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MEMORANDUM FOR THE CLASS OF 2012

Re: Materials for LEAD Week Session on “Making the Most of Class”

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Welcome to Duke Law School! The faculty looks forward to your arrival for LEAD Week on Monday, August 17, and to the beginning of classes on Monday, August 24. In particular, I look forward to meeting you at our orientation session on making the most of class, which is scheduled for Wednesday, August 19.

As you may already know, cases will comprise most of your first-year reading assignments, and most of your class sessions will either focus on or derive in substantial part from those cases. One of the initial hurdles all first-year law students face is how to read cases effectively. Among other things, this requires learning what professors expect that you will know and have thought about when you come to class each day; how to sort relevant from non-relevant information; how to classify relevant information; and otherwise how to engage intellectually in the material. This orientation session is designed to give you a head start on this learning curve, and to help you to work effectively—to make the most of class—from the very beginning.

In preparation for this session, please read the materials that follow. Part A sets out a classic template for a case brief. Part B sets out a case, *Johnson v. Calvert*, which provides you with an opportunity to work with the briefing template. A more specific assignment in connection with this case is set out in the introduction to Part B. Our orientation class session will be based on this assignment.

## A. BRIEFING CASES

Throughout your lives as law students and lawyers, or at least while you are engaged in reading cases, you will be “briefing” cases. That is, you will be reading them to discover their various formally identifiable parts, and in most cases you will be reducing them—making them brief—so that they are easier to work with.\* Over time, you will acquire your own style of briefing cases, but even then, there are formal parameters that you will follow. This is necessary (and thus even if you are a free spirit you will toe the line) because law professors and other lawyers talk in a jargon that comprises in part the elements of a case brief, and you will need to communicate with them.

The standard or formal elements of a brief, indeed of all legal analysis, is often helpfully broken down into the acronym “IRAC.” IRAC stands for Issue, Rule, Application, Conclusion. Specifically, IRAC requires that from a given “fact pattern,” or set of factual circumstances, the lawyer derive the issue or issues to be resolved, find or develop the law or legal rule that is or should be used to address the issue(s), apply the rule to the facts, and reach a conclusion as to how the issue(s) is/are to be resolved. I am not being dramatic when I tell you that what I have just written comprises much of what you will be doing in every course throughout law school and otherwise throughout your legal careers: Every case you analyze or “brief,” and every memorandum, brief, or opinion you write, will follow a version of this paradigm. As a threshold matter, IRAC assumes that the facts or factual background of a case have already been presented. For purposes of case briefing, however, it is essential always to have ready a good statement of the relevant facts. And so if you wish, you may refer to the briefing paradigm as FIRAC instead. FIRAC breaks down this way:

### 1. *(F) The facts of the case, also called “factual background” or “underlying facts.”*

This is the underlying dispute that gives rise to the lawsuit. The case facts in this respect are to be distinguished from the Procedural History (PH) of the case, that is, the facts that describe the course of the litigation once it has been initiated. You will, from time to time, be asked by your professors to provide the procedural history of a case.

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\* Commercial materials are available that contain “canned” or already-prepared briefs. It is my strong recommendation that you resist relying on such materials. While they may be helpful either when you have not had adequate time to prepare or when you are not sure you understand a case, relying on them consistently and in lieu of your own preparation will retard the development of your ability to read and especially to synthesize case materials. Because this is a big piece of what lawyers do in practice, the development of these skills is not optional. And it is certainly not something you want to tackle for the first time when you are out of law school, when there are no more canned or prepared briefs available, and when you are on someone else’s payroll. “Book briefing,” or making margin notes, is sometimes recommended by commercial materials in lieu of preparing full case briefs. Whether this is an adequate strategy depends largely on the individual student/lawyer, her ability accurately and comprehensively to retain information that is not captured in the margin notes, and the eventual uses of the case material. In other words, book briefing works for some people sometimes, but not for everyone or for all purposes.

Note that proper legal analysis requires that you cull from the facts presented only those that are relevant to the issue(s) presented. For example, if the raw facts tell you that A (who punched B in the nose) is 34 years-old and B is 33, it is likely that as a legal matter, their ages will be irrelevant to the analysis of whether B will be successful in his suit against A for battery. While such facts may have some emotional appeal, they can and most often are omitted from the formal discussion.

2. *(I) The legal issue that is implicated by those facts, also called “question presented.”*

Lawyers, and certainly your professors, will sometimes break this component down and distinguish between the “procedural issue” and the “substantive issue” in the case. In a nutshell, the procedural issue is the question that arises relating to the stage of the trial or appellate process at which a substantive issue was disposed of; e.g., if the trial court dismissed the plaintiff’s case on “summary judgment” and she appeals the case based upon that dismissal, the issue would be whether the judge correctly granted summary judgment under the applicable law. The substantive issue or question relates to the underlying claim itself; e.g. if the case that was dismissed involved a claim for battery, the issue might be whether the plaintiff made out the prima facie case or elements of that claim as required under applicable law.

3. *(R) The rule of law that is or should be used to address the issue, also called “law” or “applicable law.”*

It comprises the law as it exists and that the court must use to resolve the case, unless it is entitled and willing to change that law. Existing law for this purpose includes applicable constitutional (state or federal), statutory (state or federal), and judicially pronounced or common law. The law as it has been articulated in prior cases is often called “precedent” or “applicable precedent.”

Developing the ability to identify and describe the applicable law is part of what your legal training will be about. Correspondingly, where the law is not entirely clear, or where it might be subject to modification, your legal training also will involve developing the ability to argue convincingly that the court should adopt your position (rather than your opponent’s) on what the law should be. All of this involves understanding the value of precedent in the law, as well as the ability to synthesize cases and analogize among related areas of law. (You will work most directly on these skills in your legal writing class; and your other professors will assume you are in fact developing them in that context. Thus, as you do your work both in and out of legal writing class, train yourself to think about how these skills apply, not only to your own writing, but also to the structure and articulation of judges’ opinions, and to the way advocates and judges in all subject matters engage their analyses.)

4. *(A) The court’s application of the facts to the rule or law. This is also called the court’s analysis.*

It is in this part of the case that the court addresses the parties’ different arguments about how the law applies to the facts, and also the part in which the court resolves those arguments. This part also may contain the court’s rationale, or explanation for the ultimate holding and result.

Sometimes, the court will engage in a lengthy, detailed analysis or application, and this section will be easily distinguished from the rest. Other times, the court will be “conclusory” in its application or analysis. This means that after it has set out the fact, the issue, and the law, it will simply conclude that the result is obvious.

5. (C) *The court’s conclusion, also called the holding of the case.*

This is your summary of the new rule that emerges as a result of the court’s analysis and result in the case. As with the issue, the conclusion or holding also may be broken down into two questions in most cases, i.e., there will often be both a procedural and a substantive holding. There is quite a science to developing the substantive holding in particular; you will spend a lot of time working on this skill, also most directly in your legal writing class. In this regard, note carefully that the conclusion or holding is to be distinguished from the result in the case, which is simply the “yes” or “no” answer to the issue, or more simply the answer to the question, who won in the end.

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Note that when you work with your other professors, the IRAC formula may be presented a bit differently than I have here. But since we all speak the same language in the end, you should be able to reconcile the different formulas without much difficulty. (If this is not the case, come see one of us and we will help you with that reconciliation.) Note also that while some of your professors will focus class discussion on critical analysis of cases including case briefs, others will assume you have engaged this analysis on your own and will use that assumed analysis as a springboard for additional discussion—for example, of the policy implications of the law or its theoretical sources—while yet others will engage a hybrid approach. The professor’s approach depends upon his or her pedagogical objectives for the class.

Finally, note that while critiques of/policy arguments about the law or its application to a particular set of facts may form part of a court’s discussion (in the R/Rule and/or A/Application portions of its opinion) the IRAC template does not provide a place for you to do the same. A brief is a summary of the court’s opinion, not yours. Nevertheless, intellectual engagement in class materials—an important expectation of the faculty here at Duke Law—means more than just briefing. And so as you proceed, be sure to develop your own system for developing and chronicling your (and your professors’ and classmates’) critiques and policy arguments.

## **B. WORKING ON HOW TO READ A CASE**

The goal of this session is to develop your ability effectively to read a case so that you can make the most out of class. Part A of this memorandum provided you with a briefing template. This part sets out a case for you to practice with. Read it and prepare a brief using the briefing template. As you work, be sure to focus on the “R” (rule of law) and “A” (argument) sections, because these are most complicated and interesting, at least in this case. Be sure also to research any terms with which you are unfamiliar. I will “cold call” on one or more of you during our orientation session,

so that you have the opportunity to engage the material as you will in “real” class meetings.

**Johnson v. Calvert**  
**Supreme Court of California**  
**851 P.2d 776 (1993)**

PANELLI, Justice.

In this case we address [the issue] . . . [w]hen, pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's “natural mother” under California law? \* \* \*

We conclude that the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy.

FACTS

Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was forced to undergo a hysterectomy in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989 Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.

On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home “as their child.” Anna agreed she would relinquish “all parental rights” to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna \$10,000 in a series of installments, the last to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a \$200,000 life insurance policy on Anna's life.\*\*

The zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.

Unfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required insurance policy. She also felt abandoned during an onset of premature labor in June.

In July 1990, Anna sent Mark and Crispina a letter demanding the balance of the payments due her

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\*\* At the time of the agreement, Anna already had a daughter, Erica, born in 1987.

or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated. The parties agreed to an independent guardian ad litem for the purposes of the suit.

The child was born on September 19, 1990, and blood samples were obtained from both Anna and the child for analysis. The blood test results excluded Anna as the genetic mother. The parties agreed to a court order providing that the child would remain with Mark and Crispina on a temporary basis with visits by Anna.

At trial in October 1990, the parties stipulated that Mark and Crispina were the child's genetic parents. After hearing evidence and arguments, the trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother, that Anna had no "parental" rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims. The court also terminated the order allowing visitation. Anna appealed from the trial court's judgment. The Court of Appeal for the Fourth District, Division Three, affirmed. We granted review.

## DISCUSSION

### *Determining Maternity Under the Uniform Parentage Act*

The Uniform Parentage Act (the Act) was part of a package of legislation introduced in 1975 as Senate Bill No. 347. The legislation's purpose was to eliminate the legal distinction between legitimate and illegitimate children. The Act followed in the wake of certain United States Supreme Court decisions mandating equal treatment of legitimate and illegitimate children. A press release issued on October 2, 1975, described Senate Bill No. 347 this way: "The bill, as amended, would revise or repeal various laws which now provide for labeling children as legitimate or illegitimate and defining their legal rights and those of their parents accordingly. In place of these cruel and outmoded provisions, SB 347 would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents."

The pertinent portion of Senate Bill No. 347, which passed with negligible opposition, became Part 7 of Division 4 of the California Civil Code, sections 7000-7021.

Civil Code sections 7001 and 7002 replace the distinction between legitimate and illegitimate children with the concept of the "parent and child relationship." The "parent and child relationship" means "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." (Civ.Code, § 7001.) "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Civ.Code, § 7002.) The "parent and child relationship" is thus a legal relationship encompassing two kinds of parents, "natural" and

“adoptive.”

[1] Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to *any* parentage determination, including the rare case in which a child's maternity is in issue. We are invited to disregard the Act and decide this case according to other criteria, including constitutional precepts and our sense of the demands of public policy. We feel constrained, however, to decline the invitation. Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature. . . . the Act offers a mechanism to resolve this dispute, albeit one not specifically tooled for it. We therefore proceed to analyze the parties' contentions within the Act's framework.

[2] These contentions are readily summarized. Anna, of course, predicates her claim of maternity on the fact that she gave birth to the child. The Calverts contend that Crispina's genetic relationship to the child establishes that she is his mother. Counsel for the minor joins in that contention and argues, in addition, that several of the presumptions created by the Act dictate the same result. As will appear, we conclude that presentation of blood test evidence is one means of establishing maternity, as is proof of having given birth, but that the presumptions cited by minor's counsel do not apply to this case.

We turn to those few provisions of the Act directly addressing the determination of maternity. “Any interested party,” presumably including a genetic mother, “may bring an action to determine the existence ... of a mother and child relationship.” (Civ.Code, § 7015.) Civil Code section 7003 provides, in relevant part, that between a child and the natural mother a parent and child relationship “*may* be established by proof of her having given birth to the child, or under [the Act].” (Civ.Code, § 7003, subd. (1), emphasis added.) Apart from Civil Code section 7003, the Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, it declares that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. (Civ.Code, § 7015.) Thus, it is appropriate to examine those provisions as well.

A man can establish a father and child relationship by the means set forth in Civil Code section 7004. (Civ.Code, §§ 7006, 7004.) Paternity is presumed under that section if the man meets the conditions set forth in section 621 of the Evidence Code. (Civ.Code, § 7004, subd. (a).) The latter statute . . . contemplates reliance on evidence derived from blood testing. (Evid.Code, § 621, subds. (a), (b); see Evid.Code, §§ 890-897 [Uniform Act on Blood Tests to Determine Paternity].) Alternatively, Civil Code section 7004 creates a presumption of paternity based on the man's conduct toward the child (e.g., receiving the child into his home and openly holding the child out as his natural child) or his marriage or attempted marriage to the child's natural mother under specified conditions.

[3] In our view, the presumptions contained in Civil Code section 7004 do not apply here. They describe situations in which substantial evidence points to a particular man as the natural father of the child. (9B West's U.Laws Ann. (1987) Unif. Parentage Act, com. foll. § 4, p. 299.) In this case,

there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman's claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants.

Significantly for this case, Evidence Code section 892 provides that blood testing may be ordered in an action when paternity is a relevant fact. When maternity is disputed, genetic evidence derived from blood testing is likewise admissible. (Evid.Code, § 892; see Civ.Code, § 7015.) The Evidence Code further provides that if the court finds the conclusions of all the experts, as disclosed by the evidence based on the blood tests, are that the alleged father is not the father of the child, the question of paternity is resolved accordingly. (Evid.Code, § 895.) By parity of reasoning, blood testing may also be dispositive of the question of maternity. Further, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of a certain number of genetic markers. (Evid.Code, § 895.5.)

[4] Disregarding the presumptions of paternity that have no application to this case, then, we are left with the undisputed evidence that Anna, not Crispina, gave birth to the child and that Crispina, not Anna, is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act. (Civ.Code, §§ 7003, subd. (1), 7004, subd. (a), 7015; Evid.Code, §§ 621, 892.) Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.\*\*\*

[5] We see no clear legislative preference in Civil Code section 7003 as between blood testing evidence and proof of having given birth. “May” indicates that proof of having given birth is a permitted method of establishing a mother and child relationship, although perhaps not the exclusive one. The disjunctive “or” indicates that blood test evidence, as prescribed in the Act, constitutes an alternative to proof of having given birth. It may be that the language of the Act merely reflects “the ancient dictum *mater est quam [gestation] demonstrat* (by gestation the mother is demonstrated). This phrase, by its use of the word ‘demonstrated,’ has always reflected an ambiguity in the meaning of the presumption. It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship.” This ambiguity, highlighted by the problems arising from the use of artificial reproductive techniques, is nowhere explicitly resolved in the Act.

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy

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\*\*\* We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.

agreement. Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

[6][7] We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means 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. \*\*\*\*

Our conclusion finds support in the writings of several legal commentators. Professor Hill, arguing that the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context, notes that “while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents....* [¶] ... [T]he intended parents are the first cause, or the prime movers, of the procreative relationship.”

Similarly, Professor Shultz observes that recent developments in the field of reproductive technology “dramatically extend affirmative intentionality.... Steps can be taken to bring into being a child who would not otherwise have existed.” “Within the context of artificial reproductive techniques,” Professor Shultz argues, “intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”

Another commentator has cogently suggested, in connection with reproductive technology, that “[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in

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\*\*\*\*The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. . . . the best interests standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.

society for adequate performance on the part of the initiators as parents of the child.”

Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are “[un]likely to run contrary to those of adults who choose to bring them into being.” Thus, “[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike.” Under Anna's interpretation of the Act, by contrast, a woman who agreed to gestate a fetus genetically related to the intending parents would, contrary to her expectations, be held to be the child's natural mother, with all the responsibilities that ruling would entail, if the intending mother declined to accept the child after its birth. In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.

In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.

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Anna urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting the payment for consent to adoption of a child.\*\*\*\* She argues further that the policies underlying the adoption laws of this state are violated by the surrogacy contract because it in effect constitutes a prebirth waiver of her parental rights.

[9][10] We disagree. Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up “parental” rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes. For the same reasons, we conclude these contracts do not implicate the

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\*\*\*\* Penal Code section 273 provides, in pertinent part, as follows: “(a) It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his or her child. [¶] (b) This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption.” \* \* \*

policies underlying the statutes governing termination of parental rights.

[11] It has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. Involuntary servitude has been recognized in cases of criminal punishment for refusal to work. We see no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking. We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.

[12] Finally, Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed. However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences.

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

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## DISPOSITION

The judgment of the Court of Appeal is affirmed.

*[Concurring opinions omitted]*

KENNARD, Justice, dissenting.

When a woman who wants to have a child provides her fertilized ovum to another woman who carries it through pregnancy and gives birth to a child, who is the child's legal mother? Unlike the majority, I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed the ovum. In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.

For each child, California law accords the legal rights and responsibilities of parenthood to only one "natural mother." When, as here, the female reproductive role is divided between two women, California law requires courts to make a decision as to which woman is the child's natural mother, but provides no standards by which to make that decision. The majority's resort to "intent" to break the "tie" between the genetic and gestational mothers is unsupported by statute, and, in the absence of appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare—the best interests of the child.

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We granted review to address an issue of first impression: Under California law, how does a court determine who is the legal mother of a child born of a gestational surrogacy arrangement?

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### III. GESTATIONAL SURROGACY

Recent advances in medical technology have dramatically expanded the means of human reproduction. Among the new technologies are in vitro fertilization, embryo and gamete freezing and storage, gamete intra-fallopian transfer, and embryo transplantation. Gestational surrogacy is the result of two of these techniques: in vitro fertilization and embryo transplantation.

In vitro fertilization or IVF is the fertilization of a human egg outside the human body in a laboratory. Children that have been conceived this way are often called “test tube babies,” because their actual conception took place in a petri dish. The first live birth of a child conceived in vitro occurred in 1979 in Great Britain after 20 years of research by a British team.

To facilitate the retrieval or “harvesting” of eggs for in vitro fertilization, a woman ingests fertility hormones to induce “superovulation” or the production of multiple eggs. The eggs are then removed through aspiration, a nonsurgical technique, or through an invasive surgical procedure known as laparoscopy. To undergo superovulation and egg retrieval is taxing, both physically and emotionally; the hormones used for superovulation produce bodily changes similar to those experienced in pregnancy, while the surgical removal of mature eggs has been likened to caesarian-section childbirth.

After removal, eggs are exposed to live sperm in a petri dish. If an egg is fertilized, the resulting zygote is allowed to divide and become multicellular before uterine implantation. The expense and low success rate of in vitro fertilization demonstrate just how much prospective parents are willing to endure to achieve biological parenthood.

Generally, an egg fertilized in vitro is implanted in the uterus of the woman who produced it. The technique, however, allows for embryo transplantation, which is the transfer of an embryo formed from one woman's egg to the uterus of another woman who will gestate the fetus to term. This can take place in at least three different situations: (1) a woman may donate an egg that, when fertilized, will be implanted in the uterus of a woman who intends to raise the child; (2) the woman who provides the egg may herself intend to raise the child carried to term by a gestational surrogate; or (3) a couple desiring a child may arrange for a surrogate to gestate an embryo produced from an egg and sperm, both donated (perhaps by close relatives of the couple.)

The division of the female reproductive role in gestational surrogacy points up the three discrete aspects of motherhood: genetic, gestational and social. The woman who contributes the egg that becomes the fetus has played the genetic role of motherhood; the gestational aspect is provided by the woman who carries the fetus to term and gives birth to the child; and the woman who ultimately raises the child and assumes the responsibilities of parenthood is the child's social mother.

#### IV. POLICY CONSIDERATIONS

The ethical, moral and legal implications of using gestational surrogacy for human reproduction have engendered substantial debate. A review of the scholarly literature that addresses gestational surrogacy reveals little consensus on the desirability of surrogacy arrangements, particularly those involving paid surrogacy, or on how best to decide questions of the parentage of children born of such arrangements.

Surrogacy proponents generally contend that gestational surrogacy, like the other reproductive

technologies that extend the ability to procreate to persons who might not otherwise be able to have children, enhances “individual freedom, fulfillment and responsibility.” Under this view, women capable of bearing children should be allowed to freely agree to be paid to do so by infertile couples desiring to form a family. The “surrogate mother” is expected “to weigh the prospective investment in her birthing labor” before entering into the arrangement, and, if her “autonomous reproductive decision” is “voluntary,” she should be held responsible for it so as “to fulfill the expectations of the other parties....”

One constitutional law scholar argues that the use of techniques such as gestational surrogacy is constitutionally protected and should be restricted only on a showing of a compelling state interest. Professor Robertson reasons that procreation is itself protected under decisions of the United States Supreme Court that affirm the basic civil right to marry and raise children. From this premise, he argues that the right to procreate should extend to persons who cannot conceive or bear children.

Professor Robertson's thesis of broad application of the right of privacy for all procreational techniques has been questioned, however, in light of recent United States Supreme Court jurisprudence.

Surrogacy critics, however, maintain that the payment of money for the gestation and relinquishment of a child threatens the economic exploitation of poor women who may be induced to engage in commercial surrogacy arrangements out of financial need. Some fear the development of a “breeder” class of poor women who will be regularly employed to bear children for the economically advantaged. Others suggest that women who enter into surrogacy arrangements may underestimate the psychological impact of relinquishing a child they have nurtured in their bodies for nine months.

Gestational surrogacy is also said to be “dehumanizing” and to “commodify” women and children by treating the female reproductive capacity and the children born of gestational surrogacy arrangements as products that can be bought and sold. The commodification of women and children, it is feared, will reinforce oppressive gender stereotypes and threaten the well-being of all children. Some critics foresee promotion of an ever-expanding “business of surrogacy brokerage.”

Whether surrogacy contracts are viewed as personal service agreements or agreements for the sale of the child born as the result of the agreement, commentators critical of contractual surrogacy view these contracts as contrary to public policy and thus not enforceable.

Organizations representing diverse viewpoints share many of the concerns highlighted by the legal commentators. For example, the American Medical Association considers the conception of a child for relinquishment after birth to pose grave ethical problems. Likewise, the official position of the Catholic Church is that surrogacy arrangements are “ ‘contrary to the unity of marriage and to the dignity of the procreation of the human person.’ ”

The policy statement of the New York State Task Force on Life and the Law sums up the broad range of ethical problems that commercial surrogacy arrangements are viewed to present: “The gestation of children as a service for others in exchange for a fee is a radical departure from the way in which society understands and values pregnancy. It substitutes commercial values for the web of social, affective and moral meanings associated with human reproduction.... This transformation has profound implications for childbearing, for women, and for the relationship between parents and the children they bring into the world. [¶] ... [¶] Surrogate parenting allows the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring.... [¶] ... [¶] ... Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and children.... [¶] ... [It] is premised on the ability and willingness of women to abdicate [their parental] responsibility without moral compunction or regret [and] makes the obligations that accompany parenthood alienable and negotiable.”

Proponents and critics of gestational surrogacy propose widely differing approaches for deciding who should be the legal mother of a child born of a gestational surrogacy arrangement. Surrogacy advocates propose to enforce pre-conception contracts in which gestational mothers have agreed to relinquish parental rights, and, thus, would make “bargained-for intentions determinative of legal parenthood.” Professor Robertson, for instance, contends that “The right to noncoital, collaborative reproduction also includes the right of the parties to agree how they should allocate their obligations and entitlements with respect to the child. Legal presumptions of paternity and maternity would be overridden by this agreement of the parties.”

Surrogacy critics, on the other hand, consider the unique female role in human reproduction as the determinative factor in questions of legal parentage. They reason that although males and females both contribute genetic material for the child, the act of gestating the fetus falls only on the female. Accordingly, in their view, a woman who, as the result of gestational surrogacy, is not genetically related to the child she bears is like any other woman who gives birth to a child. In either situation the woman giving birth is the child's mother. Under this approach, the laws governing adoption should govern the parental rights to a child born of gestational surrogacy. Upon the birth of the child, the gestational mother can decide whether or not to relinquish her parental rights in favor of the genetic mother.

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## VII. ANALYSIS OF THE MAJORITY'S "INTENT" TEST

Faced with the failure of current statutory law to adequately address the issue of who is a child's natural mother when two women qualify under the UPA, the majority breaks the "tie" by resort to a criterion not found in the UPA—the "intent" of the genetic mother to be the child's mother.

\* \* \* I cannot agree that "intent" is the appropriate test for resolving this case.

The majority offers four arguments in support of its conclusion to rely on the intent of the genetic mother as the exclusive determinant for deciding who is the natural mother of a child born of gestational surrogacy. Careful examination, however, demonstrates that none of the arguments mandates the majority's conclusion.

The first argument that the majority uses in support of its conclusion that the intent of the genetic mother to bear a child should be dispositive of the question of motherhood is "but-for" causation. Specifically, the majority relies on a commentator who writes that in a gestational surrogacy arrangement, " 'the child would not have been born *but for* the efforts of the intended parents.' "

The majority's resort to "but-for" causation is curious. The concept of "but-for" causation is a "test used in determining tort liability...." In California, the test for causation is whether the conduct was a "substantial factor" in bringing about the event. Neither test for causation assists the majority, as I shall discuss.

The proposition that a woman who gives birth to a child after carrying it for nine months is a "substantial factor" in the child's birth cannot reasonably be debated. Nor can it reasonably be questioned that "but for" the gestational mother, there would not be a child. Thus, the majority's reliance on principles of causation is misplaced. Neither the "but for" nor the "substantial factor" test of causation provides any basis for preferring the genetic mother's intent as the determinative factor in gestational surrogacy cases: Both the genetic and the gestational mothers are indispensable to the birth of a child in a gestational surrogacy arrangement.

Behind the majority's reliance on "but-for" causation as justification for its intent test is a second, closely related argument. The majority draws its second rationale from a student note: " 'The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers.' "

The "originators of the concept" rationale seems comfortingly familiar. The reason it seems familiar, however, is that it is a rationale that is frequently advanced as justifying the law's protection of intellectual property. As stated by one author, "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self." Thus, it may be argued, just as a song or invention is protected as the property of the "originator of the concept," so too a child should be regarded as belonging to the originator of the concept of the child, the genetic mother.

The problem with this argument, of course, is that children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration, or made freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property. Accordingly, I cannot endorse the majority's "originators of the concept" or intellectual property rationale for employing intent to break the "tie" between the genetic mother and the gestational mother of the child.

Next, the majority offers as its third rationale the notion that bargained-for expectations support its conclusion regarding the dispositive significance of the genetic mother's intent. Specifically, the majority states that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.' "

It is commonplace that, in real or personal property transactions governed by contracts, "intentions that are voluntarily chosen, deliberate, express and bargained-for" ought presumptively to be enforced and, when one party seeks to escape performance, the court may order specific performance. But the courts will not compel performance of all contract obligations. For instance, even when a party to a contract for personal services (such as employment) has wilfully breached the contract, the courts will not order specific enforcement of an obligation to perform that personal service. The unsuitability of applying the notion that, because contract intentions are "voluntarily chosen, deliberate, express and bargained-for," their performance ought to be compelled by the courts is even more clear when the concept of specific performance is used to determine the course of the life of a child. Just as children are not the intellectual property of their parents, neither are they the personal property of anyone, and their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts.

Thus, three of the majority's four arguments in support of its exclusive reliance on the intent of the genetic mother as determinative in gestational surrogacy cases cannot withstand analysis. And, as I shall discuss shortly, the majority's fourth rationale has merit, but does not support the majority's conclusion. But before turning to the majority's fourth rationale, I shall discuss two additional considerations, not noted by the majority, that in my view also weigh against utilizing the intent of the genetic mother as the sole determinant of the result in this case and others like it.

First, in making the intent of the genetic mother who wants to have a child the dispositive factor, the majority renders a certain result preordained and inflexible in every such case: as between an intending genetic mother and a gestational mother, the genetic mother will, under the majority's analysis, always prevail. The majority recognizes no meaningful contribution by a woman who agrees to carry a fetus to term for the genetic mother beyond that of mere employment to perform a specified biological function.

The majority's approach entirely devalues the substantial claims of motherhood by a gestational

mother such as Anna. True, a woman who enters into a surrogacy arrangement intending to raise the child has by her intent manifested an assumption of parental responsibility in addition to her biological contribution of providing the genetic material. But the gestational mother's biological contribution of carrying a child for nine months and giving birth is likewise an assumption of parental responsibility. A pregnant woman's commitment to the unborn child she carries is not just physical; it is psychological and emotional as well. The United States Supreme Court made a closely related point in *Lehr v. Robertson* (1983) 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614, explaining that a father's assertion of parental rights depended on his having assumed responsibility for the child after its birth, whereas a mother's "parental relationship is clear" because she "carries and bears the child." This court too has acknowledged that a pregnant woman and her unborn child comprise a "unique physical unit" and that the welfare of each is "intertwined and inseparable." Indeed, a fetus would never develop into a living child absent its nurturing by the pregnant woman. A pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.

To summarize, the woman who carried the fetus to term and brought a child into the world has, like the genetic mother, a substantial claim to be the natural mother of the child. The gestational mother has made an indispensable and unique biological contribution, and has also gone beyond biology in an intangible respect that, though difficult to label, cannot be denied. Accordingly, I cannot agree with the majority's devaluation of the role of the gestational mother.

I find the majority's reliance on "intent" unsatisfactory for yet another reason. By making intent determinative of parental rights to a child born of a gestational surrogacy arrangement, the majority would permit enforcement of a gestational surrogacy agreement without requiring any of the protections that would be afforded by the Uniform Status of Children of Assisted Conception Act. Under that act, the granting of parental rights to a couple that initiates a gestational surrogacy arrangement would be conditioned upon compliance with the legislation's other provisions. They include court oversight of the gestational surrogacy arrangement before conception, legal counsel for the woman who agrees to gestate the child, a showing of need for the surrogacy, medical and mental health evaluations, and a requirement that all parties meet the standards of fitness of adoptive parents.

In my view, protective requirements such as those set forth in the USCACA are necessary to minimize any possibility in gestational surrogacy arrangements for overreaching or abuse by a party with economic advantage. As the New Jersey Supreme Court recognized, it will be a rare instance when a low income infertile couple can employ an upper income surrogate. The model act's carefully drafted provisions would assure that the surrogacy arrangement is a matter of medical necessity on the part of the intending parents, and not merely the product of a desire to avoid the inconveniences of pregnancy, together with the financial ability to do so. Also, by requiring both pre-conception psychological counseling for all parties and judicial approval, the model act would assure that parties enter into a surrogacy arrangement only if they are legally and psychologically capable of doing so and fully understand all the risks involved, and that the surrogacy arrangement

would not be substantially detrimental to the interests of any individual. Moreover, by requiring judicial approval, the model act would significantly discourage the rapid expansion of commercial surrogacy brokerage and the resulting commodification of the products of pregnancy. In contrast, here the majority's grant of parental rights to the intending mother contains no provisions for the procedural protections suggested by the commissioners who drafted the model act. The majority opinion is a sweeping endorsement of unregulated gestational surrogacy.

The majority's final argument in support of using the intent of the genetic mother as the exclusive determinant of the outcome in gestational surrogacy cases is that preferring the intending mother serves the child's interests, which are “ [u]nlikely to run contrary to those of adults who choose to bring [the child] into being.’ ”

I agree with the majority that the best interests of the child is an important goal; indeed, as I shall explain, the best interests of the child, rather than the intent of the genetic mother, is the proper standard to apply in the absence of legislation. The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case.

I express no view on whether the best interests of the child in this case will be served by determining that the genetic mother is or is not the natural mother under California's Uniform Parentage Act. It may be that in this case the child's interests will be best served by recognizing Crispina as the natural mother. But this court is not just making a rule to resolve this case. Because the UPA does not adequately address the situation of gestational surrogacy, this court is of necessity making a rule that, unless new legislation is enacted, will govern all future cases of gestational surrogacy in California. And all future cases will not be alike. The genetic mother and her spouse may be, in most cases, considerably more affluent than the gestational mother. But “[t]he mere fact that a couple is willing to pay a good deal of money to obtain a child does not vouchsafe that they will be suitable parents....” It requires little imagination to foresee cases in which the genetic mothers are, for example, unstable or substance abusers, or in which the genetic mothers' life circumstances change dramatically during the gestational mothers' pregnancies, while the gestational mothers, though of a less advantaged socioeconomic class, are stable, mature, capable and willing to provide a loving family environment in which the child will flourish. Under those circumstances, the majority's rigid reliance on the intent of the genetic mother will not serve the best interests of the child.

#### VIII. THE BEST INTERESTS OF THE CHILD

As I have discussed, in California the existing statutory law applicable to this case is the Uniform Parentage Act, . . . [which] allows [only] one natural mother for each child, and thus this court is required to make a choice. To break this “tie” between the genetic mother and the gestational mother, the majority uses the legal concept of intent. In so doing, the majority has articulated a rationale for using the concept of intent that is grounded in principles of tort, intellectual property and commercial contract law.

But, as I have pointed out, we are not deciding a case involving the commission of a tort, the ownership of intellectual property, or the delivery of goods under a commercial contract; we are deciding the fate of a child. In the absence of legislation that is designed to address the unique problems of gestational surrogacy, this court should look not to tort, property or contract law, but to family law, as the governing paradigm and source of a rule of decision.

The allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interests of the child. \* \* \*

The determination of a child's best interests does not depend on the parties' relative economic circumstances, which in a gestational surrogacy situation will usually favor the genetic mother and her spouse. As this court has recognized, however, superior wealth does not necessarily equate with good parenting.

Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically, and to provide ethical and intellectual guidance. Also crucial to a child's best interests is the "well recognized right" of every child "to stability and continuity." The intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive.

Here, the child born of the gestational surrogacy arrangement between Anna Johnson and Mark and Crispina Calvert has lived continuously with Mark and Crispina since his birth in September 1990. The trial court awarded parental rights to Mark and Crispina, concluding that as a matter of law they were the child's "genetic, biological and natural" parents. In reaching that conclusion, the trial court did not treat Anna's statutory claim to be the child's legal mother as equal to Crispina's, nor did the trial court consider the child's best interests in deciding between those two equal statutory claims. Accordingly, I would remand the matter to the trial court to undertake that evaluation. \* \* \*