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A Matter of Contract: The Wisconsin Supreme Court Rules Traditional Surrogacy Agreements Are Enforceable

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Surrogacy, an arrangement in which a woman carries a child for others who intend to raise it, is no longer novel. It has been in regular use since at least the 1980s, and has only grown more common with advances in reproductive technology and greater social tolerance for alternative family forms. 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. But the law has been slow to react to the growth of surrogacy, leaving many couples who rely on it to start a family in uncharted waters.

In a recent ruling, ***In re Paternity of F.T.R.*** **(http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=99308)** , the Wisconsin Supreme Court ruled that surrogacy arrangements, even those in which the surrogate uses her own egg, are enforceable as long as they are in the best interests of the child. Although this produced the right outcome in that particular case, the court's ruling does not confront many important issues regarding surrogacy contracts and leaves open the answers to some crucial questions.

Baby F.T.R.

The story of F.T.R.'s birth is one of good intentions gone bad. Marcia Rosecky and Monica Schissel had been friends since grade school. They participated in each other's weddings and retained a strong friendship in the early years of each woman's marriage.

Marcia and her husband, David, were godparents to the first child of Monica and her husband, Cory.

Marcia was diagnosed twice with leukemia during the early years of her marriage. Although she returned to good health, the cancer treatments left her with non-viable eggs and an inability to bear biological children. After each diagnosis, Monica offered to act as a surrogate—to carry a child for the Roseckys. After the second offer, the Roseckys accepted. As Monica described the arrangement in sworn testimony "I was [Marcia's] friend. I offered to do this. . . . I orchestrated this whole thing. This whole thing was my doing. I offered. I carried. I said I would do it."

As plans for the surrogacy materialized, the two couples agreed that Monica would provide both the egg and the womb for the pregnancy. Although use of an egg donor was discussed, the two couples decided that Monica would use her own egg because she preferred that route, and because artificial insemination would reduce the chance of multiples relative to the chance associated with in vitro fertilization. Marcia expressed her concern that Monica would have a hard time relinquishing her biological child, but she was reassured that Monica would be able to do so. After all, Monica and Cory already had five children and, because they desired no more, Cory had undergone a vasectomy.

The surrogacy arrangement agreed to by the parties and embodied in a written agreement after Monica became pregnant was unusual in two respects.

First, the arrangement called for "traditional surrogacy," in which the surrogate provides the egg as well as the womb. Prior to the development of *in vitro* fertilization, this was the only type of surrogacy available, but now it is very rare. Most intended parents opt for gestational surrogacy, in which the egg is provided either by the intended mother (if possible) or by a donor. 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, the surrogate will relinquish the child to its intended parents. But the gestational approach eliminates the genetic connection between surrogate and child, which makes it more difficult for the surrogate to make a legal claim to the child and, at least in theory, seems to lessen the emotional connection between surrogate and child.

Second, the arrangement contemplated an "altruistic surrogacy," in which the surrogate would receive no compensation other than her reimbursement for necessary medical expenses. Although there are cases in which a friend or relative volunteers to act as a surrogate, the vast majority of surrogates are paid—often upwards of $20,000—in addition to fees that are separately paid to brokers, lawyers, and medical providers. (The high cost of surrogacy has led to a market for international surrogacy, with couples from

the U.S. and other countries hiring surrogates, in places like India, who will perform the service for much less money.) But according to Monica's own testimony, this was something that she wanted to do out of friendship for a woman whose cancer had deprived her of the ability to be a biological mother.

The other aspects of the arrangement between the Roseckys and the Schissels were more typical. Monica agreed to relinquish the child and to terminate her parental rights voluntarily. Cory was relieved of any obligation to pay child support. The Roseckys were to pay for all expenses associated with the pregnancy, and to assume physical and legal custody of the child immediately after birth, as well as legal parental rights. The couples were each represented by legal counsel, and the written agreement was subjected to several rounds of negotiation and editing.

The Post-Birth Controversy

Shortly before baby F.T.R. was born, however, Monica expressed her intent to renege on the contract (styled a "parentage agreement"). Although the court's opinion does not rehash the ins and outs of the events leading up to this decision, it notes that they had a "falling out" with "several events resulting in hurt feelings and lack of trust among the parties." Despite her intent to renege, however, Monica did allow the Roseckys to take the baby home from the hospital.

Since the birth three-and-a-half years ago, F.T.R. has lived with and been raised by the Roseckys. A court appointed them temporary guardians pending resolution of the controversy over parental rights and custody. Monica was given a few hours of visitation per month.

After a series of legal proceedings, the crucial question was certified to the Wisconsin Supreme Court: "whether an agreement for the traditional surrogacy and adoption of a child is enforceable." The lower courts had a hard time with this question because there is neither a Wisconsin statute on point, nor any state case law addressing the enforceability of surrogacy agreements.

The General Legal Landscape for Surrogacy Arrangements

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 the practice, which cut across the full spectrum of legal possibilities. Several states prohibit surrogacy completely (including some that actually 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.

The Wisconsin Supreme Court's Opinion in *In re Paternity of F.T.R.*

Wisconsin is one of many states in which there is no law of surrogacy (at least, it was until this very opinion was issued). Other than a provision in the birth-certificate law that allows for the issuance of a replacement birth certificate in cases of surrogacy, the Wisconsin code makes no mention of it. The court in this case was thus left to determine whether surrogacy agreements are enforceable or not.

In the absence of binding statutory law, the court opted to treat the parentage agreement in this case as just a contract, more or less like any other contract. The only difference according to the court is that, in addition to needing to satisfy the other requirements for a valid contract, a surrogacy agreement cannot be enforced if it is contrary to the best interests of the child.

The Wisconsin court then proceeded to apply ordinary contract analysis to the parentage agreement. Monica offered to serve a surrogate; the Roseckys accepted her offer. The court states that "there was consideration." (All contracts require something bargained-for and something given in exchange, which is called consideration.) But here, the court doesn't say what the consideration is. In most surrogacy arrangements, the consideration is money given exchange for pregnancy and baby. Perhaps, here, the promise to pay the surrogate's medical expenses and to relieve her of obligations was enough.

The court then ruled that none of the traditional defenses to contract enforcement were relevant—fraud, mistake, duress, etc. Monica's own testimony made clear that she desired the arrangement, understood its terms, and entered into it of her own volition after receiving advice from counsel.

The court concluded that the parentage agreement was "largely enforceable" and not, as Monica had argued, void as against public policy. It found that the interests that militate in support of enforcement are more compelling than those that militate against it. Specifically, the court explained,"[e]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several

years of the child's life." The court found enforcement to be consistent with several provisions of the state's statutes governing children and family, especially one statute providing that "instability and impermanence in family relationships are contrary to the welfare of children."

Notwithstanding its willingness to enforce surrogacy agreements, however, the court stopped short of full enforcement. Specifically, it concluded that the provisions of the agreement requiring Monica to terminate her parental rights are not enforceable. It ruled this way on the theory that the voluntary-termination provision builds in procedural safeguards that would not be satisfied if the terms of the contract were enforced. The provision regarding termination of parental rights, in the court's view, was severable from the unenforceable clauses of the contract and could be excised without undermining the rest of the contract.

On remand, the court directed the lower court to make a determination of custody and visitation ("placement" in Wisconsin's terminology) consistent with the parentage agreement. Specifically, this means that David Rosecky must be given full custody of the child, and Monica must be denied all contact with the child, unless such an arrangement is contrary to the best interests of F.T.R.

The court ended its opinion with a call to the legislature to enact a statute addressing the enforceability of surrogacy agreements.

What the *F.T.R.* Opinion Doesn't Say

In my opinion, the ruling in this case reaches the correct outcome. The arrangement was entered into in good faith, with parties who took the time to negotiate the contract and consider its consequences. While it is unfortunate that the parties had a falling out, F.T.R.'s welfare will be best served by permanent placement with the Roseckys, who have been raising F.T.R. since birth. The child will not benefit from visitation with a woman, Monica, who despises the child's parents and refers to herself as "Mom." That said, the majority opinion in this case is unsatisfying in some ways.

First, the court severs and refuses to enforce the provision regarding termination of Monica's parental rights. As a general rule, a woman who gives birth to a child is presumptively its legal mother. Unless and until those rights are disestablished or terminated, Monica is the legal mother of F.T.R. So what does it mean to "largely enforce" the parentage agreement, as the court says it has done? Although that may result in a ruling of custody for David with no visitation for Monica, F.T.R.'s parentage still, apparently, resides with *Monica* and David, rather than *Marcia* and David. And if Monica is still the legal mother, Marcia cannot adopt the child.

Now, perhaps Monica will voluntarily terminate her parental rights—despite winning the right not to do so—because enforcement of the remaining provisions means that she can never have or seek custody or visitation with F.T.R. That would clear the way for Marcia to adopt. But if she holds out, the legal parent-child tie will be retained between Monica and F.T.R., and never established between Marcia and F.T.R. Legal parentage can affect a wide variety of issues, including inheritance and Social Security rights. Did the Wisconsin Supreme Court really intend that parentage would be split between two families? If not, it should have said more about how to reconcile its enforcement of the general provisions of the parentage agreement with its refusal to enforce the provision regarding parental rights.

Second, as Justice Shirley Abrahamson points out in a well-argued concurring opinion, the majority only scratches the surface of the complex policy issues surrounding surrogacy. It seems to broadly endorse all surrogacy agreements, without specifying any criteria that might screen out those that involved exploitation, coercion, or other problems that might invalidate or alter such agreements. Abrahamson criticizes the majority for treating surrogacy agreements more or less like all other contracts, without considering their truly unique nature. In her view, surrogacy agreements should be subjected not only to the usual contract analysis, but also to an in-depth public policy analysis that would take into account the particular issues that different surrogacy arrangements may involve.

Justice Abrahamson also criticizes the majority for allowing the parentage agreement to be the sole factor in the custody and visitation decision on remand. Rather, she argues, the lower court should consider the parentage agreement as one factor, under the prong that refers to proposals or agreements by the parents. This is a less compelling argument, in my view, because the nature of a surrogacy agreement—if enforceable—is that the parties are opting out of the traditional rules and the uncertainty they bring with them.

Conclusion

The Wisconsin Supreme Court was right to order enforcement of this surrogacy agreement, but it leaves the Roseckys in a puzzling conundrum, in which they are not both legal parents of their child. And the court was probably also right to call on the legislature for action. The best approach to surrogacy, in my view, is to allow it, but only in those circumstances that are least likely to involve coercion, exploitation, and deep regret by the surrogate upon relinquishment of the child. Several states, including Illinois, have adopted gestational surrogacy statutes that provide a model for other states to follow.

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