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The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child

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THE VOICELESS CITIZENS: SURROGACY CONTRACTS AND THE RIGHTS OF THE CHILD

By: Lorena Solis*

ABSTRACT

As reproduction by surrogacy increases, the problems arising from surrogacy contracts also increase. Countries around the world are being asked to solve never-before-seen legal problems arising from surrogacy agreements. When trying to solve the newly arisen problems, the rights of the child born from the surrogacy contract tend to be overlooked. Enacted laws try to solve the enforceability of the contract and protect the rights of the parties involved—such as, who are the legal parents of the child if both sides of the agreement wish to keep the child.

However, few of these laws address a situation where the opposite is true, a situation in which neither side wants to keep the child. In these situations, the primary focus should be the rights of the child, not the rights of the people involved in the contract. The law should be up to date and ready to protect the well-being of the child—a person who never asked to be born. Specifically, rights such as the citizenship of the child, the right to financial support, the right to inherit, and the right to identity should be protected.

The Comment discusses how prepared U.S. and Texas law is to handle problems arising from a surrogacy contract in which neither side wants to keep the child. In this case, a child with intended American parents should have the right to be a U.S. citizen, the right to receive financial support from a party involved in the contract, the right to inherit, and the right to know his or her identity. These problems may not be currently present, but with the increase of surrogacy use, it surely could be an issue in the future.

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I. INTRODUCTION

In today's world, almost everyone has heard of surrogacy, if not through personal experience then through a television show or a movie. Who can forget the famous quote, "I'm having my brother's babies" by Phoebe Buffay in the TV show *Friends*?¹ For most people, however, learning about surrogacy comes from a TV show and never goes further than that. No one expects to consider surrogacy later in his or her life, either as a surrogate or as an intended parent. However, surrogacy has become a massive worldwide business.² In the United States alone, it has become a billion dollar industry.³ People around the world are turning to this method as the only way to become parents or as a way to make some money. It is no longer a mere episode in our favorite TV show.

Most surrogacy cases go smoothly and according to the terms of the contract.⁴ The surrogate mother releases the baby to the intended par-

1. *Friends: The One with Ross's Wedding, Part 2* (NBC television broadcast May 7, 1998).

2. Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 530 (2013).

3. *Id.* at 530-31.

4. Mark Hansen, *And Baby Makes Litigation*, 97 A.B.A. J. 53, 54 (2011).

ents, and they become the legal parents. Usually, if there is a dispute, it arises when the surrogate mother refuses to give up the child.⁵ After nine months of carrying the child in her womb, the surrogate mother may become attached and want to keep the child; however, the intended parents are not willing to give up the child. But what if, after a child is born through a surrogacy contract, neither the surrogate mother nor the intended parents wish to keep the child? That is the situation that inspired this Comment, Baby Gammy's case. Baby Gammy was born from a surrogacy contract made between an Australian couple and a Thai surrogate mother.⁶ Baby Gammy was born with Down syndrome, and the intended parents refused to take him,⁷ leaving Baby Gammy's future uncertain.

Some scholars contend that there is a lack of legislation to help protect the interests of women entering into surrogacy contracts.⁸ However, some jurisdictions have enacted legislation in order to protect the interest of women who volunteer to be part of a surrogacy contract.⁹ Others have enacted statutes specifying the rights and duties of each party to the contract,¹⁰ presumably to protect the interests of both sides.

One might argue that a child born through a surrogacy contract has the same rights as any other child born through natural conception, so no specific laws protecting the child's rights are necessary. However, due to a surrogate child's unique conception, there are many issues a surrogate child might confront that a regular child will probably never encounter. A child born through traditional means, from the moment of birth, has the right to receive financial support from an adult whom the law recognizes to have a parent-child relationship.¹¹ Some of that financial support includes basic things, such as child support, inheritance, and even government survivors' benefits.¹² But for a child born through a surrogacy contract, establishing a legally recognized parent-child relationship might not be as simple. One of the parties might default on the contract, and the battle for child custody can be long. It could be years before either party has legal possession of the child. What if both of the parties default on the contract? Is the child still entitled to recover financial support from either or both parties?

In a gestational surrogacy contract, as many as five different people can be involved in the conception of a baby: the intended father, the intended mother, the surrogate mother, an egg donor, and a sperm

5. Browne C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*, 87 ST. JOHN'S L. REV. 899, 903 (2013).

6. See sources cited *infra* note 14.

7. See sources cited *infra* note 14.

8. Lewis, *supra* note 5, at 904.

9. *Id.* (citing 750 ILL. COMP. STAT. ANN. 47/15(b) (West 2012)).

10. See TEX. FAM. CODE ANN. § 160.754 (West 2014).

11. See Lewis, *supra* note 5, at 906.

12. *Id.*

donor.¹³ The number can vary depending on the circumstance, but a scenario with five different people is possible. After the child is born, it is important to know the rights of the child in relation to each of the people involved in the conception.

This Comment will focus on the rights of the child. Specifically, it will focus on a scenario like that of Baby Gammy, where the child is not wanted by the surrogate mother or by the intended parents. This Comment will argue for four different rights to which a surrogate child should be entitled: (1) the right to be an American citizen if the intended parents are American; (2) the right to financial support from a party involved in the contract; (3) the right to inherit; and (4) the right to identity. United States law will be used when dealing with federal law, and Texas law when dealing with state law.

II. A SURROGACY CONTRACT

A. *Made in Thailand: The Story of Baby Gammy*

David and Wendy Farnell, an Australian couple, arranged a commercial surrogacy contract with a surrogate mother, Puttharamon Chanbua, from Thailand.¹⁴ Chanbua became pregnant with twins, a boy and a girl.¹⁵ The boy, Gammy, was born with Down syndrome and was abandoned by the Farnells.¹⁶ When the story came out, Chanbua claimed the Farnells asked her to have an abortion after discovering one of the twins had Down syndrome.¹⁷ Chanbua testified she refused to have an abortion; abortions are against Chanbua's Buddhist beliefs and fetal impairment abortions are illegal in Thailand.¹⁸ After the twins—Gammy and Pipah—were born, the Farnells took healthy Pipah to Australia but left Baby Gammy behind.¹⁹ Chanbua claimed the couple abandoned Baby Gammy because he was born with Down syndrome and only wanted healthy Pipah.²⁰

13. Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 465–66 (2006).

14. *Thai Surrogate Mother of Abandoned Down's Syndrome Baby Gammy Told by Australian Parents They Were "Too Old" to Care for Twins*, DAILY MAIL (Aug. 3, 2014, 10:59 AM), <http://www.dailymail.co.uk/news/article-2714811/Parents-old-care-twins-abandoned-Downs-Syndrome-baby-Gammy.html>; see also *Thai Surrogate Baby Gammy: Australian Parents "Wanted Him,"* BBC (Aug. 11, 2014), <http://www.bbc.com/news/world-asia-28732511> [<http://perma.cc/F4XL-SG8Q>].

15. DAILY MAIL, *supra* note 14.

16. *Id.*

17. BBC, *supra* note 14.

18. *Id.*

19. Lindsay Murdoch, *Wendy Farnell Did Not Supply the Egg, Gammy's Thai Mother Says*, SYDNEY MORNING HERALD (Aug. 10, 2014), <http://www.smh.com.au/world/wendy-farnell-did-not-supply-the-egg-gammys-thai-mother-says-20140810-102joz.html>.

20. *Id.*

According to Chanbua, she was sad and angry at the Farnells²¹ because Baby Gammy was their child, yet they refused to keep him.²² Mr. Farnell testified that he was angry at the surrogacy agency because it did not conduct tests early in the pregnancy to discover the baby's condition.²³ He stated that if that had been the case, most likely the pregnancy would have been terminated.²⁴

B. *The Problems Presented by Baby Gammy*

Baby Gammy's case gained worldwide attention, causing the Thai government to look into its surrogacy laws.²⁵ Although this problem is far from American jurisdictions, an American court could soon see a similar problem. Baby Gammy was lucky that Chanbua decided to keep and raise him, but what if neither side would have been willing to keep the baby after he was diagnosed with a medical condition?

In a case like Baby Gammy's, does the child have the right to be an Australian citizen? This could possibly give him advantages, such as eligibility to Australian health care by right of being a citizen.²⁶ Does Baby Gammy have the right to obtain financial support from the Farnells or even the egg donor?²⁷ Similarly, does Baby Gammy have the right to inherit from the Farnells, the donor, or Chanbua? And, does he have a right to know how his conception took place when he reaches an appropriate age?

Most of these problems are not considered until after a case such as Baby Gammy's occurs. With surrogacy becoming a billion dollar industry,²⁸ it is important to have the right laws in place to handle such situations and make sure the child's rights are protected.

C. *Types of Surrogacy*

There are two types of surrogacy contracts: traditional and gestational.²⁹ In a traditional surrogacy contract, the surrogate mother is

21. Michael Sullivan, *Surrogacy Storm in Thailand: A Rejected Baby, a Busy Babymaker*, NPR (Oct. 22, 2014, 4:31 PM), <http://www.npr.org/blogs/goatsandsoda/2014/10/22/357870757/surrogacy-storm-in-thailand-a-rejected-baby-a-busy-babymaker>.

22. *Id.*

23. BBC, *supra* note 14.

24. *Id.*

25. See Sullivan, *supra* note 21.

26. Lindsay Murdoch, *Thai Surrogate Baby Gammy Could Become an Australian Citizen*, SYDNEY MORNING HERALD (Nov. 22, 2014), <http://www.smh.com.au/national/thai-surrogate-baby-gammy-could-become-an-australian-citizen-20141122-11rxci.html>.

27. The egg for Baby Gammy's conception was not provided by Mrs. Farnell but was donated by a Thai donor. Murdoch, *supra* note 19.

28. See Kindregan & White, *supra* note 2, at 530–31.

29. Amanda Mechell Holliday, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1102 (2003) (citing Weldon E. Havins & James J. Dalessio, *Reproductive Surro-*

also the biological mother of the child.³⁰ The intended parents' contract with the surrogate mother for her to be artificially inseminated with the intended father's sperm.³¹ The conceived child will not be biologically related to the intended mother.³²

In a gestational surrogacy contract, the process of *in vitro* fertilization is utilized.³³ The egg from the intended mother or a third-party donor is fertilized with the "sperm from the intended father or a third-party donor."³⁴ The resulting fertilized egg is then implanted in the surrogate mother.³⁵ Thus, in this type of surrogacy contract, both or neither of the intended parents may be biologically related to the child.

III. RIGHT TO BE A U.S. CITIZEN

Baby Gammy's case raises an important issue: the baby's citizenship. In Baby Gammy's case, an Australian couple hired a Thai surrogate mother through an online surrogacy company.³⁶ That raises the issue of the baby's citizenship: is he Australian, Thai, or does he have the right to hold dual citizenship? What if instead of being an Australian couple, Gammy's intended parents were American—would Gammy then be an American citizen at birth under American immigration laws? The U.S. citizenship dilemma may be described using four different scenarios:

Scenario One: The intended parents are American and hire a surrogate mother abroad. The child will be genetically related to both or one of the intended parents. The child is born abroad.

Scenario Two: The intended parents are from a country outside the United States, and they hire an American surrogate mother. The child is born in the United States.

Scenario Three: The intended parents are U.S. citizens and travel abroad to get an egg and sperm donor. The child is born abroad. Neither of the intended parents is genetically related to the child, but the intended mother is also the surrogate mother. Thus, she gives birth to the child but is not genetically related to the child.

Scenario Four: The intended parents are U.S. citizens. They hire a surrogate mother abroad, as well as an egg and sperm donor. The

gacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts, 31 McGEORGE L. REV. 673, 674 (2000)).

30. Brittney M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 361 (2011).

31. Holliday, *supra* note 29.

32. See McMahon, *supra* note 30, at 361–62.

33. Holliday, *supra* note 29.

34. *Id.*

35. *Id.* at 1102–03.

36. See source cited *supra* note 14.

child is born abroad, and neither parent is biologically related to the child.

There are two ways a child can become a U.S. citizen at birth: by being born in the United States; or, if born outside the United States, the child has at least one parent who is a U.S. citizen and that parent meets certain residence or physical presence requirements in the United States.³⁷ Thus, in some of these scenarios, the child's citizenship status will not be an issue. However, in Scenario Four particularly, the law does not give the child the right to be a U.S. citizen at birth.

A. *Jus Soli: Right of the Soil*

When a child is born in the U.S., his right to be an American citizen by birth is protected by the Constitution, even if the child is born to a surrogate mother.³⁸ The Fourteenth Amendment to the Constitution provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."³⁹ Thus, any child born within the United States is a U.S. citizen, regardless of the nature of the child's conception or the nationality of the parents.⁴⁰

Under this law, a child born under Scenario Two will acquire U.S. citizenship at birth. It does not matter whether the intended parents are American or foreign; U.S. citizenship comes from being born in the U.S.⁴¹

B. *Jus Sanguinis: Right of Blood*

Congress also acted to provide that a child is a U.S. citizen at birth by right of descent.⁴² A child with at least one parent who is a U.S. citizen who "meets certain residence or physical presence requirements" is a U.S. citizen at birth.⁴³ The law makes certain requirements different if the child is born out of wedlock or if the American parent related by blood is the mother or the father of the child. Overall, however, if the child is related by blood to at least one parent who is a U.S. citizen, the child is a U.S. citizen.⁴⁴

37. U.S. CITIZENSHIP AND IMMIGRATION SERVS., 12 SCIS POLICY MANUAL, pt. H, ch. 3, <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter3.html> [<http://perma.cc/CTQ5-YB68>] [hereinafter POLICY MANUAL].

38. Kindregan & White, *supra* note 2, at 541.

39. U.S. CONST. amend. XIV, § 1.

40. 8 U.S.C. § 1401(a) (2012).

41. *Id.*

42. Joanna L. Grossman, *Flag-Waving Gametes: Biology, Not Gestational or Parenting, Determines Whether Children Born Abroad Acquire Citizenship from U.S. Citizen Parents*, VERDICT (Apr. 3, 2012), <https://verdict.justia.com/2012/04/03/flag-waving-gametes> [<http://perma.cc/RR6S-KAQ8>].

43. POLICY MANUAL, *supra* note 37.

44. *Id.*

This law makes it possible for children born abroad to American parents to be a U.S. citizen.⁴⁵ Under this law, a child born in a Scenario One situation is a U.S. citizen at birth. This means that intended parents who hire a surrogate mother abroad but use either the intended father's sperm or the intended mother's egg should encounter no trouble from immigration laws. The child will be biologically related to at least one of the intended parents and is a U.S. citizen at birth.

C. *Non-Genetic Gestational U.S. Citizen Mother*

Until October 28, 2014, a genetic relationship between the parent and a child born abroad was required.⁴⁶ However, recently the United States Citizenship and Immigration Services ("USCIS") collaborated with the Department of State to issue a new policy expanding the definition of "natural parent" for citizenship and naturalization.⁴⁷ Now, a "natural mother" or "natural father" is defined as "a genetic parent or gestational parent."⁴⁸ The born-abroad child is a U.S. citizen at birth if he or she is "[t]he son or daughter of a non-genetic gestational U.S. citizen mother who is recognized by the relevant jurisdiction as the child's legal parent."⁴⁹ A "gestational mother" is one "who carries and gives birth to the child."⁵⁰ Under this new policy, the child born abroad no longer has to be genetically related to a parent, so long as a gestational mother who holds U.S. citizenship and is the legal parent at the time of birth in the relevant jurisdiction gives birth to the child.⁵¹

Before the new policy, a child born in a situation like Scenario Three was not a U.S. citizen at birth because the child was not born in the United States and was not genetically related to the parents. The only option for the intended parents was to adopt the child—the child the intended mother had given birth to! As one can imagine, the process of adopting the child added to the expenses already incurred by the intended parents. However, under the new policy, USCIS has explicitly addressed this problem. The child is a U.S. citizen at birth if the intended mother is also the gestational mother and is the legal parent at the time of birth.⁵² The process of adopting the child is no

45. See Grossman, *supra* note 42.

46. U.S. CITIZENSHIP AND IMMIGRATION SERVS., PA-2014-009, POLICY ALERT: EFFECT OF ASSISTED REPRODUCTIVE TECHNOLOGY (ART) ON IMMIGRATION AND ACQUISITION OF CITIZENSHIP UNDER THE IMMIGRATION AND NATIONALITY ACT (INA) (2014), <http://www.uscis.gov/policymanual/Updates/20141028-ART.pdf> [<http://perma.cc/NGS6-QCQK>] [hereinafter POLICY ALERT].

47. *Id.*

48. *Id.*

49. POLICY MANUAL, *supra* note 37, at pt. H, ch. 2.

50. *Id.*

51. *Id.*

52. *Id.*

longer required. This new policy is opening new options for American couples in need of artificial reproductive assistance. They can look abroad without fear of immigration laws or incurring additional expenses.

D. *Scenario Four: The Real Problem*

The recent policy change by USCIS is an indication that U.S. immigration laws are moving in a positive direction, but there are still holes in the laws. Under current immigration laws, the aforementioned Scenarios One through Three are not problematic, but there are no laws that expressly address Scenario Four. Since the child is not genetically related to the intended parents, the child is born abroad, and the intended mother is not the gestational mother, the child is not a U.S. citizen at the time of birth.

This does not mean that the child will not obtain U.S. citizenship; it only means that the parents will have to adopt the child before the child can become a U.S. citizen.⁵³ Under Scenario Four, a child rejected by the intended parents after the child's birth is not a U.S. citizen, even if the intended parents are American. If the intended parents reject the child, it is a good indication they will not adopt him, which would make him a U.S. citizen. The child will instead be a citizen of the country where he or she was born if the laws in said country allow the child to take the citizenship of the gestational mother. In a situation like Baby Gammy's, supposing the intended couple is American instead of Australian, the child is not a U.S. citizen at birth.

IV. RIGHT TO FINANCIAL SUPPORT

Children do not ask to be born. It is the parents, or one parent in some circumstances, who make the choice to bring a child into this world. Thus, few would disagree that the person who made the decision to have the child should be responsible for the child's financial support. Legally, a child has the right to be financially supported by his parents, and the birth parents have the obligation to support the child.⁵⁴ "To allow a parent to escape from financial support for a human being he has brought into this world goes against everything that defines what it means to be a parent."⁵⁵ Following this principle, should intended parents be required to provide financial support for a surrogate child, even if they refuse to take the child? In the case of

53. *See id.*

54. Tiffany Woo, *When the Forever Family Isn't: Why State Law Allowing Adoptive Parents to Voluntarily Rescind an Adoption Violate the Adopted Child's Equal Protection Rights*, 39 SW. L. REV. 569, 575 (2010) (citing *In re Baby Boy C.*, 638 N.E.2d 963, 967 (N.Y. 1994)).

55. Sandra Leigh King, *Abandonment: How the Texas Legislature and Family Court System Fail to Meet the Needs of Texas Children*, 51 S. TEX. L. REV. 75, 133 (2009).

Baby Gammy, for instance, should the law require the Farnells to support Baby Gammy even if his surrogate mother cares for him?

“Children are innocent individuals and their parents’ needs should be subordinate to the needs of their children.”⁵⁶ The same should hold true for intended parents. Like birth parents, they made the decision to bring a child into this world. Even if the situation changes or they have a change of heart about being a parent, they should be forced by law, at the very least, to provide financial support for the child. It is the child’s right to be provided for by the same people who made the decision to bring him or her into this world.

Some might argue that the intended parents alone did not make the decision to bring the child into this world. In a surrogacy contract, there can be up to five people involved in the process.⁵⁷ If the intended parents default from taking responsibility, is the surrogate mother or the donor(s) (egg or sperm) obligated to provide for the child financially? In order to ensure the well-being of the child, state law should be clear in establishing who will be responsible for the child’s financial support in the case of a failed contract.

A. *Financial Support from the Donors*

Section 154.001 of the Texas Family Code orders either or both parents to pay child support for a child until the age of eighteen or until the child graduates high school.⁵⁸ A “parent” is defined as:

the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under the applicable law, or an adoptive mother or father.⁵⁹

The definition does not explicitly mention donors, intended parents, or surrogate mothers. Further, section 160.702 provides that a donor is not a parent of a child conceived by assisted reproductive technology.⁶⁰ A “donor” is defined as “an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration.”⁶¹ This definition specifically excludes “a husband who provides sperm or a wife who provides eggs to be used for assisted reproduction; a woman who gives birth to a child by means of assisted reproduction; or an unmarried man who, with the intent to be the father of

56. *Id.*

57. Shapo, *supra* note 13.

58. TEX. FAM. CODE ANN. § 154.001(a)(1) (West 2014).

59. *Id.* § 101.024(a).

60. *Id.* § 160.702.

61. *Id.* § 160.102(6).

the resulting child, provides sperm to be used for assisted reproduction by an unmarried woman, as provided by section 160.7031.”⁶²

Thus, under current Texas law a child does not have the right to obtain financial support from an egg or sperm donor even if it is proven that the two are biologically related. A mere donor does not have the obligation to support a child born through assisted reproductive technology. The only way for a donor to be considered a parent and be financially responsible is to explicitly consent to assisted reproductive technology. In the case of a married man, consent is all that is required to be considered the legal father.⁶³ In the case of an unmarried man, intent and consent in writing are required.⁶⁴ If the intent and consent is not in writing, signed by both parents, the donor is not the legal father.⁶⁵

In *In the Interest of H.C.S.*, an unmarried man agreed to provide sperm for an unmarried woman.⁶⁶ Later, the man sought to obtain visitation rights.⁶⁷ The court found that he was a mere donor because there was no written agreement stating his intent to be the father.⁶⁸ Under this holding, it is unlikely that a Texas court would find a donor to be the legal parent of a child born through surrogacy if the person only intended to be a donor. If the donors are not found to be the legal parents, they are not required to pay child support under section 154.001.⁶⁹

B. *Financial Support from the Surrogate Mother*

In a valid surrogacy agreement executed in Texas, the parties involved in the contract would have to follow the requirement established by section 160.754 of the Texas Family Code.⁷⁰ If the parties follow all the steps, deciding who would be responsible for the child’s financial support, in case of a failed contract, would not be a problem. Section 160.754(a)(3) explicitly states that the intended parents are the child’s parents and orders the gestational mother to give up all parental rights and duties with respect to the child.⁷¹ If the parties follow all the steps required by Texas law, the intended parents are the

62. *Id.* § 160.102(6)(A)–(C).

63. *Id.* § 160.703.

64. *Id.* § 160.7031(a)–(b).

65. *In re Interest of H.C.S.*, 219 S.W.3d 33, 36 & n.1 (Tex. App.—San Antonio 2006, no pet.) (concluding that J.S., an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, did not have standing to pursue a suit to determine paternity of the child born through the assisted reproduction).

66. *Id.* at 34, 36 n.1.

67. *Id.*

68. *Id.* at 36–37.

69. *See* TEX. FAM. CODE ANN. § 154.001 (West 2014). The court may order only the parents to pay child support. *Id.*

70. *Id.* § 160.754.

71. *Id.* § 160.754(a)(2)–(3).

legal parents of the child and are responsible for his financial support; the gestational mother is relinquished from any duties owed to the child. In a contract that follows all legal requirements, if neither party wants the child, the surrogate mother is legally free from any duties.⁷²

However, not all surrogacy contracts follow all the requirements and are legally binding. Section 160.102(6)(B) of the Texas Family Code excludes a “woman who gives birth to a child by means of assisted reproduction” from the definition of a “donor.”⁷³ And a “gestational mother” is defined as “a woman who gives birth to a child conceived under a gestational agreement.”⁷⁴ Under these definitions, a gestational mother is not a donor; and under section 160.702 of the Texas Family Code she is not excluded from being a parent.⁷⁵ Unlike a donor, there is not a specific requirement for the gestational mother to intend to be a parent to deem her the child’s parent.

Section 160.201 of the Texas Family Code provides that the mother-child relationship is established between a woman and a child by “the woman giving birth to the child,”⁷⁶ and there is no additional requirement that the woman be genetically related to the child.⁷⁷ The only exception to this mother-child relationship is if the child is conceived through assisted reproductive technology.⁷⁸ Subchapter I of Chapter 160 “controls over any other law with respect to a child born under” a valid gestational agreement.⁷⁹ For the exception to apply, however, the gestational agreement must satisfy all legal requirements and be validated by a court.⁸⁰ But if there is no agreement satisfying Subchapter I, then section 160.201(a)(1) establishes a mother-child relationship if the woman gives birth to the child and is not rebuttable by the results of genetic testing.⁸¹

In *In the Interest of M.M.M.*, the court found that a surrogate mother was the mother of a child under section 160.201(a)(1) of the Texas Family Code, even though she was not genetically related to the child.⁸² In this case, a woman gave birth to twins but she was not genetically related to the twins.⁸³ The children were conceived via assisted reproductive technology using an egg donor, and then the

72. *See id.*

73. *Id.* § 160.102(6)(B).

74. *Id.* § 160.751.

75. *Id.* §§ 160.102(6)(B), 160.751, 160.702.

76. *Id.* § 160.201(a)(1).

77. *In re Interest of M.M.M.*, 428 S.W.3d 389, 396 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (concluding “that the mother-child relationship is established by a woman giving birth and is not rebuttable by the results of genetic testing”).

78. *Id.* at 394–95.

79. *Id.* at 395 (citing TEX. FAM. CODE ANN. § 160.752(b) (West 2014)).

80. *Id.*

81. *Id.* at 392, 396.

82. *Id.* at 396.

83. *Id.* at 392.

fertilized egg was implanted in the woman.⁸⁴ Further, there was no written agreement satisfying Subchapter I's requirement for a valid gestational agreement.⁸⁵ The court found that section 160.201 of the Texas Family Code, which establishes a mother-child relationship if the woman gives birth to the child, governed under this type of situation.⁸⁶ Under this holding, a surrogate mother may be found to be the legal mother of the child if a valid surrogacy contract does not exist, even if the surrogate mother and the child are not genetically related.⁸⁷ This could give a child the right to financial support from a surrogate mother if the intended parents refuse or are unable to provide it.

C. *Financial Support from the Intended Parents*

As mentioned above, it seems logical to hold the intended parents responsible for a child's financial support. They are the primary reason the child was brought into the world. Texas law seems to agree. Section 160.754(a) of the Texas Family Code authorizes gestational agreements and provides that the intended parents become the parents of the child.⁸⁸ Parental rights are transferred when a court validates the gestational agreement.⁸⁹ If neither side wants the child but there is a valid contract under Subchapter I, the intended parents are likely to be found the legal parents of the child,⁹⁰ giving the child the right to claim financial support from them.

If there is not a valid contract, under Texas law the intended parents are still likely to be responsible to the child for financial support.⁹¹ Section 160.762(c) of the Texas Family Code specifically provides that "a party to a gestational agreement that is not validated as provided by this subchapter who is an intended parent under the agreement may be held liable for the support of a child born under the agreement, even if the agreement is otherwise unenforceable."⁹² An intended parent will not avoid providing financial support for the child simply because the contract is not enforceable. Under this section, a court is likely to find intended parents responsible for financial support of the child, even if they decide not to take the child.

Further, a man is not allowed to file a petition to terminate the parent-child relationship if the man is the intended father under a gestational agreement under Subchapter I.⁹³ Taken together, the codes

84. *Id.*

85. *Id.*

86. *Id.* at 396.

87. *Id.* at 392, 396.

88. TEX. FAM. CODE ANN. § 160.754(a)(3) (West 2014).

89. *Id.* § 160.753(a)-(b).

90. *See id.*

91. *See id.* § 160.762(c).

92. *Id.*

93. *Id.* § 161.005(c), (d)(3).

make it very hard, with or without a valid gestational agreement, for intended parents to avoid parental duties to the child. Texas law makes it likely that a child will have the right to recover from the intended parents even if they refuse to perform their side of the agreement.

V. RIGHT TO INHERIT

Intestacy statutes favor a person's "nuclear family, descending and ascending bloodlines, and then . . . collateral bloodlines."⁹⁴ A nuclear family includes the father, mother, and dependent children.⁹⁵ "Before the introduction of reproductive technologies, a presumption of paternity applied when a child was born to a married woman, and a presumption of maternity was standard."⁹⁶ The recent increase of surrogacy, however, has required the rethinking of what makes a person a father or mother.⁹⁷ In a surrogacy contract, for example, up to five different people may be involved in the process of bringing a child into this world: the sperm donor, the egg donor, the surrogate mother, the intended mother, and the intended father.⁹⁸ In a situation with five people involved, issues can arise regarding inheritance for the child. But, it could potentially be more problematic when none of the five people involved in the conception are willing to be the child's "parent."

In order to keep up with the recent increase of surrogacy contracts, "Texas has taken measures to allow for the creation of legal and enforceable gestational agreements."⁹⁹ However, Texas intestacy law has yet to catch up with the modern trend of surrogacy contracts; specifically, with regard to recognition of non-biologically related children born under a surrogacy contract not valid under Subchapter I of the Texas Family Code. In 2013, Texas legislators amended Texas Estates Code sections 201.051 and 201.052 to include inheritance for children with intended parents.¹⁰⁰ This amendment, however, only addresses

94. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1094 (1997).

95. Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945 (2001).

96. Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J.L. COMMENT. 113, 122 (2009) (citation omitted).

97. Shapo, *supra* note 94, at 1098.

98. See Shapo, *supra* note 13.

99. TEX. FAM. CODE ANN. § 160.754 (West 2014); Julie C. Fletcher, *The Inheritance Mess with Texas ART Children: The Simple Fix*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 151, 153 (2011).

100. TEX. EST. CODE ANN. §§ 201.051–.052 (West 2014); Act of May 27, 2013, 83rd Leg., R.S., ch. 1136, §§ 11–12, secs. 201.051–.052, 2013 Tex. Gen. Laws 2737, 2740 (to be codified as an amendment to Tex. Estates Code Ann. §§ 201.051–.052); TEX. PROB. CODE ANN. § 42(a)–(b) (West 2003) (recodified at TEX. EST. CODE ANN. § 201.051 (West 2014)).

the situation under a valid gestational agreement under Texas law.¹⁰¹ The Texas Estates Code is still silent regarding a child's right to inherit under a surrogacy agreement not validated by Texas law.

A. *Child's Right to Inherit Under a Valid Gestational Agreement*

Before the 2013 amendments to sections 201.051 and 201.052 of the Texas Estates Code took effect, even under a valid gestational agreement, the inheritance of a child conceived through surrogacy was not mentioned in the statutes.¹⁰² Before this amendment, a child could only inherit through his mother if the child was related biologically or adopted by the mother.¹⁰³ Thus, if an intended mother was not biologically related to the child born through surrogacy and she never formally adopted the child, the child could not receive any part of the mother's estate under Texas intestacy statutes. Under a valid gestational agreement, the mother was the legal parent,¹⁰⁴ but under the former Texas Probate Code the child could not inherit. If the intended mother died intestate,¹⁰⁵ the child did not have the right to receive any part of her estate. Similarly, before the amendment, nothing was explicitly mentioned regarding a child born with an intended father.¹⁰⁶ This means that a child resulting from a gestational agreement could be kept from inheriting from his own father's estate if the father died intestate.¹⁰⁷

Effective January 1, 2014, however, section 201.051 of the Texas Estates Code addresses a child with intended parents.¹⁰⁸ Now a child can inherit from his mother if she is his biological mother, his adoptive mother, or his intended parent as defined by section 160.102 of the Texas Family Code.¹⁰⁹ The only requirement is that the gestational agreement under which the child was conceived was validated under Subchapter I, Chapter 160, of the Texas Family Code.¹¹⁰ If the gestational agreement was valid, this section expressly states that the child only has the right to inherit from the intended mother and not from the gestational mother or the egg donor.¹¹¹

101. *See id.*

102. *Id.*

103. *Id.*

104. TEX. FAM. CODE ANN. § 160.754(a)(3) (declaring the intended parents as the parents of the child).

105. A person dies "intestate" if she dies without a valid will. BLACK'S LAW DICTIONARY (10th ed. 2014).

106. *See* sources cited *supra* note 100.

107. TEX. PROB. CODE ANN. § 42(b).

108. TEX. EST. CODE ANN. §§ 201.051–.052; Act of May 27, 2013, 83rd Leg., R.S., ch. 1136, §§ 11–12, secs. 201.051–.052, 2013 Tex. Gen. Laws 2737, 2740 (to be codified as an amendment to TEX. EST. CODE ANN. §§ 201.051–.052).

109. *Id.* § 201.051.

110. *Id.*

111. *Id.*

Similarly, section 201.052 allows a child to inherit from an intended father if there is a validated gestational agreement under Subchapter I, Chapter 160, of the Texas Family Code.¹¹² This statute also states that the child is the child of the intended father only, and not of the biological father for purposes of inheritance.¹¹³ Therefore, if there is a valid gestational agreement, the child has the right to inherit from the intended father and not from the biological father.

With regard to the child's right to inherit, this amendment drastically changed the rights of children born through a surrogacy agreement. Although it did not expressly address a situation where a valid gestational agreement does not exist, it avoids disputes in cases where the intended parents do not have a will but are the intended parents under a valid gestational agreement. It would be unfair for a child to be considered the child of the intended parents under a validated gestational agreement but was denied the right to inherit under Texas intestacy statutes.

B. *Child's Right to Inherit Under an Invalid Gestational Agreement*

Even after the 2013 amendments to sections 201.051 and 201.052 of the Texas Probate Code, the inheritance rights of a child born under an invalid gestational agreement are still unclear.¹¹⁴ Texas only recognizes gestational surrogacy contracts,¹¹⁵ which must be validated before they can be enforceable.¹¹⁶ Sections 201.051 and 201.052 of the Texas Estates Code only protect the rights of children born under a gestational agreement that has been validated.¹¹⁷ However, they do not address the child's right to inherit when a gestational agreement is not valid. Under such circumstances, it is unclear from whom the child has the right to inherit. This section of the Comment addresses the child's right to inherit under an invalid gestational agreement.

1. Right to Inherit from a "Mother"

Texas Estates Code section 201.051 states that "[f]or purposes of inheritance, a child is the child of the child's biological or adopt[ive] mother."¹¹⁸ It also allows for a child to be the child of an intended mother, but only under a valid gestational agreement.¹¹⁹ However, if the gestational agreement is not valid, the child is only the child of the biological or adoptive mother for inheritance purposes.¹²⁰ Therefore,

112. *Id.* § 201.052(a-1).

113. *Id.*

114. *See id.* §§ 201.051–.052(a-1) (requiring that the gestational agreement be validated under Subchapter I, Chapter 160, of the Texas Family Code).

115. TEX. FAM. CODE ANN. §§ 160.752(a)–.754 (West 2014).

116. *See id.* § 160.762(a) (West 2014).

117. *Id.* §§ 201.051–.052(a-1).

118. *Id.* § 201.051.

119. *Id.*

120. *See id.*

a child born through a gestational agreement that is not valid in the state of Texas only has the option to inherit from a biological mother or an adoptive mother and maternal kindred.¹²¹ This problem can easily be avoided if the intended or surrogate mother adopts the child or if she writes a will. However, if neither party to the agreement wants to keep the child, it is doubtful that the intended mother or surrogate mother would be willing to write a will for the child's benefit or to adopt the child.

Under current Texas law, there is an even more regrettable scenario where the child will not inherit from the intended mother. For example, suppose that Abbey and Brett are intended parents who pay Cassie to be their gestational mother. Abbey and Brett use egg and sperm donors, but they do not know the identity of the donors. Abbey, Brett, and Cassie agree to the terms of the contract on their own, and they never seek legal help to make the agreement valid under Texas law. They believe everything will go according to their plan and that no legal help is needed. After nine months, Dylan is born. Cassie relinquishes all rights to Dylan, and Abbey and Brett become the parents. However, they never legally adopt Dylan, nor do they write a will. After Abbey and Brett die, Dylan will not have the right to inherit from Abbey. Under Texas law, only the biological mother, the adoptive mother, or an intended mother under a valid gestational agreement are "mothers" of a child for the purpose of inheritance.¹²² Since Dylan was never adopted and Abbey was not biologically related to Dylan—and since the gestational agreement was not valid under Texas law—Dylan will not have the right to inherit from Abbey's estate. Therefore, under current Texas law, even if the intended mother happily accepts the child, if there is no valid gestational agreement then the child can be kept from inheriting his own mother's estate.

Similarly, in a case like Baby Gammy's, where the egg donor is unknown and the child has not been formally adopted,¹²³ the child will not have a right to inherit from any "mother." In a case where the intended mother is also the egg donor, it would not be a problem because the child is biologically related to the intended mother. But in cases where there is an egg donor, and the donor is not known, the child has no legal right to inherit. The only option is to find the egg donor or be adopted. Therefore, if there is not a valid gestational agreement, the child will only have the right to inherit from the egg donor, if known, but not the gestational mother or intended mother.

121. *Id.*

122. *Id.*

123. The egg was provided by a Thai donor. Murdoch, *supra* note 19.

2. Right to Inherit from a “Father”

Section 201.052 of the Texas Estates Code reads differently than section 201.051.¹²⁴ “For purposes of inheritance, a child is the child of the child’s biological father” if: (1) there is a father-child relationship established by section 160.201 of the Texas Family Code; (2) “the child is adjudicated to be the child of the father by court decree”; (3) “the child was adopted by the child’s father”; or (4) “the father executed an acknowledgement of paternity.”¹²⁵ Under the statutes, the way to establish paternity for purposes of inheritance is broader than establishing maternity.¹²⁶ For a child born through an invalid gestational agreement, the child must prove paternity in accordance with one of the methods mentioned in the statute.

If the gestational agreement is not valid and neither party wants to keep the child, then adjudication by a court, adoption by the father, or acknowledgment of paternity are all unlikely to occur. Establishing a father-child relationship is the only remaining way to potentially inherit from an intended father. Section 160.201 of the Texas Family Code states that “[t]he father-child relationship is established between a man and a child . . . [i]f [the man consents] to assisted reproduction by his wife under Subchapter H,” Chapter 160, of the Texas Family Code.¹²⁷ A husband is the father of a child born through assisted reproduction if he “provides sperm for or consents to [the] assisted reproduction by his wife.”¹²⁸ Consent to the wife’s reproduction must be in writing, but even if the husband fails to put it in writing, if he treats the child as his own he is not precluded from being recognized as the father of the child.¹²⁹

Therefore, a child born through a gestational agreement does not have to be related by blood to the intended father, nor be legally adopted to have the right to inherit.¹³⁰ However, the intended father must be married to the intended mother and must have agreed—either in writing or by treating the child as his own—to his wife’s reproduction through assisted technology.¹³¹ Under this statute, even if the gestational agreement is not valid under Texas law, a child could still have the right to inherit from his intended father.¹³² The only require-

124. See TEX. EST. CODE ANN. §§ 201.051–.052.

125. *Id.* § 201.052(a); TEX. FAM. CODE ANN. § 160.201(b) (West 2014).

126. See TEX. EST. CODE ANN. §§ 201.051–.052.

127. TEX. FAM. CODE ANN. § 160.201(b) (West 2014).

128. *Id.* § 160.703.

129. *Id.* § 160.704(a)–(b).

130. *Id.* § 160.201(b); TEX. EST. CODE ANN. § 201.052(a)(1). If there is a father-child relationship established by section 160.201 of the Texas Family Code, the child has the right to inherit from the father. *Id.*

131. See TEX. FAM. CODE ANN. §§ 160.201(b)(5), 160.703, 160.704.

132. *Id.*

ment is that the man agreed to his wife's reproduction through assisted technology by writing or by treating the child as his own.¹³³

The problem arises when the intended father is not married to the intended mother and there is no valid gestational agreement. Under this scenario, if the intended father refuses to keep the child, the child will likely have no right to inherit. He is not biologically related, he is not adopted, and no father-child relationship has been established under section 160.201 of the Texas Family Code.¹³⁴ In this scenario, it is not likely that the child will have a right to inherit from the intended father.

Section 201.052 of the Texas Estates Code states, “[a] person may petition the probate court for a determination of right of inheritance from a decedent if the person . . . claims to be a biological child of the decedent and is not otherwise presumed to be the child of the decedent.”¹³⁵ Under this statute, a child can claim the right to inherit from the sperm donor as well, if known. In a case with a sperm donor, however, the real problem would be finding the donor. If the child does not know who the sperm donor is, it is highly unlikely he will be able to inherit.

Although Texas intestacy law is trying to adjust to the new trend of surrogacy contracts, it has not fully addressed every problem that could arise.¹³⁶ Based on current statutes, if an intended father has not adopted a child or is not biologically related to the child, it will be difficult for that child to inherit from the intended father if there is not a valid gestational agreement.¹³⁷ The only loophole exists when the intended father is married to the intended mother and he consented to the reproduction through assisted technology. But if he is not married to the intended mother, or there is no proof he consented, the child is not likely to have the right to inherit. Although a child is likely to have the right to inherit from a sperm donor under the current statute, the inability to find the sperm donor is likely to handicap that right.¹³⁸

VI. RIGHT TO IDENTITY

“The question of whether a child has the right to know [his or] her biological or genetic parents is one of the toughest issues to have risen over the past twenty years.”¹³⁹ Knowledge of one's origins is some-

133. *Id.*

134. See TEX. EST. CODE ANN. § 201.052; TEX. FAM. CODE ANN. § 160.201(b)(5).

135. *Id.* § 201.052(c)(1).

136. Act of May 27, 2013, 83rd Leg., R.S., ch. 1136, §§ 11–12, secs. 201.051–.052, 2013 Tex. Gen. Laws 2737, 2740 (to be codified as an amendment to TEX. EST. CODE ANN. §§ 201.051–.052); see *supra* Part V.

137. See TEX. EST. CODE ANN. § 201.052.

138. *Id.*

139. Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Right of the Child and the European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137, 138 (2007).

thing that most people take for granted. But if placed in such a situation, in which the identity of one's biological parents is unknown, it is probable that many people would fight for or demand the right to know. "Children must move from being the 'voiceless citizens' to becoming the new kids on the human rights block, and nowhere is that more important than with respect to rights regarding their biological origins and biological families."¹⁴⁰

The ethical focus on artificial reproductive technologies—such as surrogacy—has been almost entirely on adults' ability to access these technologies in order to start families.¹⁴¹ Now the focus is shifting toward the children's rights to know the nature of their conception and their genetic heritage.¹⁴² The Convention on the Rights of the Child ("CRC") was "the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political, and social—to protect children (defined as persons under the age of eighteen)."¹⁴³ It was the first document to recognize a child's right to his identity.¹⁴⁴ Specifically, the CRC is the first document to explicitly recognize a child's, not an adult's, right to know his identity.¹⁴⁵ Article 8 states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.¹⁴⁶

Article 8 does not define the term "identity."¹⁴⁷ Instead, three examples of what constitutes "identity" are given: "nationality, name, and family relations."¹⁴⁸ However, "family relations is usually interpreted as going beyond knowing one's legal parents and extending to biological and birth parents."¹⁴⁹ Thus, it stands to reason that a child must have the right to know the identity of his birth and biological parents.

140. Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 INT'L J. JURIS. FAM. 35, 37 (2010).

141. *Id.*

142. *Id.*

143. Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 625 (2012).

144. Besson, *supra* note 139, at 143.

145. *Id.* at 139.

146. Convention on the Rights of the Child, art. 8, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

147. *Id.*

148. Clark, *supra* note 143, at 627.

149. *Id.*

A. *Genetic Orphans: The Struggle of Donor-Conceived Children to Find Their Biological Parents*

A growing number of adults conceived through artificial insemination with the help of donors are looking for their genetic parents and “speaking out against the practice of keeping secret the means of their conception.”¹⁵⁰ “Genealogical bewilderment,”¹⁵¹ often associated with an adopted child’s identity confusion resulting from not knowing his or her origins, is now sometimes associated with children who were conceived with the help of donors.¹⁵² The resulting state of confusion and uncertainty experienced by a genealogically bewildered child undermines his security and affects his mental health.¹⁵³ “Our sense of who we are is bound up with the story we tell about ourselves If the biological parents are not known, it ‘is like a novel with the first chapter missing.’”¹⁵⁴ The following are only two stories from a website full of stories by donor-conceived children sharing their stories of how they desperately seek to know their biological parent or parents.

I often wonder who you are. What is your name? Are you even still alive? The immutable power of these eternally unanswerable questions gradually consumes my soul. . . . Simply the pleasure of knowing you exist somewhere in this universe does not bandage the wound of your absence.

I often wonder who I am. My family tree is severed in two—I am denied your half, its branches rich and strong with stories I will never be told. I wander aimlessly, never truly knowing the roots of my heritage, my nationality ambiguous and fluid.¹⁵⁵

It came from out of the blue, because I have done genealogy for the last 20 years, and very recently decided to take a DNA test. . . . It’s always on my mind. Always. The worst part that I see so far, is that no one in my circle of family and friends even has the slightest clue as to what I am feeling. . . .
. . . The unfortunate part is that now, all the pain and misery is heaped on me. Knowing what I know now, I strongly believe that [s]perm [d]onation HAS to be an open procedure. That the child should have full access to the donor’s information. It’s the only moral thing to do.¹⁵⁶

150. Shapo, *supra* note 94, at 1119.

151. A genealogical bewildered child is one who either has no knowledge of his natural parent or only uncertain knowledge of them. Kimberly Leighton, *Addressing the Harms of Not Knowing One’s Heredity: Lessons from Genealogical Bewilderment*, 3 *ADOPTION & CULTURE* 63, 64 (2012).

152. Shapo, *supra* note 94, at 1117.

153. Leighton, *supra* note 151, at 96.

154. Shapo, *supra* note 94, at 1117.

155. *A Letter to Dad on Father’s Day*, ANONYMOUS US, <http://anonymous.org/a-letter-to-dad-on-fathers-day/> [<http://perma.cc/LKV8-N9LN>].

156. *I Found out a Little Too Late*, ANONYMOUS US (July 31, 2012), <http://anonymous.org/i-found-out-a-little-too-late/> [<http://perma.cc/3TP6-DVLZ>] (alteration added).

According to one scholar:

Anticipated consent requires that when a person seriously affected by a decision cannot give consent, we must ask whether we can reasonably anticipate they would consent if able to do so. If not, it's unethical to proceed. So ethically, we must listen to what donor-conceived adults are saying¹⁵⁷

They . . . tell us of their profound sense of loss and genetic identity¹⁵⁸

It is one matter for children not to know their genetic identities as a result of unintended circumstances. It is quite another matter to deliberately destroy children's links to their biological parents¹⁵⁹

The right to know one's biological parents should not be decided by someone else on one's behalf.¹⁶⁰ One of the most fundamental human rights of all is a child's right with respect to his biological parents, and that right must be recognized.¹⁶¹ Children conceived by a surrogacy contract should, at the very least, know how they were conceived. Baby Gammy should be guaranteed the right to know his story and that somewhere in Australia he has a twin sister.

VII. MEANINGFUL CHANGE

A. Include "Intended Parent" as Part of "Natural Parent" for Immigration Purposes

After USCIS' recent change to expand the definition of "natural parent" to include gestational mothers for immigration purposes, it has been argued that the laws are facilitating the selling of U.S. citizenship.¹⁶² U.S. citizens are alleging that people around the world will hire American gestational mothers in order for their child to be U.S. citizens, and later, after reaching age of majority, the child will apply for his parents to migrate to the United States.¹⁶³ It is safe to assume that there will be public outrage if the USCIS amends the law to allow a child born from a surrogacy contract who is not biologically related to the intended parents to be a U.S. citizen. However, these critics are overlooking the problem presented by cases such as that of Baby Gammy. Baby Gammy was born with health problems and abandoned by his intended parents.¹⁶⁴ The surrogate mother, someone

157. Somerville, *supra* note 140, at 42.

158. *Id.* (alterations added).

159. *Id.* at 44.

160. Clark, *supra* note 143, at 659.

161. Somerville, *supra* note 140, at 35.

162. See Neil Munro, *Obama Administration Allows Fertility Clinics to Sell US Citizenship*, DAILY CALLER (Oct. 28, 2014, 3:29 PM), <http://dailycaller.com/2014/10/28/obama-administration-allows-fertility-clinics-to-sell-us-citizenship/> [http://perma.cc/PT98-9UT3].

163. *Id.*

164. See sources cited *supra* note 14.

who never intended to keep the child, was left with the responsibility of providing financial support and health care. If the law explicitly gave Baby Gammy the right to be an Australian citizen at the time of his birth, Baby Gammy could possibly have the right to travel to Australia and take advantage of Australian health care.¹⁶⁵ Similarly, if American intended parents contracted for the conception of a child through surrogacy, the child should have the right to be a U.S. citizen.

Under current laws, if a U.S. citizen has a child by natural means abroad, that child is a U.S. citizen.¹⁶⁶ However, if a child is born through a surrogacy contract entered into by the intended parents, that child does not have this same right.¹⁶⁷ The child must be biologically related to the parents or the intended mother must also be the gestational mother.¹⁶⁸ But the truth of the matter is that if a child is born through a surrogacy contract, it is only because the intended parents sought to have a child. The intended parents agreed to the contract; they were the ones who started the whole process. In the same way that two people have the choice to conceive a child through natural means, they also have a choice to conceive a child by entering into a surrogacy contract. In both cases, the child is born because someone made the choice to conceive a child. One child should not have fewer rights than the other. In neither case was the child more or less the child of the American parents than the other.

Further, even if the intended American parents decide to keep the child, they are at a disadvantage with the current law. If the child is not biologically related to the intended parents, they will have to adopt the child in order for the child to be a U.S. citizen. This adds unnecessary expenses to an already expensive process.

Although the USCIS is taking notice that current laws need to be changed to accommodate children born through a surrogacy process,¹⁶⁹ it has left out an important right for surrogate children. In order to protect the rights of a child born with intended American parents, the USCIS needs to expand the definition of “natural parent” to also include an intended parent. For people who will oppose this change because they believe it would facilitate the selling of U.S. citizenship, the child will have American “parents,” which means the child will not be used as bait to later bring the parents to American soil; the intended parents are already American.

165. Murdoch, *supra* note 26.

166. See Grossman, *supra* note 42.

167. See POLICY MANUAL, *supra* note 37, at pt. H, ch. 2.

168. *Id.*; see *supra* Sections III.B–C.

169. Recently, the USCIS expanded the definition of “natural parent” to include gestational parent. See POLICY ALERT, *supra* note 46.

B. *Clarification of Financial Support Under an Invalid Agreement*

In order to avoid confusion and protect the right for financial support of the child, the Texas Legislature should clarify who is responsible for paying financial support in case of an invalid agreement. It is clear that under a valid gestational agreement, the intended parents are the child's parents and would be responsible for paying financial support.¹⁷⁰ But the only attempt by the Texas Legislature to allocate financial responsibility under an invalid agreement is found in section 160.762(c) of the Texas Family Code, which states that “[a] party to a gestational agreement that is not validated as provided by this subchapter who is an intended parent under the agreement may be held liable for the support of a child born under the agreement, even if the agreement is otherwise unenforceable.”¹⁷¹ Although this is a notable improvement, it is still subject to confusion and court interpretation, as the section does not explicitly mention when or under what circumstances intended parents may be liable for support of the child.

An amendment to this statute specifying that intended parents who enter into an invalid gestational agreement and then refuse to care for the child would be liable for financial support of the child will solve problems like the ones presented by Baby Gammy's case. Even if the intended parents refuse to take the child, the proposed amendment ensures the child will have the right to financial security. Amending the statute will give a surrogate child the same right that a child born from natural conception has from his biological parents—the right to claim financial support from day one.

C. *Amending the Law to Allow Inheritance from an Intended Parent Under an Invalid Agreement*

As the Texas Legislature needs to address the right for financial support, the legislature also needs to address the inheritance rights of a child born through a surrogacy contract not valid under Texas law. In 2013, sections 201.051 and 201.052 of the Texas Estates Code were amended to include that a child has the right to inherit from the intended parents if there is a valid gestational agreement.¹⁷² But the Code does not address a case in which a valid gestational agreement does not exist.¹⁷³

As discussed in Section B, a child may not be able to inherit from the mother's estate if the child was not biologically related or legally adopted, or a valid gestational agreement never existed.¹⁷⁴ The right of a surrogate child to inherit from his father's estate is also unclear

170. TEX. FAM. CODE ANN. § 160.754(a)(3) (West 2014).

171. *Id.* § 160.762(c).

172. *See* sources cited *supra* note 100.

173. *See* sources cited *supra* note 100.

174. *See supra* Section V.B.1.

where there is no valid gestational agreement.¹⁷⁵ A simple amendment to the statute allowing inheritance for a child with intended parents regardless of whether there is validated gestational agreement under Subchapter I, Chapter 160, of the Texas Family Code could solve many of these problems.

People could argue that the premise behind the Texas Estates Code is “testamentary freedom” and that forcing inheritance rights upon the intended parents after they refuse to take the child violates that premise. However, if the intended parents wish to keep the child from inheriting their estates, the intended parents could write the child out of their wills, as parents do when they wish to disinherit their children. This is especially true since the intended parents chose to use anonymous sperm/egg donors, robbing the child of the possibility to inherit from his biological parents. In order to protect the child’s right to inherit, it is important that the Code allow the child to inherit from intended parents, even under an invalid gestational agreement. Amending the law would solve three problems: (1) when the intended parents refuse to take the child; (2) when the intended parents take the child but never formally adopt the child; or (3) where there is no validated gestational agreement.

D. *Banning Anonymity but Leaving the Decision of Disclosure to the Intended Parents*

The right of children to know their genetic origins rests on the intended parents’ decision to disclose the nature of their children’s conception.¹⁷⁶ “[T]he onus of revealing the manner of conception rests on the social parents, unless such information is disclosed by the state, such as through a birth certificate, or it is obvious that they cannot be the biological children of their social [parents].”¹⁷⁷ However, “placing greater pressure on the social parents via a legal responsibility to disclose . . . could constitute . . . an invasion of the [intended] parents’ privacy rights”¹⁷⁸ Thus, regulating the child’s right to an identity or to know the nature of his or her conception is a complicated matter.

However, some countries, including England and Sweden, have decided to ban gamete donation anonymity.¹⁷⁹ In Sweden, a donor-conceived child has the right to know about the use of donor insemination and the donor’s identity but not until he reaches a mature age.¹⁸⁰ A study conducted two decades after the introduction of this legislation indicates that parents are becoming more comfortable in disclosing

175. *See supra* Section V.B.2.

176. Clark, *supra* note 143, at 622.

177. *Id.* (citations omitted).

178. *Id.* at 659.

179. *Id.* at 635.

180. *Id.*

the use of donors to their children.¹⁸¹ Moreover, an increasing number of clinics in the United States “offer recipients the choice of gametes from donors who agree to be identified.”¹⁸² “The donor contractually permits the clinic to release identifying information to the resulting child, if the child asks for it.”¹⁸³

This Comment does not propose that the law should force intended parents to disclose the nature of a child’s conception to a child born as a result of a surrogacy agreement. However, this Comment does propose that, if the intended parents decide to disclose this information and the child then decides to search for the child’s biological parents, the child should have the right to receive information about the donors and the gestational mother. Following Swedish law, the child should only receive the information when he is “sufficiently mature.”¹⁸⁴ Thus, the decision should be left to the intended parents, but where they decide to disclose, the law should facilitate the child’s ability to obtain the information.

This could be done by banning gamete donor anonymity as in Sweden and England.¹⁸⁵ In order not to discourage gamete donation, the law should only require identifying information while enacting statutes establishing that the donors and surrogate mother are not the legal parents of the child¹⁸⁶ and have no legal responsibility. This way, the intended parents’ privacy rights are protected, but the child has the right to receive the information if the intended parents choose to disclose it.

VIII. CONCLUSION

With surrogacy becoming a billion dollar industry, problems are bound to arise with regard to surrogacy contracts. Problems like the ones presented in Baby Gammy’s story may not be a current problem in the United States, but they could occur in the future.¹⁸⁷ The ethical focus on artificial reproductive technology such as surrogacy has been focused almost entirely on adults being able to access these technologies¹⁸⁸ and not on the rights of the child conceived from these methods of reproduction. It is time that children born from surrogacy contracts are no longer kept voiceless citizens, and for their rights to be recognized.

By the nature of their conception, these children could confront situations that other children are not likely to encounter. It is important

181. *Id.*

182. *Id.* at 639.

183. *Id.*

184. *Id.* at 635.

185. *Id.*

186. *See* Shapo, *supra* note 94, at 1120.

187. Kindregan & White, *supra* note 2, at 530–31.

188. Somerville, *supra* note 140.

that their rights are protected when such situations arise. As discussed in this Comment, the United States, and Texas specifically, are amending laws and regulations to solve certain problems created by surrogacy but have not fully protected the children's rights in every situation.

It is important that laws be updated to protect the rights of surrogate children when situations such as Baby Gammy's arise; specifically, rights such as the child's right to be an American citizen when the intended parents are American, the right to financial support, the right to inherit, and the right to identity. Surrogacy contracts will inevitably bring many problems not yet seen in the United States, and the law must be prepared to address such problems, especially when the people impacted are innocent human beings.