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Extreme Makeover - Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements

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EXTREME MAKEOVER—SURROGACY EDITION: REASSESSING THE MARRIAGE REQUIREMENT IN GESTATIONAL SURROGACY CONTRACTS AND THE RIGHT TO REVOKE CONSENT IN TRADITIONAL SURROGACY AGREEMENTS

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I. INTRODUCTION

Traditional reproduction is no longer the sole means of procreation. Developments in reproductive technology have forced society to confront traditional assumptions about the family and how the law should regard these new technological advancements. Assisted reproductive technology has afforded the possibility of procreation to persons who once thought that procreation was impossible.[1] Although society should encourage and reinforce

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individual choices to nurture children, certain states have placed statutory limits on who may qualify for reproductive technological advancements. In Florida, the gestational surrogacy statute requires that the intended parents be legally married.[2] States have also adopted diverse approaches regarding the presumption of parentage in custody disputes. In traditional surrogacy agreements, Florida focuses on protecting the rights of the surrogate by allowing her to revoke her consent at any time during her pregnancy and up to forty-eight hours after the child is born.[3]

This article will address the constitutionality of the marriage requirement in Florida's gestational surrogacy statute and the repercussions of the right to revoke consent in traditional surrogacy agreements. Part two of this article will provide a background of gestational surrogacy and traditional surrogacy. Part three will examine the different theories states adopt in order to determine legal parentage. Part four will compare Florida's gestational surrogacy statute to Florida's traditional surrogacy statute. Part five of this article will present constitutional challenges on restricting surrogacy based on procreative liberty and the fundamental right to marry. This section will also examine whether Florida's surrogacy statutes are over or underinclusive. Part six will conclude with the premise that the increase of nontraditional families makes it necessary for Florida to restructure its surrogacy statutes. In addition, this section will explain how Florida should change its surrogacy statutes so that its laws will no longer infringe on any of its residents' procreative rights.

II. BACKGROUND OF GESTATIONAL SURROGACY AND TRADITIONAL SURROGACY

Every year, millions of couples learn that they are incapable of bearing children.[4] "For these individuals, alternative reproduction methods are the

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1. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002).

2. FLA. STAT. § 742.15(1) (2007).

3. *Id.* § 63.213(2)(a), (i).

4. Michael E. Eisenberg, Comment, *What's Mine Is Mine and What's Yours Is Mine—Examining Inheritance Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law*, 3 BARRY L. REV. 127, 127 (2002).

only means by which they are able to have [genetically related] children."[5] Surrogacy has readily become a popular option for infertile couples.[6] There are two main types of surrogacy: traditional surrogacy and gestational surrogacy.[7]

Traditional surrogacy, referred to in Florida as preplanned adoption,[8] is a pregnancy in which the surrogate "provides her own egg, which is fertilized [through] artificial insemination," and then gestates the fetus for another individual.[9] The most common traditional surrogacy arrangement involves the surrogate being artificially inseminated with the intended father's semen.[10] The surrogate then carries the fetus to term and gives birth to the child for another person.[11] In traditional surrogacy, the surrogate is genetically linked to the child because she is the biological contributor of the egg.[12] Therefore, the intended mother is never "considered the natural mother of the child" when the child is born.[13]

The second type of surrogacy, gestational surrogacy, is a pregnancy where one woman—the intended mother—supplies the egg, which is then fertilized, and another woman—the surrogate—gestates the fertilized egg and gives birth to the child.[14] Gestational surrogacy can occur in several

5. *Id.*

6. Amy Garrity, Comment, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain—A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 809 (2000).

7. *Id.*

8. Eisenberg, *supra* note 4, at 140. Although Florida uses the term preplanned adoption, most jurisdictions use the term traditional surrogacy. Florida's gestational surrogacy statute uses the term commissioning couple while Florida's preplanned adoption statute uses the term intended parents. *Compare* FLA. STAT. § 742.15 (2007), *with id.* § 63.213. Florida's preplanned adoption statute uses the term volunteer mother while Florida's gestational surrogacy statute uses the term gestational surrogate. *Compare id.* § 63.213, *with id.* § 742.15. For purposes of this article, the term traditional surrogacy will be used in place of preplanned adoption. The term intended parents will be used to refer to the intended parents in traditional surrogacy agreements and the commissioning couple in gestational surrogacy contracts. The term surrogate will be used to refer to the volunteer mother in traditional surrogacy agreements and the gestational surrogate in gestational surrogacy contracts. For purposes of clarity, this article will use the same terms that are used by most jurisdictions. *See* Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1233 (1997) (stating the common confusion between "the two types of surrogacy").

9. BLACK'S LAW DICTIONARY 1485 (8th ed. 2004).

10. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 435 (2004).

11. *Id.*

12. Garrity, *supra* note 6, at 809.

13. Storrow, *supra* note 1, at 609.

14. BLACK'S LAW DICTIONARY 1485 (8th ed. 2004).

ways.[15] "The inten[ded] mother can use her own egg and the inten[ded] father [can] use his own sperm," to create an embryo which will then be "fertilized outside of the womb."[16] The embryo is then "transplanted into the uterus of the surrogate" and there is no genetic link between the surrogate and the child because the surrogate is not the biological contributor of the egg.[17] Other forms of gestational surrogacy include "the inten[ded] father's sperm and the egg of an anonymous donor," or the intended mother's egg and the sperm of an anonymous donor, in order to create an embryo that will be transplanted into the uterus of the surrogate.[18] Many persons using assisted reproductive technologies prefer gestational surrogacy over traditional surrogacy "because it allows both the intended mother and father to have a biological connection to the child."[19]

In 1987, national news coverage of the case *In re Baby M*,[20] drew public attention to the question of where parental rights lie when an infertile married couple contracts with another woman to bear a child on their behalf.[21] The case arose when Mary Beth Whitehead, the surrogate mother, repudiated the surrogacy contract after giving birth and finding herself unable to part with the child.[22] This was a case of traditional surrogacy, where the child was conceived by artificial insemination.[23] The child was genetically related to both the intended father, William Stern, and the surrogate, Ms. Whitehead, with the understanding that Mr. Stern and his wife would raise the child as their own.[24] The court denied the parental rights claimed by Mr. and Mrs. Stern under the surrogacy contract by declaring such contracts void and against public interest.[25] The court recognized Mr. Stern, the intended father, and Ms. Whitehead, the surrogate mother, as the natural parents based on their biological relationship to the baby.[26] The court granted custody to Mr. Stern and visitation rights to Ms. Whitehead.[27] This case led to "an intense

15. Garrity, *supra* note 6, at 809.
16. *Id.* at 809–10.
17. *Id.* at 810.
18. *Id.*
19. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Agreements*, 51 DRAKE L. REV. 605, 606 (2003).
20. 537 A.2d 1227 (N.J. 1998).
21. *See* Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 574 (1992).
22. *Baby M*, 537 A.2d at 1237.
23. *See id.* at 1235.
24. *Id.*
25. *Id.* at 1240.
26. *See id.* at 1247 n.9.
27. *Baby M*, 537 A.2d at 1259, 1263–64.

national debate and a flurry of legislative activity" with numerous states enacting legislation to address surrogate parenting agreements.[28]

III. DIFFERING APPROACHES TO THE PROBLEM OF LEGAL PARENTAGE

Congress has not enacted federal legislation to deal with the problem of legal parentage in cases that involve surrogacy.[29] Thus, state legislatures and state courts have adopted different tests to determine legal parentage based on intent, genetic contribution, gestation, and the best interests of the child.[30] The conventional surrogacy agreement involved "a fertile husband, an infertile wife, and a fertile [surrogate]" who agreed to use her egg and the husband's sperm to create an embryo and bear the child for the couple.[31] Advances in assisted reproductive technologies, however, have made it possible to have many potential parents: the intended mother, the intended father, the sperm donor, the egg donor, and the surrogate.[32]

When a court or legislature adopts the intent based theory, legal parentage is determined based on the party who "intended to bring the child into the world" or the one who "orchestrated the reproduction."[33] Following this line of reasoning, the legal parents are the ones who planned to raise the child.[34] The intent theory was originated in California, which was one of the initial states forced to face gestational surrogacy maternity issues.[35] In *Johnson v. Calvert*,[36] the Supreme Court of California was confronted with the task of determining maternity between the gestational surrogate and the intended mother.[37] Because both of these women had a valid claim for maternity, the court was forced to create a new theory of maternity and felt the case could not "be decided without [i]nquiring into the parties' intentions."[38] The court looked at the surrogacy contract to determine the parties' intentions regarding maternity and held that "she who intended to procreate the

28. Hofheimer, *supra* note 21, at 574.

29. Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 333 (2006).

30. Lascarides, *supra* note 8, at 1227 n.19.

31. Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 702 (2001).

32. *Id.*

33. *Id.*

34. *Id.*

35. Larkey, *supra* note 19, at 622.

36. 851 P.2d 776 (Cal. 1993).

37. *Id.* at 778.

38. *Id.* at 782.

child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[39] The court's reasoning was based on the premise that the child would not have come into being if it was not for the intended parents.[40] Thus, the intended mother had a more natural claim to the child.[41]

The genetic contribution test determines parentage based on the genetic relationship between the child and the person who contributed genetic material.[42] This theory contends that when the child is biologically linked to the intended parents, the couple will be recognized as the legal parents of the child.[43] In *Belsito v. Clark*,[44] the couple entered into a gestational surrogacy agreement whereby the intended mother's sister would gestate the fertilized genetic material derived from the couple.[45] The hospital informed the intended mother that Ohio law required that the birth certificate list her sister's name as the natural mother.[46] Therefore, the intended parents sought a declaratory judgment naming them as the legal parents of the child.[47] The court held that since the intended parents provided the genetic material for the child, they were the child's legal and natural parents.[48]

Before the "emergence of assisted reproductive technologies, most jurisdictions [adhered to] the common law rule," which presumed that any woman who gestates and gives birth to a child is that child's legal mother.[49] Advocates of this theory rely on the significance of the gestational mother's contribution to the child's existence.[50] The jurisdictions that adopted this theory felt that "[t]he gestational mother . . . establishes a unique physical and emotional bond with the child during the nine months prior to birth, a bond that the [intended parents] simply cannot attain."[51] Essentially, states that follow the gestational mother theory invalidate gestational surrogacy contracts because the surrogate and her spouse, not the intended parents, will always be recognized as the legal parents of the child.[52] When a jurisdiction

39. *Id.*
40. *Id.*
41. *Johnson*, 851 P.2d at 782.
42. Larkey, *supra* note 19, at 624.
43. *Id.*
44. 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).
45. *Id.* at 761.
46. *Id.* at 762.
47. *Id.*
48. *Id.* at 762, 767.
49. Larkey, *supra* note 19, at 625.
50. *Id.*
51. *Id.*
52. *Id.* at 626.

adopts this theory, "it discredits the constitutionally protected decision of the intended parents and the decision of the surrogate who voluntarily participates in the arrangement."[53]

The last theory on legal parentage is the best interests of the child standard, where the court will grant legal parentage to the party that will best assume the responsibilities of parentage.[54] Proponents of this theory feel that it allows courts to consider aspects of all theories before deciding who should be declared the legal parents of the child.[55] Currently, surrogacy statutes usually apply the best interests of the child standard in child custody disputes as opposed to legal parentage determinations.[56] Many feel that the best interests standard is too problematic because "[i]n some instances, determining the child's best interests is just not feasible" and "[r]anking adults by their parenting ability would be a bureaucratic nightmare."[57]

IV. COMPARING FLORIDA'S GESTATIONAL AND TRADITIONAL SURROGACY STATUTES

No federal legislation has been passed to regulate surrogacy and "[t]he differing state of the law in this area demonstrates the nation's struggle with the moral and philosophical considerations involved."[58] Due to the lack of federal legislation, it is necessary to examine gestational surrogacy on a state statutory basis.[59] Florida law explicitly authorizes gestational surrogacy contracts but the statute imposes strict requirements on the contract.[60] First, a binding and enforceable contract must be made between the intended parents and the surrogate.[61] In order for the contract to be binding and enforceable, the gestational surrogate must be "[eighteen] years of age or older" and the intended parents must be legally married and "[eighteen] years of age or older."[62] Second, before entering into a surrogacy contract, a licensed physician must determine that: 1) the intended mother is unable to gestate the fetus to term; 2) "[t]he gestation will cause a risk to the physical health" of the intended mother; or 3) "[t]he gestation will cause a risk to the health of the

53. *Id.* at 625.
54. Larkey, *supra* note 19, at 626.
55. *Id.*
56. *Id.* at 627 n.177.
57. Gillers, *supra* note 31, at 694.
58. Berys, *supra* note 29, at 333.
59. *See id.*
60. Browne-Barbour, *supra* note 10, at 450.
61. FLA. STAT. § 742.15(1) (2007).
62. *Id.*

fetus."[63] Third, the surrogacy contract must include a provision that the gestational surrogate will surrender her parental rights at the birth of the child, unless it is determined that the child is genetically unrelated to the intended parents.[64]

Florida law also allows individuals to enter into traditional surrogacy agreements.[65] Although Florida limits gestational surrogacy to married couples, traditional surrogacy is available to an unmarried couple.[66] The traditional surrogacy statute refers to the "intended mother" and the "intended father," but nowhere in the statute does it say that the couple must be married.[67] The statute requires the agreement to include, "[t]hat the [surrogate] agrees to become pregnant by the fertility technique specified in the agreement, to bear the child, and to terminate any parental rights and responsibilities to the child."[68] In traditional surrogacy, however, the surrogate has up to forty-eight hours after the child is born to revoke her consent, whereas the gestational surrogate has no right to revoke her consent.[69] In gestational surrogacy, one of the intended parents must be biologically linked to the child, while no genetic connection is required for traditional surrogacy agreements.[70] Furthermore, in traditional surrogacy the intended mother has to adopt the child because she and the child are not genetically linked.[71] Before she can adopt the child, the surrogate must terminate parental rights because it is usually the surrogate's egg that is used.[72] If the father's sperm was not used via artificial insemination, then he would have to adopt the child as well.[73]

In traditional surrogacy, "the agreement may be terminated at any time by any of the parties."[74] Essentially, this could mean that the surrogate could terminate the contract and then turn around and sue the biological and in-

63. *Id.* § 742.15(2)(a)–(c).

64. *Id.* § 742.15(3)(c), (e).

65. *See id.* § 63.213.

66. *Compare* FLA. STAT. § 742.15(1) (stating that the intended parents must be married to qualify for gestational surrogacy), *with id.* § 63.213 (containing no provision requiring a couple to be married in order to qualify for traditional surrogacy).

67. *See generally id.* § 63.213.

68. *Id.* § 63.213(2)(a).

69. *Compare id.* (stating that the surrogate has the right to revoke consent "any time within [forty-eight] hours after the birth of the child"), *with* FLA. STAT. § 742.15(3)(c) (stating that the surrogate must agree to surrender parental rights upon the birth of the child).

70. *See id.* §§ 742.15(3)(e), 63.213.

71. *See id.* § 63.213.

72. *See id.* § 63.213(6)(i).

73. *See id.* § 63.213.

74. FLA. STAT. § 63.213(2)(i).

tended father for support.[75] Due to the lack of cases in Florida focusing on surrogacy, it is necessary to examine an earlier surrogacy case in another state and a current custody battle in Florida.[76] In the case of *In re Moschetta*,[77] a California court considered for the first time whether traditional surrogacy contracts, where the surrogate is both the woman who gives birth to the child and the child's biological contributor of the egg, are enforceable.[78] The intended parents and surrogate signed an agreement which stated that the surrogate would be artificially inseminated with the intended father's semen so that the child would be biologically linked to the father.[79] Although there was clear evidence that the surrogate conceived the child with the intent to facilitate the adoption to an infertile woman, the surrogate was entitled to rescind the agreement and keep the child.[80] The court held that the child had one mother and that no tie-breaker was required because the genetic mother and the gestational mother were the same person.[81] The intended mother had no claim to motherhood because she was not "equally" the mother of the child.[82] The court made it clear that couples "who resort to traditional surrogacy . . . have no assurance their intentions will be honored in a court of law" and "[f]or them and the child, biology is destiny."[83] Four years later, however, the court ruled that the intended mother does have a claim in gestational surrogacy cases because the surrogate is not biologically linked to the embryo.[84] Thus, the intended mother in a gestational surrogacy contract, not the surrogate or egg donor, is the lawful mother of the child.[85]

Presently, a baby battle is occurring in Florida between the intended parents of a traditional surrogacy agreement and the surrogate they hired.[86]

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75. *See id.* § 63.213(2)(d) (stating that if the intended father has a biological link to the child "he will assume parental responsibilities for the child"); *see also* Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 524 (1991).

76. *See* Lascarides, *supra* note 8, at 1258. The author states that there are "few court decisions on surrogacy contracts" and "far more law review articles discussing this topic than court decisions." *Id.*

77. 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

78. *Id.* at 895.

79. *Id.*

80. *Id.* at 895, 901.

81. *Id.* at 896.

82. *Moschetta*, 30 Cal. Rptr. 2d at 896.

83. *Id.* at 903.

84. *In re* Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

85. *Id.*

86. O'Reilly Factor: Bitter Baby Battle (FOX television broadcast July 20, 2007), *available at* 2007 WLNR 13850188 [hereinafter O'Reilly Factor].

Gwyn and Tom Lamitina paid a surrogate to gestate their baby because they were unable to reproduce on their own.[87] The couple, who reside in Orlando, decorated a bedroom for their baby girl, but their "biggest fear is that [they] may not be able to bring her home."[88] The surrogate has decided that "she wants to keep the [baby]"[89] and is suing the intended father for child support.[90] As a result of a prior positive surrogacy experience, the Lamitinas signed a contract with a surrogate in 2006.[91] The surrogate accepted all the benefits of the contract, such as a $1500 deposit.[92] The couple trusted that the surrogate would carry out the contract and focused their concerns on[93] the health of both the baby and the surrogate.[94] The fact that these parties entered into a traditional surrogacy agreement is a crucial part of this case because Florida law only safeguards the intended parents in a gestational surrogacy agreement.[95] Despite the intent of the parties and "as unfortunate as it may be, [the surrogate] was within her Florida rights to rescind the contract when she did."[96] As a result, it seems that there is no legal recourse for the intended parents[97] and the "baby may never lay its head in [the] crib" the couple built for her.[98]

Allowing the surrogate every opportunity to retract the traditional surrogacy agreement at any time leaves the parties whom the "agreement was meant to protect" constantly worrying about the uncertainty of the outcome.[99] "The intended parents must suffer throughout the pregnancy," fully aware that they may never "become the child's parents."[100] Traditional surrogacy agreements contain a clause that allows the surrogate to cancel the agreement during the pregnancy as well as forty-eight hours after the birth of the

87. Grayson Kamm, *Birth Battle: Couple Says Surrogate Mom Won't Give up Baby*, FIRST COAST NEWS, May 23, 2007, http://www.firstcoastnews.com/news/florida/news-article.aspx?storyid=82698.

88. *Id.*

89. O'Reilly Factor, *supra* note 86.

90. Kamm, *supra* note 87.

91. *Id.*

92. O'Reilly Factor, *supra* note 86.

93. Kamm, *supra* note 87.

94. O'Reilly Factor, *supra* note 86.

95. *Id.*

96. *Id.*

97. *Id.*

98. Kamm, *supra* note 87.

99. Eric A. Gordon, Comment, *The Aftermath of* Johnson v. Calvert*: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 207 (1993).

100. *Id.* at 209.

child.[101] Thus, the intended mother and father "fear that, at any time during and immediately following the birth of their intended [child], the surrogate [could] exercise her option [and choose] to maintain custody of the child."[102] Opponents of surrogacy feel that unmarried persons still have an option because they are able to enter into traditional surrogacy agreements, but they just have to "take their chances that the surrogate [will] relinquish custody of the child at birth."[103] However, if the surrogate exercises her option to maintain custody, the intended parents would have "no [legal] recourse"[104] and the infertile couple could, in essence, become an embryological donor for the surrogate's child.[105]

Florida provides an expedited procedure to affirm the child's parentage for couples participating in gestational surrogacy.[106] "Within [three] days after the birth of a child," the intended parents can request "an expedited affirmation of parental status" from the court.[107] If the court determines that the intended parents and the gestational surrogate entered into "a binding and enforceable" contract, and at least one of the intended parents is a "genetic parent of the child," an order is issued stating that the intended parents are the child's legal[108] and natural parents.[109] The Department of Health then releases a new birth certificate identifying the intended parents as the legal parents of the child.[110] For individuals who enter into traditional surrogacy agreements, expedited affirmation of parental status is not an option.[111]

Traditional surrogacy agreements create a "high risk of conflict" because surrogate mothers may regret their decision and refuse to surrender custody of the child after the child is born.[112] Currently, "Florida's [traditional] surrogacy policy is geared toward protecting the surrogate, . . . not the intended parents nor the child—the parties for whom the surrogacy agreement was meant to protect at its inception."[113] Gestational surrogacy affords infertile couples the opportunity to create a biological child because the woman could have her "ovum artificially fertilized by the sperm of [her]

101. FLA. STAT. § 63.213(1)(b), (2)(i) (2007).
102. Gordon, *supra* note 99, at 209.
103. Massie, *supra* note 75, at 524.
104. *Id.*
105. Gordon, *supra* note 99, at 209.
106. FLA. STAT. § 742.16 (2007).
107. *Id.* § 742.16(1).
108. *Id.* § 742.16(6).
109. *Id.* § 742.16(7).
110. *Id.* § 742.16(8).
111. *See* FLA. STAT. § 742.16.
112. Larkey, *supra* note 19, at 610.
113. Gordon, *supra* note 99, at 207.

husband . . . and implanted in the uterus of the surrogate."[114] Due to the fact that the gestational surrogate is not biologically linked to the child, the intended parents, who are also the biological parents, are in "a stronger legal position . . . in the event of a . . . custody battle."[115] Thus, most individuals favor gestational surrogacy over traditional surrogacy.[116]

V. CONSTITUTIONAL CHALLENGES

Florida requires that the intended parents in a gestational surrogacy agreement be legally married.[117] The marriage requirement "may be viewed by some as discriminatory and close-minded in our modern society."[118] Even though unmarried persons may not want to be involved in a romantic relationship, or even if involved, may not want to marry, "they may still [possess] the desire to become [a] parent[]."[119]

> Single persons wishing to assert constitutional challenges against a legislative restriction limiting parenthood through surrogacy to married couples have two available arguments: (1) that such a restriction violates their fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment because it infringes on their right to decide whether to bear or beget a child; and (2) that this legislative classification based on marital status is invidious discrimination which violates their rights under the Equal Protection Clause of the Fourteenth Amendment.[120]

A. *The Due Process Argument: Procreative Liberty*

"The United States has a longstanding tradition of procreative liberty and each state is responsible for protecting this constitutional liberty granted to its citizens."[121] Protections afforded under the substantive due process doctrine are established in the Fifth and Fourteenth Amendments of the United States Constitution.[122] The substantive due process doctrine provides that the right to privacy protects individuals against unlawful government inva-

114. Larkey, *supra* note 19, at 610–11.
115. *Id.* at 611.
116. *Id.* at 606.
117. FLA. STAT. § 742.15(1) (2007).
118. Becky A. Ray, Comment, *Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 442 (2004).
119. *Id.*
120. Massie, *supra* note 75, at 499 (footnotes omitted).
121. Garrity, *supra* note 6, at 812.
122. *See generally* U.S. CONST. amends. V, XIV.

sion.[123] Although not explicitly stated in the Constitution, the United States Supreme Court has declared the right to privacy a fundamental right because it falls under the penumbra of rights that coincide with those in the Bill of Rights.[124]

Although the United States Supreme Court "has not [yet] addressed" whether there is a constitutional right of access to assisted reproductive technology, "it has recognized an individual's right to be free from government intrusion" concerning matters relating to procreation, family relationships, and child-rearing.[125] In *Eisenstadt v. Baird*,[126] the Court extended the protection of privacy to every individual regarding the decision of whether to bear a child.[127] In regard to family relationships, the Court has held that the family is unique to society and that constitutional principles must be applied with sensitivity and flexibility to meet the needs of a parent and child.[128]

1. The Interests of Parents

In *Skinner v. Oklahoma*,[129] the Court stated that the right to procreate is "one of the basic civil rights of man" and "fundamental to the very existence and survival of the race."[130] Advocates of surrogacy argue that, "if the right to procreate through the traditional, coital method is a protected right, then procreation through surrogacy or other medically available options should also be protected."[131] There are a growing number of infertile couples who desperately desire to have and raise a child and "[i]t is the duty of the legislature to pass laws to protect the[se] citizens . . . and ensure that all of the benefits of reproductive technology are available to every member of . . . society."[132] Surrogacy supporters contend that "the liberty interests protected by the Constitution do not change definition because of the presence or absence of reproductive technology."[133] After all, a woman has a fundamental right

123. *See* Griswold v. Connecticut, 381 U.S. 479, 481–83 (1965).

124. *Id.* at 483.

125. 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, 563 (1999).

126. 405 U.S. 438 (1972) (plurality opinion).

127. *Id.* at 453.

128. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

129. 316 U.S. 535 (1942).

130. *Id.* at 541.

131. Gordon, *supra* note 99, at 200.

132. Garrity, *supra* note 6, at 832.

133. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 121 (1997).

to control her body and the choice of becoming a surrogate or hiring a surrogate is a woman's reproductive choice.[134] Furthermore, assisted conception is still a form of conception, "and arguably no more 'artificial' than the contraceptive devices" the United States Supreme Court recognized in *Griswold v. Connecticut*[135] and *Eisenstadt*.[136] Therefore, the due process argument is that "the fundamental right to 'bear or beget a child' [must] include[] access to any [legal] means of procreation."[137]

Proponents of a narrow interpretation of the fundamental right to procreate argue that procreative liberty "simply means the right to have natural children."[138] These proponents argue that the Court's definition of a right to privacy does not extend to untraditional means of reproduction because these means "are beyond the scope of the constitutionally recognized procreative liberty."[139] While advocates of surrogacy acknowledge the procreative rights of both the intended mother and the gestational surrogate, opponents feel "that the procreative choice of a gestational surrogate in conceiving, delivering, and transferring a child to its genetic parents is not the constitutional equivalent of exercising her procreative choice to bear her own child."[140] Opponents of surrogacy suggest that because the right to have a third party serve as a surrogate is not "deeply rooted in tradition," the parties do not have the constitutional right to have a child if it means that the child will be conceived through surrogacy.[141] Further, some caution that bringing a third party—the surrogate—into the procreative relationship will put a strain upon the traditional notions of parenthood and family.[142]

In the case of surrogacy, however, none of the state's arguments regarding religious and moral "concerns are justified by harm to another individual."[143] "[S]tate concerns that do not pose a tangible threat of harm to others cannot justify the government's intrusion on fundamental rights."[144] Restricting gestational surrogacy to a certain class of persons, therefore, would infringe upon the rights of infertile couples to engage in procreation in situa-

134. *Id.* at 166.
135. 381 U.S. 479 (1965).
136. Kerian, *supra* note 133, at 121.
137. *Id.* at 121–22.
138. Browne-Barbour, *supra* note 10, at 469.
139. Kerian, *supra* note 133, at 121.
140. Browne-Barbour, *supra* note 10, at 469.
141. *Id.*
142. *See id.*
143. Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 153 (2006).
144. *Id.* at 153 n.150.

tions where the intended parents want to both be biologically linked to the child.[145]

2. The Best Interest of the Child

The United States Supreme Court has stated that children are entitled to "constitutionally protected rights and liberties" and that "[a] child has a natural right . . . to be nurtured" just as parents have the right to conceive.[146] Although preconception agreements affect the substantive rights of the unborn child, "no one represents the interests of the [unborn] children in these contracts."[147]

In order to justify limiting gestational surrogacy to a certain class of persons, "the state must meet the [extremely] high burden of strict scrutiny."[148] The state is required to show that the regulation is necessary to achieve a compelling state interest.[149] Often times, a state will argue that it limits surrogacy in order to protect the best interests of the child.[150] It could be difficult to prove, however, that a child raised by its biological parents as opposed to its intended parents is "a compelling interest because there is no identifiable harm in placing [a child] with [its] intended parents."[151] Opponents of surrogacy believe in limiting the number of people who can qualify for this procedure because they feel surrogacy will ultimately have an adverse effect on the unborn child.[152] Rather, the beneficiaries of surrogacy agreements are the ones who would most probably become reliable and devoting parents.[153]

> The people who have struggled so hard to conceive their own child are probably the best candidates to be good parents and not the worst. It hardly seems likely that a couple that endured so much grief to have its own child would embark on a course of abuse and neglect with a surrogate child. . . . After all, children conceived by normal means often run a far greater risk of abuse. There is surely a risk of abuse even in apparently stable families. The risk is greater for children born of troubled marriages that end in divorce,

145. *Id.* at 153; *see also* Garrity, *supra* note 6, at 809–10.
146. Browne-Barbour, *supra* note 10, at 468.
147. *Id.*
148. Sirola, *supra* note 143, at 151–52.
149. *Id.* at 152; *see also* Massie, *supra* note 75, at 490–91.
150. Sirola, *supra* note 143, at 152.
151. *Id.*
152. *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2320 (1995).
153. *See* Lascarides, *supra* note 8, at 1251.

> and still greater for illegitimate children, especially if the mother's new boyfriend moves in. In these cases, [the legislature does] not think that the risk of harm to children constitutes a powerful reason to license, limit, or ban procreation: it seems hard to believe that these concerns rise to this level in a surrogacy context.[154]

B. *The Equal Protection Argument*

The Equal Protection Clause of the Fourteenth Amendment requires equal treatment for individuals who are similarly situated.[155] Thus, "[s]tatutes that discriminate between married and unmarried individuals and between men and women's reproductive rights may . . . violate the Equal Protection Clause."[156] In states that prohibit same-sex marriage, such as Florida,[157] "[a] gay man or a lesbian's equal protection rights may be violated because many states provide statutory protection of assisted reproductive technologies only to married individuals."[158]

> The Supreme Court has determined that the right to procreate [is] fundamental, and any ban on that right is subject to strict scrutiny. With strict scrutiny, a state must show that it had a compelling interest in creating its ban, and that the statute was narrowly drawn. With assisted reproductive technology, a state would have to allege differences between unmarried and married individuals, or between men and woman [sic], sufficient to demonstrate a compelling interest in denying unmarried individuals . . . statutory protection with assisted reproductive technologies. The second step would require a state to demonstrate that the ban was neither over nor under-inclusive.[159]

1. Married and Unmarried Individuals

Gestational surrogacy permits married couples, who choose to utilize assisted reproductive technologies, to be recognized "as the legal parents of [the] child."[160] However, unmarried couples are deprived of this privilege.[161]

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154. Epstein, *supra* note 152, at 2320–21 (footnote omitted).

155. U.S. CONST. amend. XIV.

156. Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 180 (2000).

157. *See* FLA. STAT. § 741.212(1) (2007).

158. DeLair, *supra* note 156, at 180.

159. *Id.* at 181 (footnotes omitted).

160. Storrow, *supra* note 1, at 639.

Requiring marriage as a prerequisite for gestational surrogacy contracts "is unfortunate, as it perpetuates the law's failure to recognize the many non-traditional forms of the family that exist in society today."[162] It is important to recognize that being born into a two-parent traditional family certainly does not guarantee that the child will grow up in that environment.[163] Currently, "[a]n increasingly large number of children" are raised by single parents, and just because a child is born to a single parent does not mean that is how the child will grow up.[164] Single parents often find companions with whom they are able to form a new, two-parent family unit.[165] There is a strong argument that it is better for a child to grow up in a loving environment with a single parent as opposed to the child being raised in an argumentative and stressful two-parent household.[166] Several states have enacted pro-surrogate legislation and "the marital status of the biological father and/or the intended mother is typically irrelevant in determining a presumption of parenthood."[167] Although Florida has enacted surrogacy legislation, the Florida statute restricts unmarried couples from participating in gestational surrogacy.[168]

In *Griswold*, the United States Supreme Court invalidated a state statute that banned the use of contraceptives by married couples.[169] The Court held that the penumbra of rights stemming from the Bill of Rights guarantee a parent's right to be free from governmental interference when making decisions pertaining to conception and child rearing.[170] In *Eisenstadt*, the Court emphasized that "the right to privacy means . . . the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[171] It can be inferred from several United States Supreme Court decisions, when looked at comprehensively, that the Court stands for a

161. *Id.*
162. *Id.* at 639–40.
163. Massie, *supra* note 75, at 511 (internal quotations omitted).
164. *Id.* at 511–12.
165. *Id.* at 512.
166. *Id.* at 511–12.
167. Daniel Rosman, *Surrogacy: An Illinois Policy Conceived*, 31 LOY. U. CHI. L.J. 227, 248 (2000).
168. *See* FLA. STAT. § 742.15(1) (2007) (requiring that a couple be legally married in order to qualify for gestational surrogacy).
169. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
170. *Id.* at 482–83, 485.
171. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (plurality opinion) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

constitutional right to procreate regardless of marital status.[172] "Although it is permissible to limit the procreative [rights] of prisoners and probationers, it is inconsistent with the American constitutional tradition to condition procreative liberty upon marital status."[173] Thus, to survive strict scrutiny, a state's regulation must be narrowly tailored to further a compelling state interest.[174] However, "[t]he language of *Eisenstadt* suggests that the state has no compelling interest in limiting procreative rights to married couples."[175] As such, "a legislative requirement that only married couples" meet the definition of intended parents in Florida's gestational surrogacy statute may not pass heightened scrutiny.[176]

According to the Equal Protection Clause, persons who are similarly situated must be treated equally.[177] Therefore, "unmarried persons become a class who are otherwise similarly situated but treated differently."[178] Unmarried persons who cannot naturally procreate are similarly situated to married persons who cannot naturally procreate because both are only able to procreate through the use of assisted reproductive technology.[179] However, unmarried persons are not treated equally because many state statutes will only allow married persons legal access to gestational surrogacy.[180] Although financial security and maturity are listed as reasons behind the marriage requirement, "[e]vidence of marital status . . . is neither necessary nor sufficient for establishing these traits."[181] "A more liberal surrogacy policy in this country would allow all infertile couples, not just the ones who are deemed worthy by their state legislature, the opportunity to become a family."[182]

172. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that a woman has the right to terminate a pregnancy); *Eisenstadt*, 405 U.S. at 453–55 (plurality opinion) (stating that unmarried couples have a constitutionally protected right of privacy to use contraceptives); *Griswold*, 381 U.S. at 485–86 (invalidating the state's ban on the use of contraceptives for married couples).

173. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 327 (2006).

174. Massie, *supra* note 75, at 490–91.

175. *Id.* at 491.

176. *See id.* at 512.

177. U.S. CONST. amend. XIV.

178. DeLair, *supra* note 156, at 180..

179. *Id.*

180. *See* FLA. STAT. § 742.15(1) (2007).

181. Storrow, *supra* note 173, at 323.

182. Gordon, *supra* note 99, at 202.

2. Men and Women's Reproductive Rights: Gay Men and Lesbian Women

"[A]pproximately four million gay men and lesbian women [are] raising between eight and ten million children."[183] Comparable to heterosexual couples, countless gay men and lesbian women also possess the desire to both bear and raise children.[184] Many of these individuals want to form a family unit and provide a child the benefit of their love and dedication.[185] After all, "[t]hey too have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfillment."[186] Florida prohibits marriage between persons of the same sex and defines the term "marriage" as "only [the] legal union between [a] man and [a] woman."[187] Florida also explicitly states that it will not *for any purpose* recognize same-sex marriages entered into in another jurisdiction.[188] Due to the fact that Florida bans same-sex marriage, these couples are unable to marry and thus, unable to qualify for gestational surrogacy.[189]

> By continuing to advocate vociferously for favored treatment of married couples in matters of legal parenthood, the heterosexuals-only marriage movement not only works against our legal traditions and values, but also ultimately undermines the welfare of many children whose best hope lies with parents the law does not allow to marry.[190]

Because gay men and lesbian women do not engage in the traditional means of reproduction, they must utilize "assisted reproductive technologies in order to produce genetically related children."[191]

Although assisted reproductive technology is now available that would enable homosexuals to have children, gays and lesbians are still confronted with numerous barriers.[192] Statutory and case law both create obstacles for homosexuals utilizing reproductive technology because they "will not have

183. DeLair, *supra* note 156, at 147.
184. *Id.* at 148.
185. *Id.*
186. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 330 (2004).
187. FLA. STAT. § 741.212(1), (3) (2007).
188. *Id.* § 741.212(1) (emphasis added).
189. *See id.* § 742.15(1) (stating a gestational surrogacy contract will not be binding and enforceable unless the intended parents are legally married).
190. Storrow, *supra* note 173, at 306 (emphasis omitted).
191. DeLair, *supra* note 156, at 148.
192. *Id.*

equal legal standing in defending a parental or custodial challenge."[193] In states such as Florida, where same-sex couples are prevented from legally marrying, "their family unit[] [is] not recognized as [a] legal entit[y]."[194] Second-parent adoption law has the ability to remedy this situation because the non-biological parent can "petition the court to adopt the child" in order to establish legal parentage.[195] However, same-sex couples are confronted with additional legal barriers because second-parent adoption is not an option for gays and lesbians living in states that ban homosexuals from adopting.[196] For example, Florida's adoption statute explicitly prohibits adoption by gay and lesbian persons.[197] As such, in Florida, since a child is unable to be adopted by a homosexual second-parent, the child will "never have two legal parents."[198] Gay and lesbian couples want access to assisted reproductive technology for this exact reason.[199]

Opponents of gay and lesbian access to assisted reproduction assert that it is unnatural.[200] However, it is no more unnatural than interfering with nature and assisting infertile individuals with the ability to reproduce.[201] Opponents also feel that gay or lesbian parents would negatively impact a child.[202] Yet, many studies show that gay and lesbian parents are equally capable parents and "their children are as well-adjusted as . . . children" raised by heterosexual parents.[203] "Conventional notions of homosexuality and its perceived effect on children is [sic] antiquated and scientifically unfounded" and "[n]o study has ever conclusively linked homosexuality to poor parentage."[204]

It is clear that states are free to deny gays and lesbians the right to be adoptive parents.[205] In fact, Florida's statute clearly states, "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[206] But "[i]n situations in which gays and lesbians seek to bring a child into the world, claims that children are best raised in a heterosexual married family

193. *Id.* at 162.
194. *Id.* at 171.
195. *Id.*
196. DeLair, supra note 156, at 171–73.
197. *See* FLA. STAT. § 63.042(3) (2007).
198. Storrow, *supra* note 173, at 341.
199. DeLair, *supra* note 156, at 171.
200. Robertson, *supra* note 186, at 330.
201. *Id.* at 331.
202. *Id.*
203. *Id.* at 332.
204. Eisenberg, *supra* note 4, at 147.
205. *See* FLA. STAT. § 63.042(3) (2007).
206. *Id.*

have no logical relevance to protecting the child's welfare, because the child in question would not otherwise have existed."[207] Children who otherwise would not have existed are not harmed by being born to gays and lesbians.[208] "Because a life with a gay or lesbian parent is still a meaningful life, those children are hardly protected by preventing their birth altogether."[209] Thus, harm to future offspring would not satisfy a compelling state interest test or even a rational basis test by denying gays or lesbians the right to reproduce, whether by traditional means or with the help of reproductive technology.[210] "Rather than undermine families or harm offspring, access to [assisted reproductive technologies] for gays and lesbians will promote parenting and family values, just as it does for heterosexuals."[211]

3. Are Florida's Surrogacy Statutes Over or Under-Inclusive?

In order to justify the restrictions placed on gestational surrogacy, a state could argue "that it has a compelling interest in [protecting] public morals" and unmarried persons or homosexual persons procreating would tarnish the concept of traditional family.[212] The weakness in that argument, however, is a substantial decrease in the amount of children growing up in a traditional family household.[213] In *Troxel v. Granville*,[214] the United States Supreme Court recognized that "[t]he composition of families varies greatly from household to household" and "demographic changes of the past century make it difficult to speak of an average American family."[215] Nevertheless, even if protecting the notion of the traditional family was deemed a compelling interest, "any statute that sought to protect notions of traditional family by barring access to assisted reproductive technology would be over-inclusive."[216]

The state might also argue that restricting gestational surrogacy to certain persons is permissible because it has a compelling interest in protecting the health, or more specifically the psychological welfare of its citizens.[217]

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207. Robertson, *supra* note 186, at 333.
208. *Id.* at 347.
209. *Id.*
210. *Id.*
211. *Id.* at 372.
212. DeLair, *supra* note 156, at 182.
213. *Id.*
214. 530 U.S. 57 (2000) (plurality opinion).
215. *Id.* at 63.
216. DeLair, *supra* note 156, at 182.
217. *Id.*

> A surrogacy arrangement can psychologically harm the surrogate mother who must relinquish a child she gestated and gave birth to. The intended parent(s) could suffer psychologically if a surrogate were to challenge custody. A child could be harmed if he knew he was conceived by artificial means and then given up by his mother. Even if the state's argument was sound, a ban against surrogacy is under-inclusive because it fails to consider other practices that would have a similar emotional impact on all parties.[218]

It seems ironic that Florida would use the psychological health of the child as a compelling interest when courts are aware that their rulings are inconsistent with the child's best interests.[219] In *Wakeman v. Dixon*,[220] two women lived together and were domestic partners.[221] Thereafter, they "jointly entered into a[n] . . . agreement with a sperm donor."[222] The agreement made reference to both parties and described each of them using the terms "mother" and "co-parent."[223] "[T]he sperm donor relinquished [all of his] parental rights" in the agreement and agreed that the "'co-parents' [would] be responsible for all decisions regarding [the] child conceived through sperm donation."[224] After Ms. Dixon twice became pregnant, the couple entered into a co-parenting agreement where both parties recognized that each parent would "jointly parent the child."[225] Subsequently, the couple separated, Ms. Dixon relocated with the two children, and Ms. Wakeman sought "a declaration of parental rights to the two children born to [Ms.] Dixon" based on their agreement.[226] The court granted Ms. Dixon's petition to dismiss and found that it did not have the authority to grant custody or compel visitation by a person who was not a natural parent.[227] Although "the trial court noted that . . . the guardian ad litem . . . made a compelling argument that it [was] in the best interest[] of the children to enforce the co-parenting agreement[],"[228] the court found the agreement unenforceable.[229]

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218. *Id.*
219. *See* Wakeman v. Dixon, 921 So. 2d 669, 674 (Fla. 1st Dist. Ct. App. 2006) (Van Nortwick, J., concurring).
220. *Id.* at 669 (majority opinion).
221. *Id.* at 670.
222. *Id.*
223. *Id.*
224. *Wakeman*, 921 So. 2d at 670.
225. *Id.*
226. *Id.* at 671.
227. *Id.*
228. *Id.*
229. *Wakeman*, 921 So. 2d at 673.

In his concurring opinion, Judge Van Nortwick explained that even though it "would be in the best interests of the . . . children" to enforce the co-parenting agreement, "Florida law does not provide a remedy" which allows the court to make such a ruling.[230] He acknowledged that "[t]he number of children in Florida raised in . . . non-traditional households" is escalating and he is "concerned that . . . Florida law ignores the needs of those children."[231] His purpose of writing a concurring opinion was "to urge the Florida Legislature to address the needs of the children born into or raised in these non-traditional households"[232] because this case was evidence that "Florida law does not protect the interests of the child produced by assisted reproduction."[233] In Florida, the reality is that a child growing up in a non-traditional household "is not protected either by statutory rights or by the ability of courts to secure the best interests of the child."[234]

VI. CONCLUSION

Surrogacy provides an attractive reproductive alternative to the large number of couples suffering from infertility. As a result of the rapid advancement of reproductive technology, non-traditional family units now have the ability to raise children. Medical technology should be obtainable by all persons, regardless of an individual's gender, marital status, or sexual orientation. Moral values alone should not dictate how a person exercises his or her right of procreative liberty. "Disapproval of single parenthood or homosexuality would not provide . . . a justification"[235] for denying some persons access to assisted reproductive technology while granting those services to others.

States such as Florida, which follow a more traditional interpretation of parentage, family, and marriage, preclude many deserving individuals the chance to raise a child. As a consequence of this conventional interpretation, there is a dual failure. Both children, who could have been brought into this world, and good parents, yearning for positive family units, are denied such opportunities. In Florida, the only couples who qualify for gestational surrogacy are those that are both married and incapable of having a child through traditional means. This exclusionary prerequisite, however, results in the infringement of procreative rights for many individuals who are prohibited

230. *Id.* at 674 (Van Nortwick, J., concurring).
231. *Id.*
232. *Id.*
233. *Id.* at 674–75.
234. *Wakeman*, 921 So. 2d at 675.
235. Robertson, *supra* note 186, at 349.

from participating in this miraculous technology. Florida's gestational surrogacy statute does not allow unmarried individuals or same-sex couples to participate in gestational surrogacy.[236] This statute does not reflect the reality that the number of non-traditional families is rapidly increasing. Additionally, the number of children conceived by reproductive technology is also escalating. If the public continues to perpetuate negative views of surrogacy, it could lead to children questioning their existence if they were to find out how they were conceived. Surely, that result would not be in the best interest of the child. With the composition of current family units shifting, it is crucial for society to focus on the advantageous aspects of surrogacy:

> [T]he impact on the child who learns that her genetic parents wanted her so much that they went through many medical procedures and spent thousands of dollars in order to bring her into this world, that she was not an accident but, instead, the miracle child for which her parents prayed for years; the impact on the birth mother who realizes that she gave to an infertile couple the miracle of birth and the joy of family life; and the impact on the [intended] parents once they hold the child in their arms and acknowledge that she is theirs to raise and love.[237]

With society's recognition of this stance, the accompanying result would be beneficial to all parties involved in surrogacy arrangements.

In view of the increase of non-traditional families coupled with advancements in reproductive technologies, Florida needs to re-evaluate its traditional definitions of family and parentage. Florida should provide equal and uniform opportunities to married heterosexuals, unmarried heterosexuals, and homosexuals who wish to participate in surrogacy. By adopting California's surrogacy provisions, individuals employing surrogate mothers would be able to obtain pre-birth judgments of parentage regardless of their marital status, sexual orientation, or genetic contribution to the child.

In both traditional surrogacy agreements and gestational surrogacy contracts, the "intended parent" should be defined as a single adult man, a single adult woman, or an adult couple, regardless of gender or sexuality, who agree, in writing, to be the legal parents of the child conceived through assisted reproductive technology. In traditional surrogacy custody disputes, Florida should consider both the best interests of the child and the intentions

236. *See* FLA. STAT. § 742.15(1) (2007) (stating that the intended couple must be legally married in order to qualify for gestational surrogacy); *see also id.* § 741.212(1) (stating that "[m]arriages between persons of the same sex" are not recognized in Florida).

237. Lascarides, *supra* note 8, at 1234.

of the contracting parties. In cases where both parties are deemed fit, courts should concentrate on the parties' intentions. The adjudication of legal parentage should be in favor of the party who intended to raise the child.

Thus, the Florida Legislature should strike the marriage requirement in the gestational surrogacy statute as well as the right to revoke consent in the traditional surrogacy statute. Florida residents who are deemed fit to raise a child should not be denied the right to access any kind of assisted reproductive technology. Once a surrogate signs a traditional surrogacy agreement, she should be held to fulfilling her intentions of gestating a child for a couple who is unable to do so without her help. Citizens are entitled to a sense of legal predictability when they make constitutionally protected decisions regarding their procreative lives. Florida must revise its surrogacy statutes to reflect modern times.