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WHO IS THE LEGAL PARENT? A CASE REVIEW OF *IN RE BABY M* AND THE EVOLUTION OF SURROGACY LAW IN THE UNITED STATES



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Abstract

Surrogacy has transformed the way many individuals and couples build families, especially those who cannot conceive or carry a pregnancy. Despite its growing acceptance, surrogacy continues to raise difficult legal questions about who should be recognized as a child's legal parent when biological, genetic, gestational, and intended parenthood do not belong to the same person. One of the most influential cases in this area is *In re Baby M* (1988), which marked the first major judicial examination of commercial surrogacy in the United States. Although decided more than thirty years ago, the case continues to influence legal discussions on parenthood, reproductive autonomy, and the enforceability of surrogacy agreements. This article reviews *In re Baby M* and examines its lasting impact on the development of surrogacy law in the United States. It analyzes the facts of the case, the reasoning of the New Jersey Supreme Court, and the legal principles established by the judgment. The article further explores how later judicial decisions and legislative reforms have responded to the issues raised in *Baby M*, especially the recognition of intended parents, the regulation of gestational surrogacy, and the protection of children's welfare. A comparative discussion of selected jurisdictions demonstrates that clearer statutory regulation has reduced many of the legal uncertainties that continue to exist in parts of the United States. The article argues that although *In re Baby M* remains a landmark decision, developments in assisted reproductive technology require a more modern legal framework capable of balancing reproductive autonomy, contractual certainty, and the best interests of the child. It concludes that greater consistency in surrogacy regulation is necessary to provide legal certainty for surrogate mothers, intended parents, healthcare professionals, and children born through assisted reproduction.

Keywords – Surrogacy; Legal Parenthood; *In re Baby M*; Assisted Reproductive Technology; Family Law.

I. INTRODUCTION

Advances in assisted reproductive technology (ART) have changed the way families are formed, offering new opportunities to individuals and couples who cannot conceive naturally. Among these technologies, surrogacy has become an important option for people facing infertility, same-sex couples, single parents, and individuals with medical conditions that make pregnancy impossible or unsafe. While surrogacy has enabled many people to achieve parenthood, it has also created difficult legal questions about parental rights, contractual obligations, and the welfare of children born through assisted reproduction (American Society for Reproductive Medicine [ASRM], 2024).

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One of the most debated issues in surrogacy law is the determination of legal parenthood. In traditional family law, legal parenthood was generally based on childbirth or genetic connection. However, surrogacy arrangements often separate genetic, gestational, and intended parenthood, making it difficult to identify who should be recognized as the child's legal parent. As assisted reproductive technologies have advanced, courts have increasingly been required to resolve disputes involving competing parental claims and the enforceability of surrogacy agreements (Cohen, 2021). Moreso, the legal debate surrounding surrogacy in the United States gained national attention through the landmark case of *In re Baby M* (1988). The case involved a traditional surrogacy agreement in which the surrogate mother, Mary Beth Whitehead, refused to surrender the child after birth despite an earlier contractual agreement with the intended parents. The dispute forced the New Jersey Supreme Court to consider whether commercial surrogacy contracts should be legally enforceable and how parenthood should be determined when contractual obligations conflict with the welfare of the child (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

Although *Baby M* was decided many years ago, it continues to shape discussions about surrogacy law in the United States. Since the decision, medical advances have shifted fertility practice from traditional surrogacy to gestational surrogacy, while several states have enacted legislation recognizing intended parents and regulating surrogacy arrangements. Nevertheless, significant differences remain among state laws, creating legal uncertainty for intended parents, surrogate mothers, fertility clinics, and children born through assisted reproduction (Uniform Law Commission, 2023).

This article reviews *In re Baby M* and examines its contribution to the development of surrogacy law in the United States. It analyses the court's reasoning, evaluates its influence on later judicial decisions and legislative reforms, and considers the continuing challenges surrounding legal parenthood in assisted reproduction. The article argues that although *Baby M* established important legal principles, modern reproductive technologies require a clearer and more consistent legal framework that balances contractual certainty, reproductive autonomy, and the best interests of the child.

II. THE DEVELOPMENT OF SURROGACY LAW IN THE UNITED STATES

Surrogacy has become an important part of assisted reproductive technology in the United States, offering an alternative path to parenthood for people who are unable to carry a pregnancy. Although the practice has become more common over the past forty years, its legal regulation has developed slowly and remains inconsistent across states. Much of this uncertainty arises because surrogacy challenges traditional legal concepts of parenthood by separating genetic, gestational, and intended parental roles (Jackson, 2022).

Generally, surrogacy exists in two forms. Traditional surrogacy involves a surrogate mother who is genetically related to the child because her own egg is used during conception. In gestational surrogacy, the surrogate carries an embryo created from the intended parents or donors through in vitro fertilization (IVF) and has no genetic relationship with the child. Today, gestational surrogacy is the more common form because it reduces legal disputes over genetic parenthood and is widely accepted in modern fertility practice (American Society for Reproductive Medicine [ASRM], 2024).

Before the 1980s, few American laws specifically addressed surrogacy. Most legal disputes involving reproduction were resolved under traditional principles of family law, adoption law, or contract law. As commercial surrogacy arrangements became more common, courts were asked to determine whether these agreements should be legally enforced and who should be recognized as the child's legal parents. However, the absence of a clear legislation meant that judges often reached different conclusions depending on the facts of each case and the laws of individual states (Cohen, 2021).

Also, the legal debate changed significantly after the New Jersey Supreme Court decided *In re Baby M* in 1988. The case was the first major judicial decision to examine the validity of a commercial surrogacy agreement and the competing rights of a surrogate mother and intended parents. Although the court declared the surrogacy contract unenforceable, it also recognized that decisions about parenthood should ultimately be guided by the best interests of the child rather than contractual obligations alone (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

Since *Baby M*, surrogacy law has continued to evolve. Several states now recognize intended parents through legislation or judicial decisions, while others continue to prohibit or restrict commercial surrogacy. The Uniform Parentage Act has also influenced the development of more consistent legal standards by providing guidance on establishing parentage in assisted reproduction (Uniform Law Commission, 2023). Despite these developments, significant differences remain among state laws, leaving many aspects of surrogacy regulation uncertain.

Hence, understanding this legal background is important because it explains why *In re Baby M* remains a landmark decision. The case not only shaped judicial thinking on surrogacy contracts but also influenced later debates about reproductive autonomy, legal parenthood, and the regulation of assisted reproductive technology in the United States.

III. *IN RE BABY M*: FACTS, LEGAL ISSUES, AND THE COURT'S DECISION

The case of *In re Baby M* remains one of the most important judicial decisions in the history of surrogacy law in the United States. It was the first major case to examine whether a commercial surrogacy agreement could legally transfer parental rights from a woman who gave birth to the child to the intended parents. The case exposed the challenges of applying traditional family law principles to emerging reproductive technologies and raised important questions about contracts, motherhood, and the welfare of children.

Facts of the Case

The dispute arose in New Jersey in 1985 when William and Elizabeth Stern entered into a traditional surrogacy agreement with Mary Beth Whitehead. Under the agreement, Whitehead agreed to become pregnant using her own egg and William Stern's sperm through artificial insemination. The arrangement provided that after the birth of the child, Whitehead would surrender parental rights to the Sterns in exchange for financial compensation and pregnancy-related expenses (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

In March 1986, Whitehead gave birth to a baby girl, later known as Baby M. However, after the child's birth, Whitehead developed an emotional attachment to the child and refused to surrender custody to the Sterns. She left the hospital with the baby and attempted to retain parental rights despite the previous agreement.

The Sterns sought legal intervention, arguing that the surrogacy contract was valid and that they should be recognized as the child's legal parents. The conflict attracted public attention because it involved a direct disagreement between a contractual agreement and a biological mother's relationship with the child. The case required the courts to determine whether a person could legally agree before birth to surrender parental rights and whether financial compensation for surrogacy was consistent with public policy.

Legal Issues Before the Court

The New Jersey Supreme Court was required to address several important legal questions:

- i. Was the surrogacy agreement legally enforceable? The court considered whether a contract requiring a woman to surrender her parental rights before the child's birth violated existing family law principles.
- ii. Did payment for surrogacy constitute unlawful adoption or baby selling? New Jersey law prohibited payments connected to adoption arrangements. The court examined whether the financial compensation provided to Whitehead improperly transferred parental rights through payment.
- iii. Who should be recognized as the legal parent of Baby M? The case challenged traditional assumptions about motherhood. The court had to determine whether legal parenthood should be based on childbirth, genetics, contractual intention, or the welfare of the child.
- iv. What arrangement would best protect the child's interests? The court considered whether maintaining the child with the Sterns or returning custody to Whitehead would better serve Baby M's welfare.

The Trial Court Decision

The trial court initially upheld the surrogacy agreement and awarded custody of Baby M to the Sterns. It concluded that the contract was valid and that Whitehead had voluntarily agreed to surrender her parental rights. The court also terminated Whitehead's parental rights and allowed Elizabeth Stern to adopt the child.

However, the trial court's decision reflected a contractual approach to surrogacy, emphasizing the agreement made between the parties before conception. However, Whitehead appealed, arguing that the agreement violated public policy and improperly removed her parental rights.

The New Jersey Supreme Court Decision

In 1988, the New Jersey Supreme Court reversed major parts of the trial court's decision. The court held that the surrogacy agreement was unenforceable because it violated New Jersey adoption laws and public policy principles (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

The court was more concerned that the agreement involved payment to a woman in exchange for surrendering her child. According to the court, allowing such contracts could create the risk that children would become objects of commercial transactions and that economically vulnerable women might be pressured into giving up parental rights.

However, the court did not completely reject surrogacy as a method of family formation. Instead, it focused on the specific arrangement before it, especially the combination of traditional surrogacy, financial payment, and the requirement that Whitehead permanently surrender her rights before birth. Although the court declared the contract invalid, it determined that custody should remain with the Sterns because it believed this arrangement served the best interests of Baby M. The court allowed

Whitehead to maintain visitation rights, recognizing that she was the child's biological mother and that preserving some relationship with her was consistent with the child's welfare.

Significance of the Decision

In re Baby M established several important principles that influenced later surrogacy law. First, it demonstrated that courts would not automatically enforce surrogacy agreements simply because they satisfied contractual requirements. Second, it emphasized the importance of the best interests of the child as the central consideration in disputes involving parental rights. Third, it encouraged lawmakers and courts to reconsider how surrogacy should be regulated.

However, the case also created uncertainty because it did not provide a complete legal framework for future surrogacy arrangements. As reproductive technology developed, especially the growth of gestational surrogacy where the surrogate has no genetic connection to the child, courts and legislatures began adopting different approaches to determining legal parenthood.

Furthermore, the lasting importance of *Baby M* is therefore not only the outcome of the dispute but the broader legal questions it introduced. The case forced American law to reconsider traditional definitions of motherhood and laid the foundation for continuing debates about who should be recognised as the legal parent in an era of advanced reproductive technology.

IV. CRITICAL ANALYSIS: PARENTHOOD, SURROGACY CONTRACTS, AND THE BEST INTERESTS OF THE CHILD

The decision in *In re Baby M* represents a major moment in the development of surrogacy law because it exposed the difficulty of applying traditional legal concepts of parenthood to modern reproductive arrangements. The case required the court to balance competing interests: the freedom of individuals to enter reproductive agreements, the autonomy of surrogate mothers, and the protection of children born through assisted reproduction. Although the court sought to protect important family law principles, its reasoning has been criticized for not fully addressing the complexities of modern surrogacy.

Surrogacy Contracts and the Limits of Contract Law

A central issue in *Baby M* was whether a surrogacy agreement should be treated like an ordinary contract. The Sterns argued that Whitehead voluntarily entered into the agreement and that the terms should therefore be enforced. From this perspective, surrogacy contracts provide certainty by allowing intended parents and surrogates to understand their rights and responsibilities before conception.

However, the New Jersey Supreme Court rejected this approach. The court held that parental rights cannot simply be transferred through private agreements because family relationships involve interests beyond ordinary commercial transactions (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)). The court was concerned that enforcing such contracts could weaken the legal protection traditionally given to the parent-child relationship.

This reasoning reflects a broader principle in family law: private agreements cannot always determine matters involving children. Courts have consistently recognised that the welfare of the child must remain the primary consideration, even where adults have entered voluntary agreements. However, critics argue that the *Baby M* decision placed too much emphasis on traditional ideas of

motherhood and failed to recognize the legitimate interests of intended parents who rely on reproductive agreements to create families (Cohen, 2021).

Furthermore, the development of gestational surrogacy has challenged the court's reasoning. Unlike traditional surrogacy, gestational surrogacy usually involves an embryo created through IVF using the intended parents' genetic material or donor material. Because the surrogate has no genetic relationship with the child, many later courts have been more willing to recognize intended parents as the legal parents. This shift shows that the concerns raised in *Baby M* were closely connected to the specific facts of traditional surrogacy rather than surrogacy as a whole.

The Meaning of Legal Parenthood in Assisted Reproduction

One of the most important questions raised by *Baby M* is the meaning of legal parenthood. Historically, legal systems often relied on a simple assumption: the woman who gives birth is the mother, and the husband of that woman is the father. However, assisted reproductive technologies have complicated this approach by creating situations where genetic, biological, and intentional parenthood may belong to different individuals.

In surrogacy arrangements, there may be several possible claims to parenthood:

- i. the woman who gives birth to the child;
- ii. the person who provides the genetic material;
- iii. the intended parent or parents who planned the child's birth;
- iv. the individuals recognised by law after birth.

The *Baby M* decision gave significant power to biological motherhood because Whitehead carried and gave birth to the child. However, modern surrogacy law recognizes that intention can also be an important basis for parenthood. In cases such as *Johnson v. Calvert* (1993), the California Supreme Court recognized the intended parents as the legal parents in a gestational surrogacy arrangement, emphasizing the importance of the parties' intentions when establishing parenthood.

This change reveals a broader transformation in family law. Therefore, parenthood is no longer determined only by biology or childbirth but may also involve intention, consent, and responsibility for raising the child. As reproductive technologies continue to develop, legal systems must consider whether traditional definitions of parenthood remain suitable for modern families.

Women's Autonomy and the Protection of Surrogate Mothers

Another important aspect of *Baby M* concerns the autonomy of surrogate mothers. Supporters of surrogacy argue that women should have the freedom to make reproductive choices, including the decision to carry a child for another person. From this perspective, restricting surrogacy agreements may interfere with women's personal and economic freedom.

However, the New Jersey Supreme Court expressed concern that commercial surrogacy could exploit women, most especially those experiencing financial hardship. The court feared that financial compensation might pressure economically vulnerable women into agreements involving the surrender of parental rights (*In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

This concern remains relevant in modern surrogacy discussions. Critics of commercial surrogacy argue that financial inequality may create situations where women from disadvantaged backgrounds become providers of reproductive services for wealthier intended parents. Supporters, however,

argue that properly regulated surrogacy can protect women through informed consent requirements, independent legal advice, medical screening, and fair compensation (American Society for Reproductive Medicine, 2024).

The challenge for lawmakers is therefore not simply whether surrogacy should be permitted, but how it should be regulated. Effective regulation should protect surrogate mothers from exploitation while respecting their ability to make informed decisions about their own reproductive lives.

The Best Interests of the Child Principle

The best interests of the child principle was central to the court's final decision in *Baby M*. Although the court rejected the surrogacy contract, it ultimately awarded custody to the Sterns because it believed this arrangement provided a more stable environment for the child.

This aspect of the decision demonstrates the complexity of surrogacy disputes. The court recognized that the child's welfare could not be determined primarily by contractual promises or biological relationships. Instead, it considered factors such as emotional attachment, stability, and the child's long-term interests.

However, some scholars argue that relying on the best interests principle after declaring the contract invalid creates uncertainty. If courts can disregard surrogacy agreements whenever disputes arise, intended parents and surrogate mothers may have difficulty predicting the legal consequences of their decisions (Robertson, 1994).

Therefore, a clearer legal framework could reduce such uncertainty by establishing rules before disputes occur. Modern surrogacy laws in several jurisdictions attempt to achieve this balance by recognizing intended parents while requiring safeguards to protect the interests of children and surrogate mothers.

The Continuing Importance of Baby M

Although *In re Baby M* was decided in a different technological era, its central questions remain relevant today. The case highlighted the difficulty of defining parenthood when reproductive technology separates pregnancy, genetics, and intention. It also demonstrated that surrogacy cannot be regulated through contract law alone because it involves fundamental questions about identity, family relationships, and children's welfare.

The greatest contribution of *Baby M* was not the specific legal rule it established but the debate it created. The case encouraged courts and legislatures to develop more sophisticated approaches to surrogacy, especially as gestational surrogacy became more common. While modern surrogacy law has moved beyond the strict approach adopted in *Baby M*, the case continues to influence discussions about the appropriate balance between reproductive freedom, parental rights, and child protection.

V. HOW *BABY M* CHANGED SURROGACY LAW IN THE UNITED STATES FROM TRADITIONAL SURROGACY TO MODERN GESTATIONAL SURROGACY

The decision in *In re Baby M* influenced the development of surrogacy law in the United States significantly. Although the court rejected the enforceability of the surrogacy agreement before it, the case did not end the practice of surrogacy. Instead, it encouraged lawmakers, courts, and medical

professionals to develop new methods that could better address the challenges created by assisted reproductive technology. Eventually, the focus of surrogacy law shifted from traditional surrogacy arrangements based on biological motherhood toward gestational surrogacy, where legal parenthood is often based on intention and consent.

The Shift from Traditional to Gestational Surrogacy

One of the most significant changes following *Baby M* has been the decline of traditional surrogacy and the increasing use of gestational surrogacy. In traditional surrogacy, the surrogate provides her own egg and therefore has a genetic relationship with the child. This was a major factor in *Baby M* because Whitehead was both the gestational and genetic mother of the child.

On the contrary, gestational surrogacy developed through advances in IVF technology and allows an embryo created from the intended parents' or donors' genetic material to be transferred to the surrogate. Because the surrogate has no genetic connection to the child, courts have generally found it easier to recognize the intended parents as the legal parents. This distinction has reduced some of the conflicts that existed in traditional surrogacy cases (American Society for Reproductive Medicine [ASRM], 2024).

Hence, the transition toward gestational surrogacy demonstrates how medical developments have influenced legal reasoning. While *Baby M* focused heavily on biological motherhood, modern surrogacy disputes mostly consider intention, consent, and the responsibilities assumed by intended parents.

The Influence of Johnson v. Calvert and the Recognition of Intended Parents

A major turning point in American surrogacy law came with the California Supreme Court decision in *Johnson v. Calvert* (1993). The case involved a gestational surrogacy agreement between Anna Johnson, who carried the pregnancy, and Mark and Crispina Calvert, who provided the genetic material and intended to become the child's parents.

Unlike *Baby M*, the surrogate in *Johnson* had no genetic relationship with the child. The California Supreme Court recognized the Calverts as the legal parents, holding that when genetic and gestational claims of parenthood are separated, the intentions of the parties who initiated the reproductive process should be given significant weight (*Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

The decision represented a major shift in the legal understanding of parenthood. Rather than focusing exclusively on childbirth, the court recognized that parenthood in assisted reproduction may be based on the intention to create and raise a child. This approach has influenced many later decisions involving gestational surrogacy and has contributed to the development of the "intent-based" theory of legal parenthood.

However, the acceptance of intent-based parenthood has not been universal. Some jurisdictions continue to prioritize biological or gestational connections, resulting in significant differences in surrogacy rights across the United States. This lack of uniformity remains one of the major challenges in American reproductive law.

State-by-State Regulation of Surrogacy

Unlike some countries that regulate surrogacy through comprehensive national legislation, the United States has no federal law governing surrogacy. Instead, individual states determine whether surrogacy agreements are permitted, restricted, or prohibited. This creates a complex legal environment where the rights of intended parents and surrogate mothers may depend based on location.

Some states, including California, have developed supportive legal frameworks that recognize gestational surrogacy agreements and provide clear procedures for establishing parentage. Other states impose restrictions, require additional court approval, or refuse to recognize certain agreements. This variation creates uncertainty for families who rely on surrogacy and for fertility professionals who operate across state boundaries (Cohen, 2021).

However, the absence of consistent regulation also creates challenges in interstate surrogacy arrangements. Intended parents and surrogates may live in different states with different legal rules, thereby raising questions about which state's law should apply and whether a parentage order issued in one state will be recognized elsewhere.

The Role of the Uniform Parentage Act

The Uniform Parentage Act (UPA) has attempted to provide greater consistency in determining legal parenthood in assisted reproduction cases. Developed by the Uniform Law Commission, the Act recognizes that parentage may be established through assisted reproduction agreements and provides guidance on determining the legal status of intended parents (Uniform Law Commission, 2023).

The 2017 version of the UPA includes provisions addressing gestational agreements and recognizes intended parents when specific legal requirements are met. These requirements often include informed consent, independent legal representation, and medical confirmation that assisted reproduction is necessary.

Although the UPA has influenced many state laws, adoption remains contradictory. Some states have adopted provisions based on the Act, while others have created different rules or have not addressed surrogacy comprehensively. As a result, the United States continues to lack a unified approach to surrogacy regulation.

Modern Challenges After Baby M

Although surrogacy law has developed considerably since *Baby M*, several legal challenges remain. Modern disputes involve questions such as:

- i. whether intended parents should always be recognised before birth;
- ii. how to protect surrogate mothers from exploitation;
- iii. whether surrogacy agreements should be enforceable in all circumstances;
- iv. how parentage should be determined when agreements fail;
- v. how children born through surrogacy should access information about their genetic origins.

These issues demonstrate that surrogacy law must continue to evolve alongside reproductive technology. The central lesson from *Baby M* is that parenthood in the context of assisted reproduction cannot always be determined through traditional concepts of biology or childbirth alone. Instead,

modern legal systems must balance multiple interests, including reproductive autonomy, contractual fairness, and the welfare of children.

VI. Comparative Legal Perspectives: Surrogacy Regulation in the United Kingdom, Canada, and Australia and Lessons for the United States

The legal challenges surrounding surrogacy in the United States are not unique. Countries around the world have struggled to balance competing interests, including reproductive autonomy, protection of surrogate mothers, legal certainty for intended parents, and the welfare of children born through assisted reproduction. However, different jurisdictions have adopted different regulatory approaches. Examining these models provides useful lessons for the United States, where surrogacy law remains largely dependent on individual state decisions.

The United Kingdom: Regulated Surrogacy Based on Altruistic Principles

The United Kingdom has adopted one of the most structured approaches to surrogacy regulation. Surrogacy is primarily governed by the Surrogacy Arrangements Act 1985 and the Human Fertilization and Embryology Act 2008, which establish rules concerning parental orders, legal parenthood, and assisted reproduction.

Unlike some states in the United States where commercial surrogacy is permitted, the UK prohibits commercial surrogacy arrangements. Surrogates may receive reasonable expenses, but they cannot enter into agreements primarily motivated by financial gain. The policy behind this approach is to reduce the risk of exploitation and prevent the commercialization of pregnancy and children (Jackson, 2022).

A significant feature of the UK model is that the woman who gives birth is initially recognized as the legal mother, even where she has no genetic connection to the child. Intended parents must apply for a parental order after birth to transfer legal parenthood. This approach demonstrates the principle that childbirth creates an initial legal relationship that must be formally changed through legal procedures.

Also, the UK model differs significantly from the approach developed in some American states, especially those that recognize intended parents as legal parents before birth. While the UK system provides safeguards for surrogate mothers, it has also been criticized for creating uncertainty because intended parents do not immediately become the legal parents at birth (Horsey, 2023).

Canada: Protection of Surrogates Through Non-Commercial Regulation

Canada provides another example of a regulated but restrictive approach to surrogacy. Surrogacy is governed primarily by the Assisted Human Reproduction Act 2004, which permits altruistic surrogacy but prohibits commercial payment beyond reasonable expenses.

The Canadian approach attempts to balance reproductive freedom with concerns about exploitation. Intended parents may use surrogacy arrangements, but financial incentives are limited to prevent the practice from becoming a commercial marketplace. This approach reflects the view that reproductive assistance should be available while ensuring that women's bodies are not treated as commercial resources (Baylis, 2021).

Canadian law also recognizes the importance of informed consent and medical supervision. The regulatory framework aims to protect surrogate mothers by ensuring that they understand the physical, emotional, and legal consequences of the arrangement.

However, the Canadian model also faces challenges. Restrictions on compensation may limit the availability of surrogates and encourage some intended parents to seek arrangements outside Canada. International surrogacy creates additional legal problems involving citizenship, parentage recognition, and protection of children born through cross-border arrangements.

Australia: State-Based Regulation and the Protection of Intended Parents and Surrogates

Australia follows a mixed regulatory approach, with surrogacy laws primarily developed at the state and territory level. Although the details differ between jurisdictions, most Australian states permit altruistic surrogacy while restricting commercial arrangements.

For example, states such as New South Wales, Victoria, and Queensland have enacted legislation establishing requirements for surrogacy agreements, counselling, legal advice, and parentage orders. Similar to the UK model, the woman who gives birth is generally recognized as the legal mother until a court transfers parentage to the intended parents.

On the other hand the Australian approach places strong emphasis on the welfare of the child and the protection of surrogate mothers. Surrogacy agreements are usually subject to strict requirements designed to ensure that all parties participate voluntarily and understand their responsibilities (National Health and Medical Research Council [NHMRC], 2023).

However, like the United States, Australia's state-based system creates some inconsistency. Different rules between jurisdictions can make interstate surrogacy arrangements complicated and may create uncertainty for families.

Lessons for the United States

The comparison between the United States and other jurisdictions reveals landmark differences in regulatory philosophy. The United States generally places greater emphasis on private agreements and reproductive autonomy, while countries such as the UK, Canada, and Australia emphasizes more on limiting commercialization and protecting vulnerable parties.

Each of these approach has advantages and limitations. The American model allows greater flexibility and recognizes the choices of intended parents and surrogates, but the absence of uniform regulation creates doubt. By contrast, international models provide clearer rules but may impose greater restrictions on reproductive arrangements.

The experience of these jurisdictions suggests several lessons for the United States.

First, clearer legal standards are necessary. The uncertainty created by different state approaches can make surrogacy arrangements unpredictable and increase the likelihood of legal disputes.

Second, surrogate mothers require meaningful protection. Regulation should ensure independent legal representation, informed consent, medical screening, and psychological support.

Third, intended parents need greater certainty. Where individuals enter surrogacy arrangements in good faith and comply with legal requirements, the law should provide clear pathways for recognizing parenthood.

Finally, the welfare of the child should remain the central consideration. Any legal framework should ensure that children born through surrogacy receive legal recognition, stability, and protection regardless of the circumstances of their birth.

Furthermore, the international experience demonstrates that surrogacy regulation requires a careful balance. Neither unrestricted commercialization nor excessive legal restrictions provide a complete solution. A successful framework must recognize the realities of modern reproductive technology while protecting the rights and interests of everyone involved.

VII. Emerging Legal Challenges in Modern Surrogacy: International Arrangements, LGBTQ+ Parenthood, Commercialization, and Future Reproductive Technologies

Although *In re Baby M* was decided more than thirty years ago, the legal questions it raised have become more complex as reproductive technologies and family structures continue to evolve. Modern surrogacy involves issues that extend beyond the traditional dispute between a surrogate mother and intended parents. Today, courts and lawmakers must address questions involving international arrangements, changing concepts of family, commercial practices, and future developments in reproductive science.

Cross-Border Surrogacy and Conflicts of Law

One of the most significant challenges in contemporary surrogacy law is the growth of international surrogacy arrangements. Intended parents progressively travel across national borders to access surrogacy services because of differences in cost, availability, and legal restrictions in their home countries. This practice has created complex legal issues involving citizenship, recognition of parentage orders, and the protection of children born through international arrangements (Trimmings and Beaumont, 2020).

Cross-border surrogacy can create situations where the law of the country in which the child is born conflicts with the law of the intended parents' home country. For example, a child may be recognized as belonging to the intended parents in one jurisdiction but considered legally related to the surrogate mother in another. These conflicts can delay birth registration, citizenship recognition, and access to essential services for children.

On the contrary, the United States also faces these challenges because surrogacy laws differ between states. A surrogacy agreement that is recognized in California may face legal uncertainty if the intended parents reside in a state with restrictive surrogacy laws. This creates similar concerns to international surrogacy by requiring courts to determine which legal rules should apply.

Therefore, a more coordinated approach is required. International and interstate cooperation could help establish minimum standards for recognising parentage, protecting children, and ensuring that all parties enter surrogacy arrangements voluntarily and with adequate legal protection.

LGBTQ+ Families and the Changing Meaning of Parenthood

Surrogacy has played an important role in enabling same-sex couples and single individuals to become parents. For many LGBTQ+ individuals, assisted reproductive technologies provide a

pathway to biological parenthood that may not otherwise be available. However, legal systems have not always developed at the same pace as changing family structures.

Historically, family law was based on traditional assumptions involving a married heterosexual couple and biological parent-child relationships. Assisted reproduction has challenged these assumptions by demonstrating that families can be created through intention, consent, and caregiving rather than only through genetic connection (Robertson, 1994).

Many jurisdictions have gradually recognized the parental rights of same-sex couples and single parents using surrogacy. However, legal uncertainty remains in some areas where laws are based on traditional definitions of motherhood and fatherhood. Questions may arise concerning birth certificates, parental recognition, and the rights of non-biological parents.

However, the evolution of surrogacy law after *Baby M* demonstrates that legal parenthood must adapt to the realities of modern families. A framework that focuses only on biology or childbirth may fail to protect children who are raised in diverse family structures.

Commercialization and the Risk of Exploitation

Commercial surrogacy remains one of the most controversial issues in reproductive law. Supporters argue that compensation recognizes the physical, emotional, and time commitments involved in pregnancy. They also argue that adults should have the freedom to enter voluntary agreements that benefit all parties.

On the other hand, opponents argue that commercial surrogacy may exploit economically vulnerable women, particularly where financial inequality influences reproductive decisions. Concerns have been raised that women may feel pressured to become surrogates because of economic hardship rather than genuine choice (Baylis, 2021).

The challenge for regulators is determining how to distinguish between legitimate compensation and exploitation. A complete ban on compensation may restrict access to surrogacy and encourage unregulated arrangements, while unrestricted commercialisation may create risks for vulnerable individuals.

The experience of different jurisdictions suggests that regulation is more effective than prohibition. Requirements such as independent legal advice, informed consent, medical screening, psychological evaluation, and transparent contracts can help protect surrogate mothers while allowing responsible surrogacy arrangements.

The Rights and Interests of Children Born Through Surrogacy

A central issue in all surrogacy debates is the status and welfare of children born through these deals. While disputes often focus on the rights of intended parents and surrogate mothers, children are the individuals most affected by legal uncertainty.

However, questions remain regarding whether children born through surrogacy should have access to information about their genetic origins, how parentage should be recorded, and how their rights should be protected when international or interstate disputes arise.

The best interests of the child principle, which played an important role in *Baby M*, continues to provide a foundation for resolving these issues. However, modern approaches increasingly recognize that protecting children requires more than deciding custody disputes after problems occur. Legal

systems should establish clear rules before birth to ensure that children receive immediate recognition and stability.

Future Reproductive Technologies and the Expansion of Parenthood Questions

Future developments in reproductive science are likely to create additional challenges for surrogacy law. Emerging technologies such as artificial gametes, advanced genetic screening, and artificial womb research may further separate reproduction from traditional biological processes.

These developments raise fundamental questions about the meaning of parenthood. If genetic material can be created artificially or pregnancy can occur outside the human body, traditional legal categories based on biology and childbirth may become increasingly difficult to apply.

The lessons from *Baby M* remain significant because the case demonstrated that legal systems must adapt when technology changes the traditional understanding of family relationships. Rather than relying majorly on biological definitions, future reproductive laws may need to consider intention, responsibility, consent, and the welfare of children as central principles.

The Continuing Relevance of In re Baby M

The importance of *In re Baby M* lies not only in the specific dispute it resolved but also in the broader questions it introduced. The case forced American law to confront the reality that reproduction could involve multiple claims to parenthood. Although later developments have moved beyond the court's reasoning, the fundamental question remains: who should the law recognise as a parent?

Modern surrogacy reveals that there is no single factor that can always determine parenthood. Genetic connection, pregnancy, intention, and social responsibility may all play important roles. The continuing challenge for lawmakers is creating a legal system that recognises the complexity of modern families while protecting the interests of children and respecting individual reproductive choices.

VIII. CONCLUSION AND RECOMMENDATIONS

The decision in *In re Baby M* remains one of the most influential cases in the development of surrogacy law in the United States. Although the case was decided in 1988, the legal questions it raised continue to shape contemporary debates about reproductive technology, legal parenthood, and the regulation of assisted reproduction. The case demonstrated that traditional concepts of motherhood and family relationships become increasingly complicated when reproductive technology separates genetic connection, pregnancy, and the intention to become a parent.

This review has shown that *Baby M* represented a turning point in American reproductive law. The New Jersey Supreme Court's refusal to enforce the surrogacy agreement showed concerns about the commercialization of reproduction, the protection of surrogate mothers, and the principle that the welfare of the child should remain the primary consideration. However, the decision also created uncertainty by failing to provide a comprehensive framework for determining legal parenthood in future surrogacy arrangements.

The development of gestational surrogacy after *Baby M* has significantly changed the legal landscape. Later decisions, especially *Johnson v. Calvert*, demonstrated a movement away from relying exclusively on biological connection or childbirth and toward recognizing the intentions of

individuals who initiate and assume responsibility for creating a child. This shift reflects a transformation in family law, where parenthood is increasingly understood through a combination of genetics, intention, consent, and caregiving responsibility.

Despite these developments, surrogacy regulation in the United States remains inconsistent. The absence of federal legislation has resulted in different state approaches, thereby creating uncertainty for intended parents, surrogate mothers, fertility clinics, and children born through assisted reproduction. Some states provide strong legal recognition for surrogacy agreements, while others restrict or prohibit certain arrangements. This fragmented system increases the possibility of legal disputes and creates unequal protections depending on geographic location.

Based on the analysis in this article, several recommendations should be considered.

First, the United States should develop greater consistency in surrogacy regulation. While a single federal law may be difficult to achieve because of constitutional and political differences, national guidance or model legislation could provide minimum standards for parentage recognition, informed consent, and protection of all parties involved.

Second, surrogacy agreements should receive legal recognition when they meet appropriate measures. Modern surrogacy arrangements should not be treated as ordinary commercial contracts, but properly regulated agreements can provide important certainty for intended parents and surrogate mothers. Requirements such as independent legal representation, medical evaluation, psychological assessment, and voluntary informed consent should be mandatory.

Third, surrogate mothers must receive stronger legal protection. Regulation should ensure that women who serve as surrogates are not exposed to exploitation or unfair pressure. This includes protecting their right to make informed decisions about their bodies, ensuring access to independent legal advice, and providing appropriate medical and emotional support throughout the process.

Fourth, the interests of children born through surrogacy should remain central. Legal systems should prioritize the child's right to legal recognition, stability, and protection from disputes between adults. Clear rules on parentage before birth can reduce uncertainty and prevent children from experiencing delays in accessing citizenship, healthcare, or legal identity.

Finally, future surrogacy laws must recognize the changing nature of family formation. The experience of *Baby M* demonstrates that parenthood cannot always be determined by a single factor. Modern reproductive technologies have created families that do not fit traditional legal categories. A successful legal framework must therefore balance reproductive autonomy with responsibility, fairness, and the welfare of children.

In conclusion, *In re Baby M* was not simply a dispute about a surrogacy contract; it was a defining moment that forced American law to reconsider the meaning of parenthood in an era of technological reproduction. While later legal developments have addressed some of the uncertainties created by the case, significant challenges remain. As reproductive technologies continue to evolve, the law must move beyond outdated assumptions and develop a balanced approach that protects surrogate mothers, recognizes intended parents, and ensures that every child born through assisted reproduction receives legal security and protection.