

THINKING INSIDE-THE-BOX, *KRILL V. CUBIST PHARMACEUTICALS*:  
DOES FMLA NEED TO BE AMENDED TO ADDRESS GESTATIONAL  
SURROGACY AND HOW SHOULD COMPANIES ADDRESS PAID  
“MATERNITY” LEAVE?

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INTRODUCTION

Kara Krill thought she was in the clear after the birth of her second child. The dangers associated with the birth of a child are well documented. However, Krill faced a different set of dangers not typically associated with child-birth. Unlike the birth of her first child in 2007, Krill used a gestational surrogate for her second child.<sup>1</sup> Following the birth of her first child, Krill was diagnosed with Asherman’s Syndrome,<sup>2</sup> which is characterized by the formation of scar tissue in the uterus and symptoms can include “recurrent miscarriage and infertility.”<sup>3</sup> Krill and her husband hired a gestational surrogate to have another child and found out that the surrogate had become pregnant with twins in September 2010.<sup>4</sup> The Krill’s “obtained a pre-birth order from the State of Pennsylvania”<sup>5</sup> to establish “legal and genetic parentage [of the children] without having to institute adoption proceedings” and to list Krill and her husband on the children’s birth certificate.<sup>6</sup> The legal hurdles were cleared and as far as the law was concerned, Kara Krill was the mother of her children.

The real difficulties for Kara Krill began when she notified her employer of her situation and intent to take maternity leave. In November 2010, Krill notified Cubist Pharmaceuticals that she was expecting twins in May 2011.<sup>7</sup> Krill notified Cubist that the children were genetically and legally hers, and that she intended to take maternity leave following the birth of her children.<sup>8</sup> At the time, Cubist Pharmaceuticals offered a generous benefit plan regarding birth and adoption.

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<sup>1</sup> Susanna Kim, *New York Mom of Twins Born Through Surrogate Sues Employer for Denying Maternity Leave*, ABC NEWS, (Sept. 2, 2011), <http://abcnews.go.com/Business/mom-surrogate-twins-sues-employer-refusing-paid-maternity/story?id=14430717>.

<sup>2</sup> *Id.*

<sup>3</sup> ASHERMAN’S SYNDROME, <http://www.ashermans.org> (last visited Nov. 3, 2011).

<sup>4</sup> Complaint and Demand for Jury Trial at 3, *Krill v. Cubist Pharmaceuticals, Inc.*, No. 1:11-cv-11519, (D. Mass. Aug. 26, 2011), available at <http://www.courthousenews.com/2011/09/01/Employ.pdf>.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> Kim, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Cubist offered “female employees who work twenty or more hours per week thirteen weeks of paid leave for the birth of a child.”<sup>9</sup> Cubist also offered adoption leave, providing those that worked “twenty or more hours per week five days of paid leave for the adoption of a child and up to \$4,000 in expenses reimbursed per child adopted.”<sup>10</sup> Finally, the company offered short term disability for those who worked the hour requirements, namely “paid leave if the employee is unable to perform the responsibilities of her position due to maternity leave.”<sup>11</sup> Cubist denied Krill’s request for maternity leave and offered her only adoption leave.<sup>12</sup> Krill notified Cubist that she was required to be with her children for a minimum of twelve weeks, but Cubist maintained its denial of both paid maternity leave and the twelve weeks of unpaid leave mandated by the Family and Medical Leave Act (FMLA or the Act).<sup>13</sup> In August 2011, Krill filed suit in federal court against Cubist Pharmaceuticals.<sup>14</sup> The outcome of this litigation is still pending.

The use of a surrogate is a minefield of disjunctive state laws, pieced together by courts and legislatures relying primarily on paternity and adoption statutes. Even then, most of the laws applied to surrogacy address custody determinations that arise when a surrogacy agreement between parties goes awry.<sup>15</sup> The claims surrounding custody and surrogacy agreements typically involve conflicting parental claims between the woman who gives birth and the couple, woman, or man who intends to raise the baby.<sup>16</sup> Courts have struggled with, and much has been written on, how to determine when a mother is truly a mother.<sup>17</sup> Courts and authors have expressed the need for rules governing motherhood determinations, with the need for such rules becoming acute as disputes between parties using non-coital reproductive procedures have begun to arise in the courts.<sup>18</sup> Courts have dealt with custody determinations in gestational surrogacy agreements; however, the situation presented in *Krill* regarding FMLA and leave provisions is a new issue in surrogacy jurisprudence.<sup>19</sup> Some scholars call for legislation to address the issue and create uniform standards for the rights of parents using gestational surrogates.<sup>20</sup> However, based on the purpose and legislative intent of FMLA, as

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<sup>9</sup> Complaint and Demand for Jury Trial, *supra* note 4, at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> Kim, *supra* note 1.

<sup>13</sup> *Id.*

<sup>14</sup> Complaint and Demand for Jury Trial, *supra* note 4, at 1.

<sup>15</sup> Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 673 (1993).

<sup>16</sup> *Id.*

<sup>17</sup> Dolgin, *supra* note 15, at 676; Dawn Wenk, *Belsito v. Clark: Ohio’s Battle with “Motherhood,”* 28 U. TOL. L. REV. 247, 247–48 (1996).

<sup>18</sup> Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements under California Law*, 1 UCLA WOMEN’S L.J. 89, 91 (1991).

<sup>19</sup> Kim, *supra* note 1 (“This is certainly one of the first federal cases involving a claim to benefits for paid leave by a woman who has had children through a surrogate.”).

<sup>20</sup> See Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children*, 12 WIS. WOMEN’S L.J. 113, 142–

well as the significance of parental bonding during the early stages of child development, FMLA in its current form allows leave for parents choosing to reproduce through a gestational surrogate. Additionally, employers that offer paid maternity leave should extend paid leave benefits to mothers of children born through gestational surrogacy.

The purpose of this Note is to take the debate one step further in answering whether FMLA needs to be amended to extend leave to parents choosing to reproduce through gestational surrogacy. Additionally, this Note addresses how employers that provide paid maternity leave should handle mothers that use gestational surrogates. Part I of this Note discusses the background of gestational surrogacy and the current state of the law with respect to gestational surrogacy. Part II addresses the purpose and legislative intent of FMLA and the importance of the parent-child bond. Part II also argues that economic justifications for employers to provide paid maternity leave also applies to parents reproducing through a gestational surrogate. Part III analyzes FMLA as applied to gestational surrogacy and argues that there is no need to amend the Act.

## I. BACKGROUND

Infertility affects 10–20% of couples of child-bearing age, prompting many couples who desire children to find alternative solutions.<sup>21</sup> Until recently, couples desiring children had two options: adopt or remain childless. But adoption comes with significant drawbacks, such as the process being costly and long. Waiting periods for adoption can be between three and seven years.<sup>22</sup> Also, adoption is becoming more difficult because of the dwindling supply of children available due to the widespread availability and use of contraceptives, abortion, and a growing willingness of single mothers to keep their babies.<sup>23</sup> Furthermore, many couples

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45 (1997) (referring to the 1988 adoption of the Uniform Status of Children of Assisted Conception Act (USCACA) by the National Conference of Commissioners on Uniform State Laws which was withdrawn in 2000 the Uniform Parentage Act (UPA) was proposed instead; also notes the approval of a Model Surrogacy Act by the Family Law Section of the American Bar Association); 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 16:22 (4th ed. 2011) (stating that the UPA has not received a much better reception than USCACA and has only been adopted in a few states); Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 609, 625–26 (2009) (“[I]n the absence of legislation such as the Model Act, it is likely some courts will continue to draw distinction between traditional and gestational carriers in resolving maternity issues”; also advocates for the passage of a model act). *But see generally* Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN’S L.J. 163 (2007) (a criticism of the UPA of 2000).

<sup>21</sup> Kerian, *supra* note 20, at 113; Wenk, *supra* note 17, at 247.

<sup>22</sup> John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 677 (1993); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1480 (1992); Wenk, *supra* note 17, at 248.

<sup>23</sup> Wenk, *supra* note 17, at 252.

desire genetically-related children,<sup>24</sup> and the lack of a genetic connection with adopted children makes adoption less desirable for some infertile couples.<sup>25</sup> Scientific advancements in recent decades address the desires of couples wanting a genetically-related child while reducing the wait associated with traditional adoption. Reproduction without sex “has become common and widely accepted, and more recently medical science has made it increasingly possible to have reproduction without sex.”<sup>26</sup> A byproduct of non-coital reproduction is that a child born from a surrogate arrangement now has the possibility of multiple mothers—a gestational mother, a genetic mother, and/or an intended mother.<sup>27</sup> Birth can now be separated from genetics as a way of identifying legal parents.<sup>28</sup> In the words of Judge Richard Parslow, “A three-parent, two-natural mom situation is ripe for crazy making.”<sup>29</sup>

Courts are only starting to wrestle with the issue of surrogacy and maternity leave. To that point, the *Krill* case has been described by some legal scholars as “one of the first federal cases involving a claim to benefits for paid leave by a woman who has had children through a surrogate.”<sup>30</sup> Most commonly in surrogacy litigation, the courts address issues such as assigning parental rights or the contractual and commercial elements of surrogacy agreements when the agreements entered into by the parties go awry.<sup>31</sup> Even in these previously litigated areas the law regarding surrogacy is generally unsettled, and most states have no legislation specifically governing surrogacy issues.<sup>32</sup> This unfortunate fact leaves the developing case law in individual states as the only guide-posts for courts in making a legal determination of parentage of a child resulting from a contested surrogacy birth agreement.<sup>33</sup>

#### A. Identifying Types of Alternative Reproduction Techniques

There are three commonly recognized methods of alternative reproductive techniques: artificial insemination, traditional surrogacy, and gestational surrogacy. Artificial insemination is the oldest and most popular alternative reproductive

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<sup>24</sup> *Id.* at 247, 252; Kerian, *supra* note 20, at 113.

<sup>25</sup> Colette Archer, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152, 152 (2002).

<sup>26</sup> Ingram, *supra* note 22, at 675; Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5TH 567 (2000).

<sup>27</sup> Wenk, *supra* note 17, at 247.

<sup>28</sup> *Belsito v. Clark*, 644 N.E.2d 760, 763 (Ohio 1994).

<sup>29</sup> Susan Tiff & Sylvester Monroe, *Law: It's All in the (Parental) Genes*, TIME MAG., Nov. 5, 1990, available at <http://www.time.com/time/magazine/article/0,9171,971557,00.html>.

<sup>30</sup> Kim, *supra* note 1.

<sup>31</sup> Kerian, *supra* note 20, at 114–15.

<sup>32</sup> Campbell, *supra* note 26.

<sup>33</sup> *Id.*

technique.<sup>34</sup> Conception by artificial insemination is achieved by injecting semen from the husband, donor, or mixture of the two, directly into a woman's reproductive system.<sup>35</sup> Artificial insemination is routinely used in traditional surrogacy—the situation where the gestational mother is also the genetic mother.<sup>36</sup> Traditional surrogacy typically involves “a woman who is genetically related to the baby and carries it in her womb, but who becomes pregnant through assisted reproduction and intends to give the baby to another couple.”<sup>37</sup> Gestational surrogacy separates the genetic and gestational features of mothering.<sup>38</sup> A typical gestational surrogacy arrangement involves a fertile man and woman who are capable of producing gametes (ova and sperm), but cannot carry a child to term for one reason or another.<sup>39</sup> The gametes of the couple seeking to have a child are fertilized in vitro and implanted into a surrogate who will carry the child to term, give birth, and turn the child over to its genetic parents.<sup>40</sup> In a gestational surrogacy arrangement, the resulting child is the genetic offspring of the donor man and woman, rather than the surrogate, who is the birth mother.<sup>41</sup> The surrogate has no genetic relation to the child unless the surrogate is a relative of the genetic parents.<sup>42</sup>

### B. Surrogacy Agreements and the Common Law

Surrogacy arrangements typically present multiple legal issues. In particular, surrogacy touches on adoption, custody and support matters, the right of the child to inherit, and the right to make medical and treatment decisions for the child.<sup>43</sup> Additionally, there is the matter of the appropriate issuance of a birth certificate for the child born to a surrogacy agreement which, if delayed, could affect any or all of the aforementioned issues as parental rights and responsibilities typically attach to those whose names appear on the document.<sup>44</sup> The recent surge of cases regarding surrogacy in general catalyzed numerous debates, publications by legal

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<sup>34</sup> Wenk, *supra* note 17, at 253.

<sup>35</sup> *Id.*

<sup>36</sup> Healy, *supra* note 18, at 90.

<sup>37</sup> Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who Is the Mother?*, 16 LAW & INEQ. 289, 292 (1998).

<sup>38</sup> *Id.*

<sup>39</sup> SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 16:22 (4th ed. 2011).

<sup>40</sup> HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 24:15 (2011); WILLISTON & LORD, *supra* note 39; Singer, *supra* note 22, at 1490–91.

<sup>41</sup> WILLISTON & LORD, *supra* note 39.

<sup>42</sup> Healy, *supra* note 18, at 90.

<sup>43</sup> RACHEL M. KANE, 48 CAUSES OF ACTION 2D 687, § 16 (2011); WILLISTON & LORD, *supra* note 39; Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. LOUISVILLE L. REV. 371, 378–79.

<sup>44</sup> KANE, *supra* note 43; Lewis, *supra* note 43, at 378–79; Michelle Pierce-Gealy, “Are You My Mother”?: *Ohio’s Crazy-Making Baby-Making Produces a New Definition of “Mother,”* 28 AKRON L. REV. 535, 540 (1995).

scholars, enactment of statutes, and various interpretations of existing law by courts attempting to resolve custody in surrogacy cases.<sup>45</sup> However, because not enough law has been promulgated to regulate gestational surrogacy, courts rely primarily on paternity or adoption statutes.

This is problematic because such laws do not generally apply to the more common types of surrogacy issues. For example, adoption statutes do not apply to surrogacy contracts.<sup>46</sup> Courts have specifically noted this fact in multiple jurisdictions, stating that gestational surrogacy and adoption are not comparable, “differ[ ] in crucial respects,”<sup>47</sup> that the rationale behind adoption statutes does not apply to gestational surrogacy, and that adoption statutes were not enacted with surrogacy in mind.<sup>48</sup> Typically, adoption statutes are designed to alleviate financial inducements, duress, and the pre-birth waiver of parental rights. In gestational surrogacy, as opposed to adoption, the parties often enter a contract before a child is conceived, and therefore, the gestational surrogate is not “vulnerable to financial inducements to part with her own expected offspring.”<sup>49</sup> Adoption statutes may be more applicable in gestational surrogacy for the determination of leave under FMLA. Adoption is similar to gestational surrogacy under FMLA, as the mother in each case has not given birth to the child, yet is still the mother of the child.

### C. *The FMLA and Surrogacy*

FMLA was passed in 1993 and provides eligible employees up to twelve week of unpaid leave per year for a variety of reasons.<sup>50</sup> Subject to certain conditions, such as employer size, number of employees, and amount of pay, leave under FMLA may be taken for the birth or adoption of a child “in order to care for such” child, placement of a child for foster care, to care for a spouse, child, or parent who has a serious health condition, or because of a serious health condition of the employee.<sup>51</sup> FMLA was passed at a time prior to the widespread use of alternative reproductive techniques. As with many scientific advances, particularly in medicine, the laws have been outpaced by technology and have subsequently been more reactionary than proactive. Over the past few decades the practice of surrogacy has become widespread without any resolution of the legal, moral, or ethical issues involved.<sup>52</sup> Additionally, the widespread use of alternative

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<sup>45</sup> Kerian, *supra* note 20, at 115.

<sup>46</sup> Stacy Christman Blomeke, *A Surrogacy Agreement that Could Have and Should Have Been Enforced: R.R. v. M.H.* (Mass. 1998), 24 U. DAYTON L. REV. 513, 525 (1999).

<sup>47</sup> Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

<sup>48</sup> Blomeke, *supra* note 46.

<sup>49</sup> Johnson, 851 P.2d at 784.

<sup>50</sup> The Family and Medical Leave Act of 1993, 29 U.S.C.A. § 2612(a)(1) (West 2011) [hereinafter FMLA]; Deborah F. Buckman, Annotation, *Award of Damages under Family and Medical Leave Act* (29 U.S.C.A. §§2601 et seq.), 176 A.L.R. FED. 591 (2002).

<sup>51</sup> FMLA, 29 U.S.C.A. §2612(a)(1)(A)–(D).

<sup>52</sup> Kerian, *supra* note 20, at 114.

reproductive technologies challenges society's notion of the traditional nuclear family, which customarily consists of a mother, father, and children.<sup>53</sup>

FMLA states that an eligible employee "shall" be entitled to a total of twelve weeks of leave "because of the birth of a son or daughter of the employee and in order to care for such son or daughter," or "because of the placement of a son or daughter with the employee for adoption or foster care."<sup>54</sup> One of FMLA's specific purposes was to "entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."<sup>55</sup> FMLA grants a civil right of action to the employee against an employer, and as seen above, the Supreme Court extended that right to employees of state government.<sup>56</sup> Additionally, FMLA protects employees requesting or taking leave under the Act from retaliation and discrimination. Particularly, the Act prohibits "any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title."<sup>57</sup> FMLA also protects employees against unlawful discharge for filing a complaint, instigating action under the Act, or giving information in connection to an "inquiry or proceeding relating to any right."<sup>58</sup>

In passing FMLA, Congress noted two important considerations. First, Congress acted only after allowing for private sector practices and other government policies adequate time to respond to economic and social changes in the work and family dynamic.<sup>59</sup> Congress passed FLMA to accommodate the "important social interest in assisting families, by establishing a minimum labor standard for leave."<sup>60</sup> Second, Congress preserved the right of states to enact more generous leave allowances.<sup>61</sup> FMLA specifically provides that nothing in the Act is to be construed to "supersede any State or local law which provides greater family or medical leave rights than those established under" FMLA.<sup>62</sup>

Congress did not pass FMLA as an antidiscrimination statute but instead to grant rights to any qualifying employee regardless of gender.<sup>63</sup> Still, the Act serves to eliminate gender-based discrimination in the workplace as Congress recognized

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<sup>53</sup> *Id.*

<sup>54</sup> FMLA, 29 U.S.C.A. §2612(a)(1)(A)–(B).

<sup>55</sup> *Id.* § 2601 (b)(2).

<sup>56</sup> *Id.* § 2617(a)(2); *Nevada Dep't of Human Res.*, 538 U.S. at 738–39.

<sup>57</sup> FMLA, 29 U.S.C.A. § 2615(a)(1).

<sup>58</sup> *Id.* § 2615(b)(1)–(2).

<sup>59</sup> S. REP. NO. 103-3, at 4 (1993).

<sup>60</sup> *Id.*

<sup>61</sup> *See Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001). Family law is an area of traditional state regulation and state law is protected against federal pre-emption. This protection against pre-emption can be overcome where "Congress has made clear its desire for pre-emption." *See also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–27, 737–38 (2003) (analysis of the constitutionality of FMLA, that the Act was "congruent and proportional" and "narrowly targeted at the fault line between work and family").

<sup>62</sup> FMLA, 29 U.S.C.A. § 2651(b).

<sup>63</sup> Buckman, *supra* note 50.

that women typically take on the primary responsibility of family caretaking.<sup>64</sup> Congress also recognized that the family dynamic is flexible and men may also perform the role of primary caretaker, thus extending the right to leave under the Act on a gender-neutral basis to both men and women.<sup>65</sup> Under FMLA, men and women are both entitled to take up to twelve weeks of unpaid leave for the birth or adoption of a child.<sup>66</sup> The provision for twelve weeks of leave for fathers, as well as adoptive parents, supports Congress' findings and purpose in passing FMLA—to address the burdens of working families, particularly those forced to “choose between job security and parenting”<sup>67</sup> and to note the importance of mothers and fathers in the development of children and the family unit.<sup>68</sup>

FMLA does not specifically address the issues associated with gestational surrogacy agreements. FMLA defines a “son or daughter” as the “biological, adopted, or foster child, a stepchild, a legal ward, or a child of person standing in loco parentis.”<sup>69</sup> But the Act later states that a qualifying employee may take leave for the birth of a son or daughter or the placement of a son or daughter for adoption or foster care (as well as other medical-related conditions) as qualifications for leave,<sup>70</sup> without reference to a situation where neither traditional birth nor adoption takes place.

Congress' extension of leave to both mothers and fathers, as well as to adoptive parents, was based on the importance of child development and bonding and its effect on the child and family unit, thus Congress heard testimony to this effect.<sup>71</sup> The Senate found that individuals can be scarred and basic needs can go unfilled, while families are unable to perform their functions and are undermined and weakened when there is no one to provide needed care at home.<sup>72</sup> The Senate also found that “when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.”<sup>73</sup> The Senate also heard from two doctors that supported “an infant care policy that would allow employees an adequate period of time for parents to care for newborn or newly adopted infants.”<sup>74</sup> Although the testimony went on to state that the policy would also allow recovery from birth, testimony “stressed the importance of infant-parent bonding during the first few months of a child's life” and advocated that at least one parent have time to care for a newborn “in order to create a strong foundation for the child's later development.”<sup>75</sup> The Senate went on to support the

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<sup>64</sup> FMLA, 29 U.S.C.A. § 2601(a)(5) (West 2011).

<sup>65</sup> *Id.* § 2601(b)(4)–(5).

<sup>66</sup> *Id.* § 2612(a)(1)(A)–(B).

<sup>67</sup> *Id.* § 2601(a)(3).

<sup>68</sup> *Id.* § 2601(a)(2).

<sup>69</sup> *Id.* § 2611(12).

<sup>70</sup> *Id.* § 2612(a)(1)(A)–(B).

<sup>71</sup> S. REP. NO. 103-3, at 7 (1993).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.*



need for bonding, over the need to recover from birth, by noting that most adoptive parents are required by agencies to have a parent at home for as long as four months following placement “to allow them adequate time for proper bonding.”<sup>76</sup>

The testimony heard by Congress is well supported by child development research. In a child’s early years, relationships to parents or other consistent caregivers are the most predominant and influential relationships, having “significant and lasting implications for [the child’s] well-being.”<sup>77</sup> Parent-child relationships at early stages in life form the foundation for infants’ physiological functioning, language development, and ability to function in complex social situations allowing them to function more completely at older ages than infants without a secure parental bond.<sup>78</sup> Thus, the importance of the parent-child bond recognized by Congress was a major factor in passing the provisions of FMLA allowing for men and women to take leave for the birth or adoption of a child.

## II. STATUTORY ANALYSIS: GESTATIONAL SURROGACY IS GOVERNED BY THE FMLA

Despite alternative reproductive techniques being in their infancy at the time FMLA was passed, and the call for further legislation to address a more uniform standard of the rights of intended parents using gestational surrogates,<sup>79</sup> the Act grants leave to parents choosing to reproduce through alternative reproductive techniques, thus resolving disputes like those presented in the *Krill* case. FMLA makes provisions for leave for a number of health conditions, to include the birth and adoption of a child. Although the language refers only to the birth or adoption of a child, FMLA provides leave for those using alternative reproductive techniques, including gestational surrogacy, because the ambiguous statutory language should be governed by clear congressional intent to offer benefits to all new parents.

In interpreting FMLA, courts look primarily to the plain meaning of the statute, relying on statutory language, design, and legislative history where necessary to discern legislative intent.<sup>80</sup> Within the statute, there are definitions of

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<sup>76</sup> *Id.* at 8.

<sup>77</sup> Melanie H. Mellers et al., *Perceptions of Childhood Relationships with Mother and Father: Daily Emotional and Stressor Experiences in Adulthood*, 46 DEVELOPMENTAL PSYCHOL. 1651, 1657 (2010). See also Karin Grossman & Klaus E. Grossman, *The Impact of Attachment to Mother and Father and Sensitive Support of Exploration at an Early Age on Children’s Psychosocial Development Through Young Adulthood*, in ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT 1 (Tremblay et al. eds., 2009), available at [http://www.child-encyclopedia.com/documents/GrossmanANGxp\\_rev.pdf](http://www.child-encyclopedia.com/documents/GrossmanANGxp_rev.pdf).

<sup>78</sup> Grossman & Grossman, *supra* note 77, at 1; Jay Belsky, *Parent, Infant, and Social-Contextual Antecedents of Father-Son Attachment Security*, 32 DEVELOPMENTAL PSYCHOL. 905, 910 (1996).

<sup>79</sup> See *supra* text accompanying note 20.

<sup>80</sup> *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000).

both “parent” and “son or daughter.”<sup>81</sup> The definition of parent, “the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter,” is seemingly unhelpful when addressing the employee as the parent.<sup>82</sup> The term applies only employee requests for leave to care for their parent(s). The term “son or daughter” is defined as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.”<sup>83</sup> Depending on context and circumstance, courts have different views on what is meant by “biological” parent.<sup>84</sup> Looking beyond the term “biological” parent, FMLA defines “son or daughter” to include adopted or foster children.<sup>85</sup> In the cases of adoptive or foster children, the mother has not given birth to the child, yet FMLA provisions clearly apply. A gestational surrogacy is similar as the mother has not given birth to the child but is still the mother of the child.

Finally, FMLA defines a “son or daughter” as the “child of person standing in loco parentis.”<sup>86</sup> *In loco parentis* is defined as “of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.”<sup>87</sup> The definition of *in loco parentis* may be interpreted broadly, leading several employees and employers to seek additional guidance from the Wage and Hour Division (WHD) of the U.S. Department of Labor.<sup>88</sup> The WHD’s interpretation notes that the term *in loco parentis* embodies two ideas: first, the assumption of “parental status and discharging the parental duties[,]”<sup>89</sup> and second, that “[t]he key in determining whether the relationship of *in loco parentis* is established is found in the intention of the person . . . to assume the status of a parent toward the child.”<sup>90</sup> Further, the WHD offers a list of factors for

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<sup>81</sup> FMLA, 29 U.S.C.A. § 2611(7), (12) (West 2011).

<sup>82</sup> *Id.* § 2611(7).

<sup>83</sup> *Id.* § 2611(12).

<sup>84</sup> Courts currently use three different tests. First is the genetic test, which looks to the person supplying the gametes as the mother. *Belsito v. Clark*, 644 N.E.2d 760, 766 (Ohio 1994) (“The test to identify the natural parents should be, ‘Who are the genetic parents?’”). Second is the gestation test, which determines the mother as the person who actually gestated the child and gave birth. *See generally* *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. 2000), for an application of the genetics test. Finally, other courts have applied an intent test, which determines the mother by looking to the intent of the parties in a surrogacy agreement. *Johnson v. Calvert*, 851 P.2d 776, 782–83 (Cal. 1993) (“Recent developments in the field of reproductive technology ‘dramatically extend affirmative intentionality . . . . Steps can be taken to bring into being a child who would not otherwise have existed.’”).

<sup>85</sup> FMLA, 29 U.S.C.A. § 2611(12).

<sup>86</sup> *Id.*

<sup>87</sup> BLACK’S LAW DICTIONARY 674 (9th ed. 2009).

<sup>88</sup> NANCY J. LEPPINK, DEP’T OF LABOR, WAGE AND HOUR DIV., ADMINISTRATIVE INTERPRETATION No. 2010-3 (2010), available at [http://www.dol.gov/WHD/opinion/admin/Intrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/WHD/opinion/admin/Intrprtn/FMLA/2010/FMLAAI2010_3.htm).

<sup>89</sup> *Id.* (citing *Niewiadomski v. U.S.*, 159 F.2d 683, 686 (6th Cir. 1947)).

<sup>90</sup> *Id.* (citing *Dillon v. Maryland-National Capital Park & Planning Comm’n*, 382 F. Supp. 2d 777, 787 (D. Md. 2005)).

determining *in loco parentis* status, “includ[ing] the age of the child; the degree to which the child is dependent on the person claiming to be standing *in loco parentis*; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised.”<sup>91</sup> Also, the WHD specifies that an employee that shares equally in the raising of a child is entitled to leave because they are considered *in loco parentis* to the child.<sup>92</sup>

Those advocating the granting of FMLA or paid maternity leave to the “mother” who carried and gave birth to a child will have a difficult time reconciling both the plain language of FMLA, granting leave to adoptive parents, with the WHD’s interpretation of FMLA. But, the WHD’s interpretation expresses the intent of Congress in passing FMLA and should therefore govern where terms are ambiguous.<sup>93</sup> Congress likely used the term birth in FMLA simply as a matter of convenience. As the law developed in the area of parental determination, “[e]stablishing maternity by virtue of a woman giving birth was a rule of convenience which could easily be administered and applied in resolving disputes.”<sup>94</sup> “Words such as ‘parent,’ ‘mother,’ and ‘father’ became terms, which carried different meanings in relation to other statutes. Such words also began to embody both a legal and social understanding of familial rights and obligations.”<sup>95</sup> Unfortunately, the “traditional concepts of family and the precedents established in family law do not always accommodate the situations in which many couples and courts find themselves.”<sup>96</sup> Congress’s intent was not to draw distinct lines separating those who would and would not qualify for leave as a parent, but was the opposite. Congress included a broad definition of “son or daughter” in order to encompass all relationships that could be viewed as parental, which included biological, adopted, foster child, stepchild, legal ward, and *in loco parentis* relationships between adults and children.<sup>97</sup> In their report on FMLA, the United States Senate stated that in choosing its definitional language, “the committee intends that the terms ‘parent’ and ‘son or daughter’ be broadly construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave *even if the employee does not have a biological or legal relationship to that child.*”<sup>98</sup>

Had Congress intended that leave under FMLA be granted only for recovery from childbirth, the Act would specify as such. Provisions providing for leave have been enacted in other countries, such as Canada, the United Kingdom, Australia,

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000).

<sup>94</sup> Kindregan, *supra* note 20, at 606; *see also* Dolgin, *supra* note 15, at 673 (“By allowing the separation of aspects of motherhood that society has assumed to be united, reproductive technology questions the meaning of ‘mother.’”).

<sup>95</sup> Kindregan, *supra* note 20, at 608–09.

<sup>96</sup> HUNTER, *supra* note 40.

<sup>97</sup> FMLA, 29 U.S.C.A. § 2611(12) (West 2011).

<sup>98</sup> S. REP. NO. 103-3, at 22 (1993) (emphasis added).

and New Zealand.<sup>99</sup> However, other nations passed their laws not based on the importance of child development and the family unit<sup>100</sup> or to accommodate working parents forced to choose between work and parenting,<sup>101</sup> but rather to increase birthrates due to a “shrinking workforce and growing social welfare system.”<sup>102</sup> As such, countries such as Canada and the United Kingdom have specified that only surrogate mothers—those that give birth—are entitled to maternity benefits.<sup>103</sup> To further this view, leave to care for a sick spouse, child, or parent often is unavailable.<sup>104</sup> FMLA, on the other hand, provides leave for birth, adoption, or the illness of a spouse, child, parent or dependent,<sup>105</sup> viewing leave as a tool to help support and strengthen family ties.<sup>106</sup> Congress expressly rejected the European rationale for the provision of leave. Thus it appears Congress indeed chose the word “birth” for its mere convenience, as their intention was to broadly apply the terms and expand the number of employees eligible for leave under FMLA. An important purpose in passing FMLA was Congress’s focus on early child development and the family unit and that both mothers and fathers should be able to participate in early childrearing.<sup>107</sup> Advocates of granting leave strictly to birth mothers may seek to justify their position based on the bond formed between a mother and child during gestation and the importance of furthering that bond after birth. However, despite the fact that it is critical to the child’s development that “he or she forms a bond with an adult at a very early stage in life,” there is also “no evidence that the child must form this bond with the gestational mother.”<sup>108</sup>

Intended or not, FMLA encompasses gestational surrogacy and parents using a gestational surrogate should be entitled to a minimum of twelve weeks of unpaid leave upon the birth of their child. Despite the call for further legislation to address and further a more uniform standard of the rights of intended parents using gestational surrogates,<sup>109</sup> FMLA would apply in the taking of unpaid leave for couples choosing gestational surrogacy as their alternative reproductive approach. Similarly, those denied leave under FMLA appear to have a sound base for

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<sup>99</sup> *Adoption, Surrogacy, and Maternity Leave*, STROCEL.COM (Jan. 26, 2009), <http://www.strocel.com/adoption-surrogacy-and-maternity-leave/> (last visited Nov. 3, 2011); Nishat Hyder, *Intending Mothers Fight for Maternity Leave Following Surrogacy*, BIONEW (Oct. 29, 2009), [http://www.bionews.org.uk/page\\_50608.asp](http://www.bionews.org.uk/page_50608.asp) (last visited Nov. 3, 2011).

<sup>100</sup> FMLA, 29 U.S.C.A. § 2601(a)(2).

<sup>101</sup> *Id.* § 2601(a)(3).

<sup>102</sup> OPM Report on Paid Parental Leave, <http://www.opm.gov/oca/leave/html/ParentalReport.htm>.

<sup>103</sup> Hyder, *supra* note 99.

<sup>104</sup> OPM Report on Paid Parental Leave, *supra* note 102.

<sup>105</sup> FMLA, 29 U.S.C.A. § 2612(a)(1)(A)–(D).

<sup>106</sup> S. REP. NO. 103-3, at 4 (1993).

<sup>107</sup> FMLA, 29 U.S.C.A. § 2601(a)(2) (West 2011).

<sup>108</sup> Snyder, *supra* note 37, at 320.

<sup>109</sup> *See supra* text accompanying note 20.

enforcement of leave in a private right of action, without need for amendment to the current form of FMLA.

III. COMPANIES CURRENTLY OFFERING PAID “MATERNITY” OR “PARENTAL”  
LEAVE SHOULD EXTEND THAT BENEFIT TO THOSE CHOOSING TO REPRODUCE  
THROUGH A GESTATIONAL SURROGATE

Parents using gestational surrogacy to produce a child as an alternative reproductive technique would qualify for unpaid leave under FMLA. By applying the same rationale to paid benefits as Congress applied in passing FMLA, as well as looking at the economic benefits to businesses offering leave, companies offering paid leave should extend those benefits to those choosing to reproduce through the use of a gestational surrogate.

Congressional findings regarding the FMLA are found directly in the Act.<sup>110</sup> Congress made four findings relevant to the application of “maternity” leave. First, Congress found that the number of single-parent and two-parent households where either the single-parent or both parents work is increasing.<sup>111</sup> Second, “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions.”<sup>112</sup> Third, Congress found that the “lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.”<sup>113</sup> In the final finding applicable to “maternity leave,” Congress found that “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>114</sup> Congress also stated the purpose of FMLA directly in the Act.<sup>115</sup> Congress passed the FMLA for the purpose of balancing the “demands of the workplace with the needs of families,” promoting the “stability and economic security of families,” and promoting the “national interests in preserving family integrity.”<sup>116</sup> Congress also noted that FMLA serves to “accomplish the purposes . . . in a manner that accommodates the legitimate interests of employers” as well as doing so in a manner “consistent with the Equal Protection Clause of the Fourteenth Amendment” and for “compelling family reasons.”<sup>117</sup> Of the compelling family reasons it appears that Congress focused much of their attention on the development of children and the family unit, with parental participation being an important piece.

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<sup>110</sup> FMLA, 29 U.S.C.A. § 2601(a)(1)–(6).

<sup>111</sup> *Id.* § 2601(a)(1).

<sup>112</sup> *Id.* § 2601(a)(2).

<sup>113</sup> *Id.* § 2601(a)(3).

<sup>114</sup> *Id.* § 2601(a)(5).

<sup>115</sup> *Id.* § 2601(b)(1)–(5).

<sup>116</sup> *Id.* § 2601(b)(1).

<sup>117</sup> *Id.* § 2601(b)(3)–(4).

As previously noted, Congress placed importance on the need for parents and children to bond, and additional research studies support that need.<sup>118</sup> Employers are not blind to the needs of children and parents to bond—employers that offer paid maternity leave do so in part to satisfy family needs. According to one business owner, “it’s important for parents to spend time with their newborn kids . . . it’s only fair that we be compassionate when they have family needs.”<sup>119</sup> Despite economic concerns, companies continue to offer paid maternity benefits for the purpose of bonding, although the reported number of small companies offering paid maternity leave varies. According to the Society for Human Resource Management, a recent survey of companies with fewer than 100 workers revealed that only 12% offer paid maternity leave, with 7% planning to reduce or eliminate the benefits within one year.<sup>120</sup> On the other hand, a survey conducted by the Families and Work Institute revealed that 59% of workers in companies with 50 or less employees were not paid during their maternity leave, indicating that 41% were paid some benefit.<sup>121</sup> Companies that provide paid maternity leave based on the need to bond should continue to follow Congress’s lead and extend paid leave benefits for parents using a gestational surrogate.

Congress was also cognizant of the economic benefits of providing for leave under FMLA. The Senate heard testimony from various business representatives, with titles ranging from CEO and president to the director of employee benefits. Testimony acknowledged that “women with small children are in the workforce to stay.”<sup>122</sup> This testimony was bolstered by the statistic that 19% of women of child-bearing age were in the labor force in the year 1900, but that number grew to 74% of women of child-bearing age in the labor force in 1993.<sup>123</sup> The testimony of business representatives focused on the economic impact of the leave provisions of FMLA. One representative noted that leave provisions “can work to bolster the economy by reducing turnover among experienced, trained employees” and “foster an environment among corporate and community leaders that nurtures children and family members.”<sup>124</sup> Another business representative testified that leave provisions under FMLA were “cost-effective rather than costly . . . because it serves productivity as we get people back who are not only highly trained and skilled . . . but we get them back in a way that they are very grateful to the company that cares for them, and they stay with us.”<sup>125</sup> Supporting this conclusion, three studies demonstrated FMLA to be cost-effective, with one in particular showing the cost of employee terminations ranging from \$1,131 to \$3,252 per termination versus

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<sup>118</sup> See *supra* Part II.

<sup>119</sup> Sarah E. Needleman, *Should a Business Offer Paid Maternity Leave?*, WALL ST. J. (July 6, 2010), <http://online.wsj.com/article/SB10001424052748704293604575343332721123208.html>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> S. REP. NO. 103-3, at 14 (1993).

<sup>123</sup> *Id.* at 6.

<sup>124</sup> *Id.* at 13.

<sup>125</sup> *Id.* at 13–14.

the cost of FMLA leave being \$6.70 per year per covered employee.<sup>126</sup> Although FMLA leave is unpaid and the cost of providing paid leave would be significantly higher than \$6.70 per year, there are options of short- or long-term disability insurance policies that provide for a payment of a partial benefit while keeping the cost of leave for companies reasonable.<sup>127</sup>

Businesses also recognize other economic benefits, such as retaining good employees and that by offering paid leave companies can gain an edge in recruiting and retaining the best talent.<sup>128</sup> Following the enactment of FMLA, the American Association of University Women published statistics to support the claim of retaining employees, showing that 98% of employees return to their previous employer.<sup>129</sup> Additionally, 89% of businesses reported a neutral or positive impact on employee morale, 84% of businesses reported a neutral or positive impact on productivity, and 90% of businesses reported a neutral or positive impact on profitability and growth.<sup>130</sup> As far as the costs of granting leave, 89% of businesses reported either no increase or a small increase in the cost of administering leave and continuing benefits, such as health care, to employees on leave.<sup>131</sup> Not all companies will benefit economically from offering a paid maternity leave benefit, but those that do for economic reasons will find little hardship by offering the same benefit to those mothers choosing to use a gestational surrogate for the birth of a child.

There is one economic aspect to paid leave for gestational surrogacy that has not been studied, the public relations impact on a company for denying paid maternity leave to a mother using the technique. A company faced with that situation, as in the case at hand, should evaluate the damage to reputation and the economic losses suffered as a result of that damaged reputation. Additionally, companies should evaluate the cost of litigation associated with the denial of leave. The cost to employers in defending an FMLA lawsuit, regardless of the outcome, is \$78,000.<sup>132</sup> The costs of a damaged reputation should be added to the cost of litigation and compared to the cost of allowing the employee paid leave. Undoubtedly, the cost of paid leave under the FMLA standard of twelve weeks will typically be far less than \$78,000 plus the cost of a damaged reputation. As such, companies that currently offer paid leave benefits should extend those benefits to those choosing to reproduce through a gestational surrogate when looking strictly at economic benefits and costs.

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<sup>126</sup> Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 J. GENDER & L. 39, 51–52 (1994).

<sup>127</sup> Needleman, *supra* note 119.

<sup>128</sup> *Id.*

<sup>129</sup> Am. Ass'n of Univ. Women, *FMLA: Facts and Statistics*, <http://www.aauw.org/act/laf/library/fmlastatistics.cfm>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *FMLA Leave Administration: How to Reduce Administrative Costs and Productivity Loss*, CERIDIAN CONNECTION (Nov. 2010), available at [http://www.ceridian.com/employee\\_retention\\_productivity\\_article/1,6266,15758-76282,00.html](http://www.ceridian.com/employee_retention_productivity_article/1,6266,15758-76282,00.html).

Regardless of motivation, from compassion and the recognition of the importance of a parent-child bond to a strictly economic or public relations benefit, companies that offer paid maternity leave should continue to do so. Although the number of children born to gestational surrogacy has risen significantly in the last decade,<sup>133</sup> there are still relatively few mothers that choose gestational surrogacy as an alternative reproductive technique, with only 1,400 gestational surrogacy births in the United States during 2008.<sup>134</sup> As such, companies that currently offer paid maternity leave should extend paid leave to the mothers using gestational surrogates for the birth of their children.

#### CONCLUSION

Medical science will continue to push the law into addressing ever-changing situations while racing ahead without heed to the views of legislators.<sup>135</sup> In spite of that fact or the intentions of Congress in having the FMLA encompass mothers using gestational surrogacy for the birth of their children, it appears that FMLA and its provisions for leave do indeed cover gestational surrogacy. The FMLA clearly applies in the case of adoption. Similar to adoption, the mother choosing to use gestational surrogacy did not actually give birth. Congress also intended a broad application of leave provisions intended by Congress. Had Congress intended for actual birth to be a qualifying factor for leave, FMLA would not include provisions for leave in cases of adoption, nor would leave provision apply to fathers. As FMLA seems to already encompass the use of a gestational surrogate for the birth of a child, there is no need to amend FMLA to address gestational surrogacy.

While companies may find the cost of paid leave significantly higher than the cost of the unpaid leave granted by FMLA, those providing paid maternity leave benefits for the birth of a child should extend those provisions to mothers using gestational surrogates for the birth of a child. Companies that provide paid benefits do so out of the recognition of the need for a parent to bond with their child, an economic benefit to the company, or a combination of both, and although the number of children born as a result of gestational surrogacy has been on the rise, there is no reason to believe that the extension of benefits to couples using a gestational surrogate childbirth will be significant in comparison to the mothers giving birth themselves.

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<sup>133</sup> S. REP. NO. 103-3, at 13 (1993).

<sup>134</sup> COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 4 (2010), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf>.

<sup>135</sup> Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 30 (2009); Kindregan, *supra* note 20, at 604.