

Gestational Surrogacy Contracts Enforceable in NJ 30 Years After 'Baby M' - *New Jersey Law Journal*

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New Jersey Law Journal

7.23.18

From: *New Jersey Law Journal*: Family Law Analysis

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The New Jersey Gestational Carrier Agreement Act (“GCAA” or “the Act”), N.J.S.A. 9:17-60, et seq., effective May 30, 2018, permits gestational carriers and intended parents to execute legally enforceable gestational surrogacy contracts. Prior to this legislation, “surrogacy agreements” had been unenforceable under *In the Matter of Baby M*, 109 N.J. 396 (1988). While traditional surrogacy contracts (where the pregnant woman is the natural mother of the child) remain unenforceable, the Act now permits “gestational carrier” surrogacy agreements (where the pregnant woman is not biologically related to the child).

‘In the Matter of Baby M’ and Surrogacy Law Prior to the GCAA

In *Baby M*, the New Jersey Supreme Court unanimously found surrogacy contracts to be illegal and unenforceable on the grounds that such agreements are contrary to established laws related to termination of parental rights, nonpayment in adoptions, and the right to revoke consent in private adoptions. *Id.* at 411. The *Baby M* matter involved a contract to artificially inseminate a woman with the sperm of a man who was not her husband. The contract called for the natural father of the child to pay the surrogate mother \$10,000 after she gave birth and surrendered the child to him. She agreed to cooperate in any way necessary to effectuate termination of her parental rights, and the parties planned for the natural father’s wife to adopt child. Once the surrogate gave birth to the child, however, she immediately regretted her decision and requested additional time with the baby. The parties agreed to give her a week with the child out of concern

for her mental health. Thereafter, the surrogate refused to return the baby to the natural father and his wife. Four months later, the child was forcibly returned to the father via court intervention and approximately two years of litigation ensued between the parties.

While the Baby M court recognized the challenges infertile couples confront to become parents, it held that the payment of money to a woman in exchange for bearing a child was illegal and possibly criminal. In so doing, the court distinguished a paid contract for surrogacy from voluntary surrogacy and opined that it would not find a woman's voluntary decision to serve as a surrogate without pay offensive, provided she was not compensated for her pregnancy and she reserved her right to revoke her decision and did not terminate her parental rights. Ultimately, the court invalidated the Baby M agreement, awarded custody to the natural father in the "best interests of the child" and remanded the matter to the trial court for an abbreviated hearing on the surrogate mother's "visitation"—noting that the surrogate mother was the child's natural and legal parent. *Id.* at 463.

In Baby M, the court specifically stated that its holding did "not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts." *Id.* at 411. In so stating, the court acknowledged the advancements in reproductive biotechnology and opined that "[th]e problem is how to enjoy the benefits of the [reproductive] technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area." *Id.* at 469. In 2018, the legislature accepted the court's challenge and created a legally enforceable means for those with fertility issues to pursue parenthood vis-à-vis gestational surrogacy in enacting the Gestational Carrier Agreement Act.

Gestational Carrier Agreement Act (2018)

As stated in the statute, the purpose of the GCAA is to: (1) establish consistent standards and procedural safeguards to promote the best interests of the children who will be born as a result of gestational carrier agreements; (2) protect all parties involved in such agreements; and (3) recognize technological advances in assisted reproductive medicine in ways that allow the use of these advances by intended parents and gestational carriers according to the public policy of the State of New Jersey.

Read the full story here.