IN THE SUPREME COURT OF IOWA

Case No. 17-0376

Linn County
No. EQCV086415

P.M. and C.M.,
Plaintiffs-Appellees

v.

D.B. and T.B.,
Defendants-Appellants

APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY
THE HONORABLE CHRISTOPHER L. BRUNS

APPELLEES' FINAL BRIEF

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Other Authorities

Black's Law Dictionary (10th ed. 2014).

1994 Iowa Acts 472.

ROUTING STATEMENT

This case should be transferred to the Court of Appeals in accordance with Iowa Rule of Appellate Procedure 6.1101(3)(a) and (b) because it requires applying existing legal principles and is appropriate for summary disposition. TB and DB argue that this case is a case of first impression with "urgent issues of broad public importance." While CM and PM agree that this Court has never considered the validity of surrogacy agreements, which is an important public issue, Iowa Courts have long recognized those people who provide the genetic material to make a child as the child's parents and have recognized they receive priority over all others in custody disputes. Additionally, this Court has set forth clear guidelines regarding the unenforceability of contracts on the grounds of public policy.

However, because TB and DB will almost certainly seek further review if they receive an unfavorable decision from the Court of Appeals, finality and the best interests of the child may well be served by this case being retained by the Supreme Court. Iowa R. App. P. 6.1101(2)(d, f).

STATEMENT OF THE CASE

Nature of the Case

This case concerns the validity of a gestational carrier agreement (the "Agreement") in the State of Iowa. A gestational carrier is an individual who, through in vitro fertilization, carries a fetus on behalf of people who provide the genetic material to make that child, based on an agreement reached prior to implantation of the embryo. Here, TB agreed to gestate embryos provided by PM and CM in the hopes of delivering two children. Her husband, DB, is a party to this action.

Course of Proceedings and Disposition

On October 24, 2016, the Ms filed a Petition for Declaratory Judgment and Temporary and Permanent Injunction to declare the Agreement valid and to require performance by the Bs. (App. at 47–48.) After discovering the birth of the intended children, on October 31, 2016, the Ms filed a motion for emergency ex parte injunction and the court filed an order enjoining noncompliance with the Agreement. (App. at 430–31.) On November 2, 2016, the hospital

filed, and the Ms joined, a motion to appoint a decision-maker for the surviving child pending determination of custody of the surviving child. (App. at 431.) That same day, the Bs filed a pro se "Opposition" to the hospital's motion and motion to vacate the injunction, pending hearing. (App. at 431.)

After denying the Bs' Opposition and Motion, the court held a hearing on the temporary injunction on November 4, 2016. (App. at 431.) At that hearing, the court appointed a Guardian ad Litem for the surviving child. (App. at 431.) On November 11, 2016, the Ms amended their petition to request additional relief concerning the disestablishment and establishment of parental rights to the child and the Bs and Ms, respectively. (App. at 430 n.6.) On November 15, 2016, the Bs filed an answer and counterclaim, seeking to establish TB as the biological and legal mother of both children, invalidating the Agreement on the basis of Iowa law and the Constitutional rights of both the child and TB, and awarding temporary placement to the Bs. (App. at 431.) On November 16, 2016, the Bs filed motions to dismiss, for summary judgment, for temporary custody of the surviving child, and to dissolve the injunction. (App. at 431.)

On November 22, 2016, the Ms filed a Notice re: Genetic Testing, which, through genetic test results, established PM as the genetic father of and excluded TB and DB as the genetic parents of the surviving child. (App. at 432.) On November 30, 2016, the Ms filed a Resistance to the Bs' November 16 motions, filing their own motion for summary judgment as well. (App. at 432.)

After an evidentiary hearing on November 28, 2016, the court issued an order on December 7, 2016, granting temporary sole legal custody and placement of the child to PM. (App. at 432.) The Ms responded by applying to modify the birth certificates of both children to correct parentage and names. (App. at 432.) In response, the Bs resisted this application in district court and filed with this Court a Petition for Writ of Certiorari and Application for Interlocutory Appeal, as case number 16-2185. (App. at 432.) After summarily denying the Petition and Appeal, the Supreme Court issued a Procedendo on January 28, 2017. (App. at 432.) On February 21, 2017, the district court issued a "Ruling on Motion to Dismiss, Motions for Summary Judgment, and Request for Order Regarding

Birth Certificates," finding the presence of no genuine issue of material fact that:

1) TB and DB are not the biological and legal parents of the intended parents,

2) PM, as the sole genetic parent, has a legal right to a relationship with the surviving child and is entitled to permanent custody of that child,

3) the Agreement is enforceable as a matter of law, and

4) "Plaintiffs are entitled to summary judgment on their claims and on the claims raised against them in Defendants' counterclaims." (App. at 455.)

STATEMENT OF THE FACTS

The Ms and TB came into contact during a search for someone to serve as the Ms gestational carrier. Ruling p. 1. On January 5, 2016, the Ms, TB, and DB executed a document entitled "Gestational Carrier Agreement" (the "Agreement"). (App at 465.) The Agreement provides that TB will gestate a embryos created with PM's sperm and the egg of an anonymous donor. (App. at 52, 465.) The Agreement defines any children born pursuant to the Agreement as a "Child"; this definition will be used in this brief for consistency and clarity. (App. at 50.) Further, the Agreement provides that upon the birth of the children, the Bs will allow the Child to be parented by the Ms. (App. at 51–53.) The Parties agreed it was in the best interests of the Child for the Bs not to form a parent-child relationship with the Child. (App. at 51.) Accordingly, they agreed surrender custody of a Child to the Ms "immediately upon birth." (App. at 51–52.) In exchange for gestation, the Ms agreed to pay for an in vitro fertilization procedure for TB, up to a cost of $13,000, to allow the Bs to have a child of their own. (App. at 55, 465.)

On March 27, 2016, pursuant to the Agreement, a fertility clinic implanted two of the Ms' embryos—created from the genetic material of PM and an anonymous egg donor—into TB's uterus. (App. at 428.) On April 4, 2016, blood testing confirmed TB's pregnancy. (App. at 76 ¶ 15, 100 ¶ 15.)

After signing the contract, "the relationship between the parties broke down completely" and "communication between the parties ceased." (App. at 429–30.) During this time, TB asked the Ms to pay additional funds so she could use a different IVF clinic. (App. at 429); (App. at 89–96.) TB e-mailed her attorney asking if it would "be better that we negotiate some type of payment for all the nonsense they're putting my husband and I through and I just terminate the pregnancy." (App. at 91–94.) This e-mail was forwarded by TB's attorney, and eventually reached the Ms. Following that, communication continued to decline. Eventually, TB decided to keep the children based on her opinion that the Ms were racist. (App. at 430.) Soon thereafter, TB gave birth to twins without notifying the Ms of the very premature birth. (App. at 430.) One child passed away eight days after birth and was cremated. (App. at 430.)

Not knowing of this birth, death, or cremation, the Ms filed a Petition for Declaratory Judgment and Temporary and Permanent Injunction on October 24, 2016. (App. at 430.) The Ms filed a Motion for Emergency Ex Parte Injunction on October 31, 2016, asserting a belief that the birth occurred. (App. At 459.) That same day, the Court entered an Order granting a Temporary Injunction. (App. at 431.) On November 11, 2016, the Ms filed an Amended Petition to request that the Court name them the father and mother of the Child. (App. at 430 n.6.) On November 22, 2016, the Ms filed a Notice regarding the genetic test results; the test results conclusively showed that PM was the genetic father of the Child, and excluded DB and TB as the genetic parents. (App. at 432.) On November 23, 2016, the Court issued an order upholding the injunction issued on October 31 and indicating the Ms were likely to succeed on the merits. Iowa R. Civ. P. 1.1502(1); (App. at 432.)

ARGUMENT

I. The District Court's Decision Should Be Affirmed Because the Definition of a Parent is a Legal Determination Based Solely on Genetics.

A. Preservation of Error

PM and CM agree that TB and DB preserved error on all issues in their brief.

B. Scope and Standard of Appellate Review

The Appellees agree with the Appellants' statement that the standard of review is for correction of errors at law. Summary judgment is proper "if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 802 (Iowa 2003). Under this standard, the Court's review "is limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008).

C. Appellees' Contentions

The District Court correctly recognized that Iowa Law—both statutory and case law—treats the genetic (or biological) connection as the defining factor for parentage. (Tr. Nov. 28 Hearing 13:10–13:14;

17:4–17:8.) There is no genuine issue of material fact that the only party to the litigation with a genetic connection to the Child is PM. (Tr. Nov. 28 Hearing 38:3–38:12 (the Bs' counsel admits this fact); *see also* App. at 432.) After this determination, the definition of parent is a legal matter. *See*, *e.g.*, Iowa Code § 232.2(39) (2016). As such, the defendants' purported "expert testimony" did not generate a genuine issue of material *fact* because it was an improper *opinion* on a matter of domestic law. *See In re Estate of Ohrt*, 516 N.W.2d 896, 900 n.1 (Iowa 1994); *see also Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992) ("In general an expert witness is not permitted to state a legal conclusion."). The district court properly determined on summary judgment Iowa law provides a clear definition of parent.

Parentage in Iowa turns solely on genetics. The Iowa legislature defines a "parent" as "a biological or adoptive mother or father of a child...." Iowa Code § 232.2(39) (2016). Black's Law Dictionary defines "biological father" as "the man whose sperm impregnated the child's biological mother." Black's Law Dictionary (10th ed. 2014). It defines "biological mother" as "[t]he woman who provides the egg that develops into an embryo. With today's genetic-engineering

techniques, the biological mother may not be the birth mother, but she is usually the legal mother."[1] *Id.* These definitions, again, indicate genetics, not gestation, is key.

The gestational surrogacy regulations and paternity statute provide strong support to this conclusion. The regulations use of the term "biological mother" to mean the genetic parent in contrast to "birth mother" to mean the surrogate completely undermines TB's claim that she is a "biological" parent by virtue of giving birth. *See* Iowa Admin. Code r. 641—99.15 (2016). The paternity statute provides for the use of blood and genetic tests to establish parentage, which indicate the importance of genetic connections. *See* Iowa Code § 600B.41 (2016). The Bs' definition of biological mother is unworkable; as the district court noted, the definition advanced

[1] Also of note is Black's pertinent definition of "surrogate mother: A woman who carries out the gestational function and gives birth to a child for another; esp., a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of the child." Black's Law Dictionary (10th ed. 2014).

would mean multiple people could be the biological parent. The district court wrote:

> …the Court has also considered the import of a different construction. If the phrase "a parent who has been a biological party to the procreation of the child" included any part of the entire reproductive process relating to biology, the Court's construction would result in an absurd or impractical result. Yes, this interpretation would include TB and any other gestational carrier within the definition of biological parent. It would also include the individuals who fertilized the donor egg with PM's sperm because that was a biological part of the reproductive process. It would include any individuals who cared for the fertilized eggs over the five days between the point when they were fertilized and when they were implanted in TB's uterus. It would also include the individual(s) who implanted the eggs in TB's uterus. TB would clearly have a far greater biological connection to the entire reproductive process than these other individuals, but reading the statutory definition broadly enough to include her as a biological parent would also mean all these other persons fell within the statutory definition.
>
> Additionally, if the Court settled on a construction of section 600A.2 that included TB as a parent and excluded all others who were part of carrying out the IVF process, the construction would still result in an absurd or impractical result. This construction of the statute would mean any baby born by use of a donor egg in IVF has two biological mothers, the egg donor and the gestational carrier. The Court has no basis to believe the Iowa Legislature intended for such children to have two biological mothers.

(App. at 450–51.) The Bs' definition of biological mother is not only unworkable, but it finds no support in the law of the state of Iowa.

Iowa courts have defined legal parents as synonymous with genetic (or biological) parents. "The general rule is that [t]he state cannot interfere with the rights of natural parents[2]." *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1993). The Iowa Court of Appeals has recognized that denying the truth of biological parentage would "perpetuate [a] fraud" by deceiving children into "believing a man who is not their biological father is their biological father." *In re Marriage of Bethards*, 526 N.W.2d 871, 874 (Iowa Ct. App 1994).[3] In a termination and adoption case, the Iowa Supreme Court affirmed an order vacating an adoption where the preceding termination did not terminate a biological father's rights, even though the person named as the father of the baby signed a release of parental rights. *In re B.G.C.*, 496 N.W.2d at 245.

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[2] Biological parent and natural parent are synonyms. *See* Black's Law Dictionary (10th ed. 2014); *see also* Iowa Admin. Code r. 641—99.15 (2016).

[3] Shortly after *Bethards* was decided, the Iowa legislature passed the disestablishment of paternity statute found in Iowa Code § 600B.41. *See* 1994 Iowa Acts 472.

Both the Iowa Supreme Court and the U.S. Supreme Court recognize that blood (or genetic relationships) provide the strongest constitutional parental right:

> [i]t is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from *blood relationship*, state-law sanction, and basic human right....

In re Bruce, 522 N.W.2d 67, 72 (Iowa 1994) (quoting *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 846 (1977)) (emphasis added). This Court has written scientific advancements make the "identity of a biological parent a virtual certainty." *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999). As Defendants note, the long assumption is the birth mother is also the biological mother. (Tr. Nov. 28 Hearing 22:7–22:13.) But this Court cannot decide on assumption; Iowa law, through *Callender*, recognized ways of establishing parentage have changed and the biological link—as determined by a genetic test—is key. *Callender*, 591 N.W.2d at 189–91.

Iowa law renders "biological," "genetic," and "natural parent," synonyms. Throughout this brief, these words are used as such, and the definitions provided above are not repeated, except as necessary. The significant law on this issue undergirds the district court's well-reasoned opinion granting summary judgment, as parentage, after the determination of genetic connection, is a pure legal determination.

II. The District Court's Decision Should Be Affirmed Because the Agreement Is Enforceable.

A. Preservation of Error

PM and CM agree that TB and DB preserved error on all issues in their brief.

B. Scope and Standard of Appellate Review

The Appellees agree with the Appellants' statement that the standard of review is for correction of errors at law. Summary judgment is proper "if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Pecenka*, 672 N.W.2d at 802. Under this standard, the Court's review "is limited to whether a

genuine issue of material fact exists and whether the district court correctly applied the law." *Pillsbury Co.,* 752 N.W.2d at 434.

C. Appellees' Contentions

The Agreement is an enforceable contract between the Ms and the Bs. Contracts are promises, "the performance of which the law recognizes as a duty and for a breach of which a remedy is given." *Port Huron Machinery Co. v. Wohlers*, 221 N.W. 843, 844 (Iowa 1928).

1. The Agreement contains the necessary elements of a valid contract.

The Agreement contains the requisite elements of a *prima facie* contract. Under Iowa law, a valid, binding contract requires "offer, acceptance, mutual manifestation of assent, consideration, and capacity." *Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). The Agreement contains all these necessary elements. (App. at 448.) Indeed, the Bs have never argued otherwise. (App. at 448 n.21.) Additionally, the parties both ratified the contract by making and accepting the performance contemplated by the Agreement and should therefore be bound by its terms. *Life Investors Ins. Co. of Am. v. Estate of Corrado*, 838 N.W.2d 640, 646-47

(Iowa 2013). The record and TB and DB's Brief contain no contention the Agreement was breached by the Ms. As this Court recognized in *Witten*, parties should be able to "rely on the terms of the parties' contract, especially after the use of an embryo. *In re Marriage of Witten,* 672 N.W.2d 768, 782 (Iowa 2003). Similarly, the record and TB and DB's Brief contain no contention the Agreement lacks the ordinary elements of a valid contract in Iowa. Instead, the Bs claim the otherwise enforceable contract is "void" based on public policy grounds, illegality, and incongruity with alleged State and Federal constitutional rights.

2. Defendants cannot rebut the strong presumption the Agreement is enforceable.

Defendants do not satisfy the extremely high standard for invalidation of the Agreement. Where the elements of a contract are present, "[t]here is a presumption that [the] contractual agreement is binding upon the parties." *Norwest Bank Des Moines Nat. Ass'n v. Bruett*, 432 N.W.2d 711, 712 (Iowa 1988) (citing *Commercial Trust & Sav. Bank of Storm Lake v. Toy Nat'l Bank of Sioux City*, 373 N.W.2d 521, 524 (Iowa 1985)). "The power to invalidate a contract on public

policy grounds is a delicate one, to be exercised solely in cases free from doubt." *Id.* (citing *Walker v. Am. Family Mut. Ins. Co.*, 340 N.W.2d 599, 601 (Iowa 1983). The party claiming an otherwise enforceable contract is invalid based on public policy or illegality bears the burden of persuasion as to this invalidity. *Id.*

a. The Contract is not Void for Violation of Public Policy or Illegality.

The Bs cannot show such a clear violation of public policy that would void an otherwise enforceable contract.

> The fact a statute provides an administrative or criminal penalty for its violation is not the test for determining contractual rights of parties to a transaction involving some form of illegality. The degree of the illegal factor, extent of public harm that may be involved, and moral quality of the conduct of the parties in light of prevailing mores and standards of the community are influential factors in determining whether some judicial remedy will be granted.

Beneficial Fin. Co. of Waterloo v. Lamos, 179 N.W.2d 573, 580 (Iowa 1970) (citations omitted). Today, Iowa Courts resolve contract validity issues, predicated on public policy or illegality, by following the rule set forth in the Restatement. *Mincks Agri Center, Inc. v. Bell Farms, Inc.*, 611 N.W.2d 270, 275 (Iowa 2000) (citing Restatement

(Second) of Contracts § 178(2)–(3), at 6–7 (1981)). Courts must balance the competing interest of the following three factors weighing in favor of validity:

> "(1) the parties' justified expectations; (2) whether a party would suffer a forfeiture if the contract were not enforced; and (3) any special public interest in enforcement."

Id. Courts also weigh the following four factors:

> "(1) the strength of that policy as manifested by [legislation or judicial decisions]; (2) whether refusal to enforce the contract will further that policy; (3) the seriousness of the failure to comply with the [policy] and the extent to which such failure was deliberate; and (4) the directness of the connection between policy and the contract to be performed.

Id. If these four factors are present, the court should find the contract to be invalid. *Id.* In this case, because all of the *Mincks* factors weigh in favor of finding the Agreement to be valid, the Bs are unable to meet their burden to void the otherwise enforceable contract.

In *Mincks Agri Center, Inc. v. Bell Farms, Inc.*, a grain elevator ("Mincks") purchased yield delivery hedges from a supplier ("Bell"). *Id.* at 271. Mincks then sold these hedges to Oakville, which sought to enter new hedges with Bell, who refused. *Id.* After this transfer, Mincks lost his grain dealer license and Bell failed to deliver grain

pursuant to the hedges. *Id.* Mincks brought an action seeking damages for this "breach" and obtained a jury verdict for damages. *Id.* On Bell's appeal, the Iowa Supreme Court held that the first three factors in support of validity were not present. The Court found Mincks had no justifiable expectation of delivery by Bell because Mincks transferred his interest in the contracts and could not accept delivery because he was not a licensed grain dealer. *Id.* at 278. The Court further found Mincks suffered no forfeiture because he did nothing in the way of preparation for delivery. *Id.* Additionally, the Court found "the public interest weighs against enforcement" because Mincks's performance without a license is prohibited by Iowa law, and financial instability made him unable to pay the hedged contract price. *Id.* at 279. The Court also held the four factors weighing in favor of invalidity were present. First, the policy underlying the licensing requirement was strong in that it "ensures that producers will receive payment for their grain." *Id.* Secondly, the Court found refusal to enforce the contracts will further this public policy because a result to "require [a] producer to make his own evaluation of the financial condition of the dealer [in the] absence of a

license to reflect this condition...is directly contrary to the goals" of the public policy reflected in the licensure statute. *Id.* at 279–80. Third, the Court held the gravity of the policy violation was serious, given the punishment for grain transactions by an unlicensed dealer (fines and imprisonment). *Id.* at 280. Fourth, the Court determined the licensure policy violation directly related to Mincks's ability to perform the contract legally. *Id.* Because each consideration weighed against enforceability, the Court found the "contracts unenforceable on the basis of public policy." *Id.* at 281.

Here, unlike *Mincks*, all of the factors weigh in favor of validity of the Agreement, and so the Court should refuse to invalidate the Agreement. A table found in the record compares the factors from *Mincks* to the facts of this case. (Plaintiffs' Memorandum of Authorities, p. 13.) This paragraph contains a brief discussion of each of the policy arguments made by Defendants analyzed using the factors in *Mincks*, which are discussed in greater length in the remainder of the brief. First, the Ms and Bs have justifiable expectation of performance because PM is the only party with a genetic relationship to the Child, the Bs have no genetic relationship

to the Child, the Ms would have never given their genetic material to TB without an expectation of complete performance, and the parties knowingly and voluntarily executed the Agreement and under color of statute and administrative rule. *Cf. Mincks*, 611 N.W.2d at 278. Also, distinct from *Mincks*, the Ms would suffer extreme forfeiture if the Agreement were not enforced because, not only did they spend approximately $50,000 to pay for the implantation and gestation of the Child, they would lose their genetic material and resulting Child. *Cf. id.* Here, again distinct from *Mincks*, public policy also weighs in favor of validity because support for gestational carrier agreements is found in Iowa statutes, rules, and case law. *Compare id.* at 279 *and* App. at 453–54 (citing *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 2110–11 (1977)).

Regarding the four factors that weigh against validity, distinct from *Mincks*, any public policy asserted by the Bs is, at best, weak in the face of the public policy that provides biological parents the exclusive right parent their children. *Compare Mincks*, 611 N.W.2d at 279 *and* App. at 442, 444, 454. Secondly, refusal to enforce the Agreement does not advance any valid public policy and failure to

enforce violates the stated policy of the Iowa legislature, judiciary, and executive branches. *Compare id.* at 279–80 *and* App. at 446. Third, even if a policy "violation" exists, it is not serious in the face of the State's articulated intent to enable non-traditional means of starting families and the value placed on biological relationships over emotional ones. *Compare id.* at 280 *and* App. at 442, 446, 450–51, 453–54. Fourth, the policy violation asserted by Defendants do not relate to the Bs' "ability to legally perform the contract" because no legal prohibition of gestational surrogacy agreements exists in Iowa law. *Compare id. and* App. at 437–38. Because, distinct from *Mincks*, each consideration does not weigh against enforceability beyond a reasonable doubt—and in fact weighs in favor of enforceability—the Court should find the contract valid. *Cf. id.* at 281.

Defendants' asserted nebulous public policy concerns relative to the bond between Defendants and the Child and the mandate of "clear Iowa law" fail this Court's stringent test—nebulous public policy concerns are insufficient to void an otherwise valid contract. This Court requires more, holding "public policy is not predicated on this court's 'generalized concepts of fairness and justice.'" *Dier v.*

Peters, 815 N.W.2d 1, 12 (Iowa 2012) (quoting *Claude v. Guaranty Nat'l Ins. Co.*, 679 N.W.2d 659, 663 (Iowa 2004)). Rather, courts must "'look to the Constitution, statutes, and judicial decisions of [this] state, to determine [our] public policy and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy.'" *Id.* (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003)).

Contrary to TB and DB's contentions, *In re Marriage of Witten*, supports the validity of the Agreement. *Witten* was a case about the rights of divorcing parties who disagree about disposition of embryos stored with a medical facility pursuant to an embryo storage agreement. 672 N.W.2d at 772–73. There, a wife sought to obtain custody of the embryos and use them to gestate a child. *Id.* The husband opposed his wife's attempt to use these embryos to create a child. *Id.* This Court held the agreement unenforceable between partners, where one party no longer wishes to use the embryos to create a child. *Id.* at 783. However, the Court also found the agreement was enforceable as between the couple and the fertility

clinic. *Id.* at 782. The Court wrote agreements relating to stored embryos serve:

> …an important purpose in defining and governing the relationship between the couple and the medical facility, ensuring that all parties understand their respective rights and obligations. … In fact, it is this relationship, between the couple on the one side and the medical facility on the other, that dispositional contracts are intended to address. *Id.* (citations omitted)[4]

In so ruling, this Court held, because it is a "fundamental decision" to become a parent, to force one parent to create a child in contravention of his "current views and values...would be against the public policy of this state." *Id.* at 775, 82. Significantly, the Court also recognized, although a party had a right to "change his or her mind," that right only existed until the "point of use or destruction" of the embryo. *Id.* The Bs misstate this conclusion by failing to recognize the relationship between the Bs and Ms is much more similar to the

[4] The American Society for Reproductive Medicine also supports the recognition of agreements in third party reproductive cases; it writes in the event of a dispute, the "intentions of all the parties should stand as recognized in the legal agreement." *Consideration of the Gestational Carrier: A Committee Opinion,* ASRM Ethics Committee at 1840 (available at http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/consideration_of_the_gestational_carrier-pdfmembers.pdf)

relationship between a donor and fertility clinic than it is to a husband and wife relationship. *See id.* at 782. The Bs further fail to recognize the right to change one's mind terminates at the time of use of the embryo. *Compare id. with* Appellants' Brief p. 56 (stating "[n]o contract...can be enforced in Iowa when the mother changes her mind").

Here, TB claims she changed her mind well after coming to the conclusion that, in her mind, the Ms were racist. (App. at 429.) This conclusion occurred long after implantation of the embryos, mere days before birth of the Child. (App. at 429.) Applying the holding of *Witten* to these facts, and assuming but not admitting TB has the rights contemplated in that decision, TB lost the right to change her mind because she sought to assert that right long after the use of the Ms' embryos. Additionally, because there was no change of mind inside a marital relationship, TB cannot unilaterally invalidate the contract. *See Witten*, 672 N.W.2d at 781–82 (couching a partner's right to breach for change of mind arises as a result of "marital and family relationships" and affording no such rights to those against whom

these "dispositional contracts are intended to address"). As such, under a *Witten* analysis, the Agreement should be enforced.

The Bs' suggestions of "generalized concepts of fairness and justice" fail to invalidate the Agreement. *Dier*, 815 N.W.2d at 12. Rather, as indicated in *Witten*, Iowa law allows individuals to "make family and reproductive decisions based on their current views and values." 672 N.W.2d at 782. The parties did so in this case and memorialized those views in an enforceable contract. Indeed, the Bs' asserted "public policy" considerations weigh in favor of validity and the Court should enforce this Agreement.

b. The deceitfully-created emotional relationship between the Bs' and the Child does not rise to a legally protected bond.

The Bs claim a gestational surrogacy agreement, where the surrogate shares no genetic relation to the Child, violates public policy because of the "emotional relationship" between surrogate and Child. Iowa law gives no support to this claim. Iowa statutes, administrative rules, and Iowa Supreme Court rulings favor biological relationships over "emotional parent-child relationships."

Accordingly, public policy favors validity of contracts such as the Agreement as a matter of law.

i. Iowa statutes and administrative rules support biological relationships over the creation of" "carrier-child relationships.

Gestational carriers are not entitled to parental rights under Iowa law. Parents in Iowa are defined as "a biological or adoptive mother or father of a child...." Iowa Code § 232.2(39) (2016). No statute affords a surrogate, or a gestational carrier, parental rights to a child. Indeed, Iowa law expressly precludes surrogates, either traditional or gestational, from asserting parental rights to a child they carry pursuant to agreement.

Traditional surrogate agreements, where a carrier provides the ova of an intended child and has a genetic relationship with a child,[5] are specifically exempted from the criminal statute prohibiting the purchase or sale of an individual. *Id.* § 710.11. Under color of Iowa Code §§ 144.2–144.5, the Department of Public Health promulgated several rules concerning procedures "following a birth by gestational

[5] *See In re Roberto d.B.*, 923 A.2d 115, 117 (Md. 2007) (citations omitted)

surrogate arrangement." Iowa Admin. Code r. 641—99.15 (2016). These rules restrict the rights of a carrier, grant rights to intended parents, and begin an automatic process for the intended parents to obtain a legal parent-child relationship with the child, while terminating any potential rights of the carrier and spouse of the carrier. *Id.* rs. 99.15(2–3, 6).

Contrary to TB and DB's contentions, there is nothing permissive about the process of establishing a correct birth certificate in a surrogacy arrangements when both parents are genetically related. The regulation reads as follows:

> The court shall enter an order requiring the state registrar to reestablish the certificate of live birth naming the intended mother and father as the legal mother and father and requiring the state registrar to seal the original birth certificate and all related documentation. *Id.* r. 99.15(4).

This indicates the public policy of the state not to recognize any rights of the gestational carrier. When a donor sperm is used, mandatory language is also used. The regulations state that:

> If the intended mother is the egg donor but her legal spouse is not the sperm donor, the intended mother shall petition a court of competent jurisdiction after the birth of the child to establish legal maternity. The court shall enter an order requiring the state registrar to reestablish the

> certificate of live birth naming the intended mother as the legal mother and shall require the state registrar to seal the original certificate of live birth and all related documents. *Id.* r. 99.15(4).

The same procedure is to be used if the intended/biological mother is single. *Id.* r. 99.15(4). When a donor egg is used, such as was the case here, mandatory language is also used. The regulations require the intended/biological father, in this case, PM to disestablish the birth mother's legal spouse's parental rights by court order and then requires the court order and a voluntary paternity affidavit to be forwarded to the state registrar. *Id.* r. 99.15(6).

These rules recognize and support the nationwide trend of increasing use of gestational surrogacy. *See* Centers for Disease Control and Prevention, American Society for Reproductive Medicine, Society for Assisted Reproductive Technology, *2014 Assisted Reproductive Technology National Summary Report*, US Dept. of Health and Human Services 2016 (available at https://www.cdc.gov/art/pdf/2014-report/art-2014-national-summary-report.pdf). The data collected by the CDC indicate that the number of transfers for Assisted Reproductive Technology cycles

using a gestational carrier nearly doubled between 2005 and 2014. *Id.* at 52.[6]

On their face, these statutes and this rule shows the State of Iowa favors a child's relationship to their intended and biological parents, rather than a surrogate and her spouse who share no biological relationship to the child. The State's apparent position on the public policy of a surrogate's parental rights is that biology/genetics trumps all; the creation of a parental right on the basis of "emotional bond" purportedly established during gestation finds no support in these statutes or regulations. The Bs must rebut the presumption that public policy favors these agreements by proof beyond a reasonable doubt. *Accord State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003)(citing *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 56 (Iowa 1983)) (stating "the rules of statutory construction and

[6] This report also indicates relatively high rates of success for use of Donor Eggs, likely using the medical procedures complained of by Defendants. In 2014, 66.8% of transfers of fresh embryos created with donor eggs and 51.7% of transfers of frozen embryos created with donor eggs resulted in pregnancies. Live births resulted in 56.8% of fresh embryo transfers and in 41.5% of frozen embryo transfers. Thus, in each case, approximately 10% of pregnancies did not result in a live birth.

interpretation also govern the construction and interpretation of administrative rules and regulations"). The overwhelming authority—case law, statute, and rule—recognizes that legal relationships are established by genetic connections. Thus, the State of Iowa does not need a "surrogacy enabling statute" as gestational surrogacy agreements align with the public policy of this State.

ii. Iowa case law supports biological relationships over "emotional parent-child relationships."

Parentage relates to biology (or genetics) and law, not emotion. "The general rule is that [t]he state cannot interfere with the rights of natural parents." *In Interest of B.G.C.*, 496 N.W.2d at 24. "By naming the [natural parents] on the birth certificate of [those parents'] child, the child is ensured support from [both] parent[s] and the parent[s] establish[] fundamental legal rights at the moment of birth." *Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335, 353 (Iowa 2013). Non-genetic parents have no right to custody or visitation over the objection of the genetic parent. *In re Bruce*, 522 N.W.2d at 71. The *Bethards* court wrote,

> We are without authority to unilaterally make an unrelated man, Dennis, the father of Micah. Even if Dennis established a liberty interest in a relationship with Micah based on psychological ties which developed while he acted as his father, that interest would not defeat the liberty interest of Micah's biological father.

Bethards, 526 N.W.2d at 875 (citations omitted). The Iowa Supreme Court adopted this position in 2014 when it held an "established father" with no genetic connection to a child, but who raised the child alone for the first three years of the child's life, was merely "a person standing in the place of the parents" and had no "parental rights" to terminate.[7] *In re J.C.*, 857 N.W.2d 495, 498, 505 (Iowa 2014).

As a preliminary matter, the Bs' claim this Court should recognize any bond they may have with the Child is disturbing. TB and DB could only build this "relationship" by ceasing all communication with the Ms (knowing of the Agreement and PM's genetic relation to the Child), hiding the birth of two children from the Ms, and violating the terms of the valid and enforceable contract. This, coupled with demands for money on penalty of abortion or adoption, has hints of kidnapping as contemplated under Iowa Code

[7] Except those limited rights under Iowa Code § 600B.41A.

section 710.1, child stealing as contemplated under Iowa Code section 710.5, and extortion under Iowa Code section 711.4. Further troubling, one child died during this time of deception without the opportunity to meet its biological father. Iowa law looks with disfavor on a parent who attempts to hide a child from the other parent. *See* Iowa Code § 598.41(3) (2016). Even assuming TB had some sort of parental rights, this Court should look with disfavor on the Defendants' argument that their "bond" entitles them to a parent-child relationship as a result of her deceptive scheme.

On the direct issue of Iowa's stated public policy regarding "emotional connection," in *In re J.C.*, the father in that case, D.B.[8], developed a relationship with and married an inmate who then gave birth to a child; as a result of the marriage, he became the established father. 857 N.W.2d at 498. D.B. cared for the child on his own for two-and-a-half years, until the mother left jail. *Id.* Shortly after her release, D.B. and the mother divorced, the genetic father petitioned for paternity, and the State instituted a Child in Need of Assistance

[8] Please note the initials for the biological father of the children in *J.C.* is also "D.B," similar to the male Defendant herein.

(CINA) action for the child. *Id.* In both the CINA action and a subsequent termination of parental rights action, because D.B. had no genetic relationship to the child, he had no parental rights to terminate. *Id.* at 505. As such, he was not a proper party to the CINA action, regardless of his emotional relationship with the child. *Id.*.

As was the case in *In re J.C.*, neither TB nor DB are biological or adoptive parents of the Child. *Id.* (citing Iowa Code §§ 232.2(39), .111(4)(b)(1)). Statutory authority and case law demonstrate the public policy in favor of non-parental relationships is limited; established parents are not granted rights other than those specifically contemplated by statute. *See id.* at 507 (recognizing rights as an "established father" defined by Iowa Code sections 598.31 and 600B.41A). PM is the only party who shares genetic material with the Child and is the only parent under Iowa law. *Id.* Iowa's public policy favors enforcement of PM's rights as a parent and over creating any parental rights in TB and DB.

The public has absolutely no interest in protecting this "emotional bond" between a child and surrogate, particularly when weighed against the parental bond between a Child and its biological

parents. The American Society for Reproductive Medicine recognizes that gestational carriers were found to have no psychological problems as the result of [acting as a gestational carrier]."

Consideration of the Gestational Carrier: A Committee Opinion, ASRM Ethics Committee at 1840 (available at http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/consideration_of_the_gestational_carrier-pdfmembers.pdf). The argument an emotional bond makes pre-birth consent impossible is dispelled:

> in the case of carriers who have borne children, their experience should give them the appropriate basis to honestly judge their capacity to participate in a gestational carrier role. In such cases, intentionality properly laid out in advance in the legal agreement sets the appropriate expectations for the parties.

Id. at 1841. Even when a carrier develops an emotional bond, the committee writes the arrangements are "ethically justifiable and the intended parents should become the legal parents of the child." *Id.* The importance of the biological connection has been affirmed by the Iowa legislature, the Iowa Department of Public Health, the Iowa

Department of Vital Records and Statistics, and the Supreme Court of the United States. *See Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (recognizing that broad, gender-based classifications are not supported by "any universal difference between maternal and paternal relations at every phase of a child's development). These evaluations are sufficient and need not be disturbed.

iii. Other states' case law supports the validity of gestational surrogacy agreements.

Other states have also upheld the validity of gestational surrogacy agreements, recognizing they do not violate public policy. In *Johnson v. Calvert*, the California Supreme Court recognized that the intent of parties manifested in an agreement, in combination with genetic connection, was sufficient to overcome a surrogates' claim of maternity based on gestation and birth. *See Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (writing that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother...."). The California court also rejected the best interest analysis, holding it would confuse "parentage" and "custody." *Id.*

Instead, the California court recognized the parties did not intend to donate genetic material to the surrogate; rather, they intended to bring a child in to the world for the intended parents. *Id.* The *Johnson* court wrote "by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her." *Id.* That court held the policy supporting statutes that prohibit paying for an adoption does not apply, as, at the time of contracting, there is no vulnerability to financial inducement because the gestator is not pregnant. *Id.* at 784. Further, statutes prohibiting the sale of person were also held to be inapplicable because the gestator was not the genetic mother, and payments were for the service of gestating the fetus and undergoing labor. *Id.* Finally, the Court dismissed concerns that surrogacy dehumanizes women, writing:

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.

Id. at 785. Nothing in Iowa law or this state's public policy should be read to inhibit TB from entering into the Agreement. She was willing, able, and under no duress or coercion nor was she pregnant. Instead, she wanted to have her own child and saw this as a way to benefit both families. (App. at 427.) For her to be able to escape her contractual obligations would condone the taking of the Ms' genetic material, and deny them the opportunity to parent their child.

Similarly, Ohio and Pennsylvania courts have refused to invalidate surrogacy contracts on the grounds of public policy. *See J.F.*, 879 N.E.2d at 741–42; *J.F. v. D.B.*, 897 A.2d 1261, 1277–78 (Penn. 2006).[9] Both states recognized the right of genetic parents to their children. *See J.F.* 879 N.E.2d at 742 (noting that traditional surrogacy might produce a different result because of the genetic connection); *J.F.*, 897 A.2d at 1280 fn. 25 (refusing to grant the gestational carrier standing simply because she carried the children to birth). The Pennsylvania Court found that the gestational carrier (with no

[9] Interestingly, these cases are based on the same contract and set of facts.

genetic connection) had no standing to contest the genetic father's custody of the children based on either a *in loco parentis* theory or a "legal motherhood" theory. *J.F.*, 897 A.2d at 1280. TB asserts both of these same theories, and both fail because the genetic connection possessed by PM is superior to any claim either of the Bs may have. *Id.*

The Ohio court similarly found in the absence of clear, articulated public policy of the state *against* surrogacy, the contract should be upheld because no public policy was violated. *J.F.*, 879 N.E.2d at 741. It wrote "a written contract defining the rights and obligations of the parties seems an appropriate way to enter into surrogacy agreement." *Id.* Unlike Ohio, which had no clear public policy on surrogacy, Iowa has statues, administrative code provisions, and cases which suggest Iowa's public policy is in favor of surrogacy. *See* Iowa Code § 710.11 (excepting traditional surrogacy from the statute criminalizing the sale of a person); Iowa Admin. Code r. 641—99.15 (2016) (providing methods to establish parentage after surrogacy); *Gartner v. Iowa Dept. Pub. Health*, 830 N.W.2d 335, 348 (Iowa 2013) (allowing a same sex-couple to be listed on a birth

certificate as a result of one party's genetic relationship with the child and their marriage).

The Wisconsin Supreme Court also supports enforceability of surrogacy agreements. It wrote:

> enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life."

In re F.T.R., 833 N.W.2d 634, 652 (Wis. 2013). This is precisely the purpose for the Agreement here, and is consistent with this Court's holding in *Witten*, which found the disposition contract enforceable between the clinic and the owners of the embryos. *See id.*; *In re Marriage of Witten*, 672 N.W.2d at 782.

Many of the cases relied upon by the Bs do not establish the propositions they claim. The California Supreme Court, in *Johnson*, analyzed the United States Supreme Court's decisions in *Santosky v. Kramer*, *Lassiter v. Dept. Soc. Servs.*, *Smith v. Org. Foster Families*, *Caban v. Mohammed*, *Lehr v. Robertson*, *Stanley v. Illinois*, and *Michael H. v. Gerald D.*, all cited by the Bs and found these cases do not support a

right for a gestational carrier to have parental rights. *Johnson*, 851 P.2d at 785. The *Lehr* case strongly supports the M's argument the genetic relationship is most significant; the Supreme Court wrote:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

Lehr v. Robertson, 463 U.S. 248, 262 (1983). The *Lehr* Court further foreclosed the Bs' argument by writing "The actions of judges neither create nor sever genetic bonds. *Id.* at 261.

PM and CM have asserted both their biological and relational connections to the Child as soon as they were aware of its birth, and before, as they filed their petition in this matter not knowing the Child was born. *C.f. id.* at 267–68 (the father did not assert his rights for two years). The only delay was as a direct result of the Bs' deceit by intentionally not informing them of the birth. *Michael H.* also does not advance the Bs' argument. In that case, the Court held the marital presumption does not infringe upon the liberty interest of a genetic father to assert paternity because the historic presumption of

legitimacy and the marital family were accorded a protected liberty interest. *See Johnson*, 851 P.2d at 786 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989)). No such historical protections have been granted to a "woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own." *Id.* Thus, this claim too must fail, as TB has no historically protected liberty interest as a gestational carrier.

c. Iowa's statutes on paternity and sale of an individual evidence a public policy in favor of gestational surrogacy agreements.

Iowa law mandates zealous protection of a parents' biological relationship with a child. As discussed in section II(C)(2)(a), the law is clear in that public policy favors enforcement of the Agreement. Indeed, the Bs' cited Iowa authority—the presumption of parentage statute, found at Iowa Code section 144.13(2), and section 710.11—supports enforcement of the Agreement, not invalidation.

i. The presumption of paternity statute reflects the importance of biological/genetic relationships.

The Iowa presumption of paternity statute supports a finding that the Agreement is a valid contract. Iowa's paternity presumption statute reads, in pertinent part, "[i]f the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child...." Iowa Code § 144.13(2) (2016).

An "established father" contemplated by this statute is only established where his spouse gives birth to a child to which she is the parent. Iowa Code § 232.2(39). But here, TB is not a parent of the child. *Id*. Additionally, as discussed in Section II(C)(2)(b)(ii), public policy in the State of Iowa clearly favors a biological relationship over an emotional relationship. As such, any public policy assertion based on this statute collapses into the policy previously discussed. A review of this discussion shows the Bs cannot prove the Agreement violates public policy beyond a reasonable doubt and, in fact, Iowa law supports enforcement of the Agreement.

ii. The statute regarding purchase or sale of an individual supports the Agreement.

Iowa's prohibition against the sale of individuals does not prohibit the Agreement or make it void. This statute makes it a crime if a "person purchases or sells or attempts to purchase or sell an individual to another person." Iowa Code § 710.11. There are odd factual problems with the Bs' assertion this section voids the Agreement. First, the TB sought out the Ms to enter the Agreement. Second, the amount of consideration for the Agreement was determined by the Bs' desire to have a child of their own. Third, after entering into the Agreement, TB demanded payment of *additional* money on the threat of abortion or illegal adoption. Nonetheless, the application of this statute to a gestational surrogacy agreement for public policy concerns is misguided because it does not apply.

First, a surrogate mother agreement—where "a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple"—is a specific exception to this statute. *Id.* This exemption was passed on May 4, 1989. 1989 Iowa Acts 167. The

nation's first judicial decision regarding surrogacy, *In re Baby M*, involving a challenge to a traditional surrogacy agreement, was decided February 3, 1988. *See In re Baby M*, 537 A.2d 1227 (N.J. 1988). The proximity of these events is striking; it can be inferred the Iowa legislature was responding to the *Baby M* decision by ensuring surrogacy arrangements were permitted in Iowa. This prompt legislative response establishes Iowa's policy concerns regarding the purchase or sale of a person do not extend to surrogacy agreements. Perhaps more importantly, it suggests the State of Iowa finds the Agreement **furthers** an important public policy of the State.

The Bs claim the Agreement does not fall under the exception because of the undisputed material fact PM's semen was combined with an egg from an anonymous donor and the resulting embryo was implanted into TB, as opposed to using her genetic material. One must question how, knowing these facts, TB felt it appropriate to hide the Child from the Child's only known biological relation. However, the Bs' argument the exception only applies to traditional surrogacy is spurious for separate reasons.

Under a gestational surrogacy contract, like the Agreement, the surrogate has no genetic connection to the child. *See In re Roberto d.B.*, 923 A.2d at 117 (citing *Belsito,* 644 N.E.2d at 761–62); *see also J.F.*, 879 N.E.2d at 742. Because in a gestational surrogacy arrangement the carrier lacks a genetic connection to the child, it involves significantly fewer concerns than the traditional surrogacy arrangement specifically permitted by the statute. *In re Roberto d.B.*, 923 A.2d at 117; *see also Unif. Parentage Act* Article 8, Reporter's Comment (2016–17 discussion draft) (available at http://www.uniformlaws.org/shared/docs/parentage/2016AM_AmendedParentage_Draft.pdf) (indicating relaxed restrictions on gestational surrogacy from the 2002 UPA reflect "current surrogacy practice" and recognizing the difference between gestational and traditional surrogacy). The concerns about the interplay between statutes relating to termination of parental rights and adoption do not apply in a gestational surrogacy arrangement because there are no parental rights to terminate. *In re J.C.*, 857 N.W.2d at 505; *Johnson*, 851 P.2d at 784.

In gestational surrogacy there is less concern regarding the payment of money for the surrogate's services. A gestational carrier

is compensated for the gestation of an embryo, not the transfer of child. *See Johnson*, 851 P.2d at 784. The Ms paid for the risk, complications, and pain arising from gestation of the Ms' child. The embryos implanted into TB were the Ms' to begin with. Surely, if they knew they would never receive the Child, they would never have agreed to implant the embryos into TB's uterus. The children have always been the Ms' children and never the Bs' because the embryos were always the Ms' embryos and never the Bs'. Even if human ownership were legal, moral, or possible, the Child was never the Bs' to "sell"—even if they did seek monetary gain from the Ms by threatening the Child's death, kidnapping, or sale. *See* Iowa Code §§ 232.2(39), 710.11 (defining parent and describing the illegality of a human sale or purchase). Along the same line of thinking, PM could not "purchase" the Child because he is the biological father or "parent" of that child. *Id.*

3. The Agreement is not invalid because it is not "unconstitutional."

Defendants claim invalidity based on the assertion the Agreement violates the due process and equal protection rights of

both the Bs and the Child. (Def's Mot. Reconsider 3–5, Nov. 8, 2016.) Iowa Courts must take an independent approach to the due process and equal protection clauses of the Iowa and United States Constitutions, but the interpretations of each are identical "where the [claimant has] not proposed a specific test under the Iowa Constitution." *State v. Kennedy*, 846 N.W.2d 517, 522 (Iowa 2014). The enforcement of this Agreement does not violate the Due Process Rights of the Parties and Child because the, the Department passed regulations contemplating these surrogacy agreements, these Constitutional rights do not presently apply to the Bs, and these Constitutional rights favor the Ms. Iowa Courts have long recognized the right for biological parents to have the "companionship, care, custody, and management of his or her children" is fundamental. *Callender*, 591 N.W.2d at 189.

a. Iowa Department of Public Health's regulations for establishing a birth certificate following gestational surrogacy demonstrate Iowa's public policy in favor of gestational surrogacy.

The Iowa Department of Public Health's regulations permitting the establishment of parentage after a gestational surrogacy

arrangement demonstrate the contract remains valid. "The valid rule of an authorized agency has the force and effect of law." *Davenport Comty. Sch. Dist., in Scott and Muscatine Ctys. v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 909 (Iowa 1979). When challenging an administrative rule, "the burden of proof lies on the person or entity challenging the administrative rule due to the **presumption of validity** supporting such rules." *Id.* (citing *Schmitt v. Iowa Dept. of Soc. Servs.*, 263 N.W.2d 739, 745 (Iowa 1978)) (emphasis added). "A statute [including those which delegate legislative power to an administrative agency] is presumed to be constitutional until shown otherwise beyond a reasonable doubt." *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970) (further citations omitted). "The rules of statutory construction and interpretation also govern the construction and interpretation of administrative rules and regulations." *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) (citing *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 56 (Iowa 1983)).

The Iowa Department of Public Health passed rules governing the process for official recordkeeping after a surrogate birth. *See* Iowa

Admin. Code r. 641—99.15 (2016). The Defendants have not challenged the rules in any way, only misconstrued their import. Thus, the rules are presumed valid because the Bs have not rebutted the presumption of validity beyond a reasonable doubt. *Goreham*, 179 N.W.2d at 455. As discussed previously, the rules require mandatory action following birth by gestational carrier in all situations and use the word "biological mother" to mean a genetic parent, and not the "birth mother" or gestational carrier. *See* Iowa Admin. Code r. 641—99.15 (2016). Surely, the Department would not have passed these rules in their current form if they believed gestational surrogacy agreements unconstitutional. These rules are some of the many clear statements of Iowa law which indicate the public policy of the state favors gestational surrogacy agreements.

III. The District Court's Decision Should Be Affirmed Because Iowa Law Protects Relationship with Biological Parents Over a Relationship with a Legal Stranger.

A. Preservation of Error

PM and CM agree that TB and DB preserved error on all issues in their brief.

B. Scope and Standard of Appellate Review

The Appellees agree with the Appellants' statement that the standard of review is for correction of errors at law. Summary judgment is proper "if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Pecenka*, 672 N.W.2d at 802. Under this standard, the Court's review "is limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Pillsbury Co.,* 752 N.W.2d at 434.

C. Appellees' Contentions

Iowa Courts have long protected the rights of biological parents over legal strangers when it concerns children. Iowa Courts should not interfere with the rights of biological parents. *See In re B.G.C.*, 496 N.W.2d at 245. This is true even in the face of scientific advancements, which the Supreme Court has held have "changed the legal definition of a parent." *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999). The Court went on:

> If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults

> that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake.

Id. The Court found "freedom of personal choice in family matters," "family integrity," and the "companionship, care, custody and management of his or her children" are fundamental rights afforded to biological parents. *Id.* These rights are no less fundamental when the parental rights arise in nontraditional ways. *See id.*

The Iowa Supreme Court further honed Iowa's focus on biology when it found that a non-genetic parent had no right to custody or visitation. *In re Bruce*, 522 N.W.2d at 71. There, this Court accepted the U.S. Supreme Court's recognition that blood (or genetic relationships) provides the strongest constitutional parental right to be protected by the Court. *Id.* at 72 (quoting *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 846 (1977)). Separately, this Court affirmed an order vacating an adoption where the preceding termination did not terminate a biological father's rights, even though the person named as the father of the baby signed a release of parental rights. *In re B.G.C.*, 496 N.W.2d at 245.

The Iowa Court of Appeals continued this trend, where it refused to "perpetuate [a] fraud" by deceiving children into "believing a man who is not their biological father is their biological father." *In re Marriage of Bethards*, 526 N.W.2d at 874. In another context, the Iowa Court of Appeals wrote, "the determination of a child's best interests, however, must take into account the strong societal interest in preserving the natural parent-child relationship." *Northland v. McNamara*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). The court went on to recognize, even where non-parents have provided good care, it will remove the child from the non-parent to place the child with the biological parent. *See id.* at 212–13. Even when disruption might result, the court was unwavering in its determination, writing:

> [O]ur society accepts children belong with their natural parents and that their best interests are served by staying with their natural parents. This view is reflected in the laws of this state. *See* Iowa Code § 232.116 (stating grounds upon which parental rights can be terminated); Iowa Code §§ 600A.1–600A.10 (stating the procedures for terminating parental rights prior to adoption)("The best interests of a child requires that each biological parent affirmatively assume the duties encompassed by the role of being a parent").

Id. at 213.

This well-settled Iowa law recognizes genetic parents possess the right to parent a child over non-parents. In this case, PM is the only person who is a genetic parent. Since the child was born during his marriage to CM, the presumption of parentage should be applied, as a failure to do so would violate PM's, CM's, and the Child's equal protection rights. As such, the district court's decision that the birth certificate for the Child should list PM as the father should be affirmed.

1. Iowa's paternity statute creates a presumption of paternity in P.M. that cannot be overcome.

Iowa Code chapter 600B provides a vehicle for fathers to petition to establish and disestablish the paternity of their biological child and rebut the marital presumption of paternity. The Iowa Supreme Court recognized it would violate a biological father's due process rights to read the paternity statute in such a way that he could not challenge established paternity and assert his own paternity. *Callender*, 591 N.W.2d at 190. The Supreme Court found

this right would recognize "truth and discourage deceit." *Id.* at 191. Any policy of stability of the family cannot override the biological connection and would only serve to exclude the biological father. *Id.*

The Bs erroneously assert *Callender* either provides no rights to PM or somehow cuts off his rights to a relationship with his daughter. First, there is a logical flaw in their argument because it presumes TB's maternity, which flies in the face of her lack of genetic connection to the Child. *See, e.g.*, Iowa Admin. Code r. 641—99.15 (2016). Further, the Iowa Supreme Court did not support the rationale in *Michael H.*, as claimed by Defendants. *Id.* at 187, 191 (citing Justice Brennan's dissent in *Michael H.* criticizing the majority for being intolerant and "requiring specific approval from history before protecting anything in the name of liberty"). Rather, the Iowa Supreme Court recognized the *Michael H.* decision was controversial and found the Iowa Constitution afforded greater protection to genetic parents who have a protected liberty interest in a relationship with their children. *Id.* at 190–91 ("While some courts find the notion constitutional that the putative father should not be permitted to disrupt the integrity of the family under any circumstances, we find

this view narrow under our constitution and inconsistent with our case law dealing with parental rights."). The Bs' attempt to foreclose PM's rights to assert his paternity would condone the misappropriation of genetic material and is contrary to well-established Iowa law.

PM has filed a petition to disestablish any claim to paternity by DB and establish his own paternity. (App. at 430 n.6.) DNA testing has been completed which has demonstrated that he is the biological father of the child. *See* Iowa Code § 600B.41 (allowing use of blood and genetic tests to establish paternity); *see also* (App. at 432.) If tests show a ninety-five percent or higher probability, a presumption of paternity is created, which must be rebutted by clear and convincing evidence. Iowa Code § 600B.41(5)(b)(3). No such evidence exists here. In fact, TB has admitted that PM is the father of the child. (App. at 432.) Accordingly, this Court should affirm the District Court's establishment of paternity in PM pursuant to the requirements of Iowa Code chapter 600B.

2. Iowa Code section 600B.41A should be read to allow the Ms to disestablish TB's maternal rights, if any.

As discussed above, this Court strongly supports recognition of the rights of biological parents to parent their child. This right is fundamental and requires due process be afforded. This is true even where an emotional bond exists or parentage has been incorrectly established. *See In re J.C.*, 857 N.W.2d at 507. If an established but non-biological parent has no parental rights to terminate for purposes of chapter 232, that parent should not be arbitrarily granted parental rights to terminate for purposes of chapter 600A. *See In re A.H.B.*, 791 N.W.2d 687, 690–91 (Iowa 2010) (noting the similarities between the statutes). In fact, Iowa Code section 600A.1 makes reference only to biological parents, indicating that a biological connection is required. *See* Iowa Code § 600A.1 (2016). Accordingly, the Ms should not be forced to find a way to terminate TB's parental rights because Iowa law clearly provides she has no parental rights to terminate. *See J.C.*, 857 N.W.2d at 507. This also is consistent with Iowa's gestational surrogacy regulations because it would allow the Ms to complete the

adoption process without hindrance by TB. *See* Iowa Admin. Code r. 641—99.15 (2016)

The proper vehicle for disestablishing any claim to maternity that TB may have is Iowa Code § 600B.41A. Although the statute only references paternity, applying the statute only to men would violate the Ms' rights to due process and equal protection. "Iowa's constitutional promise of equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'" *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (citations omitted). The Iowa Supreme Court has recognized the Iowa Constitution is not merely tied to tradition, but recognizes the changing nature of society. *Callender*, 591 N.W.2d at 190. In *Callender*, the Court recognized the traditional ways of establishing parentage and of creating a family change over time. *Id*. That is no less true now than it was in 1999, when *Callender* was decided. The *Callender* court recognized that DNA testing makes "the identity of a biological parent a virtual certainty." *Id*. It is now possible for a woman to give birth to a child with whom she shares no genetic connection. *See* Black's Law Dictionary (10th ed. 2014) (definition of biological mother). The

disestablishment of paternity statute found in Iowa Code 600B.41A was passed in 1994. 1994 Iowa Acts 472. Because it is a statute which classifies on the basis of sex, intermediate scrutiny applies. *See Varnum*, 763 N.W.2d at 880. "To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations." *Id.* In this case, the Child is similarly situated to other children who may have a biological father who is not that child's legal father. In addition, a biological mother who did not give birth to her child is similarly situated to a biological father who, for any number of reasons, is not listed on his child's birth certificate and is not married to the woman who gave birth to the child. Finally, PM is similarly situated to a biological mother, who might petition to disestablish the paternity of a man who is not the child's biological father. This supports the Supreme Court's goal of promoting truth in birth certificates and parentage. *Callender*, 591 N.W.2d at 191.

The United States Supreme Court also has struck down laws which treat parents differently based on their sex. *See Caban*, 441 U.S.

at 381. In *Caban*, the Court invalidated a law that required biological mothers to consent to adoption, but did not have similar protections for biological fathers. *See id*. at 382. It found that the law violated the equal protection clause because "maternal and paternal roles are not invariably different in importance." *Id.* at 389. In *Lehr*, the Supreme Court further recognized the importance of genetic connections noting that they cannot be created or destroyed by the Court. *Lehr*, 463 U.S. at 261. Iowa courts routinely write in custody cases that gender of the parent is irrelevant, and "neither party should have a greater burden than the other in attempting to gain custody." *See, e.g.*, *In re Marriage of Liebich*, 547 N.W.2d 844, 848 (Iowa Ct. App. 1996) (citations omitted). This longstanding position of Iowa Courts undermines the Bs' position that the mother occupies some special—even sacred—role and is entitled to more deference than a father, simply by virtue of her role in gestation and birth. *See id.* Iowa case law supports extending Iowa Code § 600B.41A to allow PM to disestablish TB's claimed maternal rights. Failing to do so would impermissibly differentiate between mothers and fathers, which this

Court has steadfastly refused to do, and thereby violate PM's rights of equal protection of the laws.

The Maryland Court of Appeals also found that applying Maryland's paternity statute only to men violated the state's Equal Rights Amendment. The Equal Rights Amendment provides "[e]quality of rights under the law shall not be abridged or denied because of sex." *In re Roberto d.B.*, 923 A.2d at 120. The paternity statute at issue in *In re Roberto d.B.* is very similar to Iowa Code chapter 600B, in that it provides for genetic testing, only makes references to paternity, and places the burden on the petitioner to establish paternity. *See id.* at 121. Because the statute provided more rights to men than to women, the Court held that the statute must apply equally to both sexes. *Id. In re Roberto d.B.* supports already well-established Iowa law that concludes statutes must be applied to both sexes equally.

The objectives of Iowa Code § 600B.41A support the Ms' argument they should be able to use the statute to disestablish any claim that TB has to maternity of the Child. The purpose of the disestablishment of paternity statute is to allow a biological parent to

ensure a child's birth certificate is correct, to ensure the biological parents support the child, and to promote the fundamental right for a biological parent to parent without the interference of others. *See Callender*, 591 N.W.2d at 191 (acknowledging the state interest in "preserving the integrity of the family, the best interests of the child, and administrative convenience); *Gartner*, 830 N.W.2d at 352 ("the accuracy of birth records for identification of biological parents is a laudable goal"); *see also Varnum*, 763 N.W.2d at 883 (recognizing the purpose of the law is important to determine that a classification is impermissible). When evaluating the objectives of the statue, as outlined above, they are all satisfied by allowing the statute to be used to disestablish maternity.

In Iowa, genetics are the overriding factor in parentage determinations. *See*, *e.g.*, *In re J.C.*, 857 N.W.2d at 506. The important objectives of the statute are all fulfilled by applying it equally to paternity and maternity, rather than the opposite. The classification (as paternity only) does not fulfill the objectives. As such, because the M. have provided sufficient DNA evidence to rebut any presumption

of maternity claimed by TB, this Court should affirm the disestablishment of TB's maternity.

3. Iowa Code section 144.13(2) should be read to allow the Ms to establish CM's maternity.

Because the Child was born during PM's marriage to CM, Iowa Code section 144.13(2) should be read to apply to CM and establish her maternity in the child. This statute reads, in pertinent part, "[i]f the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child...." Iowa Code § 144.13(2). This statute provides an exception to the strong adherence to biological parents being placed on birth certificates. *See Gartner*, 830 N.W.2d at 354. The marital presumption overrides biology so both intended parents can establish their "fundamental legal rights at the moment of birth." *Id.* at 353. As such, CM should be allowed to establish these rights by being named as the Child's mother as a result of her marriage to PM, the biological father.

The *Gartner* court recognized the "strong stigma accompanying illegitimacy" and found the marital presumption "counteracts the stigma by protecting the integrity of the marital family, even when a biological connection is not present." *Id.* at 348. In *Gartner*, the Iowa Supreme Court applied the marital presumption to a same-sex couple. It recognized, in the case of a sperm donor, the birth certificate will not list the biological father; rather, it will list woman's husband as the father. *Id*. at 352. It further recognized a same-sex couple could go through an adoption proceeding and could accomplish the goal of listing both parents through that mechanism. *Id.* at 353. In so recognizing, it found the classification in Iowa Code § 144.13(2) did not meet the asserted purpose of accuracy. *Id.* The Court further analyzed the purpose of efficiency, and found listing a spouse who was not a biological parent supported this purpose. *Id.* Finally, the Court found that placing the non-biological spouse on the birth certificate supported the purpose of ensuring financial support for the child and protecting the "fundamental legal rights of the nonbirthing spouse." *Id.*

The same principles are at play here. CM is PM's spouse. PM is the only known biological parent of the Child. CM should be able to establish her fundamental legal right to be the Child's mother from the moment of birth. Establishing this right furthers the purposes of accuracy, efficiency, financial support, and protects fundamental rights to parent. *See id.* It also comports with this Court's recognition of changing family dynamics. *See Callender*, 591 N.W.2d at 190. This Court should apply the marital presumption to avoid the "stigma accompanying illegitimacy" being applied to the Child. *Gartner*, 830 N.W.2d at 348. CM should be listed as the Child's mother on her birth certificate, without the need for an adoption.

CONCLUSION

Iowa law supports the District Court's rulings establishing PM as the Child's genetic parent and disestablishing TB and DB as parents. Thus, this Court should affirm the rulings in their entirety. The public policy of the State of Iowa does not provide a basis for invalidating gestational surrogacy contracts. On the contrary, Iowa has statutes, cases, and administrative rules, which strongly suggest these agreements are enforceable contracts. Iowa law also provides the structure for establishing the proper parental relationships in this case—those of PM as biological father and CM, as mother based on her marriage to PM. Although the Iowa Supreme Court has never considered a surrogacy contract like the Agreement, it has provided clear guidance indicating the agreement is enforceable because it would establish parentage in the proper parties. Similarly, it has provided clear guidance that establishing paternity in PM and maternity in CM would be proper, based on the nearly inviolate relationships created by genetic connections. This Court should follow the guidance provided by Iowa law and establish parental rights in PM

and CM based both on the Agreement and their biological connection to the children.

REQUEST FOR ORAL SUBMISSION

The Appellees respectfully request that this case be submitted with oral argument as it is necessary to the resolution of the issues presented.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS, AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and the type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Book Antiqua in size 14 and contains 13,346 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1)

/s/ Kevin C. Rigdon
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CERTIFICATE OF COSTS

The Appellee hereby certifies that the cost of this Brief and Argument was $0.00, and this sum has been paid.

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PROOF OF FILING & CERTIFICATE OF SERVICE

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