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## The Future of Compensated Surrogacy in Washington State: Anytime Soon?

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# THE FUTURE OF COMPENSATED SURROGACY IN WASHINGTON STATE: ANYTIME SOON?

Terry J. Price\*

*Abstract:* Americans in the mid-1980s were shocked by the facts of the *Baby M* case. That case, a compensated surrogacy arrangement that publicly went very wrong, raised complicated issues that the country had not considered: whether a woman could contract to carry a pregnancy for another person without becoming the legal mother; whether she could be separated from the child at birth, even though it was her genetic offspring; and whether the contract could take precedence over a mother's regret over giving up the child. As a result of that case, a number of states, including Washington, prohibited compensated surrogacy arrangements.

Twenty-five years later, the fundamental nature of families has changed. In the process, the public has gradually accepted surrogacy as an option for families with infertility issues. Gestational surrogacy, where the surrogate is not genetically related to the embryo, has become more the norm. Without the genetic link to the embryo, the concept of "mother giving up child" does not ring the same, either legally or morally. Also, while sperm-banking has been available for decades, increasingly infertile couples rely on egg banks to assist them with their infertility issues, without entangling them in personal relationships with the donors. In this climate, and specifically as some state legislators experience surrogacy firsthand, state legislatures have begun reassessing their surrogacy prohibitions. The Washington Legislature undertook such a reassessment in 2011. This paper will discuss the facts of the *Baby M* case, the enactment of the 1989 compensated surrogacy prohibitions in Washington and the 2011 attempt to reverse them, and some thoughts for future legislation in this arena.

## INTRODUCTION

In 1978, the world became familiar with the concept of *in vitro* fertilization when the first family using that procedure successfully had a baby.<sup>1</sup> Less than ten years later, in March 1986, Americans would become familiar with another newborn baby that would change their

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1. See First "Test Tube Baby" Born, BBC (July 25, 1978), [http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid\\_2499000/2499411.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid_2499000/2499411.stm).

view of “motherhood.” Baby “M,” as she was called in the courts and media, was born as a result of a compensated surrogacy arrangement. To have a baby born via surrogacy contract was a foreign enough concept. But to have a mother who contributed her genetic material—her egg—and gave birth but did not keep the baby, were startling concepts to the American public. This propelled much soul-searching on the part of the public and its elected officials.

Nearly thirty years later, no consensus exists on surrogacy. Most countries, including most of the European Union, ban compensated surrogacy.<sup>2</sup> A handful of countries, such as India, Thailand, Ukraine, and Mexico, allow for the practice.<sup>3</sup> The United States has no comprehensive policy about surrogacy, but rather a patchwork of laws that vary widely state-by-state. Some are “surrogacy-friendly”; others are “surrogacy-hostile.”<sup>4</sup> This lack of cohesive policy often confuses and sometimes traps the individuals and couples who just want a baby.

The State of Washington currently bans compensated surrogacy. Part I of this Article will briefly examine the *Baby M* case, which caused the various states to address surrogacy, including Washington. Part II will detail the events in the Washington State Legislature that led to enacting the existing surrogacy prohibitions in 1989. Part III will focus on the unsuccessful 2011 attempt to reverse Washington State’s surrogacy ban. Part IV will conclude with an eye toward answering the question: Will Washington State be able to pass compensated surrogacy legislation anytime soon?

## I. *BABY M* CASE REVEALS INSUFFICIENCY IN LAW, BEGINS NATIONAL DEBATE OVER COMPENSATED SURROGACY

The facts of the *Baby M*<sup>5</sup> case were initially straightforward. William Stern and Mary Beth Whitehead formed a surrogacy contract in February 1985.<sup>6</sup> Mr. Stern provided the sperm.<sup>7</sup> Mrs. Whitehead agreed

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2. Laurence Brunet et al., *A Comparative Study on the Regime of Surrogacy in EU Member States* 15–16 (2013), available at <http://www.lse.ac.uk/businessAndConsultancy/LSEEnterprise/pdf/surrogacy-report.pdf>.

3. Tamar Lewin, *Coming to the U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, at A1.

4. Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1239–45 (2014).

5. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

6. *Id.* at 1235.

7. *Id.*

to get pregnant using her own egg, carry the child, and, after delivery, give it to the Sterns.<sup>8</sup> The contract called for her to have her parental rights terminated, and in exchange, she would receive \$10,000 after the child's delivery.<sup>9</sup> Mrs. Stern would then adopt the child.<sup>10</sup>

Despite its appearance in hindsight, the parties at the time entered into the arrangement in good faith, albeit with their own motivations.<sup>11</sup> Mrs. Stern had multiple sclerosis, and was afraid that pregnancy would bring serious medical consequences.<sup>12</sup> Mr. Stern was a Holocaust survivor, and very much wanted a child to continue his lineage.<sup>13</sup> Mrs. Whitehead agreed to participate in part because of sympathy with family members who could not have children, and also because of the money it would bring.<sup>14</sup> Apparently, however, the parties did not focus on the implications for the other side.

Mrs. Whitehead . . . appears not to have been concerned about whether the Sterns would make good parents for her child; the Sterns, on their part, while conscious of the obvious possibility that surrendering the child might cause grief to Mrs. Whitehead, overcame their qualms because of their desire for a child.<sup>15</sup>

The pregnancy was unremarkable, and a baby girl was born on March 27, 1986.<sup>16</sup> The birth certificate listed the Whiteheads, not the Sterns, as the parents for the girl they named Sara.<sup>17</sup> The Sterns later named the child Melissa.<sup>18</sup>

Mrs. Whitehead realized quickly after delivery that she was quite attached to the baby girl and could not give her up to the Sterns.<sup>19</sup> This set in motion a four-month, multi-state odyssey about disputed parenthood. The Whiteheads fled with the baby to Florida, living in

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1235.

13. *Id.*

14. *Id.* at 1236.

15. *Id.*

16. *Id.*

17. *Id.* New Jersey apparently has been slow to change its procedures. *See, In re TJS*, 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011) (listing non-genetically-related wife on birth certificate for husband's child by surrogate with anonymous egg donor objected to by registrar of vital records; wife's recourse was stepparent adoption).

18. *In re Baby M*, 537 A.2d at 1236.

19. *Id.*

different homes, hotels and motels in order to avoid being found.<sup>20</sup> Periodically, Mr. Stern and Mrs. Whitehead would talk on the phone. “[T]he conversations, recorded by Mr. Stern on advice of counsel, show an escalating dispute about rights, morality, and power, accompanied by threats of Mrs. Whitehead to kill herself, to kill the child, and to falsely accuse Mr. Stern of sexually molesting Mrs. Whitehead’s other daughter.”<sup>21</sup>

Once her location was ascertained, extensive legal proceedings began to require Mrs. Whitehead to return the child to the Sterns.<sup>22</sup> In the meantime, the public policy debate about surrogacy raged in the national press, in part fueled by Mrs. Whitehead. Articles appeared, ranging from the expected: “Should a Surrogate Be Able to Change Her Mind and Keep Her Baby,”<sup>23</sup> “Surrogate Motherhood [sic] Something that Science Has Created and We Do Not Need,”<sup>24</sup> “Participants in Surrogate Motherhood Have Stumped America’s Legal, Social, Religious, and Political Establishments with a Sensitive Question: Whose Child Is This?”<sup>25</sup> and “Law and Morality in ‘Baby M’ Case;”<sup>26</sup> to the more outrageous, “Feminists Fear a Brave New (Third) World Ominous Prediction: Mexican Baby Farms.”<sup>27</sup> Even Mrs. Whitehead published her side of the story in *People Magazine*, “A Surrogate Mother Describes Her Change of Heart—and Her Fight to Keep the Baby Two Families Love.”<sup>28</sup>

The trial, which began in January 1987, lasted six weeks and included twenty-three fact witnesses and fifteen experts.<sup>29</sup> The trial court ultimately found for the Sterns. Specifically, and remarkably, the trial

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20. *Id.* at 1237.

21. *Id.*

22. *Id.*

23. *Should a Surrogate Mother Be Allowed to Change Her Mind and Keep Her Baby?*, ORLANDO SENTINEL (Aug. 24, 1986), [http://articles.orlandosentinel.com/1986-08-24/news/0250060262\\_1\\_surrogate-mothers-fetus-new-jersey](http://articles.orlandosentinel.com/1986-08-24/news/0250060262_1_surrogate-mothers-fetus-new-jersey).

24. Robert Maynard, *Surrogate Motherhood Something Science Has Created and We Do Not Need*, SUN SENTINEL, Aug. 26, 1986, at 15A.

25. Dale Mezzacappa, *Participants in Surrogate Motherhood Have Stumped America’s Legal, Social, Religious and Political Establishments with a Sensitive Question: Whose Child Is This?*, WICHITA EAGLE, Aug. 31, 1986, at 1D.

26. Joe Sarita, *Law and Morality in ‘Baby M’ Case*, PHILADELPHIA INQUIRER, Sept. 9, 1986, at A01.

27. Meg Lundstrom, *Feminists Fear a Brave New (Third) World Ominous Prediction: Mexican Baby Farms*, THE (NEW JERSEY) REC., Oct. 28, 1986.

28. Mary Beth Whitehead, *A Surrogate Mother Describes Her Change of Heart—And Her Fight to Keep the Baby Two Families Love*, PEOPLE, Oct. 20, 1986, at 47.

29. *In re Baby M*, 525 A.2d 1128, 1149 (N.J. Super. Ct. Ch. Div. 1987).

court ordered that the surrogate parenting agreement should be enforced.<sup>30</sup> Consequently, Mrs. Whitehead was awarded the \$10,000 in the court registry for her part of the contract.<sup>31</sup> As for custody, the court determined:

Mrs. Whitehead is manipulative, impulsive and exploitive. . . . She is a woman without empathy. She expresses none for her husband's problems with alcohol and her infusion of her other children into this process, exposing them rather than protecting them from the searing scrutiny of the media, mitigates against her claim for custody. . . . She would not be a good custodian for Baby M.<sup>32</sup>

In contrast, the court found by clear and convincing evidence that Melissa's best interests would be served by placing her in her father's sole custody.<sup>33</sup> Mr. Stern was made the legal parent, and Mrs. Whitehead's parental rights were terminated.<sup>34</sup>

Not surprisingly for such a ground-breaking matter, the case was appealed to the New Jersey Supreme Court. To say that the justices were appalled with enforcement of the contract would be an understatement. Pointedly, the majority wrote, "There are, in a civilized society, some things that money cannot buy."<sup>35</sup> Not only did the Court hold that this was contrary to New Jersey public policy,<sup>36</sup> it also held that this arrangement violated the statutory prohibitions against accepting money for placement of children, which the Court referred to as "baby-bartering" and "baby-selling."<sup>37</sup> It noted, "Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here."<sup>38</sup>

Because the Court invalidated the surrogacy contract, termination of Mrs. Whitehead's parental rights was naturally reversed.<sup>39</sup> However, based on the robust trial court record concerning custody, it upheld the custody determination for the Sterns.<sup>40</sup> It remanded the case for a

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30. *Id.* at 1175.

31. *Id.* at 1176.

32. *Id.* at 1170.

33. *Id.*

34. *Id.* at 1175.

35. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

36. *Id.* at 1246.

37. *Id.* at 1241–42.

38. *Id.* at 1248.

39. *Id.* at 1251.

40. *Id.* at 1257–59.

determination of visitation available for Mrs. Whitehead.<sup>41</sup>

The fallout from this case was remarkable. It was a media sensation at the time, and brought to light for the first time unconsidered questions about surrogacy. Should such a contract even exist? And if the law will recognize such a contract, who should be the legal parent when the child is born?<sup>42</sup> The whole spectacle showed the public what could go horribly wrong and highlighted the lack of legal precedent to address the issue. The New Jersey Supreme Court's admonition about what is acceptable in a civilized society caught the attention of many legislators.

Interestingly, early responsive legislative action in the two most populous states, New York and California, took opposite positions. In 1987, New York Governor Mario Cuomo referred the issue to the New York Task Force on Life and the Law.<sup>43</sup> The task force included members from different sides of the matter, yet issued a unanimous opinion the next year recommending that "society should discourage the practice of surrogate parenting" by legislation that makes surrogate parenting contracts void and unenforceable and prohibiting payments to surrogates.<sup>44</sup> The panel did recommend that compassionate surrogacy (surrogacy without a fee) should remain an option.<sup>45</sup> The panel's recommendation, minus the compassionate surrogacy provision, was eventually incorporated into a "total prohibition bill" sponsored by members from opposite caucuses, Assemblywoman Helene Weinstein (D) and Senator John Marchi (R). That bill passed both houses and was signed into law in 1991.<sup>46</sup>

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41. *Id.* at 1263. When she reached the age of majority, Melissa Stern petitioned to be formally adopted by Mrs. Stern, thus terminating Mrs. Whitehead's parental rights. Jennifer Weiss, *Now It's Melissa Time*, NEW JERSEY MONTHLY (Mar. 2007), <http://web.archive.org/web/20071227012617/http://www.njmonthly.com/issues/2007/03-Mar/babym.htm>.

42. Interestingly, at the same time the country was embroiled in the existential questions presented by *Baby M*, the country was also caught up in another difficult medical-legal-ethical issue: What should be done about Nancy Cruzan, who lived in a persistent vegetative state? *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

43. SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 40 (2007).

44. *Id.*

45. Elizabeth Kolbert, *Surrogate Births for Pay Opposed by State Panel*, N.Y. TIMES, May 29, 1988, at 30.

46. N.Y. DOM. REL. LAW § 123 (McKinney, Westlaw through 2014 legislation); MARKENS, *supra* note 43, at 44. Just last year, New York State Senator Brad Hoylman (who, with his partner, had a daughter through surrogacy in California) introduced two bills to repeal New York's surrogacy prohibitions. Anemona Hartocollis, *And Surrogacy Makes 3*, N. Y. TIMES, Feb. 19, 2014, at E1, E6; S. 2547, 2013 Leg., Reg. Sess. (N.Y. 2013); S. 4617, 2013 Leg., Reg. Sess. (N.Y. 2013). They have failed to progress, perhaps in part because Assemblywoman Weinstein, the original sponsor of the prohibitions, is chair of the Assembly committee that would hear the repeal bills.

While New York's reaction to prohibit surrogacy may have been in part due to the proximity of the *Baby M* litigants, California viewed the matter differently. After all, California had prided itself on its forward-thinking views in domestic relations matters, such as being the first state to permit "palimony."<sup>47</sup> Bills had been introduced both in support and opposed to surrogacy after the *Baby M* case made headlines.<sup>48</sup> One bill, introducing surrogacy prohibitions, even made it out of the Assembly after some procedural maneuverings; but, this bill died in the Senate.<sup>49</sup> At the same time, a surrogacy case caught the media's attention as it made its way through the California courts.<sup>50</sup> But that case differed in one major aspect: The surrogate was not genetically related to the embryo.<sup>51</sup> Contrary to the *Baby M* case, the California courts affirmed the enforceability of the contract, and the wife (who donated the egg) was determined to be the legal parent, not the woman who bore the child.<sup>52</sup>

In addition to deciding the case, the California courts called out to the Legislature to provide guidance on this issue. The Supreme Court noted, "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so . . . ."<sup>53</sup> The Court of Appeals was more blunt. That Court concluded its opinion as follows:

We join our colleague on the trial bench who, in delivering his decision, underscored the urgent need for legislative action. In particular, we hope the Legislature will tackle the difficult questions attendant to surrogacy agreements so that both parents and children can face the future with certainty over their legal status.<sup>54</sup>

Senator Diane Watson took up the call.<sup>55</sup> On March 8, 1991 she

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47. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (permitting a cause of action for non-married partner to seek property and alimony-type support; sexual intimacy did not preclude financial agreements; judicial barriers in the way of reasonable expectations of non-married couples removed). Popular press referred to the support payment for non-married persons as "palimony."

48. MARKENS, *supra* note 43, at 45.

49. *Id.* at 46.

50. *Id.*

51. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993), *aff'g sub nom. Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. Ct. App. 1991).

52. *Id.* at 782.

53. *Id.* at 787.

54. *Anna J.*, 286 Cal. Rptr. at 381, *aff'd sub nom. Johnson*, 851 P.2d at 778 (emphasis in original).

55. MARKENS, *supra* note 43, at 47.



introduced a simple bill that addressed the legal relationships of the parties to a surrogacy contract.<sup>56</sup> It amended the existing sperm donation statute that terminated a father's paternal rights if the sperm was provided to a physician for insemination, versus an "informal" transfer between a known donor and recipient.<sup>57</sup> Over the next year and a half, the Alternate Reproduction Act of 1992 became a comprehensive regulatory scheme for surrogate parenting contracts. It first and foremost clarified that the intended parents are presumed to be the legal parents.<sup>58</sup> The bill also detailed requirements for the substance of the surrogacy agreement (compensation, life and health insurance, expenses) as well as particulars of the contract language.<sup>59</sup> The bill passed both chambers at the end of August 1992, only to have Republican Governor Pete Wilson veto the bill after pressure from the Catholic campaign contributors and prolife supporters.<sup>60</sup> With momentum gone, veto override was not feasible, and the bill died.<sup>61</sup>

## II. TAKING THE NEW JERSEY SUPREME COURT'S MESSAGE TO HEART, THE WASHINGTON LEGISLATURE MOVED QUICKLY TO PREVENT A *BABY M* SCENARIO IN THIS STATE

Although further away from the events of the *Baby M* debacle, Washington legislators were also concerned about something similar happening in the Evergreen State. They introduced legislation to address those facts in the very next legislative session. But like the mixed member panel in New York State and the co-sponsorship of the prohibition bills with members from both sides of the aisle, the Washington prohibition bill did not simply pass on Republican or Democratic lines.

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56. S. 937, 1990–1992 Leg., Reg. Sess. (Cal. 1991).

57. CAL. CIV. CODE § 7005 (West 1983); *see also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (affirming parental rights after sperm transfer between parties without physician go-between). The termination of parental rights is currently being litigated again in a dispute between actor Jason Patric and Danielle Schreiber. Jason P. v. Danielle S., 226 Cal. App. 4th 167 (2014); *Jason Patric: I Gave You My Sperm, Now I Want Custody*, TMZ (Nov. 28, 2012), <http://www.tMZ.com/2012/11/28/jason-patric-custody-war-sperm-custody-ex-girlfriend-son/>.

58. Cal. S. 937.

59. *Id.*

60. MARKENS, *supra* note 43, at 47.

61. *Id.* at 48. Notably, the California Legislature in 2012 passed a bill adding regulations to the state's surrogacy provisions without overruling its common law precedents. The bill passed without a recorded no vote in both chambers. Governor Jerry Brown signed it into law. Assemb. 1217, 2010–2012 Leg., Reg. Sess. (Cal. 2012).

The Republicans controlled the State Senate in 1989. At the beginning of the 1989 legislative session, Senator Linda Smith (R-Vancouver), chair of the Senate Committee on Children & Family Services, introduced a bill to amend the parentage act and outlaw compensated surrogacy.<sup>62</sup> It was co-sponsored by Senators Ellen Craswell (R-Poulsbo)<sup>63</sup> and Lois Stratton (D-Spokane).<sup>64</sup> The original bill contained just seven sections, including definitions, prohibitions against contracting for surrogacy, resolution of a dispute if a child is born to a surrogate mother, and an emergency clause specifying that the act was necessary for “immediate preservation of the public peace, health, or safety” and “shall take place immediately.”<sup>65</sup> Senator Smith introduced a substitute bill at the end of January with one additional provision prohibiting surrogate parenting contracts with unemancipated minors, persons who are “mentally retarded,” mentally ill, or developmentally disabled.<sup>66</sup>

The House of Representatives also introduced a bill on this same subject in early February.<sup>67</sup> Representative Marlin Appelwick (D-Seattle) introduced his surrogacy bill with text taken from a Uniform Law Commission proposed act, the Uniform Status of Children of Assisted Conception Act.<sup>68</sup> The bill had more than twice the number of sections as the Senate bill (eighteen compared to eight in the Substitute Senate bill) and it contained the prohibitions on surrogacy as well as

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62. S. 5071, 51st Leg., Reg. Sess. (Wash. 1989) (sponsored by Senator Linda Smith (R-Vancouver) and introduced January 11, 1989). Linda Smith later represented Washington's third congressional district in Congress, and then founded Shared Hope International, an organization to eradicate sex trafficking. *Our Mission and Values*, SHARED HOPE INT'L, <http://sharedhope.org/about-us/our-mission-and-values/> (last visited Apr. 20, 2014).

63. Very conservative, religious politician who introduced legislation to castrate sex offenders, undo no-fault divorce, and weaken child abuse laws, and later ran for Governor. Mark Matassa, *Craswell's Crusade—This Long-Shot Candidate Dares to Mix Religion and Politics*, SEATTLE TIMES, Feb. 5, 1995, at 14.

64. Ranking Democrat member of Senate Committee on Children and Family Services, described as “steely” and “independent” and “often at odds with the West Side Democrats.” Lonnie Rosenwald, *Stratton's Toughness Came Hard*, SPOKESMAN REV., Feb. 28, 1987, at A1; Lonnie Rosenwald, *Stratton Disappoints Party Leaders*, SPOKESMAN REV., Apr. 28, 1987, at A6.

65. S. 5071, 51st Leg., Reg. Sess. (Wash. 1989).

66. Substitute S. 5071, 51st Leg., Reg. Sess. (Wash. 1989).

67. H.R. 1948, 51st Leg., Reg. Sess. (Wash. 1989).

68. It was drafted in 1988 by the National Conference of Commissioners on Uniform State Laws and adopted by the American Bar Association in 1989. Robert C. Robinson & Paul M. Kurtz, *Uniform Status of Children of Assisted Conception Act: A View from the Drafting Committee*, 13 NOVA L. REV. 491 (1989). Rep. Appelwick was a Uniform Law Commissioner at that time. Telephone Interview with the Honorable Marlin Appelwick, Judge, Wash. Court of Appeals, Div. I (Apr. 24, 2014).

additional sections that clarified the rights of the child born from a surrogacy arrangement.<sup>69</sup> The Uniform Law Commission drafting committee noted that the bill was deliberately brief to “state essential principles without inordinate elaboration or detailed regulatory procedures.”<sup>70</sup>

The House bill and the Substitute Senate bill shared only two similar provisions. They both provided that no person shall “enter into, induce, arrange, procure, or otherwise assist” in the formation of a surrogacy contract with an unemancipated minor, or a woman diagnosed as having “mental retardation,” mental illness or a developmental disability.<sup>71</sup> The bills also shared the operative prohibition against surrogacy: That no person, organization, or agency shall enter into a written or unwritten contract for surrogacy.<sup>72</sup> Representative Appelwick’s bill, however, specified that the contract was prohibited whether or not there was compensation;<sup>73</sup> Senator Smith’s bill prohibited only a contract for compensation.<sup>74</sup>

The differences between the bills were substantially greater. Representative Appelwick’s bill only had one punishment for violation of the surrogacy contracting prohibition: a civil penalty. Specifically, a civil penalty would be assessed for not more than \$50,000 if the person violated the prohibition against contracting with an unemancipated minor, or a woman who had the specified disabilities.<sup>75</sup> A civil penalty would be assessed for not more than \$20,000 for a person who violated the other operative surrogacy contract prohibition.<sup>76</sup> The Senate bill, to the contrary, had no civil penalty but added two different consequences for a violation: that the contract would be “void and unenforceable . . . as contrary to public policy,” and that the person who intentionally violates the prohibitions would be guilty of a gross misdemeanor.<sup>77</sup>

Regarding a “custody contest” like the *Baby M* scenario, the Senate bill provided that if a child is born to a surrogate mother pursuant to such a contract, and a dispute occurs, that the “party having physical custody of the child may retain physical custody of the child until the superior

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69. H.R. 1948, 51st Leg., Reg. Sess. (Wash. 1989); S. 5071, 51st Leg., Reg. Sess. (Wash. 1989).

70. Robinson & Kurtz, *supra* note 68, at 493.

71. Substitute S. 5071, 51st Leg., Reg. Sess. (Wash. 1989); Wash. H.R. 1948.

72. Wash. Substitute S. 5071; Wash. H.R. 1948.

73. Wash. H.R. 1948.

74. Wash. Substitute S. 5071.

75. Wash. H.R. 1948.

76. *Id.*

77. Wash. Substitute S. 5071.

court orders otherwise.”<sup>78</sup> The court asked to determine custody would use the same factors as are found in the dissolution statutes, RCW 26.09.187(3) and RCW 26.09.191.<sup>79</sup> Representative Appelwick’s bill, however, provided a more direct solution. In his bill, the surrogate would be the mother of the child, and the surrogate’s husband would be the father, unless a different legal determination is made within two years of the child’s birth.<sup>80</sup> The donor would very explicitly not be a parent.<sup>81</sup> His bill also provided for the child to inherit from these specified parents.<sup>82</sup> Representative Appelwick’s bill was referred to the House Health Care Committee, chaired by Representative Dennis Braddock (D-Bellingham).<sup>83</sup>

Meanwhile, Representative Braddock had begun his own exploration of the surrogacy landscape in the state. He wrote to then-Washington State Attorney General Kenneth Eikenberry about whether compensated surrogacy was lawful in Washington State.<sup>84</sup> Representative Braddock’s letter posed the *Baby M* scenario exactly:

Specifically, you set forth a scenario in which a woman (“surrogate”) agrees to be artificially inseminated with the sperm of a man whose wife is unable to have children. The surrogate also agrees to relinquish all rights to the child born as a result of the arrangement. Such an agreement provides for the man (“father”) and his wife to pay medical expenses related to the pregnancy and a fee to the surrogate when the child is relinquished to them. Afterward, the father’s wife institutes adoption proceedings to adopt the child.<sup>85</sup>

In fact, the opinion notes that the *Baby M* case “sparked” Braddock’s

78. *Id.*

79. *Id.* Remarkably, the Senate bill did not call out RCW 26.09.002, the fundamental policy that the best interests of the child shall prevail in making custody determinations. Rather, it called out only those statutes pertaining to the residential schedule factors and custody restrictions.

80. Wash. H.R. 1948.

81. *Id.*

82. *Id.*

83. Braddock had a complex history, including a mix of both typically liberal and conservative activities. He had been a Peace Corps volunteer in Pakistan and a helicopter pilot in the Vietnam War. Alex Fryer, *Chief Tries to Alter DSHS Habits—Braddock Says State Must Be ‘Accountable’ For Errors It May Make*, SEATTLE TIMES, July 22, 2001, at B4. Governor Gary Locke later appointed Dennis Braddock as Department of Social and Health Services secretary, serving from 2000–2004. Claudia Rowe, *Braddock to Step Down as DSHS Chief—Four-Plus Years in ‘Toughest’ State Job*, SEATTLE PI (Dec. 28, 2004), <http://www.seattlepi.com/local/article/Braddock-to-step-down-as-DSHS-chief-1162946.php>.

84. 1989 Op. Wash. Att’y Gen. 4 (1989).

85. *Id.*

inquiry.<sup>86</sup>

The Attorney General responded that Washington had no prohibitions against surrogate parenting agreements at that time. The response reviewed the Uniform Parentage Act in effect, and concluded that the father (sperm provider) would be the legal father if acknowledged by him and the mother, and the mother's husband, if she were married, disclaimed his paternity.<sup>87</sup> Regarding the question of whether this arrangement violated Washington's laws regarding "baby-selling," the Attorney General's opinion pointed out that transactions between parents were specifically excluded from the child-selling statute.<sup>88</sup> "Thus, if the father and the surrogate establish parentage pursuant to RCW 26.26, a transaction between them concerning their child is not illegal."<sup>89</sup> The Attorney General concluded that Washington law did not bar surrogate parenting agreements.<sup>90</sup>

The Substitute Senate bill passed that chamber on March 8, 1989. Representative Braddock's House Health Care Committee heard and passed that bill. It went to the House floor for a vote on April 13, 1989. Meanwhile, as a fellow committee chair, Representative Appelwick had been surprised that his bill was never given a hearing.<sup>91</sup> However, using a procedural tool available to him to bypass the Health Care committee, Appelwick and his ranking minority member from the Judiciary Committee, Representative Mike Padden (R-Spokane),<sup>92</sup> co-sponsored a "striking" amendment from the House floor using his text from the Uniform State of Children of Assisted Conception Act. The amendment struck everything in the Senate bill, and placed the House text on the same bill number. Despite Representative Braddock's not hearing the House bill, Representative Appelwick's bill text passed the House on

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86. *Id.*

87. *Id.* This is still true today. Federal paternity affidavit forms allow for three signatures: one for mother to sign, one for husband to sign (to disclaim paternity), and one for father-of-baby to sign (to acknowledge paternity).

88. *Id.* Interestingly, that statute is still in force. WASH. REV. CODE § 9A.64.030 (2012).

89. *Id.*

90. *Id.* The last part of the opinion addresses the circumstance where the surrogate withdraws her consent to relinquish the child, obviously taken from *Baby M.* The opinion analyzed the options and determined that the surrogate parenting agreement could not be enforced against a mother who did not consent, prior to court approval.

91. Telephone Interview with the Honorable Marlin Appelwick, Judge, Wash. Court of Appeals, Div. I (Apr. 24, 2014).

92. Representative Padden served for fourteen years in the House before pursuing other positions. He returned to the Legislature in 2012 to the Senate, where he is now the chair of the Senate Law and Justice committee.

April 13, 1989, by a seventy-five to twenty-two vote, with a mix of Democrats and Republicans voting on both sides.<sup>93</sup>

Four days later, on April 17, 1989, the Senate took up discussion of the House floor amendment. Senator Vognild (D-Snohomish) was concerned about two sisters who testified in committee, where one had carried the baby for the other without compensation.<sup>94</sup> He noted that they assisted with expenses but that no one earned anything.<sup>95</sup> This compassionate, uncompensated surrogacy was, he said, what the Senate wanted: a way to help relatives produce a “blood-line type child” without profit.<sup>96</sup>

Senator Nita Rinehart (D-Seattle) questioned whether the House amendments actually did completely ban surrogate parenting.<sup>97</sup> The prime sponsor, Senator Smith, responded equivocally, said there had been “quite a bit of debate as to whether it does.”<sup>98</sup> Her further remarks appeared (whether intended or not) to taint the House bill even further with confusion:

The House amendments do ban surrogate parenting for compensation or not, written or unwritten, so in most cases they would ban contracts. The question is whether or not, in personal relationships where the sisters who were involved in an embryo transplant—if that would apply or not. Everything we can see says, ‘no, it would not,’ because they would never become involved in the legal system. It would not prohibit the doctor from delivering the baby. An attorney would not be prohibited from the baby being adopted. Therefore, it appears that this bill does allow for the sisters to do what they did, but it does make it illegal for compensation or not compensation in other circumstances.<sup>99</sup>

It is difficult in hindsight to determine how the prime sponsor’s comment could so misrepresent the House amendments. The House

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93. The party split in the House that term was sixty-three Democrats and thirty-five Republicans. STATE OF WASH., MEMBERS OF THE LEGISLATURE 1889–2014, at 1, 9 (2014), available at <http://www.leg.wa.gov/History/Legislative/Documents/MembersOfLeg2014.pdf> (hereinafter MEMBERS OF THE LEGISLATURE).

94. *S-Floor-04-17-1989-1303*, WASH. ST. ARCHIVES at 19:30, <https://digitalarchives.wa.gov/Record/View/C2C84793C6F9CDC459A929E62558F648> (from the collection: Senate, Office of the Secretary of State, Floor Recordings, 1971–2010).

95. *Id.*

96. *Id.*

97. S. Journal, 51st Leg., Reg. Sess. 1914 (Wash. 1989).

98. *Id.*

99. *Id.*

amendments, banning a contract for surrogacy, “with or without compensation” in the “written or unwritten” contract,<sup>100</sup> would certainly have prevented the sisters in question from proceeding with their compassionate surrogacy. In any event, this was clearly at odds with the Senate’s policy that preferred to leave open un-compensated, “compassionate” surrogacy as an option. Her comments might also have referred to the fact that the Senate version had two penalty provisions (unenforceable contract and gross misdemeanor) while the House amendments only had one (civil penalties). For whatever reasons, either the remarks or the differences in policy objectives, the Senate voted to reject the House amendments and asked the House to recede from its position.<sup>101</sup>

Four days after that, the House voted seventy to twenty-two to recede from its amendment.<sup>102</sup> Democrat argued with Democrat in the floor debate. Representative Appelwick, co-author of the House floor amendment, made one more push for his version, saying:

I introduced a bill on surrogacy this year and I’ve participated in a process at the national level for a couple of years dealing with this issue and it’s an extremely, extremely complicated issue. And the issues that are the toughest, the legal issues that caused all the problems, are not the compensation issues. Now that may be morally reprehensible, but the problem with the area is the enforceability of the contract. And what’s particularly of interest to the state is what are the rights of the child? Who owes that child a duty of support? From whom can he or she inherit? Who is entitled to visit with that child and spend time with them? The Senate bill, which did not go to the Judiciary committee, is defective in that regard. The amendment I offered on the floor corrected those problems.<sup>103</sup>

Representative Braddock countered, urging that a simple prohibition bill would be best to address this:

This issue is certainly complex. But the bill is not complex. And the last thing that I would like us to do is put this back in the

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100. H.R. 1948, 51st Leg., Reg. Sess. (Wash. 1989).

101. S. Journal, 51st Leg., Reg. Sess. 1914. Curiously, right before the vote, Senator Talmadge (D-Seattle) raised an additional important issue about whether this bill could possibly ban assisted in vitro fertilization (which the House tried to protect), but his point was not even responded to by the bill’s sponsor. *Id.* at 1914.

102. H. Journal, 51st Leg., 1989 Reg. Sess. 2388 (Wash. 1989).

103. Substitute S. 5071, 51st Leg., Reg. Sess. (Wash. 1989) (statement of Rep. Applewick on Apr. 21, 1989).

hands of some attorneys so that we can get more legal mumbo jumbo on this . . . . Mumbo jumbo is not what this issue needs. It needs a courageous answer. We can give that answer now, that in this state we are not going to promote commercialization of the selling of children. It's not going to happen in this state. And this bill gives that message.<sup>104</sup>

Representatives Padden, Hargrove (D-Grays Harbor) and Braddock spoke in favor of the bill, with Padden and Hargrove stressing that the bill took a needed first stab at a complicated issue.<sup>105</sup> The final bill passed the House sixty-two to thirty-two,<sup>106</sup> splitting the Democratic House almost in half (thirty out of sixty-three Democrats voted nay) and with twenty-eight Republicans voting for the bill.<sup>107</sup> Governor Booth Gardner (Democrat) signed the bill on May 13, 1989, and it became effective that same day.<sup>108</sup>

These surrogacy prohibitions were left untouched for more than twenty years before the Legislature revisited the issue in 2011.<sup>109</sup> In the meantime, the science of surrogacy changed, and in many ways options available to families outpaced the legal arena. Rather than using their own egg, women are more likely now to be gestational surrogates, having a donor egg and sperm implanted and carrying a fetus that is not genetically related to them. A significant fertility medicine establishment developed in states that permit surrogacy, such as California.

104. Substitute S. 5071, 51st Leg., Reg. Sess. (Wash. 1989) (statement of Rep. Braddock on Apr. 21, 1989).

105. Substitute S. 5071, 51st Leg., Reg. Sess. (Wash. 1989) (House floor recording on Apr. 21, 1989). Of note, Representatives Padden and Hargrove are now Senators Padden and Hargrove, and both are famously conservative.

106. H. Journal, 51st Leg., Reg. Sess. 2388 (Wash. 1989).

107. MEMBERS OF THE LEGISLATURE, *supra* note 93, at 1, 9. Of note, freshman Representative (now Washington Governor) Jay Inslee (D-Yakima) voted in favor of the surrogacy prohibition bill, which was possibly more a statement about his district at the time than a specifically held belief. It would be ironic if he ended up determining the ultimate fate of a future bill to permit compensated surrogacy, in the same way New York Assemblywoman Weinstein apparently has. *See supra* note 46.

108. Act of May 13, 1989, ch. 404, 1989 Wash. Sess. Laws 2178, 2179 (codified at WASH. REV. CODE §§ 26.26.210–26.26.260).

109. The year before, in 2010, Democratic Majority Leader Lynn Kessler introduced House Bill 2793 which, among other things, would have repealed the prohibitions against compensated surrogacy and permitted gestational surrogacy contracts. H.R. 2793, 61st Leg., Reg. Sess. (Wash. 2010). It passed out of the House with about fifteen minutes of debate and a vote split largely on party lines, but died in the Senate. Remarkably, no one testified against the bill in the House and only one person with no organizational affiliation testified against it in the Senate. This was not even close to the process for the 2011 bill. *History of Bill: HB 2793*, WASH. ST. LEGISLATURE, <http://dlr.leg.wa.gov/bills/summary/default.aspx?year=2009&bill=2793> (last visited Nov. 5, 2014).



Washington residents going to places like California for such services inevitably raised the question: Why not at home?

### III. THE 2011 LEGISLATURE INTENSELY DEBATED THE REPEAL OF WASHINGTON STATE'S SURROGACY PROHIBITIONS

On January 18, 2011, then-Representative<sup>110</sup> Jamie Pedersen (D-Seattle) introduced a bill with an innocuous title: "Clarifying and expanding the rights and obligations of state registered domestic partners and other couples related to parentage."<sup>111</sup> Although the title did not mention repeal of the surrogacy prohibitions, they were one-third of the bill's substance.<sup>112</sup> And while the path to enact surrogacy regulations, and repeal the prohibitions, was not going to be simple, it turned out to be more hotly debated than could have been imagined.

#### A. *Despite Controversy, the "Window of Opportunity" to Move this Bill Appeared to Be Closing*

By the mid-2000s, the House and Senate had become solidly Democratic. Governor Christine Gregoire was also a Democrat. And the Legislature and Governor had embarked on a several-year attempt to provide domestic partner benefits to gay and lesbian couples who were unable to marry in Washington State due to a Washington State Supreme Court case.<sup>113</sup> Much of this work focused on protecting children who came from nontraditional families. But the possibility for further liberal social legislation would not remain open long. Governor Gregoire was not likely to run again in 2012, and the Republican Attorney General, Rob McKenna, was her likely replacement at that time.<sup>114</sup> Yet he was

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110. Now Senator.

111. H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

112. After the last of three domestic partnership bills passed in 2009 (Engrossed Substitute S. 5688, 61st Leg., Reg. Sess. (Wash. 2009) (known as "Everything But Marriage")) and was ratified by the voters, Washington's Uniform Parentage Act (UPA) needed to be amended to clarify the role of same-sex partners in parenting disputes where there might not be a genetic connection to the child. Washington's 2002 UPA revisions also mistakenly omitted the "holding out" provision for legal parentage, which caused substantial litigation. *See, e.g., In re L.B.*, 155 Wash. 2d 679, 122 P.3d 161 (2005). This bill also addressed both of these issues.

113. *Andersen v. King Cnty.*, 158 Wash. 2d 1, 138 P.3d 963 (2006); Substitute S. 5336, 60th Leg., Reg. Sess. (Wash. 2007); 2d Substitute H.R. 3104, 60th Leg., Reg. Sess. (Wash. 2008); Wash. Engrossed Substitute S. 5688.

114. This would have been a substantial change, because Washington State had not had a Republican governor in twenty-five years. *Washington: Past Governors*, NAT'L GOVERNORS ASS'N, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_washington.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_washington.html) (last

seen to be unlikely to support repealing the surrogacy prohibitions. That meant moving ahead on this bill.<sup>115</sup>

Representative Pedersen was no stranger to the surrogacy issue. He and his partner had children born using a surrogate in California.<sup>116</sup> He knew personally about the expense and logistical complications of the process.<sup>117</sup> But he also knew the bill would have to get substantial momentum out of the House to pass in the Senate. Hence, it had fifty-two co-sponsors at introduction, in addition to himself, three more votes than the majority necessary to pass the House.<sup>118</sup> But unfortunately, only one of those co-sponsors was Republican.<sup>119</sup>

The bill was also Washington State Bar Association “request legislation.” The Bar Association is permitted to take a position on legislation provided it does not take positions on social or political issues that do not affect the administration of justice or practice of law.<sup>120</sup> Sometimes the “request legislation” designation can give a bill even greater momentum.

The Bar Association approval process necessary for designating this bill “request legislation” foreshadowed the controversy it would ultimately encounter. The process usually requires a bill to be vetted and passed by the particular interest section (in this case, the Family Law section), then approved by the Legislative Committee and the Board of Governors. After the Family Law section approved this bill, the Legislative Committee in their November 2010 meeting was not at all in agreement about the bill. They voted first to strip out the surrogacy provisions—the vote failed—and then voted overwhelmingly to table the matter altogether.<sup>121</sup> The Board of Governors, however, took up the bill at their December 2010 meeting. The Legislative Committee chair told the Board that his committee would have supported the bill without the

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visited Oct. 29, 2014). Ultimately, he lost.

115. The Legislature and Governor Gregoire, in her last term in 2012, also used that window of opportunity to pass and sign the marriage equality bill. Engrossed Substitute S. 6239, 62d Leg., Reg. Sess. (Wash. 2012).

116. Molly Rosbach, *Bill Would Allow Paying Surrogate Mothers in Wash.*, SEATTLE TIMES (Mar. 15, 2011), [http://seattletimes.com/html/localnews/2014504976\\_apwaxgrsurrogatemothers3rdldwritethru.html](http://seattletimes.com/html/localnews/2014504976_apwaxgrsurrogatemothers3rdldwritethru.html).

117. *Id.*

118. H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

119. *Id.*

120. WASH. CT. GEN. R. 12.1(c)(2) (2013).

121. Sean O'Donnell, *WSBA Legislative Committee Meeting*, WASH. ST. B. ASS'N 4 (Nov. 5, 2010), <http://www.wsba.org/~media/Files/Legal%20Community/Legislative%20Affairs/2010/wsbalegcommminutes110510.ashx>.

surrogacy provisions.<sup>122</sup> After discussion, the Board took the unusual step of overruling the Legislative Committee and gave its approval to proceed with the bill as Bar request legislation.<sup>123</sup> In terms of momentum gathering, the bill was already off to a rocky start.

*B. The Bill Repealed the Prohibitions and Created a Contractual Safe Harbor with Requirements for Surrogate and Intended Parents to Be Enforceable*

Similar to the California bill that passed almost twenty years earlier, the sponsor, in consultation with stakeholders, chose to repeal the prohibitions and replace them with specific guidance around the surrogacy contract, essentially creating a “safe harbor” for enforceability. By doing this, the bill would “establish consistent standards and procedural safeguards for the protection of all parties involved in a surrogacy contract” and “confirm the legal status of children born as a result of these contracts.”<sup>124</sup> Notably, the bill encompassed both gestational and traditional (where the surrogate donates her egg) surrogacy.

The bill set out a series of requirements for all parties to the agreement in order to create an enforceable contract. The surrogate had to:

- be at least twenty-one years old;<sup>125</sup>
- have given birth to at least one child;<sup>126</sup>
- not previously acted as a surrogate for compensation more than once;<sup>127</sup>
- complete a medical evaluation (with physician determination that she could carry a child to term without endangering herself or the baby);<sup>128</sup>
- provide informed consent for any embryo transfer (including written consent after being informed by a physician about the risks);<sup>129</sup>

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122. *Minutes: Public Session WSBA Board of Governors*, WASH. ST. B. ASS'N (Dec. 10–11, 2010), <http://www.wsba.org/~media/Files/About%20WSBA/Governance/BOG%20Minutes/2010-2011/Public%20Session%20Minutes%20%20December%201011%202010.ashx>.

123. *Id.*

124. H.R. 1267, 62d Leg., Reg. Sess. § 54 (Wash. 2011).

125. *Id.* § 56(1)(a).

126. *Id.* § 56(1)(b).

127. *Id.* § 56(1)(c).

128. *Id.* § 56(1)(d).

129. *Id.* § 56(1)(e).

- obtain a mental health evaluation;<sup>130</sup>
- undergo legal counseling regarding the surrogacy contract;<sup>131</sup>
- and obtain health insurance, life insurance and disability insurance.<sup>132</sup>

The intended parent or parents were required to have a physician's affidavit (to be attached to the surrogacy contract) outlining the medical need for surrogacy;<sup>133</sup> a completed mental health evaluation;<sup>134</sup> and a legal consultation with independent legal counsel regarding the legal consequences of the surrogacy contract.<sup>135</sup>

The bill outlined a number of contracting requirements for an enforceable contract. The contract must be in writing, executed prior to the start of any medical surrogacy procedures, and signed by the surrogate (and her spouse or domestic partner) and the intended parent(s) (including spouse or domestic partner), and witnessed by two competent adults.<sup>136</sup> Both the surrogate and the intended parent(s) must have been represented by separate counsel concerning the contract, and must have signed a written acknowledgement about rights and obligations under the contract.<sup>137</sup> The contract must also provide that any compensation to the surrogate must be held in escrow prior to any medical procedures related to surrogacy.<sup>138</sup>

The contract also had to specify the obligation of the surrogate (and her domestic partner or spouse) to surrender the child immediately upon the child's birth.<sup>139</sup> But it also retained for the woman acting as the surrogate the right to choose her own health care provider during the pregnancy<sup>140</sup> and to make her own health and welfare decisions regarding herself and the pregnancy, including the right to terminate the pregnancy.<sup>141</sup> The intended parents, for their part, had to contract that they would receive the child immediately at birth and assume sole

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130. *Id.* § 56(1)(f).

131. *Id.* § 56(1)(g).

132. *Id.* § 56(1)(h)–(i).

133. *Id.* § 56(2)(a). This was waived in the case of same-sex couples.

134. *Id.* § 56(2)(b).

135. *Id.* § 56(2)(c).

136. *Id.* § 57(2)(a), (b), (f).

137. *Id.* § 57(2)(c), (d).

138. *Id.* § 57(2)(e).

139. *Id.* § 57(3)(a)(iii), (b)(ii).

140. *Id.* § 57(3)(c).

141. *Id.* § 57(6)(a).

responsibility for the child's support.<sup>142</sup>

Contracts that conformed to the safe harbor provisions would be enforceable. They would also establish legal parentage once the child was born.<sup>143</sup> This was a key point. Without legal certainty, intended parents generally would not proceed with surrogacy. Legal parentage at birth was clarified as follows: the intended parents would be the legal parents;<sup>144</sup> the child would be the child of the intended parents as his/her legal parents;<sup>145</sup> and neither the surrogate nor her domestic partner or spouse (if she has one) would have any legal parental rights.<sup>146</sup> The bill also provided for a court procedure for the intended parents to get a court order declaring them as legal parents at the time of the child's birth.<sup>147</sup>

*C. The Bill Made It Out of the House, but Only Barely Survived the Senate, and Not Intact*

In order to pass to the Senate, the bill had to survive three public House debates: in the House Judiciary committee, in the House General Government Appropriations and Oversight committee, and the House floor debate. Representative Pedersen was chair of the first committee, a member of the second committee, and a participant, like all other members, in the third arena, meaning he was in a good position to shepherd it through the House process. Even with party divisions, a bill that has good momentum can sometimes “ride that wave” through the other chamber.

Several stakeholders testified in favor of the bill in the Judiciary committee. This included representatives from Legal Voice,<sup>148</sup> NOW (National Organization for Women), and the Children's Alliance.<sup>149</sup> Several heterosexual couples who had used out-of-state surrogacy

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142. *Id.* § 57(3)(d).

143. This is typical for most states, but differs from California where a pre-birth determination of legal parentage is available. CAL. FAM. CODE § 7960 (West, Westlaw through ch. 931 of Reg. Sess., Res. ch. 1 of 2013–2014 2d Ex. Sess.).

144. Wash. H.R. 1267 § 55(2)(a).

145. *Id.* § 55(2)(b).

146. *Id.* § 55(2)(c).

147. *Id.* § 59.

148. Formerly Northwest Women's Law Center, it pursues justice for women and girls in the Northwest. *About Us*, LEGAL VOICE, <http://legalvoice.org/about/> (last visited Aug. 4, 2014).

149. House Bill Report, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House/1267%20HBR%20APPG%2011.pdf>.

services also testified.<sup>150</sup> Only one person testified against the bill, and the bulk of her testimony addressed other matters in the bill.<sup>151</sup> While the bill progressed out of committee, it did so on strict party lines: seven Democrats to six Republicans. While the vote in the General Government Appropriations and Oversight committee was similarly along party lines, the “nays” picked up one Democrat, socially conservative Representative Mark Miloscia.<sup>152</sup>

The bill was brought to the House floor on February 28, 2011. Representative Miloscia became the lightning rod for the floor debate. He brought thirty-two separate amendments to the bill, targeting just the surrogacy provisions.<sup>153</sup> This tactic, “Christmas tree-ing,” was intended to load the bill down with so many “ornaments” that it would topple. In doing so, Representative Miloscia found himself far apart from his Democratic colleagues, but found camaraderie with the Republicans.

Since the bill required many subparts for enforceability, these amendments easily assailed the bill. One tactic was to add more and more protections into the bill. For example, one required that a specified amount of compensation (\$5,000 per month) be called out in the contract, rather than leaving it to the negotiation process.<sup>154</sup> Another would have spelled out that intended parents pay all costs associated with the pregnancy,<sup>155</sup> or that the Department of Social and Health Services must review all surrogacy contracts and report back to the Legislature annually,<sup>156</sup> or that the surrogate be licensed with the Department of Labor and Industries.<sup>157</sup> Still another legislator’s amendments would have required the surrogate to be an American

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150. *Id.*

151. *Id.*

152. *Id.* Representative Miloscia (D-Federal Way), like Representative Braddock twenty-five years earlier, was a mix of liberal and conservative preferences. He had a strong history of supporting unions, voted to increase the minimum wage, and opposed any dismantling of the worker’s compensation program. At the same time, he voted against every domestic partnership and marriage equality bill. He was also staunchly anti-abortion. Jordan Schrader, *Former Democrat Mark Miloscia to Run for Senate as Republican*, NEWS TRIBUNE (Mar. 6, 2014), <http://www.thenewstribune.com/2014/03/06/3082010/former-democrat-mark-miloscia.html>. He was later quoted comparing “surrogacy” to “sex trafficking, prostitution, and ‘ordering a pizza.’” Josh Feit, *Extra Fizz: Miloscia Explains His Opposition to Pedersen Bill*, SEATTLE MET (Mar. 2, 2007), [www.seattlemet.com/articles/extra-fizz-miloscia-explains-his-opposition-to-Pedersen-bill](http://www.seattlemet.com/articles/extra-fizz-miloscia-explains-his-opposition-to-Pedersen-bill).

153. H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011). Twenty-four were later withdrawn. Ten were actually debated.

154. Amend. 182, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

155. Amend. 111, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

156. Amend. 115, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

157. Amend. 129, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

citizen with Washington residency for at least a year.<sup>158</sup> Other amendments, of dubious constitutionality, would have required the contract to have restrictions about the surrogate's drug, alcohol, and tobacco use during the pregnancy.<sup>159</sup> Another would have prohibited the surrogate from terminating the pregnancy for any reason, except if her life was endangered.<sup>160</sup>

Some amendments addressed medical care issues. For example, one Miloscia amendment specified that nothing in the contract could require, or incentivize, a woman to undergo a caesarian section.<sup>161</sup> Others stated that only one embryo could be transferred into the surrogate,<sup>162</sup> or that the contract could not encourage or require the surrogate to have "selective reduction" of the embryos.<sup>163</sup> Another would have required that the surrogate must have prenatal visits with her physician at least once a month.<sup>164</sup>

The House floor debate lasted for nearly three hours. Representative Miloscia yelled, cried, and beseeched the House not to pass the bill. The debate was remarkable for the shift in sympathies. The Democrats appeared indifferent to the potential exploitation of women, and Representative Miloscia and the Republicans took the moral high ground by looking out for the surrogates' best interests. The bill passed out of the House, but the momentum was gone. It passed fifty-seven to forty-one on nearly strict party lines, with two Republicans voting with the Democrats and Representative Miloscia standing with the Republicans.

The bill was heard in the Senate Government Operations and Tribal Relations & Elections committee. Bill opponents, even those not testifying, wore orange "Not For Sale" stickers.<sup>165</sup> Those opponents testifying in the Senate increased dramatically from the number in the House, and their focus was on the surrogacy provisions.<sup>166</sup>

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158. Amend. 128, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

159. Amend. 112, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

160. Amend. 113, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

161. Amend. 193, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

162. Amend. 186, H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

163. Amend. 181, H.R. 1267, 62d Leg., 2011 Reg. Sess. (Wash. 2011).

164. Amend. 110, H.R. 1267, 62d Leg., 2011 Reg. Sess. (Wash. 2011).

165. Morning Fizz, *You Can Start by Using Responsible Language*, SEATTLE MET (Mar. 16, 2011), <http://www.seattlemet.com/news-and-profiles/publicola/articles/you-can-start-by-using-responsible-language>.

166. S. COMM. GOV'T OPERATIONS, TRIBAL RELATIONS & ELECTIONS, 62D LEG., REG. SESS., S. REP. ON ENGROSSED 2D SUBSTITUTE H.R. 1267 (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/1267-S2.E%20SBR%20GO%2011.pdf>.

Representatives from the Family Policy Institute,<sup>167</sup> Washington State Catholic Conference, Washington Anti-Trafficking Engagement, and Rivers of Glory Christian Church were all present and provided such testimony as: “The last time the government allowed the purchase and sale of humans involved slavery;” “All human life is sacred but this bill creates a financial incentive to create life;”<sup>168</sup> and “HB 1267 is a perversion of God’s design for the family unit . . . [T]his bill is an unashamed affront to God’s plan.”<sup>169</sup>

As evidence of further rancor, the sponsor Representative Pedersen, and conservative Senator Dan Schwecker (R-Rochester) had a polite but pointed exchange after the hearing.<sup>170</sup> After Senator Swecker stated he would be a “responsible opponent,” Representative Pedersen responded, “You should start by using responsible language.”<sup>171</sup> Representative Pedersen drew his attention to the fact that Senator Swecker was featured prominently on a conservative Christian website claiming that Representative Pedersen was trying to “enslave women” and quoting Swecker as saying “[the bill would] open up yet another avenue for those who would use their fellow humans as slaves.”<sup>172</sup>

After the initial hearing, Senator Swecker and Senator Don Benton (R-Vancouver) brought a number of committee amendments: “some technical fixes, some clear monkey-wrenches to delay the bill’s passage, and some substantive suggestions to ensure the child is born into a ‘loving’ environment.”<sup>173</sup> Additionally, foreshadowing the Senate’s increasing focus on the home life of the child born of surrogacy, “[o]ne amendment would have required a family law court to make a ruling on whether a child is born into a safe environment at least 60 days before conception.”<sup>174</sup> Despite the proposed amendments, the bill passed out of committee on strict party lines, four Democrats to two Republicans.

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167. Family Policy Institute of Washington is a conservative alliance of organizations that promote the “sanctity of the family.” *Our Mission*, FAM. POL’Y INST. OF WASH., <http://www.fpiw.org/our-mission> (last visited May 5, 2014).

168. S. COMM. GOV’T OPERATIONS, TRIBAL RELATIONS & ELECTIONS, 62D LEG., REG. SESS., S. REP. ON ENGROSSED 2D SUBSTITUTE H.R. 1267 (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/1267-S2.E%20SBR%20GO%2011.pdf>.

169. *Id.*

170. Morning Fizz, *supra* note 165.

171. *Id.*

172. *Id.*

173. Andrew Calkins, *Controversial Surrogacy Bill Passes out of Key Senate Committee*, SEATTLE MET (Mar. 22, 2011), [www.seattlemet.com/articles/controversial-surrogacy-bill-passes-out-of-key-senate-committee](http://www.seattlemet.com/articles/controversial-surrogacy-bill-passes-out-of-key-senate-committee).

174. *Id.*



The bill came to the floor on April 12, 2011. The Senate at the time was composed of twenty-seven Democrats and twenty-two Republicans. That meant that the Democrats could “lose” two votes without losing the bill. As in the House, the Senators brought thirty-one amendments to the floor debate. These included many of the same amendments as the House entertained, as well as some new ones: “No surrogacy contract may provide for reproductive cloning of a human being or use of a cloned embryo;”<sup>175</sup> the surrogate is provided “tort protection for any decision she makes concerning her health, welfare, or pregnancy;”<sup>176</sup> and that the life insurance to be obtained by the surrogate must be for at least \$1,000,000, not \$250,000 as originally written.<sup>177</sup>

As mentioned above, during the Senate process, amendments focused on the child’s home life in ways not seen in the House debate. One senator, for instance, brought an amendment that would have required intended parents to meet the minimum characteristics of foster parents licensed in Washington, including background checks, substance abuse, medical and psycho-sexual evaluations, and provide a home that is “clean and sanitary and furnished appropriately for an infant.”<sup>178</sup> Another senator introduced an amendment that would have required a “preplacement report” (home study) prior to entry into a surrogacy arrangement, including verification that the agency or court-approved person talked to the intended parents about the “concept of parentage as a lifelong developmental process and commitment; disclosure of the fact of surrogacy to the child; the child’s possible questions about the surrogate; and the relevance of the child’s racial, ethnic, and cultural heritage.”<sup>179</sup> Another amendment would permit the surrogate to rescind the contract at any time, thus allowing her to keep the child.<sup>180</sup>

This comparison to adoption was perhaps inevitable, but certainly unfortunate for the proponents. If compared side by side at the moment of delivery, then an adoptive mother and a surrogate mother appear the same: two women with newborn children that they will relinquish. Using just those facts, without more context, legislators understandably turned to existing statutes that might cover the new surrogacy circumstances, specifically the adoption statutes.<sup>181</sup> Then, like adoptions, the court

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175. Amend. 267, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

176. Amend. 311, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

177. Amend. 309, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

178. Amend. 266, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

179. Amend. 356, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

180. Amend. 355, Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

181. WASH. REV. CODE §§ 26.33.010–26.33.903 (2012).

usually requires a social worker to file a report after a home study<sup>182</sup> and the statute provides a forty-eight-hour waiting period prior to relinquishment.<sup>183</sup>

In response, the proponents tried to distinguish surrogacy from adoption. In the surrogacy model, the child that is relinquished was never going to be the legal child of the birth mother. The child born was to be the child of the intended parents, and legal parenthood would attach at birth. Under this model, there was no need for adoption-like procedures. With legislators referencing adoption here, the proponents found themselves with more murky policy waters than they had wanted. While California's courts resolved the primacy of intended parents' rights two decades ago for its citizens,<sup>184</sup> this legislative debate rekindled, not resolved, it for Washingtonians.

With these amendments occupying time and energy, and the policy waters muddied by this comparison to adoption, the Democrats could not pass the bill intact. After ticking away precious hours before the end of the session, they could not get a majority. Because there were two other necessary parts of the bill (fixing the Uniform Parentage Act concerning same-sex couples and restoring the "holding out" provision), a compromise was struck on the last day to pass policy bills: amend out the surrogacy provisions and pass the remaining bill.<sup>185</sup> That compromise bill passed twenty-seven to twenty-one (and one excused). Further reinforcing that the bill divided legislators beyond their party affiliation, four King County moderate Republicans sided with the Democrats to pass the bill, while three conservative Democrats sided with the Republicans.<sup>186</sup>

The sponsor and stakeholders were bitterly disappointed. On the positive side, however, it kept the bill alive. The House refused to concur, however, and tried for seven days to reach a compromise position to save the surrogacy provisions.<sup>187</sup> The House appointed three representatives to negotiate in conference, but the Senate never took up the invitation. In the end, the Senate withdrew some of its amendments to the other provisions in the bill, but there were insufficient votes to

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182. *Id.* § 26.33.180.

183. *Id.* § 26.33.090.

184. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410 (1998).

185. Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

186. *Id.* Senator Hargrove was one who sided with the Republicans, which was consistent with his House vote twenty-five years earlier enacting the prohibitions.

187. *Id.*

restore the surrogacy provisions. That part of the bill had been defeated.

#### IV. WASHINGTON'S FUTURE FOR COMPENSATED SURROGACY

Compensated surrogacy, at this point in time, appears doubtful in Washington's near future. To pass legislation requires the right mix of politics and policy, and some luck. The legislative process, whether by design or just outcome, defeats more bills than it passes. But this issue has some unique challenges that make it even more of a struggle. The Legislature must first resolve some thorny policy issues. Then it must focus on renewing momentum and political will.

##### A. *The 2011 Legislation Was Overly Broad and Complex, Which Made It Easier to Defeat*

The 2011 bill had two major policy problems. First, it tried to encompass both gestational and traditional surrogacy. Secondly, there were so many safe harbor provisions that it was easy to topple the bill. For this bill to succeed in the future, the legislators should consider trimming the scope and simplifying the contractual process.

As the medical science and practice have developed since the *Baby M* case, the industry has moved to a greater reliance on gestational, not traditional surrogacy. With gestational surrogacy, the surrogate is no longer genetically related to the embryo. Her status as *not legal mother* becomes clearer and simpler under the law. The public has gotten more comfortable with surrogates providing gestational services and then relinquishing babies that do not contain their genetic material. This is not as radical as it once was.<sup>188</sup>

By comparison, traditional surrogacy, where the surrogate also provides the ovum, presents more legal conflicts. Washington does not allow a parent to terminate parental rights to their own children by

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188. For instance, the news article about two full siblings born to two surrogates within five days was published in 2010, and is "old news" now. Melanie Thornstrom, *Meet the Twiblings*, N.Y. TIMES (Dec. 29, 2010), [http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?page-wanted=all&\\_r=0](http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?page-wanted=all&_r=0). Now the media is focused on the possibility of three-parent embryos. Stuart Clark, *Genetic Treatment Using Three-Parent Embryo May be Ready in Two Years*, THE GUARDIAN (June 3, 2014, 11:14 AM), <http://www.theguardian.com/science/2014/jun/03/genetic-treatment-mitochondrial-replacement-three-parent-embryo-dna-law>. The following month, the Lifetime Channel premiered *The Lottery*, about a dystopian future, a global fertility crisis, and the political maneuverings regarding 100 fertilized embryos. *About the Lottery*, LIFETIME, <http://www.mylifetime.com/shows/the-lottery/about> (last visited Aug. 3, 2014).

contract.<sup>189</sup> Neither does Washington law permit a parent to forgo child support obligations.<sup>190</sup> Traditional surrogacy cannot escape the shadow of the *Baby M* case, or the New Jersey Supreme Court's famous recoil at "baby selling."<sup>191</sup>

By not differentiating between gestational and traditional surrogacy, the 2011 legislation tried to create a "one solution fits all" approach for two very different types of surrogacy. It did not work well. Had the bill been enacted, some of the mothers would have been relinquishing their own genetic children, and others would not. This naturally looked like adoption to some legislators, who sought to apply that framework to gestational surrogates as well. The bill's policy foundation was compromised by lumping these two groups together.

The contractual safe harbor's complexity also defeated the 2011 bill because it served as a tempting target for amendments. The surrogacy regulatory bills of other states generally contain competency and signature requirements similar to those in the 2011 bill.<sup>192</sup> This is in keeping with the state's accepted role in formation of certain documents, such as wills or deeds.<sup>193</sup> But some requirements did not make sense. For instance, the bill required that the parties to the contract have a mental health evaluation, but had no direction regarding the use or sharing of that information. Including this requirement in a statutory framework without a logical next step makes one question the state's interest in the evaluation.<sup>194</sup>

Statutory language with explicit dollar amounts also made the bill vulnerable. That only served as fodder for amendments, claiming they

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189. WASH. REV. CODE §§ 13.34.180–13.34.210 (2012). Termination of parental rights is a state process requiring opportunity for parent to remedy parental deficiencies. *See also In re Marriage of Furrow*, 115 Wash. App. 661, 671, 63 P.3d. 821, 826 (2003) (stating that a parent is not permitted to "relinquish her child into thin air" or walk away from parental responsibilities without adequate process under adoption or foster care statutes).

190. WASH. REV. CODE § 26.19.001 (2012) (Legislature intends that child support obligation is equitably apportioned between both parents); *In re Marriage of Hammack*, 114 Wash. App. 805, 808, 60 P.3d 663, 665 (Wash. Ct. App. 2003) (well settled law that parents' agreement to waive child support is unenforceable).

191. *In re Baby M*, 537 A.2d 1227, 1240–41 (N.J. 1988).

192. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47 / 20(a) (West, Westlaw through P.A. 98–925 of the 2014 Reg. Sess.) (same requirements in Illinois); S. 4617, 2013–2014 Leg., Reg. Sess. § 581-401 (N.Y. 2013) (similar requirements; introduced in April 2013 and referred to Committee on Children and Families).

193. WASH. REV. CODE § 11.12.020 (2012); WASH. REV. CODE § 64.04.020 (2012).

194. As amply demonstrated by Professor Nicolas in his companion Article, the surrogacy "intermediaries" can add certain additional requirements as part of their standard of care that the state does not need to include. Nicolas, *supra* note 4, at 1247–48.

were at once too high and too low.<sup>195</sup> Although the state has an interest in women not being exploited in these contracts, setting certain levels will not erase exploitation. It did, however, make it more difficult to pass a bill.

Unlike other contracts where the state takes no role in dictating terms, the state here walks a tightrope of enabling freedom of contract and also providing protections to the surrogate. Washington was not nearly as heavy-handed as Louisiana, which required background checks and post-birth genetic testing for intended parents and excluded all but married heterosexual couples.<sup>196</sup> Washington's 2011 bill also retained for the surrogate the sole power to make her own health and welfare decisions, unlike the 2008 Minnesota bill, for example, which would have permitted the contract to include provisions requiring the surrogate to abstain from smoking, drinking alcohol and exposure to radiation.<sup>197</sup> But the 2011 surrogacy bill could not protect against every practice of "bad medicine," such as the infamous case of Nadya Suleman (aka "Octomom").<sup>198</sup> Organizations such as the American Society for Reproductive Medicine Practice Committee have their own practice guidelines.<sup>199</sup> And legal remedies under medical malpractice tort law or regulatory law are a better way to address these practice errors than the state trying to account for every eventuality in advance and in the abstract.

In order to improve its chances of passage, one strategy that Washington legislators could pursue for a successful bill is to follow most of the other states: permit compensated surrogacy by limiting the acceptable practice to gestational surrogacy contracts.<sup>200</sup> This is in

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195. See, e.g., 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. § 56(1)(i) (Wash. 2011) (specifying amount of life and long-term disability insurance required by contract).

196. H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enacted but vetoed by Governor Bobby Jindal).

197. Wash. 2d Substitute H.R. 1267 § 58(6)(a); S.F. 2965 3d Engrossed, 85th Leg., 2007–08 Sess. § 5 (Minn. 2008).

198. Allan Duke, *Nadya Suleman's Doctor Loses California Medical License*, CNN (June 2, 2011), <http://www.cnn.com/2011/US/06/01/california.octuplets.doctor.revoked/>; *Suleman Says She Was Drugged When She Consented to 12 Embryos*, CNN (July 29, 2011), <http://www.cnn.com/2011/SHOWBIZ/07/28/california.octomom/>.

199. See, e.g., Am. Soc'y for Reprod. Med., *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY & STERILITY 44 (Jan. 2013), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Practice\\_Guidelines/Guidelines\\_and\\_Minimum\\_Standards/Guidelines\\_on\\_number\\_of\\_embryos%281%29.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_on_number_of_embryos%281%29.pdf).

200. See, e.g., 750 ILL. COMP. STAT. ch. 47 (West, Westlaw through P.A. 98–925 of the 2014 Reg. Sess.); NEV. REV. STAT. ANN. §§ 126.500–.810 (West, Westlaw through 2014 Special Sess.); N.H. REV. STAT. § 168-B (Westlaw through ch. 330 of 2014 Reg. Sess.); H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enacted but vetoed by Governor Bobby Jindal). This was also the model suggested

keeping with changes in fertility medicine, and it is legislatively much cleaner.<sup>201</sup> Such a bill permitting gestational surrogacy practice (pleasing liberals), while leaving the prohibitions against compensation in place for the more traditional method (reassuring conservatives),<sup>202</sup> could also be a legislative win-win. Both sides get something, and compromise moves bills in the legislative process.

The intended parents, who either provide the gestational surrogate with genetic material themselves or procure it from a sperm or egg bank, will have all the legal rights and obligations for the child. This was in the 2011 bill (albeit muddled by both types of surrogacy),<sup>203</sup> and is very similar to other states that permit surrogacy, which is more often than not gestational surrogacy.<sup>204</sup> It is also a familiar role, as the Legislature commonly makes decisions regarding the rights and obligations of parties in domestic relations matters.<sup>205</sup> For instance, in the Uniform Parentage Act amendments that did pass in 2011, the Legislature amended the parent-child relationship statute to update this understanding based on changing types of families.<sup>206</sup> The last subsection clarified that the intended parents in a compassionate surrogacy arrangement would be the legal parents.<sup>207</sup> Obviously, once the Legislature has already ventured into clarifying the rights in one type of surrogacy, it can certainly do it again.

### *B. Narrow Political Divisions Do Not Bode Well for Success of This Bill*

Hand in hand with the policy discussion is the political calculus. The House remains Democratic, though barely,<sup>208</sup> having lost four seats out

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by H.R. 2793, 60th Leg., Reg. Sess. (Wash. 2010).

201. Albeit more expensive. See Nicolas, *supra* note 4, at 1250 (gestational surrogacy was \$30,000 more than traditional surrogacy).

202. See, e.g., La. H.R. 187 §§ 2719–2720 (permitting gestational surrogacy in certain circumstances but continuing to prohibit genetic or traditional surrogacy).

203. Engrossed 2d Substitute H.R. 1267, 62d Leg., Reg. Sess. § 59 (Wash. 2011).

204. See, e.g., 750 ILL. COMP. STAT. ch. 47; NEV. REV. STAT. ANN. § 126.500-810; N.H. REV. STAT. § 168-B.

205. See, e.g., WASH. REV. CODE §§ 26.09.002–26.09.915 (2012) (rights and obligations post-marital dissolution specified); see also WASH. REV. CODE § 13.34.200 (2012) (state law clarifies new parent-child relationship after one or both parents' rights have been terminated by court).

206. Wash. Engrossed 2d Substitute H.R. 1267.

207. WASH. REV. CODE § 26.26.101(8).

208. Christina Salerno, *Election Update: Republicans Expected to Gain Seats in the State House*, CAPITOL REC. (Nov. 13, 2014), <http://capitolrecord.tvw.org/2014/11/election-update-republicans-expected-to-gain-seats-in-the-state-house/#.VISfcYeLkaA>.

of its fifty-five held prior to the election. The narrow majority of fifty-one seats out of ninety-eight seats is nowhere near the sixty-four members it had in 1989. And, history has shown that there have been Democrats on this issue who did not vote with their party. For that reason, a narrow Democratic majority would probably not have enough votes for passage.

For the 2013 and 2014 legislative sessions, two Democrats sided with the Republicans to form a conservative Senate coalition, with Rodney Tom (D-Medina) as its leader.<sup>209</sup> Senator Tom's announcement that he would not be running again<sup>210</sup> fueled much debate about whether the Democrats could re-take the Senate.<sup>211</sup> They failed, however, to get enough votes.<sup>212</sup> The political calculus of whether to reintroduce the surrogacy bill will be based on tallying votes after the November elections are certified and evaluating other competing policy objectives of the session, a decision made long after this article has gone to print. Suffice it to say, now the Democrats will have to find several Republican members in both chambers to provide votes to move this bill.<sup>213</sup>

Former Democratic Representative Mark Miloscia's run for the Senate as a Republican added an additional wrinkle. He and his opponent both raised well over \$350,000 and spent nearly that much in this election.<sup>214</sup> He garnered fifty-seven percent of the vote.<sup>215</sup> Now that

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209. The leader and his coalition also determine committee leadership and bill referral, which could smooth the way or add hurdles to a controversial bill like this.

210. Brian Rosenthal, *State Senate Majority Leader Rodney Tom Drops Re-Election Bid*, SEATTLE TIMES (Apr. 14, 2014, 12:06 PM), <http://blogs.seattletimes.com/politicsnorthwest/2014/04/14/state-senate-majority-leader-rodney-tom-drops-re-election-bid/>.

211. John Stang, *Change of Control in Legislature: A Shot for Both Sides*, CROSSCUT.COM (May 6, 2014), <http://crosscut.com/2014/05/06/under-the-dome/119928/democrats-start-behind-take-offense-battle-state-s>.

212. Chris Vance, *Olympia: A Bit More Red in the Color of the Legislature*, CROSSCUT.COM (Nov. 5, 2014), <http://crosscut.com/2014/11/05/elections/122692/olympia-republicans-are-genuinely-competitive-again/>. Of note, that author is the former chair of the Washington Republican party.

213. Following the August 6, 2014 Washington primary, where they were within 284 votes of each other, the outcome of a Republican vs. Republican contest in the 31st Legislative District (Roach vs. Dahlquist) might also have removed a vocal opponent of surrogacy. Jim Bruner, *Fiercely Lawmaker Pam Roach in Heated Primary Showdown*, SEATTLE TIMES (July 30, 2014), [http://seattletimes.com/html/localnews/2024203262\\_roachdahlquistxml.html](http://seattletimes.com/html/localnews/2024203262_roachdahlquistxml.html); *November 4, 2014 General Election Results*, SECRETARY OF ST., <http://results.vote.wa.gov/results/current/Legislative-District-31-State-Senator.html> (last visited Nov. 21, 2014). But Senator Roach prevailed. John Stang, *Pam Roach is Surviving a Tough Challenge from a Fellow Republican*, CROSSCUT.COM (Nov. 4, 2014), <http://crosscut.com/2014/11/04/elections/122671/pam-roach-challenger-cathy-dahlquist/>.

214. *Candidates: Legislative*, PUB. DISCLOSURE COMM'N, <http://www.pdc.wa.gov/>

he won handily, he will most likely bring his well-understood anti-surrogacy views with him. A Senate floor debate on surrogacy, if it gets to that, will probably look like the previous House floor debate, only with a much narrower margin for votes.

With that being said, two political changes have occurred that could help this bill. The original House prime sponsor is now a senator. Should he decide to reintroduce the bill, he could shepherd it through the more uncertain chamber. And, should it pass out of the Legislature, a Democratic governor with a recent public record of supporting formation of all families<sup>216</sup> will decide whether to sign it.

Lastly, with the change in politics after the election will also come a change in legislative priorities. Time has marched on and new priorities have emerged. For example, the Washington State Supreme Court found the Legislature in contempt for failing to fully fund K-12 education.<sup>217</sup> The Governor also wants a transportation budget.<sup>218</sup> Some of the same stakeholders that worked on the 2011 surrogacy bill are now focused on the Reproductive Parity Act instead, which would benefit many more people than the surrogacy bill.<sup>219</sup> Every legislative session brings new legislators and new priorities.

*C. This Bill Would Require “Re-Energizing” and Momentum in Order to Pass*

Once a spigot has been shut off, it always takes that much more energy to turn it back on again. The same is true with legislation. Even if the political bodies align in an upcoming session to move a compensated surrogacy bill, more work would need to be done to regain momentum. Just as the California Legislature found out in 1993 when the Governor

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MvcQuerySystem/Candidate/leg\_candidates (last visited Nov. 16, 2014).

215. *November 4, 2014 General Election Results*, SECRETARY OF ST., <http://results.vote.wa.gov/results/current/LegislativeDistrict30.html> (last visited Nov. 20, 2014).

216. News Release, Statement from Governor Jay Inslee on Washington State Efforts Urging U.S. Supreme Court to Support Marriage Equality (Feb. 28, 2013), *available at* <http://www.governor.wa.gov/news/releases/article.aspx?id=60>. This is markedly different than his initial vote on the matter as a freshman legislator. *See supra* note 107.

217. Christina Salerno, *Supreme Court Holds Legislature in Contempt for Education Funding*, CAPITOL REC. (Sept. 11, 2014), <http://capitolrecord.tvw.org/>.

218. Brian Rosenthal & Andrew Garber, *Legislative Session Ends Without Tackling Some Major Issues*, SEATTLE TIMES (Mar. 13, 2014), [http://seattletimes.com/html/localnews/2023125385\\_legislatureendxml.html](http://seattletimes.com/html/localnews/2023125385_legislatureendxml.html).

219. Joel Connelly, *Abortion Coverage Passes State House, Likely Doomed in State Senate*, SEATTLE PI (Feb. 5, 2014), <http://blog.seattlepi.com/seattlepolitics/2014/02/05/abortion-coverage-passes-house-uphill-going-in-state-senate/>.



vetoed that surrogacy bill, and they could not find the momentum to override the veto,<sup>220</sup> so too the Washington State Legislature will have to expend much more energy to regain momentum after a loss.

The Legislature often responds to anecdotes when passing bills.<sup>221</sup> In 1989, after the *Baby M* details emerged, the story compelled legislative action. Paraphrasing Representative Braddock at the time, “We do not need mumbo jumbo. We need a courageous answer.”<sup>222</sup> Unlike in 1989, there is no compelling story pushing this forward. In 2011, several individual stories of economic hardship and logistical difficulties were not enough to push the issue into the average legislator’s field of vision.

Favorable anecdotes can come from a number of sources. First, though unlikely, there could be a groundswell of support on the surrogacy issue as the number of people using surrogacy services reaches a critical mass. More likely in this case, one or two high profile Washington couples could publicize their infertility difficulties and the joys of a child born from a surrogate.<sup>223</sup> Putting a face on the issue, particularly one that is well-known, helps build the story that can propel a bill forward.

Sometimes the momentum comes from a source outside the state. For instance, something might happen in California or Oregon that would preclude Washingtonians from accessing surrogacy services there, thus forcing the issue at home. Or a national organization, such as the National Conference of Commissioners on Uniform Laws, might propose a new model bill for states to adopt on parentage, which might include surrogacy provisions. Even further, new techniques may be developed, engendering new debate and policy concern.<sup>224</sup>

Lastly is timing, and it is, as they say, “everything.” Sometimes an issue or bill that appeared to have died in the legislative process gets resurrected and passes.<sup>225</sup> That is the excitement and the pull of

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220. MARKENS, *supra* note 43, at 48.

221. *See, e.g.*, H.R. 1824, 61st Leg., Reg. Sess. (Wash. 2009) (concussion and head injury management in youth sports named for youth athlete severely compromised by head injury); H.R. 1138, 61st Leg., Reg. Sess. (Wash. 2009) (restroom access bill for persons with Crohn’s Disease passes with testimony from Pearl Jam musician).

222. *See supra* note 104.

223. For example, actors Sarah Jessica Parker and Matthew Broderick, and television personalities Guiliana and Bill Rancic, have been very public about their surrogacy experiences. *See 10 Celebrities Who Used Surrogates*, CELEBRITYBABYSCOOP.COM (Feb. 20, 2014), <http://www.celebritybabyscoop.com/2013/02/20/celebrities-used-surrogates>.

224. *See, e.g.*, Karen Weintraub, *Three Biological Parents and a Baby*, N.Y. TIMES (Dec. 16, 2013), <http://well.blogs.nytimes.com/2013/12/16/three-biological-parents-and-a-baby/>.

225. *See, e.g.*, H.R. 2614, 62d Leg., Reg. Sess. (Wash. 2012) (regarding short sales; amended with text from H.R. 2421 regarding foreclosures to resurrect a bill that died without Senate action).

legislative work. It is very possible that this could be one of those bills that resurface and pass in the midst of other events.

#### CONCLUSION

In 1989, based on a very public surrogacy dispute, Washington's Legislature chose to ban compensated surrogacy. But times have changed, and Washington's 2011 Legislature took a substantial step towards reconsidering the state's surrogacy prohibitions. Another legislative opportunity to consider the bill is inevitable. But its success will depend on resolution of some policy issues, timing and political alignments, and a good story to propel interest. Then, perhaps, it will reach the Governor's desk.

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before cut-off; amended bill passed and signed by Governor).