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# TRADITIONAL SURROGACY CONTRACTS, PARTIAL ENFORCEMENT, AND THE CHALLENGE FOR FAMILY LAW

MARK STRASSER\*

## I. INTRODUCTION

Surrogacy remains controversial.<sup>1</sup> Several states ban commercial surrogacy<sup>2</sup> while several other states permit it,<sup>3</sup> subject to certain conditions.<sup>4</sup> In addition, many state legislatures simply have not spoken to the legality of surrogacy agreements.<sup>5</sup> Courts have addressed whether such

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1. See Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 393 (2012) (explaining some of the modern controversies surrounding surrogacy).

2. Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 486 (2011) (“[The] District of Columbia, Indiana, Michigan, Nebraska, and North Dakota, have statutes that prohibit surrogacy contracts.”). See also Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187, 1191 (2013) (listing the number of states that banned surrogacy after *Baby M*).

3. See Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 232–33 (2012) (discussing different state limits in permitting surrogacy).

4. See *id.* at 233 (describing how some states enforce surrogacy agreements only if the intended parents are a married heterosexual couple, while other states only enforce gestational surrogacy agreements). See also Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, If Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 807 (2012) (explaining that Florida, Nebraska, Nevada, New Hampshire, New Mexico, and Washington ban any compensation outside of reasonable living costs, which include medical, legal, and mental health expenses).

5. See SaraAnn C. Bennett, Comment, “*There’s No Wrong Way to Make A Family*”: *Surrogacy Law and Pennsylvania’s Need for Legislative Intervention*, 118 PENN ST. L. REV. 407, 413–14 (2013) (stating that only 18 legislatures have enacted statutes that address surrogacy arrangements, and have done so in three different ways: prohibition, inaction, and status regulation).

contracts are enforceable in individual instances, either as a matter of public policy<sup>6</sup> or, perhaps, because of a claimed breach of contract.<sup>7</sup>

Two of the most well-known surrogacy cases<sup>8</sup> are *In re Baby M*<sup>9</sup> and *Johnson v. Calvert*.<sup>10</sup> The former struck down a traditional surrogacy<sup>11</sup> agreement while the latter upheld a gestational surrogacy<sup>12</sup> agreement.<sup>13</sup> Together, these two holdings suggest a possible compromise, which has been endorsed by various commentators.<sup>14</sup> Although courts might adopt the position that gestational agreements—but not traditional surrogacy agreements—are enforceable,<sup>15</sup> this is not the only possible view.<sup>16</sup> Some

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6. See, e.g., *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (invalidating a surrogacy contract because it conflicts with state law and public policy).

7. Cf. *J.F. v. D.B.*, 879 N.E.2d 740, 742 (Ohio 2007) (suggesting that there may be support for a breach of contract claim in gestational surrogacy contract cases).

8. See Valarie K. Blake, *Ovaries, Testicles, and Uteruses, Oh My! Regulating Reproductive Tissue Transplants*, 19 WM. & MARY J. WOMEN & L. 353, 388–89 (2013).

9. 537 A.2d 1227 (N.J. 1988).

10. 851 P.2d 776 (Cal. 1993).

11. See Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2253 (2012) (describing traditional surrogacy as a procedure where sperm is used to artificially fertilize the birth mother's own ovum).

12. See Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT'L & COMP. L. 545, 550–51 (2013) (describing the process of gestational surrogacy, where an embryo is created through in vitro fertilization—meaning the sperm and the egg are combined outside of the surrogate's body—and is then transferred to the surrogate's womb).

13. See Jami L. Zehr, Student Article, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant?*, 20 LOY. CONSUMER L. REV. 294, 304–06 (2008) (comparing *In re Baby M*, holding that the traditional surrogacy contracts are illegal, with *Johnson v. Calvert*, upholding a gestational surrogacy contract since it could be used to determine the intent of the parties).

14. See Arshagouni, *supra* note 4, at 844 (taking the opinion that a gestational surrogate provides a valuable service to the intended parents of the child); Carroll, *supra* note 2, at 1192 (describing how the last decade has brought forth more American acceptance of surrogacy and other different forms of assisted reproductive technologies); Michelle Elizabeth Holland, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 1, 19 (2013) (“[T]he state's interest in preventing baby brokering is actually supported by legalizing gestational surrogacy agreements.”); Chelsea Van Wormer, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 929 (2012) (stating that Michigan should enact new legislation validating gestational surrogacy contracts); see also Radhika Rao, *Hierarchies of Discrimination in Baby Making? A Response to Professor Carroll*, 88 IND. L.J. 1217, 1218–19 (2013) (noting that the Uniform Parentage Act recommends that gestational surrogacy contracts be deemed enforceable and effective to transfer parental rights, but does nothing to clarify the legal status of traditional surrogacy).

15. See *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007) (holding that no public policy is violated when a gestational surrogacy contract is entered into); see also *id.* at 742 (stating that a gestational surrogate may have a different legal position from a traditional surrogate).

16. See *In re Baby*, No. M2012–01040–COA–R3–JV, 2013 WL 245039 (Tenn. Ct. App. Jan. 22, 2013) (holding a traditional surrogacy agreement enforceable), *appeal docketed*, 2013 Tenn. App. LEXIS 470 (May 7, 2013).

recent court decisions have adopted a different tack,<sup>17</sup> and the implications of these decisions merit closer examination.

Part II of this Article traces the development of the jurisprudence regarding the enforcement of surrogacy agreements, noting how there seemed to be a consensus within the parameters set by state law.<sup>18</sup> Part III addresses a few recent decisions in which traditional surrogacy contracts were enforced, in whole or in part.<sup>19</sup> This Article concludes by noting some of the counterintuitive implications of these latter decisions and explaining how some of these undesirable effects might be avoided.<sup>20</sup>

## II. THE EVOLVING JURISPRUDENCE REGARDING THE ENFORCEABILITY OF SURROGACY CONTRACTS

Over the past several decades, several courts have addressed the enforceability of surrogacy contracts.<sup>21</sup> Many seemed to follow the lead provided by *Baby M* and *Johnson*, namely, enforcing gestational but not traditional surrogacy agreements.<sup>22</sup> While these courts did not explicitly adopt this position, the reasoning and results in these cases seemed to reflect that view.<sup>23</sup>

### A. Background

There are two types of surrogacy: traditional and gestational.<sup>24</sup> Traditional surrogacy involves a woman who is artificially inseminated with a donor's or the commissioning father's sperm.<sup>25</sup> Gestational surrogacy involves a procedure whereby embryos are created in vitro and are later implanted within a surrogate's uterus.<sup>26</sup> Those embryos may have

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17. See, e.g., *id.* (holding a traditional surrogacy agreement as enforceable).

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part II.B–C.

22. See *infra* Part II.C.

23. See *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011) (holding a gestational surrogacy agreement enforceable); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998) (holding a traditional surrogacy agreement unenforceable); *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007) (holding a gestational surrogacy agreement enforceable).

24. Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y 895, 897 (2011).

25. See Mortazavi, *supra* note 11.

26. See *id.*

been created using the gametes of the commissioning couple or, instead, may have been created using donor eggs or sperm.<sup>27</sup>

Various costs and benefits are associated with these two forms of surrogacy. While traditional surrogacy is less expensive and less medically complicated than gestational surrogacy,<sup>28</sup> the traditional surrogate may be more likely to bond with the child she is carrying because she and the child are genetically related.<sup>29</sup> Further, after birth, the child may look like the surrogate's other children, which might make surrender of the child much more difficult.<sup>30</sup> In contrast, the gestational surrogate does not have a genetic connection to the child she is carrying, which will likely decrease the probability that she will bond with the child during the pregnancy.<sup>31</sup> Additionally, after birth, surrender may be less difficult if the child does not look like the surrogate's other children,<sup>32</sup> which will make matters go more smoothly and which may help avoid future litigation.<sup>33</sup> For these reasons, among others, gestational surrogacy is both more common<sup>34</sup> and more accepted than traditional surrogacy.<sup>35</sup>

At least one factor influencing whether or which kind of surrogacy is used is the degree to which the surrogacy agreement is enforceable.<sup>36</sup> State

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27. Bennett, *supra* note 5, at 412.

28. See Alyssa James, Note, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 179 (2013) (describing gestational surrogacy as a process that involves significant medical procedures and expense). See also Rao, *supra* note 14, at 1221 (discussing the cheaper and less invasive low-tech procedure of artificial insemination).

29. See Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 610 (2003) (explaining how the biological connection between a surrogate mother and the child can create a bond between them).

30. See *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988) (referencing a situation where the surrogate mother became upset upon seeing the baby and believing they shared a physical resemblance).

31. See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109, 141 (describing how a gestational surrogate is less likely to form a bond with the child because of the lack of a genetic connection).

32. Cf. *supra* note 31 and accompanying text.

33. Cf. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 308 (2013) (citing the fact that U.S. medical practitioners endorse a preference for gestational surrogacy because it is a legally safer practice).

34. See June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?* 79 UMKC L. REV. 333, 337 (2010) (explaining that gestational surrogacy quickly replaced traditional surrogacy); Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 363 (2011) (stating that gestational surrogacies account for 95% of surrogacy arrangements in the United States).

35. Cf. Carroll, *supra* note 2, at 1191 (describing how gestational surrogate mothers are less offended by the arrangement because they have no genetic connection to the child).

36. See Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 MICH. ST. INT'L. L. REV. 259, 275 (2012) (describing

courts differ about the conditions under which such agreements are void because it violates an important public policy; no one view has gained general acceptance.<sup>37</sup>

### B. Baby M

*In re Baby M*<sup>38</sup> was one of the first challenges to a surrogacy agreement that was decided by a state supreme court.<sup>39</sup> The New Jersey Supreme Court found that the surrogacy contract was void,<sup>40</sup> although it upheld the custody award to the biological father.<sup>41</sup>

William Stern was married to Elizabeth Stern, who had learned that she might have multiple sclerosis and that her carrying a child to term might pose significant health risks.<sup>42</sup> William Stern and Mary Beth Whitehead entered into a contract providing that “through artificial insemination using Mr. Stern’s sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child.”<sup>43</sup> Mary Beth Whitehead was married to Richard Whitehead, who was also a party to the contract, and Richard Whitehead promised to do all he could to rebut the presumption of paternity.<sup>44</sup>

Mary Beth Whitehead’s (“Whitehead”) pregnancy was uneventful, and she gave birth to a little girl.<sup>45</sup> Whitehead had bonded with the child during pregnancy, however, and decided that she could not part with the child.<sup>46</sup> That Whitehead might have difficulty parting with the child had been foreseen prior to insemination by a psychologist, although the Sterns had not been informed about that possible difficulty.<sup>47</sup>

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how some countries and states have laws restricting the types of surrogacy agreements that will be enforceable in that jurisdiction).

37. Compare *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (invalidating a surrogacy contract because it conflicts with the law and public policy of the state of New Jersey), with *In re F.T.R.*, 833 N.W.2d 634, 649–50 (Wis. 2013) (holding that the interests supporting enforcement are more compelling than the interests against enforcement of surrogacy agreements).

38. 537 A.2d 1227 (N.J. 1988).

39. See Keith J. Hey, *Assisted Conception and Surrogacy-Unfinished Business*, 26 J. MARSHALL L. REV. 775, 787–89 (1993) (discussing a number of cases heard during the 1980s wherein state appellate courts avoided directly ruling on the validity of surrogacy contracts).

40. *Baby M*, 537 A.2d at 1234.

41. *Id.*

42. *Id.* at 1235.

43. *Id.*

44. *Id.*

45. *Id.* at 1236.

46. *Id.* at 1236–37.

47. *Id.* at 1247–48.

Whitehead turned the child over to the Sterns, but was unable to eat or sleep after doing so.<sup>48</sup> She went to the Sterns and explained that she was disconsolate—if Whitehead could have the child for a week, then she would be able to surrender the child.<sup>49</sup> The Sterns permitted Whitehead to have the child for a week.<sup>50</sup>

Rather than return the child once the week had passed, Whitehead fled the state.<sup>51</sup> Eventually, the Sterns located her and were able to have Baby M returned to New Jersey.<sup>52</sup> The Sterns then filed to have custody of Baby M, to have Whitehead's parental rights terminated, and to have Mrs. Stern adopt Baby M.<sup>53</sup>

The trial court upheld the validity of the surrogacy contract, but also found that Stern should be awarded custody of the child using a best interests analysis.<sup>54</sup> The New Jersey Supreme Court affirmed the trial court's best interests analysis and conclusion, but rejected the validity of the contract.<sup>55</sup> The New Jersey Supreme Court likened the surrogacy contract to baby-selling.<sup>56</sup>

The New Jersey high court articulated several of its concerns about surrogacy, which included the concern that the biological parents are deciding who would have custody of the child without considering which parent would best promote the interests of the child.<sup>57</sup> While the court's point is true, it is misleading. In this case, the child would never have come into existence but for the agreement that the Sterns would raise her.<sup>58</sup> It is thus surprising to suggest that the parents who commissioned the contract

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48. *Id.* at 1236.

49. *Id.* at 1236–37.

50. *Id.* at 1237.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.* at 1237–38 (describing that the court found that it was in the best interests of the child to return it to the mother and father).

55. *Id.* at 1238.

56. *See id.* at 1241, 1242 (describing the surrogacy arrangement as a private placement adoption for money, and referring to surrogacy arrangements as “baby selling” and “baby-buying”).

57. *Id.* at 1246 (holding that the surrogacy contract's basic premise bears no relationship to the settled law that custody shall be determined by the child's best interests).

58. *See* Louis Michael Seidman, *Baby M and the Problem of Unstable Preferences*, 76 GEO. L.J. 1829, 1832 (1988) (stating that a child born as a result of a surrogacy contract is substantially distinguishable from the child of divorced parents or adopted children because the contract is the “but for” cause of the child's existence).

were ignoring the child's best interests, as if it might have been better for the child never to exist than to have been raised by the Sterns.<sup>59</sup>

The court also worried that surrogacy was contrary to state public policy, in that it was intended to produce a child who would not be living with both biological parents.<sup>60</sup> Here, too, the court's point is misleading. Many couples have children anticipating that they will raise the child together; further, should the parents' relationship end, the state seeks to assure that each parent will continue to play a role in the child's life.<sup>61</sup> In a surrogacy arrangement, the commissioning couple envisions raising the child together, and in some cases, it might be confusing and harmful if the child continues to have contact with the surrogate.<sup>62</sup>

The *Baby M* court reasoned that the "surrogacy contract violates the policy of this State[, which is] that the rights of natural parents are equal concerning their child, the father's right no greater than the mother's."<sup>63</sup> Yet, merely because the rights of only one parent are terminated hardly establishes that the rights of the two parents are not being treated equally (depending upon the basis of the termination).

In the surrogacy context, the surrogate's parental rights are being terminated because of the agreement rather than because the father's rights are of greater value.<sup>64</sup> Certainly, there will be times when a court should refuse to enforce a promise to surrender parental rights as a matter of public policy,<sup>65</sup> but the New Jersey high court did a disservice when implying that a parent having his or her parental rights terminated must mean that the other parent's rights are being weighed more heavily.

The *Baby M* court worried that the surrogate would not be making an informed and voluntary decision since she is agreeing to give up the child

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59. See *id.* (arguing that enforcement of a surrogacy contract maximizes social welfare because the potential psychological harm to the mother outweighs the harm associated with the child's nonexistence).

60. *In re Baby M*, 537 A.2d 1227, 1246–47 (N.J. 1988) (holding that the public policy of New Jersey is that whenever it is possible, children should be in the custody and care of both of their natural parents).

61. See Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1132 (1978) (discussing how the state seeks to maintain the relationship between the child and custodial parent even when the relationship between the parents has ended).

62. See *In re F.T.R.*, 833 N.W.2d 634, 640 (Wis. 2013) (discussing how expert witnesses have stated that it can be harmful for children to have contact with the surrogate that gave birth to them).

63. *In re Baby M*, 537 A.2d at 1247.

64. Cf. *J.F. v. D.B.*, 879 N.E. 2d 740, 741–42 (Ohio 2007) (holding that the the parental rights of the surrogate can be terminated via a contract).

65. See, e.g., *Matos v. Matos*, 932 So.2d 316, 320 (Fla. Dist. Ct. App. 2006) (explaining that an agreement can be modified by a court if it was made via fraud, deceit, duress, coercion, misrepresentation, or overreaching).

before knowing the strength of her bond with that child.<sup>66</sup> This is exactly the wrong test to use. Imagine the possible effects on a child's self-esteem when he is told that his surrogate mother gave him up after having had ample time to assess the strength of her bond with him.<sup>67</sup>

The court described surrogacy as involving "the sale of a child, or, at the very least, the sale of a mother's right to her child,"<sup>68</sup> stating that this kind of arrangement implicates "[a]lmost every evil that prompted the prohibition on the payment of money in connection with adoptions."<sup>69</sup> Yet, this, too, is inaccurate.<sup>70</sup> Surrogacy does not involve an individual who unwillingly became pregnant and is now pressured to act because she is poor and unable to take care of the child herself.<sup>71</sup> Instead, in a surrogacy arrangement, the pregnancy is planned and the agreement to surrender parental rights was made before the onset of the pregnancy.<sup>72</sup> Further, in many cases, the child is being given to the child's biological father rather than to some stranger who simply bought the child.

The *Baby M* court understood that there would be few, if any, surrogacy agreements if commercial surrogacy agreements were unenforceable because it is against public policy, but seemed to believe that society would be better off without surrogacy entirely.<sup>73</sup> In another surrogacy decision analyzing the enforceability of a gestational surrogacy

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66. *Baby M*, 537 A.2d at 1248.

67. Cf. Linda Carroll, *New Study Tracks Emotional Health of 'Surrogate Kids'*, TODAY (June 19, 2013, 4:46 AM), <http://www.today.com/health/new-study-tracks-emotional-health-surrogate-kids-6C10366818> (discussing an academic study that suggests that children may struggle with the fact that they grew in an unrelated woman's womb).

68. *Baby M*, 537 A.2d at 1248.

69. *Id.*

70. See, e.g., *In re F.T.R.*, 833 N.W. 2d 634, 646 (Wis. 2013) (explaining that making certain payments to a surrogate may not necessarily implicate the "undue influence" concerns behind Wisconsin's statutory prohibitions on adoptive parents making certain payments to the birth mother).

71. See, e.g., Angie Godwin McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 294 (1999) (noting that the parties involved in the *Baby M* case were not poor, had modest incomes, and a high level of education). It is true that the *Baby M* court mentioned income disparity. See *Baby M*, 537 A.2d at 1249 ("Intimated, but disputed, is the assertion that surrogacy will be used for the benefit of the rich at the expense of the poor."). The court admitted, however, that the parties in this case do not fit this description. See *id.*

72. See Joanna K. Budde, Comment, *Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies*, 26 DUQ. L. REV. 633, 640 (1988) (stating that a key part of a surrogacy agreement is the relinquishment of parental rights before the birth of the child).

73. See *Baby M*, 537 A.2d at 1248, 1250 (acknowledging that making commercial surrogacy contracts unenforceable will likely lead to the elimination of the practice, and that the harm that derives from surrogacy is obvious).

contract, the California Supreme Court rejected the theory that surrogacy, as a general matter, is contrary to public policy.<sup>74</sup>

### C. *Johnson and Progeny*

In *Johnson v. Calvert*, the California Supreme Court addressed the enforceability of a gestational surrogacy agreement. Mark and Crispina Calvert were a married couple wishing to have a child.<sup>75</sup> Crispina had undergone a hysterectomy, and although she could produce eggs, she could not sustain a pregnancy.<sup>76</sup>

Anna Johnson heard about their plight and offered to act as a surrogate.<sup>77</sup> Johnson and the Calverts entered into a surrogacy contract, whereby Anna agreed to act as a gestational surrogate for the embryos created using the Calverts' gametes and would surrender any rights that she had upon the birth of the child she was carrying.<sup>78</sup> During the pregnancy, however, relations between Ms. Johnson and the Calverts cooled considerably.<sup>79</sup>

Both Cristina and Anna claimed to be the mother of the child—Crispina, because of her genetic connection to the child, and Anna, because she carried the child to term.<sup>80</sup> The California Supreme Court explained that because each party had presented acceptable proof of maternity, it was necessary to consider the intentions of the parties to determine who was the child's legal mother.<sup>81</sup> Reasoning that the pregnancy would never have taken place but for Anna's agreement that Crispina would be the child's mother, the court concluded that where each of the two women can claim maternity either by having gestated the child or by having a genetic link to the child, then "she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."<sup>82</sup>

Johnson offered some of the arguments that had won the day in *Baby M*, including the argument that surrogacy should be likened to baby-

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74. See *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993) (holding that surrogacy contracts are not a violation of public policy and thus are not unenforceable on public policy grounds).

75. *Id.* at 778.

76. See *id.* (discussing how Crispina had a hysterectomy and thereby could not get pregnant).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 781.

81. See *id.* at 781–82 (stating that California law does not recognize more than one mother, and as a result, in order to determine custody, it is necessary to look at the intention of the parties when forming the surrogacy contract).

82. See *id.* at 782.

selling,<sup>83</sup> and that the surrogacy contract required her to waive rights before she knew the strength of her bond with the child.<sup>84</sup> The California Supreme Court rejected the idea, however, that surrogacy was appropriately likened to adoption for pay, reasoning that because the agreement had been made prior to conception, the mother was not being lured by money to give up her own child.<sup>85</sup> Unlike the *Baby M* court, which feared that surrogacy would likely exploit the poor, the *Johnson* court thought the economic duress implicated here was likely no more destructive than economic duress more generally.<sup>86</sup>

The *Johnson* court upheld a gestational surrogacy agreement where the gametes had been provided by the commissioning couple.<sup>87</sup> Such a holding does not entail that a traditional surrogacy agreement is also enforceable, and a California appellate court addressed the enforceability of traditional surrogacy contracts the year after *Johnson* was handed down.<sup>88</sup>

*In re Marriage of Moschetta*<sup>89</sup> involved Robert and Cynthia Moschetta, who contracted with Elvira Jordan (“Jordan”) to perform a traditional surrogacy.<sup>90</sup> In November 1989, Jordan became pregnant through artificial insemination.<sup>91</sup> The Moschetts’ marriage began to break down a few months later, however, and Robert told his wife in April that he wanted a divorce.<sup>92</sup> Jordan was informed about the Moschetts’ marital difficulties in May while she was in labor, and she delivered the child, Marissa, the following day.<sup>93</sup>

Jordan began to have second thoughts about letting the Moschetts have Marissa, but then relented when they said that they would stay together.<sup>94</sup> Unfortunately, the marriage did not last.<sup>95</sup> Cynthia filed for a

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83. *See id.* at 783–84 (arguing that surrogacy contracts are unenforceable on the grounds of public policy, specifically citing Penal Code section 273, which prohibits payment for adoption of a child).

84. *Id.* at 784.

85. *See id.* (holding that because the voluntary arrangement was made before pregnancy, the surrogate was not in a vulnerable state when she entered into the contract).

86. *Compare In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988) (stating that it is far more likely for potential surrogates to be amongst the poor than the wealthy), *with Johnson*, 851 P.2d at 785 (stating that there is no evidence to support the assertion that low-income women are exploited by surrogacy arrangements).

87. *Id.* at 778, 782 (discussing the details of the surrogacy agreement and ultimately upholding the agreement).

88. *See In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 901 (Cal. Ct. App. 1994) (holding that traditional surrogacy agreements are unenforceable).

89. *Moschetta*, 30 Cal. Rptr. 2d 893.

90. *Id.* at 895.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

legal separation and sought to establish her parental relationship as a de facto parent, while Jordan sought to join the dissolution action.<sup>96</sup>

The court trifurcated the trial: (1) to decide the parental rights of Cynthia and Jordan; (2) to decide custody and visitation; and (3) to decide the dissolution of the marriage with respect to matters not involving Marissa.<sup>97</sup> The court found that Robert and Jordan had parental rights, and that each should have joint legal and physical custody.<sup>98</sup> Robert appealed, challenging the finding that Jordan was the mother, instead claiming that Cynthia was Marissa's mother under the Uniform Parentage Act.<sup>99</sup> Robert also argued that the surrogacy contract was enforceable.<sup>100</sup>

The court noted that Cynthia had not sought to adopt Marissa, and indeed, had filed a brief in support of the judgment below (i.e., in support of Jordan being declared the mother).<sup>101</sup> The court concluded that Jordan was the child's mother and that the surrogacy contract could not be enforced against her, although the court remanded the case for a reexamination of the custody award.<sup>102</sup>

While both the *Moschetta* and the *Baby M* courts found that the surrogacy agreement was unenforceable against the traditional surrogate,<sup>103</sup> the holdings of each case are nonetheless distinguishable.<sup>104</sup> *Moschetta* suggests that such agreements are voidable at the surrogate's option, and the agreement cannot be enforced against her.<sup>105</sup> On the other hand, *Baby M* suggests that such agreements are void and unenforceable as a general matter.<sup>106</sup> This difference is important in other kinds of surrogacy cases where the surrogate wishes to enforce the contract against the

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95. See *id.* (stating that within seven months of bringing Marissa home, Robert left, taking the child with him).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 895–96.

102. *Id.* at 901–02.

103. See *Moschetta*, 30 Cal. Rptr. 2d at 901 (declining to enforce the traditional surrogacy contract); *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988) (holding the entire contract unenforceable).

104. Compare *Baby M*, 537 A.2d at 1240 (suggesting that such agreements are voidable at the surrogate's option), with *Moschetta*, 30 Cal. Rptr. 2d at 901 (suggesting that such agreements are void and unenforceable as a general matter).

105. See *Moschetta*, 30 Cal. Rptr. 2d at 900–01 (explaining that a contract giving rise to a “traditional” surrogacy arrangement where a surrogate was simply inseminated with the husband's sperm could not be enforced against the surrogate by the intended father).

106. See *Baby M*, 537 A.2d at 1238 (stating that the contract is “void”).

commissioning couple.<sup>107</sup> Perhaps the commissioning couple did not pay all that was promised,<sup>108</sup> or perhaps the couple did not want the child after all because the child had severe abnormalities.<sup>109</sup>

California jurisprudence developed surrogacy case law further in *In re Marriage of Buzzanca*, which involved a gestational surrogacy arrangement where donor gametes were used for the commissioning couple.<sup>110</sup> The couple separated after the surrogate became pregnant.<sup>111</sup> Luanne Buzzanca claimed to be the child's mother, but John Buzzanca argued that he was not the child's father.<sup>112</sup>

The trial court agreed with John, concluding that the child had no legal parents.<sup>113</sup> The court stated that the surrogate who gave birth to the child was not the legal mother, and "the genetic contributors [we]re not known to the court."<sup>114</sup> Luanne was not the mother because she was not genetically related to the child and had not carried the child to term, and John was not the father because he had not contributed sperm to help create the child and so had no biological relationship to the child.<sup>115</sup> The appellate court was incredulous, describing the trial court's conclusion as "extraordinary."<sup>116</sup> Perhaps in anticipation of the court's reaction to the holding that Jaycee had no legal parents, John argued that the woman who gave birth to Jaycee was her legal parent.<sup>117</sup>

John claimed support for his position by citing *Johnson*, where the California Supreme Court had used the intentions of the parties as a tiebreaker for determining legal maternity when only one of the contenders was genetically related to the child, and the other was the woman who

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107. See Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303 (2007) (discussing the state differences between surrogacy law and contracts).

108. See Steven L. Miller, Comment, *Surrogate Parenthood and Adoption Statutes: Can a Square Peg Fit into a Round Hole?*, 22 FAM. L.Q. 199, 210 (1988) (stating that if the couple breaches their contract by failing to pay the surrogate, then the surrogate may sue the couple for both the price of the contract, and expenses and the service fee).

109. See William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 139 n.620 (1990) (noting the parties each refused to accept custody of the child because the infant suffered from microcephaly).

110. 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

111. *Id.*

112. See *id.* (noting that while Luanne claimed to be the mother, in John's petition for dissolution of marriage, he alleged that there were no children of the marriage).

113. See *Buzzanca*, 72 Cal. Rptr. 2d at 282.

114. *Id.* at 282, 284.

115. *Id.* at 282.

116. *Id.*

117. See *id.* at 288 (discussing John's argument that the court should declare the surrogate as the lawful mother).

delivered the child.<sup>118</sup> In response, the *Buzzanca* court reasoned that the California Supreme Court had said that maternity may be established by showing genetic connection or that the woman had delivered the child,<sup>119</sup> but had not said that those were the only ways to establish maternity.<sup>120</sup> Ultimately, the *Buzzanca* court rejected John's argument: Luanne should not be considered Jaycee's mother, analogizing Luanne to the husband who consents to artificial insemination and then is held legally responsible for the child thereby produced.<sup>121</sup>

If a husband who consents to artificial insemination under section 7613 is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and [the] subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them.<sup>122</sup>

Artificial insemination is dis-analogous to gestational surrogacy (where donated gametes are used) in that one of the spouses has a genetic connection to the child in the former,<sup>123</sup> and neither spouse has any genetic connection to the child in the latter.<sup>124</sup> The court viewed Luanne's lack of gestational or genetic role as "irrelevant" because the artificial insemination "statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father's (as well as the mother's) consent to a medical procedure."<sup>125</sup>

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118. *Id.* at 284–85. *See also Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding that where the Act recognizes two different women as a possible legal mother, the court will look to the intention to raise the child as her own to determine legal maternity).

119. *See Buzzanca*, 72 Cal. Rept. 2d at 284 (noting that the court in *Johnson* held that genetic consanguinity was proof of maternity, just like evidence of giving birth).

120. *See id.* (explaining that the *Johnson* court did not say that only proof of birth or genetics would be sufficient to establish maternity).

121. *See id.* at 288 (explaining that Luanne's motherhood may be established by virtue of the consent, like a husband in an artificial insemination case whose consent triggers the pregnancy and eventual birth; therefore she is the legal mother).

122. *Id.* at 286.

123. *See id.* at 285 (noting that in artificial insemination, the wife may be inseminated artificially with semen donated by another man that is not her husband).

124. *See id.* at 282 (stating that in this case, the child had no genetic connection to either spouse).

125. *Id.* at 288.

*Moschetta* might seem to preclude a holding that Luanne was the mother—the *Moschetta* court had suggested that Cynthia could not be the mother of the child born to Jordan because Cynthia was not genetically related to the child and had not delivered the child.<sup>126</sup> The *Buzzanca* court distinguished that case, however, by noting that “[i]n *Moschetta*, this court held that a contract giving rise to a ‘traditional’ surrogacy arrangement where a surrogate was simply inseminated with the husband’s sperm could not be enforced against the surrogate by the intended father.”<sup>127</sup> In contrast, here, there was a gestational rather than a traditional surrogacy.<sup>128</sup> Further, neither the woman who had donated the egg nor the woman who had delivered the child was seeking custody.<sup>129</sup>

*Baby M*, *Johnson*, *Moschetta*, and *Buzzanca* taken together suggest that while gestational surrogacy agreements may be enforceable, traditional surrogacy agreements will not be enforceable against the surrogate.<sup>130</sup> That analysis is given further support in *R.R. v. M.H.*,<sup>131</sup> which involved an attempt to enforce a traditional surrogacy agreement.<sup>132</sup> The biological father and his wife created a traditional surrogacy contract with the surrogate.<sup>133</sup> Pursuant to an agreement, a child was conceived via artificial insemination.<sup>134</sup> During the sixth month of pregnancy and after having received partial payment, the biological mother changed her mind about parting with the child.<sup>135</sup>

Unlike what had occurred in *Baby M*,<sup>136</sup> the biological mother in *R.R.* had been psychologically evaluated, and the psychologist thought it was

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126. Cf. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d, 893, 900 (Cal. Ct. App. 1994) (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)) (holding that parentage is easily resolved in *Elvira Jordan* because the surrogate had the two usual means of showing maternity—genetics and birth).

127. *Buzzanca*, 72 Cal. Rptr. 2d at 288.

128. See *id.* at 291 (noting that this was a “gestational surrogacy case”).

129. *Id.* at 290.

130. See *id.* at 293 (enforcing a gestational surrogacy contract against the divorcing husband who denied being baby’s father); *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (upholding a gestational surrogacy agreement where the gametes had been provided by the commissioning couple); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 901 (Cal. Ct. App. 1994) (holding that the surrogacy agreement was unenforceable against the traditional surrogate); *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (holding the traditional surrogacy agreement to be unenforceable).

131. *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998) (holding that the surrogacy agreement between the father and surrogate mother was unenforceable).

132. See *id.* at 791 (summarizing that in this case, a child was conceived through artificial insemination based on a surrogate parenting agreement, providing that the father would have custody and the surrogate would receive funds).

133. See *id.* (noting that both the mother and the father were married to others and had executed a surrogate parenting agreement).

134. *Id.*

135. *Id.*

136. See *In re Baby M*, 537 A.2d 1227, 1247–48 (N.J. 1988) (noting that psychological evaluation of the surrogate indicated that she might have difficulty surrendering the child).

unlikely that the biological mother would have difficulty in surrendering the child.<sup>137</sup> Once the mother decided to keep the child, she returned a check for \$3,500 to the father,<sup>138</sup> although she did not return the other money that the father had previously sent to her for pregnancy related costs.<sup>139</sup> Notwithstanding the contractual specification that Rhode Island law would govern<sup>140</sup> (which was where the father lived<sup>141</sup>), the Supreme Judicial Court of Massachusetts decided the case in light of Massachusetts law.<sup>142</sup> The court found that the agreement was unenforceable<sup>143</sup> because the couple used money to coerce the surrogate into the contract.<sup>144</sup>

*J.F. v. D.B.* involved a gestational surrogacy agreement where embryos created from the donor's eggs and J.F.'s sperm were implanted in D.B., eventually resulting in the birth of triplets.<sup>145</sup> J.F. and D.B. then had a custody dispute, and J.F. sued D.B. for breach of contract.<sup>146</sup> The trial court found that the surrogacy agreement was unenforceable because it required D.B. to surrender parental rights, and because it allowed J.F. to recoup any child support payments that he was ordered to make.<sup>147</sup> The intermediate court reversed,<sup>148</sup> and the Ohio Supreme Court affirmed the intermediate appellate decision.<sup>149</sup> The court explained that "[a] written contract defining the rights and obligations of the parties seems an appropriate way to enter into surrogacy agreement. If the parties understand their contract rights, requiring them to honor the contract they entered into is manifestly right and just."<sup>150</sup>

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137. *R.R.*, 689 N.E.2d at 792.

138. *See id.* at 793 (explaining that in May, the father's lawyer sent the surrogate a check and that the surrogate responded by saying she had changed her mind and wanted to keep the child, and returned the check in June).

139. *See id.* (noting that while the mother returned one check, she made no attempt to refund any pregnancy-related expenses).

140. *Id.* at 792.

141. *Id.* at 791.

142. *See id.* at 795 (noting that the court used the law of Massachusetts because it was where the mother is a resident and where the child was conceived and born).

143. *See id.* at 796 (holding that statutory prohibitions of paid adoption suggest that a contract for payment in exchange for custody should be given no effect in deciding the custody of the child).

144. *See id.* (explaining that the agreement was void because the surrogate was induced with money).

145. 879 N.E.2d 740, 740 (Ohio 2007).

146. *Id.*

147. *Id.*

148. *Id.* at 740–41.

149. *Id.* at 742.

150. *Id.* at 741.

While upholding the enforceability of gestational surrogacy agreements, the Ohio Supreme Court expressly limited its decision.<sup>151</sup> The court stated that it would be “remiss” if it were to fail to mention that gestational surrogacy and traditional surrogacy implicate different legal issues.<sup>152</sup> Because the case at hand did not involve a traditional surrogate, the court did not address whether traditional surrogacy was against public policy.<sup>153</sup>

In *Raftopol v. Ramey*, the Connecticut Supreme Court also addressed the enforceability of gestational surrogacy agreements.<sup>154</sup> The plaintiffs, Anthony Raftopol and Shawn Hargon, were domestic partners who entered into a gestational surrogacy agreement with Karma Ramey.<sup>155</sup> Prior to the expected birth date of the twins, Raftopol and Hargon sought a declaratory judgment enforcing the agreement and declaring that they were the legal parents of the children, and that Ramey was not.<sup>156</sup> Following a hearing, the trial court found that: “(1) the gestational agreement is valid; (2) Raftopol is the genetic and legal father of the children; (3) Hargon is the legal father of the children; and (4) Ramey is not the genetic or legal mother of the children.”<sup>157</sup> The Department of Public Health appealed.<sup>158</sup>

The Connecticut Supreme Court explained that Connecticut “statutes and case law establish that a gestational carrier who bears no biological relationship to the child she has carried does not have parental rights with respect to that child.”<sup>159</sup> The court considered the argument that only genetic parents can acquire parental rights by virtue of a gestational agreement,<sup>160</sup> but noted that such a holding would lead to negative “consequence[s], which [are] . . . so absurd as to be Kafkaesque.”<sup>161</sup> The court described the “Kafkaesque” results if such arguments were valid:

Suppose [there is] an infertile couple who desire to have children but cannot supply the womb, the eggs, or the sperm . . . . These intended parents would need to rely on third party egg and sperm donors to produce embryos that

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151. See *id.* at 741–42 (noting in its holding that while not relevant to the case, a gestational surrogate not involving her own egg may be different from traditional surrogates).

152. *Id.* at 742.

153. *Id.*

154. 12 A.3d 783 (Conn. 2011).

155. *Id.* at 787.

156. *Id.*

157. *Id.* at 788.

158. *Id.* at 786.

159. *Id.* at 789.

160. *Id.* at 796.

161. *Id.* at 797.

are implanted in a gestational carrier pursuant to a gestational agreement. If § 7–48a confers parental status only on biological intended parents, the intended parents are not the parents of any resulting child, nor are the gestational carrier, any spouse she may have, the gamete donors, or any spouses each may have. Every possible parent to the child would be eliminated as a matter of law, yielding the result of a child who is born parentless, not due to the death of the parents, but simply due to elimination by operation of law.<sup>162</sup>

The *Raftopol* court nowhere noted that its imagined absurd hypothetical reflected the reasoning and result offered by the *Buzzanca* trial court.<sup>163</sup> Nor did it note that the *Buzzanca* intermediate appellate court had similarly believed that such a holding and result was simply “extraordinary.”<sup>164</sup>

Where permitted to do so by statute,<sup>165</sup> many courts have enforced gestational surrogacy contracts, sometimes reserving judgment about the enforceability of traditional surrogacy contracts.<sup>166</sup> That left the enforceability of traditional surrogacy agreements an open question, although that approach also suggested that these courts viewed the two types of surrogacy as dissimilar, and therefore subject to different legal treatment. Some recent decisions suggest, however, that the two kinds of surrogacy agreements will be treated much more similarly than had previously been thought.<sup>167</sup>

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162. *Id.*

163. *See generally id.* at 783.

164. *See generally id.*

165. Some statutes expressly preclude the enforcement of such agreements. *See id.* at 802 n.37 (“Ten states prohibit compensated gestational agreements, including Florida, Kansas, Kentucky, Louisiana, Nebraska, Nevada, New Hampshire, New Mexico, Virginia and Washington.”).

166. *See, e.g., J.F. v. D.B.*, 879 N.E.2d 740, 742 (Ohio 2007) (“[W]e would be remiss to leave unstated the obvious fact that a gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate, whose pregnancy does involve her own egg . . .”).

167. *See e.g., In re Baby*, No. M2012–01040–COA–R3–JV, 2013 WL 245039, (Tenn. Ct. App. Jan. 22, 2013) (affirming the validity of a traditional surrogacy agreement in which the surrogate gave up her parental rights), *appeal docketed*, 2013 Tenn. App. LEXIS 470 (May 7, 2013); *In re F.T.R.*, 833 N.W.2d 634, 638 (Wis. 2013) (holding that the traditional surrogacy agreement is valid aside from the termination of parental rights provision because that provision was prohibited by state law).

### III. A NEW TREND IN SURROGACY CONTRACT ENFORCEMENT?

Recently, one Minneapolis court enforced many of the provisions of a traditional surrogacy agreement without speaking to its validity,<sup>168</sup> while a Wisconsin court expressly enforced most, but not all, of such an agreement's provisions,<sup>169</sup> while still another court enforced such an agreement in its entirety.<sup>170</sup> It is difficult to tell whether these decisions reflect a new trend, but if so, states may have to clarify or rethink their approaches to a variety of family law issues.

#### A. A.L.S.

*A.L.S. ex rel. J.P. v. E.A.G.* involved the enforceability of a traditional surrogacy agreement between a surrogate and a gay couple that was made following the surrogate's advertisement for surrogacy services.<sup>171</sup> A child was born ("A.L.S."), who was released to the couple.<sup>172</sup> E.A.G., the surrogate, twice visited A.L.S. in the home of R.W.S. and B.C.F., consistent with the plan to have ongoing contact between her and the child.<sup>173</sup> Sometime after the second visit, however, E.A.G. had a change of heart and refused to voluntarily surrender her parental rights.<sup>174</sup> When she next visited, she tried to take A.L.S.<sup>175</sup> The police were called, and the police left the child with R.W.S. and B.C.F.<sup>176</sup>

R.W.S. and B.C.F. proposed an open adoption agreement, which would have included visitation arrangements for E.A.G.<sup>177</sup> E.A.G. refused, and later sued to establish R.W.S.'s paternity, alleging that A.L.S. was the product of coital relations.<sup>178</sup> E.A.G. sought sole custody and child support

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168. See *A.L.S. ex rel. J.P. v. E.A.G.*, No. A10-443, 2010 WL 4181449, at \*5 (Minn. Ct. App. Oct. 26, 2010) (unpublished opinion) (declining to address the validity of the surrogacy contracts not addressed by the trial court).

169. See *F.T.R.*, 833 N.W.2d at 638 (Wis. 2013) (holding that the Parentage Agreement is an enforceable contract, with the exception of the contract's termination of parental rights provisions, as long as the contract's enforcement is not contrary to the child's best interests).

170. See *In re Baby*, 2013 WL 245039, at \*5 (explaining that the best interests analysis does not apply if there is a valid surrogacy contract since the surrogate has given up her parental rights).

171. See *E.A.G.*, 2010 WL 4181449, at \*1.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

from R.W.S.<sup>179</sup> R.W.S. admitted paternity, sought sole legal and physical custody, standby custody for B.C.F., and child support from E.A.G.<sup>180</sup> In addition, R.W.S. sought to enforce the surrogacy agreement.<sup>181</sup>

There was a bench trial, and both the guardian ad litem and the custody evaluator recommended that the child's best interests would be served by according R.W.S. sole legal and physical custody.<sup>182</sup> The trial court held that E.A.G. was not the child's legal mother,<sup>183</sup> adjudicated B.C.F. as a legal parent of their daughter, A.L.S., and awarded sole legal and physical custody to B.C.F. and R.W.S.<sup>184</sup>

The Minnesota appellate court reversed the trial court's ruling that E.A.G. should be likened to an egg donor, instead finding that she was the child's biological and legal mother.<sup>185</sup> The court further overruled the designation of B.C.F. as one of the child's parents.<sup>186</sup> The court, however, upheld the trial court's award of sole physical and legal custody to R.W.S.<sup>187</sup> The appellate court noted that "while B.C.F. is and will continue to be an important person in the child's life, he is not a legal or biological parent of A.L.S. under Minnesota law and is not entitled to custody of the child on the facts of this case."<sup>188</sup> The Minnesota appellate court expressly refused to address the enforceability of the traditional surrogacy agreement.<sup>189</sup>

Several questions were left unanswered in this case, and there was no remand to clarify some of these issues.<sup>190</sup> The trial court had found that E.A.G. was not A.L.S.'s mother.<sup>191</sup> In addition, the court had expressed concern that it might be harmful to A.L.S. if E.A.G. were to have

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at \*2.

184. *Id.*

185. *See id.* at \*2-3 (disagreeing with the district court that E.A.G. falls under the definition of an egg donor, which would preclude her from being a biological or legal parent under the Parentage Act).

186. *See id.* at \*4 (concluding that B.C.F. is not A.L.S.'s biological father under the Parentage Act ("PA")).

187. *Id.* at \*7.

188. *Id.*

189. *See id.* at \*5 (concluding that the question of the contract's enforceability is not properly before this court).

190. *See id.* at \*9 (indicating that the disposition of the appeal did not include a remand).

191. *Id.* at \*2.

unsupervised visitation with the child, based on reports of E.A.G.'s conduct during supervised visitation while this matter was on appeal.<sup>192</sup>

At least one issue that would need to be resolved would be whether E.A.G.'s supervised visitation should continue and, if so, whether it should continue with the same limitations that the court had previously imposed.<sup>193</sup> E.A.G. suggested that the trial court had been biased against her, although the appellate court rejected that contention.<sup>194</sup> Assuming that the trial court's visitation order would continue, E.A.G. could eventually seek a modification if she could show a substantial change in circumstances,<sup>195</sup> although the trial court may not have envisioned its order as continuing indefinitely, given its finding that E.A.G. was not the child's legal parent.

R.W.S. had sought child support from E.A.G.,<sup>196</sup> which would not have been granted in light of the finding that E.A.G. was not A.L.S.'s legal parent. The appellate court reversed the trial court's holding regarding parental status,<sup>197</sup> however, which might make child support again an issue. Or, E.A.G. might be told that child support would become an issue if E.A.G. were to seek more contact with the child.<sup>198</sup> That said, the trial court had believed that E.A.G. was asserting her parental rights as a way to receive child support.<sup>199</sup>

R.W.S. had sought to have B.C.F. awarded "standby custody,"<sup>200</sup> presumably to assure that B.C.F. would have legal custody of A.L.S. should

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192. *See id.* at \*5–6 (describing E.A.G.'s financial motives and indications of mental and emotional instability as cause for concern for any unsupervised contact she may have with the child).

193. *See id.* (discussing E.A.G.'s behavior during supervised visits as a consideration used to make detailed findings regarding the statutory custody factors).

194. *See id.* at \*9 (finding that the court did not believe that the district court judge showed bias towards E.A.G.).

195. *See* MINN. STAT. § 518.18(d) (2013) ("[T]he court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child.").

196. *E.A.G.*, 2010 WL 4181449, at \*1.

197. *See id.* (reversing the district court's parentage determination).

198. Sometimes, parents seek more visitation time to reduce child support. *See* D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295, 335 (1995) ("[F]athers may demand sole or joint custody, or increased visitation, because they hope to lessen the amount of their child support."). Here, however, the threat that child support might be sought might deter E.A.G. from seeking more contact.

199. *See E.A.G.*, 2010 WL 4181449, at \*6 (citing the district court's observations, E.A.G. intended to receive child support in addition to keeping the money she was paid through the contract).

200. *Id.* at \*1.

anything happen to R.W.S. The Minnesota appellate court, however, denied that B.C.F. had parental status under Minnesota law.<sup>201</sup> If something were to happen to R.W.S., then E.A.G. would be the sole legal parent of A.L.S.<sup>202</sup> While B.C.F. might be able to seek visitation in that event,<sup>203</sup> it seems clear that the effect of the Minnesota appellate court decision posed potential difficulties for all concerned parties.

### B. F.T.R.

In *In re F.T.R.*, the Supreme Court of Wisconsin addressed the enforceability of a traditional surrogacy agreement between the Roseckys and the Schissels.<sup>204</sup> The agreement specified that Monica Schissel would be a traditional surrogate for the Roseckys.<sup>205</sup>

Marcia Rosecky was unable to have children because of leukemia treatments.<sup>206</sup> Knowing this, Monica offered to act as a surrogate for the Roseckys, an offer that the Roseckys eventually accepted.<sup>207</sup> The couples discussed using donor eggs, “but decided to use Monica’s egg because they could be sure of Monica’s family history, there was a higher chance of having multiples using a donor egg, and Monica preferred to use her own egg.”<sup>208</sup> When Marcia expressed her fear that Monica would have difficulty giving up a child to whom she was genetically related, Monica assured her that there would be no such difficulty.<sup>209</sup> The parties thoroughly discussed the ramifications of the surrogacy agreement.<sup>210</sup> Each couple retained counsel, and the terms of the agreement were negotiated.<sup>211</sup>

Monica became pregnant through artificial insemination, but shortly before the child’s birth, she informed the Roseckys that she was unwilling to surrender him.<sup>212</sup> When the child was born, Monica sought custody and

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201. *Id.* at \*4.

202. *See id.* at \*3, \*6 (ruling that E.A.G. and R.W.S. are A.L.S.’s only two legal parents, and that B.C.F. is not A.L.S.’s legal parent—thus, if something were to happen to R.W.S., A.L.S.’s only legal parent would be E.A.G.).

203. *See* MINN. STAT. § 257C.08 (Subd. 4.) (2013) (stating that if an unmarried minor who has lived with a person other than a foster parent for two years or more and no longer lives with that person, that person may petition for reasonable visitation rights for as long as the child is a minor).

204. *In re F.T.R.*, 833 N.W.2d 634, 637 (Wis. 2013).

205. *Id.*

206. *Id.* at 638.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 638–39.

212. *Id.* at 637–38.

placement of F.T.R.<sup>213</sup> David Rosecky sought enforcement of the Parentage Agreement (“PA”), where Monica had agreed to the termination of her parental rights.<sup>214</sup>

The trial court found that the PA was unenforceable, although it awarded sole custody and primary placement to David, with Monica receiving secondary placement.<sup>215</sup> David appealed.<sup>216</sup> The Wisconsin Supreme Court concluded that “[a]side from the termination of parental rights provisions in the PA at issue, . . . a PA is a valid, enforceable contract unless enforcement is contrary to the best interests of the child.”<sup>217</sup>

The circuit court held separate hearings to determine temporary custody and placement on the one hand, and the enforceability of the PA on the other.<sup>218</sup> At the former hearing, both the individual doing the custody evaluation and the guardian ad litem recommended that David be awarded custody, and that Monica should not have any placement.<sup>219</sup> The custody evaluator worried that awarding custody to Monica would be destructive because Monica wanted F.T.R. to view her, rather than Marcia, as his mother, which would be very confusing to him.<sup>220</sup> In addition, the couples were unable to work with each other since their relationship was “‘beyond high conflict’ even though the parties did not swear or yell at each other.”<sup>221</sup>

Both David and the guardian ad litem argued that surrogacy agreements were presumptively enforceable because that would help provide stability and predictability.<sup>222</sup> David also sought to estop the Schissels from contesting the agreement because the Schissels had said that there was no need to get donor eggs, and the Roseckys had relied on that statement to their detriment.<sup>223</sup>

Perhaps fearing that the Wisconsin Supreme Court would not enforce the surrogacy agreement, David also argued that it was not necessary to terminate Monica’s rights “to effectuate the parties’ overall intent[, which is] for the Roseckys to be the parents of F.T.R., with full custody and placement.”<sup>224</sup> With this, David suggested that even if the court were to

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213. *Id.* at 638.

214. *Id.* at 638–39.

215. *Id.* at 638.

216. *Id.*

217. *Id.*

218. *Id.* at 639.

219. *Id.* at 640.

220. *Id.*

221. *Id.* at 640–41.

222. *Id.* at 647.

223. *Id.*

224. *Id.*

find that the agreement to terminate parental rights was unenforceable, the termination of the parental rights provision of the agreement was severable, and the remainder of the agreement could be enforced.<sup>225</sup> The Wisconsin court accepted that analysis, concluding that “[a]side from the termination of parental rights provisions, . . . the PA is a valid, enforceable contract unless enforcement is contrary to the best interests of F.T.R.”<sup>226</sup>

The Wisconsin court reasoned that “the interests supporting enforcement of the PA are more compelling than the interests against enforcement.”<sup>227</sup> The court further explained that the policy behind enforcement of surrogacy agreements is that it “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.”<sup>228</sup>

Yet, this opinion also left some matters unsettled.<sup>229</sup> Monica’s parental rights were not terminated,<sup>230</sup> which presumably meant that she retained rights of visitation as long as that visitation would be beneficial<sup>231</sup> or, perhaps, not harmful<sup>232</sup> to the child. The Wisconsin Supreme Court, however, obviously did not envision Monica having robust rights of visitation.<sup>233</sup> The court noted disapprovingly that the “circuit court awarded primary custody and placement to David and secondary placement to Monica,” and remanded because “the circuit court erroneously exercised its discretion by excluding the PA, and [by] rendering its custody and placement decision without consideration of the PA.”<sup>234</sup> The court quoted language in the surrogacy agreement, which specified that that the Schissels would relinquish all parental and visitation rights, and that the Roseckys

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225. *Id.*

226. *Id.* at 648–49.

227. *Id.* at 649.

228. *Id.* at 650.

229. *See infra* notes 271–74 and accompanying text (discussing how the failure to terminate Monica’s parental rights presumably left her with visitation options that the Wisconsin Supreme Court had not intended).

230. *See F.T.R.*, 833 N.W.2d at 651 (noting the court’s reasoning that the portions of the PA calling for the termination of Monica’s parental rights were unenforceable under the existing statute).

231. *Id.* at 648 (citing the court’s reasoning that the PA is valid unless enforcement is not in the best interest of F.T.R.).

232. *See id.* (noting that Monica argued that Wis. STAT. § 767.41(4)(b) prevents a court from precluding placement with a parent only after a hearing and determination that placement with that parent would endanger the child’s health).

233. *See id.* at 652 (noting that the circuit court had erroneously failed to consider the PA when determining custody and placement of the child).

234. *Id.*

would be “sole legal parents.”<sup>235</sup> With the court’s holding though, Monica was still a legal parent,<sup>236</sup> so the question is what this status conferred.<sup>237</sup> At the very least, it meant that Marcia was not F.T.R.’s legal parent,<sup>238</sup> an unresolved issue, however, involved the conditions under which Monica would have visitation and how extensive that visitation might be.<sup>239</sup> Further, it is unclear what would happen if David Rosecky died and both Marcia and Monica sought custody.

The *F.T.R.* court suggested that the PA is enforceable “unless enforcement is contrary to the best interests of F.T.R.”<sup>240</sup> Would it be in F.T.R.’s best interests to visit with Monica? That might depend upon whether Monica would attempt to undermine the Roseckys’ ability to parent.<sup>241</sup> Regardless of how that was decided in this case, in subsequent cases, a commissioning couple would be on notice that visitation might be ordered if a judge thought that visitation would be in the child’s best interests. This possibility undermines the Wisconsin court’s contention that its holding “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.”<sup>242</sup>

Monica would not be ordered to pay support, notwithstanding her status as a legal parent, because included within the PA was a provision specifying that there was to be “no child support to be paid by [the Schissels].”<sup>243</sup> Absent such a provision in the agreement, however, it is not clear whether a judge might order child support.<sup>244</sup> Although the Wisconsin

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235. *Id.* at 665 n.12 (noting language in the PA that required the Schissels to waive any claims to custody, visitation, and physical placement of the child, the Roseckys to be the sole legal parents, and the Roseckys’ home to be the sole parental home).

236. *See id.* at 651 (holding that the portions of the PA agreement that required Monica to terminate her parental rights were unenforceable under the language of the existing statute).

237. *See infra* note 280 and accompanying text (noting that there were questions regarding Monica’s parental status over F.T.R.).

238. *See F.T.R.*, 833 N.W.2d at 646 (holding that under the current statutory scheme, Marcia is left without any parental rights unless and until Monica terminates her own parental rights).

239. *See infra* notes 283–84 and accompanying text (noting that Monica’s visitation could depend on whether Monica attempted to undermine the Roseckys parenting, despite contentions of the Wisconsin Supreme Court that the agreement should minimize litigation early in the child’s life).

240. *F.T.R.*, 833 N.W.2d at 652.

241. *See id.* at 640 (noting Dr. Huebner’s testimony that placement with Monica would be harmful to F.T.R. because of Monica’s desire to replace Marcia as his mother, which would be confusing for F.T.R.).

242. *Id.* at 649–50 (noting that the Wisconsin Supreme Court believed that the best interests of F.T.R. would be served by enforcing the PA and thereby creating stability among the parties, and denying the opportunity for potentially long-term litigation).

243. *Id.* at 665 n.12.

244. *See* WIS. STAT. § 767.511 (2014) (discussing when child support will be ordered in the state of Wisconsin).

court believed that it was clearing up a variety of issues regarding surrogacy agreements by promoting stability and predictability and reducing further litigation,<sup>245</sup> it is clear that there will likely be further litigation in surrogacy cases, thus undermining the desired predictability and stability.

### C. Baby

*In re Baby*<sup>246</sup> raised still other issues. At issue in this case was a traditional surrogacy agreement.<sup>247</sup> Prior to the birth of the child, all parties sought a declaration of parentage and a ratification of the surrogacy agreement.<sup>248</sup> The juvenile court granted the petition.<sup>249</sup> The child was born on January 12, 2012, and all of the parties agreed that it would be best for the child to remain with the surrogate so that the surrogate could nurse the baby for a few days.<sup>250</sup> After those few days had passed, the surrogate sought to prevent removal of the child.<sup>251</sup>

The surrogate argued that Tennessee law contemplates surrogacy arrangements only in the context of the child being surrendered to the biological father and his wife.<sup>252</sup> Because the commissioning couple did not marry until a few weeks after the birth of the child, the child could not be relinquished at birth to the biological father and his spouse.<sup>253</sup> The surrogate argued that there had been no surrogate birth.<sup>254</sup> Neither the trial court nor the intermediate appellate court believed that this technicality

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245. See *F.T.R.*, 833 N.W.2d at 649–50 (noting that the Wisconsin Supreme Court held that the enforcement of the surrogacy agreement promoted 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).

246. No. M2012–01040–COA–R3–JV, 2013 WL 245039, (Tenn. Ct. App. Jan. 22, 2013), *appeal docketed*, 2013 Tenn. App. LEXIS 470 (May 7, 2013).

247. *Id.* at \*1.

248. *Id.*

249. See *id.* (stating that the petitions to modify parentage were granted and the juvenile court issued a final order declaring parentage, ratifying the surrogacy agreement, and directing the issuance of a birth certificate).

250. *Id.* at \*2.

251. See *id.* (noting that the surrogate filed for a restraining order and injunction prohibiting the child from being taken out of the country, and calling for the surrender of the child's passport).

252. See *id.* at \*5 (quoting Tennessee's statutory definition of surrogate birth as “[t]he 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”) (emphasis added). See also TENN. CODE ANN. § 36-1-102(48)(A)(ii).

253. See *In re Baby*, 2013 WL 245039, at \*2 (noting that the intended parents were not actually married until January 27, 2012, a full twenty days after the child's birth).

254. See *id.* (noting that in each motion, the surrogates argued there was no “surrogate birth” because the intended parents were not yet married).

justified voiding the agreement, given that the surrogate had long known about the marital status of the parties, and had nonetheless accepted money to be a surrogate.<sup>255</sup> The Tennessee appellate court concluded that the “[s]urrogate’s last-minute change of heart does not provide a reason to invalidate the final judgment approving the surrogacy contract.”<sup>256</sup>

In this case, the couple may very well have married to take away a possible ground for invalidating the surrogacy agreement, but it is simply unclear whether their having done so was the reason that the surrogate’s challenge to their parenthood was unsuccessful.<sup>257</sup> On the one hand, the surrogate had known that the couple was unmarried and had still accepted payment,<sup>258</sup> which would have provided some reason to issue that same decision even if the couple had not married.<sup>259</sup> On the other hand, the trial court suggested that “[i]t would be absurd to adopt the position that this was not a surrogate birth because the Intended Parents were married 20 days after the birth of the child.”<sup>260</sup> This suggests that the couple’s decision to marry had been given some weight.<sup>261</sup>

The Tennessee appellate court did not adopt the line offered by the Wisconsin Supreme Court, where the Wisconsin Supreme Court stated that the agreement was enforceable except insofar as parental rights were to be terminated.<sup>262</sup> Instead, the Tennessee appellate court enforced the agreement even with the foreseeable result that the surrogate would never see the child again, if only because the family would be in Italy.<sup>263</sup>

The *Baby* court faced a difficult task because the Tennessee Legislature had not offered sufficient direction. Consider the relevant statute:

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255. *Id.* at \*5.

256. *Id.*

257. *See infra* notes 313–15 and accompanying text (noting that legislation and court holdings have failed to clarify issues regarding the *Baby* decision).

258. *In re Baby*, 2013 WL 245039, at \*5.

259. *See id.* (noting that the surrogate parents’ last-minute position change was not based on new information regarding the intended parents’ marital status, and therefore should not serve as a reason to invalidate the surrogacy agreement).

260. *Id.*

261. *See id.* (noting the court’s recognition that the couple had married within a few weeks after the child’s birth, and were not, in fact, two single parties seeking to raise a child).

262. *Compare id.* (holding there was nothing present in the current case to warrant invalidating the surrogacy agreement between the surrogate parents and the intended parents), *with In re F.T.R.*, 833 N.W.2d 634, 652 (Wis. 2013) (holding that the PA is an enforceable contract with the exception of the TPR portions of the contract).

263. *See In re Baby*, 2013 WL 245039, at \*6.

Surrogate birth” means:

(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;

(B) No 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;

(C) Nothing 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.<sup>264</sup>

(A)(i) discusses gestational surrogacy and (A)(ii) discusses traditional surrogacy.<sup>265</sup> (B) suggests that neither termination of parental rights nor adoption is necessary in the event that a surrogate birth occurs,<sup>266</sup> but (C) suggests that this section does not authorize surrogacy “unless otherwise approved by the courts or the general assembly.”<sup>267</sup> The legislature has not taken subsequent action to authorize surrogacy,<sup>268</sup> although the legislature has also not taken any action declaring such agreements illegal or

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264. TENN. CODE ANN. § 36-1-102(48)(A)–(C) (2010).

265. See § 36-1-102(48)(A)(i)–(ii) (defining surrogate birth as either “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 “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 . . .”).

266. See § 36-1-102(48)(B) (stating that a surrogate mother who carries a baby to term does not need to surrender her parental rights, nor do the intended parents need to adopt the child for a transfer of parental rights to occur).

267. See § 36-1-102(48)(C) (suggesting that only the courts or general assembly can approve a surrogate birth process in Tennessee).

268. See *In re Baby*, 2013 WL 245039, at \*4 (noting that the court had been unable to find, and the parties had not been able to direct them to, a Tennessee statute regarding surrogacy birth contracts).

unenforceable.<sup>269</sup> Because the legislature had defined the differing kinds of surrogacy, but had done nothing to indicate which was contrary to public policy, the intermediate appellate court “decline[d] to find such agreements to be against public policy,”<sup>270</sup> and instead opted to “enforce [such contracts] until the legislature instructs otherwise.”<sup>271</sup>

At this point, it is simply unclear what to make of *Baby*, especially because the Tennessee Supreme Court has granted permission to appeal.<sup>272</sup> Nonetheless, the court’s willingness to wholly enforce a traditional surrogacy contract stands in sharp contrast to the position spelled out in *Baby M* a little over 25 years ago.<sup>273</sup>

#### IV. CONCLUSION

Up until recently, courts enforced gestational, but not traditional surrogacy contracts.<sup>274</sup> In the past few years, however, a few courts have effectuated the terms of such contracts, sometimes in addition to upholding their validity in whole or in part.<sup>275</sup> It is simply unclear whether these few decisions are outliers or, instead, reflect a modification of previously existing trends.

If courts are going to be partially enforcing such contracts, courts will need to be much clearer about a variety of matters. Suppose, for example, that such contracts are enforceable except with respect to the termination of parental rights. Courts will have to explain what the surrogate’s “parental rights” entail. Would the surrogate be liable for child support assuming that the contract did not address that issue? Or, perhaps, would the surrogate be liable for child support if the contract included a provision stating that she would be liable for such support if she refused to surrender her parental rights? As a general matter, states promote visitation with a noncustodial parent, absent a showing that such visitation would be harmful.<sup>276</sup> Courts or legislatures will have to explain whether the same rules apply with respect

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269. *See id.* (discussing Tennessee’s neutral legislative stance towards surrogacy agreements as well as public policy).

270. *Id.*

271. *Id.*

272. *See id.* at \*1 (“Application for Permission to Appeal Granted by Supreme Court May 7, 2013.”); *see also* 2013 Tenn. App. LEXIS 470 (May 7, 2013) (docketing the appeal).

273. *See In re Baby M*, 537 A.2d 1227, 1264 (1988) (holding that present laws make the surrogacy contract unenforceable, but legislation could permit these contracts in the future).

274. *See supra* Part II.

275. *See supra* Part III.

276. *See, e.g., N.M. v. R.G.*, 978 N.Y.S.2d 802, 808 (N.Y. Sup. Ct. 2014) (explaining that it is a rebuttable presumption that noncustodial parents should be awarded visitation rights unless their visitation would be harmful to the child).

to traditional surrogates. If they do not, then much more will have to be said regarding what it means to enforce all provisions except for the agreement to terminate parental rights. Included within such a specification must be what rights the surrogate would have with respect to custody or visitation if the other biological parent were to die or have his own parental rights terminated.

The *Baby M* court was concerned that surrogates might be subject to exploitation.<sup>277</sup> In both *F.T.R.*<sup>278</sup> and *A.L.S.*,<sup>279</sup> the surrogate had offered her services, just as had been true in *Johnson*,<sup>280</sup> presumably undercutting the concern that the surrogates in those cases had somehow been coerced into performing the surrogacy. While courts have not expressly suggested that an important consideration in granting or denying the surrogate's parental rights is whether the surrogate made the initial offer, this factor may play a role in the courts' resolution of the issues. If that is so, then it would be helpful for courts to make this aspect of their decisions clear.

Predictability is important for all parties in surrogacy arrangements, and courts must consider some of the foreseeable difficulties that will arise when holding that the surrogate's parental rights cannot be terminated, while at the same time expressly or impliedly denying that the surrogate has many of the rights normally associated with parenthood. Such legal positions are open invitations for further litigation, claims to the contrary notwithstanding.

Should traditional surrogacy agreements be enforceable as a matter of public policy? That is unclear. What is clear is that courts partially enforcing such agreements must clarify the various implications of their holdings, or else courts will neither promote predictability nor the interests of the various parties that they allegedly seek to protect.

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277. See *Baby M*, 537 A.2d at 1249 (reasoning that that the increase in availability for birth control has lowered the amount of babies available for adoption, and therefore created a situation ripe for exploitation for those seeking to increase the supply of available babies through the use of money).

278. *In re F.T.R.*, 833 N.W.2d 634, 638 (Wis. 2013).

279. *A.L.S. ex rel. J.P. v. E.A.G.*, No. A10-443, 2010 WL 4181449, at \*1 (Minn. Ct. App. Oct. 26, 2010) (unpublished opinion).

280. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993). In contrast, in both *R.R.* and *Baby M*, the surrogacy arrangements had been made through a third party. See *R.R. v. H.H.*, 689 N.E.2d 790, 791–92 (Mass. 1998) (explaining that both parties worked with the New England Surrogate Parenting Advisors (“NESPA”)); *Baby M*, 537 A.2d at 1235 (explaining that the parties worked with the Infertility Center of New York (“ICNY”).