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A Baby Step: The Status of Surrogacy Law in Wisconsin Following *Rosecky v. Schissel*

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A BABY STEP: THE STATUS OF SURROGACY LAW IN WISCONSIN FOLLOWING *ROSECKY V. SCHISSEL*

Surrogacy is an ancient and rapidly expanding industry in the United States and abroad. Despite this, the legal landscape governing surrogacy contracts remains tenuous in a majority of states—including Wisconsin. In 2013, the Wisconsin Supreme Court took the first step in developing surrogacy contract law in Wisconsin. Absent legislative guidance, the court fashioned a reasonable foundation for surrogacy contracts. However, its decision does little to ensure that intending parents and surrogate mothers who enter into such agreements fully understand their responsibilities and have assurances that their expectations will be met. This Comment does not seek to argue, as many others have, the merits of surrogacy or the limitations the law should place on the practice. Rather, it seeks to illustrate the Rosecky *decision's place within the legal landscape and suggest one provisions that could form a foundation for much needed legislative guidance.*

I. INTRODUCTION

The story is rare but not uncommon. A couple longs to have a child, but as the result of illness, injury, or fate, the intending mother is unable to successfully carry a child. After years of heartache, the closest of friends expresses a desire to help. The hopeful parents have known the friend for many years. The close friend and her husband have already created their family and routinely stated that they were done having children.

After several months, or even years, the intending parents agree to allow the friend to be the surrogate mother for their child. Although the parties are the closest of friends, the intending parents are not foolish and realize conflicts can arise. As a result, they contact a local attorney to learn the best course of action; the friend does the same and hires her own attorney.

The attorneys explain that surrogacy contracts are commonplace and the parties were wise to seek one in case disagreements should arise. However, the attorneys also clarify that there is no law governing such agreements in Wisconsin; there are no guidelines or requirements for the drafting of a surrogacy contract. Despite their desire to take precautions, the best the attorneys can do is draft a comprehensive and reasonable agreement between the parties. An agreement is drafted based on what other states have found to be acceptable, and after healthy discussions, the group settles on an agreement that outlines the responsibilities of all the parties and explains that the child will be placed with the intended parents.

In vitro fertilization is used with the intending father providing the sperm and the egg provided by the surrogate mother.[1] The parties are overjoyed when they learn the procedure was successful and that in a few short months the hopeful parents will finally be able to start their family.

As the months go on the intending parents' friendship with the surrogate mother begins to unravel. By the time the child is born, the

1. In vitro means "outside the body." The process involves the application of fertility drugs to the egg donor and retrieval of several eggs. An egg is then maintained in a container and fertilized with the sperm. The fertilized egg develops into an embryo, which is then placed into the woman three to five days after fertilization. *In Vitro Fertilization (IVF)*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/007279.htm (last updated Mar. 11, 2014), *archived at* http://perma.cc/58Z9-MJPZ; *Tests and Procedures: In Vitro Fertilization*, MAYO CLINIC (June 27, 2013), http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905, *archived at* http://perma.cc/N857-7D3B.

relationship has deteriorated to the point that the once good friend no longer wishes to surrender the child to the intended parents. Perhaps the surrogate mother no longer believed the family would be best for the child, or perhaps she simply could not surrender the child as she once believed she could. Regardless, there is no resolution in sight and litigation ensues.

The intending parents, armed with the carefully crafted agreement, head to court to show the judge they are the rightful parents. However, the legal landscape of Wisconsin is uncharted, and the surrogate mother argues that such agreements are void under public policy. Much to the dismay of the intended parents, the judge states he will not consider the agreement. Further, though the court awards sole custody and placement with the intended parents, he allows for the surrogate mother to have the child every other weekend. Finally, the surrogate mother will not be forced to terminate her parental rights—the intending mother cannot adopt the child as originally planned.

Surrogacy is an age-old practice, and a rapidly expanding industry both in the United States and abroad. Despite this history, the legal landscape of surrogacy—and more specifically surrogacy contracts—is far from settled. Wisconsin, like a majority of states, had no legal guidelines to govern surrogacy contracts prior to 2013, when the Wisconsin Supreme Court ruled such agreements were generally enforceable.[2] In Wisconsin, deep divides over the morals of surrogacy prevented governing legislation from being passed in the late 1980s.[3] Since that time, the issue has largely remained dormant on both the legislative and judicial fronts despite the fact the practice of surrogacy has continued to grow.[4]

The disturbing result of the legislature's failure to pass meaningful legislation is that parties who seek surrogacy as an alternative to adoption have been left unable to adequately plan in a manner to ensure expectations are met. In *Rosecky v. Schissel*, the Wisconsin Supreme Court held that surrogacy contracts were valid under Wisconsin public policy and that such agreements should be considered in determining custody and placement of a child, provided that the agreement does not conflict with the best interests of the child.[5] Though a landmark

2. Rosecky v. Schissel, 2013 WI 66, ¶ 30, 349 Wis. 2d 84, 833 N.W.2d 634.
3. *See infra* Part V.
4. *See infra* Part II.
5. *Rosecky*, 2013 WI 66, ¶ 74.

decision that validated surrogacy in Wisconsin, far more questions are left to be answered. This Comment will argue that only through comprehensive legislation can families have the clarity necessary to effectively and reliably plan for their futures.

This Comment will argue that ensuring family planning is too vital for clarity to develop via case law. Comprehensive legislation must be passed to ensure that when intending parents and surrogate mothers enter into agreements all parties fully understand their responsibilities and have assurances that their expectations will be enforced by the legal system. Part II of this Comment provides an overview of surrogacy contracts and prominent cases that highlight the competing views, which have led to a lack of uniformity in surrogacy laws across the United States. Part III will detail the *Rosecky* decision and analyze the court's reasoning along with Chief Justice Abrahamson's concurrence. Part IV will briefly analyze examples of legislation used in other states: first, the model rule of Article 8 of the Uniform Parentage Act will be examined, followed by California's permissive approach to surrogacy contracts and, finally, Illinois's 2004 Gestational Surrogacy Act. Part V will summarize Wisconsin's failed attempts at legislation to govern surrogacy contracts. Finally, Part VI will analyze questions that remain following the *Rosecky* decision and argue that the legal landscape following the decision should provide ample incentive for parties on both sides of the surrogacy debate to press for meaningful legislation. Part VI does not argue for what restrictions, if any, should be placed on surrogacy contracts. Rather, the Part highlights that, regardless of the requirements, any surrogacy legislation should include a pre-birth hearing to ensure conflicts are resolved before the birth of the child.

II. BACKGROUND OF SURROGACY CONTRACTS

Surrogacy is not a modern concept; it has been present in human society as far back as the birth of Abraham's son in the Old Testament.[6] Abraham's first wife Sarah was unable to bear children; thus, Abraham took a second wife, and their resulting child, Ishmael, was raised by Abraham and Sarah.[7] With the growth of modern medicine there has

6. *Genesis* 16:1–4; Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 799 (2012). The Bible includes at least three examples of traditional surrogacy. *See Genesis* 16:1–4, 16:15, 30:1–10.

7. *See Genesis* 17:18, 17:25–26.

been an explosion in the use of surrogacy and subsequent litigation.[8] The introduction of assisted reproductive technologies (ART), most notably in vitro fertilization, has changed the landscape of surrogacy and childbirth in general.[9] With millions of couples unable to have children, surrogacy has become an increasingly popular alternative to adoption; likewise, surrogacy contracts have become an increasingly important topic for courts and legislatures.[10]

Surrogacy can be broadly divided into two categories: traditional surrogacy and gestational surrogacy.[11] In traditional surrogacy, the surrogate mother provides the egg and a male provides the sperm.[12] Traditional surrogacy dates back thousands of years. In contrast, gestational surrogacy is a more recent creation of medical technology: the egg is provided from an individual other than the surrogate mother.[13] Therefore, in traditional surrogacy the surrogate mother has a genetic connection to the child; in gestational surrogacy the surrogate mother does not have a genetic connection.[14]

Non-commercial arrangements were often created between family members and friends.[15] The most common scenario involved a married couple where the wife was unable to carry a child for medical reasons.[16] Reliable statistics on these informal arrangements are nearly

8. Arshagouni, *supra* note 6, at 802; Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV 605, 609 (2003); Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/, *archived at* http://perma.cc/VDR9-JB2J.

9. Arshagouni, *supra* note 6, at 799–800; Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge The Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 28 (2009).

10. Danny R. Veilleux, Annotation, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.LR. 4th 70, 74–76 (1990).

11. Rosecky v. Schissel, 2013 WI 66, ¶ 35, 349 Wis. 2d 84, 833 N.W.2d 634 (explaining that the two broad categories of surrogacy can be divided into many subcategories); Arshagouni, *supra* note 6, at 801; Larkey, *supra* note 8, at 609–10.

12. *Rosecky*, 2013 WI 66, ¶ 35; Arshagouni, *supra* note 6, at 801.

13. Arshagouni, *supra* note 6, at 801; Larkey, *supra* note 8, at 610–11.

14. Arshagouni, *supra* note 6, at 801.

15. Larkey, *supra* note 8, at 608; *see* Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 560 (1999).

16. Larkey, *supra* note 8, at 607.

nonexistent.[17] In more recent years, as social dynamics have changed, surrogacy has become increasingly popular for same-sex couples and single individuals.[18]

The first formal surrogacy contract was drafted in 1976, and the first successful birth as a result of in vitro fertilization occurred in 1978.[19] Not surprisingly, a commercial market for surrogacy, in particular gestational surrogacy, developed and grew rapidly on the heels of these advances.[20] From 1976 to 1981, an estimated 100 children were born under situations where a surrogacy contract was used.[21] From 1981 to 1986, that number grew to over 500 children.[22] Current statistics estimate between 1,500 and 2,000 children are born every year under surrogacy and surrogacy contract arrangements.[23] Likewise, surrogacy contracts grew in prominence to protect parties and solidify expectations in both commercial and informal surrogacy arrangements.[24]

Surrogacy contracts typically included provisions that required the surrogate mother to terminate her parental rights, provided that the intended parents would assume legal custody over the child, and

17. MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 6 (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf, *archived at* http://perma.cc/Z6YJ-32KY.

18. MARTHA A. FIELD, SURROGATE MOTHERHOOD 6 (expanded ed. 1990); Larkey, *supra* note 8, at 608.

19. FIELD, *supra* note 18, at 5; George J. Annas, *Fairy Tales Surrogate Mothers Tell*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 43, 44 (Larry Gostin ed., 1990); Lawrence Van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, Is Dead*, N.Y. TIMES, Jan. 28, 1997, at B8.

20. Larkey, *supra* note 8, at 608; *see* HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 1–31 (1994) (discussing the growth of the surrogacy agency industry from 1976 to 1994).

21. FIELD, *supra* note 18, at 5.

22. *Id.*

23. Rosmarie Tong, *Surrogate Parenting*, INTERNET ENCYC. PHIL., http://www.iep.utm.edu/surr-par/ (last visited Jan. 11, 2014), *archived at* http://perma.cc/WX7K-D7KB; Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK (Mar. 29 2008, 10:55 AM), http://www.newsweek.com/curious-lives-surrogates-84469, *archived at* http://perma.cc/T99Q-2CGE. Accurate statistics are almost impossible to compile because of a lack of reporting standards. Tong, *supra*. The Society for Assisted Reproductive Technology attempts to keep yearly totals, but clinics are not obligated to report surrogacy births. Ali, *supra*. Though figures vary, the 1,500 to 2,000 estimate appears consistent with the American Society of Reproductive Medicine, which reported 1,593 gestational surrogacy births in 2011. Joan Cary, *Surrogate Births Growing in Popularity*, CHI. TRIB. (Oct. 9, 2013), http://articles.chicagotribune.com/2013-10-09/health/ct-x-1009-surrogate-20131009_1_illinois-gestational-surrogacy-act-egg-options-shirley-zager, *archived at* http://perma.cc/D2FH-ZBAM.

24. Larkey, *supra* note 8, at 608.

clarified the rights and obligations of both parties.[25] By-and-large, such provisions have remained common in surrogacy contracts.[26] Commercial surrogacy also involved payments from the intended parents to the surrogate mother for her services.[27] With the exception of the moral debate over surrogacy and ART generally,[28] payments to surrogate mothers have become the most heavily debated area of surrogacy.[29]

Payments to surrogate mothers have typically centered on living expenses, medical expenses, and life insurance coverage.[30] Commercial surrogacy has developed into a booming industry in the United States and internationally;[31] numerous companies have also developed to

25. *Id.* Though such provisions are common, there are nearly endless variations that could be included in such contracts. *See* FIELD, *supra* note 18, at 6.

26. *See*, *e.g.*, Rosecky v. Schissel, 2013 WI 66, ¶ 10 n.2, 349 Wis. 2d 84, 833 N.W.2d 634 (explaining provisions included in surrogacy contract).

27. Every state has a ban on "baby-selling," and any compensation provided in surrogacy contracts may not be in exchange for the child. FIELD, *supra* note 18, at 17. In states that allow commercial surrogacy, any compensation paid to the surrogate mother beyond reimbursement for various expenses is framed as compensation "for services," such as "use of the mother's womb." *Id.* at 17–18; SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? 30 (1994).

28. There are, of course, additional questions that arise in the surrogacy context—such as if either party may terminate a pregnancy. *See, e.g.*, Elizabeth Cohen, *Surrogate Offered $10,000 to Abort Baby*, CNN (March 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/, *archived at* http://perma.cc/PJ5C-3HYN. I do not wish to downplay the significance of additional questions that arise in surrogacy, but they are not the focus of this Comment. Rather, such difficulties appear to highlight the need for more effective surrogacy contracts.

29. Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91, 96 (2009); *see* FIELD, *supra* note 18, at 25–45 (discussing general debate over ART and exploitation of women); RAE, *supra* note 27, at 29–76 (evaluating common arguments for and against commercial surrogacy).

30. Larkey, *supra* note 8, at 608. Some studies comparing "for profit" compensation and compensation for "reasonable expenses" have suggested that there may be very little difference in the actual amounts received by the surrogate mother. Yukari Semba et al., *Surrogacy: Donor Conception Regulation in Japan*, 24 BIOETHICS 348, 355 (2010) (comparing for profit surrogacy in the United States with compensation paid for "reasonable expenses" in the United Kingdom).

31. Nita Bhalla & Mansi Thapliyal, *As Surrogacy Industry Booms; India Seeks Controls*, NBC NEWS (Sep. 30, 2013, 5:14 PM), http://www.nbcnews.com/business/surrogacy-industry-booms-india-seeks-controls-8C11300035, *archived at* http://perma.cc/5L27-MC6U; Himanshi Dhawann, *Unregulated Surrogacy Industry Worth over $2bn Thrives Without Legal Framework*, TIMES INDIA (July 18, 2013, 2:29 AM), http://articles.timesofindia.indiatimes.com/2013-07-18/india/40656818_1_commissioning-parents-surrogate-mother-17-lakh, *archived at* http://perma.cc/F24X-VUXT; Emily Shire, *The Newest Chinese Luxury Item: American*

connect surrogate mothers with intending parents.[32] Surrogacy agencies typically charge between $30,000 and $45,000 for a child, with the surrogate mother receiving between $10,000 and $15,000 plus expenses.[33] The total costs of a surrogacy birth can double the charges. A recent case from Tennessee noted the intending parents paid $42,000 in medical expenses and another $31,000 to the surrogate mother.[34] Some states allow for commercial surrogacy; others allow only non-commercial surrogacy; and a handful of states have responded by banning or penalizing such practices;[35] however, the lack of uniformity from state to state allows agencies and potential parents to freely operate in permissive states.[36] It is not uncommon for parties from

Surrogate Mothers, THE WEEK (Sep. 24, 2013), http://theweek.com/article/index/250052/the-newest-chinese-luxury-item-american-surrogate-mothers, *archived at* http://perma.cc/S9EA-Y2GH; *see* GUGUCHEVA, *supra* note 17, at 7 (explaining Center for Disease Control statistics on clinics performing ART procedures).

32. For example, The Surrogacy Center, a surrogacy agency located in Madison Wisconsin, was formed in 2002 and has assisted with over 100 surrogacy births. *Welcome*, SURROGACY CTR., http://www.surrogacycenter.com/ (last visited June 15, 2015), *archived at* http://perma.cc/NXP2-WRZT.

33. Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 J. PHIL. SCI. & L. (2002), http://jpsl.org/archives/commercial-surrogacy-and-redefinition-motherhood/, *archived at* http://perma.cc/L2TH-53X8; *see* GUGUCHEVA, *supra* note 17, at 26. Compensation for surrogate mothers varies greatly depending on experience, age, medical conditions, and medical procedures used. *See, e.g.*, *Surrogate Mother Compensation*, FERTILITY SOURCE COS., http://www.fertilitysourcecompanies.com/surrogacy/surrogate-mother-compensation/ (last visited June 15, 2015), *archived at* http://perma.cc/XQH3-3423.

34. *In re* Baby, 447 S.W.3d 807, 815 (Tenn. 2014). The *In re Baby* case is also notable because it followed Wisconsin's *Rosecky* decision and adopted a very similar approach. *Id.* at 831.

35. Arizona and the District of Columbia ban surrogacy contracts. ARIZ. REV. STAT ANN. § 25-218 (2007); D.C. CODE §§ 16-401–02 (2012). Indiana, Kentucky, Louisiana, and Nebraska void surrogacy contracts. IND. CODE ANN. § 31-20-1-2 (LexisNexis 2013); KY. REV. STAT. ANN. § 199.590(4) (LexisNexis 2013); LA. REV. STAT. ANN. § 9:2713 (2005); NEB. REV. STAT § 25-21,200 (2008). Michigan and New York void and penalize surrogacy contracts. MICH. COMP. LAWS ANN. §§ 722.851 to .861 (West 2011); N.Y. DOM. REL. LAW §§ 121–24 (Consol. 2009).

36. For example, North Dakota voids traditional surrogacy contracts but allows gestational surrogacy. N.D. CENT. CODE §§ 14-18-05, 14-20-62 (2009). Washington allows surrogacy contracts but bans commercial surrogacy contracts. WASH. REV. CODE ANN. §§ 26.26.220 to .240 (West 2005 & Supp. 2014). Numerous other states allow and regulate surrogacy contracts in various forms. FLA. STAT. ANN. §§ 63.212–.213 (West 2012 & Supp. 2013); *id.* §§ 742.15–.16 (West 2010); 750 ILL. COMP. STAT. ANN. 47/25 (West 2009); N.H. REV. STAT. ANN. § 168-B:13 (2002); TEX. FAM. CODE ANN. §§ 160.754 to .762 (West 2008); UTAH CODE ANN. §§ 78B-15-801 to -809 (LexisNexis 2012); VA. CODE ANN. §§ 20-159 to -165 (2008 & Supp. 2012). *See generally* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM.

different states to meet in a third state in order to execute a surrogacy contract.[37]

A. Early Cases

In 1988, surrogacy contracts burst onto the legal landscape via the *Baby M* case decided by the New Jersey Supreme Court.[38] The case gained nationwide attention as it climbed through the New Jersey courts.[39] *Baby M* was so prevalent it even sparked a "made-for-television" movie and "tell-all book."[40] *Baby M* involved William and Elizabeth Stern contracting with Mary Whitehead to serve as a surrogate mother.[41] The parties used traditional surrogacy with the genetics of the child provided by Mr. Stern and Ms. Whitehead.[42] Following the birth, Ms. Whitehead refused to turn the child over to the Sterns.[43]

The New Jersey Supreme Court held that the surrogacy contract was in violation of New Jersey statutes and in violation of public policy.[44] The court viewed the contract as an attempt to circumvent existing statutes on adoption.[45] Specifically, the court held that the surrogacy contract violated New Jersey's prohibition against paying or accepting

MITCHELL L. REV. 449 (2009) (surveying the large variety of approaches states have used to address surrogacy contracts).

37. *See* Katherine Drabiak, Carole Wegner, Valita Fredland & Paul R. Heft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 300 (2007). As an example, a New Jersey man hired a lawyer to draft a surrogacy contract with a South Carolina woman. *Id.* The parties met in Indiana to execute the agreement. *Id.*

38. Hansen, *supra* note 8.

39. *See, e.g.*, Iver Peterson, *Baby M's Future*, N.Y. TIMES, April 5, 1987, at A1.

40. MARY BETH WHITEHEAD & LORETTA SCHWARTZ-NOBEL, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE (1989); *Baby M* (ABC Circle Films television movie May 22, 1988).

41. *In re* Baby M, 537 A.2d 1227, 1236 (N.J. 1988). The Sterns had sought a child for many years through adoption. *Id.* The parties ultimately were connected thorough the Infertility Center of New York. *Id.*

42. *Id.* at 1235.

43. *Id*. at 1236–37. Mrs. Whitehead initially followed through with the arrangement but fell into a deep depression shortly after turning over the child to the Sterns. *Id.* at 1237. Believing Whitehead would again return the child, the Sterns allowed her to take Baby M. *Id.*

44. *Id.* at 1240. The New Jersey Supreme Court specifically looked to New Jersey Statutes sections 9:2-16, 9:2-17, 9:3-41, and 30:4C-23, which govern termination of parental rights and voluntary surrender of a child. *Id.* at 1242.

45. *Id.* at 1246–47; Arshagouni, *supra* note 6, at 803–04.

money in connection with an adoption.[46] The court explained that the same public policy concerns over "baby-buying" that had prompted the state's ban on paying or receiving money for adoption applied to surrogacy contracts.[47]

The court's public policy concerns also revolved around the exchange of money for surrogacy.[48] The court noted Ms. Whitehead had not been represented by counsel and characterized a mother's signing of a surrogacy contract prior to an understanding of the bond she will have with her child as "[not] totally voluntary" or "informed."[49] New Jersey's long history of respecting the right to contract did not mean such activities were beyond regulation or prohibition.[50] The court ultimately concluded that surrogacy contracts mandated separation of the child from the mother, produced a form of adoption regardless of the suitability of the intended parents, and completely ignored the best interests of the child.[51]

Just five years after the *Baby M* case, the California Supreme Court reached an opposite conclusion in *Johnson v. Calvert*.[52] The divergent opinions between the two courts have ultimately foreshadowed the variety of approaches that have developed within the United States to address surrogacy. *Johnson v. Calvert* involved gestational surrogacy: the Calverts provided the sperm and egg and Johnson served as the surrogate mother for payment of $10,000.[53] The parties ultimately had a falling out that resulted in Johnson demanding the remaining payments or she would not terminate her parental rights.[54] The subsequent lawsuits resulted in both parties seeking to be declared the legal parents.[55]

46. *Baby M*, 537 A.2d at 1240; *see* N.J. STAT. ANN. § 9:3-54 (1985).

47. *Baby M*, 537 A.2d at 1248.

48. *Id.* at 1249–50.

49. *Id.* at 1248.

50. *Id.* at 1249 ("There are, in a civilized society, some things that money cannot buy.")

51. *Id.* at 1250. The New Jersey Supreme Court explained that surrogacy contracts were a recent creation and "[t]he long-term effects of surrogacy contracts are not known, but feared." *Id.*

52. 851 P.2d 776 (Cal. 1993).

53. *Id.* at 778.

54. *Id.* The disagreement between the parties was twofold. The Calverts were disgruntled that Johnson had failed to disclose she had suffered several stillbirths, and Johnson argued the Calverts had not done enough to obtain the agreed-upon insurance policy. *Id.*

55. *Id.*

The California Supreme Court began by noting that both the act of physically giving birth and blood tests showing genetic relation were acceptable forms of proving maternity under California law.[56] Because both parties had presented acceptable proof of maternity, the court turned to the intentions of the parties in order to determine the parental rights of the child.[57] The court was clear that the agreement between the parties was for Johnson to carry and relinquish the child to the Calverts after the birth.[58] It emphasized that, although all three parties were necessary for the child to be born, the Calverts were the "prime movers[] of the procreative relationship," and it was their intent that brought about the child.[59]

Unlike in *Baby M*, the court ruled that gestational surrogacy differed significantly from adoption and, thus, adoption statutes did not provide an adequate framework for the court's decision.[60] The court found that surrogacy contracts were not contrary to public policy because "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."[61]

56. *Id.* at 781.

57. *Id.* at 782. Under California Civil Code sections 7003, 7004, and 7015, proof of being a birthmother and blood tests were both sufficient evidence to prove maternity. *Id.* at 781. However California law only allowed for one "natural" mother despite the ability for conflict. *Id.* Former sections 7003, 7004, and 7015 were updated in 1992 and 1993. Act of July 26, 1993, ch. 219, sec. 63, 1993 Cal. Stat. 1576, 1579; Act of July 11, 1992, ch. 162, sec. 4, 1992 Cal. Stat. 463, 464.

58. *Id.* at 782.

59. *Id.* (quoting John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991)) (internal quotation mark omitted). The "intent test" or "intent as a major factor" has remained California's approach to surrogacy contracts and has been adopted elsewhere. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282, 291 (Ct. App. 1998) (upholding intending parents as lawful parents of child despite the fact they had no genetic connection to the child); Raftopol v. Ramey, 12 A.3d 783, 793 (Conn. 2011) (finding intent and valid surrogacy agreement was sufficient to allow for parentage rights even absent adoption); McDonald v. McDonald, 608 N.Y.S.2d 477, 479–80 (App. Div. 1994) (relying heavily on intent based approach of California Supreme Court). This approach has not gone without criticism. *See* Belsito v. Clark, 644 N.E.2d 760, 766–67 (Ohio Ct. Com. Pl. 1994) (rejecting an intent-based approach and finding lawful parents in a gestational surrogacy arrangement to be those that provided the genetic material of the child).

60. *Johnson*, 851 P.2d at 784.

61. *Id.* at 783 (alteration in original) (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397) (internal quotation marks omitted).

The court was careful to articulate that any possible "evils" that could arise from surrogacy arrangements were not present in this case and noted that the legislature should be the proper avenue to address such concerns.[62] It also sidestepped a clause in the agreement that would have allowed the Calverts to terminate the pregnancy.[63] The court was not persuaded by Johnson's argument that surrogacy contracts would exploit lower income women and treat children as commodities.[64] The court reasoned, "The argument that a woman cannot knowingly and intelligently agree to gestate and a deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status . . . ."[65] California's approach has commonly been called the "intent test" for surrogacy contracts in that the intent of the parties was the major factor in the court's determination of parentage.[66]

III. *ROSECKY V. SCHISSEL*

Despite the increasing use of surrogacy contracts, it took over twenty years for the question over the use of such agreements to reach Wisconsin's highest court. In January 2013, the Wisconsin Supreme Court first addressed the enforceability of surrogacy contracts.[67] Though there were no governing statutes or public policy statements, the court had little issue finding that surrogacy contracts are enforceable in Wisconsin.[68] The only qualification was that such contracts could not mandate termination of parental rights.[69] The court held that, as long as a surrogacy contract was a valid contract and did not conflict with the best interests of the child, it would be enforceable.[70] The difficulty for the court appeared to rest in how such agreements fit within the existing

62. *Id.* at 784–85.

63. *Id.* at 784. The agreement specified that the Calvert's had "sole right" to order an abortion of the pregnancy. However, the agreement also states that the parties understood the pregnant woman "has the absolute right to abort or not abort any fetus." *Id.*

64. *Id.*

65. *Id.* at 785.

66. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567, 577–81 (2000).

67. Rosecky v. Schissel, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634.

68. *Id.* ¶¶ 40, 74.

69. *Id.* ¶ 65.

70. *Id.* ¶ 30.

statutory framework that governs legal custody and placement of a child.[71]

A. Facts and Procedural History

Marcia Rosecky and Monica Schissel had been good friends since grade school.[72] They had participated in each other's weddings, and the Roseckys were the godparents to the Schissels' daughter.[73] As a result of a medical condition, Marcia Rosecky was no longer able to have a biological child.[74] Schissel offered to carry a child for the Roseckys.[75] The parties agreed to a traditional surrogacy where Schissel provided the egg and David Rosecky provided the sperm.[76]

The parties each retained independent legal counsel and drafted a surrogacy contract—titled a "Parentage Agreement" by the parties—which stated the parties' intent would govern the birth of the child.[77] The surrogacy contract outlined a variety of areas for the pregnancy, including the medical procedure to be used, contingencies if the Roseckys were to pass away, requirements for Schissel's conduct during the pregnancy, and, most notably, requirements for parentage, custody, and placement of the child.[78] The agreement also included a severability clause.[79]

71. *See id.* ¶¶ 40–43.

72. *Id.* ¶ 5.

73. *Id.*

74. *Id.* ¶ 6.

75. *Id.* ¶ 7. Schissel had made numerous offers to carry a child for the Roseckys in 2004 and 2008. *Id.* She would later testify "I offered to do this. . . . I orchestrated this whole thing." *Id.* (alteration in original) (internal quotation marks omitted).

76. *Id.* ¶ 8. The Roseckys refused Shissel's offer in 2004 but ultimately agreed to a traditional surrogacy in 2008 after their attempts to secure an adoption failed. Oral Argument at 15:30–16:05, Rosecky v. Schissel, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634 (2011AP2166) [hereinafter Rosecky Oral Arguments], *available at* http://www.wiseye.org/Programming/VideoArchive/EventDetail.aspx?evhdid=7000, *archived at* http://perma.cc/TN4Q-784P.

77. *Rosecky*, 2013 WI 66, ¶ 8; *id.* ¶ 80 (Abrahamson, C.J., concurring); Rosecky Oral Arguments, *supra* note 76, at 16:30–16:45.

78. *Rosecky*, 2013 WI 66, ¶ 10 n.2. The surrogate contract was extensive, and numerous drafts were prepared and negotiated. *Id.* ¶ 8.

79. *Id.* ¶ 10 n.2. A comprehensive list of the provisions was provided in the full Rosecky opinion. *Id.*

The Roseckys and the Schissels had a falling out shortly before the birth of the child, who the court identified as F.T.R.[80] Schissel refused to terminate her parental rights in accordance with the surrogacy contract.[81] However, Schissel did allow the Rosceckys to take F.T.R. home following his birth.[82] The trial court ruled it was in the best interest of F.T.R. to remain in primary custody with the Roseckys and for Schissel to be granted two hours of placement per month.[83] The circuit court ruled that the surrogacy contract was "clear and unambiguous," but the court also ruled it could not terminate Schissel's parental rights and refused to enforce the custody and placement provisions of the surrogacy contract as well.[84] Without Schissel voluntarily relinquishing her parental rights, Marcia Rosecky was unable to adopt F.T.R.[85]

A full custody and placement trial was later held to determine the long-term custody and placement of F.T.R.[86] Under Wisconsin law, Schissel was presumed to be the mother of F.T.R., and an earlier hearing had adjudicated David Rosecky as the father.[87] The trial was

80. *Id.* ¶ 12. The Rosecky opinion describes the falling out: "It suffices to say that there were several events resulting in hurt feelings and lack of trust among the parties." *Id.* The parties' briefs elaborate that the tension developed as a result of the "unusual nature of having one's husband father a child with one's best friend." Respondent–Respondent's Brief and Appendix at 2, Rosecky v. Schissel, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634 (2011AP2166), 2012 WL 6059328; Brief of Petitioner–Appellant at 4, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634 (2011AP2166), 2012 WL 5815880.

81. *Rosecky*, 2013 WI 66, ¶ 12. Schissel's refusal to terminate her parental rights left her as F.T.R's mother under Wisconsin Statutes section 48.02(13). *Id.* ¶ 37.

82. *Id.* ¶ 12.

83. *Id.* ¶ 14.

84. *Id.* ¶ 15 (internal quotation mark omitted). A court may terminate parental rights of a parent upon voluntary consent of the parent. WIS. STAT. § 48.41 (2013–2014). Further, grounds for involuntary termination of parental rights are provided in section 48.415. Reasons for involuntary termination include abandonment, a continuing need for protection services, parental disability, failure to perform parental responsibilities, and more extreme situations, such as parenthood as a result of sexual assault, a felony committed against the child, or prior involuntary termination of parental rights for another child. *Id.* § 48.415(1)–(3), (6), (9)–(10).

85. Joanna L. Grossman, *A Matter of Contract: The Wisconsin Supreme Court Rules Traditional Surrogacy Agreements Are Enforceable*, VERDICT (Aug. 6, 2013), http://verdict.justia.com/2013/08/06/a-matter-of-contract-the-wisconsin-supreme-court-rules-traditional-surrogacy-agreements-are-enforceable, *archived at* http://perma.cc/J5Q5-HSK6.

86. *Rosecky*, 2013 WI 66, ¶ 18.

87. *Id.* ¶ 13. Absent such adjudication, Schissel's husband would have been presumed to be the father of F.T.R. WIS. STAT. § 891.40(1).

conducted under Wisconsin Statutes section 767.41.[88] Section 767.41 allows for a court determination of the custody and placement based on the "best interest[s] of the child."[89] The statute also clarifies the factors a court must consider in making such a determination.[90] Further, the statute mandates that both parents should be entitled to periods of physical placement with the child unless "the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health."[91]

The circuit court heard testimony from the Roseckys, Schissels, two doctors hired by the Roseckys, one doctor hired by the Schissels, and F.T.R.'s guardian ad litem.[92] Most notably, the circuit court stated it was "not going to consider [the surrogacy contract]" in its determination of the best interests of F.T.R.[93] The circuit court awarded primary placement of F.T.R. to David Rosecky and an overnight placement with Schissel every other weekend.[94]

B. Wisconsin Supreme Court's Analysis

The Wisconsin Supreme Court found that the surrogacy contract was a valid and enforceable contract under Wisconsin law as long as the

88. *Rosecky*, 2013 WI 66, ¶ 18.

89. WIS. STAT. § 767.41(2).

90. *Id.* § 767.41(5). The summarized factors are (1) the "wishes of the child's parents"; (2) the "wishes of the child," as communicated by the guardian ad litem or the child; (3) the interactions between the child and the parents, siblings, and other persons who may affect the child; (4) the "amount . . . of time that each parent has spent with the child"; (5) the "child's adjustment to the home, school, . . . and community"; (6) the age, education, and developmental needs of the child; (7) the mental and physical health of any child who will live with the child (8) the need for regular and meaningful physical placement for the child; (9) the "availability of public or private child care services"; (10) the cooperation and communication of the conflicting parties; (11) "[w]hether each party can support the other party's relationship with the child"; (12) any evidence of abuse; (13) any evidence of spousal battery; (14) any alcohol or drug abuse (15) "reports of appropriate professionals"; and (16) any other factors the court determines relevant. *Id.*

91. *Id.* § 767.41(4)(b).

92. *Rosecky*, 2013 WI 66, ¶¶ 17–18. A guardian ad litem is a court-appointed attorney assigned to represent the interests of the minor. WIS. STAT. § 767.407(1), (4).

93. *Rosecky*, 2013 WI 66, ¶ 23.

94. *Id.* ¶ 24. A circuit court is authorized to determine custody and placement in a paternity action under Chapter 767. WIS. STAT. § 767.41(1)(b). The Roseckys appealed the case to the Wisconsin Court of Appeals. *Rosecky*, 2013 WI 66, ¶ 25. The court of appeals subsequently certified to the Wisconsin Supreme Court to decide the enforceability of the surrogacy contract. *Id.* ¶ 26.

contract was not contrary to the best interests of the child.[95] However, the surrogacy contract could not require a termination of parental rights.[96] The court noted that Wisconsin law was exceptionally bare with regard to surrogacy contracts.[97] Though a few statutes could be read to contemplate surrogacy-like situations, the court conceded that the statues provided no direct answer to the question of the validity of a surrogacy agreement.[98] Without statutory guidance, the court explained it would analyze the enforceability of surrogacy contracts under basic principles of contract law: offer, acceptance, and consideration.[99]

The court explained that Wisconsin has long recognized the freedom of people to contract, even in unique ways.[100] Further, when a contract contains an invalid provision, courts accept the severability of that provision as long as it does not "defeat the primary purpose of the bargain."[101] This severability is especially respected when a severability clause is expressly provided in the contract.[102]

The court concluded that the surrogacy contract at issue contained the basic provisions of a contract.[103] Despite the unique nature of a surrogacy contract, it was "[n]onetheless . . . a contract and . . . [the court] conclude[d] that it [was] largely enforceable."[104] The court noted there was no consensus in other states regarding surrogacy contacts and held Wisconsin had no public policy statements that were contrary to the enforceability of such agreements.[105] Further, the court described

95. *Rosecky*, 2013 WI 66, ¶ 30.

96. *Id.* ¶ 55.

97. *Id.* ¶ 40.

98. *Id.* The court stated that Wisconsin Statutes sections 69.14(1)(h) and 891.40 at least contemplated scenarios with intended parents. *Id.* ¶¶ 40–42. Section 69.14(1)(h) is a procedural law which provides for a modification to a birth certificate if a court makes a determination of parental rights over a "surrogate mother." *See id.* ¶ 41; *see also* WIS. STAT. § 69.14(1)(h). Section 891.40 provides that a woman's husband is the father of a child even when a woman is artificially inseminated from a sperm donor. WIS. STAT. § 891.40(1).

99. *Rosecky*, 2013 WI 66, ¶ 48. The court also noted that a surrogacy contract would also be subject to traditional contract defenses such as "misrepresentation, mistake, illegality, unconscionability, void against public policy, duress, undue influence, and incapacity." *Id.* ¶ 57.

100. *Id.* ¶ 56.

101. *Id.* ¶ 58; *see also* Riley v. Leavit, 2013 WI App 9, ¶ 45, 345 Wis.2d 804, 826 N.W.2d 389; Schara v. Thiede, 58 Wis. 2d 489, 495, 206 N.W.2d 129, 132 (1973).

102. *Rosecky*, 2013 WI 66, ¶ 58.

103. *Id.* ¶ 59.

104. *Id.* ¶ 60.

105. *Id.* ¶¶ 63–64 & n.11. An example of a very clear public policy statement is expressed in the Indiana Code. "The general assembly declares that it is against public policy

that a finding that surrogacy contracts were enforceable was in the best interests of society because

> [e]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life.[106]

The only portion of the surrogacy contract that the court found invalid was the clause requiring Schissel to terminate her parental rights.[107] Wisconsin Statutes section 48.415 lays the groundwork that a court may use for a finding of involuntary termination of parental rights.[108] The court found that under the current statute there was no basis for such a termination based only on contract.[109] The termination of parental rights clause could be severed from the contract without defeating the primary purpose of ensuring that the "Roseckys [would] be the parents of F.T.R. and [would] have custody and placement."[110] The court closed its analysis by briefly dismissing Schissel's argument that the contract was void against public policy and calling for the legislature to enact legislation to provide more guidance on surrogacy contracts.[111]

C. Chief Justice Abrahamson's Concurrence

Chief Justice Abrahamson wrote an extensive concurrence of the court's decision and was critical of the court with respect to its reliance on contract law.[112] She stated, "Courts should not sacrifice statutes or

to enforce any term of a surrogate agreement . . . ." IND. CODE ANN. § 31-20-1-1 (LexisNexis 2013). Indiana law goes even further to specify that a court cannot base a best interest of the child determination on a surrogacy contract. *Id.* § 31-20-1-3.

106. *Rosecky*, 2013 WI 66, ¶ 61.

107. *Id.* ¶ 65.

108. *Id*; *see* WIS. STAT. § 48.415 (2013–2014); *supra* note 90.

109. *Rosecky*, 2013 WI 65, ¶ 65.

110. *Id.* ¶ 66.

111. *Id.* ¶¶ 68, 73. During oral arguments, members of the court expressed concern about the ramifications a decision limited to the facts of this case would have on surrogacy contracts in the state. *See, e.g.*, Rosecky Oral Arguments, *supra* note 76, at 12:05–12:35. The court's decision echoed the call from the parties that the legislature would hopefully create guidelines to assist parties wishing to enter into surrogacy contracts. *Id.* at 12:39–13:00.

112. *Rosecky,* 2013 WI 66, ¶¶ 77, 82 (Abrahamson, C.J., concurring).

public policy considerations on the altar of freedom to contract . . . ."[113] The chief justice was careful to note that surrogacy contracts are not "standard run-of-the-mill contracts" and cautioned that courts should carefully examine such agreements for public policy considerations.[114] She particularly noted "baby-buying" and "exploitation of women" as severe public policy considerations that, though not presented by this case, are intertwined with surrogacy contracts.[115]

The chief justice characterized the court's analysis as "carefree" with regard to public policy considerations.[116] She noted that the parties in this case had a very comprehensive agreement that contractually agreed that the best interests of F.T.R. would be served if the surrogate mother did not have custody and physical placement.[117] The chief justice further cautioned that public policy considerations may not be as simple as the majority suggested.[118] She listed a variety of issues that remained unanswered with the court's broad acceptance of surrogacy contracts:

> [M]ust the agreement be in writing; should compensated agreements be allowed and what are the limits on compensation; should the availability of surrogacy be limited to married couples or infertile intended parents; should the age of any party be limited; should a spouse be required either to consent or to be made a party to the contract; must each individual involved be represented by counsel; should the State require that information about each individual's legal rights be provided; what provisions are valid regarding who makes decisions about health care and termination of the pregnancy; how and when may the agreement be terminated; and must any party to the agreement be given the opportunity to change his or her mind before or after the birth of the child?[119]

The chief justice stressed that such public policy issues must be paramount when contracting for a child.[120]

113. *Id.* ¶ 78. The chief justice accused the majority's decision of allowing "people to contract out of the State's traditional, statutory oversight role in the protection of children." *Id.* ¶ 77.

114. *Id.* ¶ 82.

115. *Id.* ¶ 98.

116. *Id.* ¶ 82.

117. *Id.* ¶ 83. There seems little question that the parties took every reasonable precaution available. *See supra* notes 77–79 and accompanying text.

118. *Id.* ¶ 82.

119. *Id.* ¶ 82 n.2.

120. *See id.* ¶ 84.

Chief Justice Abrahamson also cautioned that the court was overriding aspects of Wisconsin Statutes Chapter 767.[121] As noted above, Chapter 767 lays out the relevant factors a court must consider when determining the best interests of the child.[122] The chief justice's concern laid in that the majority opinion suggested the surrogacy contract would determine custody and placement rather than the factors of Chapter 767.[123] She accused the court of "placing . . . surrogacy contract[s] above, and to the exclusion of, all other factors the legislature has enumerated."[124]

The chief justice criticized the court for treating children produced via surrogacy differently than children born through traditional means.[125] She cautioned that custody and placement of the child should be determined at the time of the court proceeding "irrespective of the means of reproduction, through a wider lens, with emphasis on the best interests of the child" as determined by the factors laid out in Wisconsin Statutes section 767.41(5).[126] The chief justice would have directed lower courts to consider the surrogacy contract along with the relevant factors proscribed in section 767.41(5).[127]

IV. LEGISLATIVE APPROACHES

A thorough analysis of the state-by-state approach to surrogacy is beyond the scope of this Comment.[128] However, a look at some of the most recent developments in surrogacy legislation can provide useful direction on how the Wisconsin legislature could provide much needed guidance for parties seeking to use surrogacy contracts.

The United States does not have national policies directing surrogacy contracts. As a result of the multitude of opinions on surrogacy, it is not surprising that states have taken a variety of approaches. Though some states prohibit or outright criminalize surrogacy contracts, others have been very accepting of surrogacy arrangements and reproductive technologies in general.[129] The difficulty

121. *Id.* ¶¶ 86–87.
122. *Id.* ¶ 87.
123. *Id.* ¶¶ 87–88.
124. *Id.* ¶ 119.
125. *Id.* ¶ 88.
126. *Id.* ¶ 97.
127. *Id.* ¶¶ 118, 126.
128. For a state-by-state survey, see Hofman, *supra* note 36.
129. *See supra* notes 35–36.

lies in that a majority of states, just like Wisconsin, still do not have legislation that addresses surrogacy.[130]

Article 8 of the Uniform Parentage Act, as revised in 2002, provides a model framework.[131] The comment introducing Article 8 highlights the differing opinions on surrogacy.[132] The comment notes that the Commission had failed to develop uniform laws over reproductive technology that were accepted by the states.[133] Article 8 attempts to provide a framework. Most notably, Article 8 abandons the previous approach used by the Commission that provided two alternative approaches that a state could adopt: the first being a ban on gestational surrogacy contracts and the second allowing such agreements with certain conditions.[134] In justifying this change, the comment preceding the article explains that reproductive technology has reached such a level that it will continue to be utilized, and such agreements between desiring parents and surrogate mothers will continue to be written.[135] Even if a state has banned such agreements, there remains a great likelihood that a state court will eventually need to make parental determinations as medical technology continues to advance.[136]

Article 8 allows for gestational surrogacy contracts provided certain criteria are met. The article requires that a court validate any surrogacy agreement, or it will be unenforceable.[137] The process is relatively simple in that the parties seeking to validate such an agreement must petition the court, provide a copy of the agreement, and attend a hearing to determine the validity.[138] The Article also outlines the criteria that a judge must consider to find a surrogacy agreement valid. The requirements include (1) ninety days of residency; (2) ensuring a

130. *Surrogacy Laws in the United States*, MILWAUKEE J. SENTINEL (Aug. 4, 2012), http://www.jsonline.com/news/health/163772546.html, *archived at* http://perma.cc/RP3C-L9DD.

131. UNIF. PARENTAGE ACT art. 8 cmt. (amended 2002), 9B U.L.A. (Supp.) 81–82 (Supp. 2014).

132. *Id.*

133. *Id.*

134. *Id.* § 801 cmt. Even prior to the introduction of Article 8, some courts, most notably California, had already interpreted provisions of the UPA to apply to surrogacy contracts. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993) (interpreting UPA, codified as California Civil Code sections 7000–7002, as applying to all parentage determinations even though surrogacy was not specified).

135. *See* UNIF. PARENTAGE ACT art. 8 cmt. (amended 2002), 9B U.L.A. (Supp.) 81–82 (Supp. 2014).

136. *Id.*

137. *Id.* § 801(c).

138. *See id.* §§ 801–03.

home study inspection of the intending parent or parents; (3) ensuring "all parties have voluntarily entered into the agreement"; (4) verifying adequate healthcare provisions have been made; and, if necessary, (5) ensuring any compensation paid to the surrogate mother is reasonable.[139]

Some states, such as California, allow for surrogacy contracts with very few requirements. The parties must be identified; a disclosure of how the intending parents will cover medical expenses must be made; the parties must be represented by separate counsel; and the agreement must be executed prior to any procedures.[140] If an agreements meets these largely procedural requirements, a court can then make a parental determination before or after the birth of the child.[141]

Illinois also provides an example of legislation that governs surrogacy contracts—though with greater restrictions. Illinois passed its Gestational Surrogacy Act in 2004.[142] The act governs gestational surrogacy but remains silent on traditional surrogacy.[143] The act provides that if the requirements are met the intended parents gain full custody at the time of the child's birth.[144] Under the law, a surrogate mother must be at least twenty-one years of age, have had at least one child, have completed mental health and medical health requirements, and have retained the required health insurance and legal counsel.[145] Gestational surrogacy contracts are presumed valid if (1) they are in writing, (2) they are entered into prior to any medical procedures, (3) the surrogate mother meets the eligibility requirements, (4) both parties have separate legal counsel, and (5) both parties sign a form of understanding in the presence of two witnesses.[146]

Further, the Gestational Surrogacy Act lays out the minimum requirements for the surrogacy agreement.[147] The agreement must

139. *Id.* § 803.

140. CAL. FAM. CODE § 7962(a)–(d) (West 2013).

141. *Id.* at § 7962(f)(2)

142. Act of Aug. 12, 2004, Pub. Act. No. 93-0921, 2004 Ill. Laws 3256. The act took effect on January 1, 2005. *Id.* at 3266; *see also* Nancy Ford, *The New Illinois Surrogacy Act*, 93 ILL. B.J. 240, 240 (2005); Judith Graham, *State Sets Standards on Surrogate Births, Legislation Called Most Liberal in U.S.*, CHI. TRIB., Jan. 2, 2005, at 1.1.

143. Ford, *supra* note 142, at 241.

144. 750 ILL. COMP. STAT. ANN. 47/15(a) (West 2009).

145. *Id.* at 47/20(a). The Gestational Surrogacy Act appears to be modeled heavily after the Uniform Parentage Act.

146. *Id.* at 47/25(b).

147. *Id.* at 47/25(c).

expressly require the surrogate mother to undergo the required medical procedure to allow her to carry the embryo.[148] The surrogate mother must also agree to immediately surrender the child to the intended parent or parents immediately upon birth.[149] The act also outlines that if the surrogate is married her spouse must agree to undertake obligations placed on the surrogate mother by the agreement and also agree to immediately surrender the child.[150] Conversely, the intending parent or parents must expressly agree to immediately accept custody and responsibility for the child.[151] The agreement must also specify that the surrogate mother may use the physician of her choosing during the pregnancy, provided she consults with the intended parents.[152] The act creates a presumption that the agreement is enforceable even if the contract contains provisions that require the surrogate mother consent to certain medical procedures and evaluations, or refrain from certain behaviors.[153] The presumption exists even if the agreement allows for reasonable payment to the surrogate mother for medical, professional, or legal expenses.[154] Finally, even if the requirements of the act are not met, the court is still permitted to base a determination of parentage on the intent of the parties.[155]

V. WISCONSIN'S PAST LEGISLATIVE ATTEMPTS

One of the most immediately apparent questions that arises out of *Rosecky* is, Why has Wisconsin lagged behind in its surrogacy law? The *Baby M* and *Johnson* cases were both decided over twenty years ago, and there is no question that the use of surrogacy has only increased since that time. The call for the Wisconsin legislature to act is not a new concept; there have been calls for guidance for over thirty years.[156] Surrogacy contracts, and ART, have produced underdeveloped and

148. *Id.* at 47/25(c)(1)(i).
149. *Id.* at 47/25(c)(1)(ii)
150. *Id.* at 47/25(b)(2)(i), (c)(2).
151. *Id.* at 47/25(c)(4)(i).
152. *Id.* at 47/25(c)(3).
153. *Id.* at 47/25(d)(1)–(2).
154. *Id.* at 47/25(d)(3)–(4)
155. *Id.* at 47/25(e).
156. Laura M. Katers, *Arguing the "Obvious" in Wisconsin: Why State Regulation of Assisted Reproductive Technology Has Not Come to Pass, and How It Should*, 2000 WIS. L. REV. 441, 441–42.

complicated areas of the law.[157] Legislators' unwillingness to address surrogacy has not prevented the practice from charging forward.

Wisconsin's primary attempt at surrogacy legislation occurred from 1987 to 1989.[158] The attempt at governing surrogacy grew out of the *Baby M* controversy.[159] Not surprisingly, several different bills were proposed to address surrogacy.[160] The first proposed bill attempted to offer a balanced approach that allowed for surrogacy if statutory requirements were met but banned payments for profit to the surrogate mother.[161] Similar to Illinois's more recent Gestational Surrogacy Act, the proposal mandated a minimum age, prior childbirth, and medical and psychological evaluations.[162] The proposal also would have placed similar requirements for agreeing to the medical procedure and surrendering of the child after birth.[163]

A second proposed bill would have banned all surrogacy arrangements in the state. The original version of the bill would have made any surrogacy punishable by up to nine months in prison and a $10,000 fine.[164] A special committee was formed in 1989 to recommend legislation after extensive debate failed to reconcile the two conflicting approaches. The special committee consisted of three state senators, six state representatives, and seven members of the public.[165] The committee recommended a bill that (1) banned all commercial surrogacy, (2) regulated non-commercial surrogacy contracts, (3) criminalized non-compliance with such requirements, and (4) required a court validate surrogacy contracts.[166] The bill mandated the

157. *Id.*; *see* Thomas J. Walsh, *Wisconsin's Undeveloped Surrogacy Law*, WIS. LAW., Mar. 2012, at 16 (reviewing legal landscape of surrogacy in Wisconsin prior to the *Resecky* decision).

158. Katers, *supra* note 156, at 454.

159. *Id.*

160. *Id.* at 455.

161. *Id.*; RICHARD L. ROE, CHILDBEARING BY CONTRACT: ISSUES IN SURROGATE PARENTING, LRB-88-RB-1, at 17 (1988).

162. ROE, *supra* note 161, at 17; *see also* 750 ILL. COMP. STAT. ANN. 47/20(a) (West 2009).

163. ROE, *supra* note 161, at 17–18; Katers, *supra* note 156, at 456.

164. Katers, *supra* note 156, at 456.

165. *Id.* at 457; *see* LAURA ROSE, LEGISLATION ON SURROGATE PARENTING: 1989 SENATE BILL 270, RELATING TO SURROGATE PARENTING, BIRTH CERTIFICATES AND MATERNITY, S. RL 89-15, at 5 (1989).

166. Katers, *supra* note 156, at 457. The committee bill was also the first proposal in Wisconsin that would have mandated court pre-approval of surrogacy contracts, similar to the UPA and Gestational Surrogacy Act. *See id.*

surrogate mother be at least eighteen years old and did not require any prior childbearing experience.[167] The bulk of the bill focused on maternity determinations for surrogacy and other ART procedures.[168]

Strangely, the committee did not mandate attorney representation for the parties or medical or psychological evaluations for the surrogate mother or intended parents. Unlike the avenue chosen by Illinois over a decade later, the bill did not create strict requirements with regard to termination of parental rights and surrendering of the child.[169] Rather the bill stated that custody, paternity, and abortion provisions of Wisconsin statutes must be strictly followed.[170] The recommended bill garnered heavy criticism.[171] When the bill was proposed in the senate, it was met with the same divisions that had prevented prior proposals from passing.[172] After the two-year attempt to pass comprehensive legislation failed, the debate was essentially shelved until litigation forced a court to address the issue.

VI. AFTER *ROSECKY*

There is no doubt that the *Rosecky* decision is a milestone for surrogacy in Wisconsin. However, *Rosecky* is just the beginning of what will surely be a long line of litigation on surrogacy contracts, albeit at a crawling pace. Prior to *Rosecky,* the legal landscape in Wisconsin was simply barren on the issue; now, though we know surrogacy contracts are valid on their face, endless questions remain to be answered. Only through legislation can proper guidance be provided so that when intending parents and surrogate mothers enter into agreements all parties fully understand their responsibilities and have assurances their expectations will be enforced by the legal system.

A. Unanswered Questions

The most glaring question that remains following the *Rosecky* decision is whether the court undervalued the public policy considerations as suggested by Chief Justice Abrahamson and if the

167. ROSE, *supra* note 165, at 11–14; Katers, *supra* note 156, at 457.

168. Katers, *supra* note 156, at 457–58.

169. *Id.* at 457; *see* ROSE, *supra* note 165, at 11–14.

170. Katers, *supra* note 156, at 457.

171. *See, e.g.*, *id.* at 458; Neil D. Rosenberg, *Doctors Call Surrogacy 'Baby Selling,'* MILWAUKEE J., Apr 14, 1989, at 2B; Editorial, *Surrogate Mother Bill Ill-Conceived, Unneeded*, WIS. ST. J., Mar. 24, 1989, at 13A.

172. Katers, *supra* note 156, at 159.

public policy question is as settled as the court pronounced. The majority accurately stated that Wisconsin Statutes did not answer the question and there was no public policy statement against enforcement.[173] The legislative history with regard to surrogacy contracts shows that public policy was far from settled in Wisconsin, and the obvious counter argument is that there are no clear public policy statements that support surrogacy contracts.[174] However, the debate has largely quieted, and the court acknowledged that the debate is anything but settled in the other forty-nine states. The court made a small leap to quickly find surrogacy contracts are valid under public policy—but it is difficult to fault it for doing so. Despite the slow crawl of the law, there were no contrary statements or statutes in Wisconsin law, and the use of surrogacy continues to grow in Wisconsin and throughout the United States.[175]

Even with accepting the validity of surrogacy contracts, there remain numerous layers and questions that must be answered. Chief Justice Abrahamson succinctly noted that the court's opinion varies in its reading by alternating between suggesting that the "Parentage Agreement" in this case was not contrary to statutes or public policy and a broader reading that Wisconsin public policy supports surrogacy contracts in general.[176] At its narrowest, *Rosecky* could merely be interpreted to mean that surrogacy contracts are valid for the purposes of determining custody in conjunction with the best interests of the child. However, the decision seems to be much broader in accepting surrogacy contracts generally, though the limits remain unclear.[177]

The *Rosecky* case presented the benefit of a very comprehensive and valid contract. Attorneys wrote the agreement; the parties were separately represented; the agreement specified the best interests of the child; no compensation was paid; and this was a traditional surrogacy

173. Rosecky v. Shissel, 2013 WI 66, ¶ 47, 349 Wis. 2d 84, 833 N.W.2d 634.

174. Despite the lack of clear public policy on surrogacy contracts, Wisconsin does have an administrative statute that directs recording of parent information on a birth certificate for a child born to a surrogate mother. WIS. STAT. § 69.14(1)(h) (2013–2014). Though this acknowledges the existence of surrogacy, it appears a stretch to consider this a support of surrogacy contracts.

175. *See supra* note 23 and accompanying text.

176. *Rosecky*, 2013 WI 66, ¶ 82 n.2 (Abrahamson, C.J., concurring).

177. The court stated, "No Wisconsin Statute or case contains a specific statement of public policy contrary to the enforcement of *this* [Parentage Agreement]." *Id.* ¶ 69 (majority opinion) (emphasis added).

situation.[178] It is not difficult to see the follow-on-issues that Chief Justice Abrahamson warns must be considered. The *Rosecky* decision does little to answer the question of what requirements must be met in order for a surrogacy contract to be valid.

Further, this surrogacy contract dealt with issues arising out of custody and placement.[179] Surrogacy contracts touch on numerous highly contentious areas such as adoption and abortion that *Rosecky* simply does not address. Though the contractual analysis of the agreement is an adequate approach to begin analyzing surrogacy contracts, surely the unique nature of such agreements—the fact they govern a child's life—must mandate additional requirements.

The relationship between surrogacy contracts and the Chapter 767 factors remains unsettled. The court stated that surrogacy contracts were enforceable only if they were not contrary to the best interests of the child.[180] By design Wisconsin Statutes section 767.41 considers a multitude of factors, not all of which would be considered equally.[181] Despite the apparent view that a surrogacy contract should be viewed as merely a factor, the court's language suggests that such agreements could be placed above other factors and be paramount in a court's consideration, provided it is not outweighed by the other best interests of the child factors.

B. The Need For Legislation

The difficulty with the *Rosecky* decision does not lie in its outcome. Determining placement and custody under the best interests of the child is the most appropriate avenue in place for the courts and complies with the current statutory framework. However, this approach retains the flaw of creating too much instability for families and children. It allows for months or even years of litigation to pass, as was the case in *Rosecky*,[182] before determinations are made.[183] The contrast is notable

178. *Id.* ¶¶ 8, 10.

179. Though the fact this was a traditional surrogacy case may have created a more challenging case for purposes of custody and placement, gestational surrogacy presents other more challenging questions.

180. *Rosecky*, 2013 WI 66, ¶ 30.

181. WIS. STAT. § 767.41(5) (2013–2014). See *supra* note 90 for a summary of factors.

182. F.T.R was born on March 10, 2010. *Rosecky*, 2013 WI 66, ¶ 12. At the time of this writing, the circuit court entered an order in this case as recently as March 2015. *In re the Paternity of FTR: Court Record Events*, WIS. CT. SYS. CIRCUIT CT. ACCESS, http://wcca.wicourts.gov/courtRecordEvents.xsl;jsessionid=38C4E730DF294EB7B30B7F00DF9852A4.render6?caseNo=2010PA000042PJ&countyNo=11&cacheId=40A015B300B043AC40A8A68DC025

when compared to a state such as Illinois where the parties' intent, and subsequent validation of the surrogacy contract, shields the families and children from these concerns by answering such questions long before the birth of the child.

The purpose of this Comment is not to present and discuss the various arguments for and against surrogacy contracts or ART in general. Rather, both sides of the argument must realize that the *Rosecky* decision leaves the legal landscape governing surrogacy contracts in a precarious position. Past attempts at legislation, the diversity of approaches to surrogacy contracts, and the divisive political landscape all suggest passing comprehensive legislation on surrogacy contracts will be a difficult challenge. However, *Rosecky* leaves many open-ended questions that should provide for common ground for all sides to reach a compromise.

For those opposed to surrogacy contracts, the decision validates such agreements and provides no guidance on limitations. Namely, the decision provides no clarity if there is any distinction between traditional and gestational surrogacy contracts, if commercial surrogacy is permitted, or what the limits on such commercial surrogacy would be. The common outcry of baby selling and exploitation of mothers will not be remedied by a failure to act. At the very least, opponents should be willing to argue for requirements such as Illinois's twenty-one years of age requirement or limitations on commercial surrogacy and payments to surrogate mothers. Absent legislation the limits of what is acceptable in surrogacy contracts will continue to remain open until courts make individual determinations and the case law develops.

For those who support surrogacy contracts, the decision does little to outline what requirements must be in place in order to ensure effective family planning and the enforcement of parties' expectations. Intending families should not be confronted with outcomes such as "most likely enforceable" or "probably" when considering family planning. There should not be gray area with regard to the creation of a child. Advocates for surrogacy contracts should advocate for requirements and guidelines that assist in this vital family planning. As the California Supreme Court aptly stated in *Johnson v. Calvert,* "[H]onoring the plans

9951&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC (last visited June 16, 2015), *archived at* http://perma.cc/3U6G-DGDF.

183. *See* Thomas J. Walsh, *Surrogacy Law Still Uncertain*, WIS. LAW., Mar. 2014, at 28, 31. Judge Walsh concluded that, from a legal perspective, traditional surrogacy remains too risky in Wisconsin. *Id.* at 32.

and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."[184]

C. Pre-Birth Hearings

Regardless of the limitations the legislature could enact on surrogacy, or the nature of the requirements for surrogacy contracts, all sides of the surrogacy debate should be willing to agree on a court validation requirement such as the one in place in Illinois's Gestational Surrogacy Act and the Uniform Parentage Act. With a minor addition, such hearings could be used to not only validate surrogacy contracts but also conform to existing statutory framework and ensure the best interests of the child are met. Pre-birth hearings serve the critical purpose of resolving conflict before the child is born—surely this is in the best interest of the child.

A court would first need to make a ruling on the validity of the surrogacy contract itself. This validation would depend largely on the requirements the legislature would put in place. For example, if the legislature allowed surrogacy contracts but banned payments to the surrogate mother beyond reasonable payments for medical and living expenses, a court would be charged with ensuring any payments were reasonable. Regardless of the requirements that potential legislation would impose on surrogacy contracts, the validation requirement is essential for ensuring the agreement meets legal requirements, all parties understand their responsibilities, and all parties have clearly expressed their expectations. Conversely, if the legislature chooses to maintain the rule that the surrogate mother could not be forced to terminate her parental rights—leaving open the possibility that visitation could be mandated—this limitation could be clearly explained to the intending parents so they could make an informed decision. The minimal burden that validation hearings would place on the courts would be a small price to pay for addressing potential issues in surrogacy contracts before the inception of a child takes place.[185]

184. Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (quoting Shultz, *supra* note 61, at 397) (internal quotation marks omitted).

185. Recent proposed legislation contemplates a similar type of hearing in the adoption context when the biological parent agrees to terminate his or her parental rights. *See* Jason Stein, *Foreign Adoptions Evaluated, Proposals Follow Discovery of "Re-Homing" of Cildren*, MILWAUKEE J. SENTINEL, Dec. 26, 2014, at 3A.

Further, the legislature could similarly mandate a "best interests of the child" analysis be a portion of the pre-validation process. An approach that focuses on the intent of the parties could be nested within the existing best interests of the child framework and would allow for parentage determinations to be made before the birth of the child and eliminate what would often be a distressing and confusing first years for the child. The surrogacy agreement should be given a more prominent position in such an analysis—not merely become the seventeenth factor for a court to consider. More often than not, the best interests of the child would be served by the intending parents who are going through exceptional lengths to have a child. Such a hearing could incorporate a similar analysis as is currently used under Chapter 767 to ensure the best possible environment for the child.

Though it may seem counterintuitive to determine the best interests of the child prior to birth, there would in reality be benefits to this approach. A court-appointed examiner could evaluate the home environment that the intending parents have developed in the same manner as currently done under Chapter 767.[186] By examining the preparation of the intending parents, the court could validate the best interests of the child and ensure issues were resolved prior to birth. Additionally, provisions could be put in place for a follow up examination to be conducted if a party believes some substantial change in circumstances is necessary. All parties should be able to agree that the best interests of the child would not include lengthy litigation and shuffling between households. With a small change, the current best interests of the child approach can be merged to include the intent of the parties and ensure a child is immediately placed in a stable situation upon birth.

It seems unlikely that the Wisconsin legislature will suddenly spark an interest in surrogacy legislation, let alone pass a relatively comprehensive legislative package such as in Illinois. Despite this, even patchwork legislation that puts layers on the *Rosecky* decision would be of benefit. The realities of medical technology, and the patchwork of approaches used in other states, ensures that surrogacy is here to stay—a failure to pass legislation will not change that fact. Parents, surrogate mothers, and children should never be forced to spend the first years of a child's life under the tension and confusion of extensive litigation. This is especially true when the parties have taken all available

186. *See* WIS. STAT. § 767.41.

precautions and the turmoil is the result of a legislature unwilling to clarify this growing area of the law.

VII. CONCLUSION

Surrogacy, and the use of surrogacy contracts, is an ever-increasing reality in medical practice and the law. Unfortunately, the law in Wisconsin has been too slow in addressing this reality. The Wisconsin Supreme Court's decision in *Rosecky v. Schissel* marked the first substantial decision on the enforceability of surrogacy contracts. The court ruled that surrogacy contracts were not contrary to Wisconsin public policy and were generally enforceable, provided they were not contrary to the best interests of the child.

Despite this much needed clarification, the decision leaves a multitude of questions in place that can only be effectively addressed by the legislature. The best interests of the child standard, though consistent with Wisconsin's current statutory framework, does little to clarify either what the requirements of a surrogacy contract are or the limits of surrogacy in Wisconsin. After *Rosecky*, the intentions and expectations of intending parents are still left to multi-factor judicial analysis. Even more disturbing is that parentage decisions will still occur months or years after the child is born, resulting in conflict and confusion for the child. The Wisconsin legislature should actively pursue surrogacy legislation that builds upon the best interest of the child by incorporating the intent of the parties in order to allow for a parentage determination before the birth of the child.

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