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BABY MAMA DRAMA: PARENTAGE IN THE ERA OF GESTATIONAL SURROGACY

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Although recent decades have seen a boom in the development of technologies that manipulate the human reproductive cycle, many states have been slow to adopt laws regulating third-party reproduction. While a handful of states recognize the validity of gestational surrogacy contracts, others find such contracts to be against public policy. Most states' statutes, however, are silent on third-party reproduction. Improving technologies will continue to open the door to more reproductive breakthroughs and the surrogacy industry will invariably grow. Infertile individuals will increasingly turn to what they consider a valuable and necessary service to fulfill their dream of having a family. States must take steps to legalize third-party reproduction, regulating it so that both the rights of intending parents and the best interests of the children produced through contractual arrangements receive adequate protection. States should model such statutes on Article 7, Alternative B of the American Bar Association's Model Act Governing Assisted Reproductive Technologies, which respects the intentionality of intending parents and includes common-sense safeguards to reduce litigation and protect the best interests of children created through third-party reproduction.

I. INTRODUCTION

American notions of the human reproductive process changed drastically in the latter half of the twentieth century as burgeoning

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reproductive technologies created an alternative to adoption.[1] The advent of in vitro fertilization and egg removal allowed formerly infertile individuals[2] to create a biological child with the assistance of gestational surrogates.[3] Unlike a traditional surrogate, a gestational surrogate is not a blood relative of the child she carries;[4] instead of acting as both egg donor and gestational vessel, a gestational surrogate agrees to carry a child to term after

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[1] *See generally* 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 (1991) (documenting the rise of reproductive technologies).

[2] The term "infertile individuals" describes those individuals and committed couples who use gestational surrogacy services to procreate. This term refers to persons in a variety of situations in which they cannot procreate with their preferred partner. Although there are certainly situations in which a person may not be technically infertile, his or her only option to procreate may be through gestational surrogacy. An example is Mrs. Elizabeth Stern, a party to the famed *Baby M* case discussed later in this Recent Development. Mrs. Stern had multiple sclerosis and feared complications from her disease if she were to become pregnant. Although Mrs. Stern was not technically infertile, she believed herself unable to geastate a child safely and chose to use a surrogate instead. Mrs. Stern is an infertile individual according to the terms of this Recent Development. "Infertile individual" also refers to the "socially infertile," such as a male homosexual couple or a single heterosexual man who is unable to find a partner. *See* Lisa C. Ikemoto, *Surrogacy Legislation in California: Destabilizing Thoughts on Surrogacy Legislation*, 28 U.S.F. L. REV. 633, 638 (1994) (arguing that legislation concerning surrogacy agreements should not limit access to reproductive technologies to the medically infertile).

[3] Charles P. Kindregan, Jr., *Family Law in the Twenty-First Century: Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL L.. 43, 43–48 (2008) (detailing the emergence of third party reproduction).

[4] This is not to say that a surrogate has no impact on a child's development. Indeed, the time in the womb is highly influential upon a child's development. *See Womb Environment "Makes Men Gay"*, BBCNEWS.COM, June 27, 2006, http://news.bbc.co.uk/2/hi/5120004.stm (on file with the North Carolina Journal of Law & Technology) (citing evidence that exposure to testosterone in the womb may play a crucial role in the child's eventual sexuality); *see also Dyed in the Wool*, ECONOMIST, Oct. 11, 2003, at 99 (detailing a 2003 study that theorized that certain similarities between lesbians and straight men could be a result of testosterone exposure in the womb). The gestational surrogate and the child, however, are not related by blood or a genetic link, traditionally the means by which a biological link would be proven after a child has been born.

receiving in vitro fertilization of already-created embryos.[5] A gestational surrogate enters a gestational agreement in no way intending to create or raise the child as either its natural or lawful mother when offering her services, and agrees that she had no claim on the child well in advance of its birth. Disregarding the gestational surrogate's intention, however, she must experience all of the circumstances that attend a traditional pregnancy and actually birth the child who was initially created through this novel reproductive process. The use of this technology has sparked complicated legal questions, including perhaps the most basic quandary: who is the "real" mother of a child created by a scientific, rather than a sexual, act that requires the genetic information, gestational services, and intention to parent of several independent actors?[6]

The time has come for states to answer this difficult, yet increasingly relevant, question by adopting legislation that appropriately addresses the burgeoning business of gestational surrogacy. This Recent Development will argue that those who procure gestational surrogacy services and intend to act as parents should be considered the legal parents of the child created. This Recent Development will further suggest that states quickly adopt legislation that mirrors Article 7, Alternative B of the American

[5] CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGIES: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 129–30 (ABA Publishing 2006). The embryos may be formed from gametes donated by either member of an infertile couple or may come from a third party. In a traditional surrogacy arrangement, the surrogate serves as both gestational carrier and egg donor. This arrangement is usually cheaper than a gestational surrogacy agreement as it allows the parties to use artificial insemination to impregnate the surrogate. In a gestational surrogacy agreement, however, the gestational carrier is not the egg donor, and the parties must use in vitro fertilization of already fertilized embryos. Gestational surrogates may also be referred to as "gestational carriers" or, as the Uniform Parentage Act calls them, "gestational mothers." *Id.* at 130; *see also* UNIFORM PARENTAGE ACT § 102 (11) (2002) [hereinafter U.P.A.].

[6] Other compelling questions include: Do gamete donors retain any parenting rights? What happens if a gestational surrogate breaches a contract so as to harm a child in utero? May an infertile individual who has contracted with a gestational surrogate deny parentage of a child who is born with birth defects?

Bar Association's ("ABA") Model Act Governing Assisted Reproductive Technologies.[7] This model statute requires some substantial changes, but, overall, it values the intentionality of both infertile individuals and surrogates and develops an equitable process to create and fairly enforce gestational surrogacy contracts.

Part II of this Recent Development briefly describes the current state of gestational surrogacy law in the United States. This section primarily focuses on the laws of New Jersey and California, two states that have produced well-known surrogacy case law on opposite ends of the issue. Part III recommends that states repeal bans on paid surrogacy and instead adopt an intentionality standard when deciding the parentage of children created using surrogate technologies. Part IV introduces and analyzes the ABA Model Act, arguing that states should adopt an amended version of Article 7, Alternative B of the Act.

II. THE LAW, OR LACK THEREOF, SURROUNDING GESTATIONAL SURROGACY

A. *Current Surrogacy Laws*

"There are more laws in the United States governing the breeding of dogs, cats, fish, exotic animals, and wild game species than exist with respect to the use of surrogates and reproductive technologies to make people."[8] The previous statement is sadly accurate—a majority of states do not have any case law or statutes regarding surrogacy.[9] The result is a smattering of surrogacy law

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[7] A.B.A. MODEL ACT GOVERNING ASSISTED REPROD. TECH., art. 7 (2008) [hereinafter MODEL ACT].

[8] Arthur Caplan, *Room For Debate: The Baby Market*, NYTIMES.COM, Dec. 29, 2009, http://roomfordebate.blogs.nytimes.com/2009/12/29/the-baby-market/ (on file with the North Carolina Journal of Law & Technology).

[9] Kindregan, Jr., *supra* note 3, at 54–55. States that do not have any statute or case law regarding gestational surrogacy include Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Wisconsin, and Wyoming. *Id.* The likely reason for this lack of guidance and structure is that surrogacy and reproductive

across the nation that ranges from complete bans on surrogacy to allowing parties to create gestational surrogacy agreements with minimal government interference.[10]

The sections that follow focus on the laws in New Jersey and California, two states that have both produced well known, yet dramatically different, surrogacy case law. New Jersey refuses to enforce paid surrogacy contracts on public policy grounds and decides parentage and custody solely based on the best interests of the child. California case law, however, contains several surrogacy disputes that have been decided based upon the intentionality to parent of the parties to a surrogacy contract.

B. *Surrogacy Bans*

States that have banned surrogacy find support for their position through the saga of *Baby M*,[11] the first surrogacy case to garner national attention.[12] The Sterns, a married couple, entered into a traditional surrogacy arrangement with Marybeth Whitehead because they feared the complications that could result from Mrs.

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technologies have proved too controversial for many state legislatures to tackle. *See* Laura Wish Morgan, *The New Uniform Parentage Act (2000): Parenting for the New Millenium*, SUPPORTGUIDELINES.COM, May 19, 2002, http://childsupportguidelines.com/articles/art200104 (on file with the North Carolina Journal of Law & Technology):

> Because of the controversy, the Drafting Committee chose to make the whole of Article 8 optional, without a recommendation either for or against its adoption. The rest of the UPA (2000) was considered too valuable and important to allow one article to jeopardize its passage. As the Committee notes in its official comment, "If the inclusion of Article 8 is so controversial in a State considering adoption of this Act to cause a risk of failure, the article may be omitted entirely."

It is very likely that the Drafting Committee's recommendation influenced states because all of the states that adopted the Uniform Parentage Act excluded Section 8 of the Act which dealt directly with gestational surrogacy.

[10] For a comprehensive survey of state surrogacy laws, *see* Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J. L. GENDER & SOC'Y 25, 58–73 (2009).

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

[12] The stunning facts of this case were, not surprisingly, turned into a made-for-television movie. *See* BABY M (ABC Circle Films 1988).

Stern's multiple sclerosis if she became pregnant.[13] Whitehead agreed to serve as the Sterns' surrogate for a fee of $10,000[14] and was artificially inseminated with sperm from Mr. Stern, eventually giving birth to a baby girl, Melissa.[15] Soon after the child's birth, however, Whitehead reneged on her prior agreement to surrender custody to the Sterns and demanded parentage and custody rights of baby Melissa.[16] Whitehead even absconded with the child for a number of months.[17] The Sterns recovered Melissa, and the parties began custody proceedings that eventually went before the Supreme Court of New Jersey.[18] The Court found the initial surrogacy contract void as a violation of state adoption laws forbidding paid agreements requiring a birth mother to surrender custody before the birth of the child.[19] The Court voided the adoption of baby Melissa by Mrs. Stern,[20] but eventually found that

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[13] *Baby M*, 537 A.2d . at 1235.

[14] *Id.*

[15] *Id.* at 1236. Because the Sterns used artificial insemination, Mr. Stern and Mrs. Whitehead were the biological parents of the child. However, in vitro fertilization was not widely available at the time. If the Sterns were to procreate today, they may very well choose to use in vitro fertilization to implant Mrs. Whitehead with embryos created with Mrs. Stern's eggs so that the child shared biological information with Mrs. Stern instead of Mrs. Whitehead.

[16] *Id.* at 1237.

[17] The dispute between Mrs. Whitehead and the Sterns became increasingly heated and dangerous during this period:

> For the next three months, the Whiteheads and Melissa lived at roughly twenty different hotels, motels, and homes in order to avoid apprehension. From time to time Mrs. Whitehead would call Mr. Stern to discuss the matter; the conversations, recorded by Mr. Stern on advice of counsel, show an escalating dispute about rights, morality, and power, accompanied by threats of Mrs. Whitehead to kill herself, to kill the child, and falsely to accuse Mr. Stern of sexually molesting Mrs. Whitehead's other daughter.

Id.

[18] *Baby M*, 537 A.2d. at 1237–38.

[19] The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions. *Id.* at 1240.

[20] *Id.* at 1244.

it would be in the best interest of the child to remain in the custody of the Sterns.[21] The Court remanded the issue of visitation for Mrs. Whitehead to the trial court, and she eventually gained visitation rights.[22]

Although New Jersey courts could have limited the *Baby M* ruling to traditional surrogacy agreements, a recent New Jersey case, *A.G.R. v. D.R.H. & S.H.*,[23] applied the *Baby M* ruling to a gestational surrogacy arrangement.[24] In 2006, a gay couple, the Hollingsworths,[25] contracted with the sister of one of the husbands to serve as a gestational surrogate.[26] The sister, Angela Robinson,[27] was implanted with embryos created with an outside donor's egg and the sperm of one of the husbands. Ms. Robinson gave birth to twins in October 2006 and surrendered custody to the Hollingsworths at that time;[28] however, in March 2007, Robinson demanded custody of the twins.[29] A New Jersey court recently declared Robinson the mother of the twins,[30] awarded her three days of visitation a week,[31] and set a date for a custody hearing for the spring.[32] The court explicitly rejected an intentionality standard and, instead, applied the *Baby M* standard to a gestational surrogacy arrangement as Judge Francis B. Schulz asked, "[w]ould it really make any difference if the word 'gestational' was substituted for the word 'surrogacy' . . . ? I think not."[33]

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[21] *Id.* at 1261.
[22] *Id.*
[23] No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div., Dec. 23, 2009).
[24] *See also* A.H.W. v. G.H.B., 339 N.J. Super. 495, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000) (refusing to validate a gestational surrogacy agreement prior to child's birth).
[25] Stephanie Saul, *21st Century Babies: Building a Baby, With a Few Ground Rules*, NY TIMES, Dec. 12, 2009, at A1.
[26] *A.G.R.,* No. FD-09-1838-07, slip op., at 2.
[27] Saul, *supra* note 25.
[28] *A.G.R.,* No. FD-09-1838-07, slip op., at 2.
[29] *Id.*
[30] *Id.* at 6.
[31] *Id.* at 2.
[32] Saul, *supra* note 25.
[33] *A.G.R.,* No. FD-09-1838-07, slip op., at 5 (*quoting In re* Baby M, 537 A.2d 1227 (N.J. 1988)).

C. *Intentionality*

In contrast to New Jersey and other states that ban all paid surrogacy agreements, California has, in some cases, allowed gestational surrogacy contracts, citing intention as an important factor in cases where the child shares a genetic link with the wife of an expectant custodial couple.[34] For instance, in *Johnson v. Calvert*, a gestational surrogate claimed parentage of a child whose genetic information had been donated by both the husband and wife with whom she contracted.[35] Since California law allows a mother to establish paternity by proof of giving birth or a genetic link established via blood test, both women could claim legal parentage in *Johnson*.[36] In response, a California appellate court crafted an intentionality standard, holding that where two women could prove maternal parentage, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[37]

Since the surrogate in this case entered the surrogacy arrangement at the behest of the infertile couple and had no intention of independently creating the child outside of the infertile couple's wishes, the Court found that the egg-donor wife was the legal parent of the child.[38] Other California cases have strongly

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[34] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. App. 1993).

[35] *Id.* at 778.

[36] *Id.* at 778–80.

[37] *Id.* at 782.

[38] Unlike the court in *Baby M*, the court in *Johnson* recognized the marked difference between the intention of a surrogate to provide gestational services and the intention of a woman who becomes pregnant through traditional means:

> Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth,

favored intentionality to decide parentage in favor of an infertile couple where neither member of the infertile couple nor the gestational surrogate shared a biological link with the child.[39] However, it should be noted that in these cases the gestational surrogate did not dispute the paternity of the child.[40]

III. INTENTIONALITY IS THE CORRECT APPROACH

Ideally, all states will enact legislation containing an intentionality standard to decide the parentage of children created through gestational surrogacy. Legislation is the best method by which states should address this issue as it offers potential users of reproductive technologies the unanimity and stability that individual court cases may not provide.[41] Effective legislation

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> it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

Id.

[39] *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal.App. 1998) (finding that a child, born within a gestational surrogacy arrangement involving five parties, had no natural parents, and, thus, the intending parents should be allowed to adopt).

[40] For an example of a California case that reached a different result, *see Moschetta v. Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994) (refusing to apply *Johnson v. Calvert* to a traditional surrogacy arrangement since the intending mother was neither the gestational nor biological mother of the child involved).

[41] The Court in *Buzzanca* explicitly requested that the California Legislature tackle the issue of parentage and reproductive technologies:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction . . . .
>
> Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.

Buzzanca, 72 Cal. Rptr. 2d. at 293. *See also* Prato-Morrison v. Doe, 126 Cal. Rpt. 2d 509, 516 n.10 (Cal. App. 2002) ("Whatever merit there may be

would reward infertile individuals with parentage of a child intentionally created through this form of third-party reproduction.

Americans who encounter no difficulty in reproducing naturally may procreate with limited government interference.[42] Yet many states effectively eliminate the reproductive autonomy of certain infertile individuals by forbidding paid surrogacy agreements. Bans on surrogacy agreements also ignore shifting notions of the American family facilitated by the advent of third-party reproductive technologies. Although *Baby M* famously ruled, "There are, in a civilized society, some things that money cannot buy,"[43] this sentiment does not accurately reflect the realities of parentage in an era where third-party reproduction is a socially accepted means of procreation[44] and provides a valuable

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to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.").

[42] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a Connecticut law that prohibited the sale of contraceptives to unmarried persons); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that a statute that ordered the sterilization of criminals who had committed two or more crimes "involving moral turpitude" so invaded personal liberty that it was "lacking in the first principles of due process.").

[43] *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988).

[44] The Court in *Buzzanca* took a much more realistic view of the place of third-party reproduction in American culture:

> No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.

Buzzanca, 72 Cal. Rptr. 2d at 293. *See also* Sara Rimer, *No, the Stork Didn't Bring You, But Mom and Dad Had Help*, N.Y. TIMES, July 12, 2009, at A1 (citing the American Society for Reproductive Medicine's estimate of between 400 to 600 gestational surrogacy births per year for the years of 2003 and 2007).

service to infertile individuals that might not otherwise experience parenthood.[45] The court in *Baby M* assumed that a surrogate is necessarily the only mother of the child.[46] Thus, because she shares a protected relationship with the child as his or her mother, a surrogate's decision to relinquish parental rights may be revoked at any time before the birth of the child.[47] The court in *Baby M* noted:

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[45] *See* DEBORAH L. SPAR, THE BABY BUSINESS 85 (Harvard Business School Press 2005) (explaining that the advent of gestational surrogacy "created considerably more choice for the consumers of reproductive services").

[46] *Baby M*, 537 A.2d at 1250.

[47] The Court in *Baby M* acknowledged that many of its policy concerns regarding surrogacy were not based on hard evidence but, rather, fears of the effects of surrogacy:

> The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct. Literature in related areas suggests these are substantial considerations, although, given the newness of surrogacy, there is little information.

Baby M, 537 A.2d at 1250. Marybeth Whitehead also made dire predictions about the impact separation from her would have on baby Melissa. *See* Robert Hanley, *Baby M Will Become Angry Over Legal Fight, Mother Says*, N.Y. TIMES, Apr. 8, 1987, at B1 (" 'Someday,' Mrs. Whitehead said in a brief interview, 'you'll see the day Sara will . . . sue Bill Stern for denying her a mother for 20 years. No matter what they've done for her . . . I feel she will be angry, and that anger will be directed at the Sterns.' "). However, even though Whitehead maintained visitation rights throughout Melissa's young life, Melissa terminated her parental relationship with Whitehead at age 18. Mrs. Stern then adopted Melissa as her own child. Bonnie Goldstein, *In Surrogacy, A Deal is Not Always a Deal*, SLATE, July 23, 2009, http://www.doublex.com/blog /xxfactor/surrogacy-deal-not-always-deal (on file with the North Carolina Journal of Law & Technology). A grown up Melissa also told reporters in 2008, "I love my family [the Sterns] very much and am very happy to be with them. I'm very happy I ended up with them. I love them, they're my best friends in the whole world, and that's all I have to say about it." Jennifer Weiss, *Making Babies: Now it's Melissa's Time*, NEW JERSEY MONTHLY, March 2007, at 72; s*ee also* Marjorie M. Schultz, *Reproductive Technologies and Intent Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297,

> The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.[48]

However, gestational surrogacy arrangements call into question the notion that a child's birth mother necessarily equals his or her "mother."[49] Although historically a woman was necessarily blood related to a child she carried to term,[50] a gestational surrogate does not share any genealogical identity with the child, and it is highly unlikely that any infertile couple would enter into an agreement with a gestational surrogate who considered herself the "mother"

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343 (1990) (pointing out that a standard that values biology over intention does not "guarantee love or adequate care" for an unintended child and that an intention standard will likely place a child with parents who have long expected and yearned for his or her birth).

[48] *Baby M*, 537 A.2d at 1250.

[49] *See* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986) (tracking the evolution of the meaning of the word "mother"); *see also Surrogate Has Baby Conceived in Laboratory*, N.Y. TIMES, Apr. 17, 1986, at A26 (describing the first recorded gestational surrogacy agreement that involved the in vitro fertilization of an embryo in a gestational carrier and the legal implications that this technology might create). *Baby M* furthered the notion that the surrogate is the natural, or preferred, mother by analogizing a surrogate to a woman who gives her child up for adoption. *Baby M*, 537 A.2d at 1248–49. Traditional adoption, however, is not perfectly analogous to a gestational surrogacy arrangement. A gestational surrogate only becomes pregnant because of the desires of an infertile individual and does not intend to give birth to her own child. A woman who is forced to give up a baby for adoption, however, likely becomes pregnant unexpectedly and independently of the gestational surrogacy arrangement. The woman most likely considers the child "hers" until its birth, while a gestational surrogacy enters her pregnancy fully aware that she is not giving birth to her own child. Although *Baby M* refuses to acknowledge it, there is a marked difference between a gestational surrogate and a woman who puts up a child for adoption, and this difference warrants disparate treatment for the two situations. *See also* Hill, *supra* note 1, at 353 (explaining that the advent of in vitro fertilization allowed for the separation of gestation and a blood connection between birth mother and child).

[50] Hill, *supra* note 1, at 353.

of the child she offers to carry.[51] *Baby M* dismisses the fact that a surrogate does not come to an infertile couple as a natural mother already pregnant by an independent sexual act and ignores that a surrogate offers her services, rather than her child, precisely because the infertile couple intends to become parents and she does not.[52]

And what of the intending mother who donates her own eggs to create the child that the gestational surrogate carries (hereinafter referred to as "egg donor-intending mother")? The reasoning contained in *Baby M*, and continued by *A.G.R. v. D.R.H. & S.H.*, would ignore the role of the egg donor-intending mother and assumes that the gestational surrogate is necessarily the child's only mother. While the gestational surrogate is the birth mother of the child and can develop a strong emotional connection with the child during its time in the womb,[53] the egg donor-intending mother is the biological mother of the child and that would also seem to vest her with a strong claim of maternity based on traditional notions of family relationships.[54] It should also be noted that if the reproductive technology in question was sperm donation, an intending father whose wife was artificially inseminated with another man's sperm would be considered the father of a child at

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[51] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. App. 1993).

[52] *Baby M*, 537 A.2d at 1249.

[53] For many critics of surrogacy, it is the bond between birth mother and child during gestation that forms the basis of their criticism of enforcement of paid surrogacy contracts because they contend that a surrogate can never fully appreciate the bond she will develop with a child prior to its gestation. *See* Maurice M. Suh, *Surrogate Motherhood: An Argument for Denial of Specific Performance*, 22 COLUM. J.L. & SOC. PROBS. 357, 362–71 (1991) (describing the bond that may form between birth mother and the child during gestation and arguing against specific performance of a surrogacy contract since a birth mother cannot foresee the strong bonding that she may experience with the child she carries).

[54] *See* Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 284–85 (1995) (observing that the law typically "designates the biological progenitors [of a child] as the legal parents").

its birth so as to provide the child with a stable family life.[55] There is also the issue of expectancy created by the surrogate's pledge at the agreement's execution that she will not pursue the parentage of the child. The egg donor-intending mother and gestational surrogate also entered into the surrogacy arrangement with the mutual understanding that the egg donor-intending parent would exclusively act as the child's "mother" and the egg donor intending mother acted upon this understanding.[56] Why should the emotional devastation of the gestational surrogate be favored over the egg donor intending mother who dreams of becoming a parent only to have her intentions quashed?[57]

Critics of surrogacy might counter that the gestational surrogate's donation to the reproductive process is much more risky and emotionally consuming than the infertile egg donor's wife, and, thus, the gestational surrogate deserves the chance to claim the child as her own.[58] Gestation is certainly vital to the birth of the child created in a gestational surrogacy agreement, but so too are the large sums of time and money that the egg donor-intending mother contributes as are the invasive medical procedures she undergoes to create a child.[59] While the gestational surrogate must take on an all-consuming task for nine months, the egg donor-intending mother procures expensive and time-intensive reproductive technologies so that she may spend the rest of her life

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[55] *Id.* (noting that many laws regarding sperm donation automatically make the husband of a wife who is artificially inseminated with another man's sperm the father of the child she births based on concerns for the welfare of the child).

[56] *See* Schultz, *supra* note 47, at 366–67 (observing that infertile individuals enter into surrogacy arrangements in reliance upon the promises of surrogates to forego claims of parentage).

[57] *Id.*

[58] *See* Elizabeth S. Anderson, *Is Women's Labor A Commodity*?, 19 PHIL. & PUB. AFF. 71, 86 (1988) (arguing that surrogacy requires "radical self-effacement, alienation from those whom one benefits, and the subordination of one's body, health, and emotional life to the independently defined interests of others").

[59] Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 45 ("[T]ypically, surrogacy agreements in the United States involve payments of $20,000 to $25,000 to the woman who bears the child.").

acting as the child's mother. To reward a gestational surrogate with parentage based on a traditional mother-child relationship disregards the bifurcated nature[60] of maternity present in gestational surrogacy arrangements and clings to a singular definition of motherhood that is no longer necessarily relevant.[61]

A surrogacy ban also assumes the inability of gestational surrogates to make an informed decision to contract. The court in *Baby M* assumed that a paid surrogate can never actually make an informed decision to give birth to a baby whom she does not consider her own.[62] Critics of paid surrogacy further contend that its legalization will create a caste of women who wealthier individuals will coerce into involuntary gestational agreements through money and superior bargaining power.[63] This fear has not come to fruition, at least not in the United States,[64] because many

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[60] *See* Schiff, *supra* note 54, at 274 (detailing the "bifurcation" of motherhood that occurs in a gestational surrogacy arrangement).

[61] *Id.* at 277 (arguing that because genetics and gestation both play a critical role in the creation of a child the intentions of parties who agree to create a child through reproductive technologies should be the critical factor in determining maternity).

[62] The *Baby M* court explained:

> [The natural mother] never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $ 10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction.

In re Baby M., 547 A.2d 1227, 1248 (N.J. 1988).

[63] *See generally* Anderson, *supra* note 58, at 90 (arguing that a surrogate who is a party to a contract requiring her to relinquish parental rights before the birth of the child she carries "is contractually bound to manipulate her emotions to agree with the interest of the adoptive parents").

[64] India, however, is at the forefront of the surrogacy market. Surrogacy is legal in India, and infertile individuals who have been unable to enter into surrogacy agreements in their home jurisdictions often turn to surrogacy brokers in India. *See* Margot Cohen, *A Search for a Surrogate Leads to India*, WALL ST. J., Oct. 9, 2009, at D1 (describing an American couple's use of an Indian surrogacy agency to produce a child); Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, Aug. 2007, at 124; *see also* SURROGACY INDIA,

surrogacy agencies refuse to recommend surrogates whose main motivation appears to be monetary gain.[65]

Compensation, however, is a crucial element of gestational surrogacy.[66] Although a woman may enter surrogacy contracts for an altruistic reason, such as providing loving couples with the opportunity to procreate, a ban on paid surrogacy refuses to acknowledge that she deserves an opportunity to receive compensation for a time-consuming and highly valuable service.[67] A surrogate must assume an extremely intrusive medical condition for nine months, and, as such, should expect consideration for the

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http://www.surrogacyindia.com/ (last visited March 29, 2010) (on file with the North Carolina Journal of Law & Technology) (offering surrogacy and egg donor services to international clients); SPAR, *supra* note 45, at 85–86 (explaining that the growth of the international surrogacy market may have resulted from bans that intending parents sought to circumvent).

[65] *See* Shayla Harris, Adam B. Ellick, & Stephanie Saul, *Donors, Daddies, Surrogates, Lawyers*, NYTIMES.COM, Dec. 12, 2009, http://video.nytimes.com/video/2009/12/12/us/1247466102011/donors-daddies-surrogates-lawyers.html (on file with the North Carolina Journal of Law & Technology).

[66] *See* Jessica H. Munyon, *Protectionism & Freedom in Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U.L. REV. 717, 718 (2003) (asserting that up to eighty-nine percent of surrogates would not provide gestational services without compensation).

[67] Many scholars who support surrogacy contend that this limitation on a surrogate's right to contract is based on sexist notions of a woman's ability to make thoughtful and informed reproductive choices. *See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminist*, 16 LAW MED. & HEALTH CARE 72, 73 (1988) (**"**[T]he rationales for such a ban are often the very rationales that feminists have fought against in the contexts of abortion, contraception, non-traditional families, and employment."); Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, 16 LAW MED. & HEALTH CARE 81, 87 (1988) (highlighting the inconsistent stances some feminist scholars might take by favoring mothering over fathering); Richard A. Posner, *The Ethics and Economics of Enforcing Surrogacy Contracts*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 27 (1989) (contending that to ban surrogacy because of concerns for a woman's ability to navigate the market place "hearkens back to the time (not so long ago) when married women were deemed legally incompetent to make enforceable contracts"); Marjorie Schultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 63 (1991) ("By invalidating commercial surrogacy, [the court in *Baby M*] restated the separation of women from the world of money and the market.").

atypical nature of her service. A ban on paid surrogacy, however, signals that a woman cannot make an informed decision to provide surrogacy services for compensation.[68] Such a ban confuses compensation with coercion and wrongly denies the intentionality of a surrogate to act as a service-provider.

Children born out of gestational surrogacy agreements are, by definition, intentionally created by individuals who are willing to devote significant time, money, and labor so that they might parent.[69] Although the gestational surrogate is necessary for the birth of the child, the child would not exist but for the initial actions of the intending parent to procure collaborative reproductive services so that he or she could create a child to parent.[70] Contrary to the fears espoused by the court in *Baby M*,[71] sufficient evidence does not exist that a child suffers because he or she is separated from his or her gestational mother so as to favor surrogates over infertile individuals when deciding parentage.[72] There is ample evidence, however, that a child may suffer if he or she is raised by an inadequate parent.[73] An intentionality standard recognizes that conception and gestation, though vital, is only a piece of the parentage puzzle.[74] Indeed, the actual rearing of the

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[68] *See In re* Baby M., 547 A.2d 1227, 1248 (N.J. 1988) ("In many cases, of course, surrogacy may bring satisfaction, not only to the infertile couple, but to the surrogate mother herself. The fact, however, that many women may not perceive surrogacy negatively but rather see it as an opportunity does not diminish its potential for devastation to other women.").

[69] Schultz, *supra* note 47, at 343.

[70] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. App. 1993) (pointing out that an infertile individual is not likely to enter into a surrogacy agreement with a surrogate who considers herself the child's intending mother).

[71] *In re* Baby M, 537 A.2d 1227, 1250 (N.J. 1988).

[72] *See* Hill, *supra* note 1, at 400–05 (detailing the conflicting evidence regarding the effect of gestational bonding on a child's social and emotional development later in life).

[73] *Id.*

[74] *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 410 (1983) ("Procreative freedom includes the right to separate the genetic, gestational, or social components of reproduction and to recombine them in collaboration with others.").

child is arguably the most important and certainly most prolonged commitment that a party to a gestational agreement can make.[75] A surrogacy ban favors to an extreme the reproductive choices of the surrogate who changes her mind, and ignores the intentional decision to parent by an infertile individual. An intentionality standard, however, recognizes that gestation alone does not equal motherhood and rightly favors the deliberate choices made by intending parents.

Reproductive technologies have irrevocably changed the rules by which humans may procreate.[76] As evidenced in the discussion above, a ban on surrogacy agreements places too great an emphasis on an outdated understanding of motherhood and unnecessarily treads upon the private decision of whether or not to procreate, thus ignoring the necessary role of an infertile individual or couple in creating the child. An intentionality standard is the most equitable measure by which to decide parentage of a child born out of a gestational surrogacy agreement as it respects the privacy and autonomy of both infertile individuals and gestational surrogates without endangering the best interests of the children created through surrogacy agreements; recognizes the deliberate choices of all parties involved in the reproductive process; and acknowledges that traditional notions of motherhood have been irrevocably impacted by new reproductive technologies.

IV. ABA MODEL ACT, ALTERNATIVE B, IS A VIABLE OPTION

An effective intentionality standard depends upon a well regulated process where all parties are fully informed of the consequences of their binding decisions and adequately plan for the various problems gestational surrogacy agreements may create.[77] Although many infertile couples may be hesitant to seek

[75] *Id.* at 411 ("Sterility bars one from conceiving or bearing only to the extent that medicine or society cannot overcome the particular cause of infertility; and sterility never bars one from rearing a child.").

[76] Hill, *supra* note 1, at 353.

[77] *See* Caplan, *supra* note 8 (arguing that regulation of the surrogacy is necessary "given the need to protect the interests of children when money is the main motive for bearing them as well as the uncertain abilities of women in need

regulation of surrogacy contracts for fear that intrusive legislatures and courts will unnecessarily burden their already limited ability to procreate,[78] well defined surrogacy laws will instead protect infertile couples by ensuring that the custody of the child is decided before the actual pregnancy occurs.[79]

A. *ABA Model Act*

The ABA Model Act provides an excellent framework for states to adopt, as it contains several provisions that focus on the intentionality of infertile couples without sacrificing the best interests of the children created by third-party reproduction. The Act offers two alternatives for states to enact: Alternative A requires judicial approval of a gestational surrogacy agreement while Alternative B allows the parties to individually craft gestational surrogacy contracts. Both alternatives offer benefits, and the decision concerning which alternative to enact would likely depend upon the policy concerns of the individual states that enact the legislation. Alternative B, however, is the preferable alternative because its contract based model recognizes the importance of the intentionality of all actors involved in the reproductive process while maintaining the safety of children created using this technology.

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of money to listen to information about risks from brokers eager to retain and profit from them."); R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 96, 102 (1988) (noting that an intentionality approach may fall short where "parties fail to agree to a contract that spells out all contingencies and their outcomes"); SPAR, *supra* note 45, at 197 (arguing that the commodification of the reproductive process, while distasteful to many, can be improved, and, eventually, widely accepted through effective regulations consistently to produce "happy, healthy children").

[78] *See* Caplan, *supra* note 8 (opining that the future of surrogacy regulation is unclear because of the opposition of infertile individuals, surrogates, and the wider surrogacy industry).

[79] For instance, a well regulated surrogacy process where all actors are screened for suitability and receive ample counseling on the impact of their decisions negates the concerns contained in *Baby M* that surrogacy contracts do not adequately consider suitability in their determination of custody or that a surrogate is not fully informed. *See In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988).

B. *Alternative B*

Unlike Alternative A which emphasizes state oversight throughout the gestational surrogacy arrangement, Alternative B enforces privately crafted gestational surrogacy agreements as long as they meet the requirements of the section.[80] This alternative includes several provisions that ensure that all parties involved make an informed decision: the gestational surrogate must be twenty-one years old[81] and must have already given birth to one child;[82] the agreement, which must be in writing,[83] must be made prior to any attempts to impregnate the surrogate;[84] the gestational surrogate, as well as the intending parents, must receive independent mental health[85] and legal counseling[86] prior to the agreement and during negotiations; a married gestational surrogate's husband must be made a party to the agreement;[87] and any compensation received must be reasonable and placed in escrow until the reproductive procedure has taken place.[88] Once the attorneys for the respective parties certify that the agreement meets the requirements of Alternative B, the intending parents will become the legal parents of the child upon its birth.[89]

Alternative B allows the parties to craft a gestational surrogacy agreement privately between the parties as though it were a legally binding contract.[90] This eliminates the need for judicial oversight

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[80] MODEL ACT, *supra* note 7, (Alternative B) § 701(2).
[81] *Id.* (Alternative B) § 702(1)(a).
[82] *Id.* (Alternative B) § 702(1)(b).
[83] *Id.* (Alternative B) § 703(2)(a).
[84] *Id.* (Alternative B) § 703(2)(b).
[85] *Id.* (Alternative B) §§ 702(1)(d), 702(2)(c).
[86] *Id.* (Alternative B) §§ 702(1)(d), 702(2)(d).
[87] *Id.* (Alternative B) § 703(3)(b)(i)–(ii).
[88] *Id.* (Alternative B) § 703(2)(e).
[89] *Id.* (Alternative B) § 705(1).
[90] *See* Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of Art: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 220–21 (2008) (explaining that Alternative B is a "self-executing contract model" that is enforceable as long as several procedural hurdles are cleared).

which may result in lower costs than Alternative A.[91] Alternative B's contract model rightly rewards the intentionality of all of the parties involved and provides them with considerable reproductive autonomy if the section's procedural requirements are met.[92] Although Alternative B does not require judicial oversight, required mental-health evaluations and an added requirement that intending parents submit to a home visit could likely screen out bad actors.[93]

Alternative B does not, however, provide for complete reproductive autonomy. Only those who can provide a "qualified physician's affidavit" certifying that there is a medical need for a gestational surrogate may satisfy the section.[94] Alternative B, thus, stops short of endorsing gestational surrogacy for convenience rather than medical necessity.[95] The Model Act, however, does not explicitly define medical need. Would this requirement prevent a homosexual couple from entering a valid gestational surrogacy agreement if both members can produce functional sperm since both members are not technically infertile? What about a woman like Mrs. Stern who may not have been technically infertile but had legitimate concerns about the possible ill effects of a pregnancy on her health? While the Model Act is right to limit the availability of reproductive technologies to those who have a bona fide need for it, the requirement is not fully defined and creates more questions than answers.

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[91] *Id.* at 222 (explaining the costs and time delays that may accompany Alternative A).

[92] *Id.* at 224.

[93] *See* Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy,* 61 J. SOC. ISS. 21, 40 (2005) (recommending that states include mental-health screening in surrogacy statutes to "minimize both the contractual disasters and the milder, but still painful, long-term feelings of regret of some birth mothers").

[94] MODEL ACT, *supra* note 7, (Alternative B) § 702(2)(b).

[95] *See* Thomas Frank, *Rent-a-Womb Is Where Market Logic Leads: Surrogate Motherhood Raises Troubling Issues*, WALL ST. J., Dec. 10, 2008, at A17 (theorizing that pregnancy might one day become a "hassle" that the affluent can contract out to the working class if surrogacy continues to gain acceptance among consumers).

Alternative B also requires that at least one intending parent donate a gamete.[96] This requirement eliminates from consideration single women who cannot donate an egg or gestate, single heterosexual men who are unable to find a partner, and hetero and homosexual couples where both partners are completely infertile. While these coupling possibilities might be rare,[97] custody disputes where neither intending parent shares a biological link with the child are the hard cases that most need regulation to provide equitable results. If Alternative B recognizes the intentionality of those infertile couples lucky enough to produce gametes, it should also recognize the intentionality of those for whom gamete production is impossible.[98]

If the gamete donation requirement is dropped and states require more thorough screening procedures, a model based on Alternative B nicely balances intentionality with the best interests of the children created under surrogacy agreements.[99] This model embraces a strong intentionality standard and ensures that well-intentioned and well-informed actors can use legal technologies to create life.

C. *Alternative A*

Under Alternative A, which largely draws from UPA Article 8,[100] a gestational surrogacy agreement must receive judicial validation before it is enforceable.[101] Intending parents must meet several procedural requirements before the agreement is

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[96] MODEL ACT, *supra* note 7, (Alternative B) § 702(2)(a).

[97] Saul, *supra* note 25. *See* Kindregan and Snyder, *supra* note 90, at 224 (theorizing that the requirement that one of the intending parents donate a gamete "may make Alternative B more acceptable to state legislators because it preserves a genetic connection to one or both of the intended parents").

[98] *See* Ikemoto, *supra* note 2, at 638 (arguing that medical necessity provisions limit the use of reproductive technologies to married, heterosexual couples).

[99] *See* Kindregan & Snyder, *supra* note 90, at 224 (theorizing that Alternative B "may even be the start of a trend toward a contractual-administrative model for surrogacy arrangements").

[100] U.P.A., *supra* note 5, art. 8.

[101] MODEL ACT, *supra* note 7, (Alternative A) § 701.

validated.[102] To weed out potentially unsafe homes, this alternative requires that intending parents submit to home visits and satisfy parental guidelines established by a child-welfare agency.[103] The intending parents must also provide proof that they have resided within the state for the last 90 days[104] and demonstrate that the agreement involves reasonable consideration.[105]

The major benefit of Alternative A is that it provides both the intending parents and the gestational surrogate with certainty of parentage once a surrogacy agreement is validated. The surety of parentage that accompanies a validated surrogacy agreement may prevent highly emotional and potentially traumatic custody litigation in the future, which one assumes would benefit the best interests of the children created through the surrogacy arrangement.[106] This alternative also provides a clear custody framework if the intending parents' marital status changes before the birth of the child.

However, Alternative A places a considerable burden on individuals already facing the tremendous obstacle of infertility. One major drawback of Alternative A is the potential for delay in the required judicial proceeding.[107] Infertile individuals must take several steps before an agreement may be judicially validated, and this alternative does not require the presiding judge to adhere to a set time limit when rendering his decision.[108] Infertile individuals already spend thousands of dollars to access reproductive technologies;[109] Alternative A further increases their expenses by

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[102] *Id.* (Alternative A) § 703(2)(a)–(e).
[103] *Id.* (Alternative A) § 703(2)(b).
[104] *Id.* (Alternative A) § 703(2)(a).
[105] *Id.* (Alternative A) § 703(2)(e).
[106] NAOMI CAHN, TEST TUBE BABIES: WHY THE FERTILITY MARKET NEEDS REGULATION 214 (New York University Press 2009) (arguing that surety of parentage prior to the birth of a child should be legally enforced to "ensure predictability and smooth transactions").
[107] *See* Kindregan & Snyder, *supra* note 90, at 222 (explaining the potential for delay and increased costs created by judicial validation of surrogacy agreements).
[108] *Id.*
[109] Ali & Kelley, *supra* note 59.

requiring infertile individuals to submit to lengthy and involved court proceedings that could potentially generate thousands of dollars in legal fees and might not necessarily result in a validated surrogacy agreement.[110]

A screening process may also adversely affect individuals who have turned to gestational surrogacy because they are not able to adopt. Homosexual couples, for instance, are not allowed to adopt children in many states.[111] It is possible that a judge from one of these states might deny a surrogacy agreement simply because the intending parents are homosexual; the state's adoption laws would provide ample support to such an outcome.[112] However, the inclusion of protections for same sex couples in a model statute might influence future legislation in states where attitudes toward homosexual adoption are more positive.[113] Without strict guidelines that eliminate sexual orientation or marital status as determining factors in a validation decision, these individuals might very well decide to pursue surrogacy options outside of America.[114]

Alternative A limits an infertile individual's reproductive autonomy by allowing a judge to make, for infertile couples, what many consider the most private of decisions: whether or not an individual may attempt to procreate.[115] Although any fertile individual can become pregnant and give birth to a child without government intervention, Alternative A compels only those who cannot gestate, many of whom are infertile solely because of the fickleness of nature, to seek approval before they can legally start a

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[110] Kindregan & Snyder, *supra* note 90, at 222.

[111] For a map that details the legality of homosexual adoption among the states, see HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/parenting_laws_maps.pdf (last visited Mar. 13, 2010) (on file with the North Carolina Journal of Law & Technology).

[112] *Id.*

[113] *See* CAHN, *supra* note 106, at 214 (recognizing that some state legislatures may seek to explicitly deny homosexual individuals access to surrogacy, but theorizing that a model statute that provides for equal access will influence eventual state legislation).

[114] *Supra* note 64.

[115] *Supra* note 42.

family. This required judicial intervention intrudes upon what, for fertile individuals, is an intensely personal choice and further robs infertile individuals of their reproductive autonomy.

However, at its core, third-party reproduction invariably involves the commercialization of the reproductive process and children, and, as such, necessitates regulation.[116] The rights of infertile individuals must be balanced against the needs of the children produced through third-party reproduction, and the judicial intervention required under Alternative A, while not perfect, seeks to prevent the abuse of reproductive technologies. There are cases where individuals have used gestational surrogates to create children that they later neglect or abuse.[117] Although the same can be said of many fertile parents, gestational surrogacy agreements couple baby making with commerce and the perception exists that such arrangements could be more susceptible than traditional reproduction to exploitation by bad actors.[118] State legislatures that are uneasy with the commercial aspect of third-party reproduction are more likely to accept Alternative A so that the state may carefully regulate the use of this valuable, but controversial, technology.[119] Alternative A, while less preferable than Alternative B, should be acceptable to infertile individuals who may otherwise face bans on third-party reproduction technology.

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[116] SPAR, *supra* note 45, at 197 (arguing that comprehensive regulation will improve market efficiency and prevent abuse of reproductive technologies).

[117] *See* Tamar Lewin, *Man Accused of Killing Son Borne by a Surrogate Mother*, NY TIMES, Jan. 19, 1995, at A16 (recounting the killing of a five-week-old baby by the single father who conceived the child with the help of a gestational surrogate; Saul, *supra* note 25 (describing a case involving the alleged neglect of two twin girls by their single father who contracted with a gestational surrogate to procreate).

[118] *See* SPAR, *supra* note 45, at 195–97 (describing the discomfort many experience when discussing the viability of a "market for babies").

[119] *See* Kindregan & Snyder, *supra* note 90, at 222 (arguing that some states may find Alternative A more desirable because it mirrors the UPA and includes judicial screening of gestational surrogacy arrangements).

V. CONCLUSION

As reproductive science continues to advance, states must be willing to tackle the legal struggles this technology creates. States should recognize that third-party reproduction is here to stay. Bans on paid surrogacy wrongly refuse gestational surrogates the right to provide, and infertile individuals the opportunity to receive, a valuable service. These bans also unnecessarily limit an infertile individual's reproductive autonomy. Article 7, Alternative B of the ABA's Model Act Governing Assisted Reproductive Technologies contains an effective intentionality standard that allows well informed parties to enter into gestational surrogacy agreements while also safeguarding the best interests of the children created. States should follow the lead of the ABA to enact legislation that effectively answers the legal questions created by the advent of third-party reproduction.