GESTATIONAL SURROGACY MATERNITY DISPUTES: REFOCUSING ON THE CHILD

by
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The growing problem of infertility coupled with increasingly sophisticated reproductive technology has produced an unfamiliar problem: the identification of a child's legal mother. This issue of legal motherhood is exacerbated in the situation where an infertile couple uses a gestational surrogate as a means of having a child. Many times, a gestational surrogacy arrangement goes smoothly. However, in some cases, the arrangement results in a maternal rights dispute. In a gestational surrogacy arrangement, there are three potential women with maternal rights claims: the gestational surrogate, the genetic donor, and the woman for whom the baby is intended.

To resolve the issue of legal motherhood, courts have traditionally applied one of three tests based on the three forms of connection to the child: the genetic maternity rule, the gestational maternity rule, or the intended mother rule. This Comment argues that none of these three tests provides an accurate determination of motherhood, as each test unfairly elevates one component of motherhood over the others. Instead, this Comment focuses on a different test, the best interest of the child test, which courts have applied to custody disputes, but never to a maternal rights dispute. The best interest test allows the court to refocus its inquiry on the child and encompasses how a woman's genetic contribution, gestational bond, and pre-conceptional intent can positively or negatively impact the welfare of the child. Courts may also take into account factors such as family stability and personality traits. Finally, this Comment proposes a new component to the best interest test: the intent-based tiebreaker. If, after weighing each woman's connection and traits, the court still finds that each woman is equally fit to care for the child, the court may use pre-conception intent as a tiebreaker. This Comment argues that intent is the fairest solution because courts should recognize and preserve the pre-conception intent as indicated by both the commissioning party and the gestational surrogate.

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I. INTRODUCTION

> *"We really have no definition of 'mother' in our lawbooks. . . . 'Mother' was believed to have been so basic that no definition was deemed necessary."*[1]

July 28, 2009 was a wonderful day for Scott and Amy Kehoe as they welcomed the birth of twins, Ethan and Bridget.[2] However, the conception of their twins was far from the norm. The Kehoes are one of the millions of couples who are plagued by infertility. After two miscarriages and five failed rounds of in vitro fertilization (IVF), they decided to use the services of a surrogate to achieve their dream of having a child.[3] The couple obtained the sperm and egg from anonymous donors and found a woman, Laschell Baker, who would serve as the gestational surrogate mother.[4] The fertilized embryo was then implanted in Baker's uterus, where she carried it to term.

One week after the birth of the twins, the parties went to court so that Baker could transfer her parental rights to the Kehoes by allowing them to legally adopt the twins. At the proceedings, Baker learned that Amy Kehoe had a history of mental illness and a minor criminal record. Kehoe's psychiatrist, however, testified that she would be a good mother.[5] Despite her apprehension regarding this new information, Baker agreed to allow the court to grant legal guardianship to the Kehoes.

A month later, Baker exercised her legal right to take the children back by going to court and having the Kehoes' guardianship rescinded.[6] Because the surrogacy arrangement took place in Michigan, which has one of the strictest laws prohibiting surrogate parentage contracts as

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[1] *Surrogate Has Baby Conceived in Laboratory*, N.Y. TIMES, Apr. 17, 1986, at A26 (quoting Judge Marianne O. Battani of Wayne County Circuit Court in her opinion in *Smith v. Jones*, the first case in which a court decided maternal rights claims in the realm of gestational surrogacy).

[2] Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at 1; Juju Chang, Jennifer Pereira & Suzan Clarke, *Adoptive Mom's Medical, Criminal Past Causes Surrogate to Revoke Agreement*, ABC NEWS (Jan. 12, 2010), http://abcnews.go.com/GMA/Parenting/twins-meant-adoption-surrogate-mom/story?id=9536107.

[3] Chang, Pereira & Clarke, *supra* note 2.

[4] Saul, *supra* note 2, at 1. For the definition of a gestational surrogate, see CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 132 (2006), defining a gestational surrogate as a woman who aids an infertile party by having a fertilized embryo implanted in her uterus and carrying the fetus to term. The gestational surrogate is never biologically related to the fetus. See also *infra* notes 55–68 and accompanying text in Part III.B for a detailed explanation on the various forms of gestational surrogacy.

[5] Saul, *supra* note 2, at 45.

[6] *Id.* at 1.

"contrary to public policy," Baker was the twins' legal mother by default.[7] Due to the slow court system and the harshness of Michigan law as applied to couples in their position, the Kehoes decided not to pursue any further legal action.[8]

The above situation illustrates the complexities that may specifically arise from a gestational surrogacy arrangement. A gestational surrogacy arrangement differs from a traditional surrogacy in that it utilizes IVF to fertilize an egg, usually belonging to the commissioning woman, outside of the surrogate mother's body.[9] The fertilized egg is then implanted in the surrogate mother's uterus.[10] The gestational surrogate mother is never genetically related to the fetus she carries to term.[11] On the other hand, because a traditional surrogate provides the egg and carries the baby to term, she is always genetically related to the fetus.[12]

Where the status of motherhood used to be "self-evident" by the pregnancy and birth of a child, new reproductive techniques have complicated maternal rights.[13] In the Kehoes' arrangement there are potentially three different women with maternal rights: the donor who supplied the ovum, the woman who gestated and gave birth to the child, and the woman for whom the child was intended. While not all gestational surrogacy arrangements are as complex as the Kehoes', they all, in some form, create a separation of the components of motherhood into different women.[14] This separation raises the potential of multiple claimants to the rights and duties of legal motherhood.[15] The purpose of this Comment is to discuss how to best determine the legal mother of a child resulting from a gestational surrogacy arrangement in the event of disputed maternity.[16]

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[7] *Compare* Surrogate Parenting Act of 1988, MICH. COMP. LAWS §§ 722.851–722.861 (2005) (prohibiting surrogacy agreements), *with* OR. REV. STAT. § 163.537 (2009) (permitting non-compensated surrogacy agreements only), *and* TEX. FAM. CODE ANN. § 160.754 (West 2008) (permitting compensated surrogacy agreements).

[8] Saul, *supra* note 2, at 45.

[9] KINDREGAN & MCBRIEN, *supra* note 4, at 132.

[10] *Id.* at 75.

[11] *Id.* at 132.

[12] *Id.* at 131.

[13] Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 318 (1990).

[14] Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 265 (1995).

[15] Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 606 (2003).

[16] This Comment focuses on determining which woman should be awarded maternal rights of a child, not on making a custody determination. Courts often treat these two issues separately, applying different tests to each issue. For example, in *In re Baby M*, the New Jersey Supreme Court applied a best interests standard in its custody determination but refused to terminate the surrogate mother's parental rights based on the same standard. 537 A.2d 1227 (N.J. 1988). Instead, the court named the surrogate the natural mother but granted the commissioning couple custody. *Id.*

Part II demonstrates the importance of determining maternal rights, especially in the gestational surrogacy realm, and why courts need to implement a more complete test, such as the best interest test. Part III differentiates between the two types of surrogacy arrangements: traditional and gestational. This Comment argues that the biological differences that result from a gestational surrogacy arrangement, as opposed to traditional surrogacy, complicate the assignment of maternal rights and create the increased need for courts to implement a new test when disputes arise.[17] Specifically, the advent of gestational surrogacy has allowed for the separation of the genetic and gestational component of motherhood into two different women who may be vying for maternal rights.

Part IV explores the three components of motherhood in the context of gestational surrogacy: the genetic mother and the gestational mother, both of whom are considered natural mothers, and the contractual intent mother for whom the child was intended at pre-conception. By discussing the value and danger of over-emphasizing each component of motherhood, this Comment demonstrates that each woman who possesses one of the three connections has strong arguments in favor of and against her award of maternal rights.

Part V discusses the three tests courts have traditionally used to determine the legal mother in complex gestational surrogacy disputes: the genetic test, the gestational test, and the intent-based test. Courts that have faced this challenge have adopted one of these three tests depending on which maternal characteristic they viewed as most compelling.[18] This approach has essentially created a maternal hierarchy, where courts weigh the different components of motherhood and elevate one woman's connections to the child over those of the others.[19] This Comment argues that by using any one of the three tests, courts have been too focused on the once simple question of who is the "correct" mother. Each mother, the genetic, gestational, and intent mother, has compelling arguments in support of and against the award of custody; therefore, it is futile and inaccurate for courts to pick one.

Part VI analyzes another possible test, the best interest of the child test, that focuses on which maternal determination makes sense for the child's continued well-being. Ilana Hurwitz first proposed the use of the best interest test as a means to determine legal motherhood in

[17] *See* Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother":* Johnson v. Calvert, 17 HARV. J.L. & PUB. POL'Y 907, 913 (1994) (stating that different biological relationships are at stake in gestational surrogacy arrangements as compared to traditional surrogacy).

[18] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 135–40 (2000).

[19] *Id.* at 135.

gestational surrogacy dispute.[20] Instead of prioritizing the claims of each potential mother, courts should shift their focus to the child and utilize a best interest of the child test. The best interest framework incorporates a court's analysis as to how a woman's genetic contribution, gestational bond, and pre-conceptional intent can positively or negatively impact the welfare of the child. In addition to these factors, courts should then consider other factors that may affect the best interest of the child, such as a woman's capacity to nurture the child and the stability of a party's household.[21] Courts should also consider, if possible, any preferences from the child's perspective. This may be difficult to do in the gestational surrogacy arena because usually the dispute concerns an infant. This Comment modifies the best interest test by proposing an intent-based tiebreaker that courts can utilize when they are still left with an indeterminate decision after weighing all appropriate factors. Although the best interest framework is not a perfect solution, it allows the court to consider the totality of each individual situation and refocus on the child.

II. WHY DO WE CARE ABOUT MATERNAL RIGHTS IN THE GESTATIONAL SURROGACY ARENA?

In order to provide context to the issue of maternal rights, it is helpful to answer the question of why we care about how courts can accurately and justly award maternal rights in the gestational arena. First, determining maternal rights has a profound impact on all the parties involved in the dispute, including the child, the women, and their families. Second, the problem of infertility and the use of gestational surrogacy arrangements as a potential solution are both unlikely to disappear in the near future. Therefore, courts need to be prepared with a new test that accurately addresses maternal rights disputes that arise out of these arrangements. Third, although legislation that pre-determines maternal rights may seem like a viable answer, this answer is equally as ineffective as the courts' current approaches. Because of the rights and interests at risk and the continuing presence of the problem, courts should adopt the best interest framework to more accurately determine legal motherhood.

A. The Importance of Determining Maternity

Determining a child's legal mother will profoundly impact a child's well-being, especially in the gestational surrogacy arena. Awarding maternal rights to a fit mother is arguably more important in a gestational surrogacy maternity dispute because of the potential effect

[20] *Id.* at 170. Part VI elaborates on the application of the test and proposes that courts turn to the intent-based mother in the situation where both parties are equally fit from the point of view of the child.

[21] *See* Johnson v. Calvert, 851 P.2d 776, 800 (Cal. 1993) (Kennard, J., dissenting).

that the confusing circumstances surrounding a child's birth can have on a child.[22] A mother of a child resulting from a surrogacy arrangement should have the mental and emotional stability to support the child through any confusion and isolation the child may experience as a result of his or her unconventional birth.

The determination of legal motherhood also triggers certain rights and responsibilities on behalf of the mother. After determining which woman is the legal mother, courts will usually award custody of the child to the same woman.[23] It is in the child's best interest to have a clear determination from the outset as to who will have custody of the child in order to create a sense of permanency.[24] In addition, a legal mother who has custody of her child also has the ability to decide how she wants to raise her child.[25] Because most surrogate maternal rights disputes center around infants, the resulting legal mother will have a profound effect in shaping all aspects of the child's life.[26] Children depend on their mother for physical and emotional support and the basic necessities of life, such as food and shelter.

B. The Problem of Infertility and Gestational Surrogacy as a Solution

This need to determine legal motherhood is also imperative because of the prevalence of infertility and the increasing use of gestational surrogacy as a potential solution. According to a 2002 national survey, the Center for Disease Control (CDC) reported that 7.3 million, or 11.8%, of women ages 15 to 44 had an impaired ability to have children.[27] In

[22] Olga B.A. van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 53–54 (2007) (stating that psychological and social uncertainty may impact the children at the center of a gestational surrogacy arrangement).

[23] *See, e.g.*, *Johnson*, 851 P.2d at 778 (concluding that the commissioning woman was the legal mother as recognized under the Uniform Parentage Act and subsequently awarding her custody of the infant). However, it is not always the case that legal mothers are awarded custody of the child. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1255–61 (N.J. 1988) (ruling that the surrogate mother was the legal mother but awarding custody to the biological and intended father).

[24] MARTHA A. FIELD, SURROGATE MOTHERHOOD 89 (1988) (asserting that being shuttled back and forth between parties can be detrimental to an infant).

[25] Commentators have likened the parent-child relationship to a fiduciary relationship between a principal and agent. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

[26] *See* Jeffrey Blustein, *Ethical Issues in DNA-Based Paternity Testing*, *in* GENETIC TIES AND THE FAMILY 44 (Mark A. Rothstein et al. eds., 2005) (listing diverse rights of a parent, including the right to name the child, to determine domicile, to direct and shape the child's psychological and social development, and the right to receive honor and respect).

[27] CENTERS FOR DISEASE CONTROL AND PREVENTION, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 22 (Dec. 2005), http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf. This infertility number may continue to increase as modern women decide to have children later in their lives. *See* NEW YORK STATE TASK FORCE ON LIFE

addition, of the 61.6 million women of reproductive age, 7.3 million women, or 12%, had used some kind of medical help, either to become pregnant or to prevent miscarriage.[28]

The use of gestational surrogacy arrangements is an increasingly attractive option for infertile couples. However, because the surrogacy realm is largely unregulated, it is often difficult to find accurate statistics regarding the use of gestational surrogacy arrangements.[29] One study reported that the practice of gestational surrogacy in the United States increased from less than 5% of all surrogate arrangements in 1988 to more than 50% as of 1994.[30] The Society of Assisted Reproductive Technology (SART) counted 260 surrogate births in 2006, a 30% increase in just three years.[31] Industry experts estimate a larger number of surrogate births than what SART reported, citing about 1,000 births in 2007.[32]

There are several proposed reasons for this increase in gestational surrogacy arrangements. First, the technology, mainly IVF, utilized in gestational surrogacy is more commonly used as a method to remedy infertility.[33] In addition, new techniques surrounding IVF are improving, thus increasing the rate of success.[34] These techniques include freezing embryos for later use, intracytoplasmic sperm injection, and pre-implantation genetic diagnosis, which allows doctors to view the health of the embryo before it is transferred back to the woman's uterus.[35] In 2002, the CDC reported that nearly 46,000 babies were born as a result of IVF, nearly a 120% increase from the 21,000 children born just seven years

AND THE LAW, EXECUTIVE SUMMARY OF ASSISTED REPRODUCTIVE TECHNOLOGY: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (Apr. 2008), http://www.health.state.ny.us/nysdoh/taskfce/execsum.htm.

[28] CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 27.

[29] Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 30, 2008 (Magazine), at 45.

[30] Heléna Ragoné, *Of Likeness and Difference: How Race Is Being Transfigured by Gestational Surrogacy*, *in* IDEOLOGIES AND TECHNOLOGIES OF MOTHERHOOD: RACE, CLASS, SEXUALITY, NATIONALISM 57 (Heléna Ragoné & France Winddance Twine eds., 2000).

[31] Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, http://www.newsweek.com/id/129594.

[32] *Id.* (stating that the discrepancy in numbers may be because at least 15% of surrogacy clinics did not report their statistics to SART and private agreements were not counted).

[33] JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 36–37 (2006) (estimating that in 2006 almost one million children had been born worldwide using IVF and predicting that this number will continue to grow). See *infra* notes 55–68 and accompanying text in Part III.B for more detail on the procedure of IVF as used in gestational surrogacy.

[34] *Id.* at 37–38 (discussing improvements to IVF in the early 1990s). *See also* CENTERS FOR DISEASE CONTROL AND PREVENTION, 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 61 (Nov. 2008), http://www.cdc.gov/ART/ART2006/PDF/2006ART.pdf (reporting that the number of ART cycles had more than doubled, and the number of live-birth deliveries had increased two-and-a-half times in 2006 as compared with 1996).

[35] DAAR, *supra* note 33, at 36.

prior.[36] Also, alternative solutions to infertility such as adoption are often considered but deemed impracticable for other reasons.[37] Lastly, gestational surrogacy itself has several aspects that appeal to an infertile couple, including the ability of infertile parents to have a genetically related child and the commissioning party's strengthened position in the event of a legal dispute because of the absence of a genetic link between the surrogate and child.[38]

C. Legislation as an Ineffective Solution

A seemingly simple solution to the maternal rights battle involves enacting legislation, which can pre-determine maternal rights. However, depending on states to enact legislation is an uncertain and slow solution. The majority of states in America do not have any legislation regarding surrogacy in general,[39] and only one state, Illinois, has comprehensive legislation specifically governing gestational surrogacy arrangements.[40] This legislative inaction indicates that a majority of maternal rights disputes that arise in the near future will be left to the determination of the courts. As a result, courts need to refine their analysis to incorporate all factors impacting motherhood.

Even if it were plausible that every state will legislate gestational surrogacy, legislation is an ineffective means of determining legal motherhood. Enacting legislation that pre-determines maternal rights essentially does the same thing courts are currently doing—elevating one type of mother over the others instead of contextually evaluating each unique situation. For example, Illinois enacted the Gestational Surrogacy Act in 2005, which specifically awards maternal rights to the intended mother in the case of a dispute.[41] Motherhood is so multifaceted and

[36] *Id.* at 36–37 (collecting these figures from nearly 400 assisted reproductive technology clinics in the United States).

[37] *See, e.g.*, HELÉNA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 93 (1994) (stating that approximately 35% of couples who chose surrogacy have either attempted or considered adoption and that, in 1983, two million couples contended for the 50,000 children placed for adoption).

[38] *See* Larkey, *supra* note 15, at 611; Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, *in* EXPECTING TROUBLE: SURROGACY, FETAL ABUSE, & NEW REPRODUCTIVE TECHNOLOGIES 156, 161 (Patricia Boling ed., 1995).

[39] *See* Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 686–88 (2000).

[40] Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/1–75 (West 2009). Other states, including Florida, Texas, Utah, Nevada, and Virginia, have limited statutory provisions governing gestational surrogacy contracts. *See* FLA. STAT. ANN. § 742.15 (West 2010); TEX. FAM. CODE ANN. §§ 160.751–160.763 (Vernon 2009); UTAH CODE ANN. §§ 78B-15-801 to 78B-15-809 (2009); NEV. REV. STAT. § 126.045 (2009); VA. CODE ANN. §§ 20-156 to 20-165 (2009).

[41] 750 ILL. COMP. STAT. ANN. 47/1–75. However, even the Illinois Gestational Surrogacy Act has its pitfalls. For a detailed discussion, see Jeremy J. Richey,

emotional that it seems unreasonable to leave its determination to a statutory provision.

III. VARIOUS TYPES OF SURROGACY ARRANGEMENTS AND THEIR IMPACT ON MATERNAL RIGHTS

In general, surrogacy is the practice of a third-party woman carrying a child for a couple and has been used by infertile couples as a method to conceive a child.[42] In order to understand why gestational surrogacy poses unusual problems to determining legal maternity, we must explore the biological difference between the two types of surrogacy arrangements available today: traditional and gestational. The main biological difference between gestational and traditional surrogacy is that a gestational surrogacy arrangement results in the division of biological motherhood between two mothers.[43] This unique difference further complicates legal motherhood because there are more parties who could potentially claim maternity rights.[44]

A. Traditional Surrogacy

Traditional surrogacy arrangements use artificial insemination (AI) to impregnate the surrogate mother's egg with the sperm of a man who is not her husband or partner.[45] The sperm that is used is usually the intended father's sperm.[46] AI is probably the least complicated of the assisted reproductive therapies and refers to the process of introducing sperm into the female reproductive organs by means other than sexual intercourse.[47]

In the traditional surrogacy realm, there are two women with potential maternal rights. The traditional surrogate mother is both the genetic and gestational contributor and is legally presumed to have maternal rights.[48] On the other hand, the wife or female companion in the arranging party is known as the "intended mother" but has no biological connection to the child.[49] Since the intended mother does not have a genetic link to the child, she only has potential maternal rights

Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. U. L.J. 169 (2005).

[42] FIELD, *supra* note 24, at 4–6.

[43] Schiff, *supra* note 14, at 265.

[44] *Id.*

[45] KINDREGAN & MCBRIEN, *supra* note 4, at 130–31.

[46] *Id.*

[47] RUTH DEECH & ANNA SMAJDOR, FROM IVF TO IMMORTALITY: CONTROVERSY IN THE ERA OF REPRODUCTIVE TECHNOLOGY 15–17 (2007) (noting that AI can be performed by numerous tools, from a syringe to a turkey baster).

[48] KINDREGAN & MCBRIEN, *supra* note 4, at 131–32.

[49] *Id.* at 131.

that are guaranteed with the adoption of the child.[50] It is common practice for the surrogate mother to relinquish her maternal rights so the intended mother can adopt the child.[51] Without legal adoption, the intended mother has no recognized maternal rights.[52]

Traditional surrogacy was the only method of surrogacy until 1978 when the world's first baby was born by IVF.[53] However, with the prevalence of IVF and the possibility of the arranging party having a genetic link with the child, gestational surrogacy has become increasingly more popular than traditional surrogacy.[54]

B. Gestational Surrogacy

Instead of utilizing AI, gestational surrogacy uses the more complicated procedure known as in vitro fertilization.[55] IVF refers to the process by which a doctor stimulates a woman's ovaries, removes several eggs, and fertilizes the eggs outside her body.[56] The fertilized egg is then implanted in the gestational surrogate's uterus.[57] Like traditional surrogates, gestational surrogates carry the child to term; however, the gestational surrogate mother never has a genetic connection to the baby.[58]

Generally, there are three different arrangements that can arise out of a gestational surrogacy arrangement. The first—and most common—arrangement involves retrieving the egg of the commissioning female and fertilizing it with the sperm of her husband or partner.[59] The resulting embryo is then transferred to the uterus of the gestational surrogate mother. This form of gestational surrogacy is usually used when a woman has viable eggs but cannot carry a child to term.[60] The resulting arrangement allows both parties in the arranging couple to have a genetic link to the child.[61] This ability to preserve a genetic link is one of the main reasons gestational surrogacy is often preferred over traditional surrogacy.

The next two variations, known as donor surrogacy arrangements, can result in the commissioning female not having any genetic links to the baby. One possible variation uses an egg donor when the intended mother is unable to produce viable eggs and is unable to carry a baby to

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[50] *Id.*
[51] *Id.*
[52] *See id.* at 131–32.
[53] DAAR, *supra* note 33, at 36.
[54] *See* KINDREGAN & MCBRIEN, *supra* note 4, at 132.
[55] *Id.*
[56] FIELD, *supra* note 24, at 35.
[57] KINDREGAN & MCBRIEN, *supra* note 4, at 75.
[58] *Id.* at 132.
[59] *Id.* at 132–33.
[60] *Id.* at 133.
[61] *Id.*

term.[62] The woman's husband or partner then fertilizes the egg so that at least one member of the arranging couple is genetically related to the child. This arrangement is less common than the first arrangement.[63] The other variation of donor surrogacy arrangements creates an embryo entirely from a donor egg and sperm, resulting in neither the woman nor the man from the arranging party having a genetic link to the baby.[64] This arrangement is the least common arrangement and is used in the unusual instance when both members of the arranging couple are unable to produce reproductive material.[65]

Although infertile couples welcome the opportunity to have a child with whom they have a genetic link, all three gestational surrogacy arrangements described above can potentially complicate maternal rights in the event of a dispute. For example, all gestational surrogacy arrangements result in the once impossible separation of the genetic and gestational role into two different women.[66] This complicates the determination of legal motherhood because some states define motherhood in terms of being a "natural mother," meaning one that either gave birth or has a genetic link to the child.[67] In addition, some complex gestational surrogacy arrangements now involve three parties with possible claims to maternal rights: the gestational mother, the genetic mother, and the intended mother. The increase in the number of women involved can lead to a complicated analysis in maternity disputes as there are more competing interests to consider.[68] The focus of this Comment is not on one type of gestational surrogacy arrangement, but on the competing interests that may arise in a maternity dispute and how to best determine legal motherhood.

IV. COMPONENTS OF MOTHERHOOD

In order to understand how different courts have chosen to adjudicate maternity disputes, we explore the three different components of motherhood they have based their decisions on: genetic, gestational, and intent motherhood. By discussing each of these components, this Comment argues that each component contributes to the definition of mother, but alone does not define motherhood. It is

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] DAAR, *supra* note 33, at 48.

[66] *See, e.g.*, LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY 218 (1998).

[67] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (stating that under California's Family Code § 7003, both the genetic and gestational mother had sufficient evidence of a mother-child relationship).

[68] FENWICK, *supra* note 66, at 217–18.

therefore futile and often unjust to elevate one paradigm of motherhood over the others.

A. Natural Motherhood

Traditionally, the term "natural mother" has been assumed to include: (1) a woman's genetic link to her child and (2) the fact that the woman gestated and gave birth to her child.[69] Before the advent of IVF and gestational surrogacy, one woman was always the natural mother. There was no need to face the possibility that two different women could serve as the genetic and gestational mother. However, in the gestational surrogacy arena, the two components of a natural mother are divided between two different women. Both the genetic and gestational links are recognizably important; however, neither should be viewed as the cardinal test for the determination of legal motherhood.

1. The Value of the Genetic Link

The genetic link a mother has to her child is an important component of motherhood, but it should not be treated as the exclusive determination of legal motherhood. In today's society, the genetic connection between parent and child has an almost divine reverence.[70] Some cultures and religious traditions that do not believe in a formal afterlife believe that we live on through the genes of our children.[71] Parents often see their own genetic child as a small link to immortality,[72] thus going to great physical, emotional, and financial lengths to produce genetically related children.[73]

In addition, some commentators argue that there is a certainty about one's genetic heritage that may benefit children.[74] A child's unique genetic makeup may serve as a blueprint, which determines an adult's characteristics, emotional traits, intelligence, and, to a certain degree,

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[69] Ragoné, *supra* note 30, at 19.

[70] DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON 8 (2004) (acknowledging that geneticists have referred to the human genome as the "Bible, the Holy Grail, and the Book of Man").

[71] R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 235 (2000) ("Jewish tradition dictates that a man marry his brother's widow if the brother should die childless. To do less would be to allow the brother's genes to go untransmitted, surely condemning him to true death.").

[72] BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 47 (2000).

[73] Christine Crowe, *'Women Want It': In-Vitro Fertilization and Women's Motivations for Participation*, 8 WOMEN'S STUD. INT'L FORUM 547, 550–52 (1985); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2794 (2005) (estimating that the cost of a single IVF cycle is $7,000 to $10,000); Robert Pear, *Fertility Clinics Face Crackdown*, N.Y. TIMES, Oct. 26, 1992, at A15 (according to the Public Health Service and the American Fertility Society, fewer than 15% of all IVF procedures lead to births).

[74] SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? 83 (1994).

health.[75] Commentators also point to the concept of "genealogical bewilderment" that impacts some adopted children who do not have access to their biological family.[76] The problem of genealogical bewilderment stems from a lack of information about one's genetic relationships and prevents a child from forming his or her individual identity.[77] Although genealogical bewilderment has not been studied in connection with children resulting from gestational surrogacy arrangements, the phenomenon demonstrates the powerful impact of a connection between a child and his or her biological family.[78]

2. The Dangers of Over-Emphasizing the Genetic Link

While we cannot deny the importance of our genes, it is dangerous and often inaccurate to view a person's genetic link as the supreme determinant of motherhood. "Genetic essentialism" is the belief that genes are the essence of a human being and determine who we are.[79] Elevating the gene over any other contributing factor ignores the roles our environment and relationships play in shaping our person.[80] The role and bond of a mother transcends cellular design; it incorporates her

[75] *See* Coburn v. Coburn, 558 A.2d 548, 554 (Pa. Super. Ct. 1989) (Cirillo, J. concurring) (stating that, in the context of hereditary medical history, "knowledge of one's biological parents and hereditary history is crucial in ordering one's affairs and making life's decisions"); NELKIN & LINDEE, *supra* note 70, at 2; Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 318 (1992) (citing to research in molecular biology that has connected genes to intelligence, personality, and behavior); Eric Mills Holmes, *Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma in Light of the Human Genome Project*, 85 KY. L.J. 503, 520 (1997) ("Different genes carry the instructions not only for different inheritable characteristics, such as hair color, eye color, gender, musculature, and intelligence, but also for many inheritable mental and physical conditions and diseases."). However, locating genes does not mean that the treatment or cure for genetically transmitted diseases necessarily follows from the discovered connection. *See* FENWICK, *supra* note 66, at 81.

[76] Betty Jean Lifton, *Brave New Baby in the Brave New World*, *in* EMBRYOS, ETHICS, AND WOMEN'S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES 149, 150 (Elaine Hoffman Baruch et al. eds., 1988) (commenting on the alienation resulting from the severing of the genetic bond by noting: "[T]he adoptee, by being extruded from his or her own biological clan, forced out of the natural flow of generational continuity, feels forced out of nature itself."); Dorothy Nelkin, *Paternity Palaver in the Media: Selling Identity Tests*, *in* GENETIC TIES AND THE FAMILY: THE IMPACT OF PATERNITY TESTING ON PARENTS AND CHILDREN 3, 12–13 (Mark A. Rothstein et al. eds., 2005) (describing adoptees as "amputees" until they can connect with their biological family).

[77] Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 217 (1995).

[78] Genetic bewilderment would only possibly occur in situations where the commissioning couple used donor gametes.

[79] *See generally* NELKIN & LINDEE, *supra* note 70, at 2.

[80] Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 4 (2003) ("[G]enetic essentialism renders all our ways of nurturing and being nurtured by one another for naught.").

environment and community, her parenting ideology, and her cultural and religious views.[81]

Critics argue that relying on a genetic link creates a male-biased perspective and reinforces the false equity between the female and male role in the reproductive process.[82] A man's sole biological contribution to reproduction is his sperm, while women contribute biologically by both providing the ovum and by gestating the fetus.[83] This is not to say that we should elevate the woman's biological role over the man's biological role; however, by emphasizing the genetic link we risk creating a biased definition of motherhood.

Society can recognize and value the genetic link between a mother and child without making it the decisive factor in determining motherhood.[84] Siblings, although genetically related, are not accorded the same legal claims over each other as a parent over their child.[85] The same is true for aunts and uncles concerning their nieces and nephews. An aunt does not have the inherent legal power to determine how to raise her nephews or to approve medical procedures for her nieces.[86] The genetic bond between a parent and child is given special legal treatment not simply because of the genetic link, but because of the unique responsibilities associated with the bond.

3. The Value of the Gestational Bond

Another component of natural motherhood is the pregnant woman's biological and emotional bond created with the child by simply gestating the embryo in her womb for nine months. Therefore, the resulting child is impacted in some part by the gestational mother, regardless of who contributed the genetic material.[87] However, a normal pregnancy and a structured, gestational surrogacy arrangement are arguably very different, thus impacting how much weight courts should accord the gestational bond.

a. The Biological Contribution by the Gestational Mother

Biologically, the placenta, an organ that is genetically part of the fetus and controls the transfer of hormones from mother to fetus,

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[81] *See* NANCY J. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 13 (1999).

[82] *Id.* at 9–10.

[83] *Id.* at 45–47. This is a purely pre-natal, biological argument. Men contribute to the reproductive process in many other ways. For example, they provide the intention to procreate, nurture and care for the expectant mother, and contribute financial and emotional support during doctor visits.

[84] ROTHMAN, *supra* note 72, at 22.

[85] *Id.*

[86] *Id.*

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

connects the mother and fetus.[88] Throughout the pregnancy, the developing fetus and its placenta form a unique, interrelated partnership, in large part controlled by maternal contributions.[89] The transfer of maternal hormones through the placenta can impact the behaviors of the fetus and contribute to a child's "unique . . . size, proportions, development, cell differentiation, and congenital normality or abnormality."[90]

In addition to the placenta, the mother's entire body and overall health play a large role in the development and health of the fetus.[91] For example, the mother's adrenal glands produce androgens, which significantly impact the sexual characteristics of a female fetus.[92] Moreover, women who are prone to hypertension during pregnancy as a result of salt retention predispose their infants to high blood pressure when their infants reach adulthood.[93] Smoking during pregnancy can also have harmful physical effects on the child,[94] and can even have an emotional impact on the fetus.[95]

b. Physical and Emotional Contributions and Sacrifices of the Gestational Surrogate

Proponents of the gestational bond argue that motherhood is an earned right gained by enduring the intense, nine-month, physical, and

[88] Bender, *supra* note 80, at 50. In addition, numerous cases have also acknowledged a pregnant woman's connection to her unborn child. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 260 (1983) (noting that a mother's parental relationship is clearer than that of a father's because she carries and gives birth to the child); Johnson v. Calvert, 851 P.2d 776, 797–98 (Cal. 1993) (Kennard, J., dissenting) (appreciating a pregnant woman's biological, psychological, and emotional commitment to the unborn child); Burgess v. Superior Court, 831 P.2d 1197, 1206 (Cal. 1992) (recognizing that during pregnancy a mother and her fetus comprise a "unique physical unit," during which the welfare of each is "intertwined and inseparable" (quoting James J. Nocon, *Physicians and Maternal-Fetal Conflicts: Duties, Rights and Responsibilities*, 5 J.L. & HEALTH 1, 15 (1990–1991))).

[89] Oxman, *supra* note 87, at 398; PEDRO ROSSO, NUTRITION AND METABOLISM IN PREGNANCY: MOTHER AND FETUS 133 (1990) (stating that the fetus is dependent on the placenta to provide the oxygen and nutrients required for growth).

[90] Bender, *supra* note 80, at 50 ("Maternal hormones, such as adrenaline, produced in response to emotions such as anger, anxiety, and fear have been shown to prompt kicking by the fetus, behaviorally linking the mother and fetus."); Oxman, *supra* note 87, at 398 ("[T]he hormones found in the mother, the fetus, the placenta, and the amniotic fluid are part of an interrelated system essential to the child's development.").

[91] Oxman, *supra* note 87, at 412.

[92] *Id.*

[93] *Id.* at 413.

[94] *See* LAURY OAKS, SMOKING AND PREGNANCY: THE POLITICS OF FETAL PROTECTION 7 (2001).

[95] RAE, *supra* note 74, at 89 (citing a study that demonstrated that even a mother's thoughts of smoking were enough to trigger emotional agitation and increased heartbeat of the fetus).

emotional experience of childbirth and labor.[96] Moreover, "[t]he birth mother risks sickness, discomfort, and inconvenience during pregnancy."[97] She also must endure a possibly long and painful labor and even faces the small, but present, possibility of death.[98] In addition, many pregnant women report the development of an attachment to their fetus especially after quickening, the point at which a woman begins to feel the movements of the fetus.[99]

A surrogate mother often has to endure the emotional sacrifice of being negatively stigmatized in society because she is engaging in an act so against most women's natural instincts: she is giving up a baby who she gestated and to whom she gave birth.[100] Although surrogates themselves say that they feel a sense of pride and satisfaction from helping an infertile couple have a child,[101] critics view the involvement of third parties as the disruption of the reproductive process.[102] Moreover, surrogates are often portrayed in the media as money-hungry, uneducated women with no moral values,[103] even if these stereotypes are

[96] *Id.* at 87–88 (suggesting a gestational mother has made a greater investment as opposed to the egg donor and therefore has a greater claim to motherhood); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 12 (1976).

[97] John Lawrence Hill, *What Does it Mean to be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 408 (1991).

[98] *Id.*

[99] *See* Mecca S. Cranley, *Development of a Tool for the Measurement of Maternal Attachment During Pregnancy*, 30 NURSING RES. 281, 281–83 (1981) (Several attachment behaviors include: "talking to the fetus, reprimanding it for moving too much, offering food when the mother was eating, calling the fetus by a pet name, engaging the husband in conversations with the fetus, pushing the fetus around to watch the movement." Seventy-eight percent of the women indicated they engaged in at least one attachment behavior, and 32% indicated that they do so most of the time. Seventy-one women from a full range of socioeconomic and educational backgrounds and different ages were included in the study. No surrogate mothers, however, were included.); Hill, *supra* note 97, at 397 (correlating pregnant women's reactions to fetal movements to her increasing sensory awareness of and attachment to the fetus).

[100] *See* ROTHMAN, *supra* note 72, at 169.

[101] RAGONÉ, *supra* note 37, at 75–77 (stating that surrogacy represents pride, confidence, and control for the women who choose to do it); Ali, *supra* note 31 (quoting one surrogate saying, "I do not want to go through this life meaning nothing, and I want to do something substantial for someone else. I want to make a difference." Ali also interviewed women who said the monetary gain influenced their decision to become surrogates.).

[102] Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 680 (1991) ("The Surrogate Mother has become . . . the personification of anxieties about unpredictable technological and social developments." (quoting Juliette Zipper & Selma Sevenhuijsen, *Surrogacy: Feminist Notions of Motherhood Reconsidered*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 118, 138 (Michelle Stanworth ed., 1987))).

[103] *See, e.g.*, Mary Jo Deegan, *The Gift Mother: A Proposed Ritual for the Integration of Surrogacy into Society*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE 91, 98–101 (Herbert Richardson ed., 1987) (listing statements published in mainstream magazines, including the statement, "Like prostitution, surrogate

often false.[104] This constant negative view of surrogate mothers can often wear on a surrogate mother.

4. The Danger of Over-Emphasizing the Gestational Bond in the Surrogate Arena

Commentators, after conducting studies involving surrogate mothers, propose that the gestational bond should not be determinative of legal motherhood because there is arguably much less of an emotional bond between the surrogate mother and the child she is carrying.[105] Declaring that the gestational bond is determinative of legal motherhood creates the assumption that all surrogates are automatically attached to the fetus they are gestating and that forcing a mother to relinquish her child has damaging emotional effects.[106] In addition, gestational surrogates are arguably different than most expectant mothers because they understand from conception that, in the end, the child does not legally belong to them.[107] It is essential to keep in mind that in the context of a surrogacy arrangement, the surrogate is a fertile woman, usually with children of her own, who does not become a surrogate to

mothering makes one of the most intimate acts a commercial, and therefore impersonal, transaction"); BABY MAMA (Universal Pictures 2008) (portraying the surrogate mother as an unemployed, wild child who wants easy money, while the arranging woman is an educated, successful executive).

[104] Ali, *supra* note 31 (interviewing numerous gestational surrogates including an artist and illustrator, a small business owner, and a single mother).

[105] *See, e.g.*, RAGONÉ, *supra* note 37, at 75–77 (stating that many surrogates perceive the fetus she is carrying as not her child and often did not feel any bond or connection); Andrews & Douglass, *supra* note 102, at 677 (stating that gestational surrogates may be even less likely to bond to the child than a traditional surrogate due to the absence of a genetic link); Hill, *supra* note 97, at 398, 406 (suggesting that prenatal attachment is not an "immutable biological imperative" and stating the possibility that women who do not expect to raise the child may be less impacted by relinquishment); Wulf H. Utian, et al., *Preliminary Experience with In Vitro Fertilization—Surrogate Gestational Pregnancy*, 52 FERTILITY & STERILITY 633, 633–34 (1989) (a psychiatric follow-up after the birth of the first gestational surrogate child reported that the surrogate gave the child to the infertile couple "without any qualms," had undergone "extremely little emotional disturbance," and had made no strong attachment to the child).

[106] Instead, some studies reflect the contrary. This Comment does not argue that no gestational surrogate has felt remorse or anxiety when giving up the child to the arranging party, but the circumstances surrounding the arrangement may lessen the detrimental impact of relinquishment. *See, e.g.*, FENWICK, *supra* note 66, at 223 (citing that one pregnant woman (non-surrogate) said, "When I'm pregnant, I just feel like a container . . . . I really don't feel anything for the baby I'm carrying. . . . I can certainly see why women would be willing to carry another woman's baby."); AMY ZUCKERMAN OVERVOLD, SURROGATE PARENTING 130 (1988) (citing a poll of surrogate mothers in which only one in five reported that relinquishment was the most difficult aspect of the arrangement).

[107] RAGONÉ, *supra* note 37, at 75. However, some states, for example North Dakota, declare surrogacy contracts void and unenforceable, and in the event of a maternity dispute, the surrogate is presumed to be the legal parent of the child. *See, e.g.*, N.D. CENT. CODE § 14-18-05 (2009).

keep the child; instead, she has agreed to help an infertile couple have a child.[108] It is this knowledge and intention that can help to explain how a surrogate does not consider the child she is gestating to be her own.[109] One ex-surrogate expressed the belief, "If it wasn't for this couple I wouldn't be pregnant."[110]

Surrogate mothers also cite specific motivational factors that shaped their decision to serve as surrogates, which help support the theory that surrogate mothers do not form as strong of an attachment as most other expectant mothers.[111] Surrogate mothers often have a pre-conception realization that their pregnancy has a specific purpose: to allow an infertile couple the chance to be parents.[112] Motivational factors include the strong desire to help an infertile party, the love of being pregnant, and the ability to instill a sense of empowerment and self-worth in a woman.[113] Some women even go so far as to describe surrogacy as a calling.[114] For example, one surrogate mother said, "I thought it sounded like something I'd like to do and I could do very well. . . . You don't just sit down and say I should do this; you just know."[115]

Many potential surrogates also specifically choose gestational surrogacy arrangements as opposed to traditional surrogacy in order to eliminate the genetic component, thereby reducing possible feelings of attachment due to a genetic connection.[116] IVF creates the possibility for the gestational surrogate to carry a baby to term that is in no way genetically related to the surrogate. The fact that many women choose gestational surrogacy specifically to avoid any genetic link that may complicate the process only supports the theory that gestational

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[108] RAGONÉ, *supra* note 37, at 76.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 57. One controversial motivation, often emphasized by the media, is monetary gain. Many surrogates acknowledge that remuneration played a role in their decision but consistently denied that it was their primary motivation. One surrogate said, "I'm not doing it for the money. Take the money: That wouldn't stop me. It wouldn't stop the majority." *Id.*

[112] *Id.* at 59.

[113] *Id.* at 52–62 (quoting a surrogate who said, "I wanted to do the ultimate thing for somebody, to give them the ultimate gift. Nobody can beat that, nobody can do anything nicer for them."). Ragoné also states that although not all surrogates have smooth pregnancies, many of the women who had difficult pregnancies nevertheless agreed to be a surrogate again. *Id. See also* Ali, *supra* note 31 (describing one surrogate who has no plans to have any more children of her own as cherishing the experience of "growing a human being beneath her heart"); Susan Fischer & Irene Gillman, *Surrogate Motherhood: Attachment, Attitudes and Social Support*, 54 PSYCHIATRY 13, 13–14 (1991).

[114] RAGONÉ, *supra* note 37, at 56.

[115] *Id.*

[116] *Id.* at 76.

surrogate mothers often do not experience an emotional connection to the fetus.[117]

B. Contractual Motherhood and the Role of Intentionality

The contractual aspect of motherhood is not traditionally seen as a component of maternal rights; however, with the advent of surrogacy contracts and increased medical advances, intent plays a new role in the reproductive process.[118] Now, infertile couples are able to intentionally engineer the birth of a child.[119] Because of the changing landscape of the reproductive process, it is necessary to acknowledge and analyze the potential rights of an intent-based mother when awarding maternal rights.

1. The Value of the Intent-Based Link

Proponents of intent-based motherhood argue that, in the case of gestational surrogacy, motherhood should not depend purely on the natural components of motherhood (i.e., genetics and gestation), but on psychology (i.e., the intent to take the baby home).[120] One commentator observed, "[W]hat could be more 'unnatural' than a woman who denies her own child?"[121] This theory would value the pre-conception understanding of all parties involved, which recognizes the commissioning woman as the legal mother. There are two main arguments that support the value of the intent-based link as the main determination of legal motherhood: (1) the intended mother's role as the orchestrator of the gestational surrogacy arrangement and (2) the desire to avoid uncertainty by honoring the pre-conception intent of all parties involved.

a. The Intended Mother's Unique Causal Role in Conceptualizing the Pregnancy

The intended mother is the woman who has orchestrated the entire gestational surrogacy arrangement, including the reproductive relationship between the gestational mother and gamete donors; therefore, she should be viewed as having the strongest connection to the

[117] *Id.* at 76–77 (quoting a gestational surrogate as saying, "The baby isn't mine. I am only carrying the baby," and "[w]ith IVF you know it's not your child."). However, some gestational carriers do develop attachment issues and find it difficult to give up the baby. *See, e.g.*, Ali, *supra* note 31 (reporting that one gestational surrogate said, "When she was born, they handed her to me for a second . . . . I cried for a month straight. I was devastated.").

[118] Shultz, *supra* note 13, at 304 (observing that throughout most of history, procreation was more of a matter of fate and was mostly outside the control of individuals).

[119] *Id.* at 307–08.

[120] Charo, *supra* note 71, at 246.

[121] *Id.*

child because she was essentially responsible for the birth of the child.[122] While the gestational surrogate and gamete donors are both necessary to the birth of the child, it is the intended mother's mental conception and desire that brings all parties together so that *her* plan can come to fruition.[123] One law professor even phrased the intended mother's role in terms of but-for causation—"the child would not have been born but for the efforts of the intended parents."[124]

Moreover, the intended mother usually has a deep desire to be a parent or else she probably would not be going to all the trouble of coordinating a gestational surrogate arrangement. Several law professors have argued that this mental conception of a child usually translates into the intended parents successfully fulfilling their end of the arrangement—to care for the resulting child.[125] While this commitment will not necessarily ensure that the intended mother will be a better mother than either the genetic or gestational mother, it can be looked to as support that she will do what it is in the best interest of the child.

b. The Desire to Avoid Uncertainty

A rule that enforces the agreed-upon, pre-conception intent of all parties involved is more likely to provide the parties with predictability regarding the outcome of a legal motherhood dispute.[126] More certainty with respect to determining a child's legal mother before birth will avoid the possibility of prolonged litigation, during which the child will face uncertainty as to who his or her legal mother is.[127] From the onset of a gestational surrogacy arrangement, it is usually agreed to by all parties

[122] Hill, *supra* note 97, at 414.

[123] *Id. See also* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 192 (1997) (asserting that the intending woman affirmatively chose to be a mother and actualized that choice by facilitating a surrogacy arrangement); RAGONÉ, *supra* note 37, at 126 (quoting an intended mother who described the importance of her role by saying, "Ann is my baby, she was conceived in my heart before she was conceived in [the surrogate's] body").

[124] Hill, *supra* note 97, at 415. Professor Hill acknowledges this counter-argument by arguing that the position of the intended parents is unique in two ways: (1) the intended parents (i.e., the mother) are the primary cause of the reproductive relationship and the other biological parties are only involved at the invitation of the arranging party and (2) no particular biological participants are necessary, but the intended party, as the first actor, is necessary. *Id.* The dissent in *Johnson v. Calvert* mentions this counter-argument. 851 P.2d 776, 799 (Cal. 1993).

[125] Schiff, *supra* note 14, at 281 (commenting that the demonstrated intention to be the rearing parents will usually be strong evidence that the arranging party is well suited to assume that role); Shultz, *supra* note 13, at 397 (arguing that a child's interest is not likely to run contrary to those of the adults who are responsible for his or her creation and that honoring the plans of the arranging parents will likely be positive for both the children and the parents); Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L. J. 187, 196 (1986) (noting the value of the "mental concept" of the child and the resulting societal expectations that the intended parents will adequately care for the child).

[126] Schiff, *supra* note 14, at 281.

[127] Hill, *supra* note 97, at 417.

involved that the arranging woman will be the child's legal mother.[128] One of the most common situations where a legal dispute arises is when the gestational surrogate decides that she wants to keep the child.

Critics argue that favoring a genetic or gestational mother also provides a level of certainty; however, if either natural mother is able to claim maternal rights contrary to their agreed-upon roles, the child faces the possibility of having no legal mother as litigation continues years after his or her birth.[129] In addition, all parties involved will be unable to prepare, both financially and emotionally, to welcome the arrival of the child.[130] Such uncertainty defies the essence of such an arrangement, which centers around the purposeful assignment of certain roles necessary to bring about the desired conception and birth.[131]

2. Why Intent Alone Is Not Enough

Critics of intent-based maternity argue that a woman's function as the orchestrator of a surrogacy arrangement can be a factor but should not be the controlling factor.[132] First, intent can be difficult to ascertain and does not ensure that the commissioning woman will be the best mother.[133] Because there are numerous motivations surrounding an intended mother's decision to enter into a surrogacy contract,[134] it can be difficult to correlate certain motivations and intentions to good mothering.

Likewise, elevating the pre-conception intent of the parties de-emphasizes deep biological connections that pervade a gestational surrogacy arrangement.[135] Two parties are entering into an agreement like no other—an agreement that will result in the gestation and birth of a child. This extremely unique arrangement has emotional, physical, biological, and psychological components, which can make it difficult to adhere to the pre-conception intent of the parties.[136] For example,

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[128] FIELD, *supra* note 24, at 5–6.

[129] Schiff, *supra* note 14, at 280.

[130] *Id.* at 280–81.

[131] *Id.* at 279–80.

[132] RAE, *supra* note 74, at 96; Thomas H. Murray, *Three Meanings of Parenthood*, *in* GENETIC TIES AND THE FAMILY 18, 27 (Mark A. Rothstein et al. eds., 2005).

[133] Murray, *supra* note 132, at 27. *See also* Belsito v. Clark, 644 N.E.2d 760, 764–65 (Ohio 1994) (rejecting *Johnson v. Calvert*'s intent-based rule because it deemed intent difficult to prove, making an intent-based test less certain and less workable).

[134] *See, e.g.*, *supra* notes 70–73 and accompanying text regarding why a mother would want a genetic link to her child.

[135] *Id.*

[136] Courts have recognized pre-conception intent in situations where there was no formal pregnancy contract. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988) (holding that a surrogacy contract was invalid and recognizing that the birth mother is irrevocably committed before realizing the strength of her bond with her child).

pregnancy may conjure unexpected emotions that may make it virtually impossible for a woman to give up her child.[137]

V. THE COURTS' GENETIC, GESTATIONAL, AND INTENT RULES FOR DETERMINING LEGAL MOTHERHOOD

Because most states have no legislation specifically governing the gestational surrogacy arena, most maternal rights disputes are resolved in court.[138] To adjudicate such disputes, state courts have developed tests to determine maternal rights based on three components of motherhood discussed above: (1) the genetic component, (2) the gestational component, and (3) the intent-to-mother component. In the formation of these three tests, the courts have been forced to choose one woman's contribution to the child over the other's. As demonstrated above, each of these three components contributes to motherhood but alone does not define motherhood; therefore, the courts' hierarchical systems are inherently unfair and ineffective.[139] This Part will analyze the application of the three rules in various cases that have determined legal motherhood based on one of the three components.

A. The Genetic Maternity Rule

Based on the view that a woman's genetic contribution to a child is the most determinative factor, some courts have adopted a genetic test to determine maternal rights.[140] In these cases, the courts awarded maternal rights to the party who provided the genetic material for the child.[141] For example, in *Belsito v. Clark*,[142] the court faced the dilemma of determining which woman's name was to be put on the birth certificate, the surrogate or the commissioning woman. There was no maternity dispute between the gestational surrogate and the intended parents; however, according to Ohio law, the woman who gave birth to the child would be listed as the child's mother.[143] In order to have their names placed on the birth certificate, the Belsitos filed a complaint for a declaratory judgment to determine who the child's legal parents were. The court held that the natural and legal parents of a child resulting from a gestational surrogacy are the genetically related parties.[144] The court said, "The genetic parent

[137] *Id.* at 1259 (recognizing that "it is expecting something well beyond normal human capabilities" for a mother to give up her newborn child without a struggle).

[138] SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 27 (2007).

[139] Hurwitz, *supra* note 18, at 134.

[140] Colette Archer, Comment, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152, 159 (2002).

[141] *Id.* at 160.

[142] 644 N.E.2d 760 (Ohio 1994).

[143] *Id.* at 762.

[144] *Id.* at 767.

can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits."[145] The court also held that the only way that someone other than either of the genetic parents could be the legal parent was if the genetic parents waived their rights.[146]

Supporters of the genetic rule favor it because they believe it provides a clear and fair determination of maternal rights.[147] Blood tests can be used to determine with certainty if a genetic link exists between mother and child.[148] In addition, a genetic test promotes gender equality in the gestational surrogacy arena by placing equal value on the procreative responsibilities of men and women.[149] Furthermore, a genetic test is more fair than a test based on gestation, as gestation can only be performed by a woman and places greater responsibility on the child bearer.[150]

Critics of a genetic-based test point to certain paternity cases, which acknowledge the importance of genetics but find that genetics alone are not determinative.[151] Although biologically and socially mothers and fathers are not exactly the same, the paternity cases can be used to argue that genetics are not decisive for either.[152] Moreover, in order to dispel gender stereotypes and encourage equality, maternity must be treated parallel to paternity.[153] For example, in *Lehr v. Robertson*,[154] the United States Supreme Court denied the petition of a putative father, Jonathan Lehr, to veto the adoption of his daughter by the husband of the child's mother. The father never supported and had rarely seen his daughter in the two years since her birth.[155] The Court essentially ruled that a genetic link alone did not merit constitutional protection of a father's parental rights.[156] The *Lehr* case indicates that there are other interests in

[145] *Id.* at 766.

[146] *Id.* at 767.

[147] Alice Hofheimer, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 601 (1992).

[148] For example, in 1986, in *Smith v. Jones*, the Michigan Circuit Court for Wayne County denied a gestational surrogate any maternal rights to the child she carried after blood tests confirmed the identity of the genetic mother in a gestational surrogacy dispute. Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 225–26 & n.20 (1993–1994). *See, also, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (recognizing that, according to California's Evidence Code, blood testing may be ordered to determine paternity).

[149] *Johnson*, 851 P.2d at 781.

[150] *Id.*

[151] RAE, *supra* note 74, at 86.

[152] *Id.* at 87.

[153] *Id.*

[154] 463 U.S. 248, 250 (1983).

[155] *Id.* at 249–50.

[156] *Id.* at 260 ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."

determining paternity, including ensuring a nurturing bond between a child and father, which may override a parent's genetic link to a child.[157] Maternity determinations should be accorded the same deference in order to preserve equality and consistency.[158]

B. The Gestational Maternity Rule

Some courts have adopted a gestational mother presumption, which favors the birth mother when determining maternal rights.[159] The gestational maternity rule awards legal motherhood to the birth mother primarily based on the emotional and physical connection developed during pregnancy.[160] The gestational rule unjustly elevates the bond developed during pregnancy above all other links and fails to consider other factors that may contribute to legal motherhood.

Before assisted reproductive technologies complicated the landscape of maternal rights, the common law presumed that the child's birth mother was the legal mother.[161] In jurisdictions that recognize this assumption, the birth mother must affirmatively relinquish her right to be recognized as the legal mother of the child. For example, in *A.H.W. v. G.H.B.*,[162] a New Jersey Superior Court refused to terminate a gestational surrogate's maternal rights before the baby was born. The biological and intended parents sought a pre-birth order establishing their parental rights to an unborn child being carried by a gestational surrogate.[163] Although the gestational surrogate had no desire to claim maternal rights, the court refused to grant the plaintiff's request as contrary to a law prohibiting surrender of a birth mother's rights until 72 hours after birth.[164] In refusing to terminate a gestational mother's rights before birth, the court cited the emotional and biological contributions made by the pregnant woman.[165]

Both critics and supporters have valid arguments regarding a gestational-based test. In addition to the unique physical and emotional

(quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (emphasis omitted))).

[157] *See* RAE, *supra* note 74, at 86–87.

[158] *Id.* at 87.

[159] Larkey, *supra* note 15, at 625.

[160] *Id.*

[161] Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 524 & n.155 (1996) (pointing to section 3 of the Uniform Parentage Act, which establishes that "[t]he parent and child relationship between a child and . . . the natural mother may be established by proof of her having given birth to the child").

[162] 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

[163] *Id.* at 949.

[164] *Id.* at 954.

[165] *Id.* (recognizing the bond created in nine months of carrying the baby and the hormonal contributions made that impact the mental capacity, appearance, growth, and development of the fetus).

bond that connects a birth mother with the fetus she is carrying,[166] supporters of the gestational test believe it can provide a judicial safeguard against the possible exploitation of women who would otherwise be forced to give up their child because of a surrogacy contract.[167] Critics of the gestational test, however, have denied a gestator's interest in maternal rights by likening the role of a gestational surrogate to that of a temporary caretaker with no legal rights to the child. For example, in *Johnson v. Calvert*, the trial court likened the gestational surrogate's role to that of a foster parent.[168] Critics also argue that a gestation-based test discredits and ignores the pre-conception decision of both the intended parents and the surrogate mother: that the surrogate will give up the child.[169]

C. The Intent-Based Test

California state courts have applied the intent-based test, which considers the pre-conception intent of the surrogate and arranging party to be the determinative factor that defines legal motherhood.[170] These courts have focused on the pre-conception intent of the parties involved rather than whether the contract, if one exists, is legally enforceable.[171] The ability for two parties to form a surrogacy arrangement, whether involving a formal contract or not, is allowed in all 50 states.[172] States, however, are divided as to whether or not they legally recognize the validity of gestational surrogacy contracts.[173] For example, in Michigan, parties are allowed to participate in surrogacy arrangements, but any legal contract they make regarding the terms of the surrogacy is

[166] *See supra* notes 87–104 and accompanying text.

[167] Coleman, *supra* note 161, at 529; Larkey, *supra* note 15, at 625.

[168] Johnson v. Calvert, 851 P.2d 776, 786 n.13 (Cal. 1993) (stating that the trial court compared the gestational surrogate's role to that of a foster parent). *See also* Hofheimer, *supra* note 147, at 591–92 (analogizing a gestational surrogate's relationship to that of a "wet nurse," a woman who was hired to suckle an infant whose mother died in childbirth or was for some other reason unable or unwilling to nurse the baby. Both relationships involved "physical closeness, dependency, nurturing, and psychological bonding.").

[169] Larkey, *supra* note 15, at 625.

[170] *See, e.g.*, Archer, *supra* note 140, at 156; Larkey, *supra* note 15, at 622.

[171] Hurwitz, *supra* note 18, at 140–41.

[172] MARKENS, *supra* note 138, at 23; *see* Havins & Dalessio, *supra* note 39 at 686–87.

[173] Not all states have enacted statutes governing gestational surrogacy arrangements. However, those states that have can loosely be categorized as following one of four models: (1) statute declares all surrogacy agreements void and unenforceable, (2) statute prohibits surrogacy agreements above the value of the expenses incurred as a result of the pregnancy, (3) statute approves surrogacy agreements with some procedural safeguards, or (4) statute addresses only one specific outcome or element of surrogacy agreements (i.e., criminalizing surrogacy arrangements). For a detailed discussion of state legislation, see Havins & Dalessio, *supra* note 39 at 686–87.

unenforceable as "contrary to public policy."[174] Therefore, if a legal maternity dispute arises out of a surrogacy arrangement, the gestational mother will be named the legal mother.[175] Regardless of whether or not the parties have a legally recognized contract, at the beginning of every surrogacy arrangement the commissioning mother has the pre-conception intent to raise the child and the surrogate mother has the intent to surrender the child. A court's recognition of contractual intent does not mean that it must find surrogacy contracts to be enforceable before determining maternal rights.[176]

The California Supreme Court applied the intent-based test in *Johnson v. Calvert*.[177] There, the court held that the Calverts, the arranging party who intended to bring about the birth of the child and raise the child, were the natural and legal parents. At the onset of the arrangement, all parties signed a contract providing that an embryo created by the sperm and egg of the Calverts would be implanted in Johnson, the gestational surrogate.[178] Johnson also agreed that she would relinquish all parental rights to the Calverts.[179] Relations deteriorated on both sides, and, prior to birth, both parties filed suit to gain parental rights.[180]

The court determined maternity according to the Uniform Parentage Act, which recognized both genetic consanguinity and giving birth as valid means of establishing a mother-child relationship.[181] Because both parties had biological links to the infant, the court decided to base its holding on the pre-conception contractual intent of the parties.[182] The California Supreme Court awarded Crispina Calvert, the intended mother, legal motherhood based on the merits of her role as the initiator of the agreement.[183]

VI. THE BEST INTEREST OF THE CHILD TEST AND THE "TIEBREAKER"

The above discussion demonstrates that each woman who possesses one of the three components of motherhood is in her own unique way a

[174] Surrogate Parenting Act of 1988, MICH. COMP. LAWS § 722.851 (2005).

[175] Adam P. Plant, *With a Little Help From My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 ALA. L. REV. 639, 650–51 (2003).

[176] *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1250 (N.J. 1988) (holding that a surrogacy arrangement was unenforceable according to public policy before making a custody determination).

[177] 851 P.2d 776, 782 (Cal. 1993).

[178] *Id.* at 778.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 782.

[182] *Id.* at 783.

[183] *Id.* at 782–83 (citing support from several law review articles).

mother; therefore, it is unjust for courts to rank one component above all others in order to determine the legal mother. Instead, courts should shift their focus to the protection of the child and apply a best interest of the child test (the "best interest test") to determine maternal rights.[184]

Why the best interest test? In particular, gestational surrogacy has produced further complications in maternal rights disputes, including the once impossible separation of the genetic and gestational contributor and the increase in potential claimants to legal maternity rights.[185] Therefore, courts will need a more context-based framework than the existing maternal hierarchy framework.[186] In arguing for the best interest test, this Comment does not propose that courts should forego their analysis of the different components of motherhood. It is important to consider each woman's connection and investment in her potential role as a mother and how these connections can impact the well-being of the child. Instead, courts should consider these connections as factors in their application of the best interest test along with other factors traditionally used by courts in the best interest framework.[187] Since there is no one defining characteristic of a woman that makes her a mother, the legal framework to determine maternal rights should be equally multi-faceted.[188] The best interest test allows courts to consider the totality of the circumstances that may impact her individual ability to be the best mother for the child and prevents maternity decisions from being made in a vacuum.[189]

A best interest standard will also provide the courts with a level of judicial discretion that may prove advantageous in adjudicating maternity disputes.[190] Each gestational surrogacy case has numerous individual components, including the various parties and interests involved.[191] Providing courts with a discretionary, flexible framework can lead to better decisions because they can be tailored to the particular circumstances of each case.[192]

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[184] Hurwitz, *supra* note 18, at 169.

[185] *See* KINDREGAN & MCBRIEN, *supra* note 4, at 132–34.

[186] Larkey, *supra* note 15, at 606.

[187] Timothy Walton, *Splitting the Baby: A Note on* Johnson v. Calvert, 1 U.C. DAVIS J. JUV. L. & POL'Y 24, 29 (1996).

[188] *See, e.g.*, ROTHMAN, *supra* note 72, at 13 (arguing there are different ideologies, including patriarchy, technology, and capitalism, that shape motherhood).

[189] ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 164 (2004) (explaining that the best interest test allows for an individualized analysis, which is fitting because the relationships between parents and children are so unique).

[190] Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2247–49 (1991).

[191] For example, there are potentially three women vying for maternal rights, who may all live in different places with differing lifestyles. In addition, courts may have to consider the interests of more than one child, as IVF often results in multiple births. For example, see the story of the Kehoes' dispute discussed *supra* notes 2–8.

[192] Schneider, *supra* note 190, at 2247.

Although no court has applied the best interest standard to determine maternal rights in a surrogacy case, courts have applied the best interest standard to adjudicate most other disputes regarding a child's welfare, including custody determinations, visitation rights, and adoption decrees.[193] Although the standard is far from perfect,[194] courts have yet to formulate a more effective test.[195] As the predominant standard in the realm of family law, courts are at least familiar with the nuances of the application of the best interest test and can model its application in the gestational surrogacy realm after existing case law.

A. The Focus on the Best Interest of the Child in the Surrogacy Debate

Since the 1980s, concerns over the welfare of the child colored the ongoing legislative debate surrounding surrogate motherhood.[196] Although the main focus of the debates was whether to permit or prohibit the practice of surrogacy agreements, this rhetoric provides at least some precedent for courts to focus on the best interest of the child in their determination of maternal rights.

Courts should take the past legislative focus on the interests of the child into consideration when deciding whether to adopt the best interest test. National coverage of surrogacy exploded with the "Baby M" saga in the late 1980s and resulted in an increase in legislative attention surrounding surrogacy.[197] Two states, New York and California, led the way in the legislative debate.[198] Although California and New York ultimately enacted legislation on opposite ends of the spectrum, legislators from both states incorporated the theme of the best interests

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[193] *See* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, *in* GENETIC TIES AND THE FAMILY 132, 142 (Mark A. Rothstein et al. eds., 2005) (arguing that because children are not able to fight for their interests, there is a risk their interests will be unprotected); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008).

[194] *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 255–62 (1975) (criticizing the application of the best interest test in custody disputes as inherently indeterminate).

[195] Kohm, *supra* note 193, at 337.

[196] MARKENS, *supra* note 138, at 50–51. *See also* TASK FORCE ON LIFE AND LAW, *supra* note 27 (stating that courts should resolve maternal disputes resulting from gestational surrogacy arrangements based on the best interests of the child).

[197] MARKENS, *supra* note 138, at 20–27 (stating that in 1987, coverage of the surrogacy issue resulted in approximately 270 articles in the *New York Times*, *Los Angeles Times*, and *Washington Post*, and that 26 state legislatures introduced 72 bills regarding surrogacy. In 1992, however, only 15 states had actually enacted laws pertaining to surrogacy). In addition, court opinions regarding surrogacy were concerned with the best interest of the child. *See, e.g.*, *In re* Baby M, 525 A.2d 1128, 1132 (N.J. Super. Ct. Ch. Div. 1987) ("The primary issue to be determined by this litigation is what are the best interests of a child until now called 'Baby M.'"), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

[198] MARKENS, *supra* note 138, at 50–69.

of the child in their lobbying efforts.[199] For example, in a statement to the Senate Judiciary Committee in support of her bill that would regulate the legalization of surrogacy agreements, California state Senator Diane Watson said, "Our measure makes the best interests of the child the guiding principal [sic] in any dispute."[200] In addition, the New York Task Force on Life and the Law commented, "The interests of children are at the center of the debate about surrogate parenting."[201]

B. Possible Critiques of the Best Interest Framework

This Comment does not assert that the best interest test is the perfect solution to the extremely complex issue of maternal rights and gestational surrogacy. In reality, there is no perfect solution. However, the best interest test is the best solution because it allows the court to assess each individual situation and elevate the child's welfare above all other parties.[202] Below, the main critiques regarding the best interest test as applied in child custody adjudications are discussed.[203] These critiques provide a complete picture of the applicability of the best interest test.

1. The Inherent Indeterminacy of the Best Interest Standard

One of the most prominent critiques of the best interest test centers on the inherent indeterminacy of the test.[204] According to law and social science professors, there are several sources of the inherent uncertainty that plagues the best interest test.[205] The best interest framework allows the judge to consider alternative outcomes associated with different courses of action and then to choose the alternative that best preserves the welfare of the child.[206] In order to do this, the judge first needs a set of factors to use to determine what is in the child's best interest.[207] Numerous problems arise when the judge must determine which factors he is going to use. For example, there is the question of whether a child's best interest should be viewed from a long-term or short-term perspective, as the child's needs will change as he or she gets older.[208]

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[199] *Id.*

[200] *Id.* at 68.

[201] NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 71 (1988).

[202] Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 708 (2003).

[203] Since no court has applied the best interest test to determine legal motherhood, critiques to the best interest test as applied in the child custody realm are the closest anticipated criticisms.

[204] Mnookin, *supra* note 194, at 255.

[205] *See, e.g.*, *id.* at 255–60; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478–79 (1984).

[206] Mnookin, *supra* note 194, at 256.

[207] *Id.* at 260.

[208] *Id.*

Furthermore, determining the values themselves is a daunting task, as there are often endless factors a judge can use to determine a child's best interest.[209] Most states, however have enacted statutes providing guidelines as to what factors to consider in applying the best interest test. For the most part, these statutes are only guidelines, and judges retain discretion to look at other factors when they see fit.[210]

A judge also needs a considerable amount of accurate information about both the parents' and the child's past and present actions and goals in order to make his decision.[211] Critics argue that judges rarely have access to the necessary information, and, even if they do, they still face the daunting task of making predictions as to the future needs and plans of both the child and parents.[212] Many courts rely on the aid of expert testimony in their application of the best interest test, but even this practice can be controversial.[213] For example, expert testimony was heavily used by the trial court in *In re Baby M* to establish various factors in the best interest test, including the family life and personalities of each party.[214] These non-legal experts were also asked to define what factors they thought should be included in the best interest test.[215] Although the trial court indicated that experts are to aid the trier of fact, not to dominate or control the final decision, the court eventually adopted the best interest factors provided by one of the experts of the arranging party.[216]

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[209] *Id.* This argument also works in the opposite way in a surrogacy dispute because there are fewer factors to consider, as it is usually impossible to consider the infant's preference, and the commissioning couple is often childless and cannot demonstrate past parenting abilities. *See* Rene R. Gilliam, Note, *When a Surrogate Mother Breaks a Promise: The Inappropriateness of the Traditional "Best Interests of the Child" Standard*, 18 MEMPHIS ST. U. L. REV. 514, 530 (1988).

[210] Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 820–21 (2000) (citing cases).

[211] Chambers, *supra* note 205, at 482; Mnookin, *supra* note 194, at 257.

[212] Mnookin, *supra* note 194, at 259 (citing a study undertaken by Dr. Joan Macfarlane that studied a group of 166 infants over a 30-year period and found that it was extremely difficult to predict what 30-year-old adults would be like, even after the most sophisticated data was gathered on them as children).

[213] Gilliam, *supra* note 209, at 524–26 (arguing that the trial court in *In re Baby M* adopted the non-legal expert's definition of the best interest standard rather than incorporating the testimony into their own decision); Steven M. Recht, Note, *"M" is for Money:* Baby M *and the Surrogate Motherhood Controversy*, 37 AM. U. L. REV. 1013, 1042–44 (1988) (asserting that the trial court was biased against the surrogate mother in its adoption of its best interest factors).

[214] 525 A.2d 1128, 1148–56 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

[215] *Id.*

[216] *Id.*

2. Potential Bias of the Courts

Critics of the best interest test argue that when a judge adjudicates a dispute using the best interest standard, there may be the possibility of an abuse of discretion and the injection of the judge's own personal opinions into the decision. This can be especially relevant in highly controversial, complex cases such as those involving surrogacy disputes, where there is the potential for a judge to have pre-conceived notions as to which mother is the deserving party.[217] Also, in the surrogacy context, courts may have to choose between two parties that have disparate lifestyles, financial resources, and values.[218] When forced to choose between two parties, there is the danger that courts may unfairly discriminate against the party who is less educated or has fewer financial resources.[219]

In spite of the above objections, critics generally do not have a strong framework to replace the best interest standard.[220] Professor Robert Mnookin, one of the leading critics of the best interest test, admits, "My conclusion is hardly comforting: while the indeterminate best-interests standard may not be good, there is no available alternative that is plainly less detrimental."[221]

C. A Proposed Outline of the Best Interest Test

As a means of demonstrating conceptually how a court might apply the best interest test, this Comment proposes a potential framework. However, this Comment does not advocate that courts should rigidly apply the test according to this exact framework. Judges should still be able to maintain the flexibility of the best interest standard as they see fit. This Comment merely anticipates and attempts to mitigate criticisms of the best interest test by providing a more structured approach to its application.

1. Part One: Weigh Factors for Each Woman Vying for Maternal Rights

Because most children are infants at the time of maternity disputes in gestational surrogacy arrangements, it is often difficult to take into consideration factors from the child's perspective. Therefore, a natural place to begin the best interest analysis is by examining the factors

[217] For example, this author can foresee judges not supporting the practice of surrogacy and potentially allowing their views to skew the decision in favor of one party.

[218] Gilliam, *supra* note 209, at 530. Such was the case in *In re Baby M*, but this is not true in all surrogacy disputes. 525 A.2d at 1149. Some surrogacy disputes find in favor of the surrogate mother. *See, e.g.*, A.G.R. v. D.R.H. & S.H., No. FD-09-001838-07, at 3–6 (N.J. Super. Ct. Dec. 23, 2009) (applying the rule from *In re Baby M* and determining that the surrogate was the legal mother).

[219] Gilliam, *supra* note 209, at 530.

[220] *See* Schneider, *supra* note 190, at 2238–39.

[221] Mnookin, *supra* note 194, at 282.

affecting a woman's ability to impact the child's life in the most positive manner.

a. Three Components of Motherhood: Genetic, Gestational, and Intent to Mother

Although none of the three theories of motherhood should alone be determinative of maternal rights, courts should take into consideration the genetic, gestational, and intended connection each woman possesses with the child. These connections are relevant because in each role the woman has experienced a bond or made a contribution to the child that may provide courts with insight as to how she will perform as a mother and protect the child's welfare. In some gestational surrogacy arrangements, one woman may possess more than one component of motherhood. For example, the intended mother could also be the genetic mother. In these situations, courts could consider the fact that one woman possesses both the intent and the genetic link to weigh favorably in terms of her connection to the child.[222]

First, a court could evaluate a woman's genetic connection, as it may indicate that she can provide the child with the strong sense of kinship rooted in the blood link that is so valued by today's society.[223] This sense of kinship may provide the child with a feeling of belonging that may positively impact a child's ability to connect with his or her mother.[224] In addition, a court may look at the emotional, physical, and social bond formed between the gestating woman and child and how this bond may create an inherent responsibility to act in the best interest of the child.[225]

A court may also want to consider the parties' pre-conception agreement regarding which woman was intended to be the mother of the child. The committed intent alone to have a child does not necessarily indicate a woman's ability to nurture or raise a child, especially since in most surrogacy arrangements the commissioning mother has never had a

[222] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781–82 (Cal. 1993). Although the *Johnson* court did not utilize a best interest test, the court did consider that the intended mother was also the genetic contributor in the decision to award maternal rights to her.

[223] *See* Murray, *supra* note 132, at 25 (explaining the idea of a "selfish gene" and that being raised by one's genetic parents is advantageous because there is a strong motivation to care for the child to ensure the survival of their genes); Roberts, *supra* note 77, at 214–15.

[224] Roberts, *supra* note 77, at 215 (observing, for example, that often when a new baby is born, one of the parents' first responses is to determine who in the family the child resembles).

[225] *See* ROTHMAN, *supra* note 72, at 57–67. This connection between a pregnant woman and a fetus, however, is de-emphasized by some commentators in the gestational surrogacy realm because of the understood role the gestator serves in the arrangement. *See supra* Part IV.A.4 & notes 105–17.

child of her own.[226] However, the fact that the intended mother has committed both her emotional and financial resources toward having a child may indicate a greater responsibility toward ensuring the child's present and future welfare.[227] Because each woman's connection has persuasive arguments that support motherhood, the court should therefore consider factors more traditionally used in the best interest test as applied in previous cases.

b. Other Factors Relating to the Best Interests of the Child

Courts should refer to two sources of guidance to determine additional factors of its best interest test: existing case law and statutes. Although no majority opinion has applied the best interest test to determine legal motherhood, Justice Kennard advocated the use of the test in his dissent in *Johnson v. Calvert*.[228] He described several factors that the California Supreme Court could have applied, including: (1) the ability of the mother to nurture the physical and mental development of the child, (2) the ability to provide moral and intellectual guidance, and (3) the capacity to provide a stable and secure environment.[229]

Courts can also incorporate the factors used in custody cases because although the exact issue is not the same, the goal is identical: to ensure that the child's best interests are met. In *In re Baby M*, the New Jersey Supreme Court used the best interest test to determine custody rights of an infant born through a surrogacy arrangement.[230] The court detailed various factors that it used in its determination of custody rights and looked at each parties' individual characteristics including family life, personalities, and past and present behaviors.[231]

For additional guidance, courts can refer to state statutes, as most states have enacted statutes outlining the factors that should be considered in the best interest test.[232] For example, two factors Oregon considers are the "interest of the parties in and attitude toward the child" and the "abuse of one parent by the other."[233]

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[226] DOLGIN, *supra* note 123, at 178–79; Hurwitz, *supra* note 18, at 149 (arguing that simply engineering a surrogacy arrangement does not equate to possessing the requisite abilities to raise a child).

[227] *See* Schiff, *supra* note 14, at 281; Shultz, *supra* note 13, at 397.

[228] 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting) (stating that the determination of maternal rights and responsibilities impact the well-being of the child and the courts frequently apply the best interest standard in issues of child welfare).

[229] *Id.* at 800.

[230] 537 A.2d 1227, 1258–59 (N.J. 1988).

[231] *Id.* (considering threats made by the surrogate mother and her numerous moves as negatively impacting the best interest of the child).

[232] For a complete listing of each state's statute, see CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTEREST OF THE CHILD: SUMMARY OF STATE LAWS, http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interestall.pdf.

[233] OR. REV. STAT. ANN. § 107.137 (2009).

Considering the wealth of the relative parties is a controversial factor[234] and can present particular issues of class-biased inequities in a gestational surrogacy case. At least one state, Missouri, expressly prohibits consideration of a parent's financial resources, however most states leave the issue to the discretion of the court.[235] Although the *Baby M* court considered the parties' financial stability, courts applying the best interest test in the realm of gestational surrogacy may not want to focus heavily on finances unless there is a strong indication that a party's financial situation would prohibit them from adequately providing a stable and healthy lifestyle for both the child and themselves.[236] Although there is a bias that surrogates are uneducated women from low-class backgrounds, one study shows that nearly half the surrogates surveyed had at least one year of college, stable jobs, and could presumably support themselves and a child.[237] Courts are free to consider the comparative wealth of both parties, but should consider the woman's ability to nurture and support the child as having a greater impact on the child's welfare.

2. Part Two: Weigh Factors From Child's Point of View

Because most maternal rights disputes in the gestational surrogacy arena occur when the child is an infant, it is difficult to take into consideration the desires of the child and any developed relationships formed between adult and child. If possible, however, courts may take into consideration factors that indicate any bonding from the perspective

[234] *See generally* Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216 (2000). In addition, some courts have challenged the relevancy of wealth when applying the best interest test. *See, e.g.*, Burchard v. Garay, 724 P.2d 486, 491 (Cal. 1986) (refusing to award custody based on the father's financial position and arguing that "there is no basis for assuming a correlation between wealth and good parenting or wealth and happiness" (quoting Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 350 (1982)) (alteration omitted)); *In re* Marriage of Fingert, 271 Cal. Rptr. 389, 392 (Cal. App. 1990) (holding that by emphasizing the father's greater financial resources, the lower court "improperly presume[d] that children should live in the community of the parent who is wealthier. This factor has nothing to do with the best interests of the child."). In most custody cases however, courts have the ability to award child support, an ability they do not possess in a surrogacy case.

[235] *See* MO. REV. STAT. § 452.375(8) (2003) ("As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child.").

[236] This Comment does not argue that financial resources do not impact the best interest of the child. However, specifically in a surrogate case, the focus on wealth may lead to an unfair bias. *See* FIELD, *supra* note 24, at 132 (commenting that incorporating financial factors in a best interest test might be unfair to the surrogate's case as it is not unusual for the commissioning party to have more financial resources).

[237] *See* RAGONÉ, *supra* note 37, at 55 tbl.2.1 (also commenting that in 1994, the average family income of a married surrogate was $38,700). For the potential disparity between the commissioning couple and the surrogate, see *id.* at 90 tbl.3.1, which demonstrates that almost all commissioning couples had a combined income of $60,000 or more.

of the child. For example, because the commissioning party was awarded custody pendente lite for the two-month duration of the trial, the *Baby M* court could have considered whether or not the infant formed a bond during her stay with the arranging party.[238] Because of the age of the infant and the difficulties in proving any established bonds, the majority of the courts' factors will evaluate the characteristics of the mothers.

3. Part Three: The Intent-Based Tiebreaker

What happens if, after weighing the factors proposed above, the court is still faced with two potential women who, if awarded maternal rights, could both serve as fit and loving mothers? What should courts do? Consider the following example. In a gestational surrogacy arrangement, one woman gestated the child and the other woman is the intended mother, as agreed by all parties pre-conception. Anonymous donors provided both the sperm and egg. Both the gestational and intent contributors are vying to be named the legal mother. Both women have the financial means to provide the necessities a child would require and have stable households. Both have demonstrated the capabilities and desire to support and nurture the child, both physically and psychologically. From the point of view of the child, both women could potentially serve as fit mothers who would protect the child's welfare.

If a court finds that each party is equally fit to be a mother, it could conclude that the child has two legal mothers,[239] possibly resulting in joint custody.[240] However this approach has numerous problems.[241] For example, the trial court in *Baby M* considered expert testimony advocating for joint custody between the Sterns, the arranging party, and Whitehead, the surrogate.[242] After reviewing the criteria for joint custody,[243] the court concluded these criteria could not be met. The court cited the disputing parties' different lifestyles and social values and the fact that they harbored too much animosity toward one another for joint custody to be a feasible option.[244]

Instead, in the situation where a court determines that, after applying the best interest test, both mothers are equally fit, the court should use the intent-based connection as a tiebreaker. The court should

[238] *In re* Baby M, 537 A.2d 1227, 1237 (N.J. 1988). The New Jersey Supreme Court, however, did not look at any developed attachment.

[239] So far, no court has concluded that a child has two legal mothers in a gestational surrogacy dispute. The California Supreme Court in *Johnson v. Calvert* explicitly rejected this possibility because the law only recognized one natural mother. 851 P.2d 776, 781 (Cal. 1993).

[240] Gilliam, *supra* note 209, at 535.

[241] *Id.* at 526.

[242] *In re* Baby M, 525 A.2d 1128, 1149–50 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

[243] *Id.* For example, one criteria that must exist for there to be a viable joint custody order is that each parent must exhibit a potential for cooperation in the matters of child-rearing. *Id.*

[244] *Id.*

then award maternal rights to the woman for whom the child was intended. Up until this point, this Comment has advocated that courts should analyze a maternity dispute through a lens that focuses on the best interest of the child. However, when each party is equally fit from the point of view of the child, courts should then shift their focus from the child to the individual mothers involved.

The use of the intent factor is an appropriate tiebreaker because, when it is arguably impossible to elevate one natural mother over the other, turning to the contractual mother provides the fairest solution.[245] While intent alone is insufficient to determine legal motherhood, courts should recognize and preserve the pre-conception intent as indicated by both the commissioning party and the gestational surrogate. In addition to being the fairest option, the intended mother has essentially engineered the entire creation of the child, arguably making her the central figure in the gestational surrogacy arrangement.[246]

If in the end, courts are only going to favor the intended mother, why then should courts apply the best interest test at all? This Comment only advocates the intent-based tiebreaker in a limited circumstance. In most cases, courts will weigh the factors they think are appropriate and evaluate any ties the women have to the child.

VII. CONCLUSION

While gestational surrogacy offers immense hope to infertile couples yearning for children, it can also lead to heartbreak and confusion. Because we do not live in a crystal-clear world, it is inevitable that disputes and complications will arise when dealing with such a controversial and emotional issue as arranging the birth of a child. The true test of our legal system is whether our courts can fairly and justly adjudicate these disputes to the best of their abilities.

This Comment demonstrates the ineffectiveness of the three approaches currently used by courts to determine legal motherhood and advocates for a new approach, the best interest standard. Applying the best interest test is by no means a panacea; it has its flaws and complications. We live, however, in a legal world where imperfect solutions are nevertheless the best and most just approaches. If courts shift the focus from a maternal pecking order to the best interest standard, we can better assure that the most important piece of the puzzle is protected: the child.

[245] The California Supreme Court used a similar rationale in *Johnson v. Calvert* in its decision to apply an intent-based test. *See* 851 P.2d 776, 782–83 (Cal. 1993).

[246] See *supra* notes 119–30 and accompanying text in Part III.B for additional arguments regarding the intent-based tie.