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Verdict

January 10, 2012

[Joanna L. Grossman](#)

The Complications of Surrogacy: A New Jersey Court Refuses to Uphold a Surrogacy Arrangement, but Awards Full Custody to the Intended Father



Surrogacy arrangements, in which a set of intended parents contract with a woman to gestate a child for them in exchange for money, have many potential complications. Studies of surrogacy suggest that the vast, vast majority of surrogacy contracts are actually carried out without a hitch. But when things go wrong, they can go drastically wrong, leaving courts and the parties to the agreement to sort out a situation that was never intended to occur.

An ongoing litigation in New Jersey, *A.G.R. v. D.R.H.*, presents just such a case. There, a gay male couple, S.H. and D.R.H., decided to pursue surrogacy as a means of having a child. D.R.H.'s sister, A.G.R., agreed to serve as a gestational carrier for the couple. (It is not clear, despite the formal contracts governing the parties' arrangement, whether A.G.R. was compensated for her gestational service.) The egg was provided by a donor; the sperm was provided by S.H.; and the pregnancy was achieved through *in vitro* fertilization. Twin girls were born on October 4, 2006.

Problems began during the pregnancy. In addition to medical complications that were dangerous to both A.G.R. and the babies, the interpersonal relationship between her and the intended fathers began to deteriorate. Their lives were overlapping in many respects. Beyond the surrogacy, the parties were co-investors in a bed-and-breakfast, and A.G.R. also worked for her brother, D.R.H., at his accounting firm. During the pregnancy, A.G.R. became depressed and, at one point, disappeared and lived in her car for three days, after warning that the intended fathers "may not see the girls again".

Despite the rocky pregnancy, A.G.R. did turn over the twins following their births to the intended fathers. They, in turn, permitted her to have access to the babies during their first few months of life. In January 2007, however, A.G.R. was terminated from her brother's firm. There were several unsettling interactions, particularly between A.G.R. and S.H., which contributed to a growing level of tension, and even hostility, among the parties. By March 2007, A.G.R. had filed a complaint seeking parental rights and custody over the twins, claiming that that the surrogacy contract was unenforceable and that she was the legal mother.

What followed were two sequential rulings from a superior court judge in New Jersey. In the first, [A.G.R. v.](#)

D.R.H. & S.H. (http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf) (“*A.G.R. I*”), which I have written about in previous columns [here](http://writ.news.findlaw.com/grossman/20100119.html) (<http://writ.news.findlaw.com/grossman/20100119.html>) and [here](http://writ.news.findlaw.com/grossman/20100120.html) (<http://writ.news.findlaw.com/grossman/20100120.html>), the judge held that the surrogacy agreement was invalid under *In re Baby M*, a 1989 ruling of the New Jersey Supreme Court holding that surrogacy contracts were void as against public policy. This ruling left the twins with two legal parents—the gestational carrier, A.G.R., and the biological father, S.H.—who had no desire to co-parent. And the ruling completely excluded D.R.H., the intended father whose sister had gestated the children. The case then proceeded to a custody fight between the two legal parents.

In the second ruling, ***A.G.R. v. D.R.H. & S.H.*** (http://www.docstoc.com/docs/document-preview.aspx?doc_id=108833252). (“*A.G.R. II*”), the judge ruled on the twins’ custody, awarding sole legal and physical custody to the biological father. In this column, I’ll discuss the basis for this second ruling and the legal limbo those utilizing surrogacy may face.

A Brief Recap: Why the Surrogacy Agreement in *A.G.R. I* Was Ruled Unenforceable

Before the twins were conceived, the gestational carrier and the two intended fathers entered into a series of contracts designed to govern the surrogacy arrangement. The purpose of these agreements was to ensure the desired outcome—that neither the egg donor nor the gestational carrier would have any parental rights with respect to any resulting children, while the two men, one of whom provided the sperm for conception, would both be legal fathers with all accompanying parental rights.

Surrogacy is relatively new—it has only been practiced with any success or regularity since the late 1980s—and it operates on a very uncertain legal landscape. It is used primarily by heterosexual couples with female-factor infertility and, more recently, by gay male couples seeking to have a child who is biologically related to one of them.

Initially, most surrogates provided both the egg and the womb, with the intent that two other people would be the legal parents. But this type of “traditional” surrogacy has been largely replaced by “gestational surrogacy,” in which the egg comes from elsewhere—either a donor or the intended mother. This modern type of surrogacy relies on *in vitro* fertilization to create embryos, which are then implanted in the gestational carrier, who is not the genetic mother of any resulting children. The intended result is the same, though: that after birth she will relinquish the child to its intended parents.

Early in the history of surrogacy, New Jersey courts were asked to rule on the validity of a surrogacy contract. In the famous case involving “Baby M,” an infertile couple hired a surrogate to carry a child for them. They agreed to pay her \$10,000 (as well as \$7500 to a broker). In exchange, she agreed to be artificially inseminated with sperm from the intended father, and to relinquish any resulting child to the father and his wife.

However, the surrogacy went grossly awry—the surrogate pleaded for a visit and then took off with the baby—and the situation led to dueling court cases in Florida and New Jersey about the parental rights to Baby M. In the end, the New Jersey Supreme Court ruled, in 1988, that the surrogacy contract was invalid because it violated the state’s public policy. The legal parents of Baby M, the court ruled, were her biological mother—the surrogate—and her biological father—the intended father. The intended mother was a legal stranger to Baby M. On remand, though, the intended/biological father was awarded full custody, based on the “best interests of the child” standard that governs family court custody proceedings, so the biological father and his wife ultimately served as Baby M’s functional parents.

The *Baby M* ruling sparked a national debate about surrogacy. In a still-evolving story, states have taken a variety of views of it, which cut across the full spectrum of legal possibilities. Several states prohibit surrogacy completely. Some prohibit it unless no money changes hands. Some simply permit it, with no identifiable limitations. And a growing number have passed legislation to permit, but regulate, surrogacy.

An important issue in *A.G.R. I* is whether the ruling in *Baby M* applies in equal force to a gestational surrogacy arrangement, in which the surrogate is not the child’s biological mother. The trial judge’s answer to this question

was yes: The judge reasoned that the contract in this case, like the contract in *Baby M.*, “is void and serves as no basis for termination of parental rights of the plaintiff [A.G.R.]”

In support of his ruling, the judge concluded that the same concerns about baby-selling, coercion, pre-birth relinquishment of parental rights, adoption without screening for parental fitness or the best interests of the child, and exploitation of the child were present regardless of whether the surrogate was the genetic mother, and regardless of whether any money changed hands. The bottom line was clear: Surrogacy is surrogacy, and it is not allowed in New Jersey.

Under this ruling, the gestational carrier is a legal mother, even though she is not biologically related to the child. And the intended father is the legal father only if he provided the sperm, not because he intended to be a father. Any other intended parent is left out in the cold.

The Ruling in *A.G.R. II*: Factors Relevant to the Custody Dispute

With the dispute over parentage out of the way, the judge then had the responsibility to decide where the twins should live, and whether both parents ought to have a role in making decisions for them.

Custody disputes between two legal parents, if both are legally fit, are governed by a best-interests-of-the-child standard, which gives the judge broad discretion to weigh various relevant factors. New Jersey law directs the court to consider “the personal safety, morals, health, general welfare and happiness of the child and satisfy itself as to the character, conditions, habits and surroundings of the respective parents.”

Under New Jersey law, joint legal custody—which, in practice, means shared decision-making power—is preferred, even if the child primarily lives with only one parent. But if a parent “cannot put away animosity and communicate with the other parent for the child’s benefit than sole legal custody may be necessary.”

Though the judge here took care to “omit much of the sniping that took place during the trial,” he gave a richly detailed summary of the parties’ backgrounds, to the extent that he saw it as relevant to these factors.

A.G.R., a 49-year-old woman, was born and raised a Baptist in Texas, along with her brother D.R.H. and two other siblings. After college, she left the Baptist church because it was not accepting of homosexuality, and she was a lesbian. At the time the surrogacy was first discussed, she was in a relationship with another woman. That relationship had ended, however, before she became pregnant.

In 2008, two years after the twins were born, A.G.R. returned to the Baptist faith and assumed a “negative view of homosexuality” and a “negative attitude towards surrogacy,” including the view that it is “unnatural.” Indeed, in a separate lawsuit, she sued the lawyer and others involved in the surrogacy arrangement for malpractice. She now works at a retail clothing store, where she earns \$35,000/year. She relies on her parents for additional support. She testified that she would send the twins to a parochial school if given primary custody. She believes that the twins need to be raised by a mother and a father, and that her brother and his partner are using this case to advance a gay rights agenda.

Both A.G.R. and D.H.R. were raised in a traditional religious household. Their mother, S.R., admits to “paddling” all of her children as a form of discipline, and, during one incident, she discharged a loaded gun into a wall in response to frustration that another daughter was staying out too late. She believes that both homosexuality and surrogacy are sinful and she offered, when D.H.R. first revealed he was gay, to send him to “Exodus International,” a program claiming to convert gays to heterosexuality. One of the girls mentioned that her father would “burn in hell,” a belief which she was apparently repeating after hearing it from her mother or grandmother.

S.H., the biological father, is 45 years old and was raised in California. He is biracial, with an African-American father and Caucasian mother. He was raised as a Baptist and served at one point as a backup singer for Jim and Tammy Faye Bakker’s ministry. His father was not accepting of his homosexuality because of the conflict with his religious beliefs.

S.H. and D.R.H. have been legally committed to one another through domestic partnership, civil union, and finally marriage since 2006. S.H. does various forms of work, but is now primarily a stay-at-home dad to the girls. He sends them to a Montessori school that teaches “courtesy, sharing and respect” and is open-minded about what religion they might choose to pursue later in life. He believes the girls have special needs as a result of being biracial, the product of surrogacy, and raised by two gay dads.

The relationship between S.H. and A.G.R. has become increasingly tense and uncomfortable, particularly as A.G.R. has become intolerant of homosexuality and seems to have shared those views with the children. Because verbal communication was so difficult, S.H. offered a program called “Family Wizard,” which is designed for parents in custody disputes to exchange information about children without the necessity for verbal communication. A.G.R., however, refused to participate even though S.H. was willing to cover the cost.

Why the Baby’s Father, S.H., Received Sole Physical and Legal Custody

The judge ruled that the father, S.H., should receive sole physical and legal custody of the twins. He shared S.H.’s assessment that the girls, despite not having a physical or mental disability, nonetheless had special needs by virtue of their background. The judge concluded that their father was best suited to assist the girls as they faced issues about religion, their unique origins, biraciality, or homosexuality. The court did not so conclude simply because S.H. himself had faced the same issues growing up—but because, in the court’s view, he had demonstrated his commitment to always looking at things from the perspective of his children’s best interests. He “stayed away from the bickering even when [the mother’s] counsel tried to bait him it.” His answers at trial were “most thoughtfully given without being self-servingly composed.”

The court also found credible the testimony of an expert, who testified that while A.G.R. and her mother may mean well and attempt to moderate their tone in front of the children, it was “inevitable” that their “strong feelings about surrogacy and homosexuality will be understood by the girls and will have a very damaging effect on them. It will make them feel ashamed of themselves and this they do not need. They will have challenges enough as they grow older. The concern of one of them, that their father (actually defendant D.R.H. whom they regard as a father) might burn in hell is an example.”

Also weighing in favor of the choice of S.H. as the custodial parent was the stability of the home environment and the “quality and continuity of the children’s education.” S.H. is also prepared to spend more time caring for the girls than working, which weighed in his favor.

The judge ruled that joint legal custody would be inappropriate in this case, because the parents’ ability to “agree, communicate and cooperate in matters relating to the children is nonexistent here.” A.G.R. did receive visitation, however. Her “parenting time” will take place every other weekend, on various holidays, and for four weeks in the summer. Time will tell whether this arrangement works well for the girls, of course.

While Surrogacy Is Much More Common, Its Legal Backdrop Remains Unclear

Although surrogacy remains controversial, it has become much more common since *Baby M* was decided. There is no hard data on the exact number of surrogacies that have occurred, but the American Society for Reproductive Medicine estimates that there have been as many as 600 surrogate births per year since 2003.

Most of these seem to involve compensation for the surrogate—in the neighborhood of \$20,000—in addition to fees paid to brokers, lawyers, and medical providers.

There is an emerging market in international surrogacy as well, with couples from the U.S. and other countries hiring surrogates in places like India, who will perform the service for much less money. This raises a whole host of additional questions about human rights and immigration laws, particularly to the extent that the rules of various nation-states on the legality of surrogacy are in conflict.

Despite its rise in popularity, however, surrogacy is still often undertaken against an uncertain legal backdrop, both in the U.S. and abroad. In a state like New Jersey, in which surrogacy has been expressly held illegal, intended parents rely on surrogacy contracts at their peril. D.R.H. and S.H. learned this the hard way.

In the end, D.R.H. and S.H. will have the opportunity to raise the children they contracted to have. But they will be subject to continuing oversight by the courts (until the twins are eighteen and free to do as they choose); the risk of potential custody challenges in the future; and the potential for constant tension and disputes with A.G.R., who will continue to have the opportunity to care for and influence the children.



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