetic parent of the child.[267] Although these statutory requirements may seem stringent, they are the best way to ensure that a surrogacy contract will be enforced.

The only necessary addition for these statutes to be complete is a provision covering gestational surrogacy arrangements where neither of the intended parents is biologically related to the child. For instance, if both of the intended parents are infertile, and they use donor sperm and eggs, which are implanted into the surrogate, the intended parents should be allowed to enforce this contract based on contract principles and the intent test. Generally, people who voluntarily donate sperm and eggs have no rights and no responsibilities as parents once they have donated the reproductive material.[268]

Therefore, notwithstanding that neither of the parents is genetically related to the child, gestational surrogacy contracts should be upheld in Maryland even if the surrogate wants to rescind the contract, because of public policy implications, the *In re Roberto d.B.* decision, and current statutes in force. Additionally, a legislative scheme similar to the one in Virginia should be implemented to ensure the greatest predictability and consistency for the intended parents and the surrogate who enter into gestational surrogacy contracts, namely for the protection of the party who stands to lose the most—the intended parents.

> risk to her health in bearing another child; (7) the parties and the court have seen reports of the physical examinations and psychological evaluations; (8) the intended mother is infertile; (9) at least one of the intended parents is a gamete provider; (10) the husband of the surrogate is a part to the surrogacy agreement; (11) the parties have received counseling regarding the effects of surrogacy; and (12) the agreement would not be substantially detrimental to anyone's interests.

KINDREGAN & MCBRIEN, *supra* note 9, at 177–78.

266. § 20-160(D).

267. *Id.*

268. COOPER & GLAZER, *supra* note 204, at 175 ("The donor needs to know that he will not be required to provide any means of care or support for the child, and the parents need to know they will be protected from any claims on their child, legal or otherwise, from the donor.").

VII. CONCLUSION

While *In re Roberto d.B.* may be a "landmark" case in Maryland because it was the first time the court of appeals decided a case dealing with surrogacy, it was clearly not enough to answer the many questions of lawyers and future parents. Many other states have gone much further than Maryland in their development of this area of the law, through appellate decisions and statutes.[269] Judge Cathell was correct in stating that the General Assembly must give the courts and practitioners guidance on this topic,[270] because there are many public policy implications involved with ART in general and surrogacy in particular.

While general contract law principles may allow surrogacy contracts to be upheld, public policy and current Maryland adoption law distinguish between traditional and gestational surrogacy arrangements.[271] Traditional surrogacy arrangements should not be enforced if the surrogate changes her mind, because there are too many adverse psychological effects on the surrogate if she has to give up her biological child before it is born. Maryland's adoption statutes do not allow pre-birth consent; this is a strong indicator that the Maryland legislature views the relationship between a mother and her biological child very seriously and would not allow a surrogate's parental rights to be relinquished so easily.[272] Gestational surrogacy arrangements, however, create a different set of rights for the parties, particularly when the intended parents are biologically related to the child, but also when there are donated sperm and eggs. In this situation, the gestational surrogate is merely a mode of transport for the baby growing inside her, and thus, the surrogate should not have any rights to the baby because there is a presumption in favor of biological parenthood in Maryland.[273] The public policy considerations also weigh strongly in favor of the intended parents, since the loss of a child they worked so hard to conceive could be formidable to their psyches.

Finally, the Maryland General Assembly should adopt a statutory scheme, such as that of Virginia, which embraces gestational surrogacy and gives protection to the intended parents as well as the

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269. *See supra* Part II.B.

270. *In re* Roberto d.B., 399 Md. 267, 300, 923 A.2d 115, 135 (2007) (Cathell, J., dissenting).

271. *See supra* Part VI.

272. *See supra* notes 233–35 and accompanying text.

273. *See supra* notes 246–48 and accompanying text.

surrogate.[274] It is imperative to provide consistent laws so attorneys will be able to advise their clients on one of the most important decisions in their lives, the decision to bring a child into the world.

Ashley E. Bashur

274. *See supra* notes 256–67 and accompanying text.