
CALIFORNIA EGG TOSS: THE HIGH COSTS OF AVOIDING UNENFORCEABLE SURROGACY CONTRACTS

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I. INTRODUCTION

In an emotionally charged decision regarding surrogacy contracts, it is important to recognize the ramifications, costs, and policy. There are advantages to both “gestational carrier surrogacy” contracts and “traditional surrogacy” contracts.² However, this paper focuses on the differences between these contracts using case law.³ Specifi-

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² See *Legal Advantages for a Surrogate Mother in California*, CALIFORNIA SURROGATE AGENCY (2014) archived at <http://perma.cc/AU58-R55L> [hereinafter *Legal Advantages*] (stating that California law legally supports both “gestational carrier surrogacy” and “traditional surrogacy”).

³ See *infra* Part III.A–C (discussing the differences in these contracts using California case law).

cally, this paper will focus on the implications of California case law regarding surrogacy contracts.⁴ Cases such as *Johnson v. Calvert*⁵ and *In re Marriage of Moschetta*⁶ provide a clear distinction between these contracts.⁷ This distinction will show that while gestational carrier surrogacy contracts are more expensive, public policy and court opinions will provide certainty and peace of mind to intended parents.⁸

After multiple miscarriages, Debbe and John looked into adoption as an alternative to starting a family.⁹ The couple met many obstacles in the adoption process.¹⁰ Debbe researched alternatives when she discovered traditional surrogacy.¹¹ The couple realized this was a viable option and quickly found a willing surrogate, Valerie.¹² Valerie contracted with the couple to deliver a child biologically related to herself and John through artificial insemination.¹³ Valerie would consent to relinquish her parental rights and Debbe would adopt the child after her birth.¹⁴ Valerie gave birth to John and Debbe's baby girl on August 23, 2004.¹⁵

⁴ See *infra* Part III.A–C (examining issues in surrogacy contracts in California case law).

⁵ See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (focusing on the issues surrounding gestational surrogacy contracts).

⁶ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994) (analyzing contract issues that arise in traditional surrogacy contracts).

⁷ See *infra* Part III.A–B (comparing the different surrogacy contracts).

⁸ See *infra* Part IV.A–C (exploring the benefits and detriments of the two different surrogacy options).

⁹ See Debbe, *Why We Turned to Traditional Surrogacy... One Mother's Story*, ALL ABOUT SURROGACY (2004), archived at <http://perma.cc/YV5Q-R9M7> [hereinafter Debbe] (sharing alternative means to starting a family when conception is impossible).

¹⁰ See *id.* (explaining the rigor and the intense scrutiny that is part of the adoption process).

¹¹ See *id.* (noting the personal, physical and emotional reasons that surrogacy was Debbe's preferred method for starting a family).

¹² See *id.* (stating that finding a surrogate took less than a month).

¹³ See *id.* (recounting the close relationship between, John and their surrogate, Valerie).

¹⁴ See *id.* (relating Debbe's belief that carrying and then giving up one's baby must be difficult).

¹⁵ See Debbe, *supra* note 9 (reporting no issues for surrogacy whereas with adoption Debbe and John kept hitting "road blocks").

Married couple, Christian and Sarah intended to have children one day, when the time was right.¹⁶ This made Sarah's diagnosis of cervical cancer even more devastating.¹⁷ In preparation of chemotherapy, doctors harvested Sarah's eggs to be frozen for future use ("cryopreservation").¹⁸ Sarah would never be able to carry a child in her womb, but the couple hoped with advancing medical technology they could still have children, biologically related to them both, through the use of a surrogate.¹⁹ If the medical procedure worked, a surrogate would carry a child created by Sarah's eggs and Christian's sperm.²⁰

Typically there are two types of surrogacy arrangements.²¹ The first is known as "gestational carrier surrogacy" where a woman provides her womb and carries a child, biologically unrelated to her, to full-term.²² The egg and sperm are provided by the parents who intends to raise the child ("intended parents").²³ The egg and sperm may be the genetic material of the intended parents or the genetic material of donors.²⁴ The second type of surrogacy arrangement is "traditional surrogacy" where the woman who carries the child to term is also biologically related to the child because it is a result of her egg and either the intended father's sperm or donated sperm acquired by the intended parents.²⁵

¹⁶ See Interview with Christian Smith, Father, in San Diego, Cal. (Oct. 30, 2012) [hereinafter Interview with Smith] (names have been changed at the request of the interviewee to protect the identity of the parties).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Brandie Umar, *Types of Surrogacy Arrangements*, FIND SURROGATE MOTHER (2012), archived at <http://perma.cc/5EBA-NNBP> (describing the various types of surrogacy).

²² See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 105-06 (2d ed. 2011) (explaining gestational carrier surrogacy and the process of fertilizing the intended mother's egg).

²³ See *id.* (defining the term "intended parents").

²⁴ See *id.* (clarifying that the egg and sperm of the intended parents does not necessarily need to be biologically theirs).

²⁵ See *id.* at 151 (addressing the elements of a traditional surrogacy in the context of modern assisted reproductive technology).

Under California law, gestational carrier surrogacy contracts are enforceable;²⁶ whereas, traditional surrogacy contracts are not enforceable.²⁷ Therefore, intended parents tend to avoid traditional surrogacy contracts and instead opt for gestational carrier surrogacy contracts.²⁸ Gestational carrier surrogacy costs additional money since intended parents must acquire genetic material or transfer their own genetic material to the surrogate through expensive medical procedures.²⁹ Thus, enforceable surrogacy contracts are limited to wealthier intended parents, meaning intended parents of more modest means are not able to secure an enforceable contract for the birth of a child.³⁰

Part I of this Article introduces the stories of two families with personal surrogacy experiences. Part II of this Article discusses the two types of surrogacy arrangements and introduces the relationship between surrogacy arrangements and contracts. Part III discusses California's approach to both traditional and gestational carrier surrogacy contracts. Part IV discusses the ramifications, costs and policy behind surrogacy contracts. Part V concludes the Article and argues that enforceable surrogacy contracts are more expensive, but the practicality of entering an enforceable contract provides assurance to intended parents that they will raise their child as a result.

II. GESTATIONAL CARRIER SURROGACY V. TRADITIONAL SURROGACY

A. Terminology

According to Concise Medical Dictionary, a surrogate mother is, "a woman who becomes pregnant (by artificial insemination or

²⁶ See *Johnson*, 851 P.2d at 782 (confirming that gestational carrier surrogacy contracts are enforceable under California law).

²⁷ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894-95 (holding that a traditional surrogacy contract by itself is unenforceable).

²⁸ See KINDREGAN & MCBRIEN, *supra* note 22, at 341 (discussing newer surrogacy arrangements have replaced traditional contract surrogacy arrangements).

²⁹ See KINDREGAN & MCBRIEN, *supra* note 22, at 341-43 (considering additional expenses attached to gestational carrier surrogacy due to differences in medical procedures).

³⁰ See KINDREGAN & MCBRIEN, *supra* note 22, at 341-43 (noting high costs of surrogacy contacts).

embryo insertion) following an arrangement made with another party (usually a couple unable themselves to have children) in which she agrees to give the child she carries to that party when it is born.”³¹ Debbe and John utilized the services of a traditional surrogate mother, Valerie, who carried her biological child to term and subsequently consented to Debbe’s adoption of the baby girl.³² Christian and Sarah utilized the services of a gestational carrier surrogate mother, Amy, who carried the children not biologically related to her to term for the couple.³³

A Lawyer’s Guide to Emerging Law and Science defines an intended parent as “an ‘individual, married or unmarried, who manifests the intent as provided in [the ABA Model Act § 102-19] to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.’”³⁴ John and Debbe were the intended parents of their baby girl.³⁵ Christian and Sarah were the intended parents of their twin daughters.³⁶

In traditional surrogacy, artificial insemination is a common procedure.³⁷ According to Concise Medical Dictionary artificial insemination is the “instrumental introduction of semen into the vagina in order that a woman may conceive.”³⁸ Debbe and John’s surrogate, Valerie, underwent artificial insemination, using John’s sperm, for the conception of their baby girl.³⁹

In vitro fertilization is commonly used in gestational carrier surrogacy.⁴⁰ Concise Medical Dictionary explains in vitro fertilization as the “fertilization of an ovum [(“egg”)] outside the body, the

³¹ *Surrogate Mother*, CONCISE MEDICAL DICTIONARY (8th ed. 2014).

³² See Debbe, *supra* note 9 (inferring the surrogate’s consent from the fact that she gave the baby to Debbe and John without issue).

³³ See Interview with Smith, *supra* note 16.

³⁴ KINDREGAN & MCBRIEN, *supra* note 22, at 2 n. 5.

³⁵ See Debbe, *supra* note 9 (highlighting that all the parties agreed that the child was Debbe and John’s).

³⁶ See Interview with Smith, *supra* note 16.

³⁷ See KINDREGAN & MCBRIEN, *supra* note 22, at 153 (noting an increase in artificial insemination in traditional surrogacy).

³⁸ *Artificial Insemination*, CONCISE MEDICAL DICTIONARY (8th ed. 2014).

³⁹ See Debbe, *supra* note 9 (describing the traditional surrogacy process that uses the surrogate’s egg).

⁴⁰ See KINDREGAN & MCBRIEN, *supra* note 22, at 153 (noting the increase of in vitro fertilization).

resultant zygote being incubated to the blastocyst stage and then implanted in the uterus.”⁴¹ Christian and Sarah’s surrogate, Amy, underwent an in vitro fertilization procedure to place the resulting blastocysts in Amy’s uterus.⁴²

B. Purpose of Contracts in Surrogacy Arrangements

The common purpose of a contract is to enforce promises.⁴³ In *The Divergence of Contract and Promise*, Professor Seanna Valentine Shiffrin stated, “[p]romises and their availability provide a concrete (and I believe indispensable) way for parties to reaffirm their equal moral status and respect for each other under conditions in which possibly divergent present or future interests create vulnerability.”⁴⁴ There may be no greater vulnerability than intended parents’ interest in their unborn child carried to term by a woman who promises to perform as a surrogate mother, in either a traditional or gestational carrier situation.⁴⁵

In a traditional surrogacy setting, the intended father provides his sperm or donor sperm for an artificial insemination procedure to create a child with a woman who promises to birth the child for the purpose of allowing the intended parents to raise the child.⁴⁶

Debbe and John entered into a traditional surrogacy contract with Valerie.⁴⁷ The result was a child Debbe and John raise as a

⁴¹ *In Vitro Fertilization*, CONCISE MEDICAL DICTIONARY (8th ed. 2014), archived at <http://perma.cc/K3KN-FYE7> (defining in vitro fertilization).

⁴² See Interview with Smith, *supra* note 16.

⁴³ See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 571 (1933) (stating that the common purpose of contract law is supposed to be the enforcement of promises).

⁴⁴ Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 750 (2007).

⁴⁵ See Joseph Chamie & Barry Mirkin, *Surrogacy: Human Right or Reproductive Exploitation*, YALEGLOBAL ONLINE (Oct. 28, 2014), archived at <http://perma.cc/4R7E-QLLC> (describing issues that can leave intended parents vulnerable even when there are legal agreements involved).

⁴⁶ See KINDREGAN & MCBRIEN, *supra* note 22, at 152 (defining traditional surrogacy).

⁴⁷ Cf. Debbe, *supra* note 9 (describing the evolution of the relationship and the agreement made between the parties).

member of their family.⁴⁸ Valerie kept her promise to consent to Debbe's adoption of the baby and did not breach the contract.⁴⁹ However, Valerie's position of power left Debbe and John vulnerable to her promise to consent to Debbe's adoption the child, after its birth.⁵⁰

Since traditional surrogacy contracts are not enforceable in California it is the final decision of the surrogate whether the parties will receive their expectations.⁵¹ When the surrogate breaches the unenforceable contract the family court is left to decide what is in the "best interests" of the child for custody.⁵² This could end in a joint custody arrangement between the biological father and mother.⁵³ Thus, if Valerie had changed her mind, John and Valerie would share custody of the child and Debbe would be a stepmother. The vulnerability of the intended parents is apparent in a traditional surrogacy setting.

In a gestational carrier surrogacy, the intended parents provide a zygote, which forms into a blastocyst, through their own egg and sperm, donated egg and sperm, or a combination of the two.⁵⁴ The surrogate mother undergoes an in vitro fertilization procedure and promises to carry the child to term for the intended parents.⁵⁵

⁴⁸ See Debbe, *supra* note 9 (showing a traditional surrogacy arrangement).

⁴⁹ See Debbe, *supra* note 9 (providing details of Debbe's experiences after returning home with the child).

⁵⁰ See Chamie, *supra* note 45 (mentioning the potential legal vulnerabilities that intended parents face as a result of a surrogacy arrangement); *cf.* Debbe, *supra* note 9 (noting that Debbe's name was left off the birth certificate as required court documents had not yet been received by the hospital).

⁵¹ See *In re Marriage of Moschetta*, 30 Cal.Rptr. 2d at 902-03 (concluding that California courts refuse to enforce traditional surrogacy contracts if the surrogate mother decides to keep her biological child).

⁵² See *Johnson*, 851 P. 2d at 799 (asserting the courts responsibility to uphold the frequently applied standard of the "best interests" of the child).

⁵³ See, e.g., *In re Marriage of Moschetta*, 30 Cal.Rptr. 2d at 901 (addressing the trial court's holding awarding joint custody between father and biological mother later overturned).

⁵⁴ See *Kindregan & McBrien*, *supra* note 22, at 105-06 (explaining the processes by which gestational carrier surrogacy can occur).

⁵⁵ See, e.g., *Johnson*, 851 P. 2d at 778 (describing the gestational surrogacy arrangement between the genetic parents and surrogate mother).

After Sarah's cancer remission, Christian and Sarah decided they were ready to start a family.⁵⁶ In 2002 they made their first attempt at pregnancy through the services of a surrogate.⁵⁷ After finding a willing surrogate, they had a medical facility combine Sarah's egg with Christian's sperm outside the surrogate's body.⁵⁸ On that attempt, none of the resulting zygotes developed into healthy blastocysts for implantation in the surrogate's uterus.⁵⁹ Sarah's eggs were gone.⁶⁰ The chance for a child biologically related to both Sarah and Christian was over.⁶¹ They put their family plans on hold.⁶²

In 2007, Christian and Sarah discussed the possibility of trying for a family again.⁶³ Advancing medical technology allowed intended parents to acquire donor eggs for use in substitute for Sarah's eggs.⁶⁴ Amy, a mutual friend they knew, desired to be a gestational carrier surrogate.⁶⁵ They decided to locate an anonymous egg donor through an agency and use Christian's sperm.⁶⁶ The medical facility repeated the process of combining Christian's sperm with eggs, this time acquired from an egg donor rather than using Sarah's eggs.⁶⁷ Two of the zygotes developed into healthy blastocysts proper for implantation into Amy's uterus.⁶⁸ Nine months later Amy gave birth to Christian and Sarah's fraternal (non-identical) twin daughters.⁶⁹

This gestational carrier surrogacy contract was enforceable in the state of California.⁷⁰ Amy was not required to give consent for adoption since the twins were not biologically related to her, plus

⁵⁶ See Interview with Christian Smith, *supra* note 16.

⁵⁷ See Interview with Christian Smith, *supra* note 16.

⁵⁸ See Interview with Christian Smith, *supra* note 16.

⁵⁹ See Interview with Christian Smith, *supra* note 16.

⁶⁰ See Interview with Christian Smith, *supra* note 16.

⁶¹ See Interview with Christian Smith, *supra* note 16.

⁶² See Interview with Christian Smith, *supra* note 16.

⁶³ See Interview with Christian Smith, *supra* note 16.

⁶⁴ See Interview with Christian Smith, *supra* note 16.

⁶⁵ See Interview with Christian Smith, *supra* note 16.

⁶⁶ See Interview with Christian Smith, *supra* note 16.

⁶⁷ See Interview with Christian Smith, *supra* note 16.

⁶⁸ See Interview with Christian Smith, *supra* note 16.

⁶⁹ See Interview with Christian Smith, *supra* note 16.

⁷⁰ See *Johnson*, 851 P.2d at 778 (holding that the gestational surrogacy contract was valid and enforceable in California).

Christian and Sarah were the intended parents.⁷¹ Christian and Sarah's position was less vulnerable because of the enforceability of the contract.⁷²

Christian and Sarah could have asked Amy to donate her eggs for the process, but this would have been a traditional surrogacy arrangement.⁷³ The couple was assured they would raise their daughters and avoid potential litigation with Amy because they took a two-step process.⁷⁴ First they acquired donated eggs and found a separate surrogate willing to carry their babies.⁷⁵ Fortunately, Christian, Sarah and their twins continue a special relationship with Amy to this day.⁷⁶ Amy never questioned her role in the lives of these baby girls.⁷⁷

Either circumstance leaves the intended parents in a vulnerable position until the child is born and placed with the intended parents.⁷⁸ The promise to perform by each party is critical.⁷⁹ If these promises are enforceable by the courts because the parties enter a contract, the vulnerabilities are protected interests.⁸⁰ Because gestational carrier surrogacy contracts are enforceable, parties to such contracts are able to protect their interests.⁸¹ The unenforceable tradi-

⁷¹ See *id.* (describing that a gestational surrogate is not required to give adoptive consent because the child is not biologically hers).

⁷² See *id.* (establishing that gestational surrogacy arrangements offer more protection for the intended parents because they are enforceable contracts).

⁷³ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 895 (illustrating how a traditional surrogacy agreement is formed).

⁷⁴ See Interview with Christian Smith, *supra* note 16.

⁷⁵ See Interview with Christian Smith, *supra* note 16.

⁷⁶ See Interview with Christian Smith, *supra* note 16.

⁷⁷ See Interview with Christian Smith, *supra* note 16.

⁷⁸ See *Johnson*, 851 P.2d at 778 (describing a situation in which the intended parents, after a legal battle, got custody of the biologically related child).

⁷⁹ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894 (stating an example of a successful surrogate agreement where the biologically related parents receive the child).

⁸⁰ See *Johnson*, 851 P.2d at 778 (showing in this case that the court upheld the surrogate contract, allowing the biologically related parents to keep the baby).

⁸¹ See *id.* (holding that the interests to the biological parents are protected under California law).

tional surrogacy contract leaves intended parents vulnerable to the surrogate mother's final decision, after the child's birth.⁸²

C. Issues Related to Enforcement of Surrogacy Contracts

i. Private Autonomy

The will theory of contracts emphasizes a required "meeting of the minds" of the parties at the time of contract formation.⁸³ The court must look at the subjective intent of the parties.⁸⁴ However, it is difficult to subjectively understand what someone else is thinking or to set a standard for the courts to look to when determining this requirement.⁸⁵ In surrogacy contracts, formation takes place at multiple times dependent on the type of surrogacy.⁸⁶

Formation in a traditional surrogacy contract takes place before the artificial insemination procedure; however, the surrogate must consent to the adoption after the child is born.⁸⁷ The adoption requires a separate contract and therefore, the will of the parties must be looked at a second time.⁸⁸ The surrogacy agreement merely establishes a present intent to consent for the future adoption following the child's birth.⁸⁹ However, if a surrogate refuses to consent to the

⁸² See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 901 (implying that if the surrogacy contract is not enforceable, parents of surrogate children will have no rights to the child born if the surrogate decides to keep them).

⁸³ See Cohen, *supra* note 43, at 575 (discussing the implications of contract law in a surrogacy agreement, requiring a "meeting of the minds" from both parties).

⁸⁴ See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 30 (4th ed. 2001) (asserting that mutual assent is necessary when creating a surrogacy contract).

⁸⁵ See *id.* (noting that courts lack clear standards to apply when determining whether the contracting parties shared the same intent).

⁸⁶ See *id.* (describing the initial stage of entering into a contract, known as formation).

⁸⁷ See CAL. FAM. CODE § 8814 (West 2014) (examining the consent process where a surrogate and biological parents must agree to before, during and after the child's birth); see also *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900 (holding that the birth mother must consent to the adoption after the surrogate child is born).

⁸⁸ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900 (inferring that the traditional surrogacy contract is not sufficient enough to establish an adoption agreement).

⁸⁹ See CAL. FAM. CODE § 8814 (West 2014) (highlighting the procedures for surrogacy which includes signing an agreement in the presence of a social worker); see

adoption, the meeting of the minds has not occurred.⁹⁰ Since the original contract is not enforceable, the courts only look to the surrogate's intent to consent to the adoption.⁹¹

A surrogate mother might intend to consent to the adoption of her child at the time she signs the surrogacy agreement.⁹² However, it is human nature for a mother to experience a connection with her child during the pregnancy and at birth.⁹³ Therefore, her changed intent at the time of the second contract, the adoption agreement, is foreseeable by a reasonable person.⁹⁴ The court will not force a parent to consent to the adoption of their child.⁹⁵

If Valerie did not consent to relinquish her parental rights to her baby girl to Debbe and John, the court would not enforce the surrogacy contract.⁹⁶ The court would not look to the meeting of the

also In re Marriage of Moschetta, 30 Cal. Rptr. 2d at 903 (stating that a surrogacy contract cannot serve as an adoption agreement).

⁹⁰ See Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 281 (2008) (defining "meeting of the minds" as a requirement in establishing a valid contract).

⁹¹ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 901 (establishing that the surrogacy contract does not serve as a binding agreement to give the child up for adoption).

⁹² See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2351 (1995) (suggesting surrogate mothers do not anticipate psychological consequences of pregnancy).

⁹³ See *id.* (highlighting the factors that might influence a surrogate's desire to keep the child); see also *The Unborn Child – Connected to the Mother by Feelings and Experiences*, PRENATAL PARENTING INFORMATION, archived at <http://perma.cc/D4PQ-3J97> (inferring that a mother develops a relationship and feelings towards her unborn child during pregnancy).

⁹⁴ See Andrews, *supra* note 92, at 2351 (highlighting the emotional change in the mother as evidenced by her wanting to keep the child).

⁹⁵ See CAL. FAM. CODE § 8814 (2004) (establishing consent is required and adoption will not be forced); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2, at 901 (outlining the policy that the court will not force a surrogate mother to consent to an adoption in traditional surrogacy, as opposed to gestational carrier surrogacy).

⁹⁶ See Debbe, *supra* note 9 (providing background of Debbe's surrogacy experience); see also *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 901 (reiterating that the courts will not force a traditional surrogate mother into relinquishing parental rights through).

minds at the formation of the surrogacy contract.⁹⁷ The analysis would strictly look to the intent of the parties at the time of adoption.⁹⁸

In gestational carrier surrogacy, the contract formation takes place prior to in vitro fertilization.⁹⁹ This type of surrogacy does not require a subsequent adoption agreement because the surrogate is not biologically related to the child.¹⁰⁰ The meeting of the minds must take place at the time the surrogacy contract is formed.¹⁰¹ The courts look to the contract to determine the intent.¹⁰² Parties enter these contracts voluntarily without the concerns of adoption addressed in traditional surrogacy.¹⁰³ Therefore, the meeting of the minds, as necessary according to the will theory of contracts, is satisfied.¹⁰⁴

If Amy failed to provide the children to Christian and Sarah, the courts would look to the surrogacy contract because a gestational carrier surrogacy arrangement is enforceable.¹⁰⁵ The meeting of the

⁹⁷ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900 (upholding the decision to look to the intent of the parties at the time of adoption rather than at the point of signing the traditional surrogacy agreement).

⁹⁸ See *id.* at 901 (explaining that the court will look to the intent of the parties after the pregnancy when enforcing a surrogacy contract)..

⁹⁹ See *Johnson*, 851 P.2d at 777 (inferring that in the case of gestational surrogacy, a contract made prior to pregnancy is enforceable).

¹⁰⁰ See *id.* at 784 (clarifying that gestational carrier surrogacy compensates the surrogate for carrying the child and does not imply any parental rights); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d. at 903 (affirming the court's holding in *Johnson v. Calvert* that surrogacy via embryo implantation results in no parental rights of the surrogate mother).

¹⁰¹ See *Johnson*, 851 P.2d at 783 (announcing intent of the parties is determined at the time the surrogacy contract is established).

¹⁰² See *id.* at 783 (recognizing the surrogacy contract as the only source to determine intent).

¹⁰³ See *In re Marriage of Moschetta*, 25 Cal. App. at 1235 (concluding that gestational carrier surrogacy contracts present less legal problems because of the lack of parental rights afforded to the surrogate mother because she lacks any relation to the baby).

¹⁰⁴ See Cohen, *supra* note 43, at 575 (highlighting that “meeting of the minds” is the first essential element in the will theory of contracts).

¹⁰⁵ See *Legal Advantages*, *supra* note 2 (noting that California courts have consistently upheld gestational surrogacy contracts); *cf. Johnson*, 851 P.2d at 783 (recognizing that, in deciding maternity, a surrogacy contract is not inconsistent with public policy).

minds occurred at the contract formation, prior to the implantation of Christian and Sarah's blastocysts.¹⁰⁶ Since Amy, Christian and Sarah each intended to create Christian and Sarah's children for the purpose of Christian and Sarah to raise them, the court would easily declare Christian and Sarah the twin's parents.¹⁰⁷

ii. Reliance

The traditional contract doctrine elements of offer, acceptance and consideration are easily identified in surrogacy contracts; however, the concern is whether or not the consideration is valid.¹⁰⁸

California law prohibits payment in exchange for the adoption of a child.¹⁰⁹ Traditional surrogacy contracts violate this law because the bargained-for-exchange includes the subsequent consent by the surrogate to relinquish her parental rights.¹¹⁰ Therefore, the court considers the compensation paid to the surrogate, in part, for relinquishing her parental rights.¹¹¹

The compensation to Valerie was, in part, to compensate her for the consent to allow Debbe to adopt her child.¹¹² This is prohibited by law.¹¹³ Had Valerie changed her mind, the surrogacy agreement would not be enforceable.¹¹⁴ The court would declare Valerie

¹⁰⁶ See Interview with Smith, *supra* note 16.

¹⁰⁷ See *Johnson*, 851 P.2d at 796 (Kennard, J., dissenting) (concluding that the woman who brings about "the birth of a child that she intended to raise as her own" is the natural mother under California law).

¹⁰⁸ See *id.* (Kennard, J., dissenting) (arguing "rights in children cannot be sold for consideration").

¹⁰⁹ See CAL. PENAL CODE § 273 (2014) (classifying an offer to pay, receive money or other consideration for an adoption, as a misdemeanor).

¹¹⁰ See *In re Marriage of Moschetta*, 25 Cal. App. at 1231 (emphasizing the implication of the traditional surrogacy contract would ignore the analysis for formal consent of the adoption by the birth mother).

¹¹¹ See *id.* at 1227-28 (considering the argument of enforcing surrogacy contracts).

¹¹² See, e.g., *Sample TS Contract*, ALL ABOUT SURROGACY, archived at <http://perma.cc/5EY4-GR52> (outlining the terms of compensation in a traditional surrogate agreement).

¹¹³ See CAL. PENAL CODE § 273 (2014) (defining compensation for the placement of adoption as a misdemeanor).

¹¹⁴ See *id.* (invalidating contracts that secured payment in exchange for adoption).

the legal mother of the child born as a result of the surrogacy.¹¹⁵ The parties kept their promises leaving the courts out of their agreement.¹¹⁶

Gestational carrier surrogacy does not require the surrogate to consent to adoption.¹¹⁷ The benefit to the surrogate is compensation “for her services in gestating the fetus and undergoing labor, rather than giving up ‘parental’ rights to the child.”¹¹⁸ The California courts hold consideration valid in gestational carrier surrogacy contracts.¹¹⁹ Christian and Sarah compensating Amy “for her services in gestating the fetus and undergoing labor” was valid consideration in California.¹²⁰ The court would enforce the agreement, declaring Christian and Sarah the parents of the twins.¹²¹ Amy would have no rights to the children.¹²²

The injurious-reliance theory is based in the concept that there is a promise, which someone relies on and a loss ensues.¹²³

In traditional surrogacy, each party promises to a performance.¹²⁴ The intended parents promise to compensate the surrogate

¹¹⁵ See *In re Marriage of Moschetta*, 25 Cal. App. at 1231 (explaining that the court would award custody when there is a genetic connection between mother and child).

¹¹⁶ See *Debbe*, *supra* note 9 (inferring that when there are no legal challenges the surrogacy contract is presumed to be valid).

¹¹⁷ See *Johnson*, 851 P.2d at 784 (noting that gestational carrier surrogates do not have any biological connection to the child, and therefore do not have to consent to the child’s adoption).

¹¹⁸ *Id.*

¹¹⁹ See *id.* (enforcing a gestational carrier surrogacy contract, where consideration in the form of monetary payments was provided in exchange for gestation and childbirth).

¹²⁰ *Id.*

¹²¹ See *id.* at 778, 787 (affirming judgment of the lower court that a child’s genetic parents were its “genetic, biological and natural” father and mother, and that surrogacy contract was valid and enforceable. The court rejected the gestational carrier’s argument that the genetic parents were merely donors of genetic material).

¹²² See *id.* (holding surrogate mother had no parental rights to a child born via gestational surrogacy where all parties had willingly entered into a valid gestational surrogacy contract).

¹²³ See *Cohen*, *supra* note 43, at 578 (describing a three-prong test for determining contractual liability under the Injurious-Reliance Theory, “(1) someone makes a promise . . . (2) someone else relies on it, and (3) suffers some loss thereby”).

in exchange for her promise to consent to the adoption of the child after its birth.¹²⁵ As previously discussed, this violates California statute.¹²⁶

In gestational carrier surrogacy, each party also promises to a performance.¹²⁷ The intended parents promise to compensate the surrogate in exchange for her promise to carry and labor the child, “rather than giving up parental rights to the child.”¹²⁸ Both parties are relying on the promise of the other party.¹²⁹ If the intended parents fail to compensate the surrogate, she would suffer a loss.¹³⁰ If the surrogate attempts to keep the child born as a result, the intended parents would suffer a loss.¹³¹ The courts could enforce these promises of the parties through injurious-reliance theory.¹³²

¹²⁴ See Amanda Mechell Holliday, *Who’s Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1102 (2003) (discussing the obligations of the parties in a traditional surrogacy contract).

¹²⁵ See *id.* (describing a traditional surrogacy contract as one in which a surrogate mother promises to give up her parental rights to a child in exchange for payment of all the surrogate mother’s pregnancy-related expenses and compensation for her services).

¹²⁶ See CAL. PENAL CODE § 273 (2014) (illustrating that offering to compensate for placing the child up for adoption or consenting to such adoption it is a misdemeanor).

¹²⁷ See *Johnson*, 851 P.2d at 784 (discussing how both parties “voluntarily agreed to participate in in vitro fertilization” and that the resulting expenses would be covered by the Calverts).

¹²⁸ See *id.* (explaining that the payments made to the surrogate are to cover gestating and labor expenses, not for the “parental rights” over the child).

¹²⁹ See *id.* at 778 (discusses the contract made between the Calverts and Johnson in which Johnson had agreed that upon birth she would “relinquish all parental rights” to the child to the Calverts and in exchange she will be paid \$10,000 and for her \$200,000 life insurance)

¹³⁰ See *id.* at 778 (reciting the facts of the case wherein the defendant-surrogate relied on the plaintiffs’ promise to compensate); see also Cohen, *supra* note 43, at 578 (explaining that anyone who is innocently injured by relying on a promise should be “made good” by those who caused it).

¹³¹ See *Johnson*, 851 P.2d at 778 (reciting the facts of the case wherein the plaintiffs-intended parents relied on the defendant’s promise to perform as a surrogate); see also Cohen, *supra* note 43, at 578 (emphasizing the elements of injury from the breach of contract).

¹³² See Cohen, *supra* note 43, at 578 (outlining the elements of the injurious-reliance theory).

iii. Damages

Courts typically enforce breach of contracts by awarding money damages to meet the expectation of the injured party to put her in the position she “would have been in had the contract been performed.”¹³³ “Rarely do expectation damages make the disappointed promisee completely whole.”¹³⁴ A court order for specific performance requires the breaching party to perform as promised in the contract rather than substituting expectations with money damages.¹³⁵

In the case of breach by a surrogate mother, the only plausible way to put the intended parent(s) in the same position as if the contract had been performed would be to order specific performance.¹³⁶ The court would order the surrogate to carry a child in her womb, give birth to the child and then give the child to the intended parent(s).¹³⁷ Involuntary servitude is prohibited by California statute.¹³⁸ However, a woman has the right to abort a fetus regardless if the circumstances involve surrogacy.¹³⁹

In gestational carrier surrogacy, since the surrogate mother is not biologically related to the child, this method of contract enforce-

¹³³ MURRAY, *supra* note 84, at § 118(D)(2).

¹³⁴ Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 6 (2007).

¹³⁵ See MURRAY, *supra* note 84, § 118(D)(3) (explaining that when the remedy of money damages is inadequate to protect the expectation interest courts will often require specific performance of the parties).

¹³⁶ See MURRAY, *supra* note 84, § 118(D)(3) (asserting that specific performance is the only reasonable remedy to put the intended parents in the same position as if the contract had been performed as promised).

¹³⁷ See, e.g., Flavia Berys, *Interpreting a Rent Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 341 (2006) (analogizing a gestational surrogacy agreement to a service contract, “where what is bargained for is a specific person’s performance”).

¹³⁸ See CAL. PENAL CODE § 181 (2011) (noting that it is punishable to hold or attempt to hold any person in involuntary servitude, which forcing a surrogate to carry a child could be deemed to be).

¹³⁹ See, e.g., *Johnson*, 851 P.2d at 784 (pointing to a provision in surrogacy contracts that provide for a woman’s absolute right to an abortion).

ment is appropriate once the child is born.¹⁴⁰ Amy carried Christian and Sarah's children.¹⁴¹ The twin girls were unrelated to Amy.¹⁴² It seems specific performance would be appropriate had Amy breached the contract.¹⁴³ If Amy attempted to keep the children, the court could easily order specific performance to give the twins to Christian and Sarah.¹⁴⁴

In traditional surrogacy this type of enforcement would require a court to order a biological mother to relinquish her parental rights after the child's birth.¹⁴⁵ In California, birth parents are required to consent to the adoption of their child in the presence of a social worker.¹⁴⁶ A court order does not substitute consent.¹⁴⁷ Thus, specific performance is not an option in traditional surrogacy.¹⁴⁸ The court would not order specific performance because you cannot force a parent to relinquish their parental rights.¹⁴⁹ If Valerie changed her mind after the birth of her baby girl, the court would not order her to relinquish her parental rights to John and Debbe.

¹⁴⁰ See *Johnson*, 851 P.2d at 800 (Kennard, J., dissenting) (determining that a gestational surrogacy contract is best enforced after the child is born).

¹⁴¹ See Interview with Smith, *supra* note 16.

¹⁴² See Interview with Smith, *supra* note 16.

¹⁴³ See Interview with Smith, *supra* note 16.

¹⁴⁴ See Interview with Smith, *supra* note 16.

¹⁴⁵ See *In re Marriage of Moschetta*, 30 Cal.Rptr.2d at 894-95 (determining that enforcing a traditional surrogacy contract will force the mother to give up her parental rights to her child).

¹⁴⁶ See CAL. FAM. CODE § 8814 (2015) (stating that the adoption consent has to be "signed in the presence of an agent of the department or of a delegated county adoption agency on a form prescribed by the department"); see also *In re Marriage of Moschetta*, 30 Cal.Rptr.2d at 900 (explaining that in order for a traditional surrogacy contract to serve as an adoption agreement the birth mother has to consent to adoption in the presence of a social worker).

¹⁴⁷ See *In re Marriage of Moschetta*, 30 Cal.Rptr.2d at 901 (holding that a formal consent is required to enforce a traditional surrogacy contract).

¹⁴⁸ See *id.* (explaining that a court cannot circumvent formal consent by way of specific performance).

¹⁴⁹ See Cal. Fam. Code § 8814 (2015) (according to the statute there must be consent); see also *In re Marriage of Moschetta*, 30 Cal.Rptr.2d at 901 (discussing that a court will not enforce the traditional surrogacy contract if there is no consent).

III. CALIFORNIA CASE LAW

A. *Johnson v. Calvert* – Gestational Carrier Surrogacy Contract

Gestational carrier surrogacy contracts are enforced by California courts.¹⁵⁰ In *Johnson v. Calvert*, Mark and Crispina Calvert desired to parent a child.¹⁵¹ Due to a hysterectomy, Crispina was unable to carry a child.¹⁵² Anna Johnson, hearing their story, offered to surrogate the embryo created by Mark's sperm and Crispina's egg.¹⁵³ The parties entered a gestational carrier surrogacy contract whereby Anna agreed to relinquish "all parental rights," to the baby born as a result of the arrangement, to Mark and Crispina.¹⁵⁴ The agreement required Mark and Crispina compensate Anna \$10,000 in payments during the pregnancy and provide a \$200,000 life insurance policy on Anna's life.¹⁵⁵

In January 1990, "the zygote was implanted" in Anna's womb.¹⁵⁶ Within a month, it was confirmed that Anna was pregnant.¹⁵⁷

In July 1990, Anna decided she wanted full compensation prior to the child's birth or she threatened to not relinquish parental rights to the child.¹⁵⁸ Mark and Crispina sought declaratory relief from the court that "they were the legal parents of the unborn

¹⁵⁰ See *Johnson*, 851 P.2d at 778 (concluding California recognizes the biological parents of child born via gestational surrogacy legal parents, not offending state and federal Constitution and public policy).

¹⁵¹ See *id.* (providing background of the couple's desire to start a family).

¹⁵² See *id.* (noting the necessary facts to highlight the case).

¹⁵³ See *id.* (highlighting surrogate's offer to carry the couple's child).

¹⁵⁴ See *id.* (describing the terms and conditions of the gestational carrier surrogacy contract).

¹⁵⁵ See *id.* (noting additional terms and compensation between the couple and the surrogate).

¹⁵⁶ See *Johnson*, 851 P.2d at 778 (indicating the time the fertilized egg was implantation in the surrogate mother).

¹⁵⁷ See *id.* (stating the procedure was successful).

¹⁵⁸ See *id.* (defining the deteriorating relationship between the natural parents and surrogate).

child.”¹⁵⁹ Anna filed suit for a declaration that she was the mother of the unborn child.¹⁶⁰ The court consolidated the two cases.¹⁶¹

In September 1990, the child was born and blood tests revealed Anna was not the genetic mother.¹⁶² In October 1990, Mark, Crispina and Anna agreed Mark and Crispina were the genetic parents.¹⁶³ The trial court held “that Anna had no parental rights to the child, and that the surrogacy contract was legal and enforceable against Anna’s claims.”¹⁶⁴ The Court of Appeals affirmed the trial court’s decision.¹⁶⁵

The California Supreme Court held “that although the Act [the Uniform Parentage Act] recognizes both genetic consanguinity and giving birth as a 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 the child that intended to raise as hers – is the natural mother under California Law.”¹⁶⁶ The court looked to the intent of the parties “as manifested in the surrogacy agreement.”¹⁶⁷

The purpose of the surrogacy arrangement was to bring Mark and Crispina’s child into the world, not “to donate a zygote to Anna.”¹⁶⁸ The \$10,000 paid to Anna was valid consideration because it compensated her for carrying the unborn child and “undergoing labor.”¹⁶⁹ The payment was not intended to compensate her for “giving

¹⁵⁹ *See id.* (reviewing the legal action the natural parents took to declare they were the parents of the child).

¹⁶⁰ *See id.* (outlining the surrogate’s response to the declaratory action).

¹⁶¹ *See id.* (articulating the court’s measures).

¹⁶² *See Johnson*, 851 P.2d at 778 (commenting on the blood test results following the child’s birth).

¹⁶³ *See id.* (recognizing both parties stipulations regarding the genetic parents of the child).

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* (announcing the Court of Appeal’s affirmation).

¹⁶⁶ *Id.* at 782.

¹⁶⁷ *Id.*

¹⁶⁸ *See Johnson*, 851 P.2d at 782 (articulating the purpose of the gestational carrier surrogacy agreement).

¹⁶⁹ *See id.* at 784 (recognizing the consideration paid was for carrying the child rather than adopting the child).

up parental rights to the child.”¹⁷⁰ Anna did not have parental rights to relinquish.¹⁷¹

B. In re Marriage of Moschetta – Traditional Surrogacy Contract

Traditional surrogacy contracts are deemed unenforceable in the state of California.¹⁷² In *Moschetta*, Robert and Cynthia Moschetta desired to raise a child.¹⁷³ Because Cynthia was sterile, the couple found a willing surrogate, Elvira Jordan, through a surrogacy broker.¹⁷⁴ The parties entered into a traditional surrogacy contract, whereby Elvira “would be artificially inseminated with Robert[’s]” sperm.¹⁷⁵ The child would be biologically related to both Robert and Elvira.¹⁷⁶ Elvira agreed Robert would have sole custody of the child and she would “terminate her parental rights.”¹⁷⁷ Elvira further agreed to assist Cynthia’s adoption of the child.¹⁷⁸ Robert and Cynthia paid Elvira \$10,000 “in recognition of Robert’s obligations to support the child and his right to provide [Elvira] with living expenses.”¹⁷⁹

Elvira was pregnant by artificial insemination in November of 1989.¹⁸⁰ In April 1990, Robert asked Cynthia for a divorce.¹⁸¹ Elvira learned about this while she was in labor in May 1990.¹⁸² Elvira hesitantly allowed Robert and Cynthia to take baby Marissa home

¹⁷⁰ *See id.* (acknowledging the purpose of the payment to the surrogate).

¹⁷¹ *See id.* (inferring that gestational carrier surrogates do not have parental rights to relinquish).

¹⁷² *See In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 903 (cautioning parents about the risks of a traditional surrogacy contract in California).

¹⁷³ *See id.* at 895 (delineating the couple’s subjective intent).

¹⁷⁴ *See id.* (offering further detail on how the parties were introduced).

¹⁷⁵ *See id.* (explaining the preliminary details of the surrogacy agreement).

¹⁷⁶ *See id.* (clarifying the parties’ rights to the child in a traditional surrogacy).

¹⁷⁷ *See id.* (acknowledging custodial terms of the agreement).

¹⁷⁸ *See In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 895 (declaring the surrogate would assist Cynthia in the adoption of the child).

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* (stating the date the surrogate became pregnant).

¹⁸¹ *See id.* (announcing when Robert told Cynthia he wanted a divorce).

¹⁸² *See id.* (explaining the time at which Elvira learned of the Moschettas’ marital problems).

from the hospital after they promised to stay together.¹⁸³ Seven months later, Robert moved out and took baby Marissa with him.¹⁸⁴ One month later, Cynthia filed for legal separation and a petition to establish parentage of Marissa.¹⁸⁵ Shortly thereafter, Robert filed for dissolution.¹⁸⁶ The actions were consolidated for trial.¹⁸⁷

At trial, the parties did not request enforcement of the surrogacy contract; “all agreed it was unenforceable.”¹⁸⁸ This was prior to the *Johnson v. Calvert* decision.¹⁸⁹ Robert and Elvira were awarded joint legal and physical custody of Marissa.¹⁹⁰

In light of the *Johnson v. Calvert* decision, Robert appealed the judgment arguing the surrogacy agreement should be enforced and that Cynthia is Marissa’s legal mother “by virtue of the Uniform Parentage Act.”¹⁹¹ Cynthia never began the adoption process and supported the trial court judgment.¹⁹²

The court held the definition of parent under California Family Code provides where the surrogate mother is the child’s biological mother, the signing of a surrogacy contract and intending to parent the child, as analyzed in *Johnson v. Calvert*, does not replace the subsequent requirement for an adoption agreement to relinquish her rights as the child’s mother.¹⁹³

¹⁸³ See *id.* (noting that, because of the couples’ consideration of divorce, Elvira began to reconsider the surrogacy agreement).

¹⁸⁴ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 895 (stating Robert left the family residence taking the baby with him on November 30, 1990).

¹⁸⁵ See *id.* (providing that on December 21, 1990 Cynthia filed a petition to establish custody).

¹⁸⁶ See *id.* (detailing Robert’s responsive pleadings).

¹⁸⁷ See *id.* (stating the court consolidated and trifurcated the actions for trial).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* (acknowledging that the case was decided before the court’s ruling in *Johnson v. Calvert*, which held “gestational surrogacy contracts do not, on their face, offend public policy”).

¹⁹⁰ See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 895 (stating that the trial court judgment ordered Robert and Elvira the legal parents, giving them custody of the child).

¹⁹¹ *Id.*

¹⁹² See *id.* at 895-96 (noting that Cynthia did failed to commence adoption and submitted a brief in support of the court’s judgment).

¹⁹³ See *id.* at 894-95 (declining to enforce a surrogacy contract in the absence of a legal adoption agreement).

C. Jaycee B. v. Superior Court – Gestational Carrier Surrogacy Contract

Married couple John and Luanne desired to raise a child.¹⁹⁴ They entered into a gestational carrier surrogacy contract with Pamela and Pamela's husband, Randy.¹⁹⁵ Pamela agreed to carry the "embryo(s) created with donated genetic material, unrelated to any of the parties."¹⁹⁶ When the child was born, the parties agreed John and Luanne were the intended parents who would raise the child.¹⁹⁷ Baby Jaycee was born in April 1995.¹⁹⁸

In March 1995, John filed for a petition for dissolution of marriage.¹⁹⁹ In April, Luanne filed her response, which asserted, "the parties were expecting a child by way of surrogate contract" and attached a copy of the surrogacy contract.²⁰⁰ On October 12, 1995, Luanne filed an order seeking sole custody of and child support for Jaycee.²⁰¹ John admitted entering into the surrogacy agreement, but argued he was not bound to the contract.²⁰² The court turned to the California Supreme Court's decision in *Johnson v. Calvert* which required it look to the intent of the parties.²⁰³ The court held baby Jaycee would not have been conceived if not for John entering the surrogacy agreement.²⁰⁴ John was determined to be the intended father and ordered to pay child support for baby Jaycee.²⁰⁵

¹⁹⁴ See *Jaycee B. v. Superior Court*, 49 Cal. Rptr. 2d 694, 695 (Cal. Ct. App. 1996) (noting that the married couple sought a child through gestational surrogacy).

¹⁹⁵ See *id.* at 697 (stating that the parties executed a surrogacy contract).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* (explaining the terms of the surrogacy contract with respect to parental rights).

¹⁹⁸ See *id.* (providing the child's birth month and year).

¹⁹⁹ See *id.* (dating when John filed for the dissolution of the marriage to Luanne).

²⁰⁰ See *Jaycee B.*, 49 Cal. Rptr. 2d at 697 (outlining Luanne's response to John's petition for dissolution of marriage).

²⁰¹ See *id.* (stating that Luanne filed an order for sole custody of Jaycee).

²⁰² See *id.* (offering the stipulations and disputes between the parties).

²⁰³ See *id.* at 701 (highlighting the importance of the parties' intent).

²⁰⁴ See *id.* at 702 (finding that John's participation in the surrogacy agreement led to Jaycee's conception).

²⁰⁵ See *id.* (holding that through existing law, John is most likely to be found as the father of Jaycee).

IV. IMPLICATIONS OF CALIFORNIA CASE LAW

A. Ramifications

California case law impacts the practice of surrogacy in this state.²⁰⁶ The courts often address the ramifications in their opinions.²⁰⁷ In *Moschetta*, the California Court of Appeals recognized the costs associated with unenforceable traditional surrogacy contracts are much less than the costs of enforceable gestational carrier surrogacy contracts.²⁰⁸ After rejecting the enforceability of a traditional surrogacy contract, the court concluded:

[i]nfertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, biology is destiny.²⁰⁹

However, the reality of the *Johnson v. Calvert* decision is that professionals in the field of surrogacy practice by using enforceable gestational surrogacy arrangements.²¹⁰ California surrogacy agencies only arrange gestational carrier surrogacy for their clients.²¹¹ These

²⁰⁶ See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d (exemplifying a case that influences California surrogacy practices).

²⁰⁷ See *id.* (highlighting legal issues that arise in surrogacy contracts).

²⁰⁸ See *id.* at 894 (explaining that traditional surrogacy can be done by a simple and cost effective method of using needleless syringe or similar device).

²⁰⁹ *Id.* at 903.

²¹⁰ See *Johnson*, 851 P.2d. at 784 (holding the gestational contract, where both parties agreed to the in vitro fertilization and payments for medical procedures, was enforceable).

²¹¹ See Telephone Interview with San Diego Surrogacy Agency (Oct. 25, 2012) [*hereinafter* Interview with Surrogacy Agency] (conversation between San Diego Surrogacy Agency and author).

agencies avoid unenforceable traditional surrogacy all together.²¹² Most surrogacies handled by California attorneys are gestational carrier surrogacy.²¹³ California doctors advertise gestational carrier surrogacy and in vitro fertilization on their websites, without any mention of traditional surrogacy.²¹⁴

While the cost of gestational carrier surrogacy is higher than traditional surrogacy, professionals in the industry tend to steer intended parents towards these enforceable arrangements rather than involve their clients in circumstances that could have potentially heart-breaking results.

B. Costs of Surrogacy

i. Gestational Carrier Surrogacy

A gestational carrier surrogacy arrangement costs intended parents roughly \$125,990.²¹⁵ This amount includes professional fees, intended parent(s) admission expenses, surrogate compensation and related expenses, egg donor compensation and related expenses, medical costs, psychological care, and legal expenses.²¹⁶

The agency involved with the surrogacy charges professional fees of approximately \$22,000.²¹⁷ Intended parent admission of \$390 includes a criminal background check, a genetic evaluation, a high-risk pregnancy evaluation, and an agency consultation fee.²¹⁸

Surrogate compensation of \$36,600 incorporates compensation (typically an additional \$3,000-\$11,000 for experienced surro-

²¹² *See id.*

²¹³ *See* Telephone Interview with Stephanie Caballero, Attorney (Nov. 14, 2012) [*hereinafter* Interview with Caballero] (of approximately 173 surrogacies Ms. Caballero has been involved with, only 1 involved traditional surrogacy).

²¹⁴ *See* Dr. Jeff Rakoff, *IVF Cost*, SANDIEGOFERTILITYSPECIALIST.COM (2015) *archived at* <http://perma.cc/S3LB-UCNT> (listing the costs of Gestational Carrier IVF Cycle and Egg Donor and Gestational Carrier IVF Cycle).

²¹⁵ *See Cost of Hiring a Surrogate*, GROWING GENERATIONS SURROGACY AGENCY, *archived at* <http://perma.cc/R4XF-S23U> (estimating surrogacy cost to total about 147,000 in 2015).

²¹⁶ *See id.* (enumerating the different costs and fees that are part of Gestational Carrier Surrogacy).

²¹⁷ *See id.* (approximating Agency Fee Costs at about 25,000 as of 2015).

²¹⁸ *See id.* (discussing what the agency fees consist of).

gates and California surrogates²¹⁹), IVF transfer fee, maternity clothes, itemized costs, expenses during screening and matching process, delivery expenses, criminal background check, travel and hotel expenses, and housekeeping services.²²⁰

Egg donor compensation and related expenses of \$14,500 includes the donor fee, a genetic history evaluation, and the egg donor agency fee.²²¹ Medical costs of \$35,000 includes medical doctors' fees for both the egg donor and surrogate, medication, and monitoring for out-of-state surrogates (if applicable).²²² Psychological care fees of \$5,000 include screening and monitoring for both the surrogate and egg donor.²²³ Legal expenses of \$12,750 includes attorney fees for consultations, surrogate and egg donor contract drafting, family planning document drafting, parental establishment, and pleadings and parentage judgment.²²⁴

ii. Traditional Surrogacy

Traditional surrogacy costs substantially less than gestational carrier surrogacy.²²⁵ The California Court of Appeal recognized in *Moschetta*, “[t]raditional surrogacy is a relatively less expensive substitute for gestational surrogacy.”²²⁶ The medical procedures are less

²¹⁹ *Financial Information*, GROWING GENERATIONS (Jan. 2013) archived at <http://perma.cc/48MS-SUFD> (stating the estimated range of costs for experienced surrogates and those residing in California).

²²⁰ See *id.* (pointing to estimates on the broad range of costs for gestational surrogacy).

²²¹ See *Cost of Hiring a Surrogate*, *supra* note 215 (providing potential clients with a tool to estimate the cost of egg donor compensation).

²²² See *Cost of Hiring a Surrogate*, *supra* note 215 (highlighting the estimated medical costs associated with egg donor and surrogate medications)

²²³ See *Cost of Hiring a Surrogate*, *supra* note 215 (explaining potential estimated fees for psychological care).

²²⁴ See *Cost of Hiring a Surrogate*, *supra* note 215 (noting the estimated legal expenses relating to surrogacy).

²²⁵ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894 (discussing the difference in cost between traditional and gestational surrogacy); see also *Financial Info*, CENTER FOR SURROGATE PARENTING, INC. archived at <http://perma.cc/V5H8-R84P> (breaking down the estimated costs of traditional surrogacy for first time surrogate parent through third time surrogate parent); *Agency & Surrogate Fees*, CONCEIVEABILITIES archived at <http://perma.cc/P7MR-XZEL> (outlining the estimated costs of gestational surrogacy).

²²⁶ *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894.

expensive.²²⁷ Typically, the surrogate undergoes artificial insemination rather than in-vitro fertilization.²²⁸ Artificial insemination costs roughly \$3,000- \$4,000.²²⁹ Because the surrogate uses her own egg(s), costs associated with egg donation are not applicable in traditional surrogacy.²³⁰ Traditional surrogacy reduces fees across the spectrum as earlier listed compared to gestational carrier surrogacies.²³¹

C. Policy

Contracts that violate public policy because they involve illegal or immoral terms or performance are not enforceable.²³² The California legislature remains silent in regards to surrogacy contracts.²³³

The California Supreme Court holds that gestational carrier surrogacy contracts do not offend public policy.²³⁴ In *Johnson v. Calvert* the majority stated, “[t]he 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

²²⁷ See *id.* (referring to cost difference between traditional surrogacy and gestational surrogacy).

²²⁸ See KINDREGAN & MCBRIEN, *supra* note 22, at 152-53 (articulating that traditional surrogacy involves artificial insemination).

²²⁹ See *Fertility Docs Cut Costs of IVF Conception by 60 Percent: Female Infertility*, OBGYN & REPRODUCTION WEEK, Apr. 20, 2009, archived at <http://perma.cc/SR9T-NGM7> (stating the cost of artificial insemination).

²³⁰ See KINDREGAN & MCBRIEN, *supra* note 22, at 153-54 (inferring that there are no associated costs with egg donation because a traditional surrogate uses her own eggs).

²³¹ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894 (inferring a significant difference in cost associated with egg donation); see also *Financial Information*, *supra* note 219 (itemizing the expenses associated with egg donorship).

²³² See MICHAEL H. DESSENT, *FIRST YEAR CONTRACT LAW: CASES, QUESTIONS AND NOTES* 547 (6th ed. 2013) (noting that contracts that violate public policy are held to be void).

²³³ See Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 808 (2012) (discussing the importance for the California Legislature to address surrogacy).

²³⁴ See *Johnson*, 851 P.2d at 778 (concluding “that the husband and wife are the child’s natural parents, and that his result does not offend the state or federal Constitution or public policy”).

prevented women from attaining equal economic rights and professional status under the law.”²³⁵ Further, the compensation paid to Anna was “for her services in gestating the fetus and undergoing labor, rather than for giving up ‘parental’ rights to the child.”²³⁶

A traditional surrogacy is subject to the adoption statutes.²³⁷ To complete a traditional surrogacy, the surrogate mother must also consent to the adoption of child after its birth.²³⁸ This directly violates public policy because it is illegal to compensate a person for giving up their parental rights.²³⁹ The compensation paid to the surrogate cannot be in exchange for her relinquishing her parental rights of the child.²⁴⁰

V. CONCLUSION

Johnson v. Calvert changed surrogacy practice in the state of California.²⁴¹ Intended parents now have opportunity to enter enforceable surrogacy contracts.²⁴² Surrogate mothers may provide in-

²³⁵ *Id.* at 785.

²³⁶ *Id.* at 784.

²³⁷ See CAL. FAM. CODE § 8814 (2015) (outlining the administrative requirements for parental consent in an adoption); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900-01 (pointing to lack of adherence to adoption statute requirements as grounds for court’s refusal to enforce a traditional surrogacy contract).

²³⁸ See CAL. FAM. CODE § 8814 (2015) (mandating the witnessed, signed consent of birth parents in an adoption); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 901 (declining to enforce a traditional surrogacy contract because statutorily mandated parental signatures consenting to adoption were not present).

²³⁹ See CAL. PENAL CODE ANN. § 273 (West 2014) (making it a misdemeanor to give or receive value in exchange for consent to adopt a child); *Johnson*, 851 P.2d at 783-84 (acknowledging the public policy behind California’s criminalization of exchanging valuable consideration for parental consent to adoption).

²⁴⁰ See *Johnson*, 851 P.2d at 784 (finding contractual payments were in compensation for gestating the fetus and giving birth, rather than for gestational surrogate’s consent to adoption, and thus did not violate California law barring payment for adoption).

²⁴¹ See *id.* at 782 (construing the term “natural mother” within California’s Uniform Parentage Act to mean the woman who “intended to bring about the birth of a child that she intended to raise as her own” and finding a gestational surrogacy contract as sufficient evidence of this intent).

²⁴² See *id.* at 778, 787 (affirming lower court’s ruling that surrogacy contract was valid and enforceable against the gestational surrogate).

fertile couples with the gift of a child without having to consider whether or not to consent to the adoption of their biologically related child.²⁴³ Attorneys are able to advise their clients to enter gestational carrier surrogacy contracts to avoid the ramifications of an unenforceable traditional surrogacy contract.²⁴⁴ Doctors understand the best circumstance for their patients is to perform in vitro fertilization with donated or intended mother's eggs.²⁴⁵ California surrogacy agencies provide their clients with the necessary means for gestational carrier surrogacy arrangements since they understand the consequences of traditional surrogacy arrangements when the surrogate changes her mind before consent to the adoption.²⁴⁶

The costs associated with gestational carrier surrogacy are higher than in a traditional surrogacy setting.²⁴⁷ However, the risks associated with the higher costing gestational surrogacy contracts are much lower than the risk of a surrogate deciding not to consent to the adoption of her biological child in a traditional surrogacy contract.²⁴⁸ This assurance may be worth the expense for intended parents.²⁴⁹

The gestational carrier surrogacy contract is supported by public policy.²⁵⁰ The traditional surrogacy contract goes against public policy because a woman is compensated, in part, to consent to the

²⁴³ See *id.* at 778, 787 (upholding the validity of a gestational surrogacy contract by affirming the lower court's ruling).

²⁴⁴ See Interview with Stephanie Caballero, *supra* note 213 (noting that attorneys can advise clients to enter gestational carrier surrogacy contracts).

²⁴⁵ See Rakoff, *supra* note 214 (explaining the procedure for successful in vitro fertilization).

²⁴⁶ See Interview with Surrogacy Agency, *supra* note 211 (explaining that California surrogacy agencies guide clients through gestational surrogacy contracts).

²⁴⁷ See *Cost of Hiring a Surrogate*, *supra* note 215 (highlighting the high cost of gestational carrier surrogacy).

²⁴⁸ See *Gestational vs. Traditional Surrogacy: A Comparative Study*, SURROGATE MOTHERS, archived at <http://perma.cc/Y3YB-XSKC> (reporting that traditional surrogacy is less expensive than gestational surrogacy).

²⁴⁹ See *id.* (inferring that because the success rate is higher for gestational surrogacy among other advantages over traditional surrogacy, it is worth the higher costs).

²⁵⁰ See *Johnson*, 851 P.2d at 778 (holding that gestational surrogacy contracts do not violate the public policies embodied in California law).

adoption to her biologically related child.²⁵¹ This is illegal because it directly violates California statute.²⁵²

In *Johnson v. Calvert*, the California Court of Appeals expressed concern of a potential, but unlikely, problem with gestational carrier surrogacy.²⁵³ There might be situations where neither the surrogate nor egg donor is willing to take responsibility for custody of the child.²⁵⁴ The court discussed that intended parents are best suited to “promote certainty and stability for the child.”²⁵⁵ This discussion further supported its decision to look to the intent of the parties.²⁵⁶

When intended parents use the services of a surrogate who donates her own eggs for the pregnancy the courts will not enforce the surrogacy contract.²⁵⁷ The court reasons that the surrogate must subsequently consent to the child’s adoption by the intended parent.²⁵⁸ When the surrogate carries a child as a result of a donated egg, not her own, the court will enforce the contract.²⁵⁹ The court reasons the mother is not biologically related to the child born.²⁶⁰

This brings into question the rights of the egg donor to make a claim to the child born as a result of her donation. If she pursued

²⁵¹ See CAL. FAM. CODE § 8814 (2015) (noting that compensation for the adoption of a child carried via surrogate is contrary to public policy); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 901 (declining to enforce a traditional surrogacy contract).

²⁵² See CAL. PENAL CODE § 273 (1998) (prohibiting any person or agency to pay or receive money for the consent to the adoption of a child).

²⁵³ See *Johnson*, 851 P.2d at 783 (explaining a rare problem involving a gestational carrier surrogacy).

²⁵⁴ See *id.* (discussing a set a circumstances where neither the gestator nor the woman who provided ovum for fertilization is willing to take custody of the child after birth).

²⁵⁵ See *id.* (noting the best interest of the child’s welfare).

²⁵⁶ See *id.* at 782 (determining that it is necessary to look at the intent of the parties).

²⁵⁷ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894 (holding the surrogate is the natural parent of the child in this traditional surrogacy arrangement and this fact allows her to change her mind before she formally consents to an adoption).

²⁵⁸ See *id.* (noting that a traditional surrogacy contract is insufficient on its own to finalize the adoption by the intended parents).

²⁵⁹ See *Johnson*, 851 P.2d at 777-78 (holding in gestational surrogacy the natural parent is not the surrogate and therefore has no right to object to adoption).

²⁶⁰ See *id.* (reasoning that because the gametes were from the husband and wife the surrogate is not the biological mother).

the matter, would she have rights to the child over the intended parents? She is not able to sign adoption papers for an egg just as a traditional surrogate is not able to sign adoption papers prior to the birth of the child born as a result of her egg.²⁶¹

Some intended parents avoid an unenforceable traditional surrogacy contract by obtaining the egg and/or sperm from a third party.²⁶² This process provides intended parents the opportunity to grow their family without the concern of adoption after the child's birth.²⁶³ The California Court decision in *Johnson v. Calvert* encourages intended parents to use their own egg for the surrogacy process rather than the egg of the surrogate.²⁶⁴ However, due to specific infertility issues this is not always an option.²⁶⁵ Thus, the court actually enforces contracts where the intended parents obtain the egg and/or sperm from a third party, not the surrogate mother.²⁶⁶ This egg toss allows intended parents to guide around the technicalities of unenforceable traditional surrogacy contracts.²⁶⁷ Silence by the California legislature indicates an approval of the court's approach.²⁶⁸

Christian and Sarah used donated eggs for their surrogacy.²⁶⁹ Since the surrogate, Amy, who carried their daughters was not biologically related to the girls, the contract between the parties was en-

²⁶¹ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894 (holding that in addition to a traditional surrogacy contract an adoption agreement must occur post-birth).

²⁶² See *Jaycee B.*, 49 Cal. Rptr. 2d at 697 (holding that because the egg did not come from the surrogate or the intended parents, the intended parents are deemed to be the parents of the child).

²⁶³ See *id.* (inferring that using a third-party's egg eliminates concern of an unenforceable surrogacy contract).

²⁶⁴ See *Johnson*, 851 P.2d at 777 (holding that if the intended parents use their own egg then they are the natural biological parents to the child and the surrogate had no parental rights to the child).

²⁶⁵ See Interview with Smith, *supra* note 16 (stating that for certain parents, using their own egg is not an option).

²⁶⁶ See *Jaycee B.*, 49 Cal. Rptr. 2d at 701-02 (holding that the surrogate was not the mother of a child resulting from a third-party's egg).

²⁶⁷ See *Johnson*, 851 P.2d at 783 (demonstrating that when the surrogate carries a child conceived from a third party egg, there is no biological connection and thus no legal rights for the surrogate as the mother of the child).

²⁶⁸ See Arshagouni, *supra* note 233, at 808 (noting that the California legislature has not involved itself with the question of surrogacy).

²⁶⁹ See Interview with Smith, *supra* note 16.

forceable.²⁷⁰ If Amy changed her mind about the process after the blastocysts were implanted in her uterus, she would not have a claim to the children.²⁷¹ Therefore, Christian and Sarah were not vulnerable to Amy's decision after their birth.²⁷² The fact that the children were created by eggs other than her own, severed any of Amy's rights to keep the children.²⁷³

Debbe and John's surrogate also donated her egg for their surrogacy.²⁷⁴ Since the surrogate was biologically related to the child, the surrogacy contract was not enforceable.²⁷⁵ The surrogate consented to the adoption after the child was born.²⁷⁶ The surrogate could have changed her mind at any time after the artificial insemination.²⁷⁷ She had a parental claim to the child born as a result of the surrogacy arrangement.²⁷⁸ Debbe and John were extremely vulnerable to the surrogate's decision of whether or not to consent to the adoption after the child's birth.²⁷⁹

The best practice method appears to be the use of gestational carrier surrogacy arrangements. The courts enforce the contracts providing peace of mind to the intended parents. The costs are higher, but the risks appear lower. Some intended parents cannot afford the more expensive alternative, but as these procedures become more common, the costs will likely lower.

²⁷⁰ See Interview with Smith, *supra* note 16.

²⁷¹ See Interview with Smith, *supra* note 16.

²⁷² See Interview with Smith, *supra* note 16.

²⁷³ See Interview with Smith, *supra* note 16.

²⁷⁴ See Debbe, *supra* note 9 (stating Debbe used her surrogate's egg for the surrogacy).

²⁷⁵ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 900 (holding that maternity is established when genetics and birth coincide in one woman).

²⁷⁶ See Debbe, *supra* note 9 (inferring the surrogate consented to the adoption).

²⁷⁷ See *In re Marriage of Moschetta*, 30 Cal. Rptr. at 894 (concluding that a couple using traditional surrogacy has no assurance of their parental rights to the child).

²⁷⁸ See *id.* (affirming that parental rights are vested in the surrogate mother under traditional surrogacy contracts).

²⁷⁹ See *id.* (concluding that in a traditional surrogacy, the surrogate can renege on the agreement).

