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# Verdict

October 14, 2014

[Joanna L. Grossman](#)

## Traditional Surrogacy in Tennessee: Strange Statute Begets Strange Judicial Ruling



According to a **recent article**

[http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?\\_r=0](http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?_r=0) in the *New York Times* by Tamar Lewin, the United States has become – or is in the process of becoming – a mecca for foreign couples seeking the services of a surrogate to gestate a child for them. Theories differ as to the draw, but the lack of national policy or strict regulation is among the most likely suspects.

An Italian couple was drawn to Tennessee several years ago for exactly this reason. And although the surrogate conceived and gestated a child with her own egg and the intended father’s sperm, as called for by the parties’ agreement, she sought to claim parental rights after its birth. In a recent ruling, aptly named *In re Baby*, the Tennessee Supreme Court held that while a so-called traditional surrogacy agreement is enforceable, it is subject to several restrictions. This ruling is odd in two key respects. First, a provision of the Tennessee Code seems to expressly contemplate that traditional surrogacy is authorized in Tennessee, without any specific restrictions. Second, the restrictions imposed by the court effectively mean that a surrogate can never be forced to relinquish rights to a child conceived pursuant to a surrogacy agreement, in which case the term “enforceable” loses its meaning.

### The Traditional Surrogacy Arrangement at Issue

In 2010, an Italian man and woman – intimately involved but not yet married because they were waiting for her to get a Catholic annulment of her prior marriage – entered into a contract with a woman in Tennessee to conceive and carry a child for them to raise. The intended parents had been unable to conceive a child together naturally and thus sought a surrogacy arrangement. The intended father provided the sperm; the surrogate provided the egg.

The term “surrogacy” generally describes an arrangement in which a woman conceives and carries a child for someone else to raise. The type of arrangement at issue in the Tennessee case, in which the surrogate provided the egg as well as the womb, was once the only type of surrogacy practiced, but is now called “traditional surrogacy.” Before *in vitro* fertilization techniques were developed and perfected, a surrogate would be impregnated by artificial insemination. It was thus always her own egg being fertilized. But with better, if more expensive, reproductive technology available, almost all intended parents opt now for “gestational surrogacy” in which the egg comes from either the intended mother or from a donor and is fertilized outside the womb before

being implanted in the surrogate. This type of surrogacy is thought to eliminate some of the concerns about surrogacy, such as paying a woman to give up her biological child.

Whether the surrogate provides the egg or not, the crux of a surrogacy arrangement is an agreement that the child will be relinquished by the surrogate shortly after birth, and that the child's legal parents will be the intended parents.

In the Tennessee case, the parties entered a standard agreement with the surrogate and her husband providing that the Italian couple would pay all expenses associated with pregnancy and childbirth, including money for pain and suffering, and the surrogate and her husband make no claim to the child. In all, the intended parents paid her \$72,000.

Two months before the child was born, the parties jointly filed a petition to declare that the intended parents would be named on the child's birth certificate and recognized as the child's legal parents. A juvenile court issued an order granting the joint request, which entailed the permanent termination of any rights the surrogate and her husband might otherwise have had to the child.

The intended parents were present when the child was born in 2012. The intended mother returned to Italy shortly afterward to help care for her ailing mother and mother-in-law. The intended father stayed and participated in newborn care. With his agreement, the surrogate breastfed the child initially to ensure "the best possible nutrition" for the baby.

Less than a week later, the surrogate filed a petition to vacate the order terminating her parental rights. She challenged the enforceability of the surrogacy agreement and argued that she should be recognized as the child's legal and biological mother with full parental rights.

### **Surrogacy Law: A Primer**

While surrogacy itself has a long history – it is featured in a prominent Bible story about Abraham and his wife's handmaid, Hagar – surrogacy *law* dates only to the 1980s. The first surrogacy case arose in New Jersey, in which courts were asked to rule on the parentage of "Baby M," a child conceived in traditional surrogacy pursuant to a written agreement. The surrogacy was a disaster in many respects, leading to litigation in two states and, ultimately, a controversial ruling from the New Jersey Supreme Court that surrogacy agreements are void as against public policy and therefore unenforceable.

The ruling in *Baby M.* raised public awareness of surrogacy; provoked spirited discussions about its ethical, moral, and legal implications; and moved legislatures across the country to debate, and in some cases pass, legislation about surrogacy.

While this area of law is still in flux, states have staked out different positions on a broad spectrum. Several states prohibit surrogacy completely (including some that actually criminalize it). Some states prohibit commercial surrogacy, but allow altruistic surrogacy. Some simply permit it, with no identifiable limitations. And a growing number have passed legislation expressly to permit, but regulate, surrogacy. In this last group of states, some allow both types of surrogacy, while others allow only gestational surrogacy.

Tennessee occupies what might be a unique place on the spectrum. The legislature added a provision to its adoption laws in the 1990s on the subject of surrogacy. That provision, section 48, housed in the "Definitions" section of the chapter on adoption, defines a "surrogate birth" as either "(i) The union of the wife's egg and the husband's sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or (ii) The insemination of a woman by the sperm of a man under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father's wife to parent."

These definitions, in short, describe first gestational surrogacy and then traditional surrogacy. But defining the term "surrogate birth" does not tell us much about the state's position on the practice. A term could be defined

and then prohibited – such as in a statute defining a discriminatory employment practice. Or it could be defined and then authorized.

The Tennessee statute quoted above, however, is followed by two provisions that raise at least the specter of a conflict. The first states that “[n]o surrender pursuant to this part is necessary to terminate any parental rights of the woman who carried the child to term under the circumstances described in this subdivision (48) and no adoption of the child by the biological parent(s) is necessary.” This provision would seem to authorize surrogacy by making clear that either type of surrogacy arrangement can be given effect without termination of the parental rights of the birth parent or adoption by the intended parents. That is, in essence, the intended result of a surrogacy contract.

But immediately following that provision is one that provides that “[n]othing in this subdivision (48) shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the General Assembly.” This would seem to negate—or at least throw into question—what appeared in the previous section to authorize the enforceability of traditional and gestational surrogacy arrangements.

### **The Ruling in *In re Baby***

In the recent case, *In re Baby*, the Tennessee Supreme Court treated as a question of first impression whether enforcement of a contract for traditional surrogacy violates state public policy. It held no, but then imposed restrictions on such arrangements that make it hard to imagine how one could ever actually be enforced.

Specifically, the court concluded that the state’s public policy prohibits the following:

“(1) compensation that is contingent on the surrender of the child, is contingent upon the termination of the surrogate’s parental rights, or exceeds the reasonable costs of services, expenses, or injuries related to the pregnancy, the birth of the child, or other matters inherent to the surrogacy process; (2) binding agreements as to the best interests of a child; (3) contractual terms that would circumvent the established procedures for determining a person’s status as a legal parent or terminating parental rights; and (4) termination of parental rights in an involuntary proceeding absent a finding that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated.”

Let’s translate those restrictions into a typical surrogacy arrangement. First, the court tries to sever the financial terms from the relinquishment of parental rights. However, most surrogacy contracts involve installment payments that cover the span of the pregnancy – including one held back until after the child is relinquished to the intended parents and all necessary legal paperwork is completed. The ruling in *In re Baby* would refuse to enforce such agreements, in effect requiring the intended parents to shell out perhaps tens of thousands of dollars with no protection against the surrogate’s refusing to carry out her end of the bargain. Moreover, the court purports to cap payments in a way that may be less than the amount most surrogates are paid today.

Second, the ruling provides that all surrogacy arrangements are subject to approval based on the best interests of the child. With a gestational surrogacy arrangement, it is likely that courts will view the best interests of the child to lie with the intended parents because the gestational surrogate does not have the benefit of biology or intent to parent tying her to the child. But with traditional surrogacy, courts may well decide – as we have seen in older cases – that a child’s best interests require the biological mother to retain custodial and/or visitation rights. The requirement of post-approval based on the child’s best interests means that the certainty of the contracting process is seriously undermined. (A ruling of the Wisconsin Supreme Court, discussed [here](http://verdict.justia.com/2013/08/06/a-matter-of-contract-the-wisconsin-supreme-court-rules-traditional-surrogacy-agreements-are-enforceable) (<http://verdict.justia.com/2013/08/06/a-matter-of-contract-the-wisconsin-supreme-court-rules-traditional-surrogacy-agreements-are-enforceable>), imposed only this restriction on traditional surrogacy arrangements.)

Third, the ruling provides that a surrogacy agreement cannot circumvent for denying or establishing parental rights. Yet, that is the very essence of a surrogacy agreement – to predetermine the parental rights of the parties. If intended parents cannot be guaranteed recognition as legal parents, they might be reluctant to enter into the agreement in the first place (the agreement in which they now, thanks to the ruling, have to pay all of the money prior to relinquishment).

Finally – and this one’s the real kicker – the surrogate’s parental rights cannot be terminated involuntarily without a showing of unfitness to parent. Very few surrogates, most of whom have been extensively vetted by a surrogacy broker or agency, will exhibit parenting that is sufficiently sub-par to justify a finding of unfitness. Thus, this “restriction” in essence gives the surrogate the unfettered power to change her mind after the child’s birth. The surrogacy agreement is “enforceable,” but the intended parents will obtain custody and parental rights to the baby only if the surrogate decides, after receiving all the payments called for by the contract, to voluntarily surrender the child for adoption.

What the Tennessee Supreme Court has done in *In re Baby* is effectively rule traditional surrogacy contracts unenforceable. This may be a tenable policy position – other states have taken the same one, and most couples have opted for a different style of surrogacy. But the court was not obviously invited to express a policy preference for or against traditional surrogacy. It was asked to interpret a statute that, while admittedly ambiguous, seems to treat gestational and traditional surrogacy agreements exactly the same. Yet the court concluded that gestational surrogacy agreements are enforceable without significant restrictions, but traditional surrogacy arrangements are so restricted as to be effectively unenforceable. The court’s claim that this interpretation is justified by legislative history – not reflected in the text of the statute – is unconvincing.

## Conclusion

As I have noted when writing about previous surrogacy cases, the practice is growing at a significant rate and being used in a wider variety of situations than ever before. There is no reliable data, but estimates suggest at least several hundreds of surrogate births a year and a growing number of foreign couples flocking to the U.S. to find surrogates. Yet, the law is unclear and in flux, leaving many in an unwanted legal limbo. States are free to disagree with one another about the proper approach to surrogacy, but each state has a responsibility to carefully consider the issues and take a position that their residents can understand. On this point, Tennessee has clearly failed.

As courts often do in opinions that touch on controversial social issues, the court in *In re Baby* implored the state’s legislature to enact a more comprehensive surrogacy statute, with greater clarity. Such a statute is long overdue.



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