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## Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child

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# DUE DATE: ENFORCING SURROGACY PROMISES IN THE BEST INTEREST OF THE CHILD

BROWNE C. LEWIS<sup>†</sup>

INTRODUCTION .....	900
I. CURRENT RESOLUTION OF BROKEN PROMISES.....	905
A. Legislative Solution.....	905
B. Judicial Answer .....	909
1. Relying on Family Law .....	909
a. The Adoption Theory—The Genetic Theory of Maternity .....	910
b. The Locke Labor Theory—The Gestational Theory of Maternity .....	914
c. The Expectation Theory—The Intent Theory of Maternity .....	917
d. Protective Theory—Best Interests of the Child Maternity Test .....	922
2. Returning to Contract Law.....	922
a. An Explanation .....	922
b. An Example .....	925
II. LEGALLY REMEDYING THE BREACH: DAMAGES AND SPECIFIC PERFORMANCE .....	928
A. Damages .....	929
B. Specific Performance .....	933
III. EQUITABLY REMEDYING THE BREACH .....	940
A. Promissory Estoppel .....	940

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B. Unjust Enrichment .....	942
IV. REBUTTABLE PRESUMPTION OF SPECIFIC PERFORMANCE .....	946
A. Changed Circumstances .....	947
B. Impracticability and Frustration of Purpose .....	948
CONCLUSION .....	950

## INTRODUCTION

*Bull Dogs.* Tom promised his son that he would buy him a bulldog for his sixteenth birthday. Therefore, Tom went to Hal's Breeding Company to inquire about purchasing a bulldog. Hal informed Tom that his prized dog, Coco, was expecting a litter of puppies. Tom and Hal signed a contract. In the contract, Hal promised to give Tom his pick of Coco's litter. In exchange, Tom promised to pay Hal \$1,000. A few weeks later, Coco gave birth to five puppies. Instead of contacting Tom, Hal sold four of the puppies to other people and decided to keep the final puppy for future breeding purposes. When Tom found out about Hal's action, he filed a cause of action for breach of contract.

*Babies.* After being diagnosed with endometriosis, Tammie was unable to conceive a child. Thus, she and her husband, Ben, decided to hire a surrogate to help them become parents. Tammie and Ben purchased eggs from an anonymous donor and had them fertilized with Ben's sperm. Then, Tammie and Ben signed a contract with Harriet. In exchange for \$10,000 and the payment of her medical expenses, Harriet agreed to gestate the couple's embryos. Harriet also promised to surrender the baby to the couple and to have her parental rights terminated. Once Harriet gave birth to a baby girl, she decided that she wanted to keep the baby. As a result, Tammie and Ben filed a cause of action for breach of contract.

The facts of both cases are similar. In both instances, one person broke a promise. The main difference is the subject matter of the contract. That difference may be enough to impact the outcome of the cases. On the one hand, Tom has a good chance of winning his case. The court is either going to award him monetary damages or order Hal to give Tom the remaining bulldog. To the contrary, the remedies available to Tammie and Ben are uncertain. Given the effort they put into making sure that the child was conceived, it is easy to see why the couple would want the court to specifically enforce the contract and

adjudicate them as the baby's legal parents. Although Harriet did not contribute the genetic material used to create the child, as the surrogate, she has established a bond with the child. Consequently, she would probably be willing to return the \$10,000 and to reimburse the couple the money they paid for her pregnancy-related expenses in order to be recognized as the child's legal mother.

When faced with this type of breach of contract case, courts are faced with a dilemma: Should babies be treated in the same manner as bulldogs? Should the focus of the litigation be on the existence of a contract or on the nature of the item for which the parties contracted? Both legislatures and courts have attempted to offer a solution to this complex problem. Neither branch has relied exclusively on contract law to solve the cases. Since a baby is a living, breathing human, legislatures and courts have been reluctant to treat a surrogacy contract as just another form of a service contract. This exists even in jurisdictions that recognize the validity of surrogacy contracts.

Millions of young adults take measures to prevent unplanned pregnancies.<sup>1</sup> The most common forms of contraceptives used are birth control pills, devices, and condoms.<sup>2</sup> If the woman is raped or unprepared for sexual intercourse, the "morning after pill" gives her an opportunity to try to prevent pregnancy.<sup>3</sup> In the event that the woman has an unwanted pregnancy, the law gives her the right to have an abortion<sup>4</sup> or to put the child up for adoption.<sup>5</sup> The law has taken all of these steps to protect women from unplanned or unwanted pregnancies. At the other extreme, there are women who

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<sup>1</sup> Michael A. Mogill, *Misconceptions of the Law: Providing Full Recovery for the Birth of the Unplanned Child*, 1996 UTAH L. REV. 827, 840–41 (1996).

<sup>2</sup> Anna Birenbaum, *Shielding the Masses: How Litigation Changed the Face of Birth Control*, 10 S. CAL. REV. L. & WOMEN'S STUD. 411, 416–18 (2001).

<sup>3</sup> Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals To Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55, 61–62 & n.23 (2006).

<sup>4</sup> See June Carbone, *Cultural Conflict and the Revival of Class Warfare*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 369, 395–96 (2010) (discussing abortion as a response to unplanned pregnancy).

<sup>5</sup> Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. FOR SOC. JUST. 729, 734–39 (2010) (discussing the different types of adoptions).

desperately want to become mothers.<sup>6</sup> Historically, the only legal option available to those infertile women was adoption.<sup>7</sup> Currently, as a result of advances in reproductive technology, infertile women can play a more active role in their quests to become mothers. Unlike adoption, those women have the opportunity to control the manner in which their children are conceived and born. Surrogacy is one of the avenues infertile women can take to arrive at motherhood.

The reasons why people enter into surrogacy arrangements are as varied as the persons involved in the process.<sup>8</sup> The surrogacy process enables a woman who is unable to conceive or carry a child to have a chance at motherhood. In a surrogacy arrangement, one woman promises to help another woman to become a mother.<sup>9</sup> The level of assistance the surrogate gives varies. For instance, the surrogate's role may be limited to that of a gestator or carrier. Gestational surrogacy, the most widely used type of surrogacy,<sup>10</sup> involves the implantation of embryos into the uterus of the woman acting as the surrogate.<sup>11</sup> If the contracting woman is capable of producing eggs but is unable to carry a child, her eggs are fertilized with her husband's sperm to create the embryos that are placed in the woman serving as a

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<sup>6</sup> Melissa Reynolds, *How Old Is Too Old?: The Need for Federal Regulation Imposing a Maximum Age Limit on Women Seeking Infertility Treatments*, 7 IND. HEALTH L. REV. 277, 302–03 (2010).

<sup>7</sup> Nicole Rank, Note, *Barriers for Access to Assisted Reproductive Technologies by Lesbian Women: The Search for Parity Within the Healthcare System*, 10 HOUS. J. HEALTH L. & POL'Y 115, 116 (2010).

<sup>8</sup> Elizabeth Seale Cateforis, *Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas*, KAN. J.L. & PUB. POL'Y, Winter 1995, at 101, 101, 105 ("The surrogate mother may have entered into the arrangement for a variety of reasons . . ."); see Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 288–89 (2009) (showing that surrogate mothers come from a variety of demographics).

<sup>9</sup> Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 512–13 (2010) (discussing the reasons why women choose to act as surrogates).

<sup>10</sup> Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 224 (2009).

<sup>11</sup> Jamie L. Zuckerman, Note, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right To Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 663–64 (2008) (discussing the different types of gestational surrogacy arrangements).

surrogate.<sup>12</sup> On the other hand, if the woman is incapable of producing eggs and cannot carry a child, a donor's eggs are united with the woman's husband's sperm in order to create the embryos gestated by the surrogate.<sup>13</sup> In either case, the gestational surrogate<sup>14</sup> is not biologically related to the resulting child.<sup>15</sup> However, that fact has not prevented litigation over whether the gestational surrogate has parental rights.

The second type of surrogacy arrangement involves a traditional surrogate. A traditional surrogate is a woman who is artificially inseminated with the sperm of the intended mother's husband or the sperm the intended mother acquires from a donor.<sup>16</sup> Since the traditional surrogate's eggs are used to create the child, she is biologically related to the resulting child.<sup>17</sup> As a consequence, traditional surrogacy agreements usually contain provisions requiring the surrogate to terminate her parental rights in order to allow the intended mother to adopt the child.<sup>18</sup>

Like in any contract dispute, the courts do not become involved until one or more of the parties to the contract decide not to abide by the contract's terms. In a surrogacy situation, the legal dispute usually arises when the surrogate refuses to surrender the child to the intended parent or parents. The courts are called upon to identify the legal parents of the child.<sup>19</sup> The law dealing with surrogacy is unsettled. The majority of states

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<sup>12</sup> Ronald Chester, *To Be, Be, Be . . . Not Just To Be: Legal and Social Implications of Cloning for Human Reproduction*, 49 FLA. L. REV. 303, 331 (1997).

<sup>13</sup> Lori B. Andrews & Lisa Douglass, Comment, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 631 (1991).

<sup>14</sup> "Gestational surrogate" is often defined as a woman who agrees to conceive a child using reproductive technology without utilizing her own eggs. See, e.g., FLA. STAT. ANN. § 742.13(5) (West 2012).

<sup>15</sup> Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 454 (1997).

<sup>16</sup> Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 639 (2005).

<sup>17</sup> Emily Stark, Comment, *Born to No Mother: In re Roberto d.B. and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 283, 287 (2008).

<sup>18</sup> Sherrie Lynne Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 527 (1992).

<sup>19</sup> See, e.g., *J.F. v. D.B.*, 897 A.2d 1261, 1279 (Pa. Super. Ct. 2006) (stating that "the designation of who is a 'legal mother' is one ultimately determined by statute and/or judicial ruling").

do not have statutes directly addressing the legal issues that arise as a consequence of surrogacy arrangements.<sup>20</sup> Some state legislatures have enacted statutes banning the conception of children using surrogacy arrangements.<sup>21</sup> Other states have made surrogacy arrangements illegal.<sup>22</sup> Thus, in order to discourage criminal behavior, the courts in those jurisdictions refuse to enforce surrogacy contracts.<sup>23</sup> Under the law of at least twelve states, however, persons may enter into surrogacy agreements.<sup>24</sup>

Some commentators contend that state legislatures have not taken adequate steps to ensure that women entering into surrogacy arrangements are protected. However, legislators in a few jurisdictions have enacted legislation that seeks to protect the interests of the women involved in gestational surrogacy arrangements.<sup>25</sup> When the surrogate fails to live up to her end of the bargain, the intended mother has to turn to the courts for assistance. Instead of enforcing the contract between the surrogate and the intended mother, courts rely on different tests to determine which woman is entitled to be adjudicated as the legal mother of the child conceived as the result of a surrogacy agreement. Consequently, the intended mother's claim to the child is dependent upon the maternity test the court decides to apply.<sup>26</sup>

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<sup>20</sup> See Lee, *supra* note 8, at 289–90 (discussing state regulation of surrogacy).

<sup>21</sup> Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1231 (1997).

<sup>22</sup> *Id.*

<sup>23</sup> States that fall into this category include Arizona, the District of Columbia, Indiana, Michigan, and North Dakota. *Id.* at 1231 & nn.57–58.

<sup>24</sup> Those states include Arkansas, California, Florida (if intended parents are married), Illinois (gestational surrogacy agreements only), New Hampshire, New Jersey (uncompensated surrogacy agreements only), North Dakota (gestational surrogacy only), Tennessee (if intended parents are married), Texas (if intended parents are married), Utah (if intended parents are married), Virginia (uncompensated agreements where intended parents are married only), and Washington (uncompensated surrogacy agreements only). See Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 454–58, 460 (2009) (providing a table listing the status of surrogacy agreements in the states and the District of Columbia).

<sup>25</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 47/15 (b) (West 2012).

<sup>26</sup> The different theories of maternity will be discussed in Part I.



This Article is not meant to debate whether surrogacy contracts should be legal. The purpose of this Article is to address situations where the surrogate reneges on her promise and attempts to keep the child. In particular, this Article deals with the adjudication of maternity after the surrogate has breached the agreement by failing to turn the child over to the intended parent or parents. This Article is divided into four parts. Part I discusses the current ways courts resolve breaches of surrogacy contracts. Part II evaluates the appropriateness of legal remedies like damages and specific performance when a surrogate breaches the contract. Part III explores the manner in which the equitable remedies of promissory estoppel and unjust enrichment can be utilized to compensate the intended mother after the contract breach. Finally, in Part IV, this Article puts forth a proposal for resolving breaches of surrogacy agreements. This Article contends that contractual surrogacy obligations should be treated like any other contractual obligations. Consequently, courts should take actions to ensure that the intended mother receives the benefit of her bargain by being recognized as the child's legal mother. The appropriate way to accomplish that is to establish a rebuttable presumption that surrogacy contracts should be specifically enforced.

## I. CURRENT RESOLUTION OF BROKEN PROMISES

### A. *Legislative Solution*

The legal recognition of a parent-child relationship<sup>27</sup> is important to the parents and the child. It is important to the parents because it gives them the right to make decisions regarding the child.<sup>28</sup> It also prevents the government from

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<sup>27</sup> CAL. FAM. CODE § 7601 (West 2014) ("Parent and child relationship' . . . means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship.").

<sup>28</sup> James A. Cosby, *Stronger Rights for Parents and Some Affirmative Rights for Children? No Problem: Changing How We Look at the Family*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 291, 295-97 (2007) (discussing the importance of parental autonomy); see also *Petersen v. Rogers*, 445 S.E.2d 901, 903 (N.C. 1994) (showing that a core parental right is the right of a parent to make decisions about the upbringing of his or her child).

unduly interfering in the parents' relationship with the child.<sup>29</sup> In some respects, establishment of a legal parent-child relationship is financially beneficial to the parents. For example, the custodial parent is usually entitled to receive child support from the non-custodial parent. Moreover, parents may have the right to inherit from their children under the intestacy system.<sup>30</sup> This right is important when the child predeceases the parents and leaves a substantial estate.<sup>31</sup> Children also benefit from the existence of a legally recognized parent-child relationship. For instance, the child's ability to receive financial support from an adult is dependent on that relationship. That financial support includes lifetime child support,<sup>32</sup> inheritance,<sup>33</sup> and government survivors' benefits.<sup>34</sup>

Historically, it was not necessary for the courts to adjudicate maternity because the identity of the child's legal mother was easy to ascertain. The familiar phrase "momma's baby, daddy's maybe" was reflective of the way society viewed maternal status. Since the woman who gave birth to the child also supplied the genetic material that created the child, maternity was typically unchallenged.<sup>35</sup> The availability of the reproductive technology that makes surrogacy possible has changed that fact. As usual, the law has not kept pace with medical advances.<sup>36</sup> Thus, courts are forced to apply traditional family law principles to novel situations.

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<sup>29</sup> See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (establishing that parents have a fundamental right to raise their children without undue governmental interference).

<sup>30</sup> Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 199 (2006).

<sup>31</sup> Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 265 (1994).

<sup>32</sup> Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109, 114 (2009).

<sup>33</sup> Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920 (1989).

<sup>34</sup> Edmund Yan, *Chapter 9: Correcting a Subtle Technical Oversight in CERL*, 41 MCGEORGE L. REV. 641, 642 (2010).

<sup>35</sup> David M. Buss, *Evolution and Human Mating*, 18 HARV. J.L. & PUB. POL'Y 537, 543-44 (1995).

<sup>36</sup> Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 234 (1998).

The federal government has generally left family-related issues like abortion and surrogacy to the states to regulate.<sup>37</sup> With regards to paternity, the majority of states have legislation dealing with the paternity of men involved in assisted reproduction arrangements, including surrogacy.<sup>38</sup> Courts have the authority to adjudicate maternity, but state legislatures have not provided sufficient guidance.<sup>39</sup> Most states do not have statutes that provide the means for determining legal maternity when a child is conceived as the result of a surrogacy arrangement. The state statutes that do address the maternity issue have taken different approaches to identify the legal mother of the child. According to the legislators in some states, the key determinant of motherhood is birth.<sup>40</sup> Nonetheless, the parties are free to reassign legal maternity using a valid surrogacy contract.<sup>41</sup> For example, under the provisions of other statutes, maternity must be determined by evaluating the intent of the parties.<sup>42</sup> In some cases, a woman may also be declared the legal mother if she gestates and gives birth to the child.<sup>43</sup> In states that permit surrogacy contracts to be enforced, the terms of the contract may control the reassignment of maternity.<sup>44</sup> Thus, the intended mother is usually found to be the legal mother if the contract complies with the mandates of the statute

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<sup>37</sup> See Jonathan Brophy, Comment, *Death Is Certain, Are Taxes? Another Argument for Equality for Same-Sex Couples Under the Code*, 34 SW. U. L. REV. 635, 644 (2005) (stating that the federal government does not deal with family law unless a fundamental right is threatened or an otherwise legitimate statutory scheme, like the tax code, bears directly on family life).

<sup>38</sup> Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 953 (2009).

<sup>39</sup> *T.V. v. N.Y. State Dep't of Health*, 88 A.D.3d 290, 295, 929 N.Y.S.2d 139, 143 (2d Dep't 2011).

<sup>40</sup> See, e.g., ARK. CODE ANN. § 9-10-201(b), (c)(1) (West 2013); see also N.D. CENT. CODE ANN. § 30.1-04-19 (West 2009) (The woman who gives birth, unless she is a gestational surrogate, is the child's legal mother.); LA. CIV. CODE ANN. art. 184 (2005) ("Maternity may be established by a preponderance of the evidence that the child was born of a particular woman, except as otherwise provided by the law.").

<sup>41</sup> See, e.g., WASH. REV. CODE ANN. § 26.26.101(1), (4) (West 2011).

<sup>42</sup> See, e.g., TEX. FAM. CODE ANN. § 160.760 (West 2005).

<sup>43</sup> See, e.g., VA. CODE ANN. § 20-158(A)(1) (West 2000) ("The gestational mother of a child is the child's mother."). But see *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (holding a statute violated the equal protection clause where it named the gestational surrogate the legal mother without giving the biological mother who donated the eggs the opportunity to prove maternity).

<sup>44</sup> See, e.g., VA. CODE ANN. § 20-159(A) (West 2013).

and is approved by the court.<sup>45</sup> Under the terms of the Arkansas statute, there is a presumption that a child born as a result of a surrogacy arrangement is the child of the intended parents and not the surrogate.<sup>46</sup> If the contract is invalid<sup>47</sup> or unenforceable for some reason, the default position usually is to recognize the surrogate as the child's legal mother.<sup>48</sup>

Some jurisdictions treat surrogacy arrangements similar to adoptions.<sup>49</sup> As a result, the surrogate is given a specific period of time after the birth of the child to give notice of her intent to keep the child. Once that notice is given, the court designates the surrogate as the legal mother of the child.<sup>50</sup> Some states only permit pure gestational surrogate arrangements where the surrogate is not allowed to use her own eggs.<sup>51</sup> In those jurisdictions, the gestational surrogate is not recognized as the child's legal mother.<sup>52</sup> Thus, gestation is not the standard used to determine maternity.<sup>53</sup> Finally, if there is a dispute between the intended mother and the surrogate over custody of the child, in some jurisdictions, the court will assign maternity based upon what it considers to be the best interests of the child.<sup>54</sup> The lack of legislation in this area has led to custody disputes between surrogates and intended parents.

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<sup>45</sup> *Id.* ("A surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child . . .").

<sup>46</sup> ARK. CODE ANN. § 9-10-201(b) (West 2013).

<sup>47</sup> Several states have statutes setting forth the process for having a surrogacy arrangement validated. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:23(III) (2014); TEX. FAM. CODE ANN. § 160.755 (West 2013).

<sup>48</sup> *See, e.g.*, N.D. CENT. CODE ANN. § 14-18-05 (West 2013); *see also* VA. CODE ANN. § 20-158(D).

<sup>49</sup> *See* A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (providing an example of a state treating gestational surrogacy agreements similar to adoption agreements).

<sup>50</sup> N.H. REV. STAT. ANN. § 168-B:25(IV).

<sup>51</sup> *See* A.H.W., 772 A.2d at 951.

<sup>52</sup> *Id.*

<sup>53</sup> *See* TEX. FAM. CODE ANN. § 160.754(a)(2) (West 2013); *see also* 750 ILL. COMP. STAT. ANN. 45/6 (a)(1)(A) (West 2013); UTAH CODE ANN. § 78B-15-801(1)(b) (West 2013).

<sup>54</sup> MICH. COMP. LAWS ANN. § 722.861 (West 2014).

## B. Judicial Answer

### 1. Relying on Family Law

When a surrogate breaches the contract by refusing to surrender the child to the intended parents, the primary question the court has to answer is the following: Who are the legal parents of the child conceived as a result of the surrogacy agreement? In particular, the court has to decide the issue of maternity. If the court treated the surrogacy contract as just another contract, the court's main concern would be making the non-breaching party whole. Nonetheless, when a surrogate breaks her promise, the judge steps away from contract law and looks to family law for an answer. Thus, instead of a breach of contract case, the case is treated as a semi-custody dispute. If the case were treated as a full-blown custody dispute, the court would make its decision by applying the best interests of the child standard.<sup>55</sup> However, the judge's task is not simply to award custody of the child to either the surrogate or the intended parents based on whom the judge thinks will make better parents. The court must first adjudicate the maternal status of the surrogate and then award custody using the best interests of the child standard.<sup>56</sup> The court applied this two-step analysis in the *Baby M* case, in which the surrogate was adjudicated as the legal mother of the child yet still lost custody to the intended parents.<sup>57</sup>

If the surrogate refuses to turn over the child, the expectant parents usually hire an attorney to file a lawsuit. Once the lawsuit is filed, the expectant parents would be confident that they will prevail. They probably expect the court to issue an order mandating that the surrogate turn over the baby to them. Thus, they would be surprised when the court seeks to adjudicate maternity based upon something other than the plain meaning of the contract. As a society, we expect valid contracts between consenting adults to be enforced. Courts have relied upon three different tests to determine whether the surrogate or the intended mother should be deemed the legal mother of the

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<sup>55</sup> See *Hathaway v. Bergheim*, 648 N.W.2d 349, 351 (S.D. 2002) ("The primary determination in a custody dispute is to ascertain the best interest of the child.").

<sup>56</sup> See, e.g., *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005).

<sup>57</sup> *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988).

child.<sup>58</sup> The tests appear to be unrelated to the surrogacy contract. Nevertheless, the judge's selection of a particular test may be influenced by the judge's opinion about the appropriateness of surrogacy contracts. For instance, courts that think that surrogacy contracts should be enforced usually rely on the intent theory to recognize the intended mother as the child's legal mother. However, some courts have made it clear that a woman cannot contract away maternal rights she obtains as a consequence of being the supplier of the genetic material or the gestator of the embryo. In this section, this Article summarizes those tests and puts forth theories that seem to support the court's decision to apply a specific test to determine maternity.

*a. The Adoption Theory—The Genetic Theory of Maternity*

In most jurisdictions, for a woman to be recognized as a child's legal mother, all she has to do is contribute the genetic material needed to conceive the child. Courts acknowledge that the only way that a woman should be able to voluntarily give her biological child to another woman is by complying with the provisions of the appropriate state adoption statute. The traditional surrogacy arrangement is similar to a private adoption, in which the biological mother surrenders custody of her child to the adoptive parents. However, at least one court has held that a surrogacy contract cannot serve as an adoption agreement.<sup>59</sup> When a traditional surrogate fails to surrender the child to the intended parents, some courts ignore the contract and treat the surrogate as the biological mother of the child. Courts reaching that conclusion rely upon the genetic test to adjudicate maternity.<sup>60</sup> As the biological mother, the surrogate is recognized as the legal mother. Once the surrogate is deemed to be the child's legal mother, she is free to give custody of the child to the intended mother. Courts applying this standard of motherhood tend to treat the woman with no biological connection to the child like an adopting mother. Normally, the woman who has the biological connection to the child is the

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<sup>58</sup> Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 539–43 (2011).

<sup>59</sup> *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994).

<sup>60</sup> Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 138 (2000).

child's natural and legal mother.<sup>61</sup> A woman can give up that legal status by voluntarily terminating her parental right and consenting to the child's adoption in the manner stipulated by the jurisdiction's adoption statute.<sup>62</sup>

The provisions of state adoption statutes vary. However, most of the statutes have several requirements in common. First, the biological parent must give written consent to the adoption.<sup>63</sup> Second, the adoption must be approved by the court even if it is a private adoption.<sup>64</sup> As a part of that approval process, the court has the authority to order the home of the adoptive parents to be evaluated to ensure that the adoption is in the child's best interests.<sup>65</sup> Finally, in some states, the biological parent has a certain period of time to withdraw her consent to the adoption. The adoption is not final until that time period has expired. In some states, the biological mother is not permitted to withdraw her consent to the adoption of the child. However, the consent does not become irrevocable until the adoption has been finalized by a court.<sup>66</sup> In states following the Uniform Adoption Act ("UAA"), the biological mother cannot give her consent to adoption prior to the birth of the child. In addition, the UAA gives the biological parent a certain period of time to rescind her consent.<sup>67</sup> The majority of states have statutes prohibiting a mother from granting irrevocable consent to adoption before the child's birth or some period after the birth.<sup>68</sup> The purpose of such

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<sup>61</sup> Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 605 (2009).

<sup>62</sup> *In re Jacob*, 86 N.Y.2d 651, 657, 660 N.E.2d 397, 399, 636 N.Y.S.2d 716, 718 (1995); see also *Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900–01. In *Marriage of Moschetta*, the traditional surrogate was adjudicated as the child's legal mother. *Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900–01. Since the surrogate did not follow the consent requirements of the adoption statute, she maintained her status as the child's legal mother. *Id.*

<sup>63</sup> Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOB. STUD. L. REV. 211, 222 & n.72 (2006); see also Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 18 (1988) (discussing reasons for the parental consent requirement).

<sup>64</sup> *Yopp v. Batt*, 467 N.W.2d 868, 875 (Neb. 1991); *McCann v. Doe*, 660 S.E.2d 500, 506 n.6 (S.C. 2008).

<sup>65</sup> *In re Adoption of X.X.G.*, 45 So. 3d 79, 84 (Fla. Dist. Ct. App. 2010).

<sup>66</sup> Mindy Schulman Roman, Note, *Rethinking Revocation: Adoption from a New Perspective*, 23 HOFSTRA L. REV. 733, 745 (1995).

<sup>67</sup> UNIF. ADOPTION ACT § 2-408(a)(1) (2012).

<sup>68</sup> See, e.g., ARK. CODE ANN. § 9-9-208(a) (West 2013).

laws is to ensure that the mother's consent is knowing, voluntary, and without duress.<sup>69</sup> Adoption statutes are usually construed in ways that protect the rights of biological parents.<sup>70</sup> The requirements governing a legal adoption may influence the way some courts handle surrogate custody disputes.

According to some courts, the blood connection between the surrogate and the child is the thing that makes the surrogate the child's legal mother. Unless her parental rights have been terminated, the child's biological mother cannot contract away her parental rights before the child is born.<sup>71</sup> If a woman's parental rights have not been terminated, her child cannot be adopted without her consent and her consent must be given without fraud, duress, or undue influence.<sup>72</sup> This same theory applies to traditional surrogacy arrangements. As a result, in order for the intended mother to be recognized as the child's legal mother, the surrogate has to consent to the adoption of the child after the child's birth. Like any other adoption case, the surrogate has the right to change her mind and keep the child.<sup>73</sup> Nothing in the surrogacy agreement impacts the rights that biology gives to the traditional surrogate.<sup>74</sup>

If a gestational surrogate is involved in the case, the surrogate is not recognized as having any maternal rights with regards to the child. In that case, the woman who supplied the genetic material used to conceive the child is deemed to be the child's legal mother. If that woman is not involved in the case, it is presumed that she would want the intended mother to be adjudicated as the child's legal mother because she donated her eggs to that woman. In cases where the intended mother uses her own eggs, she will be adjudicated as the child's legal mother. A court would recognize the intended mother as the child's legal mother based upon the lack of a biological connection between

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<sup>69</sup> *Baby Boy R. v. Velas*, 386 S.E.2d 839, 841-43 (W. Va. 1989).

<sup>70</sup> *In re Adoption of A.S.*, 912 N.E.2d 840, 848 (Ind. Ct. App. 2009).

<sup>71</sup> *See, e.g., R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998).

<sup>72</sup> KAN. STAT. ANN. § 59-2114 (West 2013); W. VA. CODE ANN. § 48-22-305(a)(2) (West 2014).

<sup>73</sup> Virginia permits a traditional surrogate to terminate the agreement within 180 days of the last assisted conception. VA. CODE ANN. § 20-161(B) (West 2013). New Hampshire allows the surrogate to opt out of the agreement to relinquish her rights to the child at any time up to seventy-two hours after birth. N.H. REV. STAT. ANN. § 168-B:25(IV) (2014).

<sup>74</sup> *See Atwell*, *supra* note 63, at 15 (arguing that surrogate parenting arrangements are a type of independent adoption).



the surrogate and the child. A court would not base its decision on the fact that the surrogate breached the contract. The action of a court in New York supports this assertion. The New York Legislature decided that surrogacy agreements were against the state's public policy. Thus, it passed a statute making those types of agreements void and unenforceable.<sup>75</sup> Nevertheless, in a case involving a gestational surrogate, the New York Supreme Court held that the intended mother was the legal mother of the resulting children.<sup>76</sup> The court ignored the existence of the surrogacy agreement and based its decision on the genetic connection between the woman and the children.<sup>77</sup>

Regardless of the existence of a contract, the biological mother is the child's legal mother unless she takes steps to give the child up for adoption. As the analysis of *Belsito v. Clark*<sup>78</sup> illustrates, this theory applies even in situations where the surrogate does not plan to breach the terms of the agreement. Doctors implanted in Carol Clark an embryo created using eggs from her sister, Shelly, and sperm from her brother-in-law, Anthony.<sup>79</sup> As a result of the procedure, Carol became pregnant.<sup>80</sup> Prior to the child's birth, a hospital representative informed Shelly that Carol would be listed on the child's birth certificate as the birth mother.<sup>81</sup> In addition, Shelly found out that since Carol was not married to Anthony, the child would be deemed a non-marital child.<sup>82</sup> Since they were the child's biological parents, Shelly and Anthony did not want to be forced to adopt their own child.<sup>83</sup> Consequently, Shelly and Anthony filed an action asking the court to adjudicate them as the child's legal parents.<sup>84</sup> They also asked the court to order the hospital to

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<sup>75</sup> N.Y. DOM. REL. LAW § 122 (McKinney 2014) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.").

<sup>76</sup> *Arredondo v. Nodelman*, 163 Misc. 2d 757, 758–59, 622 N.Y.S.2d 181, 182 (Sup. Ct. Queens Cnty. 1994).

<sup>77</sup> *Id.*

<sup>78</sup> *Belsito v. Clark*, 67 Ohio Misc. 2d 54 (Ct. Com. Pl. 1994).

<sup>79</sup> *Id.* at 56.

<sup>80</sup> *Id.* at 57.

<sup>81</sup> *Id.* at 58.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

put their names on the child's birth certificate as the birth parents.<sup>85</sup> In light of their marital status, the establishment of their parentage would have legitimized the child.<sup>86</sup>

In essence, the intended parents wanted the court to treat them like biological parents instead of adoptive parents. The court concluded that biology makes a person a legal parent.<sup>87</sup> Thus, the persons who supply the genetic material used to conceive the child are the child's biological and legal parents.<sup>88</sup> In this case, Shelly was recognized as the child's legal mother because she was the child's biological mother.<sup>89</sup> Thus, if the surrogate had breached the contract, the court would have ordered her to surrender the child to the intended parents. The court's decision would have been based upon the biological link between the intended mother and not on the existence of the contract. The surrogate would have been treated as a stranger to the child. As a stranger to the child, the only way the surrogate would have acquired rights to the child is if the biological mother had consented to the surrogate obtaining those rights. Since the biological parents intended to raise the child, that outcome would never have occurred.<sup>90</sup> In some jurisdictions, the provision of genetic material is not necessary for a woman to be recognized as a legal mother. Courts in those states reward the surrogate for the fruits of her labor.

*b. The Locke Labor Theory—The Gestational Theory of Maternity*

Some courts reason that a woman can earn the right to be a child's legal mother. The Locke Labor Theory is commonly taught in first-year property courses. The underlying principle of the theory is that property ownership is a natural right that a person acquires because of his or her labor.<sup>91</sup> According to Locke, a person who puts productive labor into creating something is

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 65–66.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 66.

<sup>90</sup> Dawn Wenk, Note, *Belsito v. Clark: Ohio's Battle with "Motherhood"*, 28 U. TOL. L. REV. 247, 264 (1996).

<sup>91</sup> Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 182–83 (2005).

entitled to claim ownership of the object.<sup>92</sup> Locke further contended that since people own their bodies, they own the labor that stems from their bodies. Hence, people own the fruits of their productive labor.<sup>93</sup> When a person takes something from nature and adds his or her labor to it in order to improve or change it into something useful, that item becomes the property of the person who contributes the labor.<sup>94</sup> The person owns the object because the value of the property comes from the labor that transformed it from its natural state into something useful.<sup>95</sup> For instance, Habitat for Humanity and some other non-profits help low-income persons to become homeowners by allowing them to provide "sweat equity" in lieu of making a monetary down payment.<sup>96</sup> Those persons are given credit for the labor they put into building the house.

In determining maternity, some courts have relied upon the medical fact that the woman who gestates the child forms a special bond with that child. The gestational surrogate nurtures the embryo for forty weeks and helps to convert it into a child.<sup>97</sup> During the course of the pregnancy, the gestational surrogate supplies the hormones that are needed to transform the embryo into a unique child.<sup>98</sup> Based upon the Locke Labor Theory, some courts and commentators have concluded that the surrogate earns the right to be adjudicated as the child's legal mother.<sup>99</sup>

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<sup>92</sup> Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RESOURCES J. 649, 684 (1999).

<sup>93</sup> Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25, 34 (2002).

<sup>94</sup> Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1295 (2003).

<sup>95</sup> Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVTL. L. 279, 282 (1998).

<sup>96</sup> John J. Ammann, *Affordable Housing and Pro Bono: Habitat for Humanity Provides Valuable Pro Bono Opportunities*, 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 225, 225 (1998).

<sup>97</sup> See Lawrence O. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL'Y 429, 435 (2001) (noting the gestational mother's commitment to nurturing the fetus for nine months or approximately forty weeks prior to giving birth).

<sup>98</sup> See generally R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 396-424 (1993) (describing the gestation process).

<sup>99</sup> Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 236 (1994). But see Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 709-11

The surrogate starts out with an embryo and puts in the labor to change it into a baby. Additionally, during actual labor, the surrogate works to make sure that the child comes into the world safely. Thus, she acquires some property interest in the child. Courts that take that approach apply the gestation test to recognize the surrogate as the legal mother of the child. The surrogate's role as a gestator qualifies her to be the child's legal mother. Thus, the contract is irrelevant. Once her status as a gestator makes her the legal mother, these courts refuse to force the surrogate to give up that title simply because she signed a contract promising to do so.

The New Jersey case, *A.H.W. v. G.H.B.*, exhibits this gestation theory of maternity. Andrea and her husband, Peter, were unable to conceive a child naturally.<sup>100</sup> After Gina, Andrea's sister, agreed to serve as a gestational surrogate for the couple, doctors implanted an embryo, created using Andrea's eggs and Peter's sperm, into Gina's uterus.<sup>101</sup> As a result, Gina became pregnant.<sup>102</sup> Before Gina gave birth to the child, Andrea and Peter asked the court to adjudicate them as the child's legal parents so that their names could appear on the child's birth certificate.<sup>103</sup> Even though Gina supported the petition, the court did not grant their request. Instead, the court reasoned that the efforts Gina took to make sure the child was born entitled her to be classified as the child's gestational mother. Because Gina was the child's gestational mother, the court held that Gina was the child's legal mother.<sup>104</sup>

In reaching its decision, the court emphasized that a strong connection is formed between the woman and the child during the pregnancy and at birth.<sup>105</sup> That connection was not weakened by the lack of a biological link. The mother-child relationship develops because of the dependency of the child on the mother. The woman who supplies the eggs that result in the

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(2001) (arguing that the Locke Labor Theory favors awarding custody of the child to the contracting parents).

<sup>100</sup> *A.H.W. v. G.H.B.*, 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 950.

<sup>104</sup> *Id.* at 953-54 (holding that, because of the special bond between gestational mother and child, Gina held the parental rights and could only transfer those rights with her consent seventy-two hours after the birth).

<sup>105</sup> *Id.* at 953.

creation of the embryo has a connection to the embryo, but not to the resulting child. The woman who provides the nutrients necessary for the embryo to develop into a child is the child's natural and legal mother. The latter woman is the woman who gestates the child.<sup>106</sup> As a consequence, gestation is the controlling factor in adjudicating maternity. By applying that test for adjudicating maternity, the court sought to ensure that the gestational surrogate received credit for her labor. Nonetheless, in some states, a woman may labor in vain if she has indicated that she expects to place the child in the care of the intended parents.

c. *The Expectation Theory—The Intent Theory of Maternity*

Despite the lack of a biological connection between the woman and the child, some courts may honor a woman's expectations and recognize her as the child's legal mother. One of the primary purposes of the law is to protect people's reasonable expectations. This principle is seen in several different areas of law.<sup>107</sup> For instance, the Restatement and several jurisdictions recognize intentional interference with an expected inheritance or gift as a valid cause of action.<sup>108</sup> Thus, the law will protect potential heirs from losing the inheritance they reasonably expect to gain.<sup>109</sup> In some jurisdictions, the law also recognizes a tort for the interference with business expectancy.<sup>110</sup> In order to prove this cause of action, the plaintiff has to show the following: (1) that a valid contractual relationship or business expectancy existed; (2) that the

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<sup>106</sup> *Id.*; Hurwitz, *supra* note 60, at 157–58.

<sup>107</sup> Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 19–20 (1997).

<sup>108</sup> Jared S. Renfro, Comment, *Does Tennessee Need Another Tort? The Disappointed Heir in Tennessee and Tortious Interference with Expectancy of Inheritance or Gift*, 77 TENN. L. REV. 385, 387, 393–95 (2010); RESTATEMENT (SECOND) OF TORTS § 774B (1979) (“One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.”); *see also* Plimpton v. Gerrard, 668 A.2d 882, 885 (Me. 1995) (recognizing the tort of wrongful interference with an expected legacy or inheritance). *But see* Munn v. Briggs, 110 Cal. Rptr. 3d 783, 794 (Ct. App. 2010) (refusing to adopt the tort).

<sup>109</sup> Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993); *Plimpton*, 668 A.2d at 885–86.

<sup>110</sup> Matheson v. Stork, 477 N.W.2d 156, 160 (Neb. 1991); *Am. Diamond Exch., Inc. v. Alpert*, 920 A.2d 357, 363–64 (Conn. App. Ct. 2007).

defendant knew about the person's expectations; (3) that the defendant's intentional interference caused the plaintiff to lose the object of his or her expectation; (4) that the defendant's interference was the result of an improper motive or the defendant used improper means; and (5) that the plaintiff was harmed by the defendant's actions.<sup>111</sup> In fact, one court has stated that "[c]ontract law is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs."<sup>112</sup> Consequently, in contractual disputes, the court's role is to determine and effectuate the parties' intentions.<sup>113</sup> When a surrogate contract is breached, courts rely upon the intent test to ensure that the parties' reasonable expectations are protected.

One of the things that surrogacy agreements have in common with other contracts is that the parties expect to receive the thing for which they bargained.<sup>114</sup> The surrogate promises to gestate and to surrender the child to the intended parents. In exchange, the intended parents promise to pay the surrogate's expenses and to abide by other terms of the agreement.<sup>115</sup> Based upon the terms of the contract, the intended mother believes that she will be recognized as the mother of the resulting child. Courts applying the intent test attempt to fulfill that belief. Application of the intent test permits the court to attempt to identify and carry out the wishes of the parties involved in the process. The court's goal is to ensure that the parties receive the benefit of their bargains. To accomplish that task, the court recognizes and honors the intended parents' expectation that they will be the child's legal parents. This is the case even if the parties' contractual intent is contrary to the mandates of the statute.<sup>116</sup> Typically, when a surrogate enters into an agreement,

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<sup>111</sup> *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp.*, 52 P.3d 30, 33 (Wash. Ct. App. 2002).

<sup>112</sup> *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000) (en banc); see also *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 249 (Colo. 2003) (Bender, J., concurring); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.1 (3d ed. 2004).

<sup>113</sup> *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 714 N.E.2d 898, 900 (Ohio 1999).

<sup>114</sup> Jerald V. Hale, Note, *From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP. L. 335, 348 (1998).

<sup>115</sup> Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 397-98 (1991).

<sup>116</sup> See, e.g., *S.N. v. M.B.*, 935 N.E.2d 463, 470-71 (Ohio Ct. App. 2010).

she does not intend to be recognized as the child's legal mother. Therefore, the surrogate's expectation that the court will permit her to retain custody of the child is unreasonable. Thus, the court is not required to take steps to protect her expectations when it adjudicates maternity. The court's goal is to make sure that, in the absence of a mutual mistake, the parties get the benefit of their bargain by honoring the parties' expectations. To accomplish that task, the court relies on the intent test to ensure that the surrogate receives the promised money and the couple receives custody of the child they intended to parent.

Even courts that apply the intent test to determine maternity may not be solely motivated by the need to make the surrogate keep her promise. Relying on intent to determine maternity is different from strictly enforcing the surrogacy agreement. Intent is not a specific element that is necessary for a valid contract.<sup>117</sup> In order for a contract to be valid, there must be an offer, an acceptance, and consideration.<sup>118</sup> Once those elements are proven, courts do not permit a party to void the contract because he or she did not intend to abide by the terms of the contract. The enforceability of a contract has nothing to do with the parties' subjective intentions.<sup>119</sup> Their objective intentions are relevant to the formation and enforcement of the contract.<sup>120</sup> Intent is implicit in the elements necessary to create the contract. The person who makes the offer expresses the intent to carry out the terms of the agreement. Likewise, the person who accepts the offer indicates the intent to be governed by the provisions of the contract. Nonetheless, intent does not play a vital role in the enforcement of the contract. Contract law has a strict liability system. The reason the person breaches the contract is not relevant to the court's determination of

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<sup>117</sup> *Cochran v. Norkunas*, 919 A.2d 700, 708 (Md. 2007) (Intent to be bound is relevant when determining whether there was a manifestation of a mutual assent to make the contract.); RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

<sup>118</sup> *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 436 (Mo. Ct. App. 2010).

<sup>119</sup> *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd sub nom. Ernst v. Mechs. & Metals Nat. Bank of City of N.Y.*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

<sup>120</sup> *Smith v. Boyd*, 553 A.2d 131, 133–34 (R.I. 1989).

damages.<sup>121</sup> When a person breaches a contract, the court does not evaluate whether or not the person intended to abide by the terms of the agreement.

For instance, if A and B enter into a contract for A to buy B's house, B is legally obligated to sell the house to A. In the case where B breaches that contract, the court does not give the remedy based upon whether or not A intended to become the owner of the house. If the contract is valid, the court will award A an appropriate remedy based upon B's breach of the contract. The remedy will not be based upon the intent of either party. The same court would probably treat a surrogacy contract differently. For example, if A and B enter into a contract for A to act as a surrogate for B, a court applying the intent test will require A to surrender the resulting child to B. B's right to the child will be based upon B's intent to be the parent and not on the validity of the contract. The court will treat A's breach of the contract as irrelevant to B's maternity. Even though the outcome will be the same, the court's reasoning will be different. The *Johnson v. Calvert*<sup>122</sup> case provides an example of this approach.

Mark and Crispina Calvert signed a surrogate contract with Anna Johnson.<sup>123</sup> According to the provisions of the agreement, Anna was to gestate the couple's embryo.<sup>124</sup> The parties agreed that Anna would give up all rights to the child and turn it over to the couple.<sup>125</sup> Thus, Crispina was to be the child's legal mother.<sup>126</sup> In exchange for Anna's services, Mark and Crispina promised to pay her \$10,000 and to insure her life for \$200,000.<sup>127</sup> The agreement provided for the couple to pay the \$10,000 in installments.<sup>128</sup> Unfortunately, during the pregnancy, Anna's relationship with the couple deteriorated.<sup>129</sup> Consequently, Anna threatened to keep the child if the Calverts did not immediately pay her the remainder of the money they owed her.<sup>130</sup> The

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<sup>121</sup> George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1226 (1994).

<sup>122</sup> 851 P.2d 776 (Cal. 1993).

<sup>123</sup> *Id.* at 778.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 778, 782.

<sup>127</sup> *Id.* at 778.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



Calverts responded to Anna's threat by filing an action asking the court to adjudicate them as the legal parents of the unborn child.<sup>131</sup> When Anna filed her own lawsuit seeking to be recognized as the child's legal mother, the court consolidated the cases.<sup>132</sup>

Anna's claim to the child was based on her role as the gestator and birth mother.<sup>133</sup> Crispina contended that, since the child was conceived using her eggs, she should be recognized as the legal mother.<sup>134</sup> The California Supreme Court concluded that both women had legitimate claims to the child.<sup>135</sup> Nonetheless, the court ruled that the child could only have one legal mother.<sup>136</sup> The court held that the appropriate test for determining the identity of the legal mother of the child was the "intent" test. Specifically, the court stated, "[S]he who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."<sup>137</sup> The Calverts intended to have a child from their genetic material. They carried out that intent by having an embryo created using his sperm and her egg implanted in Anna. Anna agreed to assist the Calverts in carrying out their intentions. The child would not exist if the Calverts had not acted on their intentions. The court did not recognize Anna's intent to keep the child because it conflicted with the parties' originally expressed intentions.<sup>138</sup> The court did not address the issue of a case involving a traditional surrogacy arrangement. However, a later California decision indicated that the existence of a traditional surrogacy agreement would have changed the outcome of the case.<sup>139</sup> The key factor in determining maternity was *intent* and not *genetics*. The court did not rule on the enforceability of the contract. Instead, the court used the information in the contract to ascertain the parties'

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 779.

<sup>134</sup> *Id.* at 780.

<sup>135</sup> *Id.* at 781.

<sup>136</sup> *Id.* This holding is consistent with the state's treatment of paternity. See *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (California law does not permit a child to have two legal fathers).

<sup>137</sup> *Johnson*, 851 P.2d at 782.

<sup>138</sup> *Id.*

<sup>139</sup> See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900–01 (Ct. App. 1994).

intent. It is possible that if the Calverts had submitted a nonbinding document, like a letter, to show intent, the court's analysis would have been the same. The court did not seek to remedy Anna's breach of the surrogacy contract. It sought to protect the expectations of the parties. Some persons are concerned that honoring those expectations may not result in the child being placed in the best home.

*d. Protective Theory—Best Interests of the Child Maternity Test*

The tests discussed above are not the end of the story when it comes to adjudicating maternity. Some people think that a woman can become a mother if she is the best woman for the job. Her qualifications depend upon what the particular child involved in the case needs. This is a protective theory of maternity because the focus is on protecting the child. The dissenting justice in *Johnson* and some legal commentators have argued that the correct maternity test to apply is the best interests of the child test.<sup>140</sup> Under that test, the court would consider the best interests of the child when determining whether the surrogate or the intended mother should be recognized as the child's legal mother. The dissent maintained that the court was obligated to have the households and lifestyles of both women evaluated in order to decide which placement would be in the child's best interests.<sup>141</sup> Under this theory, the court would ignore the existence of the contract and resolve the case in the way that protected the interests of the child. In the interest of fairness and judicial certainty, the courts should discard the tests for maternity and base their decisions on contract law.

2. Returning to Contract Law

*a. An Explanation*

As the above analysis indicates, when faced with the breach of a surrogacy contract, courts are more comfortable relying on family law than contract law. If surrogacy contracts were treated like other types of contracts, courts would deal with breaches of

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<sup>140</sup> *Johnson*, 851 P.2d at 798; Hurwitz, *supra* note 60, at 129; Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. LOUISVILLE L. REV. 371, 375, 406–12 (2011).

<sup>141</sup> *Johnson*, 851 P.2d at 798.

those contracts by relying upon traditional contract remedies. Thus, the issue becomes whether or not surrogacy contracts are a special class of contracts that deserve their own unique remedies. In the next section, this Article argues that surrogacy disputes should be settled using contract remedies. The subject of most contracts cannot talk, feel, or die. Therefore, some would argue that surrogacy contracts are different from other contracts because they involve children. The concern is that permitting children to be the subject of contracts is against public policy because it reduces children to property. Given the history of slavery in this country, it is understandable that people are uncomfortable referring to children as property.<sup>142</sup> However, adoption, marriage, and other things impacting the welfare of children are contractual in nature. The key is for legislatures and courts to put safeguards in place to protect the interests of children involved in surrogacy arrangements. Children are not protected where a majority of jurisdictions have not taken steps to regulate surrogacy arrangements. Another reason why people hesitate to have a surrogate held to the promises she makes is the fear that the surrogate may be exploited and devalued.<sup>143</sup> That fear is based upon the erroneous perception that surrogates are poor, uneducated women who are preyed upon by wealthy, infertile couples. Research indicates that the average surrogate is a middle-income, educated woman who has had other children.<sup>144</sup>

Courts should enforce the contract in a surrogacy arrangement. The debate of whether surrogacy contracts should be permitted should not factor into the court's decision with regards to the enforceability of such contracts. Persons objecting to surrogacy should register their complaints with the legislatures. It is not the courts' job to legislate. Thus, the surrogate should never be classified as the legal mother of a child conceived as the result of a surrogacy arrangement, unless extenuating circumstances warrant that outcome. As previously

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<sup>142</sup> Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 153-55 (1997).

<sup>143</sup> John Haskell, Note, *The Parent Trap: Implications of Surrogacy on Motherhood, Fatherhood, and the Family*, 6 WHITTIER J. CHILD & FAM. ADVOC. 107, 113 (2006).

<sup>144</sup> Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 138 (2009).

stated, a key reason to enforce the contract is to honor the expectations of the parties.<sup>145</sup> A woman with the requisite mental capacity has the legal right to enter into an agreement to gestate or to conceive a child for another adult woman. The surrogate should not be permitted to unilaterally change her mind after the contract has been partially performed and the child has been conceived using the genetic material of the intended mother or the sperm of the intended mother's sperm donor.

There are several reasons why the law should permit the intended mother to avail herself of contract remedies when the surrogate refuses to surrender possession of the child. Requiring the surrogate to keep her promises protects the intended parents, the courts, and the child. Courts should respect the autonomy of consenting adults. It is paternalistic to think that an adult woman is not capable of entering into a legally binding contract.<sup>146</sup> The woman agreeing to act as a surrogate is not in an unequal bargaining position. When infertile couples decide to use a surrogate, they are usually desperate for a child. That desperation makes them vulnerable. Thus, they are probably not in a position to exploit anyone. Moreover, once she conceives the child, the surrogate is actually in the stronger bargaining position. For instance, in order to get the intended parents to pay her more money, the surrogate could threaten to abort or keep the child.

In the interest of judicial economy, courts should have bright line rules when it comes to adjudicating maternity in cases involving surrogates. The clearest rules are those based upon contract principles. If the surrogate knows that she will be liable for breach of the contract, she may be reluctant to break her promise and try to keep the child. Under the current system, there is no incentive for the surrogate to abide by the terms of the contract. The use of various tests to determine maternity encourages surrogates to take their chances in court. With the way courts handle breaches of surrogacy contracts, the surrogate

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<sup>145</sup> June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 601 (1988).

<sup>146</sup> *Candlelight Props., L.L.C. v. MHC Operating Ltd. P'ship*, 750 N.E.2d 1, 10 (Ind. Ct. App. 2001) ("[A]s a general rule, the law allows persons of full age and competent understanding the utmost liberty in contracting; and their contracts, when entered into freely and voluntarily, will be enforced by the courts." (quoting *Robinson v. Century Pers., Inc.*, 678 N.E.2d 1268, 1269-70 (Ind. Ct. App. 1997))).

has a fifty-fifty chance of being declared the legal mother of the child. Those odds rewards surrogates for breaching the contracts.

Relying on contract remedies to address breaches of surrogacy contracts will also lead to judicial consistency. If a person breaches a contract, there are a finite number of remedies available. Thus, people can usually predict the outcome of a breach of contract case. Treating breaches of surrogacy contracts like breaches of other contracts will also deter surrogates from reneging on their promises. It may also discourage some women from agreeing to be surrogates because they know that they are contracting away their right to keep the child. This may weed out women who are not emotionally equipped to be surrogates. Due to the lack of consistency under the current system, a breach of a surrogacy contract typically results in a custody dispute. Custody disputes are never beneficial to children. If the dispute occurs after the child is born, the child may eventually be separated from the woman to whom the child has become attached. Some courts have recognized these concerns and treated surrogacy custody disputes as breaches of contract cases and not custody disputes.

*b. An Example*

When it comes to strictly enforcing surrogacy contracts, the law treats gestational surrogacy arrangements different from traditional surrogacy arrangements. For example, the Illinois Gestational Surrogacy Act specifically states that, if the gestational surrogate breaches the contract, the intended parents are entitled to the appropriate legal and equitable remedies.<sup>147</sup> The Ohio Appellate Court recently decided a surrogacy contract dispute in favor of the intended mother.<sup>148</sup> An unmarried woman purchased sperm and eggs from anonymous donors.<sup>149</sup> Then, she entered into a contract with a gestational surrogate.<sup>150</sup> Both the surrogate and the intended mother obtained independent legal advice and counsel before entering into the agreement.<sup>151</sup> When the surrogate gave birth to twins, the intended mother tried

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<sup>147</sup> 750 ILL. COMP. STAT. ANN. 47/55 (West 2014).

<sup>148</sup> *S.N. v. M.B.*, 935 N.E.2d 463, 473 (Ohio Ct. App. 2010).

<sup>149</sup> *Id.* at 464–65.

<sup>150</sup> *Id.* at 465.

<sup>151</sup> *Id.*

unsuccessfully to adopt them.<sup>152</sup> Since they were born prematurely, the twins had a lot of health problems.<sup>153</sup> Unfortunately, one of the babies died less than two months after being born.<sup>154</sup> The remaining baby underwent two surgeries and spent a substantial amount of time in the hospital.<sup>155</sup>

After the baby was released from the hospital, the surrogate permitted an unrelated third party to care for the baby.<sup>156</sup> The surrogate refused to give the baby to the intended mother.<sup>157</sup> Consequently, the intended mother filed suit asking the court to order DNA tests to show that the surrogate was not the child's biological parent.<sup>158</sup> She also sought to have the surrogate's maternity disestablished.<sup>159</sup> The court waived DNA testing after both women admitted that neither was biologically related to the child.<sup>160</sup> Nonetheless, both women sought to be adjudicated as the child's legal mother.<sup>161</sup>

The trial court granted the intended mother partial summary judgment on the issue of parentage.<sup>162</sup> The trial court concluded that the surrogate was presumed to be the child's legal mother because she gave birth to the child.<sup>163</sup> According to the trial court, that presumption was rebutted by the fact that the surrogate was not the child's biological mother.<sup>164</sup> The presumption was further rebutted because the surrogate voluntarily signed the surrogacy contract in which she relinquished and waived her right to be the child's natural and legal parent.<sup>165</sup> Therefore, the trial court ordered the surrogate to surrender the child to the intended mother.<sup>166</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 465-66.

<sup>162</sup> *Id.* at 466.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 467.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

The surrogate appealed the trial court's decision, claiming that the trial court erred by adjudicating the intended mother as the legal mother and giving her temporary physical custody of the child without a hearing.<sup>167</sup> The surrogate's main argument was that the presumption of her maternity had not been rebutted by the fact that she signed the surrogacy contract.<sup>168</sup> In order to resolve the case, the appellate court analyzed the state's parentage statute.<sup>169</sup> The appellate court determined that the parentage statute provided that a woman who gives birth is presumed to be the child's natural mother.<sup>170</sup> Under the terms of the statute, a man's presumption of paternity could be rebutted by clear and convincing evidence. The appellate court reasoned that a woman's presumption of maternity could likewise be rebutted.<sup>171</sup> The surrogate was presumed to be the child's legal mother because she gestated and gave birth to the child.<sup>172</sup> However, her maternity could be rebutted by evidence that she did not intend to parent the child.<sup>173</sup> The court found this evidence by reading the terms of the surrogacy agreement.<sup>174</sup>

The court relied upon contract principles to force the gestational surrogate to abide by the terms of the surrogacy agreement.<sup>175</sup> In particular, the court stated, "[W]e must apply the law of contracts in interpreting the validity of the surrogacy agreement in the instant matter."<sup>176</sup> The court was influenced by the fact that, in deciding an earlier gestational surrogacy case, the Ohio Supreme Court had stated that the "right and just" thing to do was to require the parties to a surrogacy agreement to honor the contract that they executed.<sup>177</sup> First, the court found that the parties had entered into a valid written contract.<sup>178</sup> The intended mother accepted the surrogate's offer to gestate the embryo. The consideration for the contract was the intended mother's agreement to pay the surrogate's pregnancy-related

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 468–69.

<sup>169</sup> *Id.* at 469.

<sup>170</sup> *Id.* at 470.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 470–71.

<sup>176</sup> *Id.* at 471.

<sup>177</sup> *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007).

<sup>178</sup> *S.N.*, 935 N.E.2d at 471.

medical expenses, life insurance premiums, and living expenses.<sup>179</sup> Second, the court determined that both women were old enough and had the requisite mental capacity to enter into a legal contract.<sup>180</sup> In addition, the surrogate and the intended mother negotiated the terms of the contract with the assistance of attorneys.<sup>181</sup> Third, the court concluded that the terms of the contract required the surrogate to relinquish physical custody of the child and to take actions to ensure that the intended mother was adjudicated as the child's legal mother.<sup>182</sup> Lastly, the court decided that the surrogate was not forced to sign the contract.<sup>183</sup> Thus, the appellate court held that the trial court correctly enforced the terms of the contract.<sup>184</sup> The intended mother abided by all of the terms of the contract. Therefore, she deserved to receive the benefit of her bargain. In order to meet the parties' expectations, both the trial court and the appellate court adjudicated the intended mother as the child's legal mother. Other courts should follow the approach of this court and apply contract law to breaches of surrogacy contracts. Then, the intended parents will be given the opportunity to benefit from available contract remedies.

## II. LEGALLY REMEDYING THE BREACH: DAMAGES AND SPECIFIC PERFORMANCE

This section addresses the legal remedies available to an intended mother when the surrogate attempts to deprive her of custody of the promised child. A person breaches a contract when he or she does not perform the action promised in the contract.<sup>185</sup> The two main legal remedies for breach of contract are damages and specific performance.<sup>186</sup> The underlying purpose of any contract remedy is to make the non-breaching

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 471-72.

<sup>183</sup> *Id.* at 471.

<sup>184</sup> *Id.* at 471-72.

<sup>185</sup> *Nat'l City Bank of Cleveland v. Erskine & Sons, Inc.*, 110 N.E.2d 598, 603 (Ohio 1953).

<sup>186</sup> *Lewis v. Woodbine Sav. Bank*, 165 N.W. 410, 411 (Iowa 1917).



party whole and to protect the party's expectation interests.<sup>187</sup> This purpose is accomplished by putting that party in the position he or she would have been in had the contract not been breached.<sup>188</sup> In the context of a surrogacy arrangement, damages may offer some solace to the contracting parents, but it is no substitute for the child they hoped to raise.

### A. Damages

The two primary types of damages are compensatory or actual damages and special damages. In certain cases, courts may award nominal damages to compensate for breaches resulting in no actual damages<sup>189</sup> and punitive damages to deter certain types of bad behavior.<sup>190</sup> Compensatory damages are awarded to compensate the non-breaching party for the expenses he or she actually suffers as a consequence of the breach. These damages are awarded based upon the non-breaching party's expectancy.<sup>191</sup> The correct measure of compensatory damages is the amount of economic loss that the non-breaching party actually suffers.<sup>192</sup> Actual damages are economic damages, which may be either direct or indirect.<sup>193</sup> Direct damages are designed to compensate persons for losses that the court presumes to have been foreseen or contemplated by the breaching party. Indirect or consequential damages are the foreseeable ones that result indirectly from the breach.<sup>194</sup> In the context of a surrogacy

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<sup>187</sup> John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 GEO. J. INT'L L. 61, 64 (2004); see also *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 388 N.W.2d 584, 592 (Wis. 1986).

<sup>188</sup> Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 56 (2003).

<sup>189</sup> *Brock v. King*, 629 S.E.2d 829, 835 (Ga. Ct. App. 2006) (quoting *Botterbusch v. Preussag Int'l Steel Corp.*, 609 S.E.2d 141, 146-47 (Ga. Ct. App. 2004)).

<sup>190</sup> In order for punitive damages to be awarded in breach of contract cases, the conduct causing the breach must be a tort. *Morrow v. L.A. Goldschmidt Assocs., Inc.*, 492 N.E.2d 181, 184 (Ill. 1986).

<sup>191</sup> *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (These damages are the person's "'expectation interest' or 'benefit of the bargain' damages.").

<sup>192</sup> *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 240 (Colo. 2003).

<sup>193</sup> *Wade & Sons, Inc. v. Am. Standard, Inc.*, 127 S.W.3d 814, 823 (Tex. Ct. App. 2003); Gregory K. Morgan & Albert E. Phillips, *Design Professional Contract Risk Allocation: The Impact of Waivers of Consequential Damages and Other Limitations of Liabilities on Traditional Owner Rights and Remedies*, 33 J.C. & U.L. 1, 12 (2006).

<sup>194</sup> *Valley Nissan, Inc. v. Davila*, 133 S.W.3d 702, 713 (Tex. Ct. App. 2003).

situation, the actual damages would include the surrogate's medical expenses, the cost of the reproductive technology used to make the pregnancy possible, the surrogate's living expenses, and other expenses that the intended parents pay in accordance with the dictates of the surrogacy contract.<sup>195</sup> Consequential damages might include loss of wages or leave time if the intended parents took time off from work to assist the surrogate during the pregnancy.

Special damages are damages that the parties could reasonably foresee occurring.<sup>196</sup> The person seeking special damages has the burden of proving that he or she has been damaged. In order to satisfy that burden, the person must show that (1) the defendant's breach of the contract was the cause of his or her actual loss; and (2) the defendant should have reasonably foreseen that the loss would occur if the defendant failed to fulfill the terms of the contract. In addition, the plaintiff must prove the amount of his or her loss with a reasonable degree of certainty.<sup>197</sup> The intended mother will have no problem satisfying the conditions necessary to receive special damages. First, the loss of the child and the money paid to have the child conceived will result from the surrogate's refusal to surrender custody of the child. Second, the surrogate definitely would have foreseen that her failure to abide by the terms of the contract would cause the intended mother's losses. Lastly, the intended mother will probably have receipts and medical bills showing the amount of money she lost because of the surrogate's actions. In the context of a surrogacy arrangement, special damages may include the cost of the tests to confirm the surrogate's pregnancy and the money the intended parents spent to prepare their home and lives for the arrival of the child.

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<sup>195</sup> Some persons claim that the intended parents pay between \$75,000 and \$150,000. Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 647, 649 (2010) (discussing the costs of surrogacy); BROWNE LEWIS, *THE INHERITANCE RIGHTS OF CHILDREN IN THE UNITED STATES: CASES AND MATERIALS* 315 (2010) (discussing the costs associated with the surrogacy process).

<sup>196</sup> *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 102 P.3d 257, 261-62 (Cal. 2004).

<sup>197</sup> *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 399 S.E.2d 8, 11 (S.C. Ct. App. 1990).

Nominal damages are usually awarded in breach of contract cases if they can be proven.<sup>198</sup> To prove nominal damages, the plaintiff only needs to prove that a breach occurred. Nominal damages are trivial damages that are not meant to compensate the breaching party. The courts award them to acknowledge that the person has suffered some harm just by the fact that the contract was breached.<sup>199</sup> Whenever the surrogate refuses to relinquish her claim to the child, she has breached the surrogacy contract. That breach entitles the intended parents to nominal damages. Nonetheless, in surrogacy cases, nominal damages will not be relevant because the intended parents will always be able to show some actual damages. Even in uncompensated surrogacy arrangements, the intended parents have to pay the surrogate's medical expenses.

Punitive damages are awarded in order to punish the breaching party for his or her actions and to discourage others from acting in a similar manner.<sup>200</sup> In most jurisdictions, punitive damages are not awarded for breach of contract. In order to obtain punitive damages, the non-breaching party has to prove that the defendant committed an independent tort.<sup>201</sup> To receive punitive damages, it may be possible for the intended mother to prove that the surrogate committed the tort of conversion when she refused to surrender the child.<sup>202</sup> A person is liable for conversion if he or she deprives another person of his or her property.<sup>203</sup> To successfully prove conversion, the intended mother would have to show the following: (1) She has a property interest in the child; (2) She has a right to immediately possess the child; (3) The surrogate is wrongly keeping the child; and (4) She has made a demand for possession of the child.<sup>204</sup>

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<sup>198</sup> *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 95, 612 N.E.2d 289, 292, 595 N.Y.S.2d 931, 934 (1993).

<sup>199</sup> *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 709 (N.D. 1995).

<sup>200</sup> *Frank J. Cavico, Jr., Punitive Damages for Breach of Contract—A Principled Approach*, 22 ST. MARY'S L.J. 357, 442–43 (1990).

<sup>201</sup> *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 652–53 (Ohio Ct. App. 2006).

<sup>202</sup> *Hicks v. Lilly Enters., Inc.*, 608 P.2d 186, 189 (Or. Ct. App. 1980) (explaining that punitive damages may be allowed in conversion actions).

<sup>203</sup> *Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So. 2d 1157, 1160–61 (Fla. Dist. Ct. App. 1984).

<sup>204</sup> *IOS Capital, Inc. v. Phx. Printing, Inc.*, 808 N.E.2d 606, 610 (Ill. App. Ct. 2004).

The intended mother should be able to easily prove the last three elements. The biggest hurdle she would have to overcome would be convincing the court that she has a property interest in the child. However, this obstacle is not insurmountable because the law has recognized a property interest in genetic material. For instance, in *Hecht v. Superior Court*, the court recognized a man's right to leave his sperm to his girlfriend by will.<sup>205</sup> A woman should have the same property interest in her eggs and in the embryos created from them.<sup>206</sup> The court in *Moore v. Regents of the University of California* concluded that a man had no property interest in his cells once doctors removed them from his body.<sup>207</sup> Nonetheless, the court decided that the man had the authority over them as long as they were in his body.<sup>208</sup> As a result, doctors could not remove those cells without his informed consent.<sup>209</sup> Applying this reasoning to the genetic supplier of the eggs in a surrogacy situation, a woman has control over her eggs as long as they are inside her body. The eggs cannot be used unless the woman gives her informed consent. This analysis holds true whether or not the intended mother uses her own eggs or eggs that she has acquired from a donor. In either case, she has an ownership interest in the eggs.

The surrogate is liable for conversion whether or not she is a traditional or gestational surrogate. If she is a traditional surrogate, she would have converted the sperm supplied by the intended parents. If she is a gestational surrogate she would have converted the embryo created by the intended parents. Thus, the intended mother should be able to prove the tort of conversion. Even if the intended mother is able to prove that the defendant committed a tort, in order to receive punitive damages, she may also have to prove that the surrogate's breach was

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<sup>205</sup> 20 Cal. Rptr. 2d 275, 276-77, 283 (Ct. App. 1993).

<sup>206</sup> Erik B. Seeney, Note, *Moore 10 Years Later—Still Trying To Fill the Gap: Creating a Personal Property Right in Genetic Material*, 32 NEW ENG. L. REV. 1131, 1170 (1998) (arguing for a recognition of a property right in genetic material).

<sup>207</sup> *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 489 (Cal. 1990) (in bank).

<sup>208</sup> See *id.* at 488-89 (stating that the plaintiff did not have a continuing interest in his cells after they were excised, implying that he did have a property interest in them before the cells were excised); *Id.* at 502 (Broussard, J., concurring in part and dissenting in part).

<sup>209</sup> *Id.* at 493; see Roger F. Friedman, Comment, *It's My Body and I'll Die If I Want To: A Property-Based Argument in Support of Assisted Suicide*, 12 J. CONTEMP. HEALTH L. & POL'Y 183, 208 (1995).

motivated by some type of evil intent.<sup>210</sup> For instance, if the intended mother is able to show that the surrogate entered into the agreement with no intentions of surrendering the child, she may be able to get punitive damages. When there is a sufficient reason not to award damages, the court has the authority to order the surrogate to specifically perform the contract.

### *B. Specific Performance*

A and B signed a contract for A to construct a building for B. When the building was about fifty percent complete, A refused to continue working on the building. In that case, damages are an appropriate remedy because B can use the money received from A to hire someone else to complete construction of the building. On the other hand, in a situation where A contracts with B for A to buy B's house and B decides that he does not want to sell the house to A, the outcome may be different. In that case, damages will not put A in the position that A would have been in had B not breached the contract, because there is only one house exactly like B's house. Thus, an award of money damages will not permit A to obtain the benefit of her bargain. The only way for A to be made whole is for the court to order B to specifically perform the contract and sell the house to A. This hypothetical illustrates one of the reasons why specific performance is the best remedy to cure the breach of a surrogacy contract.

A contracts with B for B to gestate A's embryo. A pays for all of the fertility treatments. Before implantation of A's embryo into B or before B conceives a child from A's embryo, B decides that she does not want to carry A's child, so she refuses to perform her part of the contract. Damages are an appropriate remedy because A can use the money damages to find another surrogate to gestate A's embryo. However, once B becomes pregnant or gives birth, damages are not adequate. The only way for A to be made whole is to receive custody of the child because there is only one child exactly like the child conceived using A's embryo. Courts have always concluded that specific performance is the proper remedy when a land contract is

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<sup>210</sup> *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 652 P.2d 665, 667 (Kan. 1982).

breached because land is unique.<sup>211</sup> That same logic can be applied to a surrogacy agreement because children are not fungible.

If the surrogate breaches the contract before she has conceived the child, she should be required to pay damages. In that instance, the intended parents can be made whole. That is not the case after the child is born because money cannot adequately make up for the loss of a child. The trickier case is where the surrogate changes her mind after conception of the child, but before the birth of the child. Once the fetus is viable enough to make abortion illegal under the state's law, the court should establish a presumption that she intends to perform the contract. Thus, if she breaches after that time, the court should order her to specifically perform the contract. Prior to that time, the woman always has the right to change her mind and abort the fetus.

Where surrogacy contracts are legal, courts should enforce the contracts. If the surrogate breaches the contract by refusing to turn the child over to the intended mother, the court should require specific performance instead of damages. The remedy stage of a trial is designed to put the intended mother in the position she would have been in if the other party had not breached the contract.<sup>212</sup> Awarding specific performance is the most accurate way for the courts to accomplish that goal because it gives the non-breaching party the exact performance that she anticipated.<sup>213</sup> In situations involving the breach of a surrogacy agreement, specific performance is the proper remedy because monetary damages are inadequate, it satisfies the expectations of the parties, and the subject of the contract, the child, is unique. The court has the discretion to award specific performance as a matter of fairness.<sup>214</sup>

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<sup>211</sup> Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 364 (1984).

<sup>212</sup> Richard R.W. Brooks, Essay, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 577-78 (2006) (showing that specific performance can be used to place both parties in the position they would have been in had there not been a breach).

<sup>213</sup> Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer's Right To Elect Between Damages and Specific Performance as a Remedy for Breach of Contract*, 35 LOY. U. CHI. L.J. 555, 585 (2004); see also Ulen, *supra* note 211, at 364-65.

<sup>214</sup> Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979).

Specific performance is usually awarded in cases where damages are inadequate because of the uniqueness of the item that is the subject of the contract.<sup>215</sup> Moreover, specific performance is an appropriate remedy when it is difficult to calculate monetary damages.<sup>216</sup> Even if the courts are able to put a price tag on the harm suffered by the non-breaching party, monetary damages may not be appropriate because the breaching party may have little or no financial resources.<sup>217</sup>

Courts usually do not grant specific performance if it would result in a situation that is unjust, oppressive, or unconscionable.<sup>218</sup> Courts are also reluctant to award specific performance because it may lead to judicial inefficiency. If the court forces the breaching party to fulfill the terms of the contract, the court may be given the difficult task of monitoring the party's actions. The costs to the court of supervising the performance of the breaching party may be inefficiently high.<sup>219</sup>

In order to determine if specific performance is warranted, the court will typically balance the equities between the parties.<sup>220</sup> The party seeking specific performance has the burden of proving that it is the correct remedy in his or her case. In order to compel specific performance, the court has to find the following: (1) the existence of a valid contract; and (2) that the party seeking specific performance has performed or is prepared to perform his or her obligations under the contract.<sup>221</sup>

Applying the above stated law to a surrogacy situation, it appears that specific performance is an appropriate remedy in a case involving the breach of a surrogacy contract. First, as indicated earlier, the subject of the contract, like all children, is unique. Children have never been considered to be interchangeable. Prior to entering into a surrogacy arrangement, the intended parents often take steps to ensure that the resulting

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<sup>215</sup> Paul G. Mahoney, *Contract Remedies and Options Pricing*, 24 J. LEGAL STUD. 139, 154 (1995).

<sup>216</sup> Deepa Varadarajan, Note, *Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*, 111 YALE L.J. 735, 738 (2001).

<sup>217</sup> Schwartz, *supra* note 214, at 284 & n.44.

<sup>218</sup> Asifa Quraishi, Comment, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 191-92 (1991).

<sup>219</sup> See Ulen, *supra* note 211, at 398.

<sup>220</sup> Campbell v. Carr, 603 S.E.2d 625, 627 (S.C. Ct. App. 2004).

<sup>221</sup> Pluhacek v. Neb. Lutheran Outdoor Ministries, Inc., 420 N.W.2d 286, 288 (Neb. 1988); see also Dixon v. Malouf, 70 A.D.3d 763, 763, 894 N.Y.S.2d 127, 128 (2d Dep't 2010).

child has certain attributes. For example, if the persons are using donor gametes, they typically make sure that the donors have physical characteristics similar to theirs.<sup>222</sup> The fact that the persons are choosing to use a surrogate rather than to adopt indicates that they do not want just any child; they want a child they helped create.

Second, damages are not an appropriate remedy for the breach of a surrogacy contract because damages are difficult to calculate. It is relatively easy to compute the money the intended parents provided for the surrogate's medical and childbirth expenses.<sup>223</sup> Nonetheless, there are other damages that are not readily quantifiable. The loss of a child is a devastating event for a parent. When the surrogate breaches the contract by refusing to surrender the child to the intended parents, those persons have lost a child. During the surrogate's pregnancy, the intended parents usually bond with the child. They attend the prenatal appointments, choose the name, and decorate a nursery.<sup>224</sup> If the surrogate is permitted to pay damages and keep the child, the intended parents are not going to be adequately compensated because money is not sufficient to ease the harm caused by the loss of the child. The only thing that could make the couple whole is for the court to order the surrogate to perform the contract.

Third, the award of specific performance may be the only way for the non-breaching party to be made whole. Most surrogates are women of modest means.<sup>225</sup> Therefore, the breaching surrogate may not have the financial resources to satisfy a monetary judgment. If the court does not consider specific performance to be an option, the intended parents may end up losing the child and being stuck with a worthless judgment. In this situation, specific performance is fair to all of the parties involved. The surrogate is not disadvantaged because she received her bargained-for expectations. The intended parents receive the benefit of the bargain by being adjudicated as the child's legal parents.

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<sup>222</sup> Keith J. Cunningham, Comment, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721, 742 (1988).

<sup>223</sup> Sharon L. Tiller, Note, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 420 (1987).

<sup>224</sup> Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 541 (1998).

<sup>225</sup> Andrews & Douglass, *supra* note 13, at 673-74.



The risks posed by awarding specific performance are not relevant to a surrogacy situation. Courts are reluctant to specifically enforce personal service contracts because they may be perceived as sanctioning involuntary servitude.<sup>226</sup> First, a surrogate agreement is not simply a service contract. The couple is not contracting solely for the surrogate's services. They are contracting for the woman's services and the resulting child. People are uncomfortable acknowledging that the contract is partially for the child because that seems too much like baby-selling.<sup>227</sup> Nonetheless, if asked, the parties to the contract would admit that the crucial part of the contract is the child.

Even if a surrogacy agreement is considered to be a service contract, specific performance is still an appropriate remedy. By enforcing the contract, the court will not be helping to place the surrogate in bondage because, once the child is born, the surrogate's services end. However, in order to ensure the fulfillment of the contract, if the court ordered the surrogate to get pregnant against her will or issued an injunction to prevent the surrogate from having an abortion, that would be against public policy because it would be a form of involuntary servitude.<sup>228</sup> After the child is born, that is not a concern. The intended parents have performed their part of the contract and are entitled to specific performance on the part of the surrogate. Courts are also worried about having to monitor to make sure that the breaching party obeys the court's order and performs the contract.<sup>229</sup> This problem will not arise in a surrogacy situation because once the child is born, the court's role in the transaction can be minimal.<sup>230</sup> All the court has to do is recognize the intended parents as the legal parents and to award them custody of the child.

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<sup>226</sup> Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 331-32 (2006).

<sup>227</sup> Atwell, *supra* note 63, at 44-51.

<sup>228</sup> Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 726-27 (Ct. App. 1991).

<sup>229</sup> Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 387-88 (1993); see also Zannis v. Lake Shore Radiologists, Ltd., 392 N.E.2d 126, 129 (Ill. App. Ct. 1979).

<sup>230</sup> Barbara K. Kopytoff, *Surrogate Motherhood: Questions of Law and Values*, 22 U.S.F. L. REV. 205, 233 (1988).

Once the legislature in a state indicates that surrogate contracts are acceptable, the courts should treat them just like any other contract.<sup>231</sup> If the legislature is concerned about surrogacy agreements, it should regulate the process or ban it. If a surrogate wants to rescind the contract because she cannot bear to part with the child, the court should overlook her emotional state and enforce the contract. In the interests of judicial consistency and fairness, courts should honor the decision made by the parties and enforce the surrogacy contract. The surrogate should not be permitted to change her mind and keep the baby. As long as the contract is not unconscionable<sup>232</sup> and does not violate other contract principles, the courts should enforce the contract.<sup>233</sup>

When the court ignores a valid contract and permits the surrogate to keep the child, in essence, the court is reforming<sup>234</sup> or rescinding<sup>235</sup> the contract. Neither of those actions is appropriate unless the surrogate takes some type of affirmative step to demonstrate that she is entitled to one of those remedies. When the court ignores the contract and awards custody of the child to the surrogate, it sets a bad precedent. The surrogate does not have an incentive to honor the terms of the contract. Therefore, she may be willing to take her chances in court. A protracted custody battle is never in the child's best interests.<sup>236</sup> In fact, all parties involved will be hurt by the litigation.

The court's action seems like reformation because, instead of forcing her to honor the contract, the court is allowing the surrogate to unilaterally change her mind. The purpose of reformation is to reform the written contract so that it reflects

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<sup>231</sup> Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 618 (2003).

<sup>232</sup> Courts will not enforce unconscionable contracts. *Rite Color Chem. Co. v. Velvet Textile Co.*, 411 S.E.2d 645, 647-48 (N.C. Ct. App. 1992).

<sup>233</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties [(procedural unconscionability)] together with contract terms which are unreasonably favorable to the other party [(substantive unconscionability)].").

<sup>234</sup> Michal S. Gal, *Harmful Remedies: Optimal Reformation of Anticompetitive Contracts*, 22 CARDOZO L. REV. 91, 93 (2000) (discussing the goals of contract reformation).

<sup>235</sup> Rescission is about fairness. *Hornback v. Wentworth*, 132 P.3d 778, 781 (Wash. Ct. App. 2006).

<sup>236</sup> Melissa Douthart Philbrick, *Agreements To Arbitrate Post-Divorce Custody Disputes*, 18 COLUM. J.L. & SOC. PROBS. 419, 426-28 (1985).

the parties' intended bargain.<sup>237</sup> The court cannot rely on the doctrine to explicitly or implicitly rewrite the contract based upon the court's view of what is socially acceptable. Reformation is only available where the following circumstances are present: there is an agreement that is a consequence of the meeting of the parties' minds; the parties consent to have the agreement put into writing; a writing is drafted allegedly based upon that agreement; the terms of the writing and the agreement are in conflict; and a legal basis exists for the court to reform the writing to conform with the agreement.<sup>238</sup> A unilateral mistake is not a ground for reformation.<sup>239</sup> Reformation is not necessary in a surrogacy arrangement because there is usually no conflict between the written contract and the agreement made by the parties. The surrogate refuses to abide by the terms of the agreement because she wants to keep the child, not because she thinks that she has a right to do so.

The court appears to be rescinding the contract because the surrogate is not obligated to perform by surrendering the child to the intended parents. Rescission of a contract is the annulling, abrogating, or unmaking of a contract. The remedy of rescission functions to restore the parties to their pre-contract position. In essence, the parties are put in the same position they were in prior to the making of the contract.<sup>240</sup> In the case of a surrogacy agreement, rescission is not an appropriate remedy because the parties can never be restored to their original positions. After the birth of the child, one of the previously childless women is going to be a legal mother. The person who loses the child will be in a more adverse position than she was in at the time she entered into the contract. Under certain circumstances, the intended parents may not have a legal remedy. If no legal remedy is available, the court should evaluate the facts to determine if equity permits it to offer the intended parents some form of relief.

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<sup>237</sup> Edward William Barnett, Note, *Contracts—Mistake—Reformation Not Permitted For Mutual Mistake as to Extent of Grantor's Interest*.—Metzler v. Bolen, 137 F. Supp. 457 (D.N.D. 1956), 35 TEX. L. REV. 263, 263 (1957).

<sup>238</sup> Hal R. Morris, *Contract Reformation—The Remedy When the Writing Is Wrong*, 93 ILL. B.J. 584, 585 (2005).

<sup>239</sup> Gouge v. McNamara, 586 N.W.2d 710, 713 (Iowa Ct. App. 1998).

<sup>240</sup> Van Bibber Homes Sales v. Marlow, 778 N.E.2d 852, 857 (Ind. Ct. App. 2002).

### III. EQUITABLY REMEDYING THE BREACH

Some jurisdictions have concluded that surrogacy contracts are against public policy.<sup>241</sup> A majority of the states have not enacted statutes indicating their stance on surrogacy agreements.<sup>242</sup> Nonetheless, persons in those jurisdictions have continued to enter into surrogacy agreements. Some states limit the application of their surrogacy statutes to married couples. This disadvantages single persons and persons in same-sex relationships. In those areas, courts do not have to enforce those agreements. A woman who enters into a surrogate arrangement should not be permitted to keep the child just because the court is unwilling to recognize the surrogacy contract. Courts should rely upon the remedies of promissory estoppel and unjust enrichment to rule that the surrogate is not the child's legal mother.

#### A. *Promissory Estoppel*

Traditionally, promissory estoppel has been recognized as strictly a defensive theory; however, recently, courts have permitted parties to use it as an independent cause of action.<sup>243</sup> Promissory estoppel applies in a situation where there is not a valid contract. If the evidence indicates that a valid contract does exist, the parties cannot bring a cause of action for promissory estoppel.<sup>244</sup> Promissory estoppel is an equitable remedy awarded by the court to permit the enforcement of a promise that would not otherwise be enforceable.<sup>245</sup> Persons claiming promissory estoppel must prove the following elements: (1) a clear and unambiguous promise exists; (2) the party to whom the promise was made has relied upon that promise; (3) the reliance was reasonable and foreseeable; and (4) the party

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<sup>241</sup> Christine A. Bjorkman, Note, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 147 (2008).

<sup>242</sup> Christen Blackburn, Note, *Family Law—Who Is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 370 (2009).

<sup>243</sup> Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 937 (1988); see also *Foote v. Simmonds Precision Prods. Co.*, 613 A.2d 1277, 1280 (Vt. 1992).

<sup>244</sup> *Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 636 (Tex. Ct. App. 2004).

<sup>245</sup> *Skebba v. Kasch*, 724 N.W.2d 408, 411 (Wis. Ct. App. 2006).

claiming the estoppel was injured because of his or her reliance.<sup>246</sup> Courts have broad discretion when deciding whether to apply promissory estoppel.<sup>247</sup>

In jurisdictions that bar surrogate contracts, the contracts essentially do not exist. Thus, promissory estoppel may be applied to the situation. Promissory estoppel should be applied in order to be fair to the intended parents. In the cases involving disputes between the surrogate and the intended parents, the parties usually admit that the surrogate promised to surrender the child to the contracting couple. Once that promise is established, the rest of the elements of promissory estoppel are relatively easy to prove. When a woman agrees to serve as a surrogate for the intended parents, they rely on that promise in numerous ways. They may announce to their friends that they are expecting a baby. Per the surrogacy agreement, the intended parents pay the medical expenses for the surrogate. They usually take the surrogate to her doctor's appointments and participate actively in the pregnancy. In addition, the couple will probably expend money setting up a nursery and buying clothes for the baby. In some instances, the couple attends a baby shower.

The reliance by the contracting couple is reasonable because persons have to prepare in advance for the birth of a child. A special relationship usually develops between the intended parents and the surrogate. As a result of that relationship, the intended parents feel that they can trust the surrogate to honor her word. The surrogacy system is built on that trust. If people thought that surrogates would not keep their promises, they would be discouraged from using surrogates. The courts need to step in and ensure couples that they can rely upon the integrity of the system. The intended parents make financial and emotional investments in reliance on the surrogate's promise to give them the child. The surrogate should foresee that the intended parents would rely upon her promise to turn over the child to them because most intended parents are desperate for a child and that desperation is usually apparent. The intended parents are injured by the surrogate's refusal to surrender the child. The injury is financial and emotional. Couples who use

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<sup>246</sup> *Baker v. Ayres & Baker Pole & Post, Inc.*, 170 P.3d 1247, 1250 (Wyo. 2007).

<sup>247</sup> *U.S. Ecology, Inc. v. State*, 28 Cal. Rptr. 3d 894, 905 (Ct. App. 2005).

surrogates have often dealt with the pain of not being able to conceive. Once they get their hopes up, it is devastating to lose the child.

A lot has been written about the negative impacts that surrogacy arrangements have on surrogates<sup>248</sup> and the resulting children.<sup>249</sup> Nonetheless, most commentators have ignored the emotional and financial toll the process can take on the contracting couple. Persons usually do not enter into surrogacy arrangements lightly. For those couples, surrogacy is often a last resort.<sup>250</sup> The average intended parents typically have suffered the pain of infertility. They have attempted unsuccessfully to have a child naturally or by adoption. At the point they contact a surrogate, they are often desperate for a child.<sup>251</sup> They have been unfairly portrayed as wealthy couples waiting to exploit lower-income women. That image does not fit the typical intended parents. If the court does not require the surrogate to honor the agreement, she may also be unjustly enriched.

### B. Unjust Enrichment

"To find unjust enrichment, a party must have received something of value to which he [or she] was not entitled and which he [or she] should restore."<sup>252</sup> Unjust enrichment is an appropriate remedy in cases where justice dictates that a person be compensated for property or services he or she provides under the terms of a contract, and the person does not have a cause of action based on the contract.<sup>253</sup> The doctrine of unjust enrichment is based on the belief that a party should not be allowed to be unjustly enriched at the expense of another or

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<sup>248</sup> See, e.g., Lori B. Andrews, Commentary, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2350-51 (1995); see also Jennifer L. Watson, Note, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 529, 544 (2007).

<sup>249</sup> Jay R. Combs, Comment, *Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico*, 29 N.M. L. REV. 407, 408-09 (1999).

<sup>250</sup> Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2319-20 (1995).

<sup>251</sup> See John M. Suender, Comment, *Surrogate Motherhood Agreements and the Law in Pennsylvania*, 91 DICK. L. REV. 1085, 1092 (1987).

<sup>252</sup> Sparks Reg'l Med. Ctr. v. Blatt, 935 S.W.2d 304, 307 (Ark. Ct. App. 1996).

<sup>253</sup> Rent-A-PC, Inc. v. Rental Mgmt., Inc., 901 A.2d 720, 723 (Conn. App. Ct. 2006).

receive property or benefits without paying just compensation.<sup>254</sup> Consequently, the breaching party should be required to either return the benefits he or she received or to compensate the non-breaching party.<sup>255</sup> When the court decides not to enforce a surrogacy contract, the intended parents should be permitted to avail themselves of the remedy of unjust enrichment. Application of the doctrine should result in the intended mother being adjudicated the legal mother of the child.

The elements of recovery based on unjust enrichment are as follows: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances.<sup>256</sup> To find unjust enrichment, a party must have received something of value that he or she is not entitled to keep and that he or she should restore. There must be some operative act, intent, or situation to make enrichment unjust and compensable.<sup>257</sup> It is not necessary that the party who is unjustly enriched be guilty of some wrongdoing. The focus is on whether that person has something of value that he or she is not entitled to keep. Permitting the person to keep the thing would lead to the detriment of someone else.<sup>258</sup> The enrichment must be unjust.<sup>259</sup>

All of the elements of unjust enrichment are satisfied when the surrogate is recognized as the legal mother of the child. First, the surrogate is enriched because she receives the right to keep the child.<sup>260</sup> The child is clearly a benefit to the woman. Second, the contracting woman suffers the loss of the child because the mother-child relationship is created between the surrogate and the child. Since a child is not permitted to have two legal mothers, the intended mother is deprived of the

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<sup>254</sup> *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001).

<sup>255</sup> *Morris v. Britt*, 620 S.E.2d 422, 424 (Ga. Ct. App. 2005).

<sup>256</sup> *S & J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2003).

<sup>257</sup> *Smith v. Whitener*, 856 S.W.2d 328, 329–30 (Ark. Ct. App. 1993) (en banc).

<sup>258</sup> *See Petrie v. LeVan*, 799 S.W.2d 632, 636 (Mo. Ct. App. 1990) (holding that the defendant could not keep a windfall profit while the plaintiff suffered a detriment from the transaction); Jennifer M. Nadler, *What Right Does Unjust Enrichment Law Protect?*, 28 OXFORD J. LEGAL STUD. 245, 270 (2008) (“[A] successful claim in unjust enrichment depends on no wrongdoing, or even any action, on the part of the defendant.”).

<sup>259</sup> *Stoeckinger v. Presidential Fin. Corp. of Del. Valley*, 948 A.2d 828, 833 (Pa. Super. Ct. 2008).

<sup>260</sup> *Suender*, *supra* note 251, at 1107.

opportunity to parent the child she helped to conceive.<sup>261</sup> The damage is especially great in a gestational surrogacy situation because the woman loses custody of her biological child. From a public policy perspective, society does not want to take a child from a biological parent who has not been shown to be unfit.<sup>262</sup> The joy the surrogate feels from having a child is at the expense of the intended mother who made plans to make the child a part of her family. In light of the circumstances, it would be unfair to permit the surrogate to keep the child.

In the case of a gestational surrogate, if she is permitted to retain custody of a child who is not biologically related to her, she has definitely been unjustly enriched. One of the purposes of unjust enrichment is to discourage persons from making misrepresentations to receive more than the benefit of their bargains.<sup>263</sup> A gestational surrogate may enter the agreement just to obtain the genetic materials she needs to have a child. If the courts permit her to keep the child, she will be unjustly enriched. The fact that she may be willing to return the money paid by the intended parents is not relevant. Money will not make the couple whole. The end result will be that the surrogate is permitted to purchase embryos belonging to other people. Gestation should not be enough to give the surrogate someone else's biological child. With regards to a traditional surrogate, even though she is contributing the eggs used to create the child, she is also being unjustly enriched if she is allowed to keep the child because the sperm belonged to a man that had no connection to or relationship with her.

The deviation from a mutual purpose often leads to unjust enrichment of one of the parties.<sup>264</sup> The appropriate remedy in a case involving unjust enrichment is for the court to attempt to place the party that has been harmed back in the position he or

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<sup>261</sup> Carlos R. Moreno, *The Promise of Equality: The Evolution of the Family in California*, 44 U.C. DAVIS L. REV. 1, 3-4 (2010).

<sup>262</sup> See Matthew R. Asman, Note, *The Rights of a Foster Parent Versus the Biological Parent Who Abandoned the Child: Where Do the Best Interests of the Child Lie?*, 8 CONN. PROB. L.J. 93, 97 (1993) (showing that courts prefer the biological parent over the foster parent, as long as the biological parent is not unfit).

<sup>263</sup> Cf. Michele C. Meske, Note, *Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma After Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 112 S. Ct. 501 (1991), 67 WASH. L. REV. 1001, 1006 (1992) ("[P]eople should not profit from their wrongs through unjust enrichment. . . . [P]ersons who gain through conscious wrongdoing must disgorge their tainted earnings.").

<sup>264</sup> *Lewis v. Lewis*, 189 P.3d 1134, 1144 (Colo. 2008) (en banc).



she was in prior to the transaction that caused the unjust enrichment.<sup>265</sup> The court can accomplish that goal by either returning something to the person or awarding damages.<sup>266</sup>

In the case of a surrogacy arrangement, the only way to make the intended mother whole is to adjudicate her as the legal mother of the child. If the case involves a gestational surrogate, the court will be returning something to the woman—her embryo. It does not matter that the embryo has been converted into a baby. Damages can never replace what the woman has lost. Before the surrogacy arrangement, the woman was childless with an embryo that needed gestating. To restore the woman to that position, the court must award her custody of the child. In situations involving a traditional surrogate, the intended mother has been deprived of sperm that she acquired from her husband, significant other, or sperm donor. Since the child is the end product of that sperm, the court should give her the child.

The parties' mutual purpose in conceiving the child is usually for the infertile couple to enjoy the benefits of parenthood. The intended parents, in expending their resources and, in some cases, contributing their genetic material, demonstrate this mutual intent. Before the conception or the birth of the child, the surrogate typically does not do anything to indicate that she intends to parent the child. All of the participants intended for the intended parents to obtain full and complete custody of the resulting child. The intended parents rely on the agreement and prepare to welcome the baby into their home.

By initially signing the agreement or making the promise and encouraging the intended parents to prepare to become parents, the surrogate acts as if she intends the intended parents to be recognized as the child's legal parents. The actions of the intended parents indicate that they intend to be the legal parents, and the surrogate does nothing to discourage their expectations. For instance, the surrogate permits the couple to invest financially and emotionally in the child. Moreover, the intended parents pay the surrogate's medical and other expenses. The surrogate does not do anything to indicate that she plans to

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<sup>265</sup> *Id.* at 1141.

<sup>266</sup> *Id.*

parent the child. Based upon the actions of the parties, the court should not unjustly enrich the surrogate by adjudicating her to be the child's legal mother.

#### IV. REBUTTABLE PRESUMPTION OF SPECIFIC PERFORMANCE

As indicated in the previous section, a person who breaches a contract involving a unique good should expect to have to specifically perform the contract. A person who contracts to buy a particular house can only be made whole if he or she receives that house. Monetary damages are not an adequate remedy for the person because no two houses are exactly alike. Thus, the person could not use the money he or she receives as damages to purchase a house that is identical to the one for which he or she bargained. This same logic follows when the case involves the breach of a surrogacy contract. An infertile person who contracts to receive a child will never be satisfied with money. In most situations where the contracted-for item is unique, there is a presumption of specific performance. Courts that follow that point of view appear to treat this presumption as though it is irrebuttable.<sup>267</sup>

Children are living beings. Thus, they should not be treated exactly like pieces of real property. To avoid that approach, when courts are faced with the task of remedying a breach of a surrogacy contract, they should presume that specific performance is an appropriate remedy, but allow that presumption to be rebutted. There should be a presumption of specific performance because that approach is fair to all of the parties involved in the case. The infertile person entered into the surrogacy contract because she was desperate to become a mother. No amount of money will remedy the harm the woman suffers when the surrogate refuses to fulfill her end of the bargain. Specific performance is fair to the surrogate because surrendering the child would put her back in the place she was in had she not entered into the contract. The presumption should be rebuttable because, unlike a piece of real estate, children may be hurt by the court's strict enforcement of the contract. The

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<sup>267</sup> See, e.g., *New Life Cmty. Church of God v. Adomatis*, 672 N.E.2d 433, 438 (Ind. Ct. App. 1996) (indicating that Indiana courts routinely award specific performance of real estate contracts).

surrogate can rebut the presumption by showing changed circumstances that make surrendering the child to the intended parents no longer feasible.

### A. *Changed Circumstances*

When circumstances change, courts should have the flexibility to modify decisions based upon the new circumstances. Giving courts that option acknowledges that unanticipated consequences and events can render court decisions obsolete or unfair. To protect children, courts must be allowed to reevaluate situations and to modify decisions in response to changed circumstances. Courts apply the doctrine of changed circumstances in several different areas of law. In property, a person can avoid the enforcement of a restrictive covenant by proving a change in circumstances.<sup>268</sup> Moreover, a person seeking a custody modification can argue that the original custody arrangement should be modified due to a change in circumstances.<sup>269</sup> In international law, a country can suspend the operation of a treaty based upon changed circumstances.<sup>270</sup> Even in the law of trust, the court is permitted to modify a private<sup>271</sup> or charitable<sup>272</sup> trust if changed circumstances make the settlor's original purpose obsolete.

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<sup>268</sup> See *Country Club Dist. Homes Ass'n v. Country Club Christian Church*, 118 S.W.3d 185, 194 (Mo. Ct. App. 2003). A plaintiff seeking to void a restrictive covenant based on changed circumstances must prove "(1) [t]he radical change in condition; (2) that as a result enforcement of the restrictions will work undue hardship on him; (3) and will be of no substantial benefit to the plaintiff." *Id.*

<sup>269</sup> See *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007) ("The threshold issue in every case involving a modification in an existing custody or visitation arrangement is whether a material change in circumstances has occurred.").

<sup>270</sup> See Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams*, 19 COLUM. J. ENVTL. L. 1, 27 (1994).

<sup>271</sup> See *Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc.*, 679 N.E.2d 1084, 1091-92 (Ohio 1997) ("Under the doctrine of deviation, a court can 'direct or permit a deviation from the terms of the trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.'" (quoting AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 381 (4th ed. 1989))).

<sup>272</sup> *In re Estate of Othmer*, 12 Misc. 3d 919, 922, 815 N.Y.S.2d 444, 446 (Sup. Ct. Kings Cnty. 2006). Courts can use the cy pres doctrine to modify the terms of a charitable trust if the person seeking the change shows that (1) the gift is charitable in nature; (2) the donor has a general charitable intent; and (3) the changed

### B. *Impracticability and Frustration of Purpose*

In contract law, courts have considered at least two types of changed circumstances to be adequate justification for a breach of contract. The first type involves an unforeseeable circumstance that renders performance of the contract vitally different from what the parties reasonably anticipated performance to require at the time of contracting. This type of unanticipated change makes performance of the contract impossible or impracticable.<sup>273</sup> The second type involves reductions in the value a party attaches to the performance to be received from the other party. That type of unforeseen change leads to what is recognized as frustration of purpose.<sup>274</sup> Once the purpose of the contract has been frustrated, it does not make sense to force the parties to perform the obligations stated in the contract.

In a surrogacy contract dispute, the only changed circumstances that are relevant are those that impact the surrogate's ability to give informed consent and the child's opportunity to be placed in the best living environment. The changed conditions may be events that occur after the child is born. Moreover, information that was not made available to the woman at the time she agreed to serve as a surrogate may also be the basis for a changed circumstances argument. For example, the intended parents may have a malevolent motive for

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circumstances make it impossible to comply with the terms of the trust. *See id.* at 922, 815 N.Y.S.2d at 447.

<sup>273</sup> *Hendrick v. Green*, 618 So. 2d 76, 79 (Miss. 1993). With regards to impracticability, the RESTATEMENT (SECOND) OF CONTRACTS states:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

<sup>274</sup> *See City of Flint v. Chrisdom Props., Ltd.*, 770 N.W.2d 888, 891 (Mich. Ct. App. 2009) (stating that a frustration of purpose occurs when changed circumstances make one party's performance worthless). The RESTATEMENT (SECOND) OF CONTRACTS addresses frustration of purpose by stating:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 265.

conceiving the child. In essence, the surrogate has to convince the court that she discovered information or things happened that make her feel that placement of the child with the intended parents would be detrimental. The surrogate can make her rebuttal argument based upon the contract theories of impracticability and frustration of purpose.

The pertinent changed circumstances may include one or more of the following: (1) the intended parents have separated or divorced; (2) the intended parents are no longer in a situation to financially provide for the child; (3) the health of the intended parents has declined; or (4) the relationship between the surrogate and the intended parents has deteriorated. The surrogate may also have information indicating that placement with the intended parents would not be in the child's best interests. For example, the couple may have shown very little interest in the child even though the surrogate did nothing to negatively impact the relationship. Either one of those factors may impact the surrogate's decision to retain custody of the child.

The woman's decision to act as a surrogate for the intended parents may have been based upon her desire to help a loving couple have a child. If the intended parents have separated or divorced, the woman may be reluctant to see the child placed in a broken home. Moreover, the surrogate may fear that the child will end up in the middle of a custody dispute. Since the surrogate cannot repair the relationship between the intended parents, she may conclude that it is impossible to place the child in the two-parent home that she envisioned when she initially agreed to serve as a surrogate. Thus, she may try to convince the court that the change in circumstances should rebut the presumption that she is obligated to surrender the child to the intended parents.

The surrogate may also argue that her purpose for acting as a surrogate has been frustrated. The surrogate's goal was to surrender the child to an intact family. If the intended parents do not reunite, the surrogate's purpose will be defeated. The nature of the relationship between the surrogate and the intended parents may also influence the surrogate's decision to keep custody of the child. When she agreed to assist the intended parents in their quest to have a child, the parties may have agreed that the surrogate could remain a part of the child's life. This may especially be true in a situation involving a

traditional surrogate. There have been cases where the intended parents send the surrogate pictures and progress reports on the child. The fact that she had a good relationship with the intended parents may be the only reason why the surrogate agreed to help the couple become parents. After that relationship sours, the surrogate may feel that it is impracticable for her to turn the child over to the intended parents. The surrogate should be able to present evidence of changed circumstances to rebut the presumption of specific performance and permit the court to determine maternity based upon the best interests of the child.

### CONCLUSION

Collaborative reproduction is now possible and beneficial. Relying on the use of assisted reproductive technology, like artificial insemination, infertile couples can become parents. Those couples can seek help from women who are willing to act as surrogates. The intended couple and the surrogate collaborate to ensure that a child is conceived, gestated, and born. That process enables persons who want to become parents to have the opportunity to have children conceived using their genetic material. The surrogate usually wants to make sure that the child is placed in a good home. She is often mainly motivated by the desire to help an infertile couple become parents. The money that she receives for her medical and other expenses is not the reason that she agrees to serve as a surrogate.

Surrogacy arrangements usually go smoothly and all of the parties are satisfied with the outcome. The intended parents receive the child, and the surrogate gets the things she is promised under the surrogacy contract. However, sometimes the surrogate refuses to surrender the child to the intended parents. In response, the intended parents seek assistance from the judicial system. When the case is filed, the court has to decide whether to treat the case as a custody dispute or a breach of contract case. If the court views it as a custody case, it will apply different tests to adjudicate the maternity of the child. On the other hand, if the court views it as a breach of contract case, the court must decide the appropriate remedy to award the intended parents. Given the existence of an oral or written contract, the court should apply contract principles and not family law principles to resolve surrogacy custody disputes. Since children

are unique, courts should presume that the contract should be specifically enforced. As a result, the intended mother should be adjudicated as the legal mother. In the interest of fairness, the court should give the surrogate the opportunity to rebut the presumption of specific performance by showing changed circumstances.

