Defining the Mother in the Modern World:  
An Analysis of Surrogacy-Related Case Law and Its Implications

Fifteen years ago, Rudolph J. Gerber, a judge on the Arizona Appeals Court, wrote that maternity “present[s] no great practical problem, because maternal identity always seems to be a given fact” (Soos v. Super. Ct., 897 P.2d 1356, 1362 (1995)). Gerber’s statement reflected the predominant view at the time that legal challenges relating to parentage would be confined to the determination of fatherhood. His logic flowed from the idea that only in male parenthood could there exist two competing parental figures – a biological father, who provided the genetic material to create the child, and an “intentional” father, who, by virtue of being married or committed to the child’s mother, had been designated as the child’s male caregiver. Such a decoupling seemed impossible in the case of motherhood, where the genetic mother would always be the child’s gestational carrier and intended female caregiver.

Yet in recent years, the rise in the use of surrogates has completely destroyed this paradigm. Surrogacy is the assisted reproductive practice in which a woman carries a child to term with the intent of surrendering that child to another couple at the time of birth. The genetic father of the resultant child can be either the intended father or a sperm donor; the genetic mother can be the intended mother, the surrogate, or a separate egg donor. Therefore, while surrogacy provides an opportunity for infertile couples to create either genetic offspring or simply a child who they will “know” from conception, it also raises a number of important legal questions about defining both paternity and maternity.

Surrogacy can create up to four parties with a parental claim on a child: the intended parents, the sperm donor, the egg donor, and the gestational surrogate and her
spouse. It also can create up to three separate definitions of parents: the gamete (sperm or egg) providers who serves as the child's genetic ancestor, the surrogate mother who gestates the child, and the “commissioning” parents, who set in motion the child's creation for the purpose of raising him or her. These complexities of legal identity are further compounded by the fact that statutes or existent case law vary widely from state to state. Seven states explicitly void all surrogacy contracts, ten states allow some regulated contracts, and five states specify that other laws do not apply to surrogacy arrangements. The remaining 28 states “lack any statutory guidance on surrogacy agreements” and thus “have looked to statutes related to adoption, custody, paternity determinations, termination of parental rights, and “baby selling”; the federal and state constitutions; and public policy considerations” (Arons) in order to determine the legal status of potential parents. The outcomes of legal cases in which various parties assert parental rights are thus intimately related to the states in which these cases take places.

Acknowledging this enormous diversity in state laws, we will restrict our analysis of emerging trends in the legal definition of maternity to two states in which there exists a large body of case law relating to surrogacy: New Jersey and California. Both are left-leaning, progressive states with large gay populations – a niche group that is commonly interested in pursuing surrogacy. In California, the recent case law has tended toward redefining motherhood by a woman’s intention to parent, rather than any genetic or biological link. In New Jersey, the law remains more muddled, though the prevailing legal definition appears to instead characterize motherhood by biological means. We can analyze these conflicting definitions of maternity in parallel with the legal meaning of paternity, which has largely been decided by state courts and the United States Supreme
Court to be defined by intentionality, rather than genetics. Taking these bodies of evidence together, we can begin to see some of the ways in which this changing definition of parenthood could have enormous implications for the ways in which we define the social construct of the family.

The ambiguity of defining fatherhood has existed as a legal question since long before the founding of the United States, though a general consensus on the issue has prevailed for centuries. States have long wrestled with the ways in which to correctly apportion paternal rights in cases in which infidelity has led to the existence of two potential fathers – the biological father and the intended father (generally the mother’s husband). As journalist Ruth Padawer notes in The New York Times, “In most states, paternity decisions are governed by centuries-old English common law [in which] a child born in a marriage is presumed the product of that union unless the husband was impotent, sterile or beyond ‘the four seas’ when his wife conceived” (Padawer). Legal scholar Katheryn Katz explains that this principle has essentially codified, “the notion that biology is irrelevant to the fatherhood of children born within marriage so long as a man can be designated as the legal father” (Katz).

This issue reached the Supreme Court in the 1989 case Michael H. v. Gerald D., a case in which a child was produced from an extramarital affair and the child’s genetic father sued for visitation rights. As law professor Linda Kelly explains, the Supreme Court “dismiss[ed] the biological father’s due process and equal protection claims” and instead “upheld a California statute which presumed that a child born to a married woman was her husband’s child” (Kelly). In denying the genetic father’s ability to see his child, the Court kept with a “history of enforcing the fiction that a child born to a married
woman is always her husband’s offspring” (Kelly). Though a number of state legislatures have subsequently acted to limit the extent of this “marital presumption” (Dolgin), it still tends to serve as the defining legal principle in paternity suits (Padawer). The marital presumption is significant because it takes a socially constructed definition of a father – the husband of the child’s biological mother, who by virtue of his marriage must coparent with his wife – and codifies it as the legal definition of paternity. This definition is essentially an “intentionality” model of paternity, since it holds that the mother’s husband is the intended parent and is therefore the legal father. The marital presumption thus legally defines the source of paternity as one’s intention to serve as a child’s father, rather than any biological relationship to the child.

The legal definition of maternity remains more complex, as a number of New Jersey and California court cases demonstrate. In New Jersey, the prevailing legal definition of maternity seems to be based in biology, rather than intentionality. In the most prominent legal action regarding surrogacy in history, the 1988 *Matter of Baby M* case, the New Jersey Supreme Court chose to eschew the intent model of maternity. In the case, Elizabeth Stern and her husband, William Stern, sought a surrogate to carry their child because Mrs. Stern suffered from multiple sclerosis and feared the health implications of pregnancy. They selected Mary Beth Whitehead, a New Jersey homemaker, to serve as a “traditional surrogate,” meaning Whitehead would be inseminated with Mr. Stern's sperm and would utilize her own egg to create a child for the Sterns. After the birth of the child, Whitehead refused to give up custody, even though she had signed a contract to terminate her parental rights. The case was essentially a battle for sole custody between two parties – the Whiteheads and the Sterns. William
Stern was both the intentional father and the biological father, and was thus indisputably the child's legal parent. The court was challenged with choosing either Mary Beth Whitehead or Elizabeth Stern to be the child’s second parent; whoever was not chosen would have no rights, as no court at that time had ever declared a child to have more than two legal parents. Yet while Mary Beth Whitehead was the child's genetic and gestational mother, it was Elizabeth Stern who had “commissioned” the child's existence and who had intended to raise her. The court dealt with this issue by declaring, “The surrogate mother's agreement to sell her child is void” (Matter of Baby M, 109 N.J. 396 (1988)) and thus, “reducing the case to a traditional two biological parent custody dispute” (Kelly) before ultimately awarding custody to William Stern. In granting visitation rights to Whitehead, the court was forced to nullify Elizabeth Stern's adoption of Baby M, in keeping with the two-parent legal restriction. The court, it seems, completely disregarded the “intent-to-parent theory,” through which “the parenting role of Mrs. Stern could have been legitimized while Mary Beth Whitehead could have been denied any parental recognition” (Kelly). While William Stern was granted sole custody of the baby, the Court nonetheless rejected Elizabeth Stern's claim to a maternal role, choosing instead to rely on the long-held principle of “establishing maternity by virtue of a woman giving birth” (Kindregan).

Five years after the Baby M case, a California Supreme Court ruling first introduced the notion of maternal intentionality in the case of Johnson v. Calvert. In Johnson, a situation virtually identical to the Baby M case emerged, with one key difference: the genetic origins of the child in question. Crispina and Mark Calvert hired Anna Johnson to serve as a gestational surrogate, meaning she would carry a fertilized
embryo to term for them in exchange for $10,000. The embryo itself was created from Mr. Calvert's sperm and Mrs. Calvert's egg, meaning the resulting child, Christopher, was their genetic offspring. When Johnson had a change of heart and decided she wanted to serve as Christopher's mother, the Calverts focused their legal argument around their biological link to the child, claiming, “Genetics determine our identity. The right to continued common relationship with progeny and the reciprocal relationship simply cannot be denied” (Johnson v. Calvert, 851 P.2d 776 (1993)). The California Supreme Court ultimately ruled in the Calverts' favor, but the ruling was not grounded solely in the Calverts' biological link. Rather, the Court found that “two women, the egg contributor and the gestational surrogate, had equally plausible claims to biological motherhood,” (Katz) – but, as in Baby M, only one woman could be declared the legal mother. The Court thus resorted to a “tie-breaker” wherein intention to parent was the deciding factor. The Court wrote that “when the two means [of deciding maternity] do not coincide in one woman, 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” (id.), and thus awarded custody to Crispina Calvert. The Johnson court therefore introduced the idea of intentionality in defining parental identity, though it did so only in light of the inadequacy of traditional biological methods of determining parentage.

The Johnson ruling had direct implications for two subsequent California divorce cases: Marriage of Moschetta in 1994 and Buzzanca v. Buzzanca in 1998. The divorce proceedings of Robert and Cynthia Moschetta did not represent a typical surrogacy suit in that they did not include a dispute between two parties seeking custody of a child.
Instead, Robert Moschetta sought to have his estranged wife Cynthia named as the legal mother of their child, who had been born to a surrogate named Elvira Jordan. Mr. Moschetta was the child's genetic and intending father, Jordan was the child's genetic and biological mother, and Mrs. Moschetta was the child's intending mother. The case was marked by a number of confusing irregularities, including the notable fact that Mrs. Moschetta initially sought to be named as the child's mother, but ultimately dropped her claim and supported Jordan's claim to maternity of the child, a girl named Marissa. Mrs. Moschetta's claim to maternity thus continued only because Robert Moschetta wanted to share custody with his soon-to-be ex-wife, rather than with Jordan. This murkiness aside, the Appellate Court ruling in the case seems to strongly indicate that the intention principle applied in Johnson matters only when a “tie” exists between two potential mothers. In the words of family law expert Deborah Wald, the court determined that “where the surrogate was both the genetic and gestational mother...procreative intent was irrelevant” as was “the fact that the 'intended mother' had raised the child from birth” (Wald). The case seemed to establish that, “intentional maternity, as defined in Johnson, only applies to cases in which the intentional mother has some biological relation (genetic or gestational) to the child involved” (Dolgin).

A California Appellate Court overturned this principle four years later with its ruling in Buzzanca vs. Buzzanca. This case was similar to Moschetta in that it involved a divorcing couple, John and Luanne Buzzanca, who were battling over legal responsibility to a child born to a surrogate around the time that their marriage dissolved. Mrs. Buzzanca was suing her estranged husband for child support, claiming that he was the child’s legal father. Yet the genetic situation was distinct in Buzzanca because the child,
Jaycee, was created from a donated embryo, due to the fact that both of the Buzzancas were infertile. Jaycee therefore had no genetic relation to the Buzzancas or to their surrogate. The appellate court reversed an earlier decision that had found that Jaycee had no parents, and instead designated the Buzzancas as her legal parents. In doing so, the Court made a meaningful statement about maternal identity, because it “relied on Johnson’s intent analysis to grant maternity to…Luanne Buzzanca, who had no biological relation to the child she claimed as her own” (Dolgin). Thus, the Court implicitly extended the intentionality test beyond cases in which the intending mother donated an egg to create her child. Yet the language of the ruling actually went far beyond this expansion. Citing the earlier Johnson case, the Court declared, “the context of the Johnson language…reveals a broader purpose, namely, to emphasize the intelligence and utility of a rule that looks to intentions” (Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998)) as a determining factor in parental rights. The Court claimed that the intentionality test was “not limited to just Johnson-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born ‘but for the effort of the intended parents’” (id.). The case therefore marked an important step forward in the establishment of the intent model of parentage in California.

Two years later, another court case in New Jersey demonstrated that California’s shifting definition of parentage was not being universally embraced, even in similarly liberal states. In the time since Baby M., a number of subsequent cases had created “a fairly well-defined common law rule that prohibit[ed] traditional surrogacy arrangements (in which the surrogate mother is the biological contributor of the egg)” (“Surrogacy”).
Thus, New Jersey chose to avoid creating any situations in which one woman could claim gestational and genetic maternity while another claimed intentional maternity. However, even in the resulting surrogacy cases, in which the gestational mother would clearly have a less substantive claim to legal maternity, New Jersey courts still sided with the gestational mother. In *A.H.W. v. G.H.B.*, a New Jersey court ruled that the genetic parents of a child born to a surrogate could *not* have their names listed on the child’s birth certificate, but that the birth mother’s name must instead be listed. According to legal scholar Adam P. Plant, the court thus recognized that “the birth mother had a claim to legal parenthood that would trump a claim by the genetic/intended parents if she chose to exercise it” (Plant). The ruling was notably friendlier toward surrogacy arrangements than previous New Jersey decisions, as it allowed the surrogate to give up the child three days after birth, leaving a 48-hour window in which the intended parents could submit their names as the child’s legal parents before the birth record was established (Plant). Nonetheless, it further established the legal principle that the woman who gives birth to a child is its legal mother, regardless of all other circumstances.

Analyzing two cases from the past five years, we can see that these divergent modes of dealing with maternal claims have only become more entrenched in California and New Jersey. In California, a 2005 ruling from the state Supreme Court amalgamated three different cases dealing with lesbian parents who had separated since the birth of their children. The ruling invalidated some of the more restrictive elements of the *Johnson v. Calvert* decision and further expanded the importance of intentionality in defining parentage. In *Elisa B. v. Superior Court*, the court dealt with a lesbian couple, Emily and Elisa, who were inseminated with sperm from the same donor in order to start
a family. Elisa bore one child, while Emily bore twins, and neither woman adopted the other’s children. When they split, Emily sued Elisa for child support, and Elisa claimed that she was the legal mother only to her biological child – not to Emily’s twins. The court was forced to contend with its ruling in *Johnson*, which stated that a child can “have only one natural mother” (*Johnson v. Calvert*, 851 P.2d 776 (1993)). The court ultimately chose to void this claim and to thus expand the “intentionality test” to include *second* legal mothers instead of solely fathers. As law professor Joanna Grossman explains, the court “applied one of the ‘presumed father’ categories to Elisa” and found that because she had “openly received the twins in her home and held them as her own ‘natural children,’” (Grossman), she was an intentional mother of the twins and was therefore their legal mother. The court therefore found that “a woman with no biological or adoptive relation to a child may be deemed that child’s ‘natural’ mother if she…presents herself to other as the child’s ‘natural’ mother” (Dolgin). The ruling had enormous implications because it was the first case to establish a child’s maternal relationship with two different women without an adoption (Grossman). Yet it was also monumental in that it further established that California courts “no longer consistently assume that identification of legal parentage should conform to presumptive biological truths” but that it can instead be “predicated on choices” made by individuals with regards to the creation of children” (Dolgin).

A case currently playing out in New Jersey courts underscores the ways in which the state diverges from California on the issue of legal maternity. In 2006, New Jersey resident Sean Hollingsworth and his partner, Donald Robinson, enlisted the help of Robinson’s sister Angelia to become parents. Angelia was impregnated with an embryo
created from a donated egg and Hollingsworth’s sperm. During her pregnancy, her relationship with her brother deteriorated; when she ultimately gave birth to twins in late 2006, she initially gave up custody but later filed to papers to be declared the twins’ legal mother, citing the legal precedent set in the Baby M case. As New York Times journalist Stephanie Saul explains, “unlike Ms. Whitehead [the surrogate in Baby M], Ms. Robinson has no genetic relationship to the girls,” though “family court has temporarily awarded Ms. Robinson three days a week of parenting time” (Saul) ahead of the April trial date for the case. Though it is unclear how the case will play out, the precedent set in A.H.W. v. G.H.B, combined with the family court’s granting of temporary shared custody, could both be taken as strong indications that Ms. Robinson will be granted custody along with Mr. Hollingsworth. It therefore seems likely that New Jersey will continue to eschew an intentionality model for determining parentage, and will instead rely on biological and genetic factors.

Acknowledging the existence of these two parallel systems of determining legal maternity, we can begin to ask a number of significant questions. First, we can analyze the two methodologies of determining legal maternity in order to gauge what kind of impact they might have if implemented as national policy. Then, we can ask if the systems must necessarily exist independently of one another – especially in light of Jacob v. Shultz-Jacob, a 2007 Pennsylvania custody case in which a court found that a child had three legal parents. While no subsequent cases have reached this same conclusion, Jacob nonetheless opened the door to “unorthodox family relationships” grounded both in “adult's autonomous choices about family matters” (Dolgin) and traditional biological standards of determining maternity. Perhaps this case could provide a roadmap for future
maternity suits by allowing courts to acknowledge more than two parents for their various roles in bringing a child into the world.

Assuming that either the New Jersey or California system ultimately wins out as the predominant legal method of defining maternity, we must inquire as to the ramifications of the widespread adoption of each system. Both the positive and negative aspects of the New Jersey system are readily apparent. The New Jersey system is laudable for the extent to which it seeks to protect surrogate mothers from socioeconomic or emotional exploitation. This purpose which is extremely evident in the language of the Baby M. ruling, where New Jersey Supreme Court Chief Justice Robert Wilentz wrote, “We doubt that infertile couples in the low-income bracket will find upper-income surrogates” (Matter of Baby M, 109 N.J. 396 (1988)). Wilentz disputed the idea that “disparate wealth [did] not play a part” in the surrogacy arrangement between the Sterns and Mary Beth Whitehead, and he claimed that the practice of surrogacy would ultimately force a surrogate to face the “full reality of the sale of her body and her child” (id). The justification behind the New Jersey system of determining maternity, then, seems to lie in the fear that socioeconomic differences or other factors might allow wealthy individuals to take advantage of women to essentially “steal” their children. By making biology, rather than intention to parent, the central criterion in determining maternity, New Jersey courts have thus attempted to give surrogates the upper hand.

Nonetheless, the downside of the New Jersey method is also extremely clear. While Wilentz complained in the Baby M. ruling that surrogacy contracts ignore “the best interests of the child” (id.), the New Jersey system appears to be concerned very little with the interests of a child born to a surrogate. Even in the Baby M. case, the ruling
named the child's legal mother to be a woman who had threatened suicide and illegally fled to Florida in order to retain sole custody of her baby (Kindregan). When Melissa Stern, the “Baby M” at the center of the case, turned 18, she formally terminated Whitehead's parentage in order to allow Elizabeth Stern to adopt her (Weiss). While this is only one example, it demonstrates the inherent problem in using biology as the primary determinant of motherhood: it ignores the fact that the willful intent to create a child is, in most cases, the most direct indication of one's desire to properly care for that child.

Furthermore, by grounding maternity solely in the act of gestating a baby, the New Jersey system also creates the nightmarish hypothetical in which a woman (let's call her P.) hires a surrogate (let's call her S.) to carry an embryo formed from P.'s egg, but S. chooses to keep the child after he is born. In such a case, P. would have no legal claim to retrieve her biological offspring under New Jersey law, and would have to let another woman raise a child which she created from her own ova and intended to raise as her own. Finally, the New Jersey system would introduce a startling gender double standard wherein intentionality would be a sufficient legal claim to paternity, but not to maternity. This system would thus have terrifying implications for custody hearings, child support suits, adoption cases, and various other family law issues.

In the California system, the pros and cons are virtually the mirror image of those in the New Jersey system. The California system would provide women with more power to fight back in cases in which surrogates change their minds; this system might therefore place more children in loving home environments, though this would hardly hold true in every instance. In addition, the method of determining maternity in California would also create a more uniform standard of determining parentage for both men and women,
which would likely ensure fairer verdicts in family law cases. However, the California system, by virtue of providing fewer protections for gestational carriers, would likely create a greater incentive for rich families to exploit poor women by essentially purchasing their procreative abilities. One can certainly imagine cases in which surrogates could be improperly selected or improperly informed of their obligations, and might subsequently suffer extreme emotional damage from having to give up custody of children that they believe to be their own. Another potential flaw in the California system is the establishment of a nebulous definition of an adult's “intention to parent.” As Padawer notes in the Times, a “nonbiological father” – a man who act as a child's parent even when he is not the child's genetic ancestor – can terminate child support statements in several states “if he can prove he was tricked into the role...and can demonstrate that upon learning the truth, he immediately stopped acting as the child’s father” (Padawer). It thus seems that courts in these states believe intentionality defines parenthood in the absence of a genetic link, but that this intentionality is revocable. If such a principle were applied to the California system, we might see nonbiological parents gain a disturbing power to abandon their children.

Based on the above discussion, it seems that implementation of the system used in California would have a greater number of concrete benefits, and fewer concrete drawbacks. Nonetheless, it seems that there are several distinct concerns regarding each system of designating legal maternity, and that these issues will only become more troublesome as assisted reproductive technology becomes more widely available. Perhaps one solution to this issue is deferring to the Jacob case in Pennsylvania, in which the Appellate Court found that “a biological mother, her former lesbian lover...and the sperm
donor” (Dolgin) were all the legal parents of a child. The case was not widely heralded as a startling revision of “fundamental assumption[s] about parentage” because the court seemed to “self-consciously elide...the implications of its decision for the shape of families” (Dolgin) by merely categorizing its decision as an expansion of financial obligations to the child. Nevertheless, the principle established in Jacob could go a long way in resolving conflicts that emerge over defining legal maternity. Removing the limitation that each child can only have two parents would allow intentional mothers and biological mothers to establish their legal relationship to a child in cases where both women wanted to serve as mothers, thus effectively mingling the California and New Jersey systems. Of course, this shift would bring with it a plethora of new issues centered around how to properly raise a child when more than two parents are involved. But it seems that a framework that allows a child to have multiple parents – who, by virtue of their contribution to the child's existence, all have some stake in his well-being – would best serve the ultimate aim of family law: to preserve the child's best interests.
Bibliography

Publications


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Cited Cases


