

# First Comes Love. Then Comes Marriage. Then Comes a Baby in a Baby Carriage: An Application of Protective Surrogacy Laws to the Tarheel State

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## ABSTRACT

Assisted Reproductive Technology (ART) and determining parentage have a common feature: each is governed by state law or the lack of such laws. This lack of statutory regulations presents significant legal challenges to gay men who wish to start a family. Because same-sex male couples seeking to become fathers through ART and surrogacy are the most likely demographic to be impacted when determining parentage, laws that influence the direction of surrogacy will undeniably facilitate whether both males will be deemed a father. To provide same-sex male couples with a pathway to parenthood, North Carolina should (1) develop robust, protective surrogacy laws and (2) adopt an intent-based approach when determining parentage.

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#### INTRODUCTION

“I do.” These sacred words historically signal a commitment to marriage and matrimony. On October 10, 1987, “The Wedding” occurred.<sup>1</sup> But instead of an “ordinary” matrimony with one bride and one groom at the altar, nearly 2,000 same-sex couples gathered at the National Mall in Washington D.C. to pledge their vows and say “I do.”<sup>2</sup> Nearly two years later, courts in New York and California “define[d] same-sex couples as families.”<sup>3</sup> In 2003, the Massachusetts Supreme Court determined that the state’s ban on same-sex marriage was unconstitutional, marking Massachusetts as the first state in United States history to constitutionalize same-sex marriage.<sup>4</sup> Shortly after, states across the northeast followed suit.<sup>5</sup> Finally, in 2015, the United States Supreme Court struck down all states’ bans on same-sex marriage and legalized same-sex marriages in all fifty states.<sup>6</sup>

While the legalization of same-sex marriage marked an incredible milestone in lesbian, gay, bisexual, transgender, and questioning (LGBTQ) rights, some individuals may view marriage as incomplete without the right to conceive children and start a family.<sup>7</sup> In this regard, same-sex male couples cannot biologically procreate the same way heterosexual and lesbian couples can. Accordingly, assisted reproductive technology (ART) and surrogacy offer a solution: same-sex male couples

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1. *The Wedding*, MALL HISTORY, <http://mallhistory.org/items/show/532> [https://perma.cc/P4HH-MRZP].

2. *Id.*

3. *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEO. LAW LIB., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201> [https://perma.cc/X4LU-3RE8].

4. Amanda Onion, Missy Sullivan & Matt Mullen, *First Legal Same-Sex Marriage Performed in Massachusetts*, HISTORY, (July 21, 2010), <https://www.history.com/this-day-in-history/first-legal-same-sex-marriage-performed-in-massachusetts> [https://perma.cc/RJ8U-Y6N4].

5. *See generally id.*

6. *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015).

7. *See, e.g.*, Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1067 (2016) (quoting Second Amended Complaint at 1, 18, *Krupa v. Porrino*, No. 16-cv-4637, (D.N.J. Oct. 13, 2016) (internal citations omitted)).

may use surrogacy to conceive children. However, while surrogacy allows same-sex male couples to start a family, problems exist within the current legal framework when determining parentage through ART. Consequently, some men who have used surrogacy but who are not biologically related to the child have found their parentage questioned, and in some cases, denied.<sup>8</sup> Because state law determines whether individuals may use surrogacy to procreate, individuals who wish to have children through surrogacy may not be protected.

This Note argues that North Carolina should enact laws to protect same-sex fathers using ART and adopt an intent-based approach in determining parentage. This Note contains three parts. Part I provides historical context surrounding the use of ART. Part II offers an analysis revealing that few states have enacted legislation regarding surrogacy. In particular, this section examines California and Washington surrogacy laws to argue that North Carolina should emulate those states' provisions. Finally, Part III reveals reasons North Carolina should adopt surrogacy laws and offers an approach through which the North Carolina General Assembly can develop such laws.

## I. THE HISTORICAL CONTEXT OF ASSISTED REPRODUCTIVE TECHNOLOGY

Because the number of gay fathers raising children as primary caregivers is increasing,<sup>9</sup> it is important to understand the historical context of ART. First, ART is a necessity for same-sex male couples intending to become parents because of structural infertility. Second, there are different types of procedures through ART that should be distinguished.<sup>10</sup> Third, the history of ART reveals that more and more individuals are using ART as a means to create a family.<sup>11</sup> Finally, despite the growing use of ART, state law and the lack of state law control how ART may be used.<sup>12</sup> Therefore, an exploration into ART's historical significance provides an understanding as to why North Carolina should adopt protective surrogacy laws for same-sex male fathers.

### *A. ART as a Necessity for Same-Sex Male Couples*

While various types of procedures available through ART exist, it is important to understand why ART is necessary for gay fathers. The use of

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8. See discussion *infra* Section I.C.

9. Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 371 (2011).

10. See discussion *infra* Section I.B.

11. See discussion *infra* Section I.C.

12. See discussion *infra* Section I.D.

ART to conceive children is, in large part, due to two categories of infertility: functional and structural.<sup>13</sup>

First, functional infertility refers to the inability, whether male or female, to reproduce for medical reasons.<sup>14</sup> Such medical reasons could include: “having a low sperm count, having no viable eggs, or being unable to carry a baby to term.”<sup>15</sup> In essence, functional infertility emphasizes the biological incapacity to conceive children through natural and sexual reproduction.

Second, structural infertility “applies to the situation of individuals who are single or those who have a partner of the same sex, and therefore require another party’s biological assistance to reproduce.”<sup>16</sup> Accordingly, same-sex male couples intending to become parents fall under this category of infertility. Because functional and structural infertility impede the ways in which infertile heterosexual and same-sex couples can create a family, ART provides a unique opportunity to conceive children.

#### *B. Distinguishing Between the Different Types of ART Available*

Three main forms of ART exist: (1) artificial insemination; (2) in vitro fertilization; and (3) surrogacy. Artificial insemination refers to the general process whereby sperm is inserted into a vagina or uterus through non-sexual means.<sup>17</sup> In this process, a medical doctor inserts sperm directly into a uterus, so that the sperm may maneuver around obstructions that may be the cause of infertility.<sup>18</sup> In vitro fertilization or “IVF” is a laboratory medical procedure in which sperm is placed with an unfertilized egg in a petri dish to achieve fertilization.<sup>19</sup> After fertilization is achieved, the embryo is then directly transferred from the petri dish into the uterus to begin pregnancy, or the embryo may also be frozen for future use if infertility is an issue.<sup>20</sup>

Surrogacy is a method of assisted reproduction where the intended parents work with a surrogate who will carry the conceived child until

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13. Dana, *supra* note 9, at 359

14. *Id.*

15. *Id.*

16. *Id.*

17. Nivin Todd, *Infertility and Artificial Insemination*, WEBMD (Aug. 1, 2021), <https://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination> [<https://perma.cc/3E3Y-H4N3>].

18. *Id.*

19. See *IVF–In Vitro Fertilization*, AM. PREGNANCY ASS’N, (Apr. 24, 2019), <https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization-70966> [<https://perma.cc/T9SU-SBNQ>].

20. See generally Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 838 (2000).

birth.<sup>21</sup> Generally, this method of ART is preferred for couples for whom pregnancy would be medically risky or biologically impossible, such as gay male partners who intend to be fathers.<sup>22</sup> As opposed to adoption, surrogacy ensures one member of the couple's genes will be inherited by the child and "the intended parents can make the decision to bring a child into the world and are thus more involved in the procreation process."<sup>23</sup> There are two types of surrogacy: traditional and gestational.<sup>24</sup> Each type presents significant and novel legal challenges to intended parents.

In traditional surrogacy, a surrogate is inseminated with sperm from an intending father and carries the child until birth.<sup>25</sup> Upon birth, the infant is genetically related to both the surrogate and the intended father.<sup>26</sup> This situation creates legal concerns in determining parentage if a surrogate refuses to terminate her legal rights after delivering the child.<sup>27</sup> Even if a surrogate terminates her legal rights, the nonbiological parent will have to undergo the process of adopting the child if the couple resides in a jurisdiction that allows second-parent adoption. "For a gay couple, the non-biological intended father would need to adopt the child and the surrogate mother would need to legally terminate her parental rights through that adoption process."<sup>28</sup> If the surrogate mother refuses to terminate her right to the child, or if the gay couple resides in a jurisdiction that bars second parent adoption, the non-biological intended father is rendered childless and is not recognized as a legal parent.<sup>29</sup>

In gestational surrogacy, a surrogate carries an embryo to term for another couple who are the intended parents of the child.<sup>30</sup> Unlike traditional surrogacy, a gestational surrogate functions as a carrier and is not genetically related to the child because a gestational surrogate "is

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21. *What is Surrogacy?*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/about/what-is-surrogacy> [<https://perma.cc/5KW7-3BXT>].

22. *Id.*

23. Evie Jeang, *Reviewing the Legal Issues That Affect Surrogacy for Same-Sex Couples*, L.A. L., July–Aug. 2016, at 12.

24. *The Different Types of Surrogacy: Which is Right for You?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/types-of-surrogacy/> [<https://perma.cc/Q2Z6-CTZW>].

25. *See id.*

26. Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y 895, 897 (2011). It is important to note that, upon birth in traditional surrogacy, the conceived child is exclusively genetically related to the surrogate and the sperm donor; the child is *not* genetically related to the other non-biological intended parent. *Id.*

27. *See, e.g., In re Baby M*, 109 N.J. 396, 457–60, A.2d 1227 (1988) (determining that evidence supported awarding custody of the child born pursuant to the surrogate parenting contract to the natural father and his wife and not the surrogate mother).

28. Palmer, *supra* note 26, at 901.

29. *Id.*

30. *See Jeang, supra* note 23.

impregnated via IVF with an embryo that was conceived via donated ovum and sperm” from the couple.<sup>31</sup> Put simply, a gestational surrogate is not genetically related to the child. Rather than being perceived as a parent, gestational surrogates assume the role of a carrier.<sup>32</sup> Because gestational surrogacy subscribes to a genetic relationship between the intended parents and the conceived child, “ninety-five percent of surrogacy agreements in the United States are gestational.”<sup>33</sup>

Accordingly, “no one can deny that assisted reproductive technology implicates an essential matter of public policy—it is a basic expectation that our legal system should enable each of us to identify our legal parents with reasonable promptness and certainty.”<sup>34</sup> While some courts have recognized this crucial expectation, only a number of states have enacted legislation regulating ART and its impact on same-sex couples.<sup>35</sup>

### C. Rising Surrogacy Use in the United States

Since its inception, more and more individuals are using ART. Between 2004 and 2008, the use of ART to procreate increased by 89% in the United States,<sup>36</sup> and in 2019, nearly 2% of all infants were conceived through ART.<sup>37</sup> While the use of ART has increased, regulations and protections governing ART are scarce.<sup>38</sup>

Unlike some births, gay fathers do not conceive children by accident.<sup>39</sup> Instead, gay persons who wish to become parents must be more intentional in conceiving children and starting a family.<sup>40</sup> Because some couples, like gay men, are unable to biologically conceive children through traditional notions of reproduction, it makes sense that “same-sex couples . . . are different from fertile heterosexual couples in that they

31. Palmer, *supra* note 26, at 897.

32. Dana, *supra* note 9, at 362–63.

33. *Id.* This view is expressed through a heterosexual lens. For heterosexual couples, the intended mother is often—but not always—the provider of the egg. In turn, both intended parents are genetically related to the resulting child in a heterosexual relationship. That option, however, is not available to gay couples. See discussion *infra* Section II.A.

34. Raftopol v. Ramey, 299 Conn. 681, 683–84, 12 A.3d 783, 784–85 (2011).

35. See generally Courtney G. Joslin, (Not) Just Surrogacy, 109 CAL. L. REV. 401, 432 (2021).

36. Emily Urch, *Putting All of North Carolina's Eggs in One Basket: The Case for Comprehensive Surrogacy Regulation*, 37 N.C. CENT. L. REV. 31, 41 (2014). See also Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 3 (2010), <http://thetarrytownmeetings.org/sites/default/files/Surrogacy%20in%20America%20Report.pdf>. [<https://perma.cc/X4ZP-VP4U>].

37. *State-Specific Assisted Reproductive Technology Surveillance*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/state-specific-surveillance/index.html> [<https://perma.cc/WUW2-TNKA>].

38. Dana, *supra* note 9, at 355. While adoption is a pathway to parentage for same-sex male couples in some jurisdictions, this Note solely focuses on ART as an option to parenthood.

39. See Palmer, *supra* note 26 at 896.

40. *Id.*

must intend a pregnancy for it to occur.”<sup>41</sup> Data indicates that there is an increase in gay and lesbian couples raising children in the United States.<sup>42</sup> Most notably, according to U.S. Census Data, nearly “one in twenty male same-sex couples were raising children in 1990; by 2000, this number had risen to one in five.”<sup>43</sup> Even though this increase of gay fathers marked a new reproductive era for gay men, most same-sex male couples emphasized that “they d[o] not feel that parenthood was available to them in the way that it was for heterosexual men.”<sup>44</sup>

Despite gay couples’ intentional effort in creating a family and having children through ART, same-sex male couples still encounter a myriad of parentage issues. *Dvash-Banks v. Pompeo* demonstrates a major challenge that gay fathers experience.<sup>45</sup> In that case, Andrew Banks held dual citizenship in the United States and Canada.<sup>46</sup> While both of his parents were from Canada, Andrew was born and raised in the United States.<sup>47</sup> In 2005, Andrew moved to Israel where he later enrolled in a master’s program at Tel Aviv University.<sup>48</sup> The following year, in 2008, Andrew met Elad Dvash.<sup>49</sup>

Elad was a citizen of Israel, and he had lived in Israel his entire life, prior to meeting Andrew.<sup>50</sup> Andrew and Elad dated and fell in love.<sup>51</sup> In 2010, the couple moved to Toronto, Canada, to marry.<sup>52</sup> While Andrew and Elad preferred to live in the United States and reunite with Andrew’s family, the United States did not recognize same-sex marriage.<sup>53</sup> Canada, however, recognized Andrew and Elad’s marriage.<sup>54</sup> Accordingly, the United States barred Elad’s pathway to permanent residency despite his marriage to Andrew.<sup>55</sup>

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41. Michael S. DePrince, *Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood Through Surrogacy*, 100 MINN. L. REV. 797, 800 (2015).

42. Dana, *supra* note 9, at 371. See *infra* Section II.A, for a discussion as to how lesbian same-sex parents are distinguished from gay same-sex parents with regard to parentage law.

43. Dana, *supra* note 9, at 371.

44. DEAN A. MURPHY, *GAY MEN PURSUING PARENTHOOD THROUGH SURROGACY: RECONFIGURING KINSHIP* 100 (2015).

45. See generally Complaint, Andrew Mason Dvash-Banks and Ethan Jacob Dvash-Banks v. U.S. Dept’ of State & the Hon. Rex W. Tillerson, Sec’y of State, No. 18-CV-00523 (United States District Court Central District of California Jan. 22, 2018). <https://immigrationequality.org/wp-content/uploads/2020/06/Dvash-Banks-Complaint-Filed.pdf> [<https://perma.cc/4UJA-M6EN>].

46. *Id.* at 10.

47. *Id.*

48. *Id.* at 11.

49. *Id.*

50. *Id.*

51. See generally *id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

In 2015, Andrew and Elad decided to have children and selected an anonymous egg donor.<sup>56</sup> In early 2016, their surrogate became pregnant with one embryo using Andrew's sperm and one embryo using Elad's sperm.<sup>57</sup> Both Andrew and Elad intended to be parents to the resulting children.<sup>58</sup> On September 16, 2016, Andrew and Elad became parents to twin boys—Aiden and Ethan.<sup>59</sup> Under Canadian law, Andrew and Elad were the sole parents of Aiden and Ethan.<sup>60</sup> Shortly after Aiden and Ethan were born, the fathers attempted to apply for U.S. passports for the twins.<sup>61</sup> Aiden's application for a U.S. passport was granted while Ethan's application was denied.<sup>62</sup> The U.S. government determined that "because Ethan does not have at least one biological or adoptive U.S. citizen parent, Andrew and Elad could not complete an application for citizenship on Ethan's behalf that would satisfy the requirements of . . . [the United States Citizenship and Immigration Services]."<sup>63</sup>

This government decision adversely affected Ethan's freedom to permanently live in the United States with his family. Despite Andrew's status as a U.S. citizen, Ethan's genetic makeup from Elad barred him from attaining U.S. citizenship.<sup>64</sup> While the U.S. Court of Appeals for the Ninth Circuit ultimately resolved this case in favor of the Dvash-Banks on appeal,<sup>65</sup> Andrew and Elad's battle against discriminatory policies towards same-sex parents demonstrates nonetheless that "[b]iologically based justifications are frequently invoked to deny recognition of LGBT[Q] nonbiological parents."<sup>66</sup>

In addition to biological justifications precluding LGBTQ couples to be recognized as parents, society's discomfort with nontraditional families involving same-sex parents influences the ways in which same-sex couples have access to ART.<sup>67</sup> "[T]he law still lags behind when it comes to protecting the family relationships [LGBTQ parents] build as the legal

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 12.

60. *Id.*

61. *Id.*

62. *Id.* at 13.

63. *Id.* at 14–15.

64. *Id.* at 15.

65. Press Release, Immigr. Equal., App. Ct. Upholds Previous Ruling That Twin Son of Gay Married Couple Born Abroad is U.S. Citizen from Birth, (Oct. 9, 2020) (on file with author), <https://immigrationequality.org/press/appellate-court-upholds-previous-ruling-that-twin-son-of-gay-married-couple-born-abroad-is-u-s-citizen-from-birth/> [<https://perma.cc/XMY5-5TK6>].

66. Joslin, *supra* note 35, at 401, 406.

67. Palmer, *supra* note 26, at 900.



system has been slow to recognize families that do not fit the traditional heterogenous structure.”<sup>68</sup>

Additionally, when judges are tasked with determining parentage, their decisions may be influenced by socio-cultural norms that dictate same-sex parents are not in the best interests of the child.<sup>69</sup> This socio-cultural conditioning within the judicial system reveals courts often treat ART cases involving same-sex parents differently than their heterosexual counterparts. Accordingly, the connection between laws defining relationship recognition and the legal framework regulating ART is imperative for gay men to understand when considering surrogacy as a means for parenthood.

#### *D. State Law Governs ART*

Surrogacy laws vary by state, and state law ultimately governs the use of surrogacy as a means to create a family.<sup>70</sup> In general, states have statutes that allow same-sex couples to use surrogacy, statutes that expressly prohibit surrogacy, statutes that allow surrogacy but restrict who may use it, or no statutes that regulate surrogacy.<sup>71</sup> For instance, Michigan imposes criminal liability onto participants who enter a compensated surrogacy arrangement.<sup>72</sup> If a surrogacy contract is created and entered into, intending parents may be found guilty of a misdemeanor, which may result in fines of up to \$10,000 and a year in prison.<sup>73</sup> Similarly, states like Louisiana consider surrogacy agreements void and unenforceable because

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68. DePrince, *supra* note 41, at 812. There is a presupposed notion that “real” parenthood—or perhaps “real fatherhood—is genetic. Thus, each man is a parent only to the child to whom he is genetically related. This situation illustrates the ambiguity in determining parentage with same-sex male couples because the egg donor, who is genetically related to the child, is not understood to be a parent and neither is the surrogate, who is not genetically related to the child but serves a parent-like function.

69. Dana, *supra* note 9, at 356. See also Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 392 (2007). Similar to society’s discomfort with nontraditional families, the cultural conditioning of judges in some jurisdictions reveals a notion that distinguishes a “real” father from a secondary father—the parent with a biological connection is primary. The universal presumption is that most men in heterosexual relationships are legal parents because they are married to the woman who gave birth. Genetic testing is not routinely conducted to establish parenthood of children born to married, heterosexual couples.

70. DePrince, *supra* note 41, at 800.

71. Stephanie Canner, *Navigating Surrogacy Law in the Non-United States: Why All States Should Adopt a Uniform Surrogacy Statute*, 33 J. C.R. & ECON. DEV. 113, 124 (2019); see also Leora I. Gabry, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 424–27 (2012) (stating that states either ban, nullify, or permit surrogacy contracts with some restriction).

72. MICH. COMP. LAWS §§ 722.855, .857, .859 (1988).

73. *Id.*

such contracts are contrary to public policy.<sup>74</sup> On the other hand, Texas permits surrogacy contracts but requires a court's approval.<sup>75</sup>

Consequently, the lack of uniform surrogacy laws in the United States "affect[s] the ability of gay men to access surrogacy."<sup>76</sup> While some states are making an effort to create and reform surrogacy laws, other states are inconsistently enforcing surrogacy laws, which complicates the necessary legal procedures for all parties involved: the intended parents, surrogates, surrogacy firms, attorneys, and most importantly, the child.<sup>77</sup> Inconsistent applications and rulings yield unpredictable results when determining parentage through the use of ART,<sup>78</sup> especially for gay fathers. Because a uniform framework does not exist among states concerning the legal relationships established through assisted reproduction, intended parents are unfairly burdened to offer proof of parentage, and, in some cases, litigate their parental status as legal parents. Consequently, judges in various states are beseeching their state legislatures for guidance in determining parentage.<sup>79</sup> Professor Courtney Joslin succinctly encapsulates the fact that states enact different surrogacy laws:

[A]pproximately half the states—[twenty-seven (27) jurisdictions]—have statutory

provisions regulating surrogacy. The contemporary trend strongly favors permissive statutory regimes; twenty-two [(22)] of the twenty-seven [(27)] existing schemes are permissive ones. This trend is accelerating and likely to continue. Most of these permissive laws—fourteen [(14)] of the twenty-two [(22)]—were enacted in the last ten years. And in 2019 alone, at least six more states considered bills to permit surrogacy.<sup>80</sup>

Because laws that define what a relationship is for same-sex couples, are constantly changing, gay couples' access to reproduction and child rearing are impacted. Therefore, it is imperative that state legislatures act

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74. LA. STAT. ANN. § 9:2713(A) (1987).

75. TEX. FAM. CODE ANN. §§ 160.751.763 (West 2003).

76. Palmer, *supra* note 26, at 900.

77. Gabry, *supra* note 71, at 422.

78. Dana, *supra* note 9, at 354.

79. *Id.* at 354–55 ("Judges in multiple states issued opinions that included a plea for guidance from their respective state legislatures yet only a handful of states actually passed laws regarding parentage in the case of surrogacy arrangements, and today many states continue to rely on judicial determinations.").

80. Joslin, *supra* note 35, at 409.

on surrogacy matters since the issue of surrogacy and use of ART has largely been left for and determined by the states.<sup>81</sup>

## II. CALIFORNIA, WASHINGTON, AND NORTH CAROLINA: DISTINGUISHING STATE STATUTORY FRAMEWORKS

The legal recognition of same-sex marriages allowed LGBTQ individuals to assert their constitutional right to marry;<sup>82</sup> however, without the right to conceive children and start a family, some individuals may view marriage as incomplete. Thus, it makes sense that the demand for surrogacy services increased upon federal recognition of same-sex marriage.<sup>83</sup> Studies indicate that, in some urban areas, gay male couples make up a large share of the surrogacy market.<sup>84</sup> Despite this indication, “there are more laws in the United States governing the breeding of dogs, cats, fish, exotic animals, and wild game species than exist with respect to the use of surrogates and reproductive technologies to make people.”<sup>85</sup>

This Part illustrates how the lack of surrogacy laws in some jurisdictions create legal challenges for same-sex male couples who wish to become fathers. By analyzing California and Washington’s ART statutory framework, this Part also demonstrates how surrogacy laws may provide protection for same-sex male partners. Finally, this Part details North Carolina’s lack of statutory provision regulating ART.

### *A. Hurdles, Burdens, and Challenges: The Legal Dilemma for Gay Fathers*

While lesbian couples and bisexual women also encounter legal issues with the use of ART to conceive children and start a family, gay male couples are unfairly burdened because the law necessitates standards that gay male couples are inherently unable to meet.<sup>86</sup> Unlike gay male

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81. Katherine C. Richardson, “*Be My Baby*”: *A Surrogacy Law Proposal for North Carolina*, 98 N.C. L. REV. 165, 175 (2019) (arguing that “states must be permitted to ‘serve as . . . laboratories’ to legislate on surrogacy arrangements accordingly”).

82. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

83. Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1169 (2014).

84. Boucai, *supra* note 7, at 1082. *See also* Kari Lydersen, *Make Room for Daddies: Demand for Surrogates Grows with Acceptance of Same-Sex Couples*, CRAIN’S CHI. BUS. (Feb. 2, 2013), <http://www.chicagobusiness.com/article/20130202/ISSUE03/302029981/make-room-for-daddies-surrogate-demand-grows> [<https://perma.cc/6DWX-W7L6>].

85. Arthur Caplan, *The Baby Market*, NY TIMES: THE OPINION PAGES (Dec. 29, 2009), <http://roomfordebate.blogs.nytimes.com/2009/12/29/the-baby-market/> [<https://perma.cc/U9S9-V8CT>].

86. Dana, *supra* note 9, at 356–57; *see also* Palmer, *supra* note 26, at 898 (stating “procreation is often more accessible”); *see also* Boucai, *supra* note 7, at 1090 (stating “[s]ome lesbians and bisexual women choose to gestate the fertilized egg of one partner in the womb of the other. One couple described this possibility as in vitro fertilization’s ‘biggest benefit,’ because the baby is then truly ‘a child of the pair of us,’ a baby ‘we both make and grow.’”).

couples, lesbian female couples who wish to conceive children are insulated with two options.<sup>87</sup> First, lesbian female couples have the ability to use “artificial insemination and donor sperm,” where “one partner can get pregnant and give birth to the child.”<sup>88</sup> With this option, “some courts have held that based on the marital presumption—meaning Partner A consented to Partner B’s artificial insemination—Partner A is also legally a second parent.”<sup>89</sup> Second, lesbian couples have the ability to utilize IVF. In this scenario, one of the females’ egg is combined with donor sperm, and the other female becomes the gestational surrogate thus carrying the pregnancy to term upon giving birth.<sup>90</sup> In these latter situations, most jurisdictions determine that *both* females within the dyad are the legal mothers because one female has a genetic link to the child, and the second female gave birth to the child.<sup>91</sup> Taken together, these options create avenues by which lesbian couples can dodge excessive bureaucracy and adherence to rules and formalities surrounding parentage and ART, so that both intended parents will be recognized as the legal mothers.<sup>92</sup>

Gay male couples, however, experience a higher burden and more legal hurdles in establishing parentage through ART because of structural infertility.<sup>93</sup> Unlike their female counterparts, males are unable to biologically gestate. Accordingly, neither of the previously mentioned loopholes, as applied to lesbians, are available to gay male couples.<sup>94</sup> Given this biological premise, gay male couples who wish to conceive a child *must necessarily* hire a surrogate to carry their child to term.<sup>95</sup> At most, the conceived child is genetically related to only one member of the gay male couple as the legal father, and the non-biological partner is the intended parent with no parental rights.<sup>96</sup> Unless the non-biological partner lives in a jurisdiction providing for second-parent adoption, he will remain childless and have no legal parental rights over the conceived child.<sup>97</sup> Additionally, if a female surrogate refuses to terminate her legal parental rights to the child, the non-biological intended father is ultimately precluded from executing a second-parent adoption.<sup>98</sup> Under these

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87. Dana, *supra* note 9, at 377.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *See supra* Section I.A for a discussion on structural infertility.

94. *See* Dana, *supra* note 9, at 377.

95. *Id.* at 378.

96. Palmer, *supra* note 26, at 897.

97. Dana, *supra* note 9, at 378.

98. *Id.*

standards, gay male couples are “unable to both be declared legal parents”<sup>99</sup> and have restricted options for determining parentage.<sup>100</sup>

While the use of surrogacy has increased, some states, such as Arizona, Indiana, Michigan, and the District of Columbia, still expressly outlaw surrogacy contracts and render such contracts unenforceable.<sup>101</sup> And yet, while “[s]ome states are considered ‘surrogacy-friendly’ states and good jurisdictions for surrogacy arrangements,”<sup>102</sup> a number of states have yet to legislate on surrogacy.<sup>103</sup> Professor Joslin argues that, at best, statutory schemes regulating surrogacy are permissive,<sup>104</sup> and therefore, “it is critical to pay careful attention not just to whether jurisdiction should allow surrogacy, but also to how they regulate surrogacy.”<sup>105</sup>

### *B. California Surrogacy Regulations*

An examination of California and its statutes regulating surrogacy offers insight into an intent-based approach in determining parentage. According to United States Census Bureau, California has a population estimated to be about 39.51 million people.<sup>106</sup> Among these 39.51 million individuals, 5.3% identify as a part of the LGBTQ community.<sup>107</sup> Males make up an estimated 49% of the LGBTQ population while females make up an estimated 51% of the LGBTQ population.<sup>108</sup> Taken together in the aggregate, California houses an estimated two million people who identify as LGBTQ. Among those who identify as LGBTQ, 24% of the population have had children or are with children.<sup>109</sup> Within that aggregate, nearly

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99. Dana, *supra* note 9, at 357.

100. Palmer, *supra* note 26, at 898.

101. *Id.* at 905.

102. *Id.* at 903.

103. For example, Alaska, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and Wyoming have no laws regarding surrogacy. *Surrogacy Laws*, SURROGACY EXPERIENCE, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> [<https://perma.cc/Q8P7-RSU7>].

104. Joslin, *supra* note 35, at 403 In this context, permissive means “allowed but not obligatory; optional.” *Permissive*, DICTIONARY.COM, <https://www.dictionary.com/browse/permissive> [<https://perma.cc/MZL3-UJMV>].

105. Joslin, *supra* note 35, at 409.

106. *Quick Facts: California*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/CA/PST045219> [<https://perma.cc/7J8Y-WZX4>].

107. *LGBT Proportion of Population: California*, UCLA SCH. L. WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=6#density> [<https://perma.cc/WR3U-DJX7>].

108. *Id.*

109. *Id.*

502,440 LGTQ people have children.<sup>110</sup> Furthermore, California ranks among the top five states with the largest LGBTQ population.<sup>111</sup>

As a state with one of the largest LGBTQ populations, *Johnson v. Calvert* established an intent-based framework by which intended parents may assert legal rights over a child through ART.<sup>112</sup> In *Johnson*, the Supreme Court of California examined a gestational surrogacy arrangement where the intended parents contributed genetic material and implanted the embryo into a surrogate.<sup>113</sup> A husband and wife brought suit seeking declaratory judgment that they were the legal parents of a child born of a woman in whom the couple's fertilized egg had been implanted.<sup>114</sup>

The task before the Court was to determine who was the legal mother when, pursuant to a surrogacy arrangement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her.<sup>115</sup> The defendant-surrogate argued she was the legal mother because she gave birth to the child.<sup>116</sup> The plaintiff—intended mother—argued she was the legal mother because she was both the genetic and the intended mother.<sup>117</sup> The Court determined that it was imperative to inquire into the parties' intentions as manifested in the surrogacy agreement.<sup>118</sup> Ultimately, the Court held “she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”<sup>119</sup>

This intent-based approach allows California courts to consider more cases “in which the intended parents . . . relied on the intent of the parties to determine the child's legal parents.”<sup>120</sup> In *C.M., v. M.C.*, the biological father of children, conceived via IVF using the father's sperm and ova from an anonymous donor, filed a petition to be declared the sole parent of the children.<sup>121</sup> The surrogate opposed the petition.<sup>122</sup> The court held that while the terms of the surrogacy agreement did not estop the surrogate

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110. *Id.*

111. *Id.*

112. *Johnson v. Calvert*, 5 Cal. 4th 84, 95, 851 P.2d 776, 19 Cal. Rptr. 2d (1993).

113. *Id.* at 88.

114. *Id.*

115. *Id.* at 87–88.

116. *Id.*

117. *Id.* at 88.

118. *Id.* at 92.

119. *Id.* at 93.

120. Gabry, *supra* note 71, at 422.

121. *C.M. v. M.C.*, 7 Cal. App. 5th 1188, 1192, 213 Cal. Rptr. 3d 351 (2017).

122. *Id.*

from challenging the legal effect or validity of the surrogacy agreement, the surrogacy agreement—which substantially complied with statutory requirements and identified the biological father as the intended parent—provided a basis to establish the biological father’s parentage and precluded the surrogate mother’s claim to the child as birth mother.<sup>123</sup> In essence, the decision in *C.M.* re-affirms the Supreme Court of California’s decision in *Johnson*—that an intent-based approach governs parentage when using ART.<sup>124</sup>

California has been revered across the country and world by same-sex couples seeking to become parents because of the state’s intent-based approach in determining parentage.<sup>125</sup> Furthermore, California legally authorizes gestational surrogacy<sup>126</sup> and does not authorize traditional surrogacy.<sup>127</sup> California also permits compensation to surrogates.<sup>128</sup> Finally, the state does not have civil bans or penalties for using surrogacy.<sup>129</sup> Therefore, it makes sense that “California’s early recognition of gestational surrogacy as a legitimate way to create parent-child relationships powerfully shifted national attention toward gestational, rather than traditional, surrogacy,” and the state’s surrogacy laws have influenced other states across the country.<sup>130</sup>

### *C. Washington Surrogacy Regulations*

An examination of Washington, and its more inclusive statutes regulating surrogacy, illuminate the positive impact such regulations have on same-sex male fathers. According to the United States Census Bureau, Washington has an estimated population of 7.61 million people as of

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123. *Id.* at 1198–203.

124. See also Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1209 (2016) (suggesting that “intent provided a way to determine parentage”).

125. See generally MURPHY, *supra* note 44, at 133. (“California was considered particularly attractive because of the possibility of a pre-birth judgment transferring legal parentage to the prospective parents.”); see also *id.* at 183 (“Australian participants typically described the United States (and particularly California) in an almost clichéd way, as ‘the land of freedom.’”).

126. CAL. FAM. CODE §§ 7960(f)(2), 7962.

127. Joslin, *supra* note 35, at 465.

128. CAL. FAM. CODE § 7962.

129. Joslin, *supra* note 35, at 465.

130. NeJaime, *supra* note 124, at 1199. Under California’s intent-based approach, with regard to the issue of parentage for a non-biological father in a same-sex male relationship, the law dictates that the partner who did not provide genetic material will also be the natural father. See *id.* at 1229–30. Thus, the law affords the non-biological father full parental rights despite not having a genetic relationship. *Id.*

2019.<sup>131</sup> Among these individuals, 5.2% identify as LGBTQ.<sup>132</sup> In Washington, about 37% of males identify as LGBTQ while 63% of females identify as LGBTQ.<sup>133</sup> Taken together in the aggregate, Washington is home to nearly 395,980 LGBTQ identifying individuals.<sup>134</sup> Among this number of people who identify as part of the LGBTQ community, 28% are raising children or have raised children.<sup>135</sup> Based on this percentage, nearly 110,600 LGBTQ males and females are raising children or have raised children at some point in their life. Further, Washington ranks sixth in the nation with the highest LGBTQ population, just under California by one-tenth of a percent.<sup>136</sup>

While Washington also utilizes an intent-based approach to determine parentage through ART, the state offers a more comprehensive list of protections afforded to intended parents.<sup>137</sup> The Washington legislature clearly addresses: (1) assisted reproduction laws;<sup>138</sup> (2) general requirements for a surrogacy agreement and/or contract;<sup>139</sup> and (3) special rules regarding a gestational surrogacy agreement.<sup>140</sup> As such, Washington's approach to its laws regulating ART and surrogacy should influence other states for the following reasons: First, Washington authorizes gestational surrogacy.<sup>141</sup> Second, the state permits compensation for surrogacy.<sup>142</sup> Third, Washington does not have civil bans or penalties for using surrogacy.<sup>143</sup> Finally, while Washington offers a comprehensive list of statutory protections for intended parents using ART, the state also clearly: (1) details expectations, requirements, and eligibility of all parties; (2) provides a clear framework by which intended parents can become legal parents; (3) mitigates and curtails issues that

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131. *Quick Facts Washington*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/WA> [<https://perma.cc/W5SE-MMZ7>].

132. *LGBT Proportion of Population: Washington*, UCLA SCH. L. WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=53#density> [<https://perma.cc/Q2P7-6P6Z>].

133. *See generally id.*

134. *See generally id.*

135. *Id.*

136. *Id.*

137. WASH. REV. CODE § 26.26A.610 (2019) (“An individual who consents under RCW 26.26A.615 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”).

138. *See* WASH. REV. CODE § 26.26A.615; WASH. REV. CODE § 26.26A.620; WASH. REV. CODE § 26.26A.625; WASH. REV. CODE § 26.26A.630; WASH. REV. CODE § 26.26A.635.

139. WASH. REV. CODE § 26.26A.700; WASH. REV. CODE § 26.26A.705; WASH. REV. CODE § 26.26A.710; WASH. REV. CODE § 26.26A.715; WASH. REV. CODE § 26.26A.725.

140. WASH. REV. CODE § 26.26A.735; WASH. REV. CODE § 26.26A.740; WASH. REV. CODE § 26.26A.750; WASH. REV. CODE § 26.26A.755.

141. WASH. REV. CODE § 26.26A.700(3).

142. WASH. REV. CODE § 26.26A.715(2)(a).

143. Joslin, *supra* note 35, at 472.



could arise during litigation; and (4) mitigates the opportunity for litigation.<sup>144</sup>

In an interview with a Washington resident, Jeff, it is clear that Washington's legal framework offers security to same-sex fathers even if one partner of the dyad does not contribute genetic material.<sup>145</sup> Jeff and his partner, Brian, entered into a gestational surrogacy contract with a surrogate, Jessica.<sup>146</sup> Brian provided genetic material to a third-party egg donor while Jeff did not.<sup>147</sup> Upon fertilization, Jessica was impregnated with an embryo created from Brian's sperm and a third-party egg donor.<sup>148</sup> Jessica carried the embryo to term, and Jeff and Brian celebrated the birth of their twin daughters in February 2020.<sup>149</sup> Despite not having a genetic relationship to his twin daughters, Jeff expressed: "Even if my relationship with the girls is not biological and is only legal, I feel very secure. The state of Washington has given me the right and the ability to take on the status of an intended parent without the necessity of walking through a formal adoption process."<sup>150</sup> Because Washington's surrogacy laws are comprehensive, the state fosters a reassuring experience for same-sex fathers as intended parents.

#### *D. North Carolina Surrogacy Regulations*

An examination of North Carolina, and its inconsistent approach in determining parentage, reveals that same-sex male couples in the state would likely benefit from enacting protective surrogacy laws. According to the United States Census Bureau, North Carolina is home to an estimated 10.49 million individuals,<sup>151</sup> and among these individuals, 4% of the population identify as LGBTQ: 39% percent identify as male and 61% percent identify as female.<sup>152</sup> Taken together in the aggregate, North Carolina is home to nearly 420,000 LGBTQ identifying individuals.<sup>153</sup>

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144. *See generally* WASH. REV. CODE § 26.26A.740; WASH. REV. CODE § 26.26A.745; WASH. REV. CODE § 26.26A.750; WASH. REV. CODE § 26.26A.755 *See also* Joslin, *supra* note 35, at 414. "Washington's surrogacy scheme is longer and more comprehensive. Importantly, this more detailed scheme sets forth a range of requirements intended to safeguard the parties and to fulfill important policy goals." *Id.* at 414.

145. Video Interview with Jeff, University Professor (Apr. 8, 2021). The name, title, and institutional affiliation of the interviewee has been redacted for purposes of honoring confidentiality.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Quick Facts North Carolina*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/NC> [<https://perma.cc/8WZ3-P9Q5>].

152. *LGBT Data & Demographics*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=37#density> [<https://perma.cc/656W-DV48>].

153. *See generally id.*

Among the 420,000 LGBTQ identifying individuals, 26% of this population, or approximately 109,200 LGBTQ individuals, either have children or have had children at one point in their lives.<sup>154</sup> Furthermore, North Carolina ranks among the top thirty states with one of the largest LGBTQ population.<sup>155</sup>

Unlike California and Washington, North Carolina does not have a statutory scheme or case law regulating the use of ART and surrogacy.<sup>156</sup> “Currently, no statutes or case law directly address surrogacy in North Carolina, and only one statute deals with artificial reproductive technology at all.”<sup>157</sup>

While surrogacy laws are nonexistent in North Carolina, most courts favor the process in determining parentage.<sup>158</sup> Even with this favorable stance, however, the process in determining parentage and asserting legal parental rights is inconsistent.<sup>159</sup> For example, some judges may not recognize an intended parent’s legal status as a parent if there is no genetic link between the parent and the child because North Carolina’s common law presumes that the husband of a pregnant mother is the father of the child.<sup>160</sup> This presumption necessarily leads to the determination that the surrogate’s husband is the legal father and the surrogate mother is the legal mother, regardless of the genetic relationship between the conceived child and the mother’s husband. In these instances, a non-biological intended parent has two options: they may need to initiate a second parent adoption; or alternatively, they may execute a pre-birth order declaring their legal standing as a parent.<sup>161</sup> The inconsistent legal determinations of parentage through ART and under common law reveal North Carolina needs to develop legal standards and legislation governing surrogacy.

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154. *See generally id.*

155. *Id.*

156. Richardson, *supra* note 81, at 169.

157. *Id.* at 171. *See also* N.C. GEN. STAT. § 49A-1 (2017) (“Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique.”); *see also* Urch, *supra* note 36, at 34 (stating “[a] majority of the nation’s states, including North Carolina, do not address surrogacy in their statutory provisions”).

158. Amy Wallas Fox, *What You Need to Know About Surrogacy in North Carolina*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/north-carolina-surrogacy-laws> [<https://perma.cc/8DDZ-ATP8>].

159. *See generally id.*

160. *State v. Bowman*, 52 S.E.2d 345, 345 (N.C. 1949) (“When conception occurs during the marriage of its mother, a child is presumed to be the legitimate offspring of the then husband of the mother . . .”).

161. *Id.*

In 2009, the North Carolina General Assembly proposed legislation regulating gestational surrogacy agreements.<sup>162</sup> The bill passed the Senate upon second reading, but it failed to pass the House.<sup>163</sup> While the legislature rejected the bill, the proposed legislation marked a milestone in reproductive law in North Carolina for multiple reasons: First, the bill acknowledged the existence of assisted reproduction and an intended parent by providing a clear definition to each term.<sup>164</sup> Second, the bill expressly authorized gestational surrogacy agreements.<sup>165</sup> Third, the proposed legislation permitted intended parents to petition the court to validate surrogacy agreements and provided instructions for navigating judicial hearings in substantiating gestational surrogacy agreements.<sup>166</sup> Fourth, the bill offered instructions governing the termination of a gestational surrogacy agreement.<sup>167</sup> Fifth, the bill allowed compensation for a gestational carrier.<sup>168</sup> Finally, and most importantly, the proposed legislation provided instructions in determining parentage under validated gestational surrogacy agreements.<sup>169</sup>

### III. STATUTORY RECOMMENDATION TO THE NORTH CAROLINA GENERAL ASSEMBLY: LEGISLATE PROTECTIVE SURROGACY LAWS

Gay fathers are significantly impacted by the lack of uniform surrogacy laws in North Carolina. Accordingly, North Carolina must adopt statutes affording gay fathers legal protection when intending to start a family.

Compelling reasons exist as to why the North Carolina General Assembly should regulate ART through specific statutory provisions. Professor NeJaime argues that “[a] more comprehensive and evenhanded use of consent in the regulation of ART can promote equality, based on gender, sexual orientation, and marital status.”<sup>170</sup> Under this premise, it is clear that surrogacy laws could provide a more inclusive vision of reproductive liberty for same-sex male couples.<sup>171</sup> As North Carolina is

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162. S.B. 440, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009); H.B. 510, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009).

163. *See generally* S.B. 440, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009); H.B. 510, 2009 Gen. Assemb., 2009–2010 Sess. (N.C. 2009).

164. Gen. Assemb. Of N.C. Sess. 2009, Senate DRS75122-LU-18A\* (01-19), *Establish Gestational Surrogacy Agreements*, Senator Rand, Section 52D-1(1), (6).

165. *Id.* at 52D-2.

166. *Id.* at 52D-3; *id.* at 52D-4.

167. *Id.* at 52D-5

168. *Id.* at 52D-9.

169. *Id.* at 52D-6.

170. Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2345 (2017).

171. Joslin, *supra* note 35, at 406.

home to 420,000 LGBTQ identifying individuals,<sup>172</sup> it is both logical and crucial that the North Carolina legislature enact laws regulating the use of ART as gay fathers are negatively impacted by its continued absence.

Without surrogacy laws governing parentage and the use of ART, same-sex male fathers are forced to adopt their own children. Rather than allowing same-sex male fathers to reap the benefits of surrogacy, “North Carolina relies on the State’s adoption statutes to achieve the same results intended by surrogacy legislation.”<sup>173</sup> However, both forcing parents to adopt their own children when they provided genetic material for conception of their child and excluding the non-biological parent from recognition as a parent likely leads to a deprivation of parental rights.<sup>174</sup>

Because of this negative impact, it is imperative to address why North Carolina needs surrogacy laws. The existing legal framework governing surrogacy in North Carolina “inadequately provides redress for many of the considerations that accompany the changing times.”<sup>175</sup> Such existing procedures do not currently guarantee same-sex male parents will maintain legal ties to their children as intended parents<sup>176</sup> thus contributing to “legacies of exclusion.”<sup>177</sup> Further, because same-sex male couples are more likely to require ART than heterosexual couples and the general population, protective surrogacy regulations are essential for same-sex male couples wishing to conceive children in North Carolina.<sup>178</sup> Because surrogacy makes parenthood a real possibility for same-sex fathers, the North Carolina General Assembly should seek to protect that opportunity through a comprehensive and express statutory schema.<sup>179</sup> While the options for having children are more limited for gay men, than for heterosexuals and lesbians, the mere existence of surrogacy allows same-sex male couples to procreate. Therefore, North Carolina legislatures should develop surrogacy laws that provide safety and assurance to same-sex male couples. As Professor NeJaime asserts, “[t]he scant case law on the status of nonbiological fathers in same-sex couples affirms the gestational surrogate’s legal parentage and authorizes the nonbiological father’s nonrecognition.”<sup>180</sup>

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172. WILLIAMS INST., *supra* note 152.

173. Urch, *supra* note 36, at 42.

174. Dana, *supra* note 9, at 372 (arguing that “to assume that all gay couples view adoption as an adequate alternative to biological reproduction is unfair because this holds them to a different standard than their straight counterparts”).

175. Urch, *supra* note 36, at 32.

176. DePrince, *supra* note 41, at 836.

177. Joslin, *supra* note 35, at 407.

178. Boucai, *supra* note 7, at 1076.

179. Murphy, *supra* note 44, at 110.

180. NeJaime, *supra* note 170, at 2312.

Under these premises, North Carolina should enact laws protecting same-sex fathers using ART and adopt an intent-based approach in determining parentage. “As assisted reproductive technology is becoming more and more common place, [North Carolina’s] statutes should also evolve to encompass the changing times.”<sup>181</sup> Same-sex parents are necessarily relying on the use of ART and surrogacy to procreate, conceive children, and start a family. As such, North Carolina should provide the necessary legal protections through effective legislation, so that same-sex parents have the legal right to raise their children.<sup>182</sup> Because surrogacy laws impact same-sex intended parents in such extraordinary ways, the North Carolina General Assembly should ensure that its surrogacy statute: (1) expressly authorizes gestational surrogacy; (2) details general requirements to a surrogacy agreement; and (3) provides special and inclusive rules that safe-guards same-sex, intended parents—such as determining the termination of a surrogacy agreement and order of parentage. Doing so will further trends in parentage law that provide intended parents with autonomy over their family.

Developing appropriate and protective surrogacy legislation requires the North Carolina General Assembly to adopt an intent-based approach when determining parentage. An intent-based test would benefit North Carolina for three reasons. First, an intent-based approach would provide protection and support to all parties involved in the surrogacy arrangement. In situations where the intended parents decide to relinquish their rights to the child upon birth, an intent-based approach will provide protection to the surrogate and ensure that they will not be forced to provide for the child.

Second, this approach would create certainty in establishing parentage for intended parents, especially same-sex male couples, prior to initiating a surrogacy arrangement. This would allow same-sex male couples to bypass the legal red tape that is required through a pre-birth order and/or a second-parent adoption.

Third, an intent-based approach would provide greater equality for intended parties, regardless of gender, marital status, or sexual

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181. Urch, *supra* note 36, at 53–54.

182. Ashley Peyton Holmes, *Baby Mama Drama: Parentage in the Era of Gestational Surrogacy*, 11 N.C. J.L. & TECH. ON. 233, 241–42 (2010). “Legislation is the best method by which states should address this issue as it offers potential users of reproductive technologies the unanimity and stability that individual court cases may not provide. Effective legislation would reward infertile individuals with parentage of a child intentionally created through this form of third-party reproduction.” *Id.*

orientation.<sup>183</sup> Therefore, the Supreme Court of California's landmark decision in *Johnson v. Calvert* reveals why an intent-based approach is essential for same-sex male couples in North Carolina. The intent-based approach in determining parentage through ART and surrogacy ultimately "render[s] biology less important,"<sup>184</sup> and its adoption would thus mark a new era for reproductive history in North Carolina.

#### CONCLUSION

*"The law casts no 'I' on who provides genetic material with respect to intended parenthood."<sup>185</sup>*

The statutory recommendation and guidance in this Note provide a clear framework for the North Carolina General Assembly to enact legislation surrounding the use of surrogacy. While some courts in North Carolina *might* take a favorable approach in determining parentage, such favorable outcomes remain *inconsistent* without express surrogacy statutes. Thus, it is apparent that North Carolina should not only have laws regulating surrogacy, but it should also have particular laws affording protection while considering surrogacy as a means for creating a family for same-sex male fathers. A statute with an intent-based approach in determining parentage in North Carolina would ensure that *both* fathers who intend to be parents will have legal rights to their conceived child.

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183. Urch, *supra* note 36, at 50–51. *See also* Dana, *supra* note 9, at 383. ("Relying on intent abolishes gender distinctions and inequalities based on sexual-partner preference in determining a child's legal parents, thus an intent test applies in the same way to everyone.").

184. NeJaime, *supra* note 124, at 1210–11.

185. Video Interview, *supra* note 145.