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ARE YOU MY MOTHER?: REMOVING A GESTATIONAL SURROGATE'S NAME FROM THE BIRTH CERTIFICATE IN THE NAME OF EQUAL PROTECTION

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In the case of *In re Roberto d.B.*,[1] the Maryland Court of Appeals considered whether a child's birth certificate must list the name of the gestational surrogate as the child's mother when neither the child's father nor the gestational surrogate wanted her name on the document.[2] The court held that under Maryland's Equal Rights Amendment,[3] women should be afforded the same opportunity as men to avoid parental duties and obligations where no genetic relationship exists between the child and the parent.[4] The court concluded that the gestational surrogate's name could be removed from the child's birth certificate and a new birth certificate naming only a father could be issued.[5] The court's decision upholds equal protection of the law in Maryland for both men and women: it protects a woman's right to serve as a surrogate without fear of being burdened with the legal and social obligations of motherhood,[6] and supports a man's right to serve as the sole parent of a child.[7] While expanding the parental rights for both men and women, the court's decision may affect how parents will proceed in obtaining an "accurate" birth certificate when using a surrogate as well as how hospitals should proceed when filling out a child's birth certificate.[8] In addition, the court's decision raises social and ethical issues such as whether a child's best interests should be considered and represented in hearings where a birth certificate is significantly modified.[9]

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1. *In re* Roberto d.B., 923 A.2d 115 (Md. 2007).
2. *Id.* at 117.
3. MD. CONST. Declaration of Rights, art. 46.
4. *In re Roberto d.B.*, 923 A.2d at 124.
5. *Id.* at 126.
6. *See infra* Part IV(2)(i).
7. *See infra* Part IV(2)(ii).
8. *See infra* Part IV(3).
9. *See infra* Part IV(3).

I. THE CASE

Roberto d.B., an unmarried male, wanted children of his own.[10] In December 2000, he initiated an *in vitro* fertilization procedure that resulted in the birth of twin girls on August 23, 2001.[11] Roberto d.B.'s sperm and a donor's[12] eggs were implanted in a gestational surrogate mother who carried the children to term.[13] As required for every birth, the hospital's medical records department reported the birth information to the Maryland Division of Vital Records (MDVR) for the issuance of the birth certificates.[14] The medical records department reported the gestational surrogate as the "mother" of the children on the birth certificate, which is the standard procedure unless otherwise provided by a court order.[15]

Neither Roberto d.B. nor the gestational surrogate wanted the surrogate's name on the children's birth certificates because both agreed that she would not serve as the children's mother.[16] Roberto d.B. filed a Petition for Determination of Parentage and Issuance of Accurate Certificates of Birth to the Circuit Court for Montgomery County, to which the surrogate joined.[17] In it, he requested that the hospital be authorized to report only the name of the father to the MDVR and the issuance of an "accurate" birth certificate; in other words, one that did not list the gestational surrogate as the mother.[18] Furthermore, Roberto d.B. requested that the court designate him as the father and assign the twins his surname.[19] Three affidavits accompanied the petition: one from Roberto d.B., another from the

10. *In re Roberto d.B.*, 923 A.2d. at 117.

11. *Id.*

12. The egg donor was not a party to this action. *Id.* at 119.

13. *Id.* Gestational surrogacy is where the sperm and egg are artificially united and the surrogate is impregnated with the resulting fertilized embryo. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994). The gestational surrogate is simply the carrier of the child; she and the child are not genetically related. *See* Belsito v. Clark, 67 Ohio Misc. 2d 54, 57 (Ohio Ct. Com. Pl. 1994). This is in contrast to traditional surrogacy, where a woman is impregnated with the sperm of a man (not her husband), with the understanding that the resulting child will be that of the man and (usually) his wife. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894. In this instance, the surrogate is both the egg donor and the carrier, and she is therefore the child's genetic mother. *Id.*

14. *In re Roberto d.B.*, 923 A.2d. at 117–18.

15. *Id.* at 118.

16. *Id.*

17. *Id.* at 118–19, 119 n.3.

18. *Id.* at 118–19.

19. *Id.* at 138 (Harrell, J., dissenting).

gestational surrogate, and the third from the egg donor.[20] On August 29, 2001, the Circuit Court for Montgomery County denied the petition without a hearing.[21] On or around September 17, 2001, Roberto d.B. filed a motion for reconsideration, arguing that his petition's denial permitted the reporting of inaccurate information to the official state records, and that placement of the surrogate's name on the birth certificate imposed future negative legal consequences.[22] Specifically, Roberto d.B. argued that including the surrogate's name on the birth certificate limited Roberto d.B.'s parental rights as well as the future inheritance rights of the children in question and the surrogate's biological children.[23]

On October 2, 2001, the circuit court issued an order that fulfilled some, but not all, of Roberto d.B.'s requests.[24] The order declared Roberto d.B. the father of the twin girls and directed the MDVR to issue the twins' birth certificates under Roberto d.B.'s surname.[25] The court did not, however, allow the removal of the gestational surrogate's name from the twins' birth certificates.[26] Roberto d.B. filed a request for hearing on the reconsideration request.[27] On January 14, 2002, the court held the hearing on the previously denied motion for reconsideration, where Roberto d.B.'s counsel (a replacement of his original counsel) first made an equal protection argument to the court.[28] On July 9, 2002, the Circuit Court issued a bench ruling reaffirming and explaining its earlier denial of the motion for reconsideration.[29] The trial judge reasoned that it would not be in the best interests of the children to declare them "effectively motherless"[30] and found that there was no Maryland case law that allowed a trial court to remove a mother's name from a birth certificate.[31]

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20. *Id.* In their respective affidavits, the egg donor and the surrogate both stated that they did not want any relationship or responsibility for the children, and that they did not want to be listed on the birth certificates as the mother. *Id.*

21. *Id.*

22. *Id.* at 138–39.

23. *Id.*

24. *Id.* at 139.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Note that no counsel was retained to protect the interests of the children. *Id.*

29. *Id.* at 140.

30. *Id.*

31. *Id.* at 119 (majority opinion). The trial judge also stated that "[t]his is not an appropriate issue for adoption" but did not say why. *Id.* n.4.

Roberto d.B. appealed to the Court of Special Appeals,[32] but the Court of Appeals granted certiorari on its own motion in advance of any Court of Special Appeals proceedings.[33] The Court of Appeals granted certiorari to decide whether the name of a genetically unrelated gestational surrogate must be listed as the "mother" on the child's birth certificate.[34]

II. LEGAL BACKGROUND

Advances in reproductive technology over the past several decades have impacted and will continue to change health and family law regarding parentage in the future.[35] However, as is typical of the relationship between the law and science, the law does not adapt as quickly as science advances, and courts must often grapple with legislation and case law that do not provide adequate guidance.[36] In these instances, judges must be creative;[37] they must apply statutes and case law to new scientific developments while preserving legislative and judicial intent and policy.[38]

The courts in Maryland and across the country have tried to adapt to the changes in reproductive technology by creating new tests, amending statutes, and recalling the underlying goals of constitutions when making a judicial decision. For instance, when an individual or a couple uses artificial reproductive technologies[39] to have a child, and a dispute arises regarding a determination of the biological and legal

32. *Id.* at 140 (Harrell, J., dissenting). The surrogate did not join in the appeal to the Court of Special Appeals. *Id.*

33. *Id.* at 119 (majority opinion).

34. *Id.* at 117.

35. *See* Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of* In Vitro *Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 506–07 (2005).

36. *See* Laura A. Brill, *When Will the Law Catch Up with Technology?* Jaycee B. v. Superior Court of Orange County: *An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW. 241, 243–44 (1999).

37. *See* Moses, *supra* note 35, at 507.

38. *Id.* "... [J]udges can interpret the words in a statute to accommodate advances in technology, including within the scope of a statute conduct that was not possible at the time it was drafted." *Id.*

39. "Artificial reproductive technologies" collectively refers to technologies that allow those who cannot conceive children through intercourse to reproduce using various medical procedures such as sperm donation, egg donation, *in vitro* fertilization, traditional surrogacy, and gestational surrogacy. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 8–10 (2006).

parents of that child, courts across the country have created various tests to determine the parentage.[40] While little case law exists in Maryland on the use of reproductive technologies, the Maryland Annotated Code has been amended to allow for the use of scientific advances where there is a dispute over parentage.[41] For instance, Maryland paternity statutes allow for blood or genetics testing where paternity is disputed or contested[42] and the courts will set aside a prior determination of parentage if the results of blood or genetics tests prove that the individual originally named is not the parent.[43] Finally, Maryland courts have also used the Maryland Equal Rights Amendment in disputes involving parentage by preventing unequal treatment between men and women in child support and custody cases.[44]

A. Artificial Reproductive Technologies and the Law

Because many states lack legislation that outlines how to determine a child's legal parentage, there is inconsistency in how courts determine the legal mother of a child born through gestational surrogacy.[45] Generally, there are three tests that courts may use.[46] The most traditional test is the "birth test," which looks to the individual

40. *See* KINDREGAN & MCBRIEN, *supra* note 39, 133–38.

41. *See e.g.* MD. CODE ANN. FAM. LAW § 5-1029 (West 2007); *see also* MD. CODE ANN. FAM. LAW § 5-1038 (West 2007). The Code, however, is still traditional in some ways; for example, two sections of the Annotated Code uphold the "presumption of legitimacy." *See* MD. CODE ANN. FAM. LAW § 5-1027(c)(1) (West 2007) and MD. CODE ANN. EST. & TRUSTS § 1-206(a) (West 2007).

42. *See* MD. CODE ANN. FAM. LAW § 5-1029 (West 2007).

43. *See* MD. CODE ANN. FAM. LAW § 5-1038 (West 2007).

44. *See e.g.*, Rand v. Rand, 374 A.2d 900, 905 (Md. 1977) (holding that the Maryland Equal Rights Amendment requires that male and female parents share financial child support obligations equally); Giffin v. Crane, 716 A.2d 1029, 1040 (Md. 1998) (finding that the lower court's decision to grant custody to a child's mother was a sex-based decision and was therefore invalid under the Maryland Equal Rights Amendment).

45. *Compare* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that the individuals who intended to procreate the child through the use of *in vitro* fertilization, not the surrogate who carried the child, are the natural parents and legal parents under California law) *with* Belsito v. Clark, 67 Ohio Misc. 2d 54, 64–66 (Ohio Ct. Com. Pl. 1994) (holding that the genetic parents are both the natural parents and the legal parents unless they have waived their legal rights to the child).

46. *See Belsito*, 67 Ohio Misc. 2d at 60–61. Historically, courts have used either blood tests (or by today's standards, genetics tests) or birth to determine the parent of a child. *Id.* at 60. However, *Johnson* added a third test, the "intent test," which looks to the intentions of the individuals who initiated the birth of a child through artificial reproductive technologies. *Id.* at 61; *see also Johnson*, 851 P.2d at 782.

who gave birth to determine the natural parent.[47] Next is the "genetics test," which grants parentage to the biological parents of the child.[48] Finally, the courts most recently created the "intent test," which says that whoever intended to be the parents of the child are the child's legal parent or parents.[49]

The intent test was first introduced in *Johnson v. Calvert*,[50] where a couple entered into a surrogacy contract with a woman who was then impregnated with the couple's fertilized embryo.[51] A dispute ensued over the surrogate's compensation, and then the surrogate claimed she was the mother of the child and refused to give the child to the couple.[52] The California Supreme Court held that because the couple intended to procreate and raise the child, they were the legal parents.[53]

In contrast to the decision in *Johnson*, the Ohio Court of Common Pleas in *Belsito v. Clark*[54] used a hybrid test that combined the traditional genetics and birth tests with an intent test to determine a child's legal parents.[55] In *Belsito*, a couple who used a gestational surrogate to have a child wanted their names, not the name of the surrogate, listed on the child's birth certificate.[56] The court likened surrogacy to adoption and rejected the pure intent test proposed in *Johnson* because it felt that the test did not address important public policy concerns that are considered in adoption proceedings, such as

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47. *Belsito*, 67 Ohio Misc. 2d at 60.

48. *Id.*

49. *See Johnson*, 851 P.2d at 782. Intended parents are usually the individual or individuals who initiated the process of having a child through artificial reproductive technologies, typically because they could not conceive a child naturally. KINDREGAN & MCBRIEN, *supra* note 39, at 14, 119–21; *see also id.* at 326. Courts have also looked to surrogacy contracts to determine who the legal mother of the child should be. *See* A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000), where the court found that the genetic mother and father of the child should be placed on the birth certificate, not the gestational surrogate, per their surrogacy contract. *Id.* at 953–54. However, the court made this decision contingent on the gestational surrogate surrendering her parental rights to the child only after seventy-two hours (required by New Jersey statute), after which the birth certificate with the genetic parents listed could be issued. *Id.* at 954.

50. 851 P.2d 776 (Cal. 1993).

51. *Id.* at 778.

52. *Id.*

53. *Id.* at 782; *see also In re* Marriage of Buzzanca, 61 Cal. App. 4th Supp. 1410 (Cal. Ct. App. 1998) (designating the couple who initiated the conception process using an egg donor, sperm donor, and gestational surrogate to be the legal parents, even though the couple was not genetically related to the child and had separated by the time the child was born).

54. 67 Ohio Misc. 2d 54 (Ohio Ct. Com. Pl. 1994).

55. *Id.* at 64–66.

56. *Id.* at 57–58.

allowing for an "unpressured surrender" of the surrogate's potential parental rights, and allowing the court to review and ensure the suitability of the intended parents.[57]

The court articulated two inquiries that must be made in determining the legal parents of a child carried by a gestational surrogate.[58] The court first asked, using a pure genetics test, who the *natural* parents of the child are.[59] The court then asked who the *legal* parents of the child should be, answering the question by determining if the natural (genetic) parents had waived their legal rights to the child (such as in the case of adoption).[60] If the natural parents did not waive their rights, then they are named the legal parents of the child.[61] The court answered these queries and found the couple to be the legal parents of the child because they were the natural parents and did not waive their legal rights to the child.[62] The court thus ordered that the birth certificate list the names of the child's genetic parents and not the surrogate mother's name.[63]

B. History and Purpose of Parentage Statutes in Maryland

The Family Law Article of Maryland's Annotated Code does not explicitly address how to determine the legal parents of a child carried by a gestational surrogate, nor does it give guidance on what information should appear on such a child's birth certificate. However, Maryland's parentage statutes[64] and their recent amendments do take into account some modern technology, such as blood and genetics testing, when making parentage determinations.[65]

In 1984, the General Assembly incorporated parentage statutes into Maryland's Family Law Article[66] "to promote the general welfare

57. *Id.* at 62–64.

58. *Id.* at 65–66.

59. *Id.* at 64–65. The court explained that it would look to the genetics test because of the abundant precedent for the test as well as its concerns for the best interests of the child and public policy. *Id.* at 64.

60. *Id.* at 65–66. It is in this second inquiry that there are hints of the intent test because by waiving one's legal rights, a person is showing that they do not intend to be the legal parent of the child. *See In re* Roberto d.B., 923 A.2d 115, 126 n.15 (Md. 2007).

61. *Belsito*, 67 Ohio Misc. 2d at 66.

62. *Id.*

63. *Id.*

64. MD. CODE ANN. FAM. LAW §§ 5-1001–1058 (West 2007).

65. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-1029 (West 2007), MD. CODE ANN. FAM. LAW § 5-1038 (West 2007).

66. *See* 1984 Md. Laws, page no. 1852.

and best interests of children born out of wedlock" and give such children the same rights as those born within wedlock.[67] The statutes do not explicitly consider artificial reproductive technologies. In addition, the statutes are not gender-neutral, meaning they deal almost exclusively with issues relating to the father such as the determination of the father's identity[68] and paternal child support obligations.[69] However, in 1995 the Family Law Article was amended to allow for some advances in reproductive technologies. For example, section 5-1029 was one of several adopted amendments, and it allows for the use of blood and genetics testing to determine paternity.[70] While the amendment says that a mother, child, or alleged father can be tested by order of the court, the only stated purpose of such testing is to determine the identity of the father of the child, with no mention of a similar determination for the mother.[71]

Similarly, section 5-1038, which the General Assembly most recently amended in 1997,[72] allows a declaration of paternity to be set aside or modified "if a blood or genetic test . . . establishes the exclusion of the individual named as the father in the order."[73] Prior to the amendment of section 5-1038, courts did not modify prior determinations of paternity unless the alleged father provided evidence of "fraud, mistake, or irregularity."[74] The problems with this requirement were demonstrated in *Tandra S. v. Tyrone W.*,[75] where a court refused to vacate an earlier declaration of paternity despite blood test results that showed the putative father was not the biological father.[76] The court refused to vacate the decision because the father

67. MD. CODE ANN. FAM. LAW § 5-1002(b)(1) (West 2007). Ironically, another purpose of the statute is to "simplify the procedures for determining paternity;" MD. CODE ANN. FAM. LAW § 5-1002(b)(3) (West 2007), however, with the advances in reproductive technology since 1984, this purpose has become a distant memory.

68. *See* MD. CODE ANN. FAM. LAW § 1027(c)(1) (West 2007) (presuming that the husband of the woman who gives birth to the child during their marriage is the father of the child); *see also* MD. CODE ANN. FAM. LAW § 1029(b) (West 2007) (allowing blood or genetic tests to determine the identity of a child's father).

69. *See* MD. CODE ANN. FAM. LAW § 1032(a)(2) (West 2007).

70. MD. CODE ANN. FAM. LAW § 5-1029 (West 2007).

71. MD. CODE ANN. FAM. LAW § 5-1029(b) (West 2007).

72. MD. CODE ANN. FAM. LAW § 5-1038 (West 2007).

73. MD. CODE ANN. FAM. LAW § 5-1038(a)(2)(i)(2) (West 2007).

74. Langston v. Riffe, 754 A.2d 389, 393 (Md. 2000); *see* MD. R. CIV. P. CIR. CT. 2-535 (authorizing trial judges to exercise its revisory power to modify final judgments in cases of "fraud, mistake, or irregularity").

75. 648 A.2d 439 (Md. 1994).

76. *Id.* at 447.

could not provide evidence of "fraud, mistake, or irregularity."[77] The General Assembly enacted section 5-1038 specifically to overturn *Tandra S. v. Tyrone W.*[78]

In *Langston v. Riffe*[79] the Maryland Court of Appeals clarified the meaning and scope of sections 5-1029 and 5-1038.[80] In *Langston*, several paternity cases were combined to address the issue of whether a putative father was entitled to a blood test after a prior determination that he was the father of the child, and whether the best interests of the child played a role in the court's decision to reconsider paternity.[81] The court explained that under sections 5-1029 and 5-1038, if a putative father moved to set aside a prior determination of paternity that had been established not through a blood or genetics testing, the court was obligated to make blood or genetics testing available to him and to allow him to present any evidence of those tests.[82] The court explained that the opportunity for genetics or blood testing was a right of a putative father for relief from potentially false paternity determinations.[83] The court therefore reasoned that the best interests of the child should not be a factor in the court's decision to allow the blood test because such a determination would "violate the mandatory tenets of section 5-1029 and the Legislature's intent" in enacting these statutes.[84]

While the purpose and structure of the parentage statutes in Maryland have changed over the last few decades, they do not fully address the advances in reproductive technology presented in the case of *In re Roberto d.B.*

C. Equal Rights and Parentage

Maryland's Equal Rights Amendment,[85] adopted by the General Assembly in 1972, states that "[e]quality of rights under the law shall not be abridged or denied because of sex."[86] While the United States Supreme Court has applied an "intermediate-level

77. *Id.*
78. *Langston*, 754 A.2d at 393.
79. 754 A.2d 389 (Md. 2000).
80. *Id.* at 392, 393–94.
81. *Id.* at 392.
82. *Id.* at 406.
83. *Id.*
84. *Id.*
85. MD. CONST. Declaration of Rights, art. 46.
86. *Id.*

scrutiny" to government actions that draw a distinction between genders,[87] Maryland courts apply a "strict scrutiny" standard to Equal Rights Amendment claims.[88] Under strict scrutiny in Maryland, the court will find a statute that draws distinctions based on gender unconstitutional "unless the distinction formed by it is necessary to promote a compelling governmental interest."[89]

Maryland courts have applied the Equal Rights Amendment to various issues relating to exercising one's parental rights. In *Rand v. Rand*,[90] a landmark case from 1977, the divorced parents of a child disputed over how much child support the father (who did not have custody of the child) should pay.[91] The mother argued, and the chancellor held, that the father should contribute his entire earnings (after payment of "personal expenses") to child support, which would have totaled ninety-two percent of the total amount the mother alleged was reasonable for the care of their child (leaving the mother responsible to pay for only eight percent of the expenses for the child's care).[92]

The mother appealed the decision to the Maryland Court of Special Appeals, arguing that the chancellor erred in not ordering the father to pay more towards their child's support.[93] The Maryland Court of Special Appeals found the allocation of ninety-two percent of the support to the father to be clearly erroneous, and modified the allocation of support to be based on each parent's net monthly income available after personal expenses.[94] The mother then appealed to the Court of Appeals, arguing that she should only be obligated to pay child support to the extent to which the father is incapable of paying.[95] The Court of Appeals dismissed the mother's argument and explained that the father's common law obligation to support his minor children is outdated and that Maryland's Equal Rights Amendment requires

87. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

88. *See* Conaway v. Deane, 932 A.2d 571, 605 n.38 (Md. 2007); *see also* State v. Burning Tree Club, Inc., 554 A.2d 366, 386 (Md. 1989) ("The level of scrutiny to which the classifications [based on sex] are subject is 'at least the same scrutiny as racial classifications.'" (quoting Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 840 (Md. 1985)).

89. *Conaway*, 932 A.2d at 603 (internal citations omitted).

90. 374 A.2d 900 (Md. 1977).

91. *Id.* at 901–02.

92. *Id.*

93. *Id.*

94. *Id.* at 902.

95. *Id.*

that both parents share the financial support of their children in accordance with each parent's financial resources.[96]

Similarly, the court in *Giffin v. Crane*[97] firmly upheld the Equal Rights Amendment in the context of parentage.[98] In *Giffin*, a divorced couple entered into an agreement that gave both parents joint legal custody and the father physical custody of their two daughters.[99] The parties also agreed to allow a mental health professional to review the residential status of the children annually.[100] After one review, the mental health professional recommended that the children live with their mother instead of their father because the older daughter had the "emotional need to be with her mother" during that period in her life.[101] The trial court agreed with this recommendation and recognized the daughter's "need for a female hand," and thus ordered a change in physical custody of the girls.[102] The father appealed to the Court of Appeals, arguing that it violated the Maryland Equal Rights Amendment to consider gender in child custody cases.[103] The court agreed with the father's argument and held that the trial court erred as a matter of law when it used gender as the sole basis for making its custody determination.[104]

Maryland courts have also discussed the Equal Rights Amendment in the context of rebutting the "presumption of legitimacy," which is found in both the Family Law Article[105] and the Estates and Trusts Article of the Maryland Code.[106] The presumption

96. *Id.* at 905; *see also* Kemp v. Kemp, 411 A.2d 1028, 1032 n.3 (Md. 1980). While the court agreed with the Court of Special Appeals that parents should share in child support payments, the court felt that it was for the chancellor to decide how to allocate the payments between parents, rather than using the "net income after personal expenses" test used by the Court of Special Appeals. *Rand*, 374 A.2d at 905.

97. 716 A.2d 1029 (Md. 1998).

98. *Id.* at 1040.

99. *Id.* at 1030–31.

100. *Id.* at 1031.

101. *Id.* at 1031, 1032 n.2.

102. *Id.* at 1033.

103. *Id.* The father first appealed to the Court of Special Appeals where he made the same argument. *Id.* In an unreported decision, the court affirmed the judgment of the trial court, reasoning that it was a valid to consider gender in making custody determinations. *Id.*

104. *Id.* at 1040.

105. MD. CODE ANN. FAM. LAW § 5-1027(c)(1) (West 2007).

106. MD. CODE ANN. EST. & TRUSTS § 1-206(a) (West 2007). While the definitions of the presumption of legitimacy differ only slightly between the two Articles, the courts have interpreted them to mean different things. Under § 5-1029 of the Family Law Article, a putative father has an absolute right to a blood test upon any party's motion, and the court has no discretion over whether to grant a blood test or not. Evans v. Wilson, 856 A.2d 679, 686

of legitimacy occurs when a child born or conceived during a marriage is presumed to be the legitimate child of both spouses.[107] This presumption was at issue in *Evans v. Wilson*,[108] where Wilson conceived a child when she was married to one man while having an affair with her ex-boyfriend at the same time.[109] Wilson and her husband raised and cared for the child, but Wilson indicated to Evans that the child was his.[110] Evans filed a Complaint to Determine Paternity and requested that a blood test be conducted to determine the paternity of the child.[111]

Evans argued that under *Langston v. Riffe*[112] and the paternity statutes in the Family Law Article, he should be automatically entitled to a blood test at his request.[113] The court, however, found that a putative father's absolute right to a blood test discussed in *Langston* only applied when the child was born out of wedlock.[114] Because in Evans' case, the mother of the child was married at the time of the conception and birth of the child, the court looked to the Estates and Trusts Article and applied the standard for children born in wedlock, which allowed consideration of the best interests of the child.[115] The court held that because Evans had not overcome the statutory presumption that Wilson's husband was the father of the child, Evans was not entitled to a blood test.[116]

Judge Irma S. Raker dissented, arguing in part that the majority's decision violated Maryland's Equal Rights Amendment.[117] She explained that where the child's mother is married, the mother has

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(Md. 2004). However, under § 1-206 of the Estates and Trusts Article, the court has discretion in granting a blood test and the court can consider the best interests of the child when determining whether the father has overcome the presumption of legitimacy. *Id.* at 687–88. This difference between the two sections is attributed to whether the child has been born within wedlock or not. *Id.* at 687. In cases where a child is born within wedlock, the court has said that an action under the Estates and Trusts Article is the preferred avenue for determining paternity. *Id.*

107. MD. CODE ANN. EST. & TRUSTS § 1-206(a) (West 2007).

108. 856 A.2d 679 (Md. 2004).

109. *Id.* at 681.

110. *Id.* at 682–683.

111. *Id.* at 683.

112. 754 A.2d 389 (Md. 2000).

113. *Evans*, 856 A.2d at 688.

114. *Id.* at 692. The court explained that section 5-1002 of the Family Law Article, which explains the purpose of the article, aims to "ensure the protection and support of children *born out of wedlock*." *Id.* (emphasis in original).

115. *Id.*

116. *Id.* at 693.

117. *Id.* at 701 (Raker, J., dissenting).

the opportunity to rebut the presumption that her husband is the father by filing a paternity action under the Family Law Article;[118] however, to rebut the same presumption, the putative father must bring an action under the Estates and Trusts Article, which, according to the majority's opinion, is a more difficult burden to overcome because it considers the best interests of the child.[119] In other words, Judge Raker argued, a biological father is more burdened than a biological mother in rebutting the presumption of legitimacy, which is a violation of the Equal Rights Amendment.[120] The majority rejected this argument and said that its concern was to preserve a functioning family unit and to act in the best interests of the child, not to provide equal protection for biological mothers and fathers in rebutting the presumption of legitimacy.[121]

Maryland courts have also addressed the issue of equal rights for men and women in the context of choosing a child's surname. In *Schroeder v. Broadfoot*,[122] an unmarried couple conceived a child, but their relationship ended before the child was born.[123] The mother gave the child her surname, which she adopted during a previous marriage.[124] The father challenged this, claiming that the child would be confused when he was older as to why he had the surname of his mother's ex-husband.[125] The lower court held that it was in the best interest of the child to change the child's surname to match his father's to avoid confusion when the child became older.[126]

The mother appealed, arguing that the trial court had abused its discretion in ruling to change the child's name because the mother had presented evidence that the child was not confused about who he or his father were, which directly contradicted the trial court's holding.[127]

The father argued, on the other hand, that the court had not abused its discretion because the presumption in favor of giving the child his surname could only be overcome in the case of abandonment or serious misconduct, and he neither abandoned the child nor engaged

118. *Id.* at 702.
119. *Id.*
120. *Id.*
121. *Id.* at 695 n.7 (majority opinion).
122. 790 A.2d 773 (Md. Ct. Spec. App. 2002).
123. *Id.* at 775.
124. *Id.*
125. *Id.* at 776.
126. *Id.* at 777.
127. *Id.*

in misconduct to disgrace his surname.[128] The Maryland Court of Special Appeals clarified that the issue was how to determine the surname of a child whose parents have equal rights and equal responsibility over the child.[129] The court found that the trial court used a legal presumption that was "a gender-based and gender-biased preference that not only is outdated in the law but also would violate the Maryland Equal Rights Amendment," namely that, absent evidence of abandonment or serious misconduct by the father, it would be in the best interests of the child for him to have his father's last name.[130] Instead, the court suggested on remand that a pure best interests of the child standard should apply.[131]

The legal system in Maryland and across the country has had to adapt to the implications of advances in reproductive technology. Courts have adapted to advances in reproductive technology by modifying older tests and creating new ones, such as in *Johnson* and *Belsito*. In addition, legislatures have reacted to these changes by amending current statutes and creating new statutes to allow for blood and genetics testing. Finally, courts have reinterpreted constitutional provisions, such as the Equal Rights Amendment, to allow for changes in both societal norms and science.

III. THE COURT'S REASONING

In the case of *In re Roberto d.B.*, the Court of Appeals considered whether a child's birth certificate could list only a father's name in the absence of a mother's name when the child was carried by a gestational surrogate and neither the father nor the surrogate wanted the surrogate's name to appear on the birth certificate.[132] Chief Judge Robert M. Bell delivered the opinion of the court, which held that Maryland's paternity statutes must be construed to apply equally to men and women to avoid a violation of the Maryland Equal Rights Amendment.[133] The court reversed the decision of the Circuit Court of Montgomery County and held that it was within the court's power to

128. *Id.* at 781.

129. *Id.* at 783.

130. *Id.*

131. *Id.* at 784. The court further held that if a father delays in seeking a determination of paternity or objecting to the surname chosen by the mother, the court may view this as the father acquiescing to the mother's choice. *Id.* at 784–85. If the father requests for a change in the child's name thereafter, the court would apply an "extreme circumstances" standard. *Id.*

132. *In re* Roberto d.B., 923 A.2d 115, 117 (Md. 2007).

133. *Id.* at 124.

order the Maryland Division of Vital Records (MDVR) to issue a birth certificate that lists only the father's name.[134]

The court first discussed the origins of the paternity statutes[135] in Maryland.[136] It explained that paternity statutes are typically used to determine the paternity of a child and, if appropriate, impose the "basic obligations and responsibilities of parenthood" on the parent.[137] The court then explained how the paternity statutes are used procedurally, specifying that if a blood or genetic test shows that the alleged father is not genetically related to the child, the court can set aside or modify a declaration of parentage for that individual.[138] The court agreed with Roberto d.B.'s argument that under current interpretation of the paternity statute, a male could successfully deny paternity based on the lack of a genetic relationship with the child, but a female could not.[139] Instead, the female would be forced by the State to be the "legal" mother of the child, despite any genetic connection between herself and the child.[140]

The court found that it was necessary to reinterpret the paternity statutes and health law statutes so that men and women would have equal opportunities to deny parentage.[141] Specifically, the court looked to section 4-211 of the Health General Article, which addresses "authorization for new certificates of birth"[142] and allows the MDVR to issue a new birth certificate if a court has "entered an order as to the *parentage* . . . ."[143] Because "parentage" is a gender-neutral word, the court held that the MDVR could issue a birth certificate with either no mother or no father at the order of a trial court.[144]

The court concluded that the gestational surrogate's name could be removed from the birth certificate because the gender-neutral language of the paternity statutes allowed such an interpretation and because the lower court's interpretation would offend Maryland's

134. *Id.* at 126.

135. MD. CODE ANN. FAM. LAW §§ 5-1001–1058 (West 2007).

136. *In re Roberto d.B.*, 923 A.2d at 120.

137. *Id.*

138. *Id.* at 121; *see* MD. CODE ANN. FAM. LAW § 5-1038 (West 2007).

139. *In re Roberto d.B.*, 923 A.2d at 122.

140. *Id.* at 121.

141. *Id.* at 121–22.

142. MD. CODE ANN. HEALTH-GEN. § 4-211 (West 2007).

143. *In re Roberto d.B.*, 923 A.2d at 121–22 (citing MD. CODE ANN. HEALTH-GEN. § 4-211(a)(2)(ii) (West 2007) (emphasis added)).

144. *Id.* The court went on to explain that because the paternity statutes were written in 1984, they do not accommodate for situations where children are conceived through reproductive technology. *Id.* at 122.

Equal Rights Amendment because it would, without "substantial justification," afford an opportunity to one sex and not the other.[145] The court reversed the decision of the circuit court and held that it was within the trial court's power to order the MDVR to issue a birth certificate that lists only the father's name.[146] The case was remanded to the Circuit Court of Montgomery County for proceedings consistent with the court's judgment.[147]

Judges Dale R. Cathell, Glenn T. Harrell and Irma S. Raker dissented.[148] Judge Cathell began by criticizing the process that Roberto d.B. used to have children, calling it a "manufacturing process" for babies.[149] Judge Cathell then criticized the majority's opinion, arguing that it created a new "intent test" whereby if a woman who gives birth to a child does not intend to be the mother of the child, she can disclaim maternity of the child.[150] He argued that this new test may itself be a violation of equal protection because a mother can disclaim maternity simply because she did not intend to be a mother, but a father cannot.[151] Judge Cathell explained that there are many men who at the time of intercourse do not intend to be fathers, but are often judicially found to be obligated to provide child support.[152] The

145. *Id.* at 122, 124. The court also noted that the MDVR Birth Section Chief did not object to removing a gestational surrogate's name from a birth certificate upon a court order. *Id.* at 131–132. The approval of the Birth Section Chief of the MDVR was expressed when an attorney wrote a letter to the Birth Section Chief regarding the issues of parentage that are at issue in this case, which the Birth Section Chief signed and therefore acquiesced to. *Id.*

146. *Id.* at 126, 132. The court also discussed the issue of whether removal of the gestational surrogate's name from the birth certificate comports with the best interests of the child standard. *Id.* at 126–30. While the lower court had found that removing the gestational surrogate's name from the birth certificate was not in the best interest of the child, the court here found that the best interests of the child standard did not apply to the current case because the dispute was not about asserting parental rights and fitness of a parent, but rather it was about relinquishing parental rights. *Id.* at 130.

147. *Id.* at 132.

148. *Id.*

149. *Id.* (Cathell, J., dissenting).

150. *Id.* at 134. Note, however, that the "intent test" to which Judge Cathell refers is not the same "intent test" put forth in *Johnson v. Calvert*. *See supra* Part II(1); *see also* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993). In *Johnson*, the court found that the person or people who intended to procreate the child and raise it as their own would be the natural parent or parents of the child. *Id.* Judge Cathell's interpretation of the majority's holding, on the other hand, is an "intent test" where "if you do not intend to be the mother, you should not be responsible as a mother." *In re Roberto d.B.*, 923 A.2d. at 134 (Cathell, J., dissenting).

151. *In re Roberto d.B.*, 923 A.2d. at 134–35 (Cathell, J., dissenting).

152. *Id.* at 134. Judge Cathell went on to argue that under this "baby manufacturing" system of surrogates, *in vitro* fertilization, and egg and sperm donors, all parties could escape the burden of responsibility for the child because none intended to be a parent, which would leave only the State to raise the child. *Id.*

majority opinion, however, allowed surrogate mothers to disclaim parental responsibility because they did not intend to be mothers to the children they carried.[153]

Judge Cathell then explained that the majority's opinion was not aligned with the intent of either the General Assembly, which enacted the Maryland Equal Rights Amendment, or the people of the state and their representatives, who approved the statute.[154] He explained that because the writers of the Equal Rights Amendment did not intend to create a procedure by which children would have no mothers on their birth certificates, the Equal Rights Amendment should not be used for such purposes.[155]

Judge Cathell also noted that the majority's opinion overstepped the court's function by shaping public policy.[156] He argued that the Maryland General Assembly was in a better position than the court to determine whether a mother's name should be removed from a birth certificate because it had access to ethicists, social scientists, scientific studies, and commissions.[157] He also stated the court's decision will negatively affect children in the long term by eliminating a mother on whom the child could depend for support.[158]

Furthermore, Judge Cathell argued that if the court's holding is truly applied equally to men and women, children could potentially have neither a mother nor a father listed on their birth certificate because all parties who contributed to the creation of the child (in other words, the sperm donor, the egg donor, and the surrogate) could avoid responsibility because they did not intend to be a parent but were rather just performing a specific service.[159] Having neither a father nor a mother on a birth certificate would likely cause tremendous problems for children in the future when they apply for a passport, enlist in the armed forces, and apply for college.[160] Judge Cathell concluded his dissent by criticizing the majority for failing to practice the appropriate judicial restraint when deciding an issue best left to the General Assembly.[161]

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153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 132.
157. *Id.* at 135.
158. *Id.*
159. *Id.* at 135–36.
160. *Id.* at 136.
161. *Id.*

Judge Harrell also dissented, with Judge Raker joining.[162] Judge Harrell began by accepting, if not applauding, the majority's "jurisprudential side-step" of reinterpreting the paternity statute so as to avoid a constitutional issue of whether the statute violated Maryland's Equal Rights Amendment.[163] However, Judge Harrell criticized the fact that the majority answered the question of whether a woman's name could be removed from a child's birth certificate in the first place.[164] He argued that the procedural posture of the case was the equivalent to a "walkover" in tennis, meaning that there was no party to oppose or test Roberto d.B.'s contentions about the legality and social acceptability of removing the mother's name from a birth certificate.[165] In other words, because this case was an "*In re*" proceeding, there was no party to oppose Roberto d.B.'s arguments, and therefore the court accepted his proposals and position without ever hearing a counterargument.[166] Later in his opinion, Judge Harrell reiterated the need for the court to hear opposing arguments and suggested that counsel for the children be appointed to protect their interests.[167]

Judge Harrell then gave a much more detailed account of the facts and procedural history of the case than the majority opinion provided.[168] Judge Harrell discussed the case's procedural history to show that Roberto d.B. did not raise the equal protection argument until very late in the case's long procedural history.[169] Judge Harrell explained that Roberto d.B. had instead originally argued that the mother should be removed from the birth certificate to serve the best interests of the children and to prevent inaccurate official records from being filed.[170]

Judge Harrell argued that since the equal protection challenge to the paternity statute was not properly presented to the lower court, and instead insignificantly mentioned in an oral argument, the Court of Appeals should neither have reached nor decided that issue.[171] He

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162. *Id.* at 137. (Harrell, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 142.

168. *Id.* at 137–40.

169. *Id.* at 139–40.

170. *Id.* at 139.

171. *Id.* at 140–41. Judge Harrell cited to Md. Rule 8-131(a), which says that the appellate court will not decide an issue "unless it plainly appears by the record to have been

went on to say that the record needed further development before he could agree with the majority's opinion.[172] Judge Harrell also suggested that the court should have considered the best interests of the children in its analysis and decision.[173]

Similar to Judge Cathell, Judge Harrell felt that the issue decided by the majority "crie[d] out for legislative review and action," especially because the paternity statutes do not provide for or even contemplate the recent advances in scientific methods for human reproduction that have developed since the statutes were passed.[174] Judge Harrell concluded his dissent by stating that Roberto d.B. would have to make a stronger and clearer equal protection argument to receive his and Judge Raker's support on an issue best suited for the legislature to decide.[175]

IV. ANALYSIS

The Maryland Court of Appeals in the case of *In re Roberto d.B.* allowed the removal of a gestational surrogate's name from two children's birth certificates.[176] The court reasoned that the processes by which a man could challenge paternity, guaranteed by the paternity statutes, must be made equally available to women to avoid a violation of the Maryland Equal Rights Amendment.[177] The opinion aimed to be very narrow and case-specific.[178] Chief Judge Bell wrote in a footnote that "[t]his opinion does not attempt to predict the future of reproductive technologies, it does not attempt to write policy on the topic of surrogacy, and it does not define what a 'mother' is."[179] However, *In re Roberto d.B.*'s simple reinterpretation of a statute may have great implications for future cases that involve the use of artificial reproductive technologies.

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raised in or decided by the trial court," but the court may decide a new issue if it would guide the trial court or prevent delay and extra expenses. *Id.* at 140 (citing MD. R. APP. REV. 8-131(a)). However, Judge Harrell explained that the one-sidedness of the case combined with the improper presentation of the equal protection argument prevented him from exercising the discretion allowed by the rule. *Id.* at 140–41.

172. *Id.* at 142.

173. *Id.*

174. *Id.* at 137 n.1.

175. *Id.* at 142.

176. *Id.* at 126 (majority opinion).

177. *Id.* at 124.

178. *See id.* at 125, 126 n.15.

179. *Id.* at 126 n.15.

The court's decision protects the rights of both men and women, but through different means. Most clearly, the court allows women to deny parentage under the Equal Rights Amendment when they are not genetically related to the child, just as a man may.[180] The decision also benefits men because it allows them to be fathers if they so chose, which is a fundamental right recognized throughout this country's history.[181] Furthermore, the court's decision supports single fathers and their ability to raise a child.[182]

There are, however, some practical problems with the court's decision, including whether the removal of the surrogate's name may occur before the birth or whether the surrogate and father must file a claim for removal every time.[183] In addition, the dissenting judges raised important social and ethical concerns that the court should have addressed, including whether the children should have representation during hearings about removing a parent's name from the birth certificate,[184] and whether the court should apply the best interests of the child standard in such cases.[185]

A. The Court's Adherence to Maryland Paternity Laws

Although the court in *In re Roberto d.B.* reinterpreted several paternity and health law provisions,[186] it adhered to case precedent and Maryland's paternity and health law statutes and helped clarify the meaning and breadth of those provisions. Most notably, the court adhered to section 4-211 of the Health General Article[187] by interpreting the word "parentage" as gender-neutral, therefore allowing a modification of a child's birth certificate such that the mother's name could be removed by order of a court.[188] In doing so, the court avoided a conflict with the Equal Rights Amendment by allowing men and women to equally deny parental obligations.[189]

The court's decision is also in line with section 5-1038 of the Family Law Article, which allows a declaration of paternity to be set

180. *See infra* Part IV(2)(i).
181. *See infra* Part IV(2)(ii).
182. *See infra* Part IV(2)(ii).
183. *See infra* Part IV(3).
184. *In re Roberto d.B.*, 923 A.2d at 142 (Harrell, J., dissenting).
185. *Id.* at 126 (majority opinion).
186. *Id.* at 125.
187. MD. CODE ANN. HEALTH-GEN. § 4-211(a)(2)(ii) (West 2007).
188. *In re Roberto d.B.*, 923 A.2d at 121–22.
189. *Id.* at 124–25.

aside if a blood or genetics test excludes the person named as the father.[190] The court acknowledged that in light of modern reproductive technologies, it is possible for a woman to be genetically unrelated to the child she carries and delivers.[191] Therefore, the court held that section 5-1038 should be applied not only when a man denies paternity, but also when a woman denies her maternity.[192] The lack of genetic connection between the child and the alleged parent is the key piece of the puzzle, and in the case of gestational surrogacy, it is no longer a gender-specific question.

B. The Impact of the Court's Decision on Equal Rights and Parentage

Similar to *Rand*,[193] *Giffin*,[194] and *Schroeder*,[195] which resolved issues of parentage (child support, child custody, and choice of child's surname, respectively), and resulted in equal treatment of men and women in accordance with the Equal Rights Amendment, the court's decision in the case of *In re Roberto d.B.* preserves equal rights for both genders in the area of denying parental responsibility. Most clearly, the court's decision benefits women and protects their reproductive freedom. The court's decision also benefits men and protects and supports their fundamental right to be parents. However, some may argue that the court's decision stretches the meaning of the Equal Rights Amendment too far—indeed, past its original purpose.[196]

1. Expansion of Women's Rights

By allowing women to avoid parentage by proving that they are genetically unrelated to a child, the court in *In re Roberto d.B.* allowed women the same opportunity afforded to men, thereby upholding the Equal Rights Amendment.[197] While women and men cannot always be treated the same due to real differences between them,[198] the facts and the science of *In re Roberto d.B.* allowed for

190. MD. CODE ANN. FAM. LAW § 5-1038(a)(2)(i)(2) (West 2007).

191. *In re Roberto d.B.*, 923 A.2d at 121–22.

192. *Id.* at 121–22.

193. 374 A.2d 900 (Md. 1977); *see supra* Part II(3).

194. 716 A.2d 1029 (Md. 1998); *see supra* Part II(3).

195. 790 A.2d 773 (Md. Ct. Spec. App. 2002); *see supra* Part II(3).

196. *See In re Roberto d.B.*, 923 A.2d at 134 (Cathell, J., dissenting).

197. *See id.* at 124 (majority opinion).

198. *See e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (finding that exclusion of women from required registration in the Armed Services was not discriminatory because of true differences between men and women and their ability to participate in combat).

equal treatment of men and women in their ability to deny parentage. Moreover, the court's decision allows women to serve as a surrogate without fear that they will be obligated to be a legal parent to the child they carried through the surrogacy process.[199]

Many of the Maryland cases that discussed equal rights in the area of parentage resulted in an expansion of rights only for men. As noted, in *Rand v. Rand*, the father no longer had to pay the majority of the child support, but rather he and his ex-wife split the costs.[200] In *Giffin v. Crane*, the father maintained custody of his children because the lower court erred when it considered gender in making its custody determination.[201] Also, the Maryland parentage statutes have, up until the current case, considered only paternity, and have been used solely to protect men from unfair and inaccurate declarations of paternity.[202] The court in *In re Roberto d.B.*, however, allows women some of the same legal benefits. The court's decision protects women who choose to act as surrogates from the legal and financial responsibilities of motherhood when they only performed a service for a couple or individual who could not have children on their own.

2. Expansion of Men's Rights

While the court's decision focuses on allowing women the same opportunities to deny parentage as men, the decision also benefits men and expands their parental rights. The right to conceive and raise one's children is constitutionally protected,[203] and has been deemed by the United States Supreme Court as "essential"[204] and "far more precious . . . than property rights."[205] The court in *In re Roberto d.B.* reiterated this fundamental notion by allowing Roberto d.B. to have children through the use of modern technology. By allowing the

199. The freedom to serve as a surrogate has a place amongst other reproductive freedoms, such as the right to abortion. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (finding Texas statute prohibiting abortions at any stage of pregnancy unconstitutional).

200. Rand v. Rand, 374 A.2d 900 (Md. 1977).

201. Giffin v. Crane, 716 A.2d 1029 (Md. 1998).

202. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-1029 (West 2007); MD. CODE ANN. FAM. LAW § 5-1038 (West 2007); Langston v. Riffe, 754 A.2d 389 (Md. 2000).

203. *See* Matter of Delaney, 617 P.2d 886, 890 (Okla. 1980) ("Parents have a fundamental, constitutionally-protected interest in the continuity of the legal bond with their children.").

204. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

205. May v. Anderson, 345 U.S. 528, 533 (1953); *see also* Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating an Illinois statute which presumed unwed fathers to be unfit to raise their children in the event of the mother's death and holding that unwed fathers had a right to be considered for custody of the children on an individualized basis).

removal of the surrogate's name from the children's birth certificates, the court acknowledged and supported single fatherhood.

3. Intent of the Drafters of the Equal Rights Amendment

In his dissent, Judge Cathell said that the majority's opinion "is not what was fathomed when the General Assembly enacted the [Maryland Equal Rights Amendment]."[206] Judge Cathell explained that allowing a child to have a birth certificate without a listed mother does not conform to the purpose of the Amendment.[207] Although Judge Cathell correctly noted that the Equal Rights Amendment was not established to "create a procedure whereby children would end up not having any mothers, even at birth,"[208] it has been raised and applied in parentage contexts for over thirty years.[209] It was only a matter of time before the courts applied it in the context of assisted reproductive technologies. The majority's decision is sound because it simply reinterprets the Maryland paternity statutes in light of advances in technology to afford women the same opportunities as men to avoid an incorrect determination of parentage.

C. Complications That May Arise from the Court's Decision

When the court in *In re Roberto d.B.* ordered the Maryland Division of Vital Records to issue birth certificates for the twin girls with no mother listed, it did so in the name of equal rights for men and women.[210] However, the court's decision is likely to cause a number of

206. *In re* Roberto d.B., 923 A.2d 115, 134 (Md. 2007) (Cathell, J., dissenting).

207. *Id.* In Judge Cathell's theory that the majority has created a violation of the Equal Rights Amendment with the "intent test" put forth by the majority, *see supra* Part III, his reliance on the role of intent is misplaced. *See id.* at 134–35; *see also supra* note 150. Intent is more likely to play a role when there is a dispute over who is the legal parent of the child, such as in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). In *In re Roberto d.B.*, there was no dispute over who intended to be the parent of the twin girls. 923 A.2d at 118 (majority opinion). It was clear that Roberto d.B. was the one who orchestrated the birth of the children, therefore he is the intended parent. *Id.* at 117. "[G]estational surrogates should not be considered the parents of any child resulting from an embryo donation and implantation, as such a finding would contradict the intent of the parties at the time of transfer, which should govern." KINDREGAN & MCBRIEN *supra* note 39, at 119.

208. *In re Roberto d.B.*, 923 A.2d at 134 (Cathell, J., dissenting).

209. Contexts include adoption (*see* Bridges v. Nicely, 497 A.2d 142 (Md. 1985)), child custody (*see* Giffin v. Crane, 716 A.2d 1029 (Md. 1998); McAndrew v. McAndrew, 382 A.2d 1081 (Md. Ct. Spec. App. 1978)), child support (*see* Rand v. Rand, 374 A.2d 900 (Md. 1977); Kemp v. Kemp, 411 A.2d 1028 (Md. 1980)) and choice of child's surname (*see* Schroeder v. Broadfoot, 790 A.2d 773 (Md. Ct. Spec. App. 2002)).

210. *In re Roberto d.B.*, 923 A.2d at 124–25, 126 (majority opinion).

practical problems in its application. In addition, there are social and ethical issues that courts should consider in future cases that involve individuals who have conceived or want to conceive children through assisted reproductive technologies.

The first question that must be answered is when an individual who has hired a gestational surrogate should petition for an "accurate" birth certificate. In the case of *In re Roberto d.B.*, the modified birth certificates, which only listed Roberto d.B.'s name and not the surrogate's name, were presumably issued after the children's birth.[211] However, some states allow the court to issue "pre-birth orders," which are judgments that establish, even before the child is born, that the intended parents are the legal parents of the child, and order that the child's birth certificate reflect that information.[212] Currently, no Maryland statutes explicitly address pre-birth orders. Thus, the court's decision affects the content of the child's birth certificate, but it does not allow for any administrative convenience by allowing the parties to agree on the content before the child is born. The court's reinterpretation of section 4-211 of the Health General Article,[213] entitled "Authorization of new certificates of birth," implies that the modifications to the birth certificate that occurred in *In re Roberto d.B.* may only be applied after the child is born.

The court's decision may also raise questions of how hospital staff should proceed when filling out a child's birth certificate when they know that the mother is a gestational surrogate. As discussed above, the court's decision focuses on modifying a preexisting, "inaccurate" birth certificate to allow a parent to avoid an incorrect determination of parentage. It is unlikely, therefore, that hospital staff would modify the standard protocol for filling out a birth certificate in light of this case. Instead, they will likely allow parents to file a claim for a modification of the birth certificate under section 4-211 of the Health General Article.[214]

In addition to the practical difficulties that may arise from the court's decision, *In re Roberto d.B.* raises social and ethical issues that

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211. In fact, almost six years had passed between the birth of the twin girls and the Court of Appeals' decision. *See id.* at 115, 117.

212. KINDREGAN & MCBRIEN, *supra* note 39, at 140 n.41. There are several hurdles, however, to obtaining a pre-birth order, such as a state's adoption laws, which may prevent the birth mother from giving up her rights to the child before it is born. *Id.* at 140–41; *see also* A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000) (finding that the surrogate could not give up her parental rights until seventy-two hours after she gave birth).

213. MD. CODE ANN. HEALTH-GEN. § 4-211(a)(2)(ii) (West 2007).

214. *Id.*

the courts and legislature should consider in future cases and statute drafting. For instance, in his dissent, Judge Harrell suggested that the children needed legal representation so that their best interests were heard and considered.[215] The majority, however, felt that the best interests of the child standards did not apply to the case.[216] The majority's position on this issue is more in line with precedent, namely *Langston v. Riffe*, where the court explicitly said that a consideration of the best interests of the child in a parentage determination would contradict the paternity statutes' legislative intent.[217] In other words, it is the right of the putative father to defend himself against false accusations of paternity; a consideration of the best interests of the child would likely bias the judge's decision of whether to grant the father's requests for blood or genetics testing.[218] The same theory can be applied in cases where gestational surrogates are incorrectly named the mother of the child they deliver. If the Maryland Court of Appeals had considered the best interests of the children in Roberto d.B.'s case, the court would have likely affirmed the lower court's decision to keep the surrogate's name on the birth certificate, thereby legally binding the surrogate to support the children. This would have been a disturbing and unfair result because the surrogate was simply performing a service for Roberto d.B., and none of the parties involved intended for her to act as the children's mother.

Had the surrogate's name been kept on the birth certificate due to consideration of the best interests of the children, the decision it may have deterred future gestational surrogates, and possibly egg and sperm donors as well, from assisting others for fear that they would be pinned with parental responsibility. The court's holding, therefore, not only guarantees equal protection of the laws between men and women, but it also gives men and women the freedom to help others have children without fear of legal repercussions.

V. CONCLUSION

In the case of *In re Roberto d.B.*, the court applied old parentage law to new facts. The court avoided a constitutional conflict with the Maryland Equal Rights Amendment by reinterpreting Maryland's health law and paternity statutes to allow a woman the

215. *In re Roberto d.B.*, 923 A.2d at 142. (Harrell, J., dissenting).

216. *Id.* at 126. (majority opinion).

217. Langston v. Riffe, 754 A.2d 389, 406 (Md. 2000).

218. *Id.*

same opportunity as a man to avoid parental responsibility when there was no genetic connection between herself and the child to which she gave birth.[219] The court therefore held that it was within a trial court's power to order the Maryland Division of Vital Records to issue a birth certificate with only the father's name listed.[220] The court's decision follows in a long line of cases that applied the Equal Rights Amendment to parental obligations, but in this case the court also had to consider the law's intersection with current technology.[221] The court's holding allows women to avoid being incorrectly labeled as a child's mother, an opportunity that men have enjoyed for many years.[222] Now women can freely serve as a surrogate to an individual or a couple without fear of the legal, financial, and social ramifications of motherhood. In addition, the court's decision benefits men because it protects their fundamental right to be a father, and it acknowledges that single fathers can provide a good life for a child.[223] Though several practical, social, and ethical concerns with the court's decision remain,[224] the ultimate issue of equality between genders has been resolved in this particular instance and will likely encourage the passage of statutes that consider scientific advances in reproductive technology.

219. *In re Roberto d.B.*, 923 A.2d at 124–25.
220. *Id.* at 126.
221. *See supra* Part II(3).
222. *See supra* Part IV(2)(i).
223. *See supra* Part IV(2)(ii).
224. *See supra* Part IV(3).