

**GESTATIONAL SURROGACY: AN APPEAL TO REFORM MICHIGAN’S
SURROGATE PARENTING ACT**

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TABLE OF CONTENTS

INTRODUCTION2

I. BACKGROUND3

 A. Gestational Surrogacy and New Reproductive Technology3

 1. *Assisted Reproduction*.....3

 2. *Defining Surrogacy*.....5

 a. Traditional Surrogacy5

 b. A Genetic Donor5

 c. Gestational Surrogacy6

 B. The Foundation of State Regulation of Surrogacy7

 1. *In re Baby M – Traditional Surrogacy*7

 2. *Johnson v. Calvert – Gestational Surrogacy*9

 C. A Survey of Current State Surrogacy Statutes.....11

 D. Surrogacy in Michigan.....14

 1. *Michigan’s Surrogate Parenting Act*14

 2. *Doe v. Attorney General*.....17

II. ANALYSIS19

 A. The *Doe v. Attorney General* Applied to Gestational Surrogacy
 Contracts19

 1. *Children as Commodities*.....20

 2. *Best Interests of the Child*22

 3. *Exploitation of Women*.....24

 4. *The Surrogate Parenting Act Not Narrowly Tailored to Any
 Compelling Interest*.....28

 B. An Amendment is Necessary In Light of Recent Innovations in
 Reproductive Technology28

 C. Proposed Legislative Amendments to Michigan Surrogacy
 Parenting Act32

 1. *Enforcing Gestational Surrogacy Contracts*32

 2. *Proposed Amendments to Michigan’s Surrogate Parenting Act*.....34

V. CONCLUSION38

INTRODUCTION

Sandra and Michael have been married for six years. As a result of a condition known as endometriosis, Sandra is unable to carry a child to term, and has suffered six miscarriages during their marriage. Both she and Michael wish to have a child; however, the adoption process is expensive and it often takes several years to adopt a baby. They have examined the various options available to them, and have concluded that a gestational surrogate would be the best choice for them to have a child that is genetically related to both of them. However, because they live in Michigan, where all types of surrogacy parentage contracts are unenforceable, they must either seek out a surrogacy arrangement in a state such as Nevada or Florida which allows for such contracts, attempt to wait several years to adopt a child, or resolve themselves to the fact they may never have children.¹

Sandra and Michael are not alone. In a recent national survey, approximately 1.2 million, or 2% of married couples, had an infertility-related medical appointment within the prior year and another 13% had received infertility services at some time.² In addition 7% of married couples had been unable to conceive a child for twelve months.³ In light of such statistics, medicine and science have responded with incredible advances that have created more options to address reproductive problems, and better success rates for in vitro fertilization. Moreover, if there is anything that time has revealed it is that technology and science will continue to progress, and that the legislature must either respond to these changes as they occur, or develop legislation that is written to stand the ebb and flow of such advances.

¹ Sandra and Michael and the above fact pattern are fictional and are for illustrative purposes only.

² See CENTER FOR DISEASE CONTROL AND PREVENTION, 2000 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY REPORTS 3 (Dec. 2002) (citing 1995 National Survey of Family Growth) [hereinafter CDC 2000 ART SUCCESS RATES].

³ See *id.*

This commentary is a plea to the legislature of Michigan to amend its Surrogate Parenting Act (SPA) to allow for the enforceability of gestational surrogate parenting contracts, under certain conditions. This paper will begin with a brief recitation of the historical background of surrogacy, will identify the different types of surrogacy, will survey current state surrogacy statutes, and provide a background of both the most well known surrogacy cases in other states, and the legislative history of Michigan's SPA and case law. It will then identify the flaws in the Michigan Supreme Court's *Doe v. Attorney General*⁴ decision, and will analyze the need to amend the SPA in response to the changing artificial reproductive techniques which have created a growing number of infertile couples who wish to elect gestational surrogacy. The commentary will conclude with suggested legislative changes that would provide for the enforceability of gestational surrogacy contracts in the State of Michigan.

I. BACKGROUND

A. Gestational Surrogacy and New Reproductive Technology

1. Assisted Reproduction

Surrogacy is not a modern concept. The origins of surrogacy date back to Biblical times when Sarah, who was barren, asked her husband Abraham to lie with Hagar, an Egyptian handmaid, in order to establish a family.⁵ Other references include the stories of Rachel and Leah, who were unable to bear children of their own, and consequently gave their maids to their

⁴ 194 Mich. App. 432, 487 N.W.2d 484 (1992).

⁵ See JULIA J. TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! 1 (1995); *Genesis* 16:1-2 (King James).

Now Sarai Abrams wife bare him no children: and she had a handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. *See id.*

husbands.⁶ However, time and technology would render unnecessary this scenario with the birth of the first “test-tube” baby on July 25, 1978; a new age of surrogacy was born.⁷

Louise Brown’s birth as a result of in vitro fertilization (IVF) techniques,⁸ was a miracle in light of the numerous failures by the Drs. Steptoe and Edward, which resulted in only two live births among the first seventy-nine patients.⁹ These low success rates were due in part to the IVF procedures performed. For example, superovulation (where ovaries are stimulated to produce more than one egg during ovulation thereby allowing doctors to harvest multiple eggs from the fallopian tubes and cervix, rather than the ovary itself) was initially not utilized because it was believed that the drugs used to produce the superovulated ova hindered implantation.¹⁰ Thus, doctors generally used the more invasive technique of withdrawing eggs from the ovaries with a laparoscope.¹¹ Unfortunately, this method was often unsuccessful due to the uncertain timing of egg release by the ovaries.¹² These initial faltering steps eventually gave way to impressive strides in IVF that enabled increased success rates.¹³

⁶ See *Genesis* 30:1-4 (King James). “And she said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her.” *Id.* at 3. “When Leah saw that she had left bearing, she took Zilpah her maid, and gave her Jacob to wife.” *Id.* at 9.

⁷ See ROBERT EDWARDS & PATRICK STEPTOE, *A MATTER OF LIFE* 176-81 (1980).

⁸ See CENTER FOR DISEASE CONTROL AND PREVENTION, 2000 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY REPORTS 3 (Dec. 2002) [hereinafter CDC 2000 ART SUCCESS RATES]. IVF “[i]nvolves extracting a woman’s eggs, fertilizing the eggs in the laboratory, and then transferring the resulting embryos into the woman’s uterus through the cervix.” *Id.*

⁹ See John D. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 *NEW ENG. J. MED.* 336, 338 (1981).

¹⁰ See EDWARDS & STEPTOE, *supra* note 7, at 145.

¹¹ See Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier’s Right to Abortion*, 70 *FORDHAM L. REV.* 93, 98 (2001) (citing John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproductive*, 59 *S. CAL. L. REV.* 939, 948 (1986)). See also, Anne Taylor Fleming, *New Frontiers in Conception*, *N.Y. TIMES*, July 20, 1980, §6, at 14.

¹² See *id.*

¹³ See, e.g., CDC 2000 ART SUCCESS RATES, *supra* note 8, at 57.

The number of live-birth deliveries increased 73%, from 14,573 in 1996 to 25,228 in 2000. The number of live babies born who were conceived using ART also increased steadily over the past five years. In 2000, a total of 35,025 infants were born, an increase of 67% over the 20,921 born in 1996. Because in some cases more than one infant is born during a live-birth delivery ... the total number of live babies born is greater than the number of live-birth deliveries. *Id.*

In light of the fact that these statistics encompass only the period from 1996 through 2000, the increase is even more startling.

2. Defining Surrogacy

As IVF technology developed, new alternatives beyond traditional adoption became available for women who are unable to bear children. These alternatives include traditional surrogacy, genetic donors, and gestational surrogacy.¹⁴

1. Traditional Surrogacy

Under the traditional surrogacy arrangement the surrogate mother has a genetic link to the child growing inside her. The surrogate is not only the gestational carrier, but also the egg donor.¹⁵ She agrees to be artificially inseminated by the genetic father's sperm and to carry the child to term.¹⁶ This is the type of arrangement at the center of the controversy in *Baby M* case and in other early surrogacy cases. However, it is likely to become less common due to reproductive technology that now allows for egg donation either from the intended mother, or from an anonymous donor.

b. A Genetic Donor

Under this type of surrogacy arrangement, a woman who has nonfunctioning ovaries, but is otherwise able to carry a child, seeks out an egg from a donor which is then fertilized by her husband's sperm and implanted into her uterus.¹⁷ In this circumstance, the surrogate mother is birth mother and the intended mother; however, she is not genetically related to the child. A child born under these circumstances would be genetically related to the surrogate's husband, but not the surrogate/birth/intended mother. Of the three surrogacy arrangements, this arrangement is

¹⁴ See Yamamoto & Moore, *supra* note 11, at 109.

¹⁵ See CHERYL L. MEYER, *THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN* 70 (1997). Traditional surrogacy is also referred to as "partial surrogacy" because the surrogate contributes her genetic material to the child, as opposed to gestational surrogacy, or "full surrogacy" in which no genetic connection to the embryo exists between the surrogate and the child. See *id.*

¹⁶ See Yvonne M. Warlen, *The Renting of the Womb: An analysis of Gestational Surrogacy Contracts Under Missouri Contract Law*, 62 UMKC L. REV. 583, 587 (1994) (citing Eugene C. Sandberg, MD, *Only an Attitude Away: The Potential of Reproductive Surrogacy*, Address at the Fifty-fifth Annual Meeting of the Pacific Coast Obstetrical and Gynecological Society (No. 12-19, 1988), in 160 AM. J. OBSTETRICS & GYNECOLOGY 1441 (1989)).

theoretically the least controversial, because the egg donor would assume no legal responsibility, and no legal rights to the child. Further, because the intended mother is also the birth mother, no controversy regarding legal parenthood results as in traditional and gestational surrogacy arrangements.¹⁸

c. Gestational Surrogacy

The final arrangement, less controversial than traditional surrogacy, is gestational surrogacy. Under such agreements, gestational carriers agree to carry the embryo created from the ova and sperm of the intended parents.¹⁹ Thus, there is no genetic relation between the surrogate and the child she carries.²⁰ This arrangement is most appealing to a woman who is unable to carry a child on her own, such someone who has undergone a hysterectomy, yet has functioning ovaries. Similarly, a woman that has nonfunctioning ovaries and is unable to bear a child, may prefer this alternative as well because the child is genetically related to her husband, yet there is no genetic link to the gestational carrier because the egg is from a donor. Under such an arrangement many of the complications associated with traditional surrogacy may be avoided; however, additional problems arise due to the fragmentation of legal motherhood between the gestating mother, the genetic mother, and the social mother.²¹

This is an area ripe for a legislative response in light of the fact that between 1986 and 1990 there were only eighty to one hundred births by gestational surrogates,²² whereas 1,210 artificial reproductive techniques (ART) cycles involved gestational carriers in the year 2000

¹⁷ See *id.* at 587-588.

¹⁸ See *id.*

¹⁹ See CDC 2000 ART SUCCESS RATES, *supra* note 8, at 50.

²⁰ See MEYER, *supra* note 15, at 70.

²¹ See Warlen, *supra* note 16, at 588.

²² See *id.* (citing Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back into the Bottle*, 18 L. MED. & HEALTH CARE 345, 350 n.1 (1990)).

alone.²³ Furthermore, that number will likely continue to increase in light of recent data indicating the success rate with gestational carriers is higher than those where the ART patient carries the pregnancy.²⁴ Not only does gestational surrogacy offer better ART success rates, recent advances in reproductive technology will likely continue to establish gestational surrogacy as an attractive option for infertile couples.

B. The Foundation for State Regulation of Surrogacy

Two cases are of particular importance in any examination of surrogacy statutes in the context of gestational surrogacy. The first, *In re Baby M*,²⁵ examines traditional surrogacy and the controversy that can arise when a surrogate mother refuses to perform the contract. The second, *Johnson v. Calvert*,²⁶ is a gestational surrogacy case in which the California Supreme Court applied contractual principles rather than a family law model as in *Baby M*. These cases evidence the difference between gestational and traditional surrogacy, and serve to bolster an amendment that would narrow the broad ban against surrogacy in the State of Michigan.

1. *In re Baby M*²⁷ - *Traditional Surrogacy*

In order to understand the reasoning and context of Michigan's as well as other state surrogacy statutes, an analysis of one of the first cases to examine a surrogacy contract is necessary. In *Baby M* the parties to a surrogacy contract found themselves in a heated custody battle after the surrogate mother, Mary Beth Whitehead, decided that she no longer wished to relinquish her parental rights to the baby after giving birth.²⁸ Mrs. Whitehead had agreed to be inseminated with the sperm of William Stern for a fee of \$10,000 and the contract provided that she would relinquish her parental rights and consent to the adoption of the baby by Mr. Stern's

²³ CDC 2000 ART SUCCESS RATES, *supra* note 8, at 50.

²⁴ *See id.*

²⁵ 537 A.2d 1227 (N.J. 1988).

²⁶ 851 P.2d 776 (Cal. 1993).

wife Elizabeth.²⁹ The Supreme Court of New Jersey determined that that contract was void as a matter of public policy and that custody of the child should be determined by Baby M's best interests, rather than the contract provisions.³⁰

Unlike the trial court that had enforced the contract, the New Jersey Supreme Court examined the contract in the context of a family law model, rather than contract law.³¹ It determined that the contract fee arrangement was designed to buy the baby, particularly in light of the decreased fee of \$0.00 if the surrogate miscarried prior to five months and \$1,000 if the child was still born after five months, and the mandatory relinquishment of parental rights upon the baby's birth.³² Both of these factors led the court to assume that the surrogacy contract was designed to obtain the adoption of the baby, rather than merely the gestational services of Mrs. Whitehead.³³

Once the court determined the contract was void and unenforceable, it evaluated Mrs. Whitehead's relinquishment of her parental rights.³⁴ It determined that the contract failed to meet the stringent standard outlined in New Jersey's adoption statute as well as requirements for termination of parental rights.³⁵ First, in order to terminate Mrs. Whitehead's parental rights without her consent, New Jersey required a finding that she was an unfit mother or that she had abandoned her child.³⁶ The court determined that neither of these elements was present.³⁷ Further, the New Jersey adoption laws provided that a birth mother must be given a specified

²⁷ 537 A.2d 1227 (N.J. 1988).

²⁸ See *In re Baby M*, 537 A.2d 1227, 1236-137 (N.J. 1988).

²⁹ See *Baby M*, 537 A.2d at 1234. Elizabeth Stern was technically not infertile although she did have a mild case of multiple sclerosis that she believed to be a health risk during pregnancy. See RAE, *supra* note 25, at 138.

³⁰ See *Baby M*, 537 A.2d at 1234.

³¹ See *id.* at 1240-46.

³² See *id.* at 1241.

³³ See *id.*

³⁴ See *id.* at 1251-53.

³⁵ See *id.* at 1252.

³⁶ See *Baby M*, 537 A.2d at 1252.

³⁷ See *id.*

time period to change her mind prior to irrevocably giving up her child for adoption.³⁸ The surrogacy contract provided for no such time period. Finally, under New Jersey custody law, the natural parents were to determine who would raise their child. The court observed that “[t]he whole purpose of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.”³⁹

This case characterizes the controversy that can occur in surrogacy cases, but is perhaps most notable because it is one of the few cases in which the surrogate mother changed her mind upon surrendering custody of the child. It also illustrates the variety of complications that can occur.⁴⁰ Of particular import to a discussion of gestational surrogacy contracts is an understanding of the volatile background surrounding surrogacy legislation. The rationale of *Baby M* was used as a framework for Michigan’s surrogacy legislation; however, *Baby M* is a traditional surrogacy case. Therefore, the New Jersey court’s rationale is not applicable to gestational surrogacy, particularly when the child is not genetically related to the surrogate mother. Rather, the rationale of *Johnson v. Calvert*⁴¹ should be applied, because that case involved gestational surrogacy, not traditional surrogacy.

2. *Johnson v. Calvert*⁴² – *Gestational Surrogacy*

Johnson was the first contested gestational surrogacy case and, as a consequence, received worldwide public attention.⁴³ Anna Johnson was hired by Mark and Crispina Calvert to be a gestational surrogate for their child.⁴⁴ The embryo implanted in Anna was created via in

³⁸ See *id.* at 1248.

³⁹ *Id.* at 1247.

⁴⁰ See RAE, *supra* note 25, at 141.

⁴¹ 851 P.2d 776 (Cal. 1993).

⁴² 851 P.2d 776 (Cal. 1993).

⁴³ See RAE, *supra* note 25, at 141.

⁴⁴ See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993)

vitro fertilization using the egg and sperm of the Calverts.⁴⁵ The surrogacy contract provided that Anna would be paid \$10,000 plus associated medical expenses for giving birth and relinquishing “all parental rights” to the baby in favor of the Calverts.⁴⁶ During the pregnancy, the parties’ relationship began to deteriorate resulting in a demand by Anna (prior to the birth of the child) that she be paid the balance of the fees due her or she would not give up the child.⁴⁷ After this demand, the Calverts responded with a lawsuit seeking to have themselves declared the legal parents of the unborn child; while Anna countered with a suit establishing her as the child’s legal mother.⁴⁸ After the baby’s birth, blood tests excluded Anna as the baby’s *genetic* mother and the parties later stipulated that the Calverts were the child’s genetic parents; however, the court still needed to decide who would be the *legal* parents of the child.⁴⁹

The California Supreme Court faced the difficult task of identifying the legal mother of a child who has both a birth mother and a genetic mother. First, the court concluded that under the Uniform Parentage Act, either circumstance was enough to establish a mother-child relationship;⁵⁰ however, California law only recognizes one legal mother per child, “despite advances in reproductive technology rendering a different outcome biologically possible.”⁵¹ To resolve the issue, the court examined the intent of the parties because the California Civil Code did not place a preference on proof of blood testing over proof of having given birth as being

⁴⁵ See *Johnson*, 851 P.2d at 778. The \$10,000 was to be paid in a series of installments, the last being paid six weeks after the child’s birth. See *id.* Also, the Calverts also purchased a \$200,000 life insurance policy on Anna’s life. See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* The relations began to deteriorate after Mark learned that Anna had not disclosed she had suffered from several stillbirths and miscarriages; whereas, Anna felt Mark and Crispina had not done enough to obtain the insurance policy and that she had been “neglected” by the couple when she had gone into premature labor. See *id.*

⁴⁸ See *Johnson*, 851 P.2d at 778.

⁴⁹ See *id.* After the trial court determined that Mark and Crispina were the child’s “genetic, biological and natural” father and mother, and that the surrogacy contract was enforceable. After the Court of Appeals affirmed the trial’s court’s holding, Anna appealed the Supreme Court of California. See *id.*

⁵⁰ See *id.* at 781 (citing CAL. CIV. CODE §§ 7003 subd. (1), 7004, subd. (a), 7015; CAL. EVID. CODE §§ 621, 892).

⁵¹ *Id.*

dispositive of legal motherhood.⁵² The court concluded that Crispina was the natural and legal mother of the child because it was the actions of Mark and Crispina which caused the child's existence.⁵³ They had intended the birth of the child.⁵⁴ They had pursued in vitro fertilization to ensure the child's existence.⁵⁵ And the aim of the parties to the contract was to bring about the birth of Mark and Crispina's child, not to donate a zygote to Anna.⁵⁶ Therefore, the court concluded that because the Uniform Parentage Act recognized both giving birth and genetic consanguinity as means of establishing the mother and child relationship, and when one woman is not both the birth mother and the genetic mother, the mother who "intended to bring about the birth of a child that she intended to raise as her own -- is the natural mother."⁵⁷

Although there was no surrogacy legislation in California at the time of this decision, as in the case of *Doe v. Attorney General*⁵⁸ in Michigan, it is pivotal to an argument in favor of amending Michigan's Surrogate Parenting Act, because it acknowledges the differences between traditional and gestational surrogacy and confirms that many of the constitutional arguments raised by a traditional surrogate are not applicable to gestational surrogacy.

C. A Survey of Current State Surrogacy Statutes

Like the *Johnson* court, a majority of people in the United States believe that the intention of the parties to a gestational surrogacy arrangement should determine legal parentage

⁵² See *Johnson*, 851 P.2d at 781-82 (citing CAL. CIV. CODE § 7003).

⁵³ See *id.* at 782.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.* The court also noted that it is unlikely Anna would have been given the opportunity to gestate the child had she manifested her intent to be the child's natural mother prior to implantation of the zygote. See *id.*

⁵⁷ *Johnson*, 851 P.2d at 782. This case is distinguishable from the Michigan case of *Doe v. Attorney General*, 194 Mich. App. 432, 497 N.W.2d 484 (1992), because there is no legislation in California which declared surrogacy as against public policy. See *Johnson*, 851 P.2d at 783. However, even if the court had declared the contract void as a matter of public policy, the Calverts would have still been determined to be the natural parents of the child because they "intended" the child's existence, not Anna. See *id.* at 782-83 ("We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of the child that she intended to raise as her own – is the natural mother under California law.")

and that such agreements should be enforceable.⁵⁹ However, surrogacy legislation in most states has been different.

As of 2002, over twenty states have enacted statutes that address surrogacy in some form or another.⁶⁰ States address surrogacy in a variety of ways. For example, Arizona, District of Columbia, Indiana, and North Dakota treat all surrogacy contracts, whether gestational or traditional, as void and contrary to public policy.⁶¹ New York, Kentucky, Louisiana, Nebraska, Utah, and Washington have declared only those surrogacy contracts, traditional or gestational, entered into in exchange for compensation (commercial surrogacy contracts) void and unenforceable.⁶² Alabama, Arkansas, Iowa, New Jersey, Oregon, Tennessee and West Virginia have enacted statutes which address or reference surrogate motherhood in some way or another.⁶³

Four states, Florida, New Hampshire, Nevada, and Virginia have enacted statutes that make certain noncommercial surrogacy arrangements enforceable. The approach among these states appears to be to allow surrogacy contracts that meet certain requirements outlined in the

⁵⁸ 194 Mich. App. 432, 487 N.W.2d 484 (1992).

⁵⁹ See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 503 n.36 (1996).

⁶⁰ See ALA. CODE §§ 26-10A-22 to -34 (1992); ARIZ. REV. STAT. ANN § 25-218 (West 1999); ARK. CODE ANN. § 9-10-201 (Michie 1993); D.C. CODE ANN. §§ 16-104 to 16-402 (Supp. 1995); FLA. STAT. ANN. §§ 742.15-.16 (West 1997); IND. CODE ANN. §§ 31-20-1-1 to -3, 31-9-2-63, 31-9-2-126 to -127 (West 1998); IOWA CODE § 710.11 (1993); KY. REV. STAT. ANN. §§ 199.590(e), .590(4), .990 (Michie 1995); LA. REV. STAT. ANN. § 9:2713 (West 1991); MICH. COMP. LAWS ANN. §§ 722.851-.863 (West 1993 & Supp. 1996); NEB. REV. STAT. § 25-21,200 (Supp. 1996); NEV. REV. STAT. ANN. §126.045 (Michie Supp. 1995); N.H. REV. STAT. ANN. §§ 168-B:1 to -B:32 (1994 & Supp. 2002); N.J. STAT. ANN. §§ 9:2-41, :17-44 (West 1993 & Supp. 1996); N.Y. DOM. REL. LAW §§ 121-124 (McKinney Supp. 1997); N.D. CENT. CODE §§ 14-18-01 to -07 (1991 & Supp. 1995); OR. REV. STAT. §§ 109.239, .243, .247 (1995); TENN. CODE ANN. § 36-1- 102(48)(A) (1996); UTAH CODE ANN. § 76-7-204 (1995); VA. CODE ANN. §§ 20- 156 to - 165 (Michie 1995); WASH. REV. CODE ANN. §§ 26.26.210-.260 (West 1997); W. VA. CODE § 48-22-803 (1996).

⁶¹ See ARIZ. REV. STAT. ANN § 25-218; D.C. CODE ANN. §§ 16-104 to 16-402; IND. CODE ANN. §§ 31-20-1-1 to -3, 31-9-2-63, 31-9-2-126 to -127; N.D. CENT. CODE §§ 14-18-01 to -07.

⁶² See N.Y. DOM. REL. LAW §§ 121-124; KY. REV. STAT. ANN. §§ 199.590(e), .590(4), .990; LA. REV. STAT. ANN. § 9:2713; NEB. REV. STAT. § 25-21,200; UTAH CODE ANN. § 76-7-204; WASH. REV. CODE ANN. §§ 26.26.210-.260.

⁶³ See ALA. CODE §§ 26-10A-22 to -34; ARK. CODE ANN. § 9-10-201; IOWA CODE § 710.11; N.J. STAT. ANN. §§ 9:2-41, :17-44; OR. REV. STAT. §§ 109.239, .243, .247; TENN. CODE ANN. § 36-1- 102(48)(A); W. VA. CODE § 48-22-803.

statute and that are court approved prior to the enforceability of the contract. Nevada's statute is of particular interest, because it addresses the specific instance of gestational surrogacy. Under its provisions only gestational surrogacy contracts in which the intended parents are married are enforceable because "assisted conception" is defined as "a pregnancy resulting when an egg and sperm from the intended parents are placed in a surrogate through the intervention of medical technology."⁶⁴ Florida's surrogacy statute specifically authorizes gestational surrogacy for "commissioning couples," although there is no marriage requirement as in Nevada.⁶⁵ Further, Florida does not require court approval of the contract but provides for specific requirements such as medical certifications by a licensed physician.⁶⁶ No compensation beyond "reasonable living, legal, medical, psychological, and psychiatric expenses" is permitted.⁶⁷

New Hampshire and Virginia each enforce both traditional and gestational surrogacy contracts.⁶⁸ Like Nevada, such contracts must be court approved in order to be enforceable,⁶⁹ and the "intended parents" must be a man and woman who are married.⁷⁰ Both states provide for requirements concerning the parties' physical and mental health⁷¹; however, Virginia is more stringent, including the requirement of a home study for both the intended parents and the surrogate mother, as well as the requirement that the intended parents meet the fitness standards of adoptive parents.⁷² Virginia also provides that the surrogate must be married and to have

⁶⁴ See NEV. REV. STAT. ANN. 126.045 (Michie Supp. 2002). "Intended parents is defined as "a man and woman, married to each other, who enter into an agreement providing that they will be the parents of a child born to a surrogate through assisted conception." *Id.* The implication of the marriage restriction on "intended parents" is that gay couples, and single men and women, would no be able to enter into an enforceable surrogacy contract in Nevada.

⁶⁵ See FLA. STAT. ANN. § 742.15 (West 1997).

⁶⁶ See *id.* §§ 742.15-.16.

⁶⁷ See *id.* § 742.16.

⁶⁸ See N.H. REV. STAT. ANN. §§ 168-B:1 (1994 & Supp. 2002); VA. CODE ANN. §§ 20- 156 (Michie 1995).

⁶⁹ See N.H. REV. STAT. ANN. §§ 168-B:21; VA. CODE ANN. § 20- 160.

⁷⁰ See N.H. REV. STAT. ANN. §§ 168-B:1; VA. CODE ANN. § 20- 156.

⁷¹ See N.H. REV. STAT. ANN. §§ 168-B:21; VA. CODE ANN. § 20- 160.

⁷² See VA. CODE ANN. § 20- 160(B)(2)-(3).

given birth to at least one live child prior to the arrangement.⁷³ Virginia's more stringent standards are understandable in light of the fact that there is no provision allowing the surrogate to change her mind, as in New Hampshire.⁷⁴ Each of these state requirements for enforceability of surrogacy contracts closely mirror adoptions statutes, due in part to the similarity between traditional surrogacy and adoption.

Michigan is in line with states who categorize all surrogacy contracts as void and unenforceable and goes even further by criminalizing all commercial surrogacy contracts.⁷⁵

D. Surrogacy in Michigan

Beginning in the early 1980s and particularly in the aftermath of the *Baby M* case, which gained public attention prior to the time it reached the New Jersey Supreme Court, many states began the arduous task of developing surrogacy legislation that addressed the immense complexities of such arrangements.⁷⁶ Michigan was included in that number when it enacted the Surrogate Parenting Act in 1988.⁷⁷

1. *Michigan's Surrogate Parenting Act*

Michigan and New Jersey were at the forefront of surrogacy legislation in the United States.⁷⁸ Thus, an examination of Michigan's Surrogate Parenting Act (SPA) and the motivation behind its enactment is integral not only to the argument for amending the SPA, but also to an

⁷³ See VA. CODE ANN. § 20-160(B)(6). The rationale of such a requirement likely results from the belief that a woman who already has a child is likely better able to understand the import of the surrogacy arrangement and is less likely to contest custody.

⁷⁴ See N.H. REV. STAT. ANN. §§ 168-B:25(IV) (surrogate mother may signed writing expressing her intention to keep the child within 72 hours of the birth).

⁷⁵ See MICH. COMP. LAWS ANN. 722.851 et seq. (2002).

⁷⁶ See RAE, *supra* note 25, at 125.

⁷⁷ See MICH. COMP. LAWS ANN. 722.851 et seq.

⁷⁸ See RAE, *supra* note 25, at 146. See also S. 228, Senate Analysis 1 (Mich. June 23, 1987). Another influential Michigan case that motivated the Michigan legislature to act, involved an alleged biological father who had contracted with a surrogate mother and had later repudiated the contract after the child was born handicapped. See *id.* It was later determined that the surrogate mother's husband was actually the genetic father of the child. See *id.*

understanding of the influence such legislation had on surrogacy laws in other states through the establishment of anti-surrogacy precedent.⁷⁹

When proponents first introduced S.B. 228 on April 28, 1987,⁸⁰ almost one year prior to the New Jersey Supreme Court's holding in *Baby M*,⁸¹ they were motivated by a number of factors in drafting the legislation.⁸² Namely, the Senate sought "[t]o establish surrogate parenting contracts as contrary to public policy and void; to prohibit surrogate parentage contracts for compensation; to provide for a child conceived, gestated, and born pursuant to a surrogate parentage contract; and to provide for penalties and remedies."⁸³ However, prior to its enactment, the custody provision of S.B. 228, section 11, was amended by both the Senate Committee on Health Policy (the Committee)⁸⁴ and the House of Representatives.⁸⁵

Among the first of the amendments to S.B. 228, included suggested changes to the Bill's custody provisions for those instances in which a surrogacy contract was entered into and a child was born of the arrangement. The original bill provided that

If a child is born to a surrogate mother or surrogate carrier as a consequence of a surrogate parentage contract, the surrogate mother or surrogate carrier and the spouse of the surrogate mother or surrogate carrier, if any, are the legal parents of the child and are entitled to the custody of the child.⁸⁶

The Senate approved the Committee amendments which deleted the entirety of section 11 and inserted the following language:

⁷⁹ See RAE, *supra* note 25, at 146.

⁸⁰ See S. 228, JOURNAL OF THE SENATE 853 (Mich. 1987); *see also* S. 228, Senate Analyses (Mich. 1987/1988) [hereinafter S. 228 I].

⁸¹ See *Baby M*, 537 A.2d 1227 (N.J. 1988).

⁸² S.B. 228 was introduced by Senators Binsfield, Welborn, Gast, Cropsey, Carl, Di Nello, Ehlers, Dillingham, Mack, Barcia, J.Hart, Vaughn, Cruce, Dingell and De Grow. See S.B. 228 I, *supra* note 91, at 1.

⁸³ See S.B. 228 I, *supra* note 91, at 1.

⁸⁴ See S. 228, JOURNAL OF THE SENATE 853 (Mich. 1987).

⁸⁵ See S. 228, JOURNAL OF THE HOUSE, 5717 (Mich. 1988).

⁸⁶ See S. 228 I, *supra* note 91, at 3-4.

(1) If a child is born to a surrogate mother as a consequence of a surrogate parentage contract, the surrogate mother and the spouse of the surrogate mother, if any, are the legal parents of the child and are entitled to custody of the child.

(2) If a child is born to a surrogate carrier as a consequence of a surrogate parentage contract, the biological father and the biological mother, who are infertile and married, are the legal parents of the child and are entitled to custody of the child.⁸⁷

The Senate Committee identified two surrogacy arrangements in its amendments. One identified a “surrogate mother,” for those instances where a child is born of a traditional surrogacy arrangement. The other involved a “surrogate carrier,” and identified the legal parents of a gestational surrogacy arrangement. The implications of this language are profound. No longer is the surrogate mother presumed to be the legal mother, but rather, an exception is carved out for gestational surrogates who have no genetic relation to the child. Under this new language, although S.B. 228 would still make surrogacy contracts void, if a child is born under a gestational surrogate contract, and has no genetic relation to the surrogate mother, the genetic parents would be the child’s legal parents, not the surrogate mother and her husband. Thus, the Committee implicitly acknowledged the unique situation of embryo transplantation, as opposed to insemination contracts. Had the language remained, gestational surrogacy contracts may not have been legal; however, custody disputes would not lead to an inequitable and illogical outcome where genetic parents may be deprived of their biological child because an unrelated birth mother changed her mind. Unfortunately, this custody language was subsequently amended by the House.

Following approval by the Senate, S.B. 228 was presented to the House; however, after committee, the bill was substituted for one that once again revised the language of the custody

⁸⁷ S. 228, JOURNAL OF THE SENATE 1468 (Mich. 1987).

provision. The House approved S.B. 228 with the following language inserted in place of section 11:

If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning the custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interest of the child. As used in this section, “best interests of the child” means that term as defined in section 3 of the child custody act of 1970, Act No. 91 of the Public Acts of 1970, being section 722.23 of the Michigan Compiled Laws.⁸⁸

Thus, under this revised version of the bill, the rights of genetic parents to their biological offspring are no longer protected. Rather, the outcomes of custody battles between the surrogate and the genetic parents will be determined by the courts in accordance with the best interests of the child. This concept is in direct opposition not only to the original bill’s language, but also the amendments thereto. Further, by enacting this provision the Michigan legislature achieved the opposite result for which the legislation was initially enacted. Instead of avoiding the anguish and controversy associated with contested custody cases like *Baby M*, the legislature ensured that such battles will continue in the courtrooms and the victims will continue to be the children.

2. *Doe v. Attorney General*⁸⁹

Following the enactment of Michigan’s Surrogate Parenting Act in 1988, the American Civil Liberties Union Fund of Michigan (ACLU) brought suit against the Attorney General on behalf of unnamed infertile couples and prospective surrogate mothers challenging the constitutionality of the Act on both jurisdictional and constitutional grounds.⁹⁰ After dispensing

⁸⁸ See S. 228, JOURNAL OF THE HOUSE, 5717 (Mich. 1988).

⁸⁹ 194 Mich. App. 432; 487 N.W.2d 484 (1992).

⁹⁰ See *Doe v. Attorney General*, 194 Mich. App. 432, 433-434; 487 N.W.2d 484, 485 (1992). It is interesting to note the Senate passed a resolution in which they had counsel submit a brief on their behalf clarifying the legislative intent of the UPA. This was particularly controversial and opponents of the resolution argued that such action was in violation of the separation of powers doctrine and such a resolution could never accurately portray the legislative intent of the UPA because there may have been “38 reasons for members on [the] floor to support that legislation.” S.R. 575, Journal of the Senate 2931, 2936 (Mich. 1988).

with the jurisdictional argument,⁹¹ the Michigan Court of Appeals determined that because the SPA violated the due process guarantee of “freedom from government interference in matters of marriage, family, procreation, and intimate association” the state’s interference with this fundamental right may only be justified by a “compelling state interest” that is narrowly tailored to the end to be achieved.⁹² The court continued with an analysis of the compelling state interests which may justify the state policy against enforcing surrogacy contracts for compensation.

There are three compelling interests that the court concludes justify state intrusion into the procreative decisions of surrogate mothers and infertile couples. The court first found that the state had an interest in preventing children from becoming commodities.⁹³ It reasoned that compensated surrogacy contracts would eventually lead to a competitive market that responded more desirably to “healthy” babies; thus, children would assume the characteristics of merchandise.⁹⁴ Further, surrogate mothers would succumb to the profit motive behind any for-profit surrogacy arrangement, thereby impacting their ability to make informed decisions.⁹⁵ Second, the court determined that for-profit surrogacy arrangements are entered into prior to conception of the child, according to the wants and desires of the parties to the contract, rather than the best interests of the child.⁹⁶ Finally, the state’s intrusion was also justified because of its interest in preventing the exploitation of women.⁹⁷ Namely, impoverished women would be

⁹¹ *See Doe*, 194 Mich. App. at 435-36; 487 N.W.2d at 485.

⁹² *See id.* at 436-437, 487 N.W.2d at 485-86.

⁹³ *See id.* at 436, 487 N.W.2d at 486.

⁹⁴ *See id.* at 437.

⁹⁵ *See id.*

⁹⁶ *See id.* at 438; 487 N.W.2d at 487.

⁹⁷ *See Doe*, 194 Mich. App. at 438; 487 N.W.2d at 487.

motivated by profit, rather than good will, when they decide to carry the children of infertile couples.⁹⁸

Following its determination that these compelling interests justified the state's intrusion in the parties' procreative rights, although it is unclear whether any one or all of them combined were "compelling" enough to survive the constitutional challenge, the court nevertheless failed to examine whether the statute was narrowly-tailored to meet those interests.⁹⁹ Therefore, the court held that in light of the plaintiffs' failure to prove that the SPA was vague, that they were denied equal protection under the law; or that there were no compelling interests, which justified the state's intrusion in their fundamental procreative rights, the SPA was constitutional.¹⁰⁰

II. ANALYSIS

A. The *Doe v. Attorney General*¹⁰¹ Rationale Applied to Gestational Surrogacy Contracts

The decision in *Doe* is susceptible to criticism because the policy positions it relied on to determine that the state's interference with the plaintiff's constitutional rights is justified by compelling interests are not applicable to gestational surrogacy contracts. Thus, when it failed to assess whether or not the program was narrowly-tailored to meet each of the compelling interests outlined in the opinion, it did not recognize that the Michigan Surrogate Parenting Act (SPA)

⁹⁸ *See id.*

⁹⁹ *See id.* at 440-41, 487 N.W.2d at 487-488.

¹⁰⁰ *See id.* at 440-445; 487 N.W.2d at 487-490. With regard to the equal protection claim the court determined that the SP does not prohibit surrogacy contract that provided solely compensation for conception or surrogate gestation expenses, there was no need for the court to reach this argument. *See id.* at 443; 487 N.W.2d at 489. Also, with regard to the plaintiffs' vagueness argument, the court held that the intent of the legislature to make void surrogate contract was clear and in order for a surrogacy contract to fall with the SPA, not only must there be compensation for the surrogacy services, but also the relinquishment of parental rights provisions. The implication of this interpretation of the statute is that essentially surrogacy contracts that did not include relinquishment of the child would not fall under the SPA; however, a subsequent amendment by the legislature that created a presumption of relinquishment in any surrogacy contract, closed this loophole in the statute. *See* MICH. COMP LAWS ANN. 722.853(i) ("It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.")

¹⁰¹ 194 Mich. App. 432, 487 N.W.2d 484 (1992).

was too broad. The holding in *Doe* is flawed, and the SPA should be amended to allow for gestational surrogacy contracts, subject to appropriate regulatory requirements.¹⁰²

1. *Children as Commodities*

The first interest addressed by the court involved the prevention of children becoming mere commodities, or, what is affectionately referred to as the general public policy against “baby selling.”¹⁰³ Under this provision the court expressed its concern that unregulated surrogacy for profit would result in the treatment of babies as commodities.¹⁰⁴ The court noted that with time “desireable, healthy babies would come to be ‘viewed quantitatively, as merchandise that can be acquired, as market or discount rates.’”¹⁰⁵ The court also relied on the rationale of the *Baby M* case in which the New Jersey Supreme Court noted that there are some things that money should not be able to buy in a civilized society.¹⁰⁶ Babies being one of them.

Few would argue that the state has a legitimate public policy interest in preventing baby-selling; however, the question remains whether gestational carrier contracts are the equivalent of baby-selling. In order to be a “commodity” it must first be assessed whether a child born of a gestational carrier is “good.” According to the Uniform Commercial Code:

¹⁰² At least the court should amend the statute to allow for the enforceability of uncompensated gestational surrogacy contracts. The current statutory language is too broad.

¹⁰³ See *Doe v. Attorney General*, 194 Mich. App. 432, 437, 487 N.W.2d 484, 486 (1992).

¹⁰⁴ See *Doe*, 194 Mich. App. at 437, 487 N.W.2d at 486.

¹⁰⁵ *Id.* (quoting Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 144 (1986)). Although the concerns raised by the court and Ms. O’Brien are substantial in the context of insemination context, the argument holds little weight in the context of embryo implantation contracts. See discussion *infra* Part II.A.1.

¹⁰⁶ See *id.* at 438 (citing *Baby M*, 537 A.2d at 1249).

“Good” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid.

*Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future goods.” A purported sale of future goods or of any interest therein operates as a contract to sell.*¹⁰⁷

In gestational surrogacy no child exists at the time of the contract and therefore the parties to such an agreement have no parental rights.¹⁰⁸ The definition of “good” is not satisfied because not only is the child nonexistent, but the gestational surrogate has no parental rights to the child.¹⁰⁹ On the other hand, the child may still be likened to a “future good.” In order to contract to sell a future good, one must have a right to the future goods at the time of contract. Because a gestational surrogate never has any rights to the child she carries, she does not have a right to the future goods at the time of contract.¹¹⁰ Thus, the child born of a gestational carrier fails to meet the definition of “goods.” In light of these definitions, such arrangements can hardly result in the treatment of children as commodities.

Furthermore, there is a stronger argument that surrogacy contracts are personal services contracts in the context of gestational surrogacy versus traditional surrogacy.¹¹¹ Personal services contracts are contracts in which the promisor himself is required to perform.¹¹² Such service contracts are often distinguished by the fact that only the promisor can perform the contract, such as a world renowned opera singer who has promised to perform at a gala. Although the surrogate carrier is not the only individual who could perform the contract, *i.e.*

¹⁰⁷ U.C.C. §2-105 (2001) (emphasis added).

¹⁰⁸ *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993). This view of parental rights is supported not only by the gestational surrogate lack of genetic relation to the child, but also by the fact that the child would never existed had not the intended parents taken the steps necessary to bring about its creation.

¹⁰⁹ *See Denise E. Lascarides, A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 Hofstra L. Rev. 1221, 1242 (1997).

¹¹⁰ *See id.*

¹¹¹ *See, e.g., Johnson*, 851 P.2d at 782.

gestating a baby, she becomes unique once the intended parents' embryo is implanted.¹¹³ At that time, only she can carry the particular embryo to term, no other surrogate could serve as a substitute. This argument is further bolstered because many gestational contracts provide that the agreement is not enforceable until pregnancy occurs. Thus, the contract does not become enforceable until pregnancy, the time when the surrogate is the only one who can perform the contract. It is also easier to reconcile the personal services rationale with a gestational surrogacy contract, as opposed to a traditional surrogacy arrangement because in traditional surrogacy the surrogate is performing more than gestating, she is also giving up her parental rights to a genetically related child.

The gestational surrogacy contract is also similar to a personal services contract because the surrogate's promise to perform goes beyond "renting the womb." Although she fulfills the contract when she gestates the baby and gives it to the promisees (the intended parents), like most personal service contracts, there are still additional promises associated with the contract. For example, under most surrogacy agreements the surrogate agrees to regularly obtain prenatal care¹¹⁴ and to refrain from behavior that may be harmful to the fetus.¹¹⁵ Therefore, not only must she gestate and give up the baby to the promisees, she must perform all her promises in order for her service to be complete.

2. Best Interests of the Child

The next interest addressed by the *Doe* court was the best interest of the child. The court reasoned that because surrogacy contracts focus on the needs and wants of the parties to the contract, prior to even the conception of the child, it is impossible for the parties to consider what

¹¹² See E. ALLAN FARNSWORTH, *CONTRACTS* § 9.5, at 700-06 (2d. ed. 1990); see also Lascarides, *supra* note 120, at 1243-44.

¹¹³ See Lascarides, *supra* note 120, at 1243-44.

¹¹⁴ See Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 282-83 (1981-1982).

is in the best interests of the child.¹¹⁶ The court reasoned that a failure to consider those interests was in direct opposition to Michigan child custody laws.¹¹⁷ The court once again quoted the *Baby M* case when it addressed the complications and trauma associated with custody battles and the impact on the children upon the realization that they were “bought and paid for” by their parents and their birth mothers gestated them for money.¹¹⁸

The court’s reliance on *Baby M* once again demonstrates its failure to consider gestational surrogacy. In gestational surrogacy, the baby’s parents are its genetic parents. As discussed above, the child is not “bought and paid for,” rather, the surrogate mother is compensated for gestating the baby. When one defines parental rights based on who the intended parents are of the child, the surrogate mother never has parental rights to the child. Thus, there is no fear that traumatic custody battles would ensue because the parties’ rights are established from the beginning, and a gestational surrogate would be far less likely to change her mind and decide to keep the baby when there is no genetic link between herself and the child. Even in *Johnson*, the custody battle was not because of the surrogate mother’s desire to keep the child, but her attempt to blackmail the intended parents. Because the SPA demands a best interest analysis, rather than specifically defining who is the legal parent to the child of such a contract, it promotes custody battles, which surely are not in the child’s best interest. The court’s argument is circular and without merit and only continues to demonstrate its failure to consider that the SPA makes both unenforceable gestational as well as traditional surrogacy contracts.

¹¹⁵ See Keith J. Cunningham, Comment, Surrogate Mother Contracts: Analysis of a Remedial Quagmire, 27 Emory L.J. 721, 731, 734-36 (1988).

¹¹⁶ See *Doe*, 194 Mich. App. at 438; 487 N.W.2d at 487.

¹¹⁷ See *id.* (citing MCL 722.23; *Duperon v. Duperon*, 175 Mich. App. 77, 437 N.W.2d 318 (1989); and *Zuziak v. Zuziak*, 169 Mich. App. 741, 426 N.W.2d 761 (1981)).

¹¹⁸ See *id.* (quoting *Baby M*, 537 A.2d at 1250). Once again the court based its decision on assumptions made by the New Jersey Supreme Court with no basis in actuality. This argument is further weakened, once again, in light of gestational surrogacy and current reproductive technology. See discussion *infra* Part II.B.

Moreover, by determining custody based on the best interests of the child, the SPA interferes with the fundamental rights of the natural parents. The U.S. Supreme Court has stated unequivocally that parents have a fundamental right to control the upbringing of their children.¹¹⁹ For example, in *Troxel v. Granville*,¹²⁰ the Court held that “there is a presumption fit parents act in the best interests of their children.”¹²¹ The Court went on to hold that Washington’s grandparent visitation statute, which allowed the judge to determine visitation based on that best interests of the child, without first finding that the parents are unfit, interfered with this fundamental right.¹²² Under a gestational surrogacy arrangement the parental rights should be determined from the time of conception based not only on the genetic link to the child, but also the intent of the parties,¹²³ therefore, the SPA is flawed because it allows the judge to determine custody based on the best interests of the child, without a finding that the natural parents are unfit.

3. *Exploitation of Women*

Finally, the *Doe* court concludes its medley of compelling interests with a recitation of the state’s interest is preventing the exploitation of women.¹²⁴ First, the court again relies on the rationale of the *Baby M* by concluding that the profit motive behind such arrangement impairs the surrogate’s ability to make an informed decision.¹²⁵ The court also alleges that such surrogacy-for-profit arrangements have the “potential” of demeaning woman by reducing them

¹¹⁹ See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000).

¹²⁰ 530 U.S. 510 (1925).

¹²¹ *Troxel*, 530 U.S. at 68.

¹²² See *id.* at 68-71.

¹²³ See *Johnson*, 851 P.2d at 782.

¹²⁴ See *Doe*, 194 Mich. App. at 439, 487 N.W.2d at 487.

¹²⁵ See *id.* at 438, 487 N.W.2d at 486-87.

to “breeding machines,”¹²⁶ and expressed concern that women of lesser means will become the breeding instruments of the rich and powerful.¹²⁷

The argument that women are incapable of making informed decisions about whether to gestate a child when compensation is involved is the type of archaic stereotyping that the feminist movement have long sought to disqualify.¹²⁸ This argument is far less persuasive in the gestational context because the gestational carrier is truly carrying the child and is not giving up her rights to the child because the child is that of the intended parents, not her. Thus, the moral conundrum associated with traditional for-profit surrogacy and for-profit adoption does not exist.

The court also alleges that the economic realities of any for-profit surrogacy arrangement will relegate poor women as “breeding machines” for rich, upper class couples.¹²⁹ However, such allegations are not supported by any factual basis.¹³⁰ Rather, recent data compiled regarding surrogates shows that they are not economically exploited.¹³¹ Although monetary reasons are one motivation among surrogates, other factors such as an altruistic desire to provide an infertile couple with a baby; the desire to experience pregnancy without the responsibility of having to raise a child; and attitudes after working in the fields of medicine or childhood education, also influence their decisionmaking.¹³² Studies have also revealed that surrogates come from lower-middle and middle classes “with annual incomes between \$15,000 and \$50,000 in 1987 dollars.”¹³³ This hardly exhibits the type of economic exploitation often associated with prostitution, which is often compared to surrogacy.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See Johnson*, 851 P.2d at 785.

¹²⁹ *See Doe*, 194 Mich. App. at 438; 487 N.W.2d at 486-87.

¹³⁰ *See Johnson*, 851 P.2d at 785. (“The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.”)

¹³¹ *See* Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 SO. CAL. L. REV. 623-673-78 (1991).

¹³² *See id.*

¹³³ John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 691 (1994) (footnote omitted).

Some proponents of anti-surrogacy legislation have compared for-profit surrogacy with the exploitation associated with prostitution based on the surrogate's lack of choice in the arrangement.¹³⁴ They argue surrogacy is akin to slavery whereby a woman exchanges her body for money.¹³⁵ However, there are significant differences between these two arrangements. Surrogacy arrangements are distinguishable from prostitution when one examines the motivations behind the parties' entering into such arrangements. In surrogacy, contracts are sought because an infertile couple desires to have a child, whereas, in prostitution, a man desires sexual gratification. Although both involve payment of money for the use of a woman's body, this is where the similarity ends. In prostitution a man uses a woman sexually to obtain gratification in a purely physical act, and the end result is a satisfied man and perhaps self-loathing by the woman. In contrast, gestational surrogacy results in the birth of a child, and the surrogate gets the satisfaction of knowing her services allowed a couple to experience the joy of parenthood. Clearly, there is no comparison between "the miracle of life [and] vile pleasure."¹³⁶

In addition, although certain actions may not be morally acceptable, this does not preclude the parties' right to contract. There must be something more than immorality to criminalize such contracts. The Supreme Court, in the context of abortion, expressed that morality alone cannot be the basis for the law:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implication of termination pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive in our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

¹³⁴ See, e.g., Jean M. Sera, *Surrogacy and Prostitution: A Comparative Analysis*, 5 AM. U.J. GENDER & L. 315 (1997); ANDREA DWORKIN, RIGHT-WING WOMEN 181-88 (1983); Catharine MacKinnon, *Consciousness Raising*, in TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989).

¹³⁵ See *id.*

¹³⁶ Lascarides, *supra* note 120, at 1248.

Although many may be morally opposed to surrogacy, just as they are to prostitution, morality alone is not enough to criminalize a contract.

Even, assuming *arguendo*, that prostitution was comparable to surrogacy, perhaps the ills associated with prostitution have more to do with its illegality and the failure of the state to regulate it, rather than the act of prostitution itself. For example, in certain counties in Nevada where prostitution is legal¹³⁷ and carefully regulated by the state, women are not as susceptible to the same exploitation as in other states where prostitution is illegal. License requirements preclude minor girls from participating, several sexually transmitted diseases are checked weekly in registered brothels, and condoms are mandatory for all oral sex and sexual intercourse.¹³⁸ In addition, both the brothels and the prostitutes have to be licensed.¹³⁹ Demonstrative of the positive effect of such state regulation is the fact that since 1986, when mandatory testing of HIV began, not a single brothel prostitute has ever tested positive for HIV.¹⁴⁰ Further, although most Nevada prostitutes say that they enter prostitution because the “money is good,” they regret the “stigma” attached with the profession.¹⁴¹ Because surrogacy is criminalized in Michigan and such for-profit contracts are illegal, there is the fear that couples will go underground.¹⁴² Once this occurs, just like in the case of prostitution, young, poor women, will become susceptible to monetary inducement without the state’s protection. This seems to be in direct opposition to the purpose of the legislation.¹⁴³

¹³⁷ See Natalie Patton, *UNLV Sociologists Study Effects of Nevada’s Sex Industries*, LAS VEGAS R-J, Oct. 26, 1998, at 1, available at http://www.lvrj.com/lvrj_home/1998/Oct-26-Mon-1998/news/8448120.html (revealing that 10 out of 17 of Nevada’s counties authorize prostitution).

¹³⁸ See *Prostitution in Nevada*, WIKIPEDIA, at http://www.wikipedia.org/wiki/Prostitution_in_Nevada (last visited February 22, 2003).

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ Patton, *supra* note 148, at 1. The women conducting this study also were amazed at how well the brothels integrated into the small communities. See *id.*

¹⁴² S. 228, Senate Analyses, at 4 (Mich. June 23, 1987).

¹⁴³ See S. 228 I, *supra* note 91, at 1.

4. *The Surrogate Parenting Act Narrowly Tailored to Any Compelling Interest*

The court in *Doe* never examined whether or not the SPA was narrowly tailored to meet any of the three compelling interests it identified in its opinion.¹⁴⁴ Both prongs must be satisfied in order to justify the government's intrusion of a fundamental right.¹⁴⁵ Therefore, the SPA's method of making unenforceable all surrogacy contracts must be narrowly tailored to achieve the state's compelling interests of preventing the commodification of children, preventing the exploitation of women, and acting in the best interests of the children. As discussed above, because none of these arguments is applicable to gestational surrogacy contracts, the SPA is not narrowly-tailored; therefore, it should have been struck down as unconstitutional.

A review of the opinion, the legislative history of the SPA, and the time period of the legislation's enactment, reveals that gestational surrogacy was still a relatively new alternative for infertile couples, since only between eighty and one hundred children were born between 1986 and 1990 using this type of arrangement.¹⁴⁶ Therefore, it is not surprising that the court analyzed the case without considering the impact on gestational surrogacy contracts, particularly when the leading gestational surrogacy case in California was not decided until 1993.¹⁴⁷

B. An Amendment is Necessary In Light of Recent Innovations in Reproductive Technology

Technology has taken tremendous strides in an effort to assist infertile couples who desire to have a child that is genetically related to them. Science and the medical community have responded to this demand. Of particular import are those technologies that have developed after the enactment of surrogacy legislation in Michigan and other states which occurred in the

¹⁴⁴ See *Doe*, 194 Mich. App. at 432, 440; 487 N.W.2d at 484, 488.

¹⁴⁵ See *Eisenstadt v. Baird*, 405 U.S. 438, 463-64 (1972) (White J., concurring).

¹⁴⁶ See Warlen, *supra* note 19, at 588 (citing Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back into the Bottle*, 18 L. MED. & HEALTH CARE 345, 350 n.1 (1990)).

¹⁴⁷ See *Johnson*, 851 P.2d at 776.

late 1980s and early 1990s in response to *Baby M.*¹⁴⁸ Some of the most recent advances in ART include gamete intrafallopian transfer (GIFT),¹⁴⁹ zygote intrafallopian transfer (ZIFT),¹⁵⁰ intracytoplasmic sperm injection (ICSI),¹⁵¹ and cryopreservation of human oocytes (freezing eggs).¹⁵² Each technique has increased the success rates of IVF procedures, as well as, the number of couples who may choose gestational rather than traditional surrogates. Thus, the SPA's general ban against all surrogate parenting contracts fails to respond to the trend in reproductive technology that creates an incentive for infertile couples to choose gestational, rather than traditional surrogates.

ICSI and cryopreservation, are of particular import to any discussion of gestational surrogacy. ICSI, a technique in which a single sperm is injected directly into the ova,¹⁵³ now provides an alternative for infertile couples where the husband has a low sperm count or other sperm dysfunction such as poor mobility. For example, the Center for Disease Control identified a number of infertility factors that include, by percentage, the following:

¹⁴⁸ See SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD 125 (1994)

¹⁴⁹ See CDC 2000 ART SUCCESS RATES, *supra* note 8, at 3. GIFT “[i]nvolves using a fiber-optic instrument called a laparoscope to guide the transfer of unfertilized eggs and sperm (gametes) into the woman’s fallopian tubes through small incisions in her abdomen.” *Id.* Although ZIFT and GIFT are important advances in reproductive technology, they are more relevant to a woman who nonfunctioning ovaries, yet is able to carry a child. They do however demonstrates the advances made in reproductive technology in an effort to alleviate the pain of infertility.

¹⁵⁰ See *id.* ZIFT “[i]nvolves fertilizing a woman’s eggs in the laboratory and then using a laparoscope to guide the transfer of the fertilized eggs (zygotes) into her fallopian tubes. *Id.*

¹⁵¹ See *id.* ICSI is a specialized IVF technique where “a single sperm is injected directly into the woman’s egg.” *Id.*

¹⁵² See Scott B. Rae, *Freezing Eggs, Not Embryos*, The Center for Bioethics and Human Dignity, at http://www.cbhd.org/resources/aps/rae_02-10-23.htm (Oct. 24, 2002) (reporting that a British infertility specialist had reported that a healthy baby was born to a woman from eggs that had been frozen and then thawed and fertilized in vitro). The author noted that this technique is useful for those individual who worry about destruction of unused embryos, because only a few eggs can now be frozen at a time; women whose eggs may be damaged from medical treatments can now have their eggs harvested and frozen prior to the treatment; and women who want to wait until their 30’s and 40’s to have children can do so with less difficulty if eggs are harvested and frozen when they are younger. See *id.* See also, Press Release, ASRM, New Technique Dramatically Improves Survival Rates for Frozen Eggs, at http://www.inciid.org/press/pr_asrm-jan112002.html (citing Eroglu, et al., *Beneficial Effect of Microinjected Trehalose on the Cryosurvival of Human Oocytes*, 77 FERTILITY & STERILITY (Jan. 2002).

¹⁵³ See CDC 2000 ART SUCCESS RATES, *supra* note 8, at 3.

Diagnoses Among Couples Who Had ART Cycles
Using Fresh, Nondonor Eggs or Embryos, 2000¹⁵⁴

Tubal Factor	16.1%
Ovulatory dysfunction	5.4%
Diminished ovarian reserve	4.5%
Endometriosis	7.8%
Uterine factor	1.0%
Male factor	18.9%
Other causes	5.7%
Unexplained cause	10.5%
Multiple factors, female	12.5%
Multiple factors, female + male	17.6%

According to this data, the male factor constitutes 18.9% of all infertility factors. With the advent of ISCI techniques, poor mobility and low sperm count are no longer as detrimental to fertilization because a single sperm can be injected directly into an egg. Thus, this technique, along with cryopreservation of ova, may increase the demand for gestational surrogates.

Cryopreservation of ova also provides more opportunities for infertile couples. IVF success rates decline as a woman gets older when she uses her own eggs.¹⁵⁵ Moreover, the CDC found that “eggs produced by women in older age groups form embryos that are less likely to implant and more likely to spontaneously abort if they do implant.¹⁵⁶ Consequently, women in older age groups were more likely to use donor eggs.¹⁵⁷ The CDC determined that the success rate of donor eggs was directly related to the age of the woman at the time the eggs were harvested.¹⁵⁸ Therefore, as cryopreservation techniques become more reliable, a woman who freezes her eggs in her 20’s or 30’s and subsequently has an embryo implanted into either herself or a gestational carrier, would expect similar success rates to those experienced by ART patient’s who used donor eggs – 43%. For older women, a success rate much larger than using their own,

¹⁵⁴ See *id.* at 26.

¹⁵⁵ See *id.* at 47.

¹⁵⁶ See *id.* at 46.

¹⁵⁷ See *id.*

freshly harvested eggs, because “live birth rates for cycles using embryos from the woman’s own eggs decline steadily as women get older.”¹⁵⁹ These advances strengthen the argument that perhaps Michigan’s SPA should be amended in light of new reproductive technology that makes gestational surrogacy a more common option for infertile couples, as opposed to 1988 when it was first enacted.

Cyropreservation also affects gestational surrogacy in other ways. Like sperm banks, “egg” banks may become increasingly more prevalent. Thus, more infertile couples will be able to choose donor eggs, if the intended mother is not able to produce eggs of her own. This would be much more attractive to an infertile couple because the complications of the donor and surrogate being the same woman, as in traditional surrogacy, could be avoided. Gestational surrogacy would therefore become more common. Further, in light of recent advances in freezing of ova, women are now able to harvest and freeze eggs at younger ages. Therefore, as more women seek to “stop their biological clock” by harvesting their ova at younger ages, they will likely be in a position to use their own genetic material, and that of their husbands to produce a genetically related embryo that can then be implanted in a gestational surrogate. As technology progresses, and more younger women decide to freeze their ova in an attempt to ensure they will be able to have genetically related children, the demand for gestational surrogates will likely continue to grow.

In 1988, when the SPA was enacted, in vitro fertilization was relatively new, and the success rates were quite low. As science and medicine progressed, so too did the success rates.¹⁶⁰ Then, with the advent of ISCI and cyropreservation of ova, more couples were given the opportunity to have a genetically related child, or at least an embryo from a donor, other than

¹⁵⁸ *See id.* at 47.

¹⁵⁹ *See id.*

the a surrogate. The ramifications of these technologies are clear; as between gestational surrogacy and traditional surrogacy, infertile couples will likely choose a gestational surrogacy arrangement because they can either use their own genetic material to create an embryo, or they can select donor gametes unrelated to the surrogate.

Because infertility appears to be a trend that is increasing in America,¹⁶¹ and reproductive technology provides more attractive options than artificial insemination, gestational surrogacy will continue to become more common, and the Michigan legislature should respond in a way similar to Nevada and Florida.

C. Proposed Legislative Amendments to Michigan Surrogacy Parenting Act

1. Enforcing Gestational Surrogacy Contracts in Michigan

There are two legislative alternatives that would help cure the injustice currently enforced by Michigan's SPA. Under the first alternative, the definition of "surrogate parenting contract" should be amended by deleting the following phrase "or in which a female agrees to surrogate gestation."¹⁶² Also, the provision relating to custody of children of such contracts should be revised to designate the surrogate as the legal mother of the child, and if she is married, her husband as the father. A new section should be added specifically addressing gestational surrogacy contracts, entitled "Gestational Surrogate Parenting Contracts."¹⁶³ Finally, the portion of the statute criminalizing commercial surrogacy arrangement should be struck from the statute.

The proposed gestational surrogacy provision should require court-approval of the surrogacy contract to ensure that the parties to the contract are not being coerced and understand the implications of their decision. This provision would specifically address the concern that

¹⁶⁰ See 2000 ART SUCCESS RATES, *supra* note 8, at 57.

¹⁶¹ See THE NATIONAL INSTITUTES OF HEALTH, ENVIRONMENTAL HEALTH PERSPECTIVES (Nov. 1997). The National Institutes of Health found that from 1938 to 1996, sperm counts in the United States have fallen annually about 1.5%. European countries have fallen at twice that rate. See *id.*

women in lower income brackets will be exploited and motivated by financial gain, rather than altruism, to enter into surrogacy contracts. The statute should also require the following in order to address public policy concerns regarding exploitation of women and commodification of children: (1) the participants should undergo psychological testing and be thoroughly examined to ensure that the surrogate mother has exercised informed consent, (2) a physician must certify as to the physical and mental health of all parties to the contract, (3) the contract must provide for the custody of the child in the event it is determined that the child is not genetically related to the parents, and (4) the intended parents are designated the natural, legal parents of the child from the time of conception; however, all contracts should contain express language that the surrogate mother's right to abort the child is not affected by the contract.¹⁶⁴

In addition, the definition of intended parents should not be limited solely to those who have each contributed genetic material.¹⁶⁵ Rather, as is the case of Florida, either the egg or the sperm of one of the intended parents should be required.¹⁶⁶ This allows for a genetic link between at least one of the intended parents, but no genetic relationship to the surrogate mother, thus avoiding the complication of traditional surrogacy. Further, it allows intended parents to take advantage of donor gametes.

2. Proposed Amendments to Michigan's Surrogate Parenting Act

In light of the flawed rationale exhibited in the *Doe v. Attorney General* opinion and the court's failure consider gestational surrogacy in its constitutional analysis, as well as, the growing

¹⁶² MICH. COMP. LAWS ANN. 722.853(i).

¹⁶³ The surrogacy statutes used in Nevada and Florida are particularly instructive.

¹⁶⁴ The author has chosen not to address the specific issues of surrogate parenting contracts and the surrogate carrier's right to abortion. However, it is logical that the intended parents would share the rights of traditional, natural fathers; thus, the right to abort lays with the woman carrying a fetus, rather than any other party.

¹⁶⁵ See NEV. REV. STAT. ANN. 126.045(4)(a) (Michie Supp. 2002).

¹⁶⁶ See FLA. STAT. ANN. §§ 742.13(2) (West 1997) (“‘Commissioning couple’ means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.”)

demand for gestational, rather than traditional surrogates, due to innovations in reproductive technology, I propose the following amendments to the SPA.

PROPOSED AMENDMENTS TO MICHIGAN'S SURROGATE PARENTING ACT

Section I. Definitions

1. As used in this act:

(a) "Compensation" means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother.

(b) "Developmental disability" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974, being sections 330.1001 to 333.2106 of the Michigan Compiled Laws.

(c) "Mental illness" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(d) "Mentally retarded" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(e) "Intended parents" means a man and woman, married to each other, who enter into an agreement providing that they will be the parents of a child born to a surrogate through assisted conception.

(f) "Surrogate carrier" means the female in whom an embryo is implanted in a surrogate gestation procedure.

(g) "Surrogate gestation" means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.

(h) "Surrogate mother" means a female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination pursuant to a surrogate parentage contract.

(i) "Traditional surrogate parentage contract" means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.

(j) "Gestational surrogate parentage contract" means a contract, agreement, or arrangement in which a female agrees to gestate a child that is not genetically related to her, and to voluntarily relinquish her parental or custodial rights to the child.

Section II. Traditional surrogate parentage contracts; void and unenforceable

A traditional surrogate parentage contract is void and unenforceable as contrary to public policy.

Section III. Contracts involving unemancipated minors, mentally retarded, mentally ill, or developmentally disabled as surrogate mother or carrier; felony, fine

(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier.

(2) A person other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who enters into, induces, arranges, procures, or otherwise assists in the formation of a contract described in subsection (1) is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

Section IV. Gestational Surrogate Parentage Contracts

(1) Prior to engaging in surrogate gestation, a binding and enforceable gestational surrogate parentage contract shall be made between the commissioning couple and the gestational surrogate. A contract for surrogate gestation shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older.

(2) The intended parents shall enter into a contract with a surrogate carrier only when, within reasonable medical certainty as determined by a physician licensed under chapter [] or chapter []:

- (a) The commissioning mother cannot physically gestate a pregnancy to term;
- (b) The gestation will cause a risk to the physical health of the commissioning mother; or
- (c) The gestation will cause a risk to the health of the fetus.

(3) A gestational surrogate parentage contract must include the following provisions:

(a) The intended parents agrees that the surrogate carrier shall be the sole source of consent with respect to clinical intervention and management of the pregnancy, included any decision to abort in accordance with state law.

(b) The surrogate carrier agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.

(c) Except as provided in paragraph (e), the surrogate carrier agrees to relinquish any parental rights upon the child's birth and to proceed with the judicial proceedings prescribed under Section V.

(d) Except as provided in paragraph (e), the intended parents agree to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment of the child.

(e) The surrogate carrier agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the intended parents is the genetic parent of the child.

(4) As part of the contract, the intended parents may agree all fees, including but not limited to reasonable living, legal, medical, psychological, and psychiatric expenses of the surrogate carrier that are directly related to prenatal, intrapartal, and postpartal periods.

Section V. Expedited affirmation of parental status for gestational surrogacy

(1) Within 3 days after the birth of a child delivered of a surrogate carrier, the intended parents shall petition a court of competent jurisdiction for an expedited affirmation of parental status.

(2) After the petition is filed, the court shall fix a time and place for hearing the petition, which may be immediately after the filing of the petition. Notice of hearing shall be given as prescribed by the rules of civil procedure, and service of process shall be made as specified by law for civil actions.

(3) Upon a showing by the intended parents or the child or the surrogate carrier that privacy rights may be endangered, the court may order the names of the intended parents or the child or the surrogate carrier, or any combination thereof, to be deleted from the notice of hearing and from the copy of the petition attached thereto, provided the substantive rights of any person will not thereby be affected.

(4) Notice of the hearing shall be given by the intended parents to:

(a) The surrogate carrier.

(b) The treating physician of the assisted reproductive technology program.

(c) Any party claiming paternity.

(5) All hearings held in proceedings under this section shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, and any persons who have received notice of the hearing.

(6) The intended parents or their legal representative shall appear at the hearing on the petition. At the conclusion of the hearing, after the court has determined that a binding and enforceable gestational surrogate parenting contract has been executed pursuant to Section II and that at least one member of the intended parents is the genetic parent of the child, the court shall enter an order stating that the intended parents are the legal parents of the child.

(7) When at least one member of the intended parents is the genetic parent of the child, the intended parents shall be presumed to be the natural parents of the child.

(8) Within 30 days after entry of the order, the clerk of the court shall prepare a certified statement of the order for the state registrar of vital statistics on a form provided by the registrar. The court shall thereupon enter an order requiring the Department of Health to issue a new birth certificate naming the intended parents as parents and requiring the department to seal the original birth certificate.

(9) All papers and records pertaining to the affirmation of parental status, including the original birth certificate, are confidential and exempt from the provisions of section [] and subject to inspection only upon order of the court. The court files, records, and papers shall be indexed only in the name of the petitioner, and the name of the child shall not be noted on any docket, index, or other record outside the court file.¹⁶⁷

CONCLUSION

Because of the unconstitutional interference by the state in the fundamental procreative rights of gestational surrogate and infertile couples who seek out their services and the current trend favoring gestational surrogacy versus traditional due to new artificial reproductive techniques the Surrogacy Parenting Act (SPA) should be amended to enforce gestational surrogacy contracts.

Even if the legislature decides that there are overriding state interests in maintaining the unenforceability of all surrogacy contracts, the custody provision should nevertheless be revised to reflect what the Senate originally approved.¹⁶⁸ There should not be a best interest analysis to determine custody because this leads to protracted custody trials. Such trials are expensive and detrimental not only to the parties, but also to the child. Therefore, if a child is born of an

¹⁶⁷ Please note that the provisions in the SPA which criminalize all commercial surrogate parenting contracts have been struck from the statute.

unenforceable surrogacy arrangement, and if a surrogate mother is genetically related to the child, she and her husband should be declared the natural parents of the child. If the child is the product of embryo implantation, and at least one of the intended parents are genetically related to the child, then, based on the *Johnson* “intent of the parties” standard,¹⁶⁹ the intended parents should be determined to be the natural, legal parents of the child.

¹⁶⁸ See S.B. 228-I, *supra* note 91, at 1.

¹⁶⁹ See *Johnson*, 851 P.2d at 782.