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# Verdict

April 29, 2014

Joanna L. Grossman

## Adoption by Gay Couple Not Blocked by Illegal Surrogacy Agreement



A man petitioned to adopt the biological twins of his husband, conceived with a donor egg and gestated by a woman in Mumbai, India. Although New York law permits children to have two legal fathers and permits a spouse to adopt stepchildren with the biological parent's consent, a question was nonetheless raised about the validity of this particular adoption: Does New York's statutory ban on surrogacy prevent a court from using adoption to give effect indirectly to the contractually intended arrangement? A family court judge said no.

In *In the Matter of J.J.H.C.*, the judge allowed the co-parent adoption to proceed, correctly deeming the surrogacy agreement that led to the children's birth legally irrelevant. The anti-surrogacy law is a leftover relic of an earlier time that should be read narrowly until the legislature has the good sense to repeal it.

### The Practice of Surrogacy

At the most basic level, surrogacy is any arrangement in which a woman carries a baby for someone else. Although the legal controversy surrounding surrogacy is a modern one, surrogacy has been practiced in some form since ancient times. In the Old Testament, the Book of Genesis tells of Abraham's wife, Sarah, who "gave" her handmaid, Hagar, to her husband because Sarah was barren. Hagar then gave birth to Ishmael, who was to be raised by Abraham and Sarah. Surrogacy of this sort no doubt occurred once in a while over the course of the centuries, but quietly and privately.

Surrogacy became more widespread and more controversial in the late 1980s, as it began to be used by infertile couples seeking to have children with a biological tie to at least one parent. In so-called "traditional surrogacy," a surrogate is inseminated with sperm from the intended father (or from a donor). The surrogate provides both the egg and the womb, with the intent that two other people will be the child's legal parents.

Today, however, the dominant arrangement involves "gestational surrogacy," in which a woman conceives a child, using *in vitro fertilization*, with gametes provided by either the intended parents or donors. Surrogacy can be used in a variety of situations, but is most commonly employed by couples with female-factor infertility or, in increasing numbers, gay men seeking to have children either alone or as part of a male couple.

In the case mentioned above, for example, M.H.-W. contracted with a woman in India to serve as a gestational

carrier. He provided the sperm, and the egg came from a donor. The carrier gave birth to twins and relinquished them at birth to the genetic father. Even though foreign-born, the twins were granted U.S. citizenship by descent and have been living with their father and his husband since birth. When the husband proposed to adopt them—to become a second legal father—a question arose about whether the underlying surrogacy, illegal under New York law, was a problem.

### **The Emergence of “Surrogacy Law”: *Baby M* and Its Aftermath**

Scientific advances and increasing social acceptance for non-traditional methods of family formation have made surrogacy both possible and more popular. But surrogacy can raise tough questions about parentage—to whom does the child born to a surrogate belong, for example—and can provoke controversy.

Questions about the legality and enforceability of surrogacy contracts were thrust before courts and legislatures for the first time in the 1980s, when the *Baby M* case worked its way through the court system. In that case, Mary Beth Whitehead conceived a child through traditional surrogacy for William Stern, who provided the sperm, and his wife, Elizabeth, who believed (perhaps incorrectly) that she had multiple sclerosis and would not be able to safely carry a child. Pursuant to a written surrogacy agreement, the Sterns agreed to pay \$10,000 to Mary Beth who, in return, agreed to relinquish custody and parental rights after delivery. The Sterns also paid \$7,500 to a broker who handled the legal and technical aspects of the arrangement.

After “Baby M” was born, a series of events occurred that eventually led the parties to court. Mary Beth did relinquish the baby initially, but then she pleaded for a temporary visit and absconded with the child. She and her husband moved with the baby from hotel to hotel in Florida for three months, while trying to evade both the Sterns and law enforcement. Several of the conversations between Mary Beth and William were recorded, and they reveal an escalating fight that included Mary Beth’s threatening to commit suicide, to kill the child, and to falsely accuse William of child molestation.

The basic question at trial, when the matter finally landed in court, was whether the surrogacy contract was valid and enforceable under New Jersey law. The trial lasted more than two months and resulted in a 121-page written opinion, ruling in favor of the Sterns. The judge concluded that they were the legal parents of Baby M, and that Mary Beth’s parental rights were to be terminated.

But the New Jersey Supreme Court reversed that ruling, holding, in 1988, that William Stern was Baby M’s legal father, but that Mary Beth Whitehead—not Elizabeth Stern—was her legal mother. On remand, William was awarded full custody on a “best-interests-of-the-child” analysis, so he and Elizabeth ultimately served as Baby M’s functional parents, with Mary Beth receiving only visitation rights.

In the course of ruling in favor of Mary Beth Whitehead, the New Jersey Supreme Court concluded broadly that surrogacy contracts are “illegal and unenforceable.” The court saw danger for everyone involved if the contracts were to be upheld:

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.

*Baby M* was the subject of tremendous, and contentious, public debate. As law professor Carol Sanger observed, the case “provoked philosophical debate, political organizing, and legislative action as ethicists, feminists, theologians, lawmakers, and local men and women weighed in on surrogacy’s moral, legal, and practical significance.”

When *Baby M* reached New Jersey’s highest court, there was essentially no law on the books regarding surrogacy—in that state or elsewhere. But the ruling triggered action across the country. Bills to ban or regulate surrogacy were introduced in more than half of the states within about a year of the ruling.

## Surrogacy in New York and the Ruling in *In the Matter of J.H.C.C.*

The New York legislature considered a bill to permit surrogacy subject to certain restrictions, but ultimately dropped it in favor of a 1992 bill providing that agreements for paid surrogacy are *unenforceable*. At the opposite end of the spectrum, however, the California Supreme Court enforced a surrogacy agreement in a 1993 case, *Johnson v. Calvert*, ruling that the intended parents of a child were the legal parents, and the surrogate was not. And in the decades since *Baby M.*, as many as ten states have adopted statutes that expressly allow surrogacy, but regulate it.

Although many bills have been introduced in New York to change the law—to allow surrogacy in some form—none has passed. Thus, current law, N.Y. Domestic Relations Law §§ 122–124, provides that surrogacy contracts are “contrary to the public policy of this state, and are void and unenforceable.” The law also provides that no compensation can be paid to or accepted by a surrogate, and that a court cannot consider a birth mother’s “participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations.”

The question in *In the Matter of J.H.C.C.* is whether the illegality of the surrogacy contract in New York is relevant to the proposed second-parent adoption. The statutory text does not speak directly to the question, but its wording focuses on the enforceability of surrogacy contracts, which implies only that it limits the ability of a court to intervene when there is a dispute over such a contract. For example, if a gestational carrier refused to relinquish a child after birth, despite a contract requiring her to surrender the child and waive her parental rights, the intended parents could not enlist a court to order her to comply with the contract or pay damages for the breach. Nor could a gestational carrier sue to enforce the intended parents’ promise to compensate her for carrying their child.

When a contract is “void and unenforceable,” it is not legally binding. But that does not mean in any meaningful sense that it cannot exist. In many contexts, parties enter into contracts that are not enforceable in court. As long as the parties carry out the terms and do not get into a dispute, there is no occasion for a court to consider the meaning or force of the contract, nor to condemn its existence. In *J.H.C.C.*, the intended father and the gestational carrier both acted according to the contract’s terms. She became pregnant using the gametes he and a donor provided; she gave birth and relinquished the children; and he assumed parental responsibility immediately and indefinitely. Because neither sought the assistance of a New York court to enforce the contract, its “void and unenforceable” status is of no moment.

The court in *J.H.C.C.* reasoned similarly. It also considered the small number of surrogacy cases decided in New York courts and found no bar to its conclusion. (There is almost no case law on surrogacy in New York. This is no doubt due, at least in part, to the fact that surrogacy brokers and intended parents steer clear of New York when finding gestational carriers and when writing surrogacy contracts. Regardless of where the parties or the brokers are located, they seek surrogacy-friendly jurisdictions to govern the arrangements.)

The court in *J.H.C.C.* concluded that none of the surrogacy precedents barred approval of an adoption simply because it indirectly approved an underlying surrogacy arrangement. In one case, *T.V. v. NY Dep’t of Health* (2011), an appellate court granted intended parents a declaration of their legal parent status to a child born through gestational surrogacy. In another case, *Doe v. NY Dep’t of Health* (2004), a family court judge declared a genetic mother and father the legal parents of triplets born to a gestational surrogate. These cases suggest that courts can be used to establish legal parentage even when the underlying surrogacy contract is unenforceable.

Moreover, the court reasoned, it would be inconsistent with the general search for the “best interests of the child” to deprive a child of a second parent simply because its conception was the product of an illegal agreement. The validity of the underlying arrangement is simply irrelevant. Thus, the court concluded, “where a surrogacy contract exists and an adoption has been filed to establish legal parentage, such surrogacy contract does not foreclose an adoption from proceeding.” Because there was no conflict over the care or custody of the twins in this case, the court did not need to consider the underlying agreement. Rather, “[i]n keeping with the Legislature’s intent to encourage loving, happy families for children with parents who wish to accept that role, the best interests of the [children] under the totality of the circumstances, and reading [the statute] broadly, the Court finds that the surrogacy contract’s legality is of no consequence to the matter.”

## Conclusion

The court in *J.H.C.C.* clearly reached the right conclusion—allowing the de facto family to cement its ties under law, a move that can only benefit the children who now benefit from a second legal parent. But courts should not be faced with an outdated law, passed in a reactionary political moment. Surrogacy is just one of the modes through which the new American family comes into being. The legislature can pick and choose among acceptable modes, or impose protections or restrictions on some, but it must do so often enough that it accounts for the rapid changes in social norms and reproductive technology. In family law terms, twenty-two years is a lifetime.



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