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WHAT TO EXPECT WHEN SOMEONE IS EXPECTING FOR YOU:
NEW JERSEY NEEDS TO PROTECT PARTIES TO
GESTATIONAL SURROGACY AGREEMENTS
FOLLOWING *IN RE T.J.S.*

MELISSA RUTH*

“Today, it is not uncommon for couples unable to conceive a child to turn to assisted-reproductive technology. The promise of this new technology, to be sure, comes with the potential for its abuse. The State unquestionably is empowered to regulate this area of human affairs.”¹

I. CONCEIVING NEW WAYS TO BE A PARENT: AN INTRODUCTION TO
SURROGACY AGREEMENTS

Technological advancements in reproductive technology have propelled surrogacy into the public eye as an option for those who would not otherwise be able to have children, including same-sex couples and heterosexual couples facing either infertility problems or potential high risk pregnancies.² Surrogacy gives these couples the option to have children to whom they have a genetic connection.³ While surrogacy is a growing

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1. *In re T.J.S.*, 54 A.3d 263, 269–70 (N.J. 2012) (Albin, J., dissenting) (footnote omitted) (discussing surrogacy agreements).

2. See Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN’S RTS. L. REP. 67, 67 (2013) (explaining surrogacy has become mainstream due to celebrities using surrogates, as well as television shows and books representing surrogacy in pop culture).

Doctors at fertility clinics treat “plumbers, schoolteachers and lawyers” as well as patients whose desire for children has been hampered by psychological problems, life-threatening diseases, or crippling accidents. Among the fastest growing clientele are single mothers, lesbians, and gays—driven less by infertility than by the absence of a willing or viable reproductive partner.

J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 351 (2011) (footnote omitted).

3. See Fred Silberberg, *Is Surrogacy on Its Way to Becoming ‘The New Normal’?*, HUFFINGTON POST (June 20, 2012, 11:53 AM), http://www.huffingtonpost.com/fred-silberberg/surrogacy_b_1610804.html (“Surrogacy affords the opportunity of a dream-come-true for couples and individuals hoping to become parents but face the burdens of infertility or other health issues which make pregnancy and delivery dangerous or impossible. It enables you to welcome a child into the world who is truly your own and continue the miracle of your family lines.”).

practice, it remains highly unregulated, or at least very inconsistently regulated.⁴

Surrogacy is frequently featured in headlines for both positive and negative experiences.⁵ News stories often share many joyful experiences with surrogacy, including many notable celebrities who have taken part in the growing fertility option.⁶ Unfortunately, some people face difficulties with surrogacy agreements where regulations are lacking or nonexistent.⁷

Despite some negative attention, when properly regulated, surrogacy can be a great opportunity to start families for those who cannot conceive

4. See Conklin, *supra* note 2, at 68–69 (discussing various state laws on surrogacy throughout the country). Conklin asserts that surrogacy laws vary greatly from state to state within the United States. See *id.* (discussing laws from state to state). She finds three categories of regulation: states that have no statute regarding surrogacy agreements, have a complete ban on surrogacy agreements, or have a statute limiting enforcement of the agreements to gestational carrier agreements. See *id.* (finding three categories of laws states use to deal with surrogacy).

5. See, e.g., Kirthana Ramiseti, *Sherri Shepherd's Surrogate Gives Birth to Baby Boy: Report*, N.Y. DAILY NEWS (Aug. 5, 2014, 5:22 PM), <http://www.nydailynews.com/entertainment/gossip/sherri-shepherd-surrogate-birth-report-article-1.1892957> (explaining divorce dispute regarding surrogacy arrangement). Sherri Shepherd recently gained media attention due to her messy divorce and a dispute with her husband regarding the surrogacy agreement that the couple entered into during their marriage. See *id.* Despite reports that Shepherd did not want to be listed as the child's mother, and did not seek custody over the child, her ex-husband nevertheless sought child support from her for the child. See *id.*

6. See, e.g., Leigh Blickley, *Celebrities Who've Used Surrogates to Conceive (PHOTOS)*, HUFFINGTON POST (Feb. 6, 2013, 4:28 PM), http://www.huffingtonpost.com/2013/02/06/celebrities-who-have-used-surrogates_n_2624998.html (listing celebrities who have used surrogates to have children and report great experiences with surrogacy process, including Giuliana Rancic, Elton John, and Sarah Jessica Parker). Additionally, surrogacy has been featured in popular culture, such as in the television show *The New Normal*, which has also helped make surrogacy seem more commonplace. See Conklin, *supra* note 2, at 67 (discussing ways surrogacy has become more mainstream).

7. See Jocelyn Gecker, *News Guide: Thailand's Surrogacy Scandals and Laws*, ASSOCIATED PRESS (Sept. 3, 2014, 2:06 AM), <http://bigstory.ap.org/article/news-guide-thailands-surrogacy-scandals-and-laws> (explaining recent scandals regarding Thailand's loose surrogacy laws and their effects). News stories recently arose out of Thailand regarding the country's lack of regulation and its reputation as a hub for international surrogacy. See *id.* (discussing country's lack of regulation).

First, in July, Thai media publicized that a couple from Australia abandoned one of their twins born from a surrogate in Thailand because the baby, "Baby Gammy," had Down syndrome, but the couple nonetheless took the healthy twin home. See *id.* (discussing couple's choice to use surrogate in Thailand due to Australia's prohibition on surrogacy). Most recently, reports of a twenty-four-year-old Japanese man fathering up to sixteen babies through surrogacy caused international outrage. See *id.* (stating Japanese man used Thai surrogate to father sixteen babies). Thai authorities did not know why the man had entered into so many surrogacy agreements and were investigating the matter. See *id.* (stating that motivation for man entering surrogacy agreements was unknown). Due to the numerous problems, Thailand put a temporary ban on surrogacy, and surrogate children were thus unable to leave the country with their intended parents. See *id.* (discussing actions taken to prevent more problems in future).

on their own.⁸ Intended parents frequently bond and become close with their gestational carriers.⁹ Estimates suggest that over 22,000 children have been born through surrogates so far in America, many of which fortunately occur without dispute.¹⁰

There are two different types of surrogacy agreements: traditional and gestational.¹¹ In traditional surrogacy, the surrogate is artificially inseminated using her own egg and the intended father's sperm (or in some situations, a donor sperm).¹² In gestational surrogacy, the surrogate is impregnated through in vitro fertilization, so she has no genetic connection to the child.¹³ Therefore, in a typical gestational surrogacy situation, there can be as many as five different people with potential parental rights

8. See Difonzo & Stern, *supra* note 2, at 348 (discussing how use of reproductive technologies has changed how families are started).

9. See *id.* at 359 (discussing bond between intended parents and gestational carriers). Difonzo and Stern explain that “[w]hen treated with ‘respect, honor and care,’ surrogates find that it is their bond with the intended parents, not with the baby, that is of the utmost value.” *Id.* (footnote omitted) (quoting Karen Busby & Delaney Vun, *Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Motherhood* 32 (2009) (unpublished manuscript), available at <http://claradoc.gpa.free.fr/doc/329.pdf>) (describing relationship between intended parents and surrogates). They also point out that surrogate mothers typically want to have good relationships with the intended parents to make the experience more rewarding and to have what she is doing for the couple “‘celebrated and acknowledged.”” See *id.* at 358 (quoting LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 136 (2007)) (discussing intended parents’ relationships with their surrogate mothers).

10. See Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/ (stating not many reliable statistics exist on surrogacy due to lack of studies or tracking, but at least one statistic suggests as many as 22,000 children have been born using surrogacy); see also Difonzo & Stern, *supra* note 2, at 356 (“Although surrogates admit that separating from the baby ‘is still the hardest part of the job,’ they rarely refuse to relinquish a child after giving birth.” (footnote omitted) (quoting Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK (Apr. 7, 2008))).

11. See Leora I. Gabry, Note, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 418–19 (2012) (“In a traditional surrogacy arrangement, the surrogate’s egg is fertilized using artificial insemination, resulting in a genetic relationship between the carrier and the child. . . . Gestational surrogacy, which involves implanting the surrogate with an embryo via in vitro fertilization (IVF), eliminates the biological relationship between the surrogate and the child.”).

12. See *id.* at 419 (stating father has genetic connection to child when his sperm is used instead of donor’s sperm). Artificial insemination is one of the oldest forms of assisted reproduction technology. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 845 (2000) (describing artificial insemination).

13. See Gabry, *supra* note 11, at 419 (finding gestational surrogacy more commonly used today). For in vitro fertilization, fertilization of the egg occurs outside of the body, and the embryo is subsequently implanted in the uterus. See Garrison, *supra* note 12, at 848–49. Thus, the carrier does not necessarily have a genetic connection to the child. See *id.* (explaining how in vitro fertilization works).

to a child: the intended parents (the person or couple who plans to keep and raise the child), people with a genetic relation to the child (a sperm donor and/or an egg donor), and the surrogate mother who carries the child to term.¹⁴

When problems arise regarding surrogacy agreements, state legislatures and a non-existent regulatory framework are usually to blame.¹⁵ With potentially five different people involved in bringing a child into the world, courts have struggled to determine who should be the legal parents of these children.¹⁶ Some laws, like New Jersey's, remain unchanged by advancing technology and only allow the woman who gives birth to a child to be the child's legal mother.¹⁷

In *In re T.J.S.*,¹⁸ the New Jersey Supreme Court, in a divided decision, failed to give any clear guidance on the matter.¹⁹ In *T.J.S.*, the court reinforced New Jersey's law, finding compensated surrogacy agreements unen-

14. See Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 855 (2013) (listing all individuals who can be considered in determining parental rights as part of gestational surrogacy agreement). Intended parents, genetic parents, and the birth mother can all potentially assert parental rights to the child. See *id.* (discussing confusion over who to name as legal parents).

15. See *In re T.J.S.*, 54 A.3d 263, 266 (N.J. 2012) (Hoens, J., concurring) (explaining that Legislature, instead of courts, should address surrogacy issues). As a general matter, gestational surrogacy remains highly unregulated. See Dashiell, *supra* note 14, at 859–60. No federal statute or case law exists to provide guidance, and the state laws vary significantly. See *id.* (asserting that issue of surrogacy is ripe for Supreme Court's review).

16. See, e.g., *T.J.S.*, 54 A.3d at 264 (Hoens, J., concurring) (interpreting New Jersey Parentage Act); see also *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988) (deciding whether birth mother or intended mother has parental rights); *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *1–3 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (involving two male intended parents, one of which was also genetic parent, and birth mother); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (involving intended parents who were also genetic parents in surrogacy arrangement).

17. See N.J. STAT. ANN. § 9:17-41(a)–(b) (West 2013) (defining mother and child relationship based only on who gave birth to child). The statute specifies: “[t]he parent and child relationship between a child and [] [t]he natural mother, may be established by proof of her having given birth to the child, or under P.L. 1983” See *id.* § 9:17-41(a). The act proceeds to list the numerous ways that legal fatherhood can be determined, after listing only the birth mother as being proper to establish a mother and child relationship. See *id.* § 9:17-41(a)–(b) (providing multiple ways that men can be deemed legal fathers but only one way for women to be recognized as legal mothers).

18. 54 A.3d 263 (N.J. 2012) (per curiam).

19. See *id.* at 263 (affirming Appellate Division's ruling due to equally divided court). The Appellate Division found no violation of the New Jersey Constitution's Equal Protection Clause in the differences between the presumptions of paternity and maternity. See *In re T.J.S.*, 16 A.3d 386, 393 (N.J. Super. Ct. App. Div. 2011) (dismissing equal protection claims). “Where, however, only one of the spouses is infertile, an equal protection claim has not been articulated because their respective situations are not parallel and the Legislature is entitled to take these situational differences into account in defining additional means of creating parenthood.” *Id.* at 398. The Appellate Division also found that, under the Par-

forceable.²⁰ The court also dismissed claims of gender discrimination, allowing a presumption of parentage for infertile men but not for infertile women.²¹ Further, Governor Chris Christie vetoed a bill that would have allowed and regulated gestational surrogacy agreements, a few months prior to the Supreme Court's decision in *T.J.S.*²²

This Note disagrees with the New Jersey Supreme Court's dismissal of gestational surrogacy agreements under the New Jersey Parentage Act, and it argues that legislation must be passed to enforce and regulate gestational carrier agreements and to alleviate the state's public policy concerns.²³ Part II provides an overview of surrogacy law in New Jersey

entage Act, only the biological mother of the child can be deemed the legal mother. *See id.* at 391 (finding surrogacy agreement contrary to Parentage Act).

The Appellate Division also interpreted the silence of the Legislature following *Baby M* as an indication that the holdings of *Baby M* still applied. *See id.* at 395–96 (relying on *Baby M* court's reasoning). “Nothing in our Constitution or law provides that an adult—male or female—with no biological or gestational connection to a child has a fundamental right to create parentage by the most expeditious or convenient method possible.” *Id.* at 398. Some commenters express contrary opinions. *See, e.g.,* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 110 (2010) (“A Fourteenth Amendment argument can also be made on Equal Protection grounds. State laws do not usually ban artificial insemination when the man is sterile; thus, banning surrogacy, the remedy when the woman is sterile or otherwise unable to gestate a child, discriminates based on sex.”).

20. *See T.J.S.*, 54 A.3d at 268 (Hoens, J., concurring) (finding compensated gestational surrogacy agreements against statutory provisions and public policy). While surrogacy has never been expressly prohibited in New Jersey, courts consistently refuse to enforce these agreements. *See, e.g., id.* at 268–69 (failing to enforce surrogacy agreement); *Baby M*, 537 A.2d at 1235 (refusing to enforce surrogacy agreement); *A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *4 (refusing to enforce surrogacy agreement); *A.H.W.*, 772 A.2d at 954 (refusing to enforce surrogacy agreement).

21. *See T.J.S.*, 54 A.3d at 268–69 (Hoens, J., concurring) (dismissing gender discrimination claims, even though court was evenly split on issue).

22. *See* Chris Christie, *Governor's Veto Message to S. Bill No. 1599* (Aug. 9, 2012), available at <https://votesmart.org/static/vetotext/41597.pdf> (declining to approve legislation regulating gestational carrier agreements). Governor Christie currently holds the record as the New Jersey Governor who has vetoed the most legislation. *See* Matt Friedman, *Gov. Christie Breaks Record for Most Bills Vetoed in N.J.*, STAR LEDGER (Jan. 21, 2014, 10:26 PM), http://www.nj.com/politics/index.ssf/2014/01/christie_signs_some_bills_vetos_others.html (stating that Governor Christie holds record for vetoing most legislation since 1988). As of January 2014, Governor Christie had vetoed over 164 bills in a two-year time period—a record unmatched by any other governor since 1988. *See id.* (discussing bills Governor Christie has vetoed). Altogether, Governor Christie has now used his veto power 314 times. *See* Reid Wilson, *Chris Christie's Veto Strategy*, WASH. POST (July 9, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/09/chris-christies-veto-strategy/> (discussing politics of New Jersey Governor's veto power). The Governor of New Jersey receives considerable power from the state's constitution, including the veto power, more so than in most other states. *See id.* (explaining New Jersey executive power).

23. *See T.J.S.*, 16 A.3d at 397–98 (failing to enforce gestational surrogacy agreement); *see also* S. 1599, 215th Leg. (N.J. 2012) (regulating gestational surro-

leading up to the case of *T.J.S.*²⁴ Next, Part III sets out the facts and holdings of *T.J.S.*²⁵ Part IV then analyzes the court's reasoning.²⁶ Part V concludes by asserting that legislation is needed in New Jersey to protect the rights of all parties involved in gestational surrogacy agreements.²⁷

II. PREPARING FOR THE NEW ARRIVAL: THE LAW LEADING UP TO *T.J.S.*

The law regarding the enforcement of surrogacy agreements in New Jersey prior to *T.J.S.* was ambiguous.²⁸ While no state law prohibits surrogacy, New Jersey courts have rarely enforced surrogacy agreements and have consistently refused to enforce compensated surrogacy agreements.²⁹ While many hoped the Legislature's consideration of the issue in 2012 would provide a solution, Governor Christie vetoed the bill, stopping progress in its tracks.³⁰

A. *Baby-proofing the State: Surrogacy Cases in New Jersey*

First surfacing in the 1970s, surrogacy contracts proliferated, provoking questions regarding their legality.³¹ In *In re Baby*

gacy agreements through Gestational Carrier Agreement Act); Christie, *supra* note 22 (vetoing Gestational Carrier Agreement Act).

24. For a further discussion of surrogacy law in New Jersey, see *infra* notes 28–95 and accompanying text.

25. For a further discussion of the facts, procedural history, and holdings in *T.J.S.*, see *infra* notes 96–153 and accompanying text.

26. For a further discussion of the necessity of surrogacy legislation in New Jersey, see *infra* notes 154–93 and accompanying text.

27. For a further discussion of how *T.J.S.* will affect potential parents in New Jersey, see *infra* notes 194–200 and accompanying text.

28. See *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988) (invalidating compensated surrogacy agreements and traditional surrogacy agreements); see also *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *4 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (refusing to enforce surrogacy agreement); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (refusing to enforce surrogacy agreement but allowing intended parents, who were both also genetic parents, to put names on birth certificate following 72-hour wait period).

29. See, e.g., *Baby M*, 537 A.2d at 1235 (refusing to enforce surrogacy agreement); *A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (same); *A.H.W.*, 772 A.2d at 954 (same).

30. See S. 1599, 215th Leg. (N.J. 2012) (allowing enforcement of gestational surrogacy agreements following required guidelines). *But see* Christie, *supra* note 22 (vetoing Gestational Carrier Agreement Act).

31. See Spivack, *supra* note 19, at 98 (stating traditional surrogacy first became available in 1978 due to technological advances). One of the first surrogacy contracts occurred in California in 1978, after a couple put an ad in a newspaper looking for a surrogate who would be impregnated via artificial insemination. See *id.* (providing historical background to surrogacy agreements). A Michigan couple then approached attorney Noel Keane to see if the couple could use a similar agreement in Michigan. See *id.* (discussing early occurrences of surrogacy agreements). Keane wrote to a judge to learn the legalities of the proposal, and the judge wrote back explaining that the agreement would be enforceable as long as the surrogate was not paid for her services. See *id.* (seeking legal advice on enforceability of surrogacy agreement).

M,³² the Supreme Court of New Jersey famously became the first court to consider the validity of surrogacy agreements.³³ The *Baby M* case featured plaintiffs Mr. and Mrs. Stern, who entered into a traditional surrogacy agreement with Mrs. Mary Beth Whitehead, their surrogate.³⁴ Mrs. Whitehead became pregnant through in vitro fertilization using Mr. Stern's sperm and Mrs. Whitehead's own egg.³⁵

The surrogacy agreement between the plaintiffs and the surrogate stated that Mrs. Whitehead would terminate her maternal rights after the child was born.³⁶ Additionally, the agreement stipulated that Mr. Stern would pay Mrs. Whitehead \$10,000 after the child was born and in his custody.³⁷ The agreement also provided that Mr. Whitehead would rebut the presumption of paternity as her husband.³⁸ While Mrs. Stern was not a party to the contract, the contract gave her custody of the child should anything have happened to Mr. Stern.³⁹

Once Baby Melissa (Baby M) was born in 1986, Mrs. Whitehead changed her mind about giving up her parental rights and wanted to keep

32. 537 A.2d 1227 (N.J. 1988).

33. *See id.* at 1234–35 (finding surrogacy contracts violate statutory law and public policy). The New Jersey Supreme Court addressed the issue for the first time when surrogacy first became more prominent in the 1980s. *See id.* at 1264 (becoming first court to address surrogacy contracts).

34. *See id.* at 1235 (noting Ms. Stern's decision to pursue surrogacy upon learning of potential health risks she could face in pregnancy due to her multiple sclerosis diagnosis). The Sterns had considered other options to start a family, including adoption, but the couple determined surrogacy would be the best choice for them. *See id.* at 1236 (deciding to use surrogacy to have child). Additionally, having children was very important to Mr. Stern, who had lost much of his family in the Holocaust and wanted to further his family line. *See id.* at 1235 (discussing reasoning behind surrogacy choice).

35. *See id.* at 1235–36 (discussing use of traditional surrogacy). Traditional surrogacy gives the surrogate mother a genetic connection to the child, which frequently causes more legal problems if disputes arise. *See id.* (explaining surrogate's genetic relationship to child). The genetic connection to the child gives more weight to the surrogate's argument for parental rights. *See id.* (discussing genetic relationship).

36. *See id.* at 1235 (discussing necessity of terminating surrogate's maternal rights so Mrs. Stern could proceed as child's legal mother).

37. *See id.* (describing terms of contract). In another contract, Mr. Stern also agreed to pay the fertility clinic that arranged the agreement \$7,500. *See id.* (discussing fees paid by Stern family regarding surrogacy agreement).

38. *See id.* (discussing surrogate's husband as additional party to contract). Under New Jersey law, Mr. Whitehead could have attempted to assert paternal rights over the child because his wife gave birth to the child. *See* N.J. STAT. ANN. § 9:17-43(a)(1) (West 2013) (presuming husband as father of children to which his wife gives birth). Therefore, Mr. Whitehead declining to assert parental rights was important to this particular surrogacy agreement. *See Baby M*, 537 A.2d at 1235 (explaining that Mr. Whitehead promised to take action to rebut presumption of paternity).

39. *See Baby M*, 537 A.2d at 1235 (commenting that Mrs. Stern's absence from surrogacy contract may have been to avoid New Jersey's baby-selling statute that was relevant at that time).

Baby M.⁴⁰ The plaintiffs responded by filing a complaint seeking to restore custody of Baby M, at which point Mrs. Whitehead fled the state with the child.⁴¹ The trial court found the surrogacy agreement between the parties valid and ordered the termination of Mrs. Whitehead's parental rights over Baby M.⁴² Mrs. Whitehead appealed the trial court's decision, and the Supreme Court of New Jersey subsequently granted direct certification.⁴³ On appeal, the New Jersey Supreme Court ultimately overturned the trial court's decision, holding that the surrogacy agreement was invalid because it conflicted with state statutes and public policy.⁴⁴

Moreover, in the 2000 case *A.H.W. v. G.H.B.*,⁴⁵ the Superior Court of New Jersey (Chancery Division) declined to enforce a surrogacy agreement, even though both intended parents were genetically related to child.⁴⁶ Andrea and Peter, unable to conceive a child on their own, en-

40. *See id.* at 1236 (noting Mrs. Whitehead's realization that she did not want to part with child). Mrs. Whitehead initially remained true to the agreement and gave the child to the Sterns. *See id.* (honoring agreement at birth of child). The next day, Mrs. Whitehead expressed extreme despair over not having the child, so the Sterns agreed to let Mrs. Whitehead take the baby for a week, out of fear that Mrs. Whitehead might commit suicide. *See id.* at 1237 (describing Sterns' fear regarding Mrs. Whitehead's mental state). Mrs. Whitehead then refused to give the baby back, and the Sterns had the baby forcibly removed from Mrs. Whitehead. *See id.* at 1236 (stating baby had to be forcibly taken from Mrs. Whitehead).

41. *See id.* at 1237 (stating Mrs. Whitehead fled to Florida with child). After the order [seeking enforcement of the surrogacy agreement] was entered, *ex parte*, the process server, aided by the police, in the presence of the Sterns, entered Mrs. Whitehead's home to execute the order. Mr. Whitehead fled with the child, who had been handed to him through a window while those who came to enforce the order were thrown off balance by a dispute over the child's current name.

Id.

42. *See id.* at 1237–38 (describing trial court's determination that surrogacy contract was valid, thus allowing Mrs. Stern to adopt baby). The trial took over thirty-two days and included twenty-three witnesses, most of whom testified regarding what custody outcome would be in the child's best interest—a question heavily focused on in the trial court's opinion. *See id.* (noting that allowing Sterns to be child's parents would be in that child's best interest).

43. *See id.* at 1238 (granting certification following appeal). The court granted continuation of visitation rights for Mrs. Whitehead during the appeal, contrary to the opinion of the lower court. *See id.*

44. *See id.* at 1240 (finding surrogacy agreement in conflict with public policy and statutory provision). The New Jersey Supreme Court held that surrogacy agreements violated the New Jersey Parentage Act by requiring the birth mother to give up her parental rights. *See id.* at 1240, 1242 (finding violation of Parentage Act). Under the act, a mother was only defined as the "birth mother," and the act does not allow someone to be compelled to terminate his or her parental rights. *See id.* at 1242 (defining legal mother only as birth mother). The court also held that the agreement conflicted with New Jersey public policy due to the potential for the degradation of women volunteering to be surrogate mothers and the separation of a child from its natural parent. *See id.* at 1246–50 (finding surrogacy agreements contrary to public policy).

45. 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

46. *See id.* at 949 (invalidating gestational surrogacy agreement despite intended parents' genetic relation to baby).

tered into an uncompensated gestational surrogacy contract with Andrea's sister, Gina.⁴⁷ An embryo created from Andrea's egg and Peter's sperm was implanted in Gina.⁴⁸ The couple filed a complaint seeking a pre-birth order allowing them to be listed as the child's parents on the child's birth certificate.⁴⁹

The Superior Court of New Jersey denied the pre-birth order.⁵⁰ Instead, the court issued a separate order, allowing the couple to be listed as parents on the birth certificate, following a mandated 72-hour wait period after the child's birth, so long as the certificate was filed before expiration of the required five-day deadline to file birth certificates.⁵¹ In its decision, the court urged the Legislature to clarify the issues surrounding gestational surrogacy.⁵² Nevertheless, without such guidance, the court was bound by precedent, set by *Baby M* and the applicable statutes, which required a 72-hour wait period before a birth mother could relinquish her parental rights.⁵³

In 2009, the New Jersey Superior Court (Chancery Division) decided *A.G.R. v. D.R.H.*,⁵⁴ a case featuring a same-sex male couple, D.R. and S.H., who entered into a gestational surrogacy agreement with D.R.'s sister, A.G.R.⁵⁵ The couple used S.H.'s sperm and a donor egg.⁵⁶ A.G.R. gave birth to twins in October 2006, and shortly after, A.G.R. sought parental rights over the children.⁵⁷ The couple argued that the case was distinguishable from *Baby M* because A.G.R. had no genetic connection to the

47. *See id.* at 949–50 (stating wife could not carry pregnancy to term, so Gina volunteered to serve as her sister's surrogate).

48. *See id.* (making both Andrea and Peter genetic parents of child).

49. *See id.* at 950 (arguing pre-birth orders could be entered in gestational surrogacy agreements as opposed to traditional surrogacy agreements, where such orders had been prohibited).

50. *See id.* at 949 (denying pre-birth order).

51. *See id.* (modifying original agreement to allow intended parents to be listed as legal parents after seventy-two hour wait period and before five-day period to file birth certificate elapsed).

52. *See id.* at 954 (supporting ability of Legislature to provide clarity on issues surrounding surrogacy).

53. *See id.* at 953–54 (finding surrogate still has connection to baby, even if not biologically, and as such, she cannot be forced to give up her rights to child prior to that child's birth).

54. No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

55. *See id.* at *1–2 (discussing defendants' decision to start family and their desire to have genetic link to child).

56. *See id.* at *2.

57. *See id.* at *2–3 (asserting parental rights over twin girls). During the pregnancy, the relationship between the couple and A.G.R. began to fall apart. *See* Joanna L. Grossman, *The Complications of Surrogacy: A New Jersey Court Refuses to Uphold a Surrogacy Arrangement, but Awards Full Custody to the Intended Father*, VERDICT (Jan. 10, 2012), <http://verdict.justia.com/2012/01/10/the-complications-of-surrogacy> (describing relationship between couple and A.G.R.). A.G.R. and her brother worked together and had a rocky work relationship. *See id.* (discussing deteriorating relationship between A.G.R. and her brother). During the pregnancy, A.G.R.

child, but the court disagreed stating: “the genetic makeup of the infant as it relates to the birth mother was only mentioned once in *Baby M*.”⁵⁸

The A.G.R. court pointed to the same public policy considerations referred to in *Baby M* as being relevant to the case at hand.⁵⁹ Once again noting the Legislature’s silence on the enforceability of surrogacy agreements, the court was limited to the definitions of “mother” and “father” provided in the New Jersey Parentage Act.⁶⁰ The A.G.R. decision also reflected the court’s reluctance to terminate parental rights of the birth mother.⁶¹ Ultimately, the court upheld the parental rights of A.G.R. and found the gestational agreement void.⁶² The court, however, recognized S.H. as the legal father due to his genetic connection to the child.⁶³ While A.G.R. initially gained parental rights after being deemed the children’s legal mother, S.H. subsequently won sole custody in 2011, when the court considered the children’s best interests.⁶⁴ Nonetheless, D.R. was still left with no legal parental rights to the child he intended to raise with his husband.⁶⁵

“became depressed,” disappeared, “and lived in her car for three days” *See id.* (discussing issues that arose during pregnancy).

58. *See A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *4–5, 7 (finding *Baby M* holding not limited to situations of traditional surrogacy). The court also compared New Jersey surrogacy laws to those of California. *See id.* at *11. The court stated that California law takes the position that it is “disrespectful toward women to not allow them to enter into agreements of this nature, whereas New Jersey law takes a clearly different position that agreements of this nature have a ‘potential for devastation’ to women.” *See id.* (citation omitted) (quoting *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988)).

59. *See id.* at *9 (noting public policy concerns recognized in *Baby M* also apply to this case). The court suggested the *Baby M* decision still controlled the situation, even though the surrogate had no genetic connection to the child. *See id.* at *10 (relying on *Baby M* precedent).

60. *See id.* at *8 (finding Legislature’s silence following *Baby M* decision suggested deliberate choice not to recognize surrogacy).

61. *See id.* at *11–12 (discussing why surrogacy contracts “‘are directly contrary to the objectives of our laws’” (quoting *Baby M*, 537 A.2d at 1250)).

62. *See id.* at *12–13 (finding consent to judgment of adoption void).

63. *See id.* at *13 (referencing New Jersey Parentage Act). The court declined to find both defendants as legal parents of the children, and it only made the determination in regards to S.H., who was the genetic father of the children. *See id.*

64. *See Grossman, supra* note 57 (explaining subsequent custody hearing). At this subsequent hearing, the court considered what was in the children’s best interest. *See id.* Following the initial court decision, A.G.R. returned to the Baptist faith and adopted negative views of homosexuality, which she shared with the twins while in their presence. *See id.* (discussing factors considered in custody decision). Considering A.G.R.’s views, among many other factors, the judge found S.H. more suited to deal with the unique needs of the twins. *See id.* (deciding custody dispute in favor of S.H.).

65. *See A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *12–13 (recognizing S.H. and A.G.R. as legal parents).

B. *Governor Christie Refuses to Pacify Surrogacy Concerns by Vetoing Gestational Surrogacy Legislation*

Hearing the outcry for guidance from the courts, in 2012, the New Jersey Legislature proposed a bill to regulate gestational surrogacy.⁶⁶ The State Senate introduced the Gestational Carrier Agreement Act in February 2012, and passed the bill as amended on May 31, 2012.⁶⁷ Less than one month later, the bill passed the Assembly on June 21, 2012.⁶⁸ The Gestational Carrier Agreement Act, however, came to a standstill on August 9, 2012, when Governor Chris Christie vetoed the bill.⁶⁹

The Gestational Carrier Act would have validated gestational surrogacy agreements and imposed regulations clarifying standards for enforceability.⁷⁰ Under the act, gestational surrogacy agreements meeting the specific codified conditions would be presumed enforceable in New Jersey courts.⁷¹ First, the bill regulated which individuals could serve as a surrogate, specifying that the individual must be at least 21-years-old; have given birth to at least one other child; retained an attorney; and undergone a psychological and medical evaluation.⁷² Moreover, the intended parents would be required to undergo psychological evaluations and to retain independent counsel.⁷³ The proposed act also required the agreement between the intended parents and the surrogate to be in writing.⁷⁴

Notably, if an intended parent was married, in a civil union, or in a domestic partnership, the proposed act required both partners to enter

66. See S. 1599, 215th Leg. (N.J. 2012) (validating compensated gestational surrogacy agreements with regulations).

67. See *id.*; see also *Vitale-Weinberg-Buono Legislation to Permit Gestational Carrier Agreements Clears Senate*, POLITICKERNJ (May 31, 2012, 5:49 PM), <http://politickernj.com/2012/05/vitale-weinberg-buono-legislation-to-permit-gestational-carrier-agreements-clears-senate/> (noting bill's passage in New Jersey Senate).

68. See N.J. S. 1599 (passing in New Jersey Assembly in June 2012).

69. See Christie, *supra* note 22 (explaining Governor's veto of Gestational Surrogacy Act).

70. See N.J. S. 1599 (providing regulations for gestational surrogacy agreements).

71. See *id.* at 2 (declaring gestational surrogacy agreements to be in accordance with New Jersey public policy).

72. See *id.* at 4–5 (providing requirements as to who could serve as surrogate under legally enforceable agreements). The law would create a twenty-one-year-old age requirement, as well as medical and psychological requirements. See *id.* (listing requirements to qualify as surrogate).

73. See *id.* at 3, 5 (stating medical and psychological screenings must occur prior to any medical procedures to begin embryo implantation in surrogate). A requisite psychological evaluation is defined as “an evaluation and consultation by a clinical social worker, psychotherapist, or psychiatrist licensed by the State of New Jersey or licensed to practice in any one of the United States” *Id.* at 3.

74. See *id.* at 5 (specifying that agreements must be in writing to be enforceable).

into the surrogacy agreement.⁷⁵ Further, the bill recognized that neither the surrogate mother nor the spouse of a surrogate would be considered a legal parent of the child.⁷⁶ The intended parents would become the child's legal parents "immediately upon the birth of the child"⁷⁷ The proposed act also validated compensated surrogacy agreements, provided the compensation was limited to "reasonable expenses in connection with the agreement"⁷⁸

Ultimately, Governor Christie did not think New Jersey was ready to be one of the first states regulating gestational surrogacy.⁷⁹ Referring to surrogacy agreements as "contracts for the birth of children" and "arranged births," Governor Christie vetoed the Gestational Carrier Act, claiming the questions and issues raised by gestational surrogacy agreements had not been studied enough by the Legislature to justify passing such a law.⁸⁰

75. *See id.* (stating any intended parent's spouse must be included in surrogacy agreement and stipulate that both partners would become legal parents at birth).

76. *See id.* at 6 ("[I]f the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child's birth").

77. *See id.* at 4 (stating intended parents become legal parents upon the birth of child).

78. *See id.* at 6 (allowing only reasonable expenses as permissible compensation to gestational surrogate). The act defined "[r]easonable expenses" as: [M]edical, hospital, counseling or other similar expenses incurred in connection with the gestational carrier agreement, reasonable attorney fees and costs for legal services in connection with the gestational carrier agreement, and the reasonable living expenses of the gestational carrier during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and during the period of postpartum recovery.

Id. at 4. Additionally, the act clarified that these payments could be made directly to the surrogate or to a third party supplying goods or services in relation to the surrogacy agreement. *See id.* (specifying how payments could be made).

79. *See Christie, supra* note 22, at 2 (finding bill "would now make New Jersey one of the few states in the nation that expressly authorize gestational carrier agreements").

80. *See id.* (claiming more in depth study on gestational surrogacy is needed). Governor Christie noted that "[p]ermitt[ing] adults to contract with others regarding a child in such a manner unquestionably raises serious and significant issues." *Id.* Governor Christie will most likely get another chance to review the legislation in the upcoming year, however, because the New Jersey legislature has proposed the Gestational Carrier Act again. *See* Susan K. Livio, *N.J. Senate Approves Bill Expanding Definition of Surrogate Parenting*, STAR-LEDGER (Feb. 5, 2015, 5:22 PM), http://www.nj.com/politics/index.ssf/2015/02/nj_senate_approves_bill_expanding_definition_of_su.html (discussing proposal of previously-vetoed bill). In February 2015, the bill passed in the New Jersey Senate, and the bill was sent to the Assembly for further review. *See id.* (noting Assembly must vote on bill).

C. *Taking a Peek into Surrogacy Laws in Other States*

The advances in infertility technology over the past two decades, in particular regarding gestational surrogacy, have resulted in patchwork approaches to surrogacy agreements by the states.⁸¹ Due to the complications that arise when the surrogate mother is also the genetic mother of the child, as seen in *Baby M*, traditional surrogacy has been deemed unacceptable in most states.⁸² On the other hand, laws regarding gestational surrogacy, where the surrogate mother has no genetic connection to the child, vary from state to state.⁸³ Some jurisdictions, including Arizona and the District of Columbia, completely ban surrogacy agreements.⁸⁴ Alternatively, other states have no relevant statutes, or only ambiguous case law regarding the validity of surrogacy agreements.⁸⁵ Further, other states put only partial bans on surrogacy.⁸⁶

California's history with surrogacy agreements is much more progressive than New Jersey's, as demonstrated by the Supreme Court of California's decision in the 1993 case *Johnson v. Calvert*.⁸⁷ In *Johnson*, the Supreme Court of California upheld a gestational surrogacy agreement and held that the intended mother was the legal mother of the child born as a result of a surrogacy agreement.⁸⁸ The surrogate and the intended

81. See Conklin, *supra* note 2, at 74–87 (discussing differences in surrogacy laws by state).

82. See *id.* at 74–79 (noting that traditional surrogacy agreements are unenforceable in New Jersey and New York).

83. See *Guide to State Surrogacy Laws*, CTR. FOR AM. PROGRESS (Dec. 17, 2007), <http://www.americanprogress.org/issues/women/news/2007/12/17/3758/guide-to-state-surrogacy-laws/> (noting which states ban surrogacy, threaten voids and penalties, threaten voids only, enforce some prohibitions of surrogacy, and allow surrogacy generally, but regulate it).

84. See *id.* (noting that currently, Arizona and District of Columbia ban all surrogacy agreements). Nevertheless, Washington, D.C. currently has legislation pending that would allow and regulate gestational surrogacy. See Council B20-0032, 2013 Leg. (D.C. 2013) (validating surrogacy contracts and providing guidance on how to enforce agreements).

85. See Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 141–42 (2006) (stating no Pennsylvania statutes exist regarding surrogacy). Pennsylvania has a policy for gestational surrogacy enacted by the Department of Health, which allows intended parents to be considered the legal parents of the child on the birth certificate. See *id.* (explaining surrogacy options in Pennsylvania). This policy “is not binding on the courts,” but at least fifteen counties have recognized the intended parents on birth certificates. See *id.* at 142 & n.68 (discussing Pennsylvania recognition of surrogacy).

86. See *Guide to State Surrogacy Laws*, *supra* note 83 (explaining that some states prohibit certain types of agreements while allowing others). North Dakota “recognizes gestational carrier agreements,” while voiding traditional surrogacy agreements. See *id.* (discussing North Dakota law). The state of Washington allows for surrogacy, but only allows for surrogate compensation of reasonable expenses and nothing beyond that. See *id.* (explaining Washington surrogacy law).

87. 851 P.2d 776 (Cal. 1993) (in bank).

88. See *id.* at 782 (upholding validity of gestational surrogacy agreement).

mother both presented acceptable claims as the child's mother because the surrogate gave birth to the child, and the intended mother was the child's genetic mother.⁸⁹ The court analyzed the surrogacy agreement based on the parties' intentions and found the intended mother had planned to both ensure the birth of the child and then raise the child as her own.⁹⁰ Further, the court held that gestational surrogacy agreements were not contrary to public policy and found no constitutional rights at issue for the surrogate.⁹¹

Following up on the court's progressive attitude toward surrogacy, last year, California was among the first states to adopt a statute enforcing gestational surrogacy agreements.⁹² New York now has similar legislation proposed.⁹³ The California and New York statutes are similar to the vetoed New Jersey legislation, as all three presume gestational carrier agreements to be valid while placing regulations on such agreements to protect all of the parties involved.⁹⁴ Additionally, the California statute requires

89. *See id.* at 781 (finding both women presented proper evidence of mother-child relationship).

90. *See id.* at 782 (looking to parties' intentions).

91. *See id.* at 785–86 (establishing intended parents as legal parents).

92. *See* CAL. FAM. CODE § 7962 (West 2014) (validating and regulating surrogacy agreements). The new California law validates gestational surrogacy agreements as long as the parties to a surrogacy agreement have separate counsel, have the agreement notarized, attest to their compliance with the agreement under penalty of perjury, and file the agreement with the court. *See id.* (explaining requirements of new law).

In addition, intended parents in California can establish their parental rights for a child prior to that child's birth. *See id.* The language of the statute provides "[u]pon petition of any party to a properly executed assisted reproduction agreement for gestational carriers, the court shall issue a judgment or order establishing a parent-child relationship The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633." *Id.* § 7962(f)(2).

93. *See* Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0 (following New York state senator's push for bill allowing gestational surrogacy). Brad Hoylman, a New York state senator, co-sponsored a bill to make compensated surrogacy legal and the agreements enforceable. *See id.* (discussing proposed surrogacy bill). The senator and his partner used a surrogate in California to start their own family, but the couple had to travel to California to find a surrogate because New York's laws were so harsh. *See id.* (explaining personal experiences with surrogacy). Hartocollis discusses the extreme costs for New Yorkers of leaving the state to find surrogate mothers. *See id.* (discussing consequences of harsh surrogacy laws).

94. *See* Richard Moody, *Updating NY's Surrogacy Laws*, LEGISLATIVE GAZETTE (Mar. 3, 2014), <http://www.legislativegazette.com/Articles-Top-Stories-c-2014-03-03-87021.113122-Updating-NYs-surrogacy-laws.html> (expanding on proposed New York bill regarding surrogacy). Moody notes that the New York bill "legally defines several terms such as artificial insemination, assisted reproductive technology and providers, and collaborative reproduction." *Id.* Furthermore, if passed, the bill "would also set new rules for determining the parentage of a child born through a surrogacy agreement. . . . allow[ing] parentage to be determined before birth but

that the parties each retain individual counsel and have the agreement notarized before embryo implantation occurs.⁹⁵

III. NEW JERSEY LACKS MATERNAL INSTINCT BY ONLY SUPPORTING PRESUMPTION OF FATHERHOOD IN *T.J.S.*

The New Jersey Supreme Court addressed the enforceability of a gestational surrogacy agreement in 2012, in *T.J.S.*, refusing to validate the agreement and leaving the intended mother without legal rights to her child.⁹⁶ The intended parents argued that New Jersey's Parentage Act could be construed to presume parentage of the intended mother.⁹⁷ The Supreme Court split on the issue in a per curiam opinion, resulting in the affirmance of the Appellate Division's decision, which had declined to enforce the agreement. Still, the concurring and dissenting opinions thoroughly discussed both sides of the issues raised by the case.⁹⁸

A. *Facts and Procedure*

T.J.S. and his wife, A.L.S., wanted to have a child but were unable to do so naturally.⁹⁹ T.J.S. and A.L.S. entered into an agreement with A.F., an unrelated third party, to serve as a surrogate and carry a child for the couple.¹⁰⁰ Through in vitro fertilization, the egg of an anonymous donor was fertilized with the husband's sperm, and the resulting embryo was implanted in A.F.¹⁰¹ The agreement stated A.F. would relinquish parental rights to the child seventy-two hours after the child was born, not prior to birth.¹⁰²

not take effect until after birth." *Id.* Moreover, the bill would notably "define who would be allowed to petition for a judgment of the parentage of the child." *Id.*

95. See CAL. FAM. CODE § 7962 (regulating gestational surrogacy agreements).

96. See *In re T.J.S.*, 54 A.3d 263, 264 (N.J. 2012) (Hoens, J., concurring) (declining to enforce gestational surrogacy agreement).

97. See *id.* (declining to enforce surrogacy agreement despite allegations of gender discrimination).

98. See *id.* at 263–80 (providing multiple opinions).

99. See *id.* at 264 (Hoens, J., concurring) (explaining A.L.S. was unable to carry pregnancy to term). New Jersey law presumes a pregnant woman's husband to be the biological father of the child she gives birth to. See N.J. STAT. ANN. § 9:17-43(a)(1) (West 2013) (listing multiple ways men can be presumed to be child's father). This provision, entitled "Presumptions," lists over six different ways a man can be presumed to be a father, but does not address any presumptions regarding maternity. See *id.* § 9:17-43(a) (listing presumptions of paternity).

100. See *T.J.S.*, 54 A.3d at 264 (Hoens, J., concurring) (noting A.F. was unrelated to intended parents or egg donor).

101. See *id.* (explaining use of in vitro fertilization). The anonymous egg donor had relinquished any and all rights to the eggs. See *id.* at 270 (Albin, J., dissenting) (stating egg donor "had relinquished her legal rights to the egg[]").

102. See *id.* at 271 (noting anticipation of seventy-two hour wait period required by law). New Jersey law requires a seventy-two hour wait period before a biological mother can relinquish her rights to a child. See N.J. STAT. ANN. § 9:3-41(e). The statute provides that "[a] surrender of a child shall not be valid if taken prior to the birth of the child who is the subject of the surrender. A surrender by

In anticipation of A.F. relinquishing parental rights, A.L.S. and T.J.S., the “intended parents,” sought a pre-birth order from the New Jersey Superior Court (Chancery Division), stating that their names should be listed on the child’s birth certificate as the child’s legal parents upon A.F.’s renunciation of her parental rights.¹⁰³ The pre-birth order was granted on July 2, 2009, and the child was born on July 7, 2009.¹⁰⁴ As anticipated, A.F. relinquished all parental rights seventy-two hours after the baby’s birth, and a birth certificate was issued listing the intended parents, T.J.S. and A.L.S., as the parents of the newborn.¹⁰⁵ Even though A.F. never tried to assert parental rights, the Department of Health and Human Services, Bureau of Vital Statistics filed a motion for the court to vacate the pre-birth order, which would remove A.L.S. from being listed as the child’s mother.¹⁰⁶ The trial court granted the motion, and the Appellate Division ultimately affirmed that judgment.¹⁰⁷

On appeal, the couple argued that New Jersey’s Parentage Act violated the state constitution through gender-based discrimination.¹⁰⁸ The couple asserted that the provisions of the New Jersey Parentage Act presuming husbands to be the fathers of children to whom their wives give birth should be read to construe a presumption of maternity for infertile wives as well.¹⁰⁹ The couple claimed that the lack of a presumption of

the birth parent of a child shall not be valid if taken within 72 hours of the birth of the child.” *Id.*

103. *See T.J.S.*, 54 A.3d at 271 (Albin, J., dissenting) (seeking pre-birth order by filing complaint in Chancery Division, Family Part in Camden County, requesting intended parents to be listed on birth certificate).

104. *See id.* (noting that Superior Court granted order that intended parents be listed as biological parents on child’s birth certificate).

105. *See id.* (listing A.L.S. and T.J.S. as parents of child). The surrogate relinquished her rights as agreed and never attempted to assert parental rights over the child. *See id.* (stating that surrogate gave up her parental rights to child).

106. *See id.* (stating Department had not received notice of pre-birth order). Further, a worker in the hospital had never seen a gestational surrogacy situation before and called the Bureau of Vital Statistics to make the office aware of the arrangement. *See* Kate Zernike, *Court’s Split Decision Provides Little Clarity on Surrogacy*, N.Y. TIMES (Oct. 24, 2012), http://www.nytimes.com/2012/10/25/nyregion/in-surrogacy-case-nj-supreme-court-is-deadlocked-over-whom-to-call-mom.html?pagewanted=all&_r=0 (explaining how Department became aware of surrogacy agreement).

107. *See T.J.S.*, 54 A.3d at 264 (Hoens, J., concurring).

The trial court, after considering the arguments raised on behalf of the plaintiffs and the Department, granted the Department’s application and vacated the order that had been entered prior to the child’s birth. The Appellate Division affirmed that judgment, rejecting both the statutory and constitutional arguments that plaintiffs advanced on appeal.

Id.

108. *See In re T.J.S.*, 16 A.3d 386, 389–90 (N.J. Super. Ct. App. Div. 2011) (discussing arguments raised on appeal).

109. *See id.* (arguing Parentage Act is discriminatory based on gender). *See generally* N.J. STAT. ANN. § 9:17-44(a) (West 2013) (presuming husbands of women who have been artificially inseminated with donor’s sperm to be fathers of children conceived through artificial insemination). The statute provides that:

maternity equal to the presumption of paternity constituted an equal protection violation because it treated similarly-situated infertile married men and infertile married women differently, without justification.¹¹⁰ Applying New Jersey's "substantial relationship" test for equal protection claims, the Appellate Division found no fundamental right at stake and then rejected the equal protection claims, finding that the differences in the law were based upon "actual reproductive and biological differences."¹¹¹ Further, the Legislature had created the presumption of paternity for circumstances where a man is "highly likely to be the *biological* father of a child," which the Appellate Division found irrelevant to infertile women because the women would not be biologically linked to the child.¹¹²

These decisions had the effect of removing the intended mother, A.L.S., from the birth certificate, so she had no legal rights over the child until she could go through the lengthy and costly adoption process, as a stepparent to the child that was genetically related to her husband.¹¹³ In light of the appellate court's decision, T.J.S. and A.L.S. appealed to the Supreme Court of New Jersey.¹¹⁴

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent shall be in writing and signed by him and his wife.

Id.; see also *id.* § 9:17-41(a) (defining mother and child relationship based only on who gave birth to child); *id.* § 9:17-43(a)(1) (listing all ways man can be presumed to be child's father).

110. See *T.J.S.*, 16 A.3d at 390 (explaining equal protection claims).

111. See *id.* at 398 (rejecting equal protection claims). The Appellate Division stated the "right to equal protection does not require us to scrutinize gender distinctions that are based on real physiological differences to the same extent we would scrutinize those distinctions when they are based on archaic, invidious stereotypes about men and women." *Id.* at 393 (quoting *State v. Chun*, 943 A.2d 114, 143 (N.J. 2008)).

112. See *id.* at 393 (discussing purpose of statute). The court stated the purpose of the presumption of paternity was to ensure children received financial support from their biological fathers. See *id.* (explaining Legislature's intent). The Legislature focused on the biological connection, which the court argued did not apply in situations with no maternal biological connection. See *id.* (finding written agreements not enough to establish maternity).

113. See *In re T.J.S.*, 54 A.3d 263, 269 (N.J. 2012) (Albin, J., dissenting) (observing that court's decision would require intended mother to go through adoption process even though agreement was never disputed by any relevant parties). The appellate opinion did not see the adoption process as costly or unnecessary for the plaintiffs. See *T.J.S.*, 16 A.3d at 398 (discussing effects of adoption process on plaintiffs). The Appellate Division found this to be an "acceptable means of establishing parenthood" and implied that the plaintiffs were just looking for a more convenient method. See *id.* (finding adoption to be adequate method of obtaining parental rights).

114. See *T.J.S.*, 54 A.3d at 263 (per curiam) (seeking certification to Supreme Court of New Jersey).

B. *New Jersey Supreme Court Delivers Multiple Opinions*

The New Jersey Supreme Court heard the case and issued its decision on October 24, 2012.¹¹⁵ The court reviewed the constitutionality of the Parentage Act in light of the equal protection issues raised by T.J.S. and A.L.S.¹¹⁶ The initial per curiam opinion provides no guidance on the matter and simply stated “[t]he judgment of the Appellate Division . . . is affirmed by an equally divided Court.”¹¹⁷ Both sides of the issue were thoroughly analyzed in the concurring and dissenting opinions.¹¹⁸ The concurring opinion heavily relied upon the Appellate Division’s decision finding no equal protection violation and declining to enforce the surrogacy agreement.¹¹⁹ The dissent argued that the relevant provisions of the Parentage Act created an equal protection violation, and would have reversed the Appellate Division’s judgment.¹²⁰

1. *The Concurrence Fosters Dated Notions of Parentage*

The concurrence supported affirming the Appellate Division’s judgment, which refused to enforce the gestational surrogacy agreement.¹²¹ First, the opinion agreed with the Appellate Division’s analysis of the language of the Parentage Act.¹²² The statute provided that a biological or genetic connection to a child is the only way to become the child’s legal mother at birth; therefore, the concurrence agreed that a written document could not create a legal mother-child relationship.¹²³

Second, the concurring justices rejected the equal protection claims raised against the Parentage Act.¹²⁴ The concurrence stated that a presumption of paternity does not automatically create a presumption of maternity, and the gender differentiations in the Parentage Act were based

115. *See id.*

116. *See id.* at 264 (Hoens, J., concurring) (reviewing constitutionality of Parentage Act).

117. *See id.* at 263 (per curiam) (affirming Appellate Division judgment through equally divided Supreme Court). Because the decision was equally divided, it had the effect of affirming the lower court. *See id.* (affirming lower court decision).

118. *See id.* at 264–80 (providing concurring and dissenting opinion).

119. *See id.* at 264–69 (Hoens, J., concurring) (upholding appellate court decision). Justice Hoens wrote the concurring decision and agreed with the reasoning provided by the Appellate Division. *See id.* at 264–65 (agreeing with Appellate Division’s reasoning).

120. *See id.* at 269–80 (Albin, J., dissenting) (finding New Jersey Parentage Act confers unequal rights to infertile men and infertile women). The dissent focused on the equal protection issues raised by the Parentage Act through the presumption of parentage for infertile men but not infertile women who choose surrogacy as a means to procreate. *See id.*

121. *See id.* at 264–69 (Hoens, J., concurring).

122. *See id.* at 264 (supporting maternity determination based upon genetic connection).

123. *See id.* (citing N.J. STAT. ANN. § 9:17-41(a)) (discussing Parentage Act).

124. *See id.* at 264–65 (dismissing equal protection challenge).

upon physiological differences between men and women.¹²⁵ The concurrence also noted that intended mothers still had the option to become legal mothers through the adoption process, and the desire for a faster, more convenient process did not create a constitutional right to have one.¹²⁶ Further, the intended parents argued that infertile men and infertile women were similarly situated and deserved equal protection.¹²⁷ The concurrence rejected this argument because the individuals in the infertile couple were not the only parties to the agreement; the concurrence alternatively stressed the significance of the agreement requiring a third party, the surrogate mother, who also had rights.¹²⁸ The intended mother had no fundamental or statutory parental right, but as the birth mother, the surrogate mother had a constitutional and statutory parental right.¹²⁹ The concurrence would not recognize a parental right for the intended mother due to the conflict with the birth mother's established rights.¹³⁰

Last, the concurrence found that the legislative or executive branches would be better suited to confront the concerns raised by the intended parents.¹³¹ The legislature would be better suited to make decisions regarding parentage because the legislature has the flexibility and time to pursue a deeper inquiry into the issue.¹³² The concurrence stated that surrogacy was a social policy issue requiring an informed debate and consideration of all parties involved, which is not a constitutional issue but one for the legislature or executive.¹³³

2. *Is It a Boy or a Girl? The Dissent Asserts Gender Discrimination*

The dissenting justices alternatively found that the Parentage Act treated "similarly situated infertile married women and infertile married men" differently, thereby violating the state's equal protection guarantee.¹³⁴ First, the dissent criticized the Appellate Division's focus on hypo-

125. *See id.* at 264 (finding differences in statutes based upon physiological gender differences).

126. *See id.* at 264–65 (supporting Appellate Division's observation of process already in place for intended mother).

127. *See id.* at 266 (explaining intended parents' arguments).

128. *See id.* (rejecting plaintiffs' characterization as infertile people). Justice Hoens stressed the importance of a third person in surrogacy agreements to combat claims that husbands and wives were being treated unequally. *See id.* (stating child is still biologically connected to surrogate mother).

129. *See id.* (protecting rights of birth mother).

130. *See id.* (supporting birth mother's rights over intended mother's rights).

131. *See id.* at 267 (finding surrogacy would be better dealt with by executive or legislative branch).

132. *See id.* at 268 (discussing consequences of having court decide issue rather than Legislature).

133. *See id.* (stating issue requires consideration of all parties, including intended parents and surrogates, and is not court's role to determine).

134. *See id.* at 269 (Albin, J., dissenting) (stating case is about unequal treatment of men and women).

thetical scenarios.¹³⁵ The Appellate Division found the “‘surrogate mother whose parental rights are deemed worthy of protection . . . stand in the way of the infertile wife’s claim to automatic motherhood,’” but the dissent stressed the difference between such a hypothetical scenario and the case at hand, where the surrogate mother was cooperative and supportive of the intended parents.¹³⁶ Thus, the Appellate Division’s conclusion was based upon a fictional scenario, not the facts of the case at hand.¹³⁷

Second, the dissent claimed that the concurrence’s analysis of the Parentage Act did not comport with the purpose of the statute.¹³⁸ According to the dissent, the purpose of the Parentage Act was to ensure children receive the financial support due to them from their parents.¹³⁹ The concurrence’s interpretation of the statute would, however, in a practical sense, leave a child born through a surrogacy agreement without a legal mother during the time it takes to complete the adoption process.¹⁴⁰

Third, the dissent analyzed the statute under the state’s “substantial relationship” equal protection test and reached a conclusion contrary to the Appellate Division’s decision.¹⁴¹ The state’s balancing test weighs “(1) the nature of the right at stake, (2) the extent to which the challenged [law] restricts that right, and (3) the public need for the statutory restriction.”¹⁴² The dissent recognized there was no fundamental right at issue, but the right for infertile wives to be legal parents, in the same way infertile husbands would, was substantial.¹⁴³ Moving to the second prong of the test, the right was significantly restricted by forcing the intended

135. *See id.* at 272 (disagreeing with concurrence’s reliance on Appellate Division’s hypothetical situation).

136. *See id.* at 272–73 (alteration in original) (quoting *In re T.J.S.*, 16 A.3d 386, 396 (N.J. Super. Ct. App. Div. 2011)) (noting that surrogate did not try to assert rights to child, so court should limit focus of case to relevant facts).

137. *See id.* at 273 (finding concurrence’s reliance on hypothetical situations unconvincing).

138. *See id.* (discussing purpose of Parentage Act).

139. *See id.* (stating Parentage Act “guarantees that children will receive the financial support that is rightfully due from their parents”).

140. *See id.* (finding result contrary to intended purpose of statute). The dissent explained that the purpose of the act is to ensure children are always financially cared for, not to allow the law to leave a child without two legal parents when they are available. *See id.* (describing decision as contrary to Parentage Act). “Indeed, denying the infertile wife the opportunity to assert a parental right, after the surrogate surrenders her parental interests, leads to a result completely contrary to the purpose of the Parentage Act—a child without a *legal* mother responsible for the child’s financial support.” *Id.* at 277.

141. *See id.* at 276 (applying New Jersey’s “substantial relationship” test).

142. *Id.* (alteration in original) (quoting *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006)) (internal quotation marks omitted) (explaining balancing test).

143. *See id.* (recognizing no fundamental right at issue). “The right at issue is that of an infertile married woman to ‘equality of treatment relative to comparable’ infertile married men.” *See id.* (quoting *Lewis*, 908 A.2d at 215).

mother to go through the costly and time-consuming adoption process.¹⁴⁴ The dissent then found no necessity or “legitimate public need” to create this disadvantage for intended mothers because New Jersey did not prohibit surrogacy agreements, and the parties entered into the agreement knowingly and voluntarily.¹⁴⁵ Applying the balancing test, the dissent concluded that the Parentage Act violated the state’s equal protection guarantees by discriminating against infertile women.¹⁴⁶

Last, the dissent distinguished the case of *T.J.S.* from the infamous case of *Baby M.*¹⁴⁷ The concurring opinion and the Appellate Division decision used *Baby M.* to support the affirmance of the trial court’s holding, but the dissent found that the facts at hand created very different circumstances from those in *Baby M.*¹⁴⁸ The surrogacy agreement in *Baby M.* was declared void because it was against public policy; however, the decision in *Baby M.* did not declare all surrogacy agreements void.¹⁴⁹ The *Baby M.* court held that a surrogate’s parental rights could not be relinquished by contract or prior to birth.¹⁵⁰ The agreement in *T.J.S.* recognized A.F.’s ability to assert parental rights upon the birth of the child, but she did not do so.¹⁵¹ Additionally, the contract in *Baby M.* was void based upon public policy concerns, due to the compensation the surrogate received, but there was no evidence of compensation beyond costs relating to childbirth in *T.J.S.*¹⁵² Therefore, the *Baby M.* decision was distinguishable from *T.J.S.*¹⁵³

144. *See id.* (stating adoption can take two to three months). During this period, if the intended mother passed away, the child would be unable to benefit from worker’s compensation or Social Security benefits, and it would be unable to inherit from the mother if she would die intestate. *See id.* (discussing repercussions of refusing to recognize intended mother as legal mother of child).

145. *See id.* at 277 (commenting that law disfavoring intended mothers actually acts in contrast to purpose of Parentage Act). The dissent asserted that the purpose of the Parentage Act was to ensure children *had* parents who were legally and financially responsible for the child, not to remove a potential legal parent. *See id.* (discussing purpose of Parentage Act).

146. *See id.* at 278 (finding gender discrimination). “The disparate treatment of infertile wives based solely on their sex is not justified by any substantial government interest and is an arbitrary denial of A.L.S.’s right to equal protection of the laws.” *Id.*

147. *See id.* (distinguishing facts of *T.J.S.* from facts of *Baby M.*).

148. *See id.*

149. *See id.* (explaining *Baby M.* holding). Only compensated surrogacy agreements are against New Jersey public policy; the New Jersey courts never found any fault with uncompensated agreements, and surrogacy agreements are not illegal in the state. *See id.* (summarizing New Jersey surrogacy law).

150. *See id.* (discussing holding of *Baby M.*).

151. *See id.* (describing facts of *T.J.S.*).

152. *See id.* at 278–79 (stating record only suggests compensation for costs related to pregnancy and birth of child).

153. *See id.* at 269–80 (finding presumption of paternity present under Artificial Insemination statute, but lack of presumption of maternity under Parentage Act, creating inequality of law).

IV. CRITICAL ANALYSIS: *T.J.S.* ILLUSTRATES THE OUTCRY FOR THE
ADOPTION OF LEGISLATION TO PROTECT PARTIES TO
GESTATIONAL SURROGACY AGREEMENTS

By failing to enforce gestational surrogacy agreements, the New Jersey Supreme Court halted the progress of infertility technology and limited New Jersey residents' options for how to become parents.¹⁵⁴ New Jersey courts have consistently refused to enforce surrogacy agreements.¹⁵⁵ New Jersey courts could have followed California's lead after *Johnson* and upheld surrogacy agreements by distinguishing gestational surrogacy cases from *Baby M.*¹⁵⁶ Alternatively, the evenly divided *T.J.S.* court also could have found that New Jersey's Parentage Act violated the state's equal protection guarantee with just one more vote; nevertheless, the equally split court upheld the lower courts' decisions and continued New Jersey's tradition of declining to enforce surrogacy agreements.¹⁵⁷ The courts continuously invalidate surrogacy agreements because the agreements are contradictory to the New Jersey Parentage Act and the state's public policy.¹⁵⁸ Because of the courts' anti-enforcement stance on surrogacy agreements, the only effective option to protect parties to surrogacy agreements is through legislation, which the courts have frequently suggested as a remedy.¹⁵⁹ Moreover, legislation would create guidelines to ease the public policy concerns associated with surrogacy and provide protection to the parties involved.¹⁶⁰

154. *See id.* at 263 (per curiam) (failing to enforce surrogacy contract).

155. *See, e.g., id.* (refusing to recognize intended mother as legal mother and removing intended mother from birth certificate); *In re Baby M.*, 537 A.2d 1227, 1264 (N.J. 1988) (declining to enforce surrogacy agreement resulting in surrogate mother being deemed legal mother); *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *1-3 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (refusing to enter pre-birth order in relation to surrogacy agreement); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (granting maternal rights to surrogate mother for same-sex couple).

156. *See Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (in bank) (upholding gestational surrogacy agreement).

157. *See* N.J. STAT. ANN. § 9:17-41(a) (West 2013) (defining mother and child relationship based only on who gave birth to child); *see also id.* § 9:17-44 (presuming husbands of women who have been artificially inseminated with donor sperm to be father of child); *T.J.S.*, 54 A.3d at 263 (per curiam) (upholding lower courts' decisions not to enforce surrogacy agreement).

158. *See T.J.S.*, 54 A.3d at 263 (per curiam) (finding surrogacy agreements contradictory to New Jersey Parentage Act); *see also Baby M.*, 537 A.2d at 1246 (discussing numerous public policy concerns with surrogacy agreements that were much more uncommon in past).

159. *See T.J.S.*, 54 A.3d at 263 (per curiam) (refusing to enforce surrogacy agreement); *see also* Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 515 (1995) (supporting legislation as necessary reform to protect parties in surrogacy agreements). Brandel argues for legislation to protect the parties to these agreements due to the states' highly inconsistent "patchwork of judicial precedent and legislative activity." *See id.*

160. *See, e.g.,* S. 1599, 215th Leg. (N.J. 2012) (enforcing gestational surrogacy agreements and providing regulation for surrogacy agreements).

A. *Legislation Would Soothe Surrogacy's Contradictions with the Parentage Act*

The New Jersey Supreme Court missed its opportunity to bring New Jersey's surrogacy law up to date, but the courts frequently suggest that it is the Legislature that should take up the issue.¹⁶¹ The concurrence in *T.J.S.* put a strong emphasis on why the Legislature would be more suited to handle the issue; and the courts in *A.G.R.* and *A.H.W.* also mentioned possible legislative intervention.¹⁶² Thus, while the courts have not found it appropriate to enforce these agreements, the Legislature should change the law to enforce them.¹⁶³

Legislation would resolve surrogacy agreements' contradiction with the requirements of the Parentage Act.¹⁶⁴ The proposed New Jersey bill, for example, would have amended the relevant parts of the New Jersey Parentage Act to properly allow for intended parents to be the legal par-

161. *See, e.g., T.J.S.*, 54 A.3d at 266 (Hoens, J., concurring) (noting that Legislature would be better suited to handle issues surrounding surrogacy); *Baby M*, 537 A.2d at 1235 (stating its holding did not preclude Legislature from creating legislation to allow surrogacy); *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (noting Legislature could have allowed surrogacy by statute but had not yet done so); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (stating Legislature could weigh in on gestational surrogacy contracts, but courts must follow current law as closely as possible prior to legislative action). In each of these cases, the courts found that applicable statutory authority and case law precluded enforcement of compensated surrogacy agreements but acknowledged the ability of the legislative branch to change the statutory constraints on these agreements. *See, e.g., T.J.S.*, 54 A.3d at 266 (Hoens, J., concurring) (discussing potential legislative action).

162. *See T.J.S.*, 54 A.3d at 266 (Hoens, J., concurring) (finding Legislature better suited to consider issues surrounding surrogacy); *A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (suggesting Legislature could ascertain rights of parties to surrogacy agreements); *A.H.W.*, 772 A.2d at 954. The concurrence in *T.J.S.* stated that the Legislature is "ordinarily the body vested with making decisions about such important social policies as this." *See T.J.S.*, 54 A.3d at 267 (Hoens, J., concurring). Additionally, the court in *A.H.W.* seemed to support legislative intervention that would create relief for the intended parents. *See A.H.W.*, 772 A.2d at 954 (discussing possible ways to provide relief for parties involved). The *A.H.W.* court found that absent legislative action to decipher the rights of the involved parties, "[t]he most prudent course . . . is to follow the current statutes as closely as possible while allowing the parties, to the maximum extent possible, the relief requested." *See id.*

163. *See T.J.S.*, 54 A.3d at 266 (Hoens, J., concurring) (finding other branches of government better suited to confront surrogacy); *Baby M*, 537 A.2d at 1235 (noting Legislature could create statutes to allow for surrogacy agreements within constitutional limits); *A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (recognizing that Legislature had not yet acted on issue of surrogacy); *A.H.W.*, 772 A.2d at 954 (suggesting Legislature address issues surrounding surrogacy agreements).

164. *See N.J. STAT. ANN.* § 9:17-41(a) (West 2013) (establishing maternal rights for woman who gives birth to child). Surrogacy agreements currently contradict this law by attempting to recognize a woman who has not given birth to the child as the legal mother. *See T.J.S.*, 54 A.3d at 264 (Hoens, J., concurring) (affirming lower courts' findings and holding that agreement making intended mother also legal mother contradicts New Jersey Parentage Act).

ents of a child “immediately upon the birth of the child”¹⁶⁵ The statutory concerns would no longer be a barrier to intended parents.¹⁶⁶ The statute would allow for both the intended father *and* the intended mother to be legal parents at birth, so the equal protection issues discussed by the dissent in *T.J.S.* would become moot.¹⁶⁷

Legislation would also ease the statutory concerns set forth by the Appellate Division.¹⁶⁸ The *T.J.S.* concurrence favored the rights of the birth mother (the surrogate mother) over the intended mother because the Legislature had afforded the birth mother the presumption of maternity, while choosing not to grant intended mothers this right in any circumstances.¹⁶⁹ A model surrogacy statute would enforce agreements so an intended mother could be the legal parent at birth and would remove the 72-hour wait period required according to the adoption statute.¹⁷⁰

B. *Legislation Is Necessary to Calm Public Policy Concerns*

Proper legislation would provide safeguards for all of the parties involved in surrogacy agreements.¹⁷¹ Legislation should create requirements for both surrogate mothers and intended parents, in order for an

165. *See* S. 1599, 215th Leg. (N.J. 2012) (making intended parents of valid gestational surrogacy agreement legal parents upon child’s birth).

166. *See id.* (allowing intended parents to become legal parents of child “immediately upon the birth of the child”). *Contra* N.J. STAT. ANN. § 9:3-41(e) (requiring seventy-two hour waiting period before birth mother can relinquish parental rights to child).

167. *See* N.J. S. 1599 (introduced Feb. 13, 2012; passed by Senate as amended May 31, 2012); A. 2636, 215th Leg. (N.J. 2012) (introduced Mar. 8, 2012; amended June 21, 2012). *Contra* N.J. STAT. ANN. § 9:3-41(e) (requiring seventy-two hour wait period before terminating parental rights); *id.* § 9:17-41(a) (providing legal maternal rights to birth mother but not intended mother).

168. *See In re T.J.S.*, 16 A.3d 386, 390 (N.J. Super. Ct. App. Div. 2011) (establishing that statutory definition of parent and child relationship only extends to relationship between natural or adoptive parents and only defines natural mother as birth mother).

169. *See* N.J. STAT. ANN. § 9:17-41(a) (failing to create mother-child relationship through any means other than giving birth to child); *see also T.J.S.*, 54 A.3d at 266 (Hoens, J., concurring) (stating birth mother has statutory and constitutional right to legal parent-child relationship and recognizing no constitutional or statutory right protecting intended parents in surrogacy agreements). The *T.J.S.* concurrence did not believe that refusing to terminate the surrogate’s parental rights interfered with the intended mother’s right because she could still adopt the child. *See id.* (recognizing rights of birth mothers). However, the dissent pointed out the numerous problems that the lengthy adoption process poses for the intended parents, including lack of protection or benefits should the mother die before the process concludes, as well as the costs and time constraints associated with adoption. *See id.* at 276–77 (Albin, J., dissenting) (discussing negative aspects of adoption process as opposed to enforcement of surrogacy agreements).

170. *See, e.g.*, N.J. S. 1599 (creating legal parent-child relationship upon birth of child and removing seventy-two hour wait period before birth mother can relinquish rights).

171. *See* Brandel, *supra* note 159, at 489 (asserting well-planned legislation could protect all parties involved in surrogacy agreements).

agreement to be valid.¹⁷² These requirements would ensure the welfare of the child during pregnancy and establish that the intended parents are fit to raise a child.¹⁷³ The statute would also provide protection for the child by requiring the intended parents to remain legally responsible for the child, even should the intended parents breach the surrogacy agreement before the child is born.¹⁷⁴ This provision ensures that the child is cared for financially, even if the intended parents attempt to renege on the agreement for any reason.¹⁷⁵

Ideal legislation would only extend enforcement to gestational surrogacy contracts.¹⁷⁶ Limiting the scope of legislation to regulating gestational surrogacy agreements reflects courts' concerns regarding traditional surrogacy contracts and would suggest that traditional surrogacy agreements should be avoided, because the legislation will not enforce them.¹⁷⁷ Limiting enforcement to gestational surrogacy agreements alleviates the concerns initially set forth in *Baby M*, that enforcing traditional surrogacy agreements would separate children from their genetic mothers.¹⁷⁸ A traditional surrogate mother who is genetically related to the child has a much more compelling argument for parental rights, as

172. *See, e.g.*, N.J. S. 1599 (establishing requirements for parties entering into surrogacy agreements). The act required a surrogate be at least twenty-one-years old, have already given birth to at least one healthy child, complete psychological and medical evaluations, and retain counsel independent from the intended parents. *See id.* (requiring provisions be met before any woman can be eligible as surrogate). The act also required intended parents to complete a psychological evaluation and retain counsel independent from the surrogate. *See id.* (requiring provisions be met by intended parents for surrogacy agreement to be valid).

173. *See id.* (demonstrating that child will be protected during pregnancy by ensuring surrogate's proper medical evaluations and prior pregnancies). The child would further be protected by the creation of a legal relationship between the intended parents and the child upon birth, so the child is taken care of financially. *See id.*

174. *See id.* (creating legal responsibility of intended parents immediately upon child's birth). "The breach of the gestational carrier agreement by the intended parent shall not relieve the intended parent of the support obligations imposed by the parent and child relationship . . ." *Id.* Additionally, the act provided the basis for a child support action against an intended parent. *See id.* Such a provision would clarify potential problems similar to those of Sherri Shepherd, as discussed above. *See Ramiseti, supra* note 5.

175. *See* N.J. S. 1599 (creating legal and financial responsibility for intended parents immediately upon child's birth).

176. *See id.* (declaring gestational carrier agreements in accordance with public policy in New Jersey).

177. *See id.* (limiting enforcement to agreements involving "gestational carrier" who acts as surrogate "without the use of her own egg").

178. *See In re Baby M*, 537 A.2d 1227, 1246 (N.J. 1988) (refusing to terminate rights of surrogate who was also child's genetic mother).

opposed to a gestational surrogate.¹⁷⁹ Both the proposed New Jersey act and the current California statute only enforce gestational agreements.¹⁸⁰

Proper legislation would also limit the costs associated with surrogacy.¹⁸¹ Another common criticism of surrogacy agreements comes from comparisons to “baby-selling,” due to the compensation of surrogate mothers.¹⁸² Intended parents usually compensate surrogates in return for the surrogate’s services and pay for medical and other expenses throughout the pregnancy as well.¹⁸³ Legislation should limit the compensation a surrogate would receive.¹⁸⁴ The proposed New Jersey law limited compensation to “reasonable expenses,” which included medical expenses related to the pregnancy or birth of the child, expenses for counseling services, legal fees in regards to the surrogacy agreement, and reasonable living expenses.¹⁸⁵ These expenses can add up quickly, but limiting the costs payable to necessities and expenses related to the pregnancy prevents couples from paying outrageous costs to use a surrogate.¹⁸⁶

179. See Difonzo & Stern, *supra* note 2, at 393 (discussing ways courts have distinguished traditional surrogacy from gestational surrogacy).

180. See N.J. S. 1599 (enforcing only gestational surrogacy agreements); see also CAL. FAM. CODE § 7962 (West 2014).

181. See CAL. FAM. CODE § 7962 (limiting costs paid to surrogate mothers).

182. See *Baby M*, 537 A.2d at 1241 (comparing surrogacy to “baby-bartering” and explaining evils associated with it). The *Baby M* court worried about baby-selling and found “[t]he negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.” *Id.* at 1242.

183. See Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 513 (2010) (stating that intended parents enter into agreements to achieve reproduction goals while surrogates enter into same agreements for many different motivations, including associated fees). Patton enumerates different reasons that women agree to be surrogates, including connecting their employment to their domestic lives, simple goodwill in helping another couple, and also compensation. See *id.* (discussing motivation for women to become surrogate mothers). While the fees probably still play a large role in the decision, Patton suggests that many women do not name compensation as their motivation for entering into a surrogacy agreement. See *id.* (explaining motivational factors).

184. See N.J. S. 1599 (defining reasonable expenses). Reasonable expenses include:

[M]edical, hospital, counseling or other similar expenses incurred in connection with the gestational carrier agreement, reasonable attorney fees and costs for legal services in connection with the gestational carrier agreement, and the reasonable living expenses of the gestational carrier during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and during the period of postpartum recovery.

Id.

185. See *id.* (limiting expenses and costs surrogate mothers can receive as compensation in order for agreement to be enforced).

186. See *id.* (defining “reasonable expenses”).

Limiting the expenses also helps to combat the concerns about exploitation of the women serving as surrogates.¹⁸⁷ The *Baby M* court expressed concern about degrading women and creating a class distinction between infertile couples and surrogates.¹⁸⁸ However, as one commenter noted, surrogacy has the potential “both to exploit and to liberate women.”¹⁸⁹ While the exploitation of women is a very legitimate concern, with proper regulation, surrogacy can be a key option for women who would otherwise be unable to have children or begin a family.¹⁹⁰ By limiting the expenses surrogates can receive to reasonable wages and providing strict requirements as to who can serve as a surrogate, surrogacy is less likely to become an exploitative necessity for vulnerable women.¹⁹¹ Putting requirements and limitations on surrogacy will weed out many women who should not be surrogates and would enter into an agreement for the wrong reasons.¹⁹² Limitations created through legislation would help to ensure a mutually beneficial relationship for the intended parents and the surrogate mother and work to protect all of the parties to the agreement.¹⁹³

187. See Conklin, *supra* note 2, at 67 (noting that allowing regulation of compensation for surrogacy would aid in combatting exploitation of surrogate mothers).

188. See *In re Baby M*, 537 A.2d 1227, 1242, 1249 (N.J. 1988) (expressing concern with taking advantage of women’s circumstances). While the court recognized that “the Sterns [were] not rich and the Whiteheads not poor,” the court still worried about the potential class distinction created by the compulsion of a large fee for surrogacy. See *id.* at 1249 (discussing economic status of the parties). The court also asserted that “in a civilized society, [there are] some things that money cannot buy.” See *id.*

189. Brandel, *supra* note 159, at 489 (discussing potential harms of surrogacy agreements and possible solutions for such issues). Brandel asserts that “although critics have valid concerns about surrogacy and its implications, carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option.” See *id.*

190. See *id.* at 516–19 (expressing concern over lack of regulation due to increased possibility for exploitation of women without restrictions). Brandel points out that without the proper medical and psychological examinations required by most gestational surrogacy statutes, the risk of exploiting vulnerable women remains significantly higher. See *id.* at 518–19 (stating need for regulation of surrogacy agreements).

191. See *id.* at 516–19 (discussing potential for exploiting women and statutory solutions to this risk); see also Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL’Y 279, 290–91 (2010) (arguing surrogacy does not risk exploitation any more than “exotic dancing, posing for pornographic magazines, donating gametes, or serving as a telephone sex operator” does).

192. See S. 1599, 215th Leg. (N.J. 2012) (regulating what women can serve as surrogates under legally enforceable gestational surrogacy agreements).

193. See Difonzo & Stern, *supra* note 2, at 349–75 (discussing mutual benefits of surrogacy agreements). While surrogates tend to have lower incomes than the intended parents, there is no evidence that these women are typically in any economic crisis. See *id.* (discussing economic status of parties to surrogacy agreements). Compensation from gestational surrogacy agreements frequently serves to

V. CONCLUSION

Whether or not legislation enforcing gestational surrogacy agreements passes, New Jersey residents will continue to seek surrogate mothers as a way to start their families.¹⁹⁴ For many individuals and couples, gestational surrogates provide the only option to have a genetic connection to a child.¹⁹⁵ Surrogacy agreements are not prohibited or illegal in New Jersey, and many fertility clinics continue to advertise for surrogates in New Jersey.¹⁹⁶ Surrogacy agreements undoubtedly have and will continue to be utilized in New Jersey.¹⁹⁷ If New Jersey does not see fit to ban surrogacy, the state must pass legislation to regulate the practice.¹⁹⁸ As the practice of surrogacy continues to grow, New Jersey needs to provide guidance and protection for all of the parties involved, including the child, the intended parents, and the surrogate mother.¹⁹⁹ Therefore, New Jersey needs legislation to regulate the practice of gestational surrogacy agreements within the state and protect intended parents like A.L.R.²⁰⁰

“supplement” a surrogate’s income or to allow her to stay home, as surrogates usually have families of their own. *See id.* at 357–58.

194. *See* Susan K. Livio, *Christie Vetoes Bill that Would Have Eased Tough Rules for Gestational Surrogates*, STAR-LEDGER (Aug. 8, 2012, 12:23 PM), http://www.nj.com/politics/index.ssf/2012/08/christie_vetoes_bill_that_woul.html (noting surrogacy continued to occur in New Jersey for decades, even after court’s decision in *Baby M* case). The attorney for the intended parents in *T.J.S.*, Donald C. Cofsky, stated that “[g]estational carrier arrangements have been taking place in New Jersey for well over a decade, and are, and will remain, legal.” *Id.*

195. *See* Silberberg, *supra* note 3 (explaining how surrogacy allows infertile couples to have children who are still “truly [their] own”).

196. *See In re T.J.S.*, 54 A.3d 263, 279 (N.J. 2012) (Albin, J., dissenting) (explaining surrogacy agreements may be declared void but are not illegal). The dissent explained “[s]urrogacy agreements—such as the one in this case—are not uncommon in this State; no party has claimed otherwise or that they are illegal.” *Id.* at 278–79.

197. *See* Livio, *supra* note 194 (stating use of gestational carriers has increased 28% since 2007, according to American Society of Reproductive Medicine).

198. *See id.* (expressing concern that, due to lack of regulation, children born through surrogates could be left without legal parents). Because surrogacy is not illegal in New Jersey, these agreements will continue to happen. *See id.* However, without regulation, none of the parties involved receive any legal protection. *See id.* (discussing concerns due to vetoing of New Jersey bill).

199. *See* Brandel, *supra* note 159, at 515 (supporting legislation as necessary reform to protect parties in surrogacy agreements). Brandel asserts that proper legislation is necessary not only to protect the parties involved, but also to make surrogacy more predictable. *See id.* (discussing necessity of legislation on gestational surrogacy agreements).

200. *See, e.g.*, S. 1599, 215th Leg. (N.J. 2012) (setting requirements for surrogates, intended parents, and providing for child should disagreements arise regarding surrogacy agreement).