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"Be My Baby": A Surrogacy Law Proposal for North Carolina

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"Be My Baby": A Surrogacy Law Proposal for North Carolina*

Surrogacy has become a popular alternative for couples who are unable to carry their own children. As artificial reproductive techniques advance, so too must the law. States have codified surrogacy arrangements in a variety of ways, including intent-based and best interests tests. However, North Carolina remains one of several states that has not provided any guidance, either by statute or case law, for its citizens considering a surrogacy arrangement. North Carolina can and should pass a surrogacy law because it would give peace of mind to intended parents to help ensure their surrogate children are legally their own. North Carolina family law provides a landscape conducive to develop surrogacy jurisprudence. The state already uses intent-based and best interests tests to determine the custody of children. Therefore, this Comment argues that North Carolina should develop a surrogacy statute to determine the legal parentage of a child based on its own pre-existing custody law, using both intent of the parents and best interests of the child as guides. By adopting a surrogacy statute, the state can provide much-needed reassurance to people considering surrogacy without disrupting the current family law framework. In doing so, North Carolina will update its laws to better reflect its citizens' needs and bring it in line with modern reproductive practices.

INTRODUCTION

> "It was our biological child; my egg, Daniel's sperm," Ana Carla said. "Because the baby was going to come out of someone else's vagina, unless we had a legal document saying that the baby was indeed our child and we wanted this baby and it was not going to be in any way associated with the surrogate, we had to go through this whole thing even though it seems like it could have been a much . . . simple[r] process."[1]

Ana Carla's frustration foreshadows many of the issues North Carolina couples face to expand their families through surrogacy. This Comment seeks to ease Ana Carla's and countless other North Carolinians' uncertainties regarding surrogacy arrangements by proposing a solution for the North Carolina General Assembly to adopt.

Surrogacy—most simply a woman carrying the child of another—dates back to at least Biblical times, when Genesis's Abram and his wife Sarai used their Egyptian slave, Hagar, as a surrogate mother for their children.[2] In the modern era, as fans of celebrity culture might recall, surrogacy is a popular option for many Hollywood mothers, from Sarah Jessica Parker to Tyra Banks to Kim Kardashian West.[3] Surrogacy has surged in popularity in the last thirty years[4] due to recent scientific advancements allowing a woman to carry a child who is not genetically hers, known as gestational surrogacy.[5] Before scientists developed in vitro fertilization ("IVF") in the late 1970s, all surrogate mothers gave birth to children who were genetically their own, commonly known as

1. Melissa Boughton, *Modern Families Unprotected by Outdated NC Laws*, N.C. POL'Y WATCH (Apr. 6, 2018), http://www.ncpolicywatch.com/2018/04/06/modern-families-unprotected-by-outdated-nc-laws/ [https://perma.cc/JL7B-5ANE].

2. *Genesis* 16:1–4 (New International Version) ("Now Sarai, Abram's wife, had borne him no children. But she had an Egyptian slave named Hagar; so she said to Abram, 'The Lord has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her.' Abram agreed to what Sarai said. So after Abram had been living in Canaan ten years, Sarai his wife took her Egyptian slave Hagar and gave her to her husband to be his wife. He slept with Hagar, and she conceived.").

3. Corynne Cirilli, *These 10 Celeb Moms Welcomed Babies Using a Surrogate*, BRAVO (June 15, 2017), http://www.bravotv.com/blogs/celeb-moms-welcomed-babies-using-a-surrogate [https://perma.cc/TLF7-YB53]; *see* Joe Sutton, *Kim Kardashian and Kayne West's Surrogate Has Gone into Labor*, CNN (May 9, 2019), https://www.cnn.com/2019/05/09/entertainment/kim-kardashian-baby-surrogate/index.html [https://perma.cc/22GE-W74V].

4. The Centers for Disease Control and Prevention reports that the number of artificial reproductive technology ("ART") cycles using gestational carriers has increased 372% between 1999 and 2013, from 727 cycles to 3432. *ART and Gestational Carriers: Key Findings: Use of Gestational Carriers in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/key-findings/gestational-carriers.html [https://perma.cc/X9WT-GJ4M] [hereinafter *ART and Gestational Carriers*].

5. *See Surrogate Has Baby Conceived in Laboratory*, N.Y. TIMES, Apr. 17, 1986, at A26 [hereinafter *Surrogate Has Baby*].

genetic surrogacy.[6] However, the advent of IVF allowed scientists to take genetic material from both the intended mother and intended father to implant an embryo in a surrogate who bore no genetic relation to the fetus.[7] This advancement led to the first successful gestational surrogacy in 1986.[8]

Improved technology resulted in increased legal headaches for surrogates and intended parents alike. With respect to genetic surrogacy, the surrogate carrier was also the biological mother, and courts could easily find that person to be the child's legal mother.[9] However, courts have reached widely varying conclusions when confronted with a surrogate who holds no biological relationship to the child she had carried, as is the case in gestational surrogacy.[10] Gestational surrogacy continues to prompt litigation today.[11]

There are a few important preliminary points to address in dealing with surrogacy's legal issues. First, it is important to note from the outset the differences between custody and parentage; even surrogacy commentators and judges sometimes confuse the terms.[12] Custody involves a court's determination of a child's legal and/or physical status in relation to another person, including visitation rights.[13] While physical custody and visitation rights are relatively self-evident, *legal* custody in North Carolina "refer[s] generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare."[14] Importantly, courts can, and regularly do, make custody decisions without determining the legal parentage of a child.[15]

6. *See The History of Surrogacy: A Legal Timeline*, WORLDWIDE SURROGACY SPECIALISTS, LLC (Aug. 8, 2018), https://info.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline [https://perma.cc/TE4T-R58T]; *see also* UNIF. PARENTAGE ACT § 801(1) (UNIF. LAW COMM'N 2017); Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. (SUPPLEMENT) 97, 98 (2010) ("[Genetic surrogacy] involves the implantation of the surrogate with the sperm of the biological father, but uses the surrogate mother's eggs to form the pregnancy.").

7. *See Surrogate Has Baby*, *supra* note 5, at A26; *see also ART and Gestational Carriers*, *supra* note 4.

8. *See Surrogate Has Baby*, *supra* note 5, at A26.

9. *See* Spivack, *supra* note 6, at 98 ("This earlier type of surrogacy, because it used the surrogate's eggs, created [a] biological . . . connection which made it relatively easy for courts to determine that the birth mother was also the legal mother.").

10. *See id.* at 99 ("This variant on surrogacy eliminated the birth mother/genetic mother equation, and led to litigation disputing the child's parentage.").

11. *See, e.g.*, Cook v. Harding, 190 F. Supp. 3d 921 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

12. *See* Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993) ("The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody.").

13. N.C. GEN. STAT. § 50A-102(3) (2017).

14. Diehl v. Diehl, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006) (citing Patterson v. Taylor, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000)).

15. *See, e.g.*, *In re* Safriet, 112 N.C. App. 747, 750–51, 436 S.E.2d 898, 900–01 (1993) (holding that the Department of Social Services should retain legal custody of a badly neglected child; the court was not called to determine—and indeed made no ruling on—the legal parents of the child).

Parentage refers to the "legal relationship between a child and a parent of a child."[16]

Parentage is, quite simply, who a minor child's parents are, decided in North Carolina by genetic tests or, in the case of adoption,[17] an affidavit of parentage.[18] One judge noted the distinction between custody and parentage this way: "Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions."[19] This difference is important because while any person or agency may gain custody of a child,[20] earning the right to make decisions for the child, legal parentage belongs solely to the person or persons who are the child's legal parents and can only be extinguished upon a showing of willful abandonment, neglect, or abuse of the child.[21] In the hierarchy of care for a minor child, legal parentage is supreme. While this Comment proposes using North Carolina's existing custody laws to craft a surrogacy statute, the ultimate determination is one of parentage of a surrogate child, not custody.

Second, controversy centers on the enforceability of a surrogacy contract to determine the legal parentage of the child.[22] The surrogate carrier and intended parents sign the surrogacy contract to ensure that the woman who carries the child for another person or couple will honor her commitment to relinquish the child at birth and that the intended parents will, in fact, take the child for whom they have contracted.[23] However, there is no uniform surrogacy law in the United States, and various states have taken differing approaches to the surrogacy contract in the last thirty years.[24] Some states, such as California, have embraced surrogacy contracts and provided legal protection for the continuance of the practice,[25] while other states have banned it completely.[26]

16. UNIF. PARENTAGE ACT § 102(16) (UNIF. LAW COMM'N 2017).

17. This Comment uses the term "adoption" solely to refer to the law, circumstances, and event of an adoption that is planned *prior* to the birth of a child. Though adoption can occur at any point in a child's life, the comparison made here is solely to adoptions planned during a pregnancy.

18. *See* N.C. GEN. STAT. §§ 8-50.1(a), 48-3-206(a)–(b) (2017).

19. Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993).

20. *See* N.C. GEN. STAT. § 50-13.2(a)–(b)(1) (2017).

21. *See id.* § 7B-1111(a) (Supp. 2018).

22. For more on how various states treat surrogacy agreements, see MAGDALENA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 14–16 (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf [https://perma.cc/2NWT-A9LR].

23. *See id.* at 6.

24. *In re Baby M*, 537 A.2d 1227 (N.J. 1988), was the first major surrogacy case in the United States. Spivack, *supra* note 6, at 99. For a more a detailed discussion of the case, see *infra* notes 116–31 and accompanying text.

25. *See Johnson*, 851 P.2d at 778.

26. *See* N.Y. DOM. REL. LAW § 122 (McKinney Supp. 2019) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.").

However, a great many states have not legislated at all on surrogacy or the validity of surrogacy agreements.[27]

North Carolina falls into the final category because there are currently no statutes or case law on surrogacy in the state.[28] As a result, North Carolina parents who wish to use surrogacy are left wondering whether or not a surrogate child will be legally recognized as their own. This uncertainty may lead potential parents to flock to surrogacy-friendly states, such as California, instead of taking their chances within the nonexistent legal framework in North Carolina; some potential parents may even decide not to pursue surrogacy at all.[29] North Carolina has an opportunity to fix this problem using pre-existing family law statutes, specifically those involving custody arrangements.

This Comment aims to provide the North Carolina legislature with a workable solution to adopt a law on surrogacy. In doing so, this piece adds to the scholarly discussion in two important ways. First, it takes the premise that existing North Carolina family law can be adapted to uphold, not strike down, the enforceability of surrogacy contracts. Indeed, other North Carolina scholars have argued for adapting existing North Carolina law to surrogacy arrangements.[30] For example, in one of the few pieces of scholarship on North Carolina surrogacy, Katharine Bartlett argued that existing North Carolina adoption and custody law could easily govern the law of surrogacy in the state.[31] However, Bartlett concluded that existing North Carolina law would not uphold the enforceability of a surrogacy contract.[32] Written thirty years after Bartlett's piece and still before the codification of any surrogacy laws in the state, this Comment arrives at the opposite conclusion: the North Carolina legislature can effectively adapt existing child custody laws to surrogacy

27. For example, Alaska, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and Wyoming have no laws regarding surrogacy. *Surrogacy Laws*, SURROGACY EXPERIENCE, https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html [https://perma.cc/H4AJ-XXA4].

28. *See Surrogacy in North Carolina*, FERTILITY AUTHORITY, https://www.fertilityauthority.com/articles/surrogacy-north-carolina [https://perma.cc/5JJ3-UV6V]; *see also* John L. Saxon, *Who's Your Daddy: Comparing North Carolina's Paternity Law and the Uniform Parentage Act*, UNC SCH. GOV'T: FAM. L. BULL., Mar. 2004, at 4, 18.

29. For more on the problems that plague intended parents using surrogacy in North Carolina, see Boughton, *supra* note 1.

30. Katharine T. Bartlett, *Surrogate Parenthood: Finding a North Carolina Solution*, 18 N.C. CENT. L.J. 1, 1 (1989).

31. *Id.* at 2.

32. *Id.* at 15–16 ("The policies underlying existing adoption and custody laws in this state seem inconsistent with an enforceability approach to surrogate parent contracts . . . . A surrogate parent contract should not be enforceable in North Carolina insofar as it ignores restrictions placed on adoptions in this state, including the statutory requirements for revocation of consent and the prohibition against payment of money in connection with an adoption.").

arrangements in order to uphold surrogacy contracts and give intended parents more security to pursue surrogacy arrangements here in the state.

Second, this Comment introduces a two-part test, based on intent of the parties and best interests of the child,[33] that will help lawmakers craft a surrogacy statute for legal parentage. No other scholars have suggested or applied a two-part test within the context of North Carolina or its existing custody laws.[34] Additionally, this Comment aims to correct a common yet concerning conflation of the legal consequences of custody with those of legal parentage via a proposal that concentrates solely on parentage.

This Comment will proceed in five parts. Part I raises the question of why North Carolina needs a surrogacy law. Part II briefly addresses constitutional concerns regarding the enforceability of surrogacy contracts. Part III examines how other states have handled the validity of surrogacy contracts. Part IV examines existing child custody laws in North Carolina and suggests a similarity between other states' surrogacy laws and North Carolina's existing family law. Finally, Part V offers a test, based on other states' surrogacy laws and North Carolina's child custody laws, that enforces surrogacy contracts while also ensuring the best interests of the child. This test will eliminate the uncertainty that plagues North Carolina's intended parents and bring the state up to speed on modern surrogacy practices.[35] By mapping onto existing and well-established child custody laws and practices in the state, North Carolina can provide legal protection to both surrogate children and their intended parents without overhauling the state's entire family law framework.

33. The best interests test only arises in cases where the custody or legal parentage of a child is in question. Therefore, in the case of natural conceptions between couples, the best interests test does not arise. This Comment considers the best interests test applicable because, while the motives behind couples who conceive naturally and those who must use a surrogate may be similar or identical, the mechanism by which each actually creates and acquires legal parentage of a child are different. The ethical considerations of questioning the motives of parents or hopeful parents in one circumstance but not the other are outside the scope of this paper.

34. For a multifactor test applied in California, see Matthew Demopoulos, *Surrogacy in California: Replacing Section 7962 of the California Family Code with a Two-Part Hybrid Best Interests Test*, 51 U.C. DAVIS L. REV. 1751, 1760–61 (2018).

35. For more on how North Carolina is currently "many, many steps behind the practice of humans," see Boughton, *supra* note 1 (quoting a North Carolina attorney).

I. WHY SHOULD NORTH CAROLINA PASS A SURROGACY STATUTE?

To begin, it is important to note why North Carolina needs surrogacy laws at all. Currently, no statutes[36] or case law[37] directly address surrogacy in North Carolina, and only one statute deals with artificial reproductive technology at all.[38] As such, North Carolina lacks governing law on surrogacy in the state. The absence of legal authority on the matter may lead some to question why North Carolina should pass a surrogacy law in the first place. There are several reasons to do so.

First, there is some evidence that North Carolina's courts would uphold a surrogacy statute. For example, some North Carolina courts have permitted "pre-birth parentage orders," which indicate the intended parents—instead of the surrogate carrier—on the surrogate child's birth certificate.[39] However, surrogacy and pre-birth orders remain an "unsettled area of law" in the state.[40]

Second, North Carolina needs a surrogacy statute because the current "unsettled" status of surrogacy in North Carolina may be pushing couples to other states to ensure their child is recognized as genetically and legally related to them. While empirical data on surrogacy in general is scarce[41]—and no estimate of the number of couples that travel out-of-state to obtain a surrogate carrier exists—there is some anecdotal evidence that couples are forced to do

36. In 2009, members of the North Carolina General Assembly introduced a bill to enforce the validity of gestational surrogacy agreements under certain conditions, including a court's approval of the agreement before the surrogate carrier became pregnant. *See* S.B. 440, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009); H.B. 510, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009). The bill, in fact, passed a first reading in the House and second reading in the Senate but was subsequently killed in committees of both houses. *See also House Bill 510*, N.C. GEN. ASSEMBLY, https://www.ncleg.gov/BillLookUp/2009/h510 [https://perma.cc/6947-6AFS] (listing the legislative history of H.B. 510); *Senate Bill 440*, N.C. GEN. ASSEMBLY, https://www.ncleg.gov/BillLookUp/2009/S440 [https://perma.cc/4C5R-BB2X] (listing the legislative history of S.B. 440) The legislative minutes for those committee meetings were unavailable at the North Carolina Legislative Library and North Carolina Archives at the time of this Comment's completion. *See House Bill 510*, *supra*; *Senate Bill 440*, *supra*.

37. *5 Questions You Have About Surrogacy Laws in North Carolina*, PARKER HERRING L. GROUP, PLLC, https://parkerherringlawgroup.com/surrogacy-lawyer-attorney-raleigh-nc/surrogacy-information/surrogacy-laws-in-north-carolina/ [https://perma.cc/N6QJ-ZJ4K].

38. Section 49A-1 of the North Carolina General Statutes states, "[a]ny child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique." N.C. GEN. STAT. § 49A-1 (2017). However, this statute is irrelevant to the surrogacy discussion because it does not contemplate a surrogate carrier who is artificially inseminated and gives birth to a child she does not intend to legally keep.

39. *See What Is a Pre-Birth Order, and Why Is It Important?*, PARKER HERRING L. GROUP, PLLC, https://parkerherringlawgroup.com/surrogacy-lawyer-attorney-raleigh-nc/establishing-parentage-pre-birth-order/ [https://perma.cc/X5ZB-DPHX]; *see also Gestational Surrogacy in North Carolina*, CREATIVE FAM. CONNECTIONS LLC https://www.creativefamilyconnections.com/us-surrogacy-law-map/north-carolina/ [https://perma.cc/K6TP-3ZPQ].

40. *See What Is a Pre-Birth Order, and Why Is It Important?*, *supra* note 39.

41. For some relatively recent statistics, see *ART and Gestational Carriers*, *supra* note 4.

just that. For example, prominent family lawyer and professor Maxine Eichner recently discussed a North Carolina same-sex couple that was forced to travel to Utah, a state with liberal surrogacy laws,[42] to ensure they could become the legal parents of their surrogate child.[43] Similarly, a local North Carolina news station recently reported on a surrogate carrier living in North Carolina who carried three surrogate children using a California-based surrogacy agency, the Center for Surrogate Parenting.[44] One of the many historic criticisms of surrogacy is that it commodifies women and babies, potentially turning a lower-income woman's body into a money-maker while richer women benefit.[45] Whether or not this criticism remains a valid concern today, by making surrogacy agreements uncertain at best, North Carolina lawmakers encourage the national trade of "baby-selling"[46] for North Carolina couples desperate for a child.

This is not to say, of course, that all states should be forced to enact the same legislation regarding surrogacy.[47] Surrogacy is an issue fraught with debate and constitutional concerns,[48] and states should be left to legislate—and indeed have legislated—as they see fit on the issue[49] as "laboratories of democracy."[50] However, by refusing to enact legislation on surrogacy at all, North Carolina is missing a valuable opportunity to regulate surrogacy arrangements in the state and help mitigate the number of couples forced to contract for a baby across state lines.

42. *See* UTAH CODE ANN. § 78B-15-807 (Westlaw through 2019 First Special Sess.) (settling the parentage of a child born to surrogacy); *see also id.* § 78B-15-808 (upholding surrogacy agreements).

43. Interview with Maxine Eichner, Graham Kenan Distinguished Professor of Law, Univ. of N.C. Sch. of Law, in Chapel Hill, N.C. (Sept. 4, 2018).

44. *'The Ultimate Gift': Local Surrogate Mother Helps Fulfill Others' Dreams*, WRAL (Jan. 3, 2019), https://www.wral.com/the-ultimate-gift-local-surrogate-mother-helps-fulfill-others-dreams/18099563/ [https://perma.cc/8BSJ-H3FZ].

45. *See* Rebecca Beitsch, *As Surrogacy Surges, New Parents Seek Legal Protections*, PEW CHARITABLE TR. (June 29, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/06/29/as-surrogacy-surges-new-parents-seek-legal-protections [https://perma.cc/FCV8-ETMG]. *See generally* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009) (providing a historic account of why surrogacy was once viewed as "baby-selling" and how those views have since changed).

46. *See* Scott, *supra* note 45, at 109 (explaining some of the "baby-selling" drama that accompanied the *In re Baby M* case).

47. There are such issues within family law, such as jurisdiction for child custody, that have been uniformly adopted. *See, e.g.*, UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201 (UNIF. LAW COMM'N 1997).

48. *See infra* Part II.

49. *See infra* Part III.

50. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Lastly and most importantly, a well-established surrogacy law would eliminate, or at least drastically reduce, the insecurity that intended parents feel with regard to their child's parentage. North Carolina currently uses genetic blood tests[51] or affidavits[52] in the case of adoption to determine a child's parentage.[53] These two methods of determining parentage pose problems for couples in which one of the intended parents is not genetically related to the child.[54] Couples in that situation, most notably same-sex couples, are left with serious uncertainty about whether or not they will be the legal parents of the child they intend to bring into the world through the surrogate.[55] Even opposite-sex couples who use a gestational surrogate, meaning both intended parents are fully genetically related to the child, are required to file a document certifying the child legally belongs to them.[56] A well-defined surrogacy law that establishes legal parentage of a surrogate child would eliminate these obstacles and bring peace and security to intended parents.

II. A STATE LAW PROBLEM: THE DOMESTIC RELATIONS EXCEPTION AND CONSTITUTIONAL CHALLENGES

As a preliminary matter, the issues surrounding the enforceability of surrogacy contracts belong with state legislatures and in state courts. Since the late nineteenth century, federal courts have recognized a "domestic relations exception" to federal jurisdiction.[57] The domestic relations exception dictates that "family law [is in] the exclusive domain of the states."[58] Originally, the exception applied to "[t]he whole subject of the domestic relations of husband and wife, parent and child,"[59] although later cases limited the exception to "divorce, alimony, and child custody decrees."[60] Despite its somewhat unclear parameters,[61] the domestic relations exception stands for the proposition that, except in "rare instances . . . in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic

51. *See* N.C. GEN. STAT. § 8-50.1(a) (2017).

52. *See id.* § 48-3-206.

53. *See* Boughton, *supra* note 1 ("There are only two ways to be a parent in North Carolina - one can be an adoptive parent or one can be a genetic parent.").

54. *Id.*

55. *Id.*

56. *Id.*

57. *See In re* Burrus, 136 U.S. 586, 593–94 (1890); *see also* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 131 (2009).

58. Harbach, *supra* note 57, at 131.

59. *In re Burrus*, 136 U.S. at 593–94.

60. Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); *see also* Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1366–67 (2016) (providing an overview of relevant case law).

61. *See* Silverman, *supra* note 60, at 1366.

relations to the state courts."[62] Surrogacy thus likely qualifies as a "delicate issue of domestic relations" that state courts and legislatures are the most equipped to handle.

Of course, the United States Supreme Court has seemingly disregarded its domestic relations exception in certain areas pertaining to family law. Therefore, any surrogacy solution proposed by the states must still fit into the parameters of constitutional jurisprudence. For example, while the Supreme Court has never decided a surrogacy case,[63] it has recognized certain implicit fundamental rights, such as reproductive and child-rearing freedoms. The Supreme Court first found in *Griswold v. Connecticut*[64] a constitutional right to privacy, a concept now firmly entrenched in constitutional jurisprudence as an implicit fundamental right.[65] Intimately intertwined with the right to privacy is the right to procreate, central to such decisions as *Eisenstadt v. Baird*[66] (unmarried couples must have the same access to birth control as married couples)[67] and *Skinner v. Oklahoma*[68] (forced sterilization is unconstitutional because individuals have a right to reproduce).[69] Then, in *Roe v. Wade*,[70] the Court declared a fundamental right to terminate a pregnancy,[71] later upheld in *Planned Parenthood v. Casey*.[72] Likewise, parents have a fundamental right to rear their children as they see fit without undue interference from the state.[73] Parents also have the right to control who may visit their children.[74]

In sum, as the Supreme Court in *Prince v. Massachusetts*[75] held, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[76] Thus, the Court, without deciding a surrogacy case, has

62. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 13 (2004) (citation omitted), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

63. *See* Arina O. Grossu, Opinion, *Supreme Court Must Take on Heartbreaking Surrogacy Case*, HILL (Sept. 30, 2017), https://thehill.com/opinion/judiciary/353252-supreme-court-must-take-on-heartbreaking-surrogacy-case [https://perma.cc/EFS7-NHGV].

64. 381 U.S. 479 (1965).

65. *Id.* at 486.

66. 405 U.S. 438 (1972).

67. *Id.* at 454.

68. 316 U.S. 535 (1942).

69. *Id.* at 541.

70. 410 U.S. 113 (1973).

71. *Id.* at 164.

72. 505 U.S. 833, 901 (1992).

73. *See* Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (holding parents have a right to have their children educated in a language other than English); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 519 (1925) (holding parents have a right to send their children to private school if they wish).

74. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000).

75. 321 U.S. 158 (1944).

76. *Id.* at 166.

nevertheless provided the constitutional framework in which states must operate when crafting surrogacy laws.

Without a direct answer from the Court, scholars and litigants alike have argued surrogacy agreements do not fit within the Court's family law jurisprudence because they violate a surrogate's constitutional freedoms. For example, some have argued that surrogacy agreements violate the surrogate's implicit, fundamental privacy rights[77] and the right to an abortion, should the surrogate seek one.[78] Still others have argued that surrogacy agreements infringe upon a surrogate's right to procreate and right to companionship with her child.[79]

While these are valid constitutional concerns, there are also important counterarguments. For example, in the first major surrogacy case in the United States,[80] the New Jersey Supreme Court found in *In re Baby M*[81] that the "parent-child biological relationship, by itself, does not create a protected interest in the absence of a demonstrated commitment to the responsibilities of parenthood; a natural parent who does not come forward and seek a role in the child's life has no constitutionally protected relationship."[82] Similarly, and perhaps most convincingly, a surrogate has the freedom to contract away any fundamental rights she chooses by "freely and knowingly entering into the contract" in the first place.[83]

If and until the Supreme Court decides a case involving surrogacy, which is unlikely due to the domestic relations exception, states are left to grapple with the various constitutional boundaries the Supreme Court has set forward. Since the issue of surrogacy has been left to the states, states must be permitted to "serve as . . . laborator[ies]"[84] to legislate on surrogacy arrangements accordingly.

Surrogacy is a unique human condition, situated at the crossroads of contract law, concepts of bodily autonomy, and fundamental constitutional rights. This Comment's proposal for North Carolina does not run afoul of the United States Constitution precisely because it allows for the surrogate to "freely and knowingly" agree to the terms of the surrogacy arrangement, leaves

77. *See* Spivack, *supra* note 6, at 107.

78. *See* Cook v. Harding, 190 F. Supp. 3d 921, 929 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

79. *In re* G.P.B., Jr., 736 A.2d 1277, 1285 (N.J. 1999).

80. Spivack, *supra* note 6, at 99, 101.

81. 537 A.2d 1227 (N.J. 1988).

82. *Id.* at 1255 n.14 (citing Lehr v. Robertson, 463 U.S. 248, 258–62 (1983)); *see* Quilloin v. Walcott, 434 U.S. 246, 254–55 (1978).

83. Spivack, *supra* note 6, at 109–10.

84. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

some room for the surrogate to change her mind, and bolsters certainty in legal parentage.[85]

States across the country have grappled with these constitutional arguments and legislated various surrogacy solutions as explored in the next part.

III. SURROGACY ACROSS THE COUNTRY

A. *California's Intent-Based Test*

While many states, like North Carolina, have not yet broached the issue of surrogacy in lawmaking, other states have developed different approaches to the practice. One approach is the intent-based test, which centers on the validity of a surrogacy contract between the two parties: the intended parents who want the child and the surrogate carrier who carries the child.[86] The idea is that if the intended parents and surrogate carrier do in fact intend for the surrogacy to occur and manifest this intent in a surrogacy contract, then the contract is valid and will be upheld.[87]

California, perhaps the most surrogacy-friendly state in the country, chiefly utilizes this approach.[88] In 1975, the state adopted the Uniform Parentage Act ("UPA"), which determines parentage by examining the relationship between parent and child once the child is born.[89] The UPA takes an intent-based approach, stating that if the contracting parties meet various requirements, such as a minimum age and completion of a mental health consultation, the surrogacy contract is enforceable[90] and the intent of the parties is dispositive.

In 1993, in the landmark case of *Johnson v. Calvert*,[91] the Supreme Court of California applied the UPA standard to a surrogacy arrangement in the state.[92] In *Johnson*, a surrogate carrier bore a child with no genetic relationship to her but wanted to keep the child, while the intended biological parents argued

85. *See* Carmina D'Aversa, *The Right of Abortion in Surrogate Motherhood Arrangements*, 7 N. ILL. U. L. REV. 1, 15–16 (1987).

86. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (indicating the couples signed a surrogacy agreement and that the "case [could not be] decided without enquiring into the parties' intentions as manifested in the surrogacy agreement").

87. *Id.*

88. *See* Demopoulos, *supra* note 34, at 1761.

89. *Johnson*, 851 P.2d at 779.

90. For a comprehensive look at how North Carolina can update its family laws, including surrogacy agreements, in accordance with UPA, see UNIF. PARENTAGE ACT §§ 802(a)(1), (a)(4), (b)(1), (b)(3), 804 cmt. (UNIF. LAW COMM'N 2017). *See also* Saxon, *supra* note 28, at 18–19.

91. 851 P.2d 776 (Cal. 1993).

92. *Id.* at 782.

the child was theirs.[93] The court used the UPA's parent-child relationship standard to apply an intent-based test[94] and held that the child's intended parents were the legal parents.[95] The intended parents' desire to have a child caused the pregnancy of the surrogate carrier.[96]

California took its enforcement of intent-based parentage one step further in 2012 with section 7962, a statute which specifically validates and enforces surrogacy agreements between intended parents and surrogate carriers, provided that certain conditions are met.[97] The "presumptively valid" surrogacy contract[98] solidified California's long-held position that only the intent of the parties to the contract should determine the legal parents of the child.[99] Once the intended parents have executed a surrogacy contract that conforms to the requirements of section 7962, the surrogate carrier no longer has any legal right to the child she carried, and the intended parents are the legal parents of the child.[100]

For many surrogacy arrangements, this process works smoothly because both parties receive what they contracted for: the surrogate carrier has the baby for the intended parents and may receive compensation, and the intended parents receive the baby they intend to parent. However, problems arise when the surrogate carrier refuses to give up the child she carried. One of the most recent examples of this situation came in the California case of *Cook v. Harding*.[101] In *Cook*, a valid surrogacy contract existed between the surrogate carrier and plaintiff, Cook, and the intended, biological, single father, C.M.[102] The surrogate carried triplets for C.M., who was then a fifty-year-old, deaf man living with his parents on the opposite side of the country.[103] Despite the valid surrogacy contract, Cook began having second thoughts about the arrangement a few months into her pregnancy when C.M. asked her to abort at least one of

93. *Id.* at 778.

94. *Id.* at 782.

95. *Id.* at 778.

96. *Id.* at 782 ("[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.").

97. CAL. FAM. CODE § 7962(a)(4), (b) (Westlaw through ch. 161 of 2019 Reg. Sess.) (requiring, for example, that both parties be represented by independent counsel and that the surrogacy contract contain information on how the intended parents will pay for the surrogate mother's medical expenses).

98. *Id.* § 7962(i).

99. *See* Demopoulos, *supra* note 34, at 1760–61.

100. § 7962(f)(2) ("Subject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children.").

101. 190 F. Supp. 3d 921 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

102. *Id.* at 928.

103. *Id.* C.M. lived in Georgia with his two aging parents. *Id.*

the fetuses due to financial concerns regarding medical care.[104] Cook refused and continued the pregnancy as planned.[105] A few weeks before the children were born, C.M. seemingly had a change of heart and exercised his rights under section 7962 to terminate Cook's parental rights and became sole legal parent of the three children.[106] Concerned about the well-being of the children, Cook challenged section 7962 on constitutional due process and equal protection grounds.[107] She posited that the family court's decision to uphold the surrogacy contract violated the *children's* due process rights to have a relationship with their mother and violated *her* due process rights to a hearing before the termination of her parental rights.[108] However, the district court refused to rule on the merits, citing federalism concerns and the right of the state of California to deal with family law matters.[109] As such, the family court's decision to terminate Cook's parental rights relating to the triplets stands,[110] and section 7962 currently remains good law in the state of California.[111]

The *Cook* case illustrates the difficulties with using a solely intent-based test to determine the enforceability of surrogacy contracts.[112] While intent tests and section 7962 certainly ease the burden on family courts, permitting the court to look no further than the four corners of the presumptively valid contract, can lead to situations where the best interests of the children are ignored.[113] In *Cook*, while the intended father became hesitant about the contract and pushed to terminate the pregnancy, the surrogate carrier was a willing parent, offering to adopt one of the fetuses.[114] Despite the surrogate carrier's willingness to parent the children, parentage was awarded to the intended parent who, at one time, had tried to eliminate the fetus.[115] This rigid conformity to the terms of the surrogacy contract, regardless of what might best benefit the children, has led some commentators to reject section 7962 in favor of multifactor tests that include the intent of the parents, best interests of the children, and other genetic and gestational factors.[116]

104. *Id.* at 928–29.
105. *Id.* at 929.
106. *Id.*
107. *Id.* at 929–31.
108. *Id.*
109. *Id.* at 936.
110. *Id.* at 930, 938.
111. CAL. FAM. CODE § 7962 (Westlaw through ch. 161 of 2019 Reg. Sess.).
112. *See* Demopoulos, *supra* note 34, at 1767–68.
113. *Id.*
114. *Cook*, 190 F. Supp. 3d at 929.
115. *Id.*
116. For more on this approach and an innovative point-based test, see Demopoulos, *supra* note 34, at 1776–80.

B. *New Jersey's Best Interests Test*

On the opposite end of the spectrum from California's rigid intent-based test lies the best interests test, first promulgated by the aforementioned and well-known case *In re Baby M*.[117] In that case, as with many surrogacy disputes, the surrogate carrier refused to give up the child and a legal battle ensued.[118] The New Jersey Supreme Court eventually awarded custody of the child,[119] who was genetically a product of the surrogate carrier and intended father, to the intended father but not on the basis of the surrogacy contract.[120] Rather, the court found that surrogacy contracts, especially those in which the surrogate carrier is compensated for carrying the child, violate the state's public policy and existing statutes.[121] The court took special issue with the contractual termination of the surrogate carrier's parental rights because a New Jersey statute already provided the legal pathway to terminate parental rights.[122]

Instead of upholding the surrogacy contract and deciding the issue of parentage of Baby M, the court decided only the issue of custody on the basis of a best interests test, the standard required for custody disputes under New Jersey law.[123] Under its best interests analysis, the court considered such factors as: the stability and financial situation of the home; the employment history of the parties; the potential presence of alcohol abuse by either party; and the "prospects for wholesome, independent psychological growth and development" of the baby.[124] Had the case been decided under the intent-based framework of California, the intended father and his wife would certainly have been granted both custody and full legal parentage of the child because the parties had executed a valid surrogacy contract.[125] While ultimately reaching the

117. 537 A.2d 1227 (N.J. 1988).

118. *Id.* at 1237.

119. Importantly, the New Jersey Supreme Court did not decide the issue of parentage, only custody. *Id.* at 1234.

120. *Id.*

121. *Id.* at 1234, 1240.

122. New Jersey requires a "written surrender to an approved agency or to [Division of Youth and Family Services]" or "a very strong showing of abandonment or neglect." *Id.* at 1243. "[I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts." *Id.* The court continually reiterated this point throughout the opinion. *Id.* at 1245 ("Contractual surrender of parental rights is not provided for in our statutes as now written.").

123. *Id.* at 1256 ("With the surrogacy contract disposed of, the legal framework becomes a dispute between two couples over the custody of a child produced by the artificial insemination of one couple's wife by the other's husband. Under the Parentage Act the claims of the natural father and the natural mother are entitled to equal weight, i.e., one is not preferred over the other solely because he or she is the father or the mother. The applicable rule given these circumstances is clear: the child's best interests determine custody." (citations omitted)).

124. *Id.* at 1258–59.

125. *See* CAL FAM. CODE § 7962(i) (Westlaw through ch. 161 of 2019 Reg. Sess.) ("An assisted reproduction agreement for gestational carriers executed in accordance with this section is

same custody (although not parentage) decision as California, the New Jersey Supreme Court in *In re Baby M* left the door open to a surrogate carrier gaining full custody of a child intended for other parents, should it be in the best interests of the child.[126] States like Massachusetts have relied on existing family law doctrine to determine that surrogacy contracts—especially for compensation—are invalid, and courts must determine the best interests of the child.[127]

One of the main issues with the divisive *In re Baby M* decision lies in the court's reluctance to determine the legal parentage of the child, deciding the case only on custody grounds.[128] The court relied on existing family law statutes in New Jersey to resolve a custody dispute between two genetic parents.[129] However, the court avoided the far more difficult question of who remained the legal parent of Baby M.[130] Courts have long settled mere custody disputes, as opposed to disputes over parentage, by examining the best interests of the child.[131] However,

> [t]he determination becomes more difficult . . . when a woman agrees before conception to bear a child for an infertile or same-sex couple and then changes her mind once the baby is born. Surrogacy cases raise additional concerns because it is not just custody, but parentage that is at issue.[132]

C. *A Hybrid Test: Contract Law and Best Interests*

In an apparent attempt to reconcile the intent-based and the best interests tests, some states have combined elements of both. For example, the Supreme Court of Wisconsin recently applied basic contract law to surrogacy agreements

presumptively valid and shall not be rescinded or revoked without a court order."); *see also* Cook v. Harding, 190 F. Supp. 3d 921, 937 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

126. *See In re Baby M*, 537 A.2d at 1257 ("The issue here is which life would be better for Baby M, one with primary custody in the Whiteheads [the surrogate mother and her husband] or one with primary custody in the Sterns [the intended, biological father and his wife]." (emphasis omitted)). For more on best interests tests, see Demopoulos, *supra* note 34, at 1756–57.

127. *See* R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) ("No private agreement concerning adoption or custody can be conclusive in any event because a judge, passing on custody of a child, must decide what is in the best interests of the child.").

128. *See In re Baby M*, 537 A.2d at 1256–57.

129. *See* N.J. STAT. ANN. § 9:17-40 (Westlaw through L.2019, c. 266 and J.R. No. 22); *see also In re Baby M*, 537 A.2d at 1256.

130. *See In re Baby M*, 537 A.2d at 1256–57.

131. Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 485 (2011).

132. *Id.*; *see* Rachel M. Kane, *Cause of Action for Determination of Status as Legal or Natural Parents of Children Borne by Surrogate or Gestational Carrier*, *in* 48 CAUSES OF ACTION 2D 687, § 20, Westlaw (database updated July 2019) (listing the states that employ a best interests test); *see also* Demopoulos, *supra* note 34, at 1756–57.

and upheld their validity, provided that the agreement did not violate the best interests of the child.[133] Other states, such as Tennessee, uphold surrogacy agreements so long as they do not terminate the parental rights of the surrogate carrier—if she is also the genetic mother—before the child's birth.[134] However, these attempts to determine parentage of a child born to a surrogate mother tend to be ad hoc and often draw heavily from the state's existing family law regime.[135]

IV. NORTH CAROLINA'S EXISTING FAMILY LAW STATUTES

Despite some criticism that states dealing with surrogacy do so on an ad hoc basis by drawing from existing family law statutes,[136] it makes sense to examine a state's family laws—including those involving custody and adoption—to craft a surrogacy statute rather than start from scratch.[137] This part first briefly touches on North Carolina's adoption statutes.[138] It then explores North Carolina's custody laws and points out similarities between North Carolina's existing laws and the intent-based and best interests tests explained above.

A. *North Carolina Adoption Statutes*

The current North Carolina law on adoption, codified at article 3 of chapter 48 of the North Carolina General Statutes, permits a mother to revoke her consent to adoption within seven days of giving that consent.[139] Professor Katherine Bartlett, writing thirty years ago, argued that this law exists to protect the biological mother from exploitative circumstances surrounding the relinquishment of her child and that these same pressures exist in a surrogacy agreement.[140] However, this argument is flawed, especially in the case of gestational surrogacy, in two ways. First, it presupposes that the woman carrying the child is the child's *legal* mother in all cases. There is support for the proposition that, at least in certain circumstances, the carrier of the child is the

133. *In re* F.T.R., 833 N.W.2d 634, 648 (Wis. 2013).

134. *See In re* Baby, 447 S.W.3d 807, 833, 834 (Tenn. 2014).

135. *See In re F.T.R.*, 833 N.W.2d at 644 ("Many courts have encountered issues surrounding surrogacy, and the cases often involve ad hoc procedures attempting to effectuate the parties' intent by analyzing surrogacy issues under the state's statutes for [termination of parental rights], adoption, custody and placement, and the like.").

136. *See id.*

137. Other scholars have taken this approach to addressing surrogacy statutes, as well. *See* Bartlett, *supra* note 30, at 1–2.

138. *See In re F.T.R.*, 833 N.W.2d at 644–45; *see also* Bartlett, *supra* note 30, at 3–4 (describing the proposition that adoption statutes lend themselves more easily to informing surrogacy statutes).

139. N.C. GEN. STAT. §§ 48-3-601(1), -608(a), (2017).

140. Bartlett, *supra* note 30, at 4–5 ("[I]t is questionable whether any woman can make a well-considered decision about surrendering her child for adoption before the child is born.").

child's legal mother, regardless of the lack of genetic relationship.[141] However, this broad presumption leaves little room for the genetic mother—whose desire for motherhood brought the child into the world and whose biological child the surrogate carries—to make any decisions regarding the child.

Second, this argument also presumes that surrogate carriers are under the same exploitative pressures as a woman who has naturally conceived a child of her own and has determined she cannot care for it. Instead, unlike a mother who determines she cannot care for a child she naturally conceived, a gestational carrier becomes pregnant with the full knowledge that she carries the child for someone else.[142] This difference between adoption and surrogacy alone is enough to differentiate between the public policy reasons for revocation of consent in adoption situations and the contractual nature of a surrogacy agreement.[143]

Of course, there are similarities between planned adoptions of infants and surrogacy; namely, in both situations, a woman carries a child she will not raise as her own. These issues are complex, and courts should remain sensitive to any potential exploitation of either biological mothers giving their children up for adoption or surrogate carriers. However, this section simply argues that adoption and surrogacy are not interchangeable concepts, and based on the two above-mentioned faulty presumptions, it would be unwise to rely on North Carolina's adoption statute in crafting a surrogacy statute.

141. *See In re* Adoption of A.F.C., 491 S.W.3d 316, 317 (Tenn. Ct. App. 2014) (holding that the "gestational carrier should be listed as the mother"); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., PA-2014-009, EFFECT OF ASSISTED REPRODUCTIVE TECHNOLOGY (ART) ON IMMIGRATION AND ACQUISITION OF CITIZENSHIP UNDER THE IMMIGRATION AND NATIONALITY ACT (INA) (2014), https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf [https://perma.cc/2Q2W-FRBT] (stating that "[a] gestational mother has a petitionable relationship without a genetic relationship to the child, as long as she is also the child's legal parent at the time of birth" in the context of immigration).

142. This is not to suggest that a gestational carrier cannot develop maternal feelings for the child she is carrying. Most of the controversy surrounding surrogacy and surrogacy lawsuits centers on this very premise. As Bartlett points out, "That mothers will develop feelings of connection and commitment to their children during the course of pregnancy, notwithstanding agreements they may make to the contrary, demonstrates the strength of the parent-child relationship." Bartlett, *supra* note 30, at 5. However, this Comment argues that this "mother-child" pre-birth relationship, so present in adoption situations, is weakened in the gestational surrogacy context.

143. Other courts have come to this same conclusion. Indeed, the *Johnson* court, in examining the defendant's argument that, based on California's adoption statutes, the surrogacy contract should be voided, held "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. . . . We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in [the relevant California penal code] and the adoption statutes." Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993); *see* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1138 (Mass. 2001) ("As is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements.").

B. *North Carolina Child Custody Statutes*

A more promising approach would be for the North Carolina General Assembly to adapt North Carolina's child custody laws to the surrogacy arrangement. Like many states, North Carolina employs a best interests test when settling custody disputes.[144] In determining the best interests of a child in custody situations, courts consider the following: the special needs of a child; the home, neighborhood, and school of the child; the religious instruction one parent intends to provide; the type of discipline; substance abuse; and domestic violence.[145] However, North Carolina does not automatically resort to a best interests analysis in every custody dispute; rather, North Carolina courts only apply this standard after the court first determines that a natural parent has somehow not acted in the best interests of the child.[146]

North Carolina courts have long held, under the Due Process Clause of the Fourteenth Amendment, parents have a right to oversee the "care, custody, and control of their children."[147] However, that constitutional protection is weakened when parents "act[] in a manner inconsistent with [this] constitutionally-protected status."[148] In those circumstances, courts will intervene to apply a "best interest[s] of the child test."[149] Importantly, the parent does *not* have to commit some "bad act[]" that might "endanger the children" in order to give up his or her constitutionally protected status.[150] Rather, the act could be something as simple as choosing to start a family with another person and "ced[ing] to [that person] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child."[151] In that case, the person to whom the parent ceded authority would have a strong claim to custody.[152] Further, the parent seeking custody must prove, by clear and convincing evidence, that the natural parent in fact acted in a manner inconsistent with being a parent.[153] Importantly, when making this determination, North Carolina

144. *See* Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997); *see also* N.C. GEN. STAT. § 50-13.2(a) (2017).

145. *See* 1 LLOYD T. KELSO, NORTH CAROLINA FAMILY LAW PRACTICE § 13:11 (database updated Dec. 2017) (articulating factors in determining the best interest of a child).

146. *Price*, 346 N.C. at 79, 484 S.E.2d at 534; *see also* Estroff v. Chatterjee, 190 N.C. App. 61, 63–64, 660 S.E.2d 73, 75 (2008).

147. Heatzig v. MacLean, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008).

148. *Id.*, 664 S.E.2d at 350 (citing *Price*, 346 N.C. 68, 484 S.E.2d 528).

149. *Id.*

150. *Id.* at 455, 664 S.E.2d at 351.

151. *Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78.

152. *See id.*

153. David N. v. Jason N., 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

courts look to the *intent* behind the parent's actions.[154] Thus, the natural parent has to *intend* to give "parent-like status" to another person before they have ceded some of their constitutional protections as parent.[155] In sum, North Carolina uses a two-part test to determine custody of children: the court looks first to see whether the natural parent intended to cede some of his or her constitutionally protected authority over his or her children; and, if so, the court will employ a best interests test to settle which parent should retain custody of the child.[156]

North Carolina courts have used this test in a number of child custody cases. For example, in the *Mason v. Dwinnell*,[157] the North Carolina Court of Appeals held that a natural mother had so intentionally involved her domestic partner in her children's lives, including using the partner's name as "parent" on school forms and declaring her a parent at the children's baptisms, that she acted inconsistently with her constitutionally protected status as parent.[158] As such, the court could apply a best interests test to determine who, between the natural mother and her domestic partner, should have custody of the children.[159] Notably, the court did not decide the issue of parentage in this case, indicating that the domestic partner did not achieve the status of a legal parent.[160] Rather, the domestic partner simply had a right to custody of the child, under the best interests test.[161]

In another case with very similar facts, the North Carolina Court of Appeals reached a different conclusion. *Estroff v. Chatterjee*[162] also involved two domestic partners, with Ms. Chatterjee, the younger of the two women, deciding that she wished to bear children.[163] Despite the women living as partners in the same home, Ms. Chatterjee intended to raise the children as her own and rejected the idea that Estroff was the "other mom."[164] The court held that Ms. Chatterjee decided to have children on her own and merely got

154. *Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78–79 ("By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.").

155. *Id.*

156. *See* Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997); *see also* Heatzig v. MacLean, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008); *Estroff*, 190 N.C. App. at 68, 660 S.E.2d at 77.

157. 190 N.C. App. 209, 660 S.E.2d 58 (2008).

158. *Id.* at 223, 660 S.E.2d at 67.

159. *Id.* at 223, 227–28, 660 S.E.2d at 67, 70.

160. *Id.* at 227–28, 660 S.E.2d at 70 ("[The natural mother's] choice [to cede some of her parental authority] does not mean that [the domestic partner] is entitled to the rights of a legal parent, but only that a trial court may apply the 'best interest of the child' standard in considering [the domestic partner's] request for custody, including visitation.").

161. *Id.*

162. 190 N.C. App. 61, 660 S.E.2d 73 (2008).

163. *Id.* at 65, 660 S.E.2d at 75.

164. *Id.*, 660 S.E.2d at 76.

permission from her partner to raise the children in the home in which they lived; Ms. Chatterjee alone picked the sperm donor; she did not permit hospital staff to call Ms. Estroff the "other mom"; and she emphasized that she alone was the children's mother.[165] These findings of fact led the court to determine that Ms. Chatterjee did not intend to relinquish her constitutional protection as parent of the twins, and therefore, a best interests test could not be applied for custody purposes.[166]

The difference in outcomes between *Mason* and *Chatterjee* illustrates just how seriously North Carolina courts examine parental intent to determine whether a parent has ceded his or her constitutional protections. In *Mason*, the court found intent in the natural mother's actions and therefore applied a best interests test, eventually awarding custody to both the natural mother and domestic partner in the best interests of the child.[167] By contrast, the same court in *Chatterjee* could not find intent to cede in the actions of the natural mother and therefore did not proceed to a best interests test determination.[168]

To summarize, in dealing with child custody cases, North Carolina courts primarily consider whether or not a natural parent has *intended* to give up some of his or her constitutional protection as parent. Once a court has determined that a parent has intended to act in a way that is inconsistent with his or her constitutional privileges, the court will look to the best interests of the child to decide the custody arrangement.

V. APPLYING NORTH CAROLINA'S CUSTODY LAWS TO SURROGACY

North Carolina custody laws already contain the basic framework for a workable, practical parentage test for surrogacy situations. It is readily apparent, merely from the language of the custody cases above, that both intent and best interests play a large role in settling custody disputes in North Carolina. Intent of the parties and best interests of the child are also the main methods other states have used to give effect to surrogacy arrangements to determine parentage of a surrogate child. This section explores the possibility that North Carolina lawmakers can map onto the pre-existing custody laws to determine a child's legal parentage.

A. *A Proposal for North Carolina Surrogacy Law*

I propose a two-prong test for legal parentage in North Carolina surrogacy cases. First, did the surrogate carrier agree to carry a child for the intended

165. *Id.* at 74, 660 S.E.2d at 81 ("Chatterjee did not choose to create a family unit with two parents, did not intend that Estroff would be a '*de facto* parent,' and did not allow Estroff to function fully as a parent." (citation omitted)).

166. *Id.* at 75, 660 S.E.2d at 82.

167. Mason v. Dwinnell, 190 N.C. App. 209, 230, 232, 660 S.E.2d 58, 71, 72 (2008).

168. *Estroff*, 190 N.C. App. at 75, 660 S.E.2d at 82.

parents, and did the intended parents agree to receive the child as their own, as evidenced by a valid surrogacy agreement? Second, would the surrogacy agreement be in the best interests of the child?

Under the first prong, if a valid surrogacy agreement exists, there should be a strong presumption in favor of awarding parentage to the intended parents because the surrogate carrier has shown intent to cede to the intended parents any constitutional parenting rights she may have had, as in the North Carolina custody decisions. For the second prong, the burden should lie with the surrogate carrier to show that the arrangement would *not* be in the best interests of the child. This section will explain each prong in more detail.

Under current custody laws, North Carolina first looks to the intent of the natural parent: Did that parent intend to give up some of his or her constitutionally protected parental privileges?[169] The same test should be applied to determine parentage, as well: Did the surrogate carrier intend to give up some of her rights as a parent?[170] If there is a valid surrogacy agreement, then North Carolina law should presume that the surrogate carrier did indeed intend to give up her rights to the child, just as the parent who ceded some of his authority as parent to a domestic partner in *Mason* gave up some of his custodial rights.[171]

To determine the validity of the surrogacy agreement between the parties, and thus satisfy that the surrogate mother intended to relinquish any rights she held as parent, this Comment proposes using the UPA's list of criteria.[172] For example, section 802 of the UPA states:

> (a) To execute an agreement to act as a gestational or genetic surrogate, a woman must: (1) have attained 21 years of age; (2) previously have given birth to at least one child; (3) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor; (4) complete a mental-health consultation by a licensed mental-health professional; and (5) have independent legal representation of her choice throughout

169. *See supra* text accompanying notes 121–30.

170. I adopt Kristen Bradley's assumption that the surrogate mother does have some rights as the person who birthed the child for the purposes of this test. However, these rights are quickly settled as against the intended parent's rights to the child using this test. For more on these constitutional implications of surrogacy, see Kristen Bradley, *Assisted Reproductive Technology After* Roe v. Wade*: Does Surrogacy Create Insurmountable Constitutional Conflicts?*, 2016 U. ILL. L. REV. 1871, 1901 ("It would be difficult to argue that a surrogate is suddenly devoid of all rights to her bodily integrity upon becoming a surrogate."). *See also* Spivack, *supra* note 6, at 109 (expressing one constitutional argument that "because of her privacy right, the surrogate cannot waive the right to the child she carries, and that these rights trump the rights of the intended parents if the surrogate should change her mind at the birth of the child"). *But see* Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (holding that the constitutional rights of "substantive due process, privacy, and procreative freedom" do not apply to gestational surrogate mothers).

171. *See supra* text accompanying notes 157–61.

172. *See* UNIF. PARENTAGE ACT §§ 802–804 (UNIF. LAW COMM'N 2017).

> the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.
>
> (b) To execute a surrogacy agreement, each intended parent, whether or not genetically related to the child, must: (1) have attained 21 years of age; (2) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor; (3) complete a mental-health consultation by a licensed mental health professional; and (4) have independent legal representation of the intended parent's choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.[173]

Once North Carolina adopts these requirements, a court could easily discern whether a disputed surrogacy agreement is valid or not. If valid, the court would presumptively hold that the surrogate carrier intended to relinquish any constitutional rights she may have had with regard to the surrogate child.

This intent prong represents the bulk of the test. Once a court has found a valid surrogacy arrangement in place, intent on the part of the surrogate carrier is presumed, and the court should lean strongly toward awarding parentage to the intended parents.[174] As other proponents of an intent-based test have noted, relying on the contract between the parties gives intended parents a "bright-line test," removing some of the uncertainty related to parentage of a surrogate child.[175] In addition, North Carolina custody law is already well-settled in this area, so courts would simply have to apply the same test they always do in other areas of family law—what was the intent of the parent, or, in surrogacy cases, the surrogate carrier?

However, using an intent-based test alone, even if based in existing North Carolina custody law, can lead to troubling results. Many argue that a surrogate carrier cannot contractually give away her constitutionally protected right to privacy, which is inherent in the surrogacy arrangement.[176] Others have argued

173. *Id.* § 802.

174. This part of the test very much mirrors California's section 7962(i), which reads:

> An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.

CAL. FAM. CODE § 7962(i) (Westlaw through ch. 161 of 2019 Reg. Sess.).

175. *See* Teresa Abell, *Gestational Surrogacy: Intent-Based Parenthood in* Johnson v. Calvert, 45 MERCER L. REV. 1429, 1436 (1994) ("Infertile couples will continue to search for ways to procreate, and they should be able to rely on contracting parties to their endeavors to keep their promises."); *see also* Demopoulos, *supra* note 34, at 1761 ("Supporters of intent-based tests point to positives such as providing a bright-line, the avoidance of uncertainty, and conformance with contractual principles.").

176. *See* Spivack, *supra* note 6, at 109.

that surrogacy contracts violate the constitutional rights of the surrogate children themselves, as the contracts tend to commodify children, and some states treat surrogate children differently than adopted children.[177] Finally, as in the case of *Cook v. Harding*, an intent-based test may not lead to a scenario in the best interests of the child.[178] Responding to these concerns, North Carolina should also introduce a second prong to the parentage test: a best interests standard.

As with custody law, once a court examining a surrogacy contract finds intent, it should next turn to the best interests of the child. In this determination, the court should again award a strong presumption in favor of the intended parents. The California Supreme Court in *Johnson v. Calvert* iterated the main reason for doing so: "but for" the desire of the intended parents, the surrogate child would never have been born.[179] Although California observes an intent-based test, the *Johnson* court reasoned that awarding parentage to the people who intended for the child to be born was also in the child's best interests.[180] This reasoning is both persuasive and logical because many of the factors that North Carolina courts examine when determining the best interests of the child, including the stability of the home and the financial resources of the parents, would seem to favor the intended parents whose very intent and desire brought the surrogate child into the world.[181] North Carolina should likewise presume that awarding parentage to the intended parents would also be in the child's best interests.

Yet, this presumption should be rebuttable. There are some situations in which parentage might better remain with the surrogate carrier instead of the intended parents, as the case of *Cook v. Harding* arguably demonstrates.[182] For example, circumstances might so change between the formation of the surrogacy contract and the time of the child's birth that the best interests of the surrogate child change as well. In those cases, North Carolina would be wise to adopt a law that allows for flexibility.

Consider, for example, how this test would apply to the facts of *Cook*. The California court hearing the case decided in favor of the intended father, despite valid misgivings on the part of the surrogate carrier, in order to uphold the surrogacy contract. Should a court apply this Comment's proposed test to the

177. *See* Demopoulos, *supra* note 34, at 1765–66, 1770.

178. *See supra* text accompanying notes 112–16.

179. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("But for [the intended parents'] acted-on intention, the child would not exist.").

180. Spivack, *supra* note 6, at 103; *see also* Demopoulos, *supra* note 34, at 1762 ("Commentators have also argued that intended parents who enter surrogacy arrangements have a deep desire to parent, which usually translates to them successfully fulfilling their parental duties.").

181. *See supra* text accompanying note 145.

182. *See supra* text accompanying notes 101–16 (explaining the facts of *Cook* and why the surrogate carrier was arguably the better parent as between her and the intended father of the children).

same set of facts, it is likely the court would award the surrogate carrier, not the intended father, parentage of the child. First, the court would find that the surrogate carrier intended to cede some of her constitutional authority to the intended father due to the validly executed surrogacy contract. Having found this, the court would move to the best interests prong of the test, with a strong presumption in favor of the intended father because he is the parent whose intent to raise a child brought the child into the world. However, examining the specific facts of this case—namely, that the intended father had at one time asked for an abortion of at least one of the fetuses, was in his fifties and deaf, and resided with his elderly parents[183]—the court would likely conclude the best interests of the children would be served with the surrogate carrier as their legal parent.[184]

There are, of course, arguments against adopting a multipart test such as the one listed above. For example, those who favor the UPA may criticize this proposal[185] because the UPA does not allow for a best interests analysis in the case of a valid surrogacy arrangement[186] and instead severs all parentage rights of the surrogate carrier upon birth of the child.[187] These opponents of a best interests analysis would argue that giving up the child upon birth is exactly what the surrogate carrier contracted to do, and she should be held to that contract. Indeed, for some it is a form of paternalism for the state to allow a woman to back out of a contract once she has entered it.[188] Thirty years ago, much of Bartlett's argument to permit a woman to revoke her agreement to serve as surrogate was based on the notion that "it is questionable whether any woman can make a well-considered decision about surrendering her child for adoption before the child is born."[189] Such a paternalistic theory would not and should

183. *Cook v. Harding*, 190 F. Supp. 3d 921, 928–29 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

184. Surrogacy author Matthew Demopoulos came to the same conclusion regarding *Cook v. Harding*, using a different test. Demopoulos, *supra* note 34, at 1779–80. However, his test determined only custody, not parentage. *Id.*

185. Those proponents of the UPA may include several North Carolina family law experts. *See generally* Boughton, *supra* note 1 (referencing the commentary of Jennifer Tharrington and Maxine Eichner on such policies).

186. *See* UNIF. PARENTAGE ACT § 601(b) (UNIF. LAW COMM'N 2017) ("A proceeding to adjudicate the parentage of a child born under a surrogacy agreement is governed by [Article] 8."); *see also id.* art. 8.

187. *Id.* § 809(b) (stating that "neither a gestational surrogate, nor the surrogate's spouse or former spouse, if any, is a parent of the child" so long as the surrogacy agreement follows the requirements of the UPA according to section 812(a)).

188. Indeed, this argument has been used in other areas of family law, most notably in the context of premarital agreements. Paternalism in contracting was used to strike down some state laws that permitted women to renege on premarital agreements. *See* Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) ("Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded.").

189. Bartlett, *supra* note 30, at 5.

not hold much weight today, as it is premised on sexist notions of the frailty of female decisionmaking.

By contrast, others might critique this test as placing *too much* emphasis on the surrogacy contract and not enough on the surrogate carrier's unique legal position. Indeed, under my proposal, intended parents have a strong presumption of legal parenthood, absent some serious showing that the best interests of the child would be served by remaining with the surrogate carrier. However, I believe this proposal strikes the appropriate balance between the intent-based and best interests tests. To be sure, the proposal slants strongly in favor of the intended parents, so long as the surrogacy contract is valid. Yet, unlike the pure intent-based test, it leaves the door open for a surrogate carrier to express her genuine concerns about the well-being of the child she carried, in line with the concerns of Bartlett and other scholars.

CONCLUSION

Surrogacy across the United States is becoming a more popular alternative for couples who are unable to carry their own children. As artificial reproductive techniques advance, so too must the law. North Carolina remains one of the many states that has not provided any guidance, either by statute or case law, for its citizens considering a surrogacy arrangement. North Carolina can and should pass a surrogacy law because the state would receive it well, and it would give peace of mind to intended parents looking to ensure their surrogate children are legally theirs. North Carolina family law is already a landscape conducive to the types of tests that other states have used in order to determine parentage of a surrogate child: specifically the intent-based and best interests tests. North Carolina's two-prong custody test, including a consideration of both intent and best interests, provides the basis of a statute by which to determine parentage in surrogacy cases. By adopting a surrogacy statute, the state can provide much-needed reassurance to people considering surrogacy without disrupting the current family law framework. In doing so, North Carolina will update its laws to better reflect its citizens' needs and bring itself in line with modern reproductive practices.

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