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# Baby Mama: Appellate Court Declares Sherri Shepherd Is the Legal Mother of a Child Born to Her via Surrogate

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# Verdict

DECEMBER 1, 2015

JOANNA L. GROSSMAN

## Baby Mama: Appellate Court Declares Sherri Shepherd Is the Legal Mother of a Child Born to Her via Surrogate

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It seems like the kind of case Sherri Shepherd and her co-hosts on *The View* might have discussed on the air, alternating inflammatory and judgmental tones. “Who does this woman think she is—walking away from the child she insisted be brought into the world?,” they might have asked. But they didn’t—and probably will not—because the woman is Sherri Shepherd herself, former co-host of *The View*, who now stars in her own legal drama over a controverted surrogacy arrangement. According to the recent ruling of an appellate court in Pennsylvania, Shepherd is the legal mother of



a child born via surrogate—a result she fought hard to *avoid*.

## The Surrogacy Arrangement

Sherri Shepherd and Lamar Sally married in 2011. They quickly decided to have a child and, after encountering conception difficulties, began to pursue fertility treatments. Within a year, they had made contact with a company that facilitates surrogacy arrangements, Reproductive Possibilities.

Although surrogacy ostensibly dates to biblical days—Abraham and Sarah’s handmaiden, Hagar, for example—it is quintessentially a modern path to parenthood. In its initial iteration, so-called traditional surrogacy, the arrangement called for artificial insemination of the surrogate carrier with sperm from the intended father, whose wife provided no genetic material but was the intended mother and a party to the contract. As reproductive technology advanced, and *in vitro* fertilization was first developed and then improved, a new type of surrogacy became the norm. With gestational surrogacy, the carrier provides only the womb, while both egg and sperm come from the intended parents or donors or a combination of the two. Virtually all surrogacy arrangements now involve this latter type, which reduces controversy over the practice and makes parentage disputes easier to resolve.

After meeting with Reproductive Possibilities, Shepherd and Sally entered into an agreement with the company to locate a gestational carrier. In that contract, both Shepherd and Sally recited their desire to have a child via surrogate. This agreement made clear that the intended parents could freely terminate the arrangement, but not after a gestational carrier becomes pregnant. Shepherd and Sally also told their lawyer that they wanted to work with a gestational carrier who resided in a state where Shepherd’s name could be put immediately on the child’s birth certificate, without the need for the carrier to relinquish parental rights and Shepherd to adopt the child.

Shepherd and Sally were matched with a surrogate, J.B., who resided in Pennsylvania, a state that was deemed by the lawyer to meet Shepherd’s requirements. In an e-mail to J.B., Shepherd said she had wanted another child since she and Sally began dating four years earlier. She described herself as “a person who can appreciate the magnitude of what a gestational carrier will be doing for us,” and the whole surrogacy process as “a miracle.”

Shepherd and Sally then entered into a separate agreement with an egg donation agency, fittingly named Tiny Treasures. In that agreement, the couple recited their desire to have a child related to at least one of them and their physical inability to achieve pregnancy using Shepherd’s eggs. This agency selected an egg donor, with whom Shepherd and Sally

entered into an egg donation agreement. This agreement clearly released the egg donor of any legal responsibility for a child conceived with her eggs and recited the parties' shared intent that Shepherd and Sally would be the legal parents of any such child. Their parentage was to be immediate upon birth, "regardless of whether the Child suffers from any physical or mental disease or defect."

With three contracts in place—the agreement with the surrogacy agency, the egg broker, and the egg donor—all that remained was an agreement with the surrogate herself, J.B. In that agreement, J.B. agreed to bear a child for Shepherd and Sally "and not for the purpose of having a Child who the Gestational Carrier will raise or with whom she will have a legal relationship." For their part, Shepherd and Sally agreed to be working to have legal parentage declared by the twentieth week of pregnancy and agreed "to accept custody and legal parentage of any Child born pursuant to this Agreement." As this was a paid surrogacy arrangement, the contract also called for Shepherd and Sally to compensate J.B. for a variety of expenses associated with the surrogacy process, totaling over \$100,000. Shepherd, rather than Sally, paid the lion's share of those expenses.

In the early but crucial stages, the surrogacy went forward as planned. An embryo created with Sally's sperm and a donor egg was transferred into J.B.'s uterus. Shepherd and Sally were present for the procedure and offered thanks to J.B. for carrying their baby. J.B. became pregnant in November 2013, after which Shepherd and Sally moved from a brownstone in New York City to a large house in New Jersey, to make room for their growing family. (Shepherd has a son from a previous relationship.) They communicated regularly with J.B. during the pregnancy and attended her twenty-week ultrasound.

In accordance with their contractual commitments, Shepherd and Sally's attorney began preparing to seek a court order regarding parentage, one that would permit the birth certificate to identify Shepherd and Sally as the child's birth mother and father. This is when the arrangement began to falter. Shepherd refused to sign the paperwork because she and Sally were, by then, having marital problems. She sent an e-mail to the surrogacy agency stating that she and Sally were "trying to figure out how we can best co-parent [Baby S.] in the wake of our irreconcilable differences. The lawyer did not file the paperwork called for by the surrogacy agreement because of Shepherd's refusal to cooperate; the lawyer then withdrew from representing the couple.

J.B., now eight months pregnant with a baby she was carrying for someone else, filed a petition seeking a court order declaring that Shepherd and Sally were the legal parents. In August 2014, J.B. gave birth to a baby. J.B. was named as the mother on the child's birth certificate and no one was named as the father, as if the surrogacy arrangement did not even exist. Notwithstanding the birth certificate, however, Sally took the baby and moved to California. Shepherd expressed no interest in the child's birth and did not, despite a

contractual commitment to the contrary, add the baby to her health insurance policy.

In response to J.B.'s parentage petition, Shepherd claimed that the surrogacy agreement was unenforceable. If she were to prevail in that claim, J.B. would most likely be deemed the legal mother of the child since maternity generally flows from the act of giving birth. (The egg donor would neither have rights or responsibilities given the terms of the egg donation agreement.) And Sally would likely be deemed the legal father because of his genetic tie to the child and his actions to claim parentage after the child's birth. Sally would also be deemed the legal father of the child if the surrogacy agreement was *enforceable*. Thus, Shepherd's claim of unenforceability was relevant only to her standing—and, by default, J.B.'s—vis-à-vis the baby.

### **Are You My Mother? What if Everyone Answers No?**

In the stereotypical case, surrogacy raises this question when two women—the surrogate and the intended mother—are fighting for maternal status, and the court must choose between them. But here, neither woman wanted to be the child's mother. This may be more common than our intuitions tell us. According to a 2014 report in the *New York Times*, surrogacy arrangements go awry more often because the intended parents want out than because the surrogates do. (Although the vast, vast majority of all surrogacy arrangements go off without a hitch.)

After a short hearing, the trial court last March ruled that Shepherd and Sally were the legal parents of the child birthed by J.B. It upheld the validity of the surrogacy agreement and found that Shepherd had breached it. In addition to her financial responsibilities to the child, which she would have to pay regardless of whether she opted to have a relationship with the child, the court ordered her to pay J.B.'s legal fees.

On appeal, Shepherd again argued that the surrogacy agreement was unenforceable under Pennsylvania law, which has no specific authorization for surrogacy, nor much by way of relevant judicial precedent.

### **Surrogacy on the National Landscape**

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 went bad in nearly every respect, leading to litigation in two states and a controversial ruling from the New Jersey Supreme Court that surrogacy agreements are void as against public policy and therefore unenforceable.

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. The result is a like a patchwork quilt, but without the loving, tasteful eye of the quilter deciding how to make the odd pieces fit. Several states prohibit surrogacy completely (including some, like New York, which criminalize it). Some prohibit commercial surrogacy, but allow altruistic surrogacy. Some simply permit it, with no identifiable limitations. And a growing number have passed legislation to permit, but regulate, surrogacy. In this last group of states, only gestational surrogacy is permitted. And some have no law at all.

Pennsylvania falls into this last group. There is no specific statute authorizing it, nor one prohibiting it. To the extent surrogacy has come before the state's highest court, the court has declined to rule on the basic question whether surrogacy agreements are enforceable under Pennsylvania law. The Pennsylvania Department of Health has, however, maintained and followed an administrative directive for twenty years that facilitates birth registrations for children of assisted conception. This was the procedure that Shepherd and Sally had agreed to pursue before the child's birth and, when they didn't, that J.B. tried to pursue.

Moreover, the lack of a law to authorize surrogacy is not necessarily a bar to an enforceable agreement. Surrogacy has come to many states, including California, by virtue of a court ruling in a disputed arrangement much like this one. The burden was thus on Shepherd to show that Pennsylvania's silence on surrogacy means it is disallowed, rather than allowed. Her main theory was that a surrogacy contract, even if entered into voluntarily by all parties, is unenforceable because it violates the state's public policy. This was a successful argument in the *Baby M.* case, although that case was almost thirty years ago before reproductive technology and other social changes had really burst on the scene. That case also involved traditional surrogacy, where the surrogate provided both the egg and womb, which made the court even more wary about an order forcing her to turn over her biological child for money.

### **The Ruling in *In re Baby S.*: Why Sherri Shepherd Won Motherhood and Thus Lost Her Case**

Shepherd argued that Pennsylvania allows provides two bases for establishing parentage: genetics and adoption. It does not provide, according to her view, for the possibility of establishing parentage by agreement or on the basis of intent. The surrogacy agreement, she argued, was "an unlawful means of circumventing the statutory adoption procedure." But the surrogacy contract was only an unlawful means if the contract was illegal. And it's only illegal if the legislature or a court says it is.

But this appellate court did not say so. It gave a careful explanation, quoting prior Pennsylvania precedents, of what it means to declare the "public policy" of a state. It is

“more than a vague goal which may be used to circumvent the plain meaning of the contract,” and it is “to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.” Only “in the clearest of cases may a court declare a contract void as against public policy.”

Applying this exacting standard, the appellate court declined to find public policy an obstacle to enforcement of Shepherd and Sally’s agreement with J.B. Although the state’s highest court had declined in prior cases to rule on the validity of surrogacy agreements, it had not invalidated them. Moreover, in an important case from 2007, *Ferguson v. McKiernan*, the court enforced an oral agreement between a mother and her known sperm donor—a man with whom she had been romantically involved previously—providing that he would have no rights or obligations with respect to any child conceived with his sperm through artificial insemination. The mother there claimed the agreement violated public policy, but the court characterized her claim as “unsustainable in the face of the evolving role played by alternative reproductive technologies in contemporary American society.” The court thought it relevant that the legislature had not “chosen to proscribe” donor agreements, despite their “growing pervasiveness.” The same could be said of surrogacy agreements. And in both contexts, the children would not have been born but for the parties’ agreement, which makes it even harder to justify ignoring the parties’ intention.

The court noted the “growing acceptance of alternative reproductive arrangements” in Pennsylvania, and case law that is increasingly supportive of diverse paths to parenthood.

## Conclusion

The appellate court in Shepherd’s case made clear it was not announcing that Pennsylvania had a public policy in favor of surrogacy, but only that it could not discern one against such that it would be within its discretion to block enforcement of this agreement. Whether she likes it or not, Sherri Shepherd is thus the legal mother of the child born to J.B., a role she undertook only because Shepherd and Sally paid her. After providing the “miracle” they claimed to seek, the surrogate should not be penalized by obligations for a child she never saw as her own. Shepherd, on the other hand, should be required to carry out the obligations she voluntarily undertook.

Because Shepherd has sought no relationship with the child since the birth over a year ago, this case seems to be primarily about child support. As the legal mother, Shepherd has a responsibility to pay child support to the custodial parent—Lamar Sally—in the amount determined by the court. This is a perfectly fair and appropriate result. For Shepherd is really no different from a man who seeks to avoid supporting a child because his relationship with the child’s mother has ended. To that man, we would say that the

obligations of parenthood do not end with divorce or when a parent loses interest. We should say the same to Sherri Shepherd. That this child came about through a complicated series of contracts and payments, rather than a sexual act, does not change the fact that Shepherd made sure this child was brought into the world, and she must assume her share of the responsibility for the child's well being.



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