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THE UPDATING OF *BABY M:* A CONFUSED JURISPRUDENCE BECOMES MORE CONFUSING

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THE UPDATING OF *BABY M*: A CONFUSED JURISPRUDENCE BECOMES MORE CONFUSING

Mark Strasser*

I. INTRODUCTION

States differ in a number of respects with regard to the conditions under which surrogacy contracts are enforceable. Some states distinguish between gestational and traditional (genetic) surrogacy contracts, treating the former but not the latter as enforceable,[1] whereas others make no such distinction.[2] Some states distinguish between commercial and non-commercial surrogacy,[3] whereas others make no such distinction.[4] In short, there is a patchwork of laws regarding the conditions under which surrogacy contracts are enforceable.[5]

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[1] Ashley E. Bashur, *Whose Baby Is It Anyway? The Current and Future Status of Surrogacy Contracts in Maryland*, 38 U. BALT. L. REV. 165, 194 (2008) ("[T]hrough case law, California also distinguishes between traditional and gestational surrogacy."). *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

[2] Jennifer S. White, *Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance*, 2 BELMONT L. REV. 269, 275 (2015) ("Some states proscribe surrogacy altogether, and penalize individuals that enter into such contracts under criminal or civil sanctions.").

[3] *Id.* at 276 ("[F]our states ban only commercial surrogacy and authorize surrogacy contracts that do not involve compensation.").

[4] *Cf.* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 424–25 (2012) ("Some states allow commercial surrogacy, i.e., where surrogates may be paid compensation over and above medical expenses.").

[5] *See generally* Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1239–49 (2014).

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This patchwork notwithstanding, the current trend is to enforce gestational but not traditional surrogacy agreements.[6] While commentators may debate whether that is the best policy,[7] such a policy choice offers some clarity and predictability to both would-be commissioning couples and would-be surrogates. Nonetheless, recent decisions have modified the jurisprudence in surprising ways, sometimes creating the potential for harm to families and children.

This article first discusses two seminal cases—one addressing the enforceability of a traditional (genetic) surrogacy agreement[8] and the other addressing the enforceability of a gestational surrogacy agreement.[9] The article then discusses some of the ways in which the approaches to gestational and genetic surrogacy have blurred, creating the potential for harm to families and children. The article concludes that unless courts deciding surrogacy disputes take better account of some of the foreseeable results of their decisions, these courts may unwittingly bring about results that almost no one would prospectively endorse.

II. CONFLICTING VIEWS ABOUT SURROGACY

Surrogacy disputes involve extremely important and competing interests, which helps explain why states have adopted different positions with respect to the conditions, if any, under which such agreements should be enforced. These varying interests also may help explain why two of the most important state supreme court decisions regarding surrogacy disputes reached very different conclusions after offering very different analyses.

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[6] *See* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 100 (2014) (discussing "a general trend toward enforcement of gestational surrogacy agreements . . ."); *see also* Jennifer Jackson, *California Egg Toss: The High Costs of Avoiding Unenforceable Surrogacy Contracts*, 15 J. HIGH TECH. L. 230, 233 (2015) ("Under California law, gestational carrier surrogacy contracts are enforceable; whereas, traditional surrogacy contracts are not enforceable."); Brittnay M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 370 (2011) ("Some states legally distinguish between traditional and gestational surrogacy. While these states don't permit traditional surrogacy contracts, they do permit gestational."); Radhika Rao, *Hierarchies of Discrimination in Baby Making? A Response to Professor Carroll*, 88 IND. L.J. 1217, 1218 (2013) ("[S]everal states appear to apply a similar approach by refusing to enforce traditional surrogacy contracts while at the same time sanctioning gestational surrogacy.").

[7] *Cf.* Rao, *supra* note 6, at 1219 ("But why should the law treat gestational surrogacy so differently from traditional surrogacy?").

[8] *See In re* Baby M (*In re Baby M II*), 537 A.2d 1227, 1234 (N.J. 1988).

[9] *See* Johnson v. Calvert, 851 P.2d 776, 777 (Cal. 1993).

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A. Background

Surrogates carry a child to term with the intention of surrendering the child to the intended parent or parents.[10] Uniformity of purpose notwithstanding, surrogates might be divided into two distinct classes. Traditional surrogates are artificially inseminated,[11] and thus will be genetically related to any child born from the surrogacy.[12] On the contrary, gestational surrogates have embryos that are created through in vitro fertilization ("IVF") implanted in their uteruses,[13] and thus will not be genetically related to any child produced through the surrogacy.[14]

There are costs and benefits associated with each of these two different types of surrogacy. Achieving pregnancy in a traditional surrogacy is less costly financially.[15] Further, the traditional surrogate will not have to undergo hormonal therapy to prepare her body to receive embryos created via IVF.[16] However, there are other costs associated with this kind of surrogacy. For example, because any child born from a traditional surrogacy is genetically related to the surrogate,[17] and at least

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[10] *See In re* Baby (*In re Baby II*), 447 S.W.3d 807, 818 (Tenn. 2014) (citing BLACK'S LAW DICTIONARY 1582 (9th ed. 2009) ("Surrogacy is generally defined as '[t]he process of carrying and delivering a child for another person.'"); Keith J. Cunningham, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721 (1988) (noting that the "'surrogate mother' . . . agrees to carry the child to term and to surrender all parental rights in the child . . .").

[11] *In re* Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 815 (Sur. Ct. 1986) ("In the case of surrogate motherhood, the couple usually contracts with the surrogate mother who agrees: first, to be artificially inseminated with the couple's husband as donor and to carry the child to full term; and second, to surrender all parental rights in the child as of the date of birth.").

[12] Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 247 (2012) ("In traditional surrogacy, the surrogate mother is genetically related to the child by contributing her genetic material to the child.").

[13] Susan L. Crockin, *Who's My Client? Recognizing and Avoiding Conflicts of Interest in ART Law Representation*, 34 FAM. ADVOC. 14, 18 (2011) ("'Gestational carrier' or 'gestational surrogate carrier' refers to a woman who has agreed to carry a pregnancy created through an IVF retrieval and fertilization and the resulting embryo transferred to her uterus through an IVF transfer.").

[14] Alyssa James, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 177 (2013) ("Gestational surrogacy allows the intended parent(s) to have a child, through advanced reproductive technology, that is either genetically linked to themselves or a donor (the surrogate has no genetic connection to the child).").

[15] *See* Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 321 (2011) (describing gestational surrogacy as "more costly than traditional surrogacy . . .").

[16] *See* Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 492 (1995) (noting that the gestational surrogate has to undergo hormonal treatment).

[17] *See* Ladomato, *supra* note 12 and accompanying text.

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in part because such a child is more likely to look like the surrogate's other children,[18] the child might be much more difficult to surrender at birth.[19]

Would-be commissioning couples and would-be surrogates can take into account the differing costs and benefits of traditional versus gestational surrogacy agreements. A separate question is whether states should take into account some of the differences between the two types of contracts when deciding the conditions, if any, under which such contracts will be enforceable.[20]

B. Baby M

One of the most well-known cases[21] involving surrogacy is *In re Baby M*, in which the New Jersey Supreme Court addressed the enforceability of a contract involving traditional surrogacy.[22] William Stern entered into a contract with Mary Beth Whitehead, 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."[23] After several artificial insemination attempts, Whitehead became pregnant and carried the child to

[18] *See* Christine A. Bjorkman, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 153 (2008) (discussing "the requirements that the surrogate mother must be at least 21 years old and must have already given birth to at least one child . . .").

[19] *See* Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 535 (2011) ("Many potential surrogates also specifically choose gestational surrogacy arrangements as opposed to traditional surrogacy in order to eliminate the genetic component, thereby reducing possible feelings of attachment due to a genetic connection."); Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 88 (2015) ("[T]he traditional surrogate may be more likely to bond with the child she is carrying because she and the child are genetically related. Further, after birth, the child may look like the surrogate's other children, which might make surrender of the child much more difficult.").

[20] *See* Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 292 (2013) ("[T]he majority of U.S. states that permit surrogacy, distinguish between gestational and traditional surrogacy.").

[21] *See* Donald D. Moreland, *Reproductive Technology Outpacing Connecticut Lawmakers*, 14 QUINNIPIAC PROB. L.J. 287, 296 (1999) (discussing "*[In re] Baby M.* [sic], perhaps the most well known case regarding the enforceability of surrogacy contracts . . .").

[22] *In re Baby M II*, 537 A.2d 1227, 1234 (N.J. 1988).

[23] *Id.* at 1235.

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term.[24] However, she realized shortly after the child's birth that it would be difficult, if not impossible, for her to surrender the child.[25]

Whitehead surrendered the child to the Sterns.[26] However, the next day she told them that she was suffering terribly and had to have the child back, if only for a week, after which she would return the child.[27] The Sterns permitted her to have the child for the week.[28] When it became clear that Mary Beth Whitehead would not voluntarily relinquish the child,[29] William Stern secured an ex parte order requiring her to do so.[30] With the Sterns present, a process server aided by the police went to retrieve the child.[31] However, there was some confusion about the child's name, perhaps because the Sterns called her by one name and the Whiteheads called her by another.[32] That confusion created the opportunity[33] for the child to be handed out of a window to Richard Whitehead, who then fled.[34]

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[24] *Id.* at 1236.

[25] *Id.* ("Mrs. Whitehead realized, almost from the moment of birth, that she could not part with this child.").

[26] *Id.* ("Despite powerful inclinations to the contrary, she turned her child over to the Sterns on March 30 at the Whiteheads' home.").

[27] *Id.* at 1236–37.

[28] *Id.* at 1237 ("The Sterns, . . . believing that Mrs. Whitehead would keep her word, turned the child over to her.").

[29] *Id.* ("Due to Mrs. Whitehead's refusal to relinquish the baby, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract.").

[30] *Id.* ("[T]he order was entered, *ex parte*.").

[31] *Id.* ("[T]he process server, aided by the police, in the presence of the Sterns, entered Mrs. Whitehead's home to execute the order.").

[32] *See* Joanna Owen Quinley, *Surrogate Motherhood: What Is Happening and Where Are We Going from Here?*, 9 WHITTIER L. REV. 287, 296 (1987) ("Richard Whitehead's name appeared on the birth certificate, and the child's name appeared as Sara Elizabeth Whitehead."); *see also* Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby* M, 30 HARV. J.L. & GENDER 67, 68 (2007) ("Judge Harvey Sorkow of the Bergen County Court ordered that little Melissa (the Sterns' name for the baby) be turned over to them.").

[33] *In re Baby M II*, 537 A.2d at 1237 ("[T]hose who came to enforce the order were thrown off balance by a dispute over the child's current name.").

[34] *Id.* ("Mr. Whitehead fled with the child, who had been handed to him through a window.").

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The Whiteheads went to Florida, staying at various locations.[35] During this period, William Stern and Mary Beth Whitehead would occasionally have conversations where Mrs. Whitehead would falsely accuse Mr. Stern of molesting one of her daughters. Mrs. Whitehead would sometimes threaten to kill herself and the child during these conversations.[36]

When holding the surrogacy contract unenforceable,[37] the *Baby M* court made clear that it was interpreting New Jersey law and public policy rather than the state constitution,[38] which meant that the New Jersey legislature could have offered its own statutory framework regulating surrogacy had it desired to do so.[39] Nonetheless, the court's view of surrogacy was not difficult to discern.[40]

The *Baby M* court noted that it was not inalterably opposed to all forms of surrogacy—"[w]e find no offense to our present laws where a woman voluntarily and without payment agrees to act as a 'surrogate' mother, provided that she is not subject to a binding agreement to surrender her child."[41] However, as the court fully understood, not many individuals would be willing to be surrogates absent payment—"it is unlikely that surrogacy will survive without money."[42]

The state supreme court seemed to treat the dispute between Stern and Whitehead as if it were between two biological parents who simply had different spouses. "With the surrogacy contract disposed of, the legal framework becomes a dispute between two couples over the custody of a child produced by the artificial

[35] *Id*. ("The Whiteheads immediately fled to Florida with Baby M. They stayed initially with Mrs. Whitehead's parents . . . . For the next three months, the Whiteheads and Melissa lived at roughly twenty different hotels, motels, and homes in order to avoid apprehension.").

[36] *Id.* ("From time to time Mrs. Whitehead would call Mr. Stern to discuss the matter . . . accompanied by threats of Mrs. Whitehead to kill herself, to kill the child, and falsely to accuse Mr. Stern of sexually molesting Mrs. Whitehead's other daughter.").

[37] *Id.* at 1235 ("Under current law, however, the surrogacy agreement before us is illegal and invalid.").

[38] *Id.* at 1234 ("We invalidate the surrogacy contract because it conflicts with the law and public policy of this State.").

[39] *Id.* at 1235 ("[O]ur holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts.").

[40] *See infra* notes 41–42 and accompanying text.

[41] *In re Baby M II*, 537 A.2d at 1235.

[42] *Id.* at 1248.

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insemination of one couple's wife by the other's husband."[43] No extra weight would be given to the rights of one parent over the rights of another.[44] The court awarded custody of the child to Stern based on a best interests analysis,[45] and it remanded the case for a determination of an appropriate visitation schedule between mother and child.[46]

The New Jersey Supreme Court offered some implicit and some explicit guidance to the trial court to which the case would be remanded. The court mentioned "the Whiteheads' flight to Florida with Baby M,"[47] and "the telephone threats to kill Baby M and to accuse Mr. Stern of sexual abuse of her daughter."[48] However, the court did not seem to believe these threats and accusations to be especially problematic, instead stating: "We do not find it so clear that her efforts to keep her infant, when measured against the Sterns' efforts to take her away, make one, rather than the other, the wrongdoer."[49]

The court issued some directions to be taken into consideration on remand. For example, "Mrs. Whitehead is entitled to visitation at some point, and that question is not open to the trial court on this remand."[50] Further, the court made clear what it thought of the recommendation that Mary Beth Whitehead not be allowed to have contact with the child for years. "It also should be noted that the guardian's recommendation of a five-year delay is most unusual—one might argue that it begins to border on termination."[51]

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[43] *Id.* at 1256.

[44] *Id.* ("Under the Parentage Act the claims of the natural father and the natural mother are entitled to equal weight, *i.e.*, one is not preferred over the other solely because he or she is the father or the mother.") (citing N.J. STAT. ANN. § 9:17-40 (West 2013) ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

[45] *Id.* at 1234 ("[W]e grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant . . . .").

[46] *Id.* at 1234–35 ("We remand the issue of the natural mother's visitation rights to the trial court . . . .").

[47] *Id.* at 1257.

[48] *Id.*

[49] *Id.* at 1259.

[50] *Id.* at 1263.

[51] *Id.*

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While ostensibly directing the trial court to make its own determination,[52] the New Jersey Supreme Court explained that "Mrs. Whitehead was rather harshly judged—both by the trial court and by some of the experts."[53] The court may have been correct that Whitehead did not pose a threat to the child, and her kidnapping and threatening to kill the child were merely her inappropriate reactions during a stressful situation.[54] However, parents might lose visitation entirely for such actions in other contexts,[55] and the court's claim that it would not sacrifice the interests of the child as a way of manifesting its strong disapproval of surrogacy agreements was not entirely credible.[56] For example, the court issued a warning to fathers who sought temporary custody during a surrogacy contract dispute in New Jersey: "Any application by the natural father in a surrogacy dispute for custody pending the outcome of the litigation will henceforth require proof of unfitness, of danger to the child, or the like, of so high a quality and persuasiveness as to make it unlikely that such application will succeed."[57] But the court thereby imposed a higher standard for the father to meet than would be imposed in a custody context where surrogacy was not at issue.[58]

Perhaps because of its focus on assuring that Whitehead would be awarded visitation,[59] the *Baby M* court failed to discuss several issues that would be relevant

[52] *Id.* at 1263 ("The trial court will determine what kind of visitation shall be granted to her, with or without conditions, and when and under what circumstances it should commence.").

[53] *Id.* at 1259.

[54] *Cf. id.* at 1239 ("The resulting pressure, Mrs. Whitehead contends, caused her to act in ways that were atypical of her ordinary behavior when not under stress, and to act in ways that were thought to be inimical to the child's best interests . . . .").

[55] *See* El Idrissi v. El Idrissi, 377 A.2d 330, 334 (Conn. 1977) (affirming ex-husband's loss of all visitation because, inter alia, he threatened to kidnap and harm the child). *See also In re Baby M II*, 537 A.2d at 1239 ("She [the guardian ad litem] first took the position, based on her experts' testimony, that the Sterns should have primary custody, and that while Mrs. Whitehead's parental rights should not be terminated, no visitation should be allowed for five years. As a result of subsequent developments . . . her view has changed. She now recommends that no visitation be allowed at least until Baby M reaches maturity.").

[56] *See supra* notes 47–51 and accompanying text.

[57] *In re Baby M II*, 537 A.2d at 1261.

[58] *See* N.J. STAT. ANN. § 9:2-3 (West 2013) ("Until the court determines the final custody of the minor child and unless the parties agree otherwise, the court shall determine temporary custody based upon the best interests of the child with due regard to the caretaking arrangement that previously existed.").

[59] *See supra* note 50 and accompanying text.

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if the surrogacy contract were void and of no legal effect.[60] For example, suppose that this were simply an artificial insemination resulting in the birth of a child into an existing family. The presumption of paternity would apply, which presumably is why Mary Beth Whitehead's husband at the time,[61] Richard, was also a party to the contract[62] "promis[ing] to do all acts necessary to rebut the presumption of paternity."[63] Both Richard[64] and Mary Beth Whitehead promised to do what was necessary to terminate their own parental rights.[65] However, because the court held "the entire contract . . . unenforceable,"[66] those promises were not binding.

State law determines whether the presumption of paternity is rebuttable and, if so, under what conditions.[67] Under current New Jersey law, "when there is a reasonable possibility that a parentage is in doubt, good cause must be shown why genetic testing should not be undertaken."[68] Were a case like *Baby M* to come before the New Jersey courts currently, the commissioning man would presumably be able to be named the father if his sperm was used.[69] But other states have a different approach when deciding who can establish paternity to a child born into an existing marriage.

Consider a state that precludes a challenge to the presumption of paternity by a third party as long as the marriage is intact and the husband is parenting the child.[70]

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[60] *See In re Baby M II*, 537 A.2d at 1235.

[61] Richard and Mary Beth Whitehead divorced after the trial. *See id.* n.1.

[62] *See id.* at 1235.

[63] *Id.*

[64] *See supra* notes 62–63 and accompanying text.

[65] *In re Baby M II*, 537 A.2d at 1235.

[66] *Id.* at 1240.

[67] Suzanne K. Ishii, *Baby "M" and the Application of Adoption and Parentage Statutes*, 24 WILLIAMETTE L. REV. 1086, 1088 (1988) (citations omitted) ("In some states the presumption is rebuttable by clear and convincing evidence of paternity, such as blood tests or a statement of non-paternity written and signed by the mother's husband. In other states the presumption is irrebuttable.").

[68] D.W. v. R.W., 52 A.3d 1043, 1045 (N.J. 2012).

[69] *See In re* T.J.S., 54 A.3d 263, 273 (2012) ("A person is the 'natural father' if his paternity is proven by the methods set forth in N.J.S.A. 9:17-41, which includes genetic testing . . . .").

[70] *See, e.g.*, *In re* KH, 677 N.W.2d 800, 807 (Mich. 2004) ("If the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered to be the issue of the marriage despite lacking a biological relationship with the father.").

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In such a state, the child might well be presumed to be the child of the surrogate and her husband if the surrogacy contract were considered null and void.[71]

Surprisingly, there was no mention of child support[72] in the *Baby M* supreme court decision or in the trial court decision on remand.[73] Perhaps none was sought,[74] but it is common for a child support claim to be pursued by the party granted custody in a surrogacy case where custody had been challenged.[75]

The state supreme court chided the trial court for its analysis, as if to imply that the trial court knew that upholding the validity of the contract was error. "Although clearly expressing its view that the surrogacy contract was valid, the trial court devoted the major portion of its opinion to the question of the baby's best interests."[76] The New Jersey Supreme Court then commented that "[t]he inconsistency is apparent,"[77] as if it would make no sense to discuss the child's interests if the court were going to enforce the contract anyway. Yet, there are at least two reasons that the criticism of the trial court was not well-founded. First, the trial court may well have been offering its best interests analysis in case its holding the contract enforceable was reversed on appeal.[78] Second, the court may have believed a best

[71] *But cf.* Turchyn v. Cornelius, No. 98 CA 86, 1999 WL 689202 (Ohio Ct. App. Aug. 26, 1999) (ordering genetic testing where surrogate was artificially inseminated and then decided to keep the child). In this case, the court held it would be in the best interests of the child to determine the child's genetic father. *See id.* at *14.

[72] The trial court noted: "The parties are financially able to provide for themselves." *Id.* at 54. But that does not helpfully address whether support should have been ordered and, if so, how much. If both mother and father are self-supporting, then both can contribute to child support. *See* Pascale v. Pascale, 660 A.2d 485, 489 (N.J. 1995) (noting that "'[e]ach parent has a responsibility to share the costs of providing for the child while she remains unemancipated'") (citing Lynn v. Lynn, 398 A.2d 141, 148 (N.J. Super. Ct. App. Div.), *cert. denied*, 404 A.2d 1152 (N.J. 1979)).

[73] *See generally In re* Baby M (*In re Baby M III*), 542 A.2d 52 (N.J. Super. Ct. Ch. Div. 1988).

[74] *But see Pascale*, 660 A.2d at 489 ("The right to child support belongs to the child and 'cannot be waived by the custodial parent.'") (citing Martinetti v. Hickman, 619 A.2d 599 (N.J. Super. Ct. App. Div. 1993)).

[75] For example, in a Minnesota traditional surrogacy case, both the commissioning father and the surrogate mother sought custody and, in addition, support from the other party. *See* A.L.S. *ex rel.* J.P. v. E.A.G., No. A10-443, 2010 WL 4181449, at *3–4 (Minn. Ct. App. Oct. 26, 2010) ("E.A.G. sought sole custody of A.L.S. and child support from R.W.S. R.W.S. admitted paternity and counterclaimed for sole legal and physical custody, 'standby custody' with B.C.F., and child support from E.A.G.").

[76] *In re Baby M II*, 537 A.2d 1227, 1238 (N.J. 1988).

[77] *Id.*

[78] The court believed that it would have to consider best interests were the contract not followed. *See In re* Baby M (*In re Baby M I*), 525 A.2d 1128, 1157 (N.J. Super. Ct. Ch. Div. 1987) ("If there is non-

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interests analysis appropriate even if the contract was enforceable, because best interests would be considered if the commissioning father's spouse wanted to adopt the child.[79] Neither the trial court nor the New Jersey Supreme Court considered whether courts should consider best interests before enforcing a surrogacy contract.[80]

If a state were to employ a best interests test before a surrogacy contract could be enforced, one might expect would-be commissioning couples to take that requirement into account when deciding whether or where to enter into a surrogacy contract.[81] All else equal, a commissioning couple might seek to avoid a state with a requirement that a best interests analysis be performed before the contract could be enforced—the couple might not want to take a chance that a court would decide against them or might prefer to avoid litigation costs by entering into a surrogacy contract in a state less willing to entertain such challenges.[82] In the alternative, the couple might be incentivized to choose a surrogate who would be less likely to mount a best interests challenge successfully.[83]

B. Johnson

Johnson v. Calvert[84] offered a different view of the legality of surrogacy arrangements. At issue was the validity of a surrogacy agreement between a gestational surrogate, Anna Johnson, and a married couple, Mark and Crispina

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compliance with the contract, as in this case, best interests is still litigated with protection to the child, with its own guardian and experts retained to aid the court in its best interests determination."), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988). But the same point might be made were the contract unenforceable.

[79] *See id.* ("If there is compliance with the contract terms, adoption will be necessary; hence, court inquiry about best interests must take place.").

[80] *Cf.* Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993) (Kennard, J., dissenting) ("To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare—the best interests of the child.").

[81] *See* Nicolas, *supra* note 5, at 1240–49 (discussing the advantages and disadvantages of entering into surrogacy contracts in differing states).

[82] *Cf.* 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, 504 (2011) (noting that the lack of certainty about who would be the child's parents "will continue to increase unnecessary litigation").

[83] *Cf.* Douglas S. Irwin, *Maternity Blues: What About the Best Interests of the Child in* Johnson v. Calvert?, 24 SW. U. L. REV. 1277, 1295 (1995) ("Ms. Calvert's claim was probably stronger than that of Ms. Johnson's under the 'best interests of the child' test, and accordingly, she still would have been granted custody of the child.").

[84] *Johnson*, 851 P.2d at 777–78.

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Calvert. The Calverts had provided their own gametes to create embryos via IVF and intended to raise any child born of the surrogacy.[85] When the child was born, both Anna and Crispina claimed to be the child's mother.[86] In affirming that Crispina was the mother, the California Supreme Court suggested that where one woman has provided her own gametes and another woman has given birth to a child, "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."[87]

When holding that Crispina Calvert was the legal mother, the *Johnson* court was offering an analysis of California law and policy,[88] so there was no contradiction in the *Johnson* court giving force to the intentions reflected in a surrogacy contract[89] and the *Baby M* court refusing to do so in light of New Jersey law and policy.[90] In addition, *Baby M* involved traditional surrogacy and *Johnson* involved gestational surrogacy, so the two decisions are reconcilable in that a state might enforce gestational but not traditional surrogacy agreements.[91] Nonetheless, the two decisions differed greatly in tone and approach,[92] and the California court had a much more open attitude towards surrogacy, at least if it involved gestational surrogacy.[93]

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[85] *See id*. at 778.

[86] *Id.* ("Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated.").

[87] *Id.* at 782.

[88] *Id.* at 779.

[89] *See id.* at 783 ("In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy."). *But see id.* ("[W]e conclude that the passage of Senate Bill No. 937, in and of itself, does not establish that surrogacy contracts are consistent with public policy.").

[90] *See In re Baby M II*, 537 A.2d 1227, 1246–50 (N.J. 1988).

[91] *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Cal. Ct. App. 1994) (holding traditional surrogacy agreement unenforceable). *See also* R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) (holding traditional surrogacy agreement unenforceable).

[92] *See* 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, 803 (2012) ("These two cases . . . took very different approaches when determining whether or not to enforce surrogacy agreements.").

[93] *See Johnson*, 851 P.2d at 784 ("Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes."); *see also id.* at 785 ("We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds.").

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Other courts have also distinguished between traditional and gestational surrogacy, emphasizing that the important difference between the two lies in the existence of a genetic link between the child and the surrogate in one type but not the other.[94]

The *Johnson* court framed the dispute between Anna Johnson and Crispina Calvert as one where each woman had a legitimate basis for claiming to be the child's mother.[95] But that left open whether a woman using donated eggs and a gestational surrogate would have any basis for claiming that she was the child's legal mother. A California intermediate appellate court later answered that question in the affirmative.[96]

III. THE EVOLVING JURISPRUDENCE

The trend in surrogacy jurisprudence has been to make gestational, but not traditional, surrogacy contracts enforceable.[97] However, several recent cases cast doubt on that understanding of the jurisprudence, demonstrating both some reluctance to give effect to gestational surrogacy agreements and some willingness to give effect to traditional surrogacy agreements.[98] Not only have these cases made

[94] *See, e.g.*, *In re Baby II*, 447 S.W.3d 807, 818–19 (Tenn. 2014) ("The key distinction is that a traditional surrogate is the biological mother of the child, whereas a gestational surrogate has no genetic relation to the child." (citing *In re* C.K.G., 173 S.W.3d 714, 720 (Tenn. 2005))). *Cf.* 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."); Raftopol v. Ramey, 12 A.3d 783, 804 (Conn. 2011) ("[I]ntended parents who are parties to a valid gestational agreement acquire parental status and are entitled to be named as parents on the replacement birth certificate, without respect to their biological relationship to the children.").

[95] *Johnson*, 851 P.2d at 781.

[96] *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (holding woman who intended to raise child born of surrogacy was child's legal mother, notwithstanding her not having carried the child to term and her not having a genetic connection to the child).

[97] *Cf.* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 430 (2011) (noting that "California treats gestational surrogacy contracts (where the surrogate carries the fetus to term but does not contribute the egg for fertilization) as enforceable but not traditional surrogacy contracts (where the surrogate is both the genetic mother and carries the fetus to term)"); McMahon, *supra* note 6, at 383 ("Because gestational surrogate mothers have no biological ties to the child, permitting gestational surrogacy agreements alleviates the issue of women selling their own children for a profit."); Daniel Rosman, *Surrogacy: An Illinois Policy Conceived*, 31 LOY U. CHI. L.J. 227, 248–49 (2000) ("Florida's legislative scheme distinguishes between traditional surrogacy and gestational surrogacy. Gestational agreements are binding and enforceable. In contrast, traditional surrogate arrangements may be terminated at any time.").

[98] *See infra* notes 102–270 and accompanying text.

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the jurisprudence even less clear, but they have also created new potential risks for families and children.

A. Who Is the Mother When Parentage Is Uncontested?

Some of the surrogacy cases involving parentage challenges pit a surrogate against the commissioning couple.[99] However, there are many surrogacy arrangements that proceed without any legal challenges,[100] and it would be reasonable to think that parentage issues would be relatively straightforward in those cases. Yet, even in uncontested surrogacy cases, states may be unwilling to permit the members of a commissioning couple to be recognized as the legal parents of a child born through a surrogacy arrangement.[101]

1. New Jersey

Consider *In re T.J.S.*, in which a married couple (husband T.J.S. and wife A.L.S.)[102] hired a gestational surrogate to carry two embryos to term created through IVF.[103] The husband was genetically related to the child,[104] but the wife was not.[105] This case did not involve a gestational surrogate who had a change of heart before or after delivering the child—on the contrary, she surrendered her parental rights three days after giving birth.[106]

The commissioning couple sought to have the wife's name on the birth certificate, fearing that requiring her to adopt would place the child in legal limbo in

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[99] *See supra* notes 21–94 and accompanying text (discussing *In re Baby M II*, 537 A.2d 1227 (N.J. 1988) and *Johnson*, 851 P.2d 776 (Cal. 1993)).

[100] *See* Elizabeth Seale Cateforis, *Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas*, 4 KAN. J.L. & PUB. POL'Y 101, 102 (1995) ("Surprisingly few [surrogacy arrangements] have resulted in litigation.").

[101] Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 233 (2012) ("In most states that prohibit surrogacy agreements, the surrogate is deemed to be the legal mother of the child.").

[102] *In re* T.J.S., 16 A.3d 386, 388 (N.J. Super. Ct. App. Div. 2011) (discussing "T.J.S. and A.L.S., husband and wife"), *aff'd*, 54 A.3d 263 (N.J. 2012).

[103] *Id.* at 389.

[104] *Id.* at 388.

[105] *Id.* at 389 *("[T]here is no genetic connection between the child born of this IVF procedure and . . . A.L.S.")*.

[106] *Id.* ("The child, T.D.S., was born on July 7, 2009. Three days later, the gestational carrier relinquished all parental rights to the child.").

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the interim.[107] A trial court ordered the birth certificate to reflect the husband and wife as the birth parents, as long as the gestational surrogate voluntarily terminated her own maternal rights.[108] The State Registrar challenged that decision,[109] and the trial court then held that state law did not permit the wife to be named the child's mother on the birth certificate.[110] She instead would have to establish her relationship via a stepparent adoption.[111]

The trial court opinion was affirmed on appeal,[112] and an equally divided supreme court affirmed that decision.[113] This decision meant that the gestational surrogate was the child's legal mother,[114] despite having no desire for the rights and responsibilities of parentage.[115] As a matter of public policy, New Jersey's position is regrettable, at least in part, because the initial trial court decision was hardly revolutionary[116]—it was only naming the wife as the child's mother if the gestational surrogate renounced her own parental rights.[117]

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[107] *Id.* ("Plaintiffs expressly rejected adoption because the extended legal process would place the legal status of the child in limbo.").

[108] *Id.* ("The trial court ordered that the birth certificate to be placed on file for this child was to reflect T.J.S. as the father and A.L.S. as the mother, provided that, as to the latter, the gestational carrier, A.F., surrender her rights to the child seventy-two hours after giving birth.").

[109] *Id.* ("Shortly thereafter, the State Registrar learned of the pre-birth order and promptly moved to vacate the portion of the order directing A.L.S. to be listed as the mother on the child's birth certificate.").

[110] *Id.* ("[T]he trial court granted the State's motion, concluding that . . . the Parentage Act does not permit, either explicitly or implicitly, A.L.S. to be declared the parent through a pre-birth order adjudication.").

[111] *Id.* ("A.L.S.'s exclusive remedy is stepparent adoption.").

[112] *Id.* at 399.

[113] *In re* T.J.S., 54 A.3d 263 (N.J. 2012).

[114] *See* Melissa Ruth, *What to Expect When Someone Is Expecting for You: New Jersey Needs to Protect Parties to Gestational Surrogacy Agreements Following* In Re T.J.S., 60 VILL. L. REV. 383 (2015) ("The intended mother had no fundamental or statutory parental right, but as the birth mother, the surrogate mother had a constitutional and statutory parental right.").

[115] *In re* T.J.S., 54 A.3d at 264 (Hoens, J., concurring).

[116] *See id.* at 271 (Albin, J., dissenting) ("[T]he court . . . recognized that the issuance of the pre-birth order in this case was not a novel procedure and had been approved by the Camden Vicinage and followed in other counties." (citing A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000))).

[117] *Cf.* Caitlin Conklin, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67 (2013) ("After the seventy-two hour period, the surrogate can renounce her rights to the child, and the intended mother can have her name added to the birth certificate.").

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Suppose, for example, that T.J.S. were to die shortly after the surrogate had relinquished her parental rights.[118] Would A.L.S. still be able to avail herself of the advantages of a stepparent adoption[119] even after her husband's death?[120] If not, the child would be left parentless,[121] which hardly seems desirable as a matter of public policy.[122]

Or, suppose that the commissioning father were to die during the pregnancy. The only parent the child would have—the surrogate—would be someone who had expressly renounced in the contract her intention to parent that child.[123] The surrogate could voluntarily terminate her parental rights,[124] but that would not mean that the intended mother would have the opportunity to parent the child, especially if the state disfavored private placements.[125]

In *T.J.S.*, the woman who embraced the opportunity to have the rights and obligations of parentage was (temporarily) denied that opportunity, while the woman who desired neither[126] was nonetheless given the rights and obligations until her

[118] *In re* T.J.S., 54 A.3d at 264 (Hoens, J., concurring).

[119] N.J. STAT. ANN. § 9:3-48(a)(4) (West 2013) ("Whenever the plaintiff is a stepparent of the child, the court, in its discretion, may dispense with the agency investigation and report and take direct evidence at the preliminary hearing of the facts and circumstances surrounding the filing of the complaint for adoption.").

[120] *See, e.g.*, Hays v. Hays, 946 So. 2d 867, 879 (Ala. Civ. App. 2006) (holding spouse of natural parent no longer a stepparent upon death of natural parent).

[121] *In re* T.J.S., 54 A.3d at 276 (Albin, J., dissenting) ("The child in this case, whose surrogate carrier relinquished her parental rights seventy-two hours after his birth, is left legally motherless . . . .").

[122] *See id.* at 278 (Albin, J., dissenting) (suggesting that the approach embodied in this case undermines rather than promotes good public policy).

[123] *See* Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 413 (2012) ("In general, contracts require the surrogate to relinquish parental rights to the child upon delivery.").

[124] *In re Baby M II*, 537 A.2d 1227, 1242 (N.J. 1988) ("Our law, recognizing the finality of any termination of parental rights, provides for such termination only where there has been a voluntary surrender of a child to an approved agency or to the Division of Youth and Family Services ("DYFS"), accompanied by a formal document acknowledging termination of parental rights." (citing N.J. STAT. ANN. §§ 9:2-16–17, 9:3-41, 30:4C-23 (West 2013))).

[125] Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 176 (2013) ("New Jersey . . . disfavors private-placement adoptions.").

[126] *In re* T.J.S., 54 A.3d at 272 (Albin, J., dissenting) (noting that the surrogate had no desire or intention of parenting the child).

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parentage was voluntarily surrendered.[127] Even after the surrogate gave up those rights, the would-be mother was forced to overcome additional obstacles before she could become the child's legal mother.[128] It is hard to understand how making it more difficult for the would-be mother to establish her legal relationship in this case benefits the child,[129] and it is easy to imagine situations where the child might be harmed instead.

T.J.S. suggests that neither gestational nor traditional surrogacy contracts are enforceable in New Jersey.[130] Justice Hoens, in her *T.J.S.* concurrence, suggested that the child was "biologically related to A.F., to whom the Legislature has afforded statutory rights and to whom the Constitution likewise grants protection."[131] Justice Albin, in his dissenting opinion, emphasized that this would have been a different case if the surrogate had a change of heart, indicating that he or others might not have dissented if the gestational surrogate had refused to terminate her parental rights.[132] Perhaps the New Jersey legislature will again try to pass legislation specifying the conditions under which surrogacy agreements are enforceable.[133] Absent that, it seems likely that no surrogacy contracts will be enforceable in the state for the foreseeable future.

2. Tennessee

Tennessee law regarding gestational surrogacy is especially confusing when the intended mother does not have a genetic connection to the child.[134] In *In re Adoption of A.F.C.*, a married couple entered into a gestational surrogacy agreement

[127] *Id.* at 269 (Albin, J., dissenting) ("The surrogate, three days after the birth of the child, knowingly and voluntarily relinquished her parental rights.").

[128] *Id.* at 274 (Albin, J., dissenting) (discussing "the delay and the cost of the adoption process").

[129] *See id.* at 276 (Albin, J., dissenting) ("The time and cost involved in second-parent adoption is more than a mere inconvenience . . . it is a considerable burden placed on the intended mother.").

[130] *See infra* notes 129–30 and accompanying text.

[131] *In re* T.J.S., 54 A.3d at 266 (Hoens, J., concurring).

[132] *Id.* at 273 (Albin, J., dissenting).

[133] *See* Ruth, *supra* note 114, at 388 ("While many hoped the Legislature's consideration of the issue in 2012 would provide a solution, Governor Christie vetoed the bill, stopping progress in its tracks.").

[134] For a discussion of how gestational surrogacy contacts are treated when the gametes of the husband and wife are used, see *infra* notes 234–35 and accompanying text.

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with another married couple.[135] The intended husband had used his sperm to fertilize a donated egg, which was then implanted in the surrogate's uterus.[136]

A day before the child was born, the intended parents (father D.F.C. and mother C.M.C.[137]) filed a motion for a declaration of parentage,[138] which was granted.[139] In a separate action, C.M.C. filed a motion to adopt the child, which was also granted.[140] The Tennessee Department of Health (the "Department") intervened in the parentage action, arguing that the surrogate's name should be on the birth certificate and that the intended mother could only have her name on a new birth certificate via a stepparent adoption.[141] The Department also sought to set aside the adoption proceeding and to consolidate the parentage and adoption proceedings.[142]

The court consolidated the proceedings, ordered that the initial birth certificate list the mother as unknown,[143] and also ordered that a new birth certificate be issued listing the intended mother as the mother by adoption.[144] Both the intended parents and the Department appealed.[145]

The intermediate appellate court reasoned that the Department had challenged the court order requiring that the birth certificate list the mother as unknown but had not challenged the court order naming the intended mother as the child's legal

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[135] *In re* Adoption of A.F.C., 491 S.W.3d 316, 317 (Tenn. Ct. App. 2014).

[136] *Id.* ("Per their agreement, Intended Mother and Father obtained an egg from an anonymous, surrogate egg donor; the egg was fertilized *in vitro* with Father's sperm, and the fertilized egg was implanted in J.L.B.'s uterus.").

[137] *Id.*

[138] *Id.*

[139] *Id.* ("The court entered an Order of Parentage on August 1 holding that Father was the legal father and Intended Mother was the 'legal mother' of the Child.").

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 317–18.

[144] *Id.* at 318.

[145] *Id.*

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mother.[146] This ruling meant that the intended parents had, in effect, received the remedy sought—the declaration that C.M.C. was the legal mother.[147] Because the issue of whether C.M.C. was the child's legal parent did not "present[] an actual, ongoing controversy,"[148] the court declined to address that issue and instead focused its attention on who should be on the birth certificate. The court noted that the certificate includes:

> [D]etailed medical information regarding the mother's pregnancy, including the date of her first and last prenatal care visits and the number of total visits; height; prepregnancy weight and weight at delivery; whether she received food assistance; number of previous births, pregnancies, and the outcomes of those events; whether she smoked cigarettes before and/or during the pregnancy; and the date of her last menses. The form includes detailed information about the birth itself, including risk factors of the pregnancy; obstetric procedures; infections present and/or treated during the pregnancy; onset of labor; characteristics of labor and delivery; method of delivery; and maternal morbidity.[149]

This information involved matters occurring during the pregnancy or at birth, which convinced the appellate court that the birth mother should be listed on the certificate.[150] The court reversed the lower court's ruling that the mother should be listed as unknown and instead held that the gestational surrogate's name should be listed on the certificate.[151]

A.F.C. suggests that in an uncontested gestational surrogacy, the surrogate should be listed on the original birth certificate as the mother, but that the intended mother should be recognized as the child's legal mother.[152] However, that approach

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[146] *Id.* at 319 ("The Department appeals the ruling that the birth certificate should show the mother as 'unknown'; the Department does not challenge the court's ruling that Intended Mother is the 'legal mother.'").

[147] *Id.* ("Consequently, to the extent Intended Parents sought a declaration that Intended Mother is the 'legal mother,' they have effectively received the relief that they sought in both proceedings.").

[148] *Id.* at 320.

[149] *Id.* at 321.

[150] *See id.*

[151] *Id.*

[152] *Id.* at 320–22.

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has not been universally adopted in Tennessee, even in uncontested gestational surrogacy cases.[153]

In re Amadi A.[154] involved a gestational surrogacy agreement in which the commissioning couple, the surrogate, and her husband all sought to have the intended parents' names on the birth certificates.[155] A court ordered the Tennessee Department of Health to issue birth certificates naming the intended parents as the children's parents,[156] but the Department filed a motion to set aside the portion of that order "finding that Mrs. A, the 'non-genetic, non-gestational intended mother,' was the legal mother of the children and entitled to have her name listed on the original birth certificates."[157] After considering the Department's objections, the court held that the gestational surrogate had to be listed as the children's mother[158] and that the "nonbiological parent must adopt in order to obtain parental rights[.]"[159] That decision was appealed.[160]

The Tennessee Court of Appeals noted that a previous case, *A.F.C.*, involved "strikingly similar" facts,[161] and that the *A.F.C.* court had held that the gestational surrogate's name had to appear on the birth certificate.[162] The *Amadi A.* court found the *A.F.C.* reasoning persuasive and also held that the surrogate's name should appear on the birth certificate.[163] However, in *A.F.C.*, the intended mother had been

[153] *E.g.*, *In re* Amadi A., No. 14-1281, 2014 WL 1956247 (Tenn. Ct. App. Apr. 24, 2015).

[154] *Id.*

[155] *Id.* at *1.

[156] *Id.* at *2.

[157] *Id.*

[158] *Id.* ("[T]he court concluded that the woman who gave birth to the children must be listed as the mother on the original birth certificates.").

[159] *Id.* (citing TENN. CODE ANN. § 36-1-102(48) (2016)).

[160] *Id.* ("The joint petitioners timely filed a notice of appeal to this Court.").

[161] *Id.* at *4.

[162] *Id.* ("Considering the intent of and purpose served by the Vital Records Act and the relevant federal law, the court of appeals determined that "the 'mother' to be entered on the certificate of live birth . . . is the . . . woman who delivers the child." (citing TENN. CODE ANN. § 68-3-301 (2016))).

[163] *Id.* ("We agree with the court's reasoning in *In re Adoption of A.F.C.* and likewise hold that the surrogate mother in this case, C.B., should be listed on the birth certificates for the children.").

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declared the legal mother.[164] In contrast, the trial court in *Amadi A*. held that the surrogate was the legal mother and that the intended mother could only be recognized as the legal mother through a stepparent adoption.[165]

In *Amadi A.*, there was "no dispute between parties with real and adverse interests,"[166] because the intended parents, the surrogate, and her husband all agreed that the intended mother should be recognized as the legal mother.[167] But that meant that the resolution of legal maternity "would not resolve any real controversy,"[168] which induced the appellate court to "vacate the juvenile court's finding regarding the legal maternity of the children."[169] The appellate court understood that its holding that legal maternity should be left unresolved might leave the parties frustrated,[170] but reasoned that the legislature should determine who should be declared the parent in this kind of case.[171]

Leaving the identity of the child's legal mother an open question cannot be thought good public policy.[172] States interested in promoting stability for a child[173] undermine that goal by leaving the legal relationship between parent and child unresolved until a live controversy presents itself. In the interim, the would-be legal parent may not invest emotionally and financially in the child as much as she otherwise would have.[174] Further, waiting to legally cement the relationship until

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[164] *In re* Adoption of A.F.C., 491 S.W.3d 316, 318 (Tenn. Ct. App. 2014).

[165] *In re* Amadi A., 2015 WL 1956247, at *2.

[166] *Id.* at *9.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at *10 ("We recognize the parties' frustration with the uncertainty in this area of the law.").

[171] *Id.* at *10 ("We . . . urge the Tennessee General Assembly to give Tennessee's courts and citizens guidance in this important and increasingly complex area of the law.").

[172] *See In re* T.J.S., 54 A.3d 263, 276–77 (N.J. 2012) (Albin, J., dissenting) (noting that there are disadvantages to being "motherless").

[173] *See* Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J.L. & FAM. STUD. 1, 2 (2013) ("[A]s a general matter, children benefit in a variety of ways from the stability and caring that placement in a permanent, loving home can bring.").

[174] *See* Purvis, *supra* note 102, at 213 ("[S]tudies indicate that the emotional relationships between legal parent and child are stronger even than the relationship between a permanent caregiver and child. Having a legal parent as caregiver is thus beneficial for children both financially and emotionally.").

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there is a live controversy, such as a challenge to the mother's legal parentage, would hardly promote the child's feelings of security and well-being.[175] A non-resolution of legal maternity almost invites future litigation, especially if the legal father should die during the pregnancy[176] or if the surrogate should have a change of heart.[177] In short, leaving maternity unresolved until there is a live controversy is an approach that is not reasonably calculated to promote the interests of children, families, or society.

B. PARENTAL RIGHTS IN CONTESTED TRADITIONAL SURROGACY CASES

Recently, two state supreme courts addressed the enforceability of traditional surrogacy contracts. Both held that the surrogate's parental rights could not be terminated against her will.[178] However, the courts were willing to enforce the contracts in other respects, which may well create a number of future difficulties.

1. Wisconsin

In re F.T.R.[179] involved a traditional surrogacy contract between the Roseckys and the Schissels.[180] Monica Schissel was artificially inseminated with David

[175] *Cf.* Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1, 9 (2012) ("[P]ermanency, security, and stability are recognized as essential to children's well-being and healthy development and are considered inherent in legal parent-child relationships.").

[176] *Cf.* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 336 n.189 (1988) ("These rules could compel a surrogate mother to accept responsibility for a child she does not want, such as when the father dies or becomes unable to care for the child."); Associated Press, *Father of Triplets Kept by Surrogate Dies*, PITT. POST GAZETTE (Feb. 18, 2011), http://www.post-gazette.com/breaking/2011/02/18/Father-of-triplets-kept-by-surrogate-dies/stories/201102180175 (discussing the death of the commissioning father in a surrogacy agreement).

[177] *Cf.* John A. Robertson, *"Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729, 1745 (2003) ("Should a court enforce the gestational surrogate mother's agreement to relinquish the child at birth or side with the surrogate mother who now wishes to keep the child?").

[178] *In re Baby II*, 447 S.W.3d 807, 832 (Tenn. 2014) ("If a surrogate contests the termination of her parental rights, however, and the termination proceedings take on an involuntary nature, then the statutory procedures for safeguarding a parent's constitutional rights must be satisfied before contractual terms relating to termination can be enforced."); *In re* F.T.R., 833 N.W.2d 634, 649 (Wis. 2013) ("[T]he portions of the PA [parenting agreement] calling for the termination of Monica's parental rights are unenforceable.").

[179] 833 N.W.2d 634 (Wis. 2013).

[180] *Id.* at 637 ("David and Marcia Rosecky (the Roseckys) entered into a Parentage Agreement (PA or the agreement) with Monica and Cory Schissel (the Schissels) whereby the parties agreed that Monica

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Rosecky's sperm so that the Roseckys would have a child to raise.[181] Marcia Rosecky had previously undergone treatment for leukemia, which had rendered her eggs non-viable.[182]

Monica had offered to be a surrogate for the Roseckys,[183] preferring artificial insemination to having an embryo implanted in her uterus.[184] That way, the Roseckys would know the child's family history and there would be a lower probability of multiples.[185] When Marcia had expressed concern that Monica would have difficulty parting with any child born of a traditional surrogacy,[186] Monica assured her that the Roseckys would be able to raise the child.[187]

The couples discussed the issues before the pregnancy, agreeing that "Monica and the child would have no legal relationship, Monica would not have formal custody and placement of the child, Monica would see the child through informal social visits, and the Roseckys would raise the child."[188] Both couples had the benefit of legal counsel and their agreement was reflected in a writing[189] signed by all of the parties.[190]

During Monica's pregnancy, the Schissels and Roseckys had a falling out.[191] When F.T.R. was born, the Roseckys took him home but Monica Schissel refused to

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Schissel (Monica) would become pregnant and carry a child for the Roseckys."); *id.* ("Monica became pregnant through artificial insemination using her egg and David Rosecky's (David) sperm.").

[181] *Id.*

[182] *Id.* at 638 ("[H]er eggs are no longer viable and she is unable to have biological children.").

[183] *Id.* ("Monica offered to act as a surrogate for the Roseckys.").

[184] *Id.* (" . . . Monica preferred to use her own egg.").

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* ("Both parties retained counsel, and the attorneys reduced the agreement to writing.").

[190] *Id.* at 639 ("On November 7, 2009, the agreement was signed by David as the 'father,' and Marcia as the 'mother.' On November 17, 2009, the agreement was also signed by Monica as the 'carrier,' and Cory Schissel (Cory) as the 'husband.' The attorneys for both parties also signed the agreement.").

[191] *Id.* ("Toward the end of the pregnancy, the parties had a falling out.").

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terminate her own parental rights.[192] The circuit court eventually granted David Rosecky primary custody with Monica being awarded "two hours of placement per month."[193] After a separate hearing, the circuit court held that the parenting agreement (in which Monica would terminate her own parental rights) was not enforceable.[194]

The child, F.T.R., formed an attachment with Marcia, and placement with Monica might harm him "because of Monica's desire to be his mother and to replace Marcia, which would be confusing for F.T.R."[195] Further, the relationship between the Roseckys and Schissels was "essentially dead,"[196] although "the parties did not swear or yell at each other."[197] Perhaps because of "many instances of failed communication, hurt feelings, and tense interactions,"[198] the parties would likely have difficulty cooperating with each other with respect to visitation. Nonetheless, the circuit court noted that "the contact between the families was generally civil,"[199] and held out hope that "cordial transitions can be accomplished and that cordiality may develop into friendly transitions."[200]

The Wisconsin Supreme Court considered "whether an agreement for the traditional surrogacy and adoption of a child is enforceable."[201] That issue was necessary to resolve because "[u]nder the current statutory schemes, Marcia is left without any parental rights unless and until Monica's parental rights are terminated and Marcia adopts F.T.R."[202] While Monica could have surrendered her parental

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[192] *Id.* ("[S]hortly before F.T.R. was born, Monica reneged on the PA and refused to terminate her parental rights. On March 19, 2010, Monica gave to F.T.R. and allowed F.T.R. to go home with the Roseckys from the hospital.").

[193] *Id.*

[194] *Id.* ("On February 8, 2011, the court held a hearing and determined that the PA was not enforceable.").

[195] *Id.* at 640.

[196] *Id.*

[197] *Id.* at 640–41.

[198] *Id.* at 641.

[199] *Id.* at 642.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 646.

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rights voluntarily,[203] she refused to do so.[204] One of the litigated issues was whether those rights could be terminated involuntarily—after all, she had been a party to the parenting agreement specifying that she would surrender her parental rights.[205]

The parental rights termination issue was easily resolved—the parenting agreement was unenforceable to the extent that it required Monica to surrender her parental rights.[206] But that did not end the analysis. Wisconsin recognizes that unenforceable provisions in a contract may be severable,[207] especially if a severability clause is included in the contract.[208] The agreement between the Roseckys and the Schissels did include such a clause.[209]

Under Wisconsin law, a contractual provision may be severable if deleting that provision would not defeat the primary purpose of the contract.[210] The *F.T.R.* court reasoned that the "primary purpose of this agreement is to ensure that the Roseckys will be the parents of F.T.R. and will have custody and placement"[211] and that those purposes could be served even if the unenforceable parental rights termination

[203] *See id.* ("Parental rights can be terminated voluntarily."); *see also* WIS. STAT. § 48.41 (2016).

[204] *In re* F.T.R., 833 N.W.2d at 639 ("Monica reneged on the PA and refused to terminate her parental rights.").

[205] *See id*. at 647 ("David argues that the PA is enforceable under contract law and that public policy does not invalidate the PA.").

[206] *Id.* at 649 ("[T]he portions of the PA calling for the termination of Monica's parental rights are unenforceable.").

[207] *Id.* ("Even if a contract contains an illegal provision, 'Wisconsin has long accepted that portion of a contract may be severable.'" (citing Markwardt v. Zurich Am. Ins. Co., 724 N.W.2d 669, 682 (Wis. Ct. App. 2006))).

[208] *Id.* ("A severability clause, though not controlling, is entitled to great weight in determining if the remaining portions of a contract are severable."); *see also* Town of Clearfield v. Cushman, 440 N.W.2d 777, 782 (Wis. 1989).

[209] *In re* F.T.R., 833 N.W.2d at 647 (referring to the severability clause in the PA).

[210] *See* Simensted v. Hagen, 126 N.W.2d 529, 534–35 (Wis. 1964) (citing RESTATEMENT (FIRST) OF CONTRACTS § 603 (1932); Zaremba v. Int'l Harvester Corp., 155 N.W. 114 (Wis. 1915)). *See also In re* F.T.R., 833 N.W.2d at 649 ("If a contract contains an illegal clause, the remaining portions of the contract can be enforced if severing the illegal portions does not defeat the primary purpose of the bargain." (citations omitted)).

[211] *In re* F.T.R., 833 N.W.2d at 651.

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provision was excised from the agreement.[212] However, the primary purpose presumably included making Marcia the *legal* parent of F.T.R., and that could not happen while Monica was F.T.R.'s legal parent.[213] It simply is not credible to believe that the Roseckys did not care whether Marcia, rather than Monica, was recognized as F.T.R.'s legal parent, although David argued that it was "not necessary to terminate Monica's parental rights to effectuate the parties' overall intent—for the Roseckys to be the parents of F.T.R., with full custody and placement."[214]

Accepting that the involuntary termination of parental rights provision was severable,[215] the Wisconsin Supreme Court then examined whether the remaining parts of the agreement could be enforced: "Aside from the termination of parental rights provisions in the PA [parenting agreement] at issue, we conclude a PA is a valid, enforceable contract unless enforcement is contrary to the best interests of the child."[216] Enforcement of the contract promoted public policy in several ways:

> Enforcement 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.[217]

The Wisconsin Supreme Court also reversed the circuit court decision on visitation, concluding that "the circuit court erroneously exercised its discretion by excluding the PA and rendering its custody and placement decision without consideration of the PA."[218] Basically, the circuit court had held the parenting

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[212] *Id.* ("The purpose of the PA can be carried out, after severing the TPR portions, by enforcing the custody and placement provisions of the PA." (citing Simenstad v. Hagen, 126 N.W.2d 529, 534 (Wis. 1964))).

[213] *Id.* at 646.

[214] *Id.* at 647.

[215] *Id.* at 651 ("[T]he offending TPR provisions in the PA can be severed from the remainder of the contract without defeating the primary purpose of the agreement.").

[216] *Id.* at 647.

[217] *Id.* at 649–50.

[218] *Id.* at 643.

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agreement unenforceable[219] and had refused to take that agreement into account when making the custody and visitation award.[220] Yet, without more direction, it was not entirely clear what the Wisconsin Supreme Court was directing the circuit court to do.

The circuit court had granted primary custody to David Rosecky and secondary custody to Monica Schissel.[221] The court also "awarded Monica six hours of placement every other weekend until F.T.R. turned two (March 2012), and at that time, Monica was awarded an overnight stay from Friday evening until Saturday evening every other weekend."[222] However, the Wisconsin Supreme Court seemed incredulous, claiming that the circuit court had "rejected the expert testimony and the guardian ad litem's opinion that the tension between the parties and the separation from attachment figures could endanger F.T.R.'s mental or emotional health."[223] It was unclear whether the state supreme court was making this point because it thought overnight visitation unwise or, instead, any visitation unwise.

A few points might be made about the state supreme court's criticism of the circuit court. First, the circuit court had accepted that there was a risk of harm in its decision,[224] but had nonetheless decided that the risk was worth taking because of other benefits that might accrue.[225] But if instead the circuit court was, in effect, deciding that cutting off all visitation between Monica and F.T.R. would be contrary to the child's interests, then the state supreme court was telling the circuit court that it should *not* enforce the parenting agreement provision that cut off visitation. Assuming that the circuit court made the child's best interests the polestar of its

[219] *Id.* at 638.

[220] *Id.*

[221] *Id.* at 641 ("[T]he circuit court awarded sole custody and primary placement of F.T.R. to David and secondary placement to Monica.").

[222] *Id.*

[223] *Id.*

[224] *Id.* at 641 ("The possibility that difficulties may occur and that allowing the Schissels to play a role in the child's life is a risk. But risks are a part of life.").

[225] *Id.* at 642 ("F.T.R. would have the benefit of five half siblings if Monica received placement.").

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analysis,[226] then the remand might not result in a change in the visitation order.[227] Or, even if it did, Monica's visitation might be reduced rather than terminated.[228]

When discussing the benefits of enforcing the surrogacy agreement, the state supreme court mentioned that doing so would reinforce the parties' expectations and reduce contentious litigation.[229] All else being equal, those are desirable outcomes. But by conditioning enforcement of the agreement on the child's best interests, the court almost invites surrogates who have had a change of heart to challenge the agreement by asserting that its enforcement would be contrary to the child's interests. Inviting such challenges on that basis neither reinforces party expectations nor reduces contentious litigation.

Suppose that on remand the circuit court modified its visitation order, for example, by refusing to permit overnight visitation on alternate weekends once F.T.R. had reached two years of age.[230] Even so, Marcia still would not have parental rights while Monica retained them.[231] One question left open is who would get custody if something were to happen to David, given that Monica still had some

[226] *See id.* at 650 ("[T]he legislature has manifested its intent in the children's code, wherein it concluded that the best interests of the child are always paramount."); *see also* WIS. STAT. § 48.01 (2016).

[227] *Cf. In re* the Paternity of F.T.R., No. 2011AP2166, 2012 WL 3205579, at *1 (Wis. Ct. App. Aug. 9, 2012) ("Monica argues that the placement order should be upheld because the circuit court properly exercised its discretion in weighing the expert testimony in this case.").

[228] Thomas J. Walsh, *Surrogacy Law Still Uncertain*, WIS. LAWYER (Mar. 2014), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/article.aspx?Volume=87&Issue=3&ArticleID=11410 ("Once the TPR provisions are severed, the parentage agreement says that Marcia and David shall have primary placement, but it does not cut off secondary placement (Formerly called visitation) for Monica.").

[229] *In re* F.T.R., 833 N.W.2d at 649–50.

[230] *Id.* at 641.

[231] *See id.* at 651 ("[T]he portions of the PA requiring a voluntary TPR do not comply with the procedural safeguards set forth in Wis. Stat. § 48.41 because Monica would not consent to the TPR and there is no legal basis for involuntary termination.").

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visitation and her parental rights had not been terminated?[232] Perhaps Marcia would be awarded visitation,[233] although she might well not be awarded custody.[234]

2. Tennessee

In re Baby involved a traditional surrogacy agreement.[235] Before the birth, the surrogate, her husband, and the commissioning couple had all filed to have the surrogate's parental rights terminated and the commissioning couple given custody.[236] That request was granted.[237] But the surrogate changed her mind less than a week after the child was born and filed to obtain custody of the child.[238]

Tennessee law reads:

> (A) "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

[232] Strasser, *supra* note 19, at 108 ("[I]t is unclear what would happen if David Rosecky died and both Marcia and Monica sought custody.").

[233] *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 431 (Wis. 1995) ("[T]he legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes.").

[234] *Cf. id.* at 420 ("Holtzman has not raised a triable issue regarding Knott's fitness or ability to parent her child and has not shown compelling circumstances requiring a change of custody.").

[235] *In re Baby II*, 447 S.W.3d 807, 812 (Tenn. 2014) ("The parties contracted for a 'traditional surrogacy,' which involves the artificial insemination of the surrogate, who, after giving birth, is meant to relinquish the child to the biological father and the intended mother.").

[236] *Id.* at 812 ("Prior to the birth of the child, all parties filed a joint petition asking the juvenile court to declare the paternity of the child, grant custody to the intended parents, and terminate the parental rights of the surrogate.").

[237] *Id.* at 815–16.

> [S]eventeen days prior to the birth of the child, a juvenile court magistrate (the "Magistrate") issued an order approved by all parties (the "Consent Order"), which "forever terminated" the "rights and responsibilities that the [Surrogate and her husband] might theoretically claim with regard to the [c]hild, if any," and further declared the child to be "the lawful child of" the Intended Father, and that the Intended Parents be entitled to "full legal and physical custody of the [c]hild immediately upon birth." *Id.*

[238] *Id.* at 812 ("When the child was almost one week old, the surrogate filed a series of motions asking the magistrate to vacate the prior order, set aside the surrogacy contract, and award her custody.").

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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 [G]eneral [A]ssembly.[239]

The Tennessee statute suggests that a gestational surrogate who is carrying a child genetically related to both members of a commissioning married couple does not have parental rights and that there is no need for the wife to adopt the child.[240] However, the statute does not speak to a situation where only one member of the couple is genetically related to the child carried by the gestational surrogate, and Tennessee law with respect to legal maternity in that kind of case is unresolved.[241]

The *Baby* court explained that since the passage of the Tennessee statute, "the General Assembly has not further addressed the propriety of traditional surrogacies."[242] But the legislature's failure to act meant that "the determination of whether public policy prohibits the enforcement of a traditional surrogacy contract has become the obligation of this Court."[243] That said, the Tennessee Supreme Court was not writing on a blank slate. "Because 'neutral' legislation cannot be interpreted as expressing a policy against the agreements defined in the surrogacy statute . . . the

[239] *Id.* at 820–21 (citing TENN. CODE ANN. § 36-1-102(48)(A)–(C) (2014)).

[240] *See* TENN. CODE ANN. § 36-1-102(48)(B) (2014).

[241] *See supra* notes 159–69 and accompanying text (discussing *In re* Amadi A.).

[242] *In re Baby II*, 447 S.W.3d at 822.

[243] *Id.*

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surrogacy statute did not establish a public policy prohibiting traditional surrogacy agreements."[244]

The Tennessee Supreme Court spelled out some limitations on surrogacy compensation, namely, that

> the terms of a surrogacy contract pertaining to compensation will only be enforceable to the extent that they are not contingent upon the surrogate's surrender of the child or the termination of her parental rights, and to the extent that they reflect the reasonable costs of services, expenses, or injuries related to the pregnancy, the birth of the child, or other matters inherent to the surrogacy process.[245]

Presumably, this limitation would also apply to gestational surrogates in that the compensation would have to be tied to "reasonable costs."[246] However, because "the gestational surrogate has no parental rights recognized under Tennessee law,"[247] the compensation provision could not be held unenforceable on the ground that she was allegedly being induced to give up those rights.

With respect to the custody award, the Tennessee court explained that "courts are not bound by any surrogacy contract as to the determination of the best interests of a child."[248] That said, when doing its own best interests analysis, the court "may consider the terms of a surrogacy contract as a factor in the best interest analysis."[249] The court cited *F.T.R.* with approval, noting how "surrogacy agreements 'allow[ ] the intended parents to plan for the arrival of their child, reinforce[ ] the expectations of all parties to the agreement, and reduce[ ] contentious litigation that could drag on for the first several years of the child's life.'"[250] The court also cited with approval the *F.T.R.* observation that "these agreements tend to 'promote[ ] stability and permanence in family relationships' and, therefore, can advance the interests of the

[244] *Id.* at 823 (citing *In re Baby* [*In re Baby I*], No. M2012–01040–COA–R3–JV, 2013 WL 245039, at *4 (Tenn. Ct. App. Jan. 22, 2013).

[245] *Id.* at 827.

[246] *Id.*

[247] *Id.* at 835.

[248] *Id.* at 828.

[249] *Id.* at 828–29.

[250] *Id.* at 829 (citing *In re* F.T.R., 833 N.W.2d 634, 649–50 (Wis. 2013)).

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child,"[251] and that "the 'expos[ure] to contentious family relationships' from protracted disputes concerning a child can cause significant harm."[252] Finally, the court adopted the *F.T.R.* approach to severability:

> [W]henever possible, courts should interpret a contract in a way that supports its validity and invalidates only the offending contractual terms. In many instances, a court will be able to successfully sever any improper terms related to the termination of parental rights while effectuating the main purpose of the agreement.[253]

Nonetheless, the *Baby* court was not simply directing that the contract be enforced. On the contrary, "when there is a conflict between the contractual terms and the best interests of a child, the best interests as determined by the trial court . . . must be given priority."[254] Further, "the enforcement of a traditional surrogacy contract must occur within the confines of the statutes governing who qualifies as a legal parent and how parental rights may be terminated."[255] But that qualification is important, both because "a traditional surrogate, as the biological mother of the child, is a legal parent until her parental rights are terminated through one of our statutory procedures,"[256] and because "[i]n a traditional surrogacy, an intended mother—who, by definition, is not genetically related to the child—may only attain the status of a legal parent through adoption."[257]

The Tennessee court was limiting the force of surrogacy contracts in two different respects. First, they are unenforceable if contrary to the child's interests. Second, parental rights can neither be terminated nor acquired by virtue of the contract.

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[251] *Id.* (citing *In re* F.T.R., 833 N.W.2d at 649–50).

[252] *Id.* (citing *In re* F.T.R., 833 N.W.2d at 650).

[253] *Id.* at 831 (citing *In re* F.T.R., 833 N.W.2d at 651).

[254] *Id.* (citing Tuetken v. Tuetken, 320 S.W.3d 262, 271 (Tenn. 2010)).

[255] *Id.* at 830.

[256] *Id.* at 831.

[257] *Id.* (citing TENN. CODE ANN. § 36-1-102(28)(E) (2015)).

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In light of all of these considerations, the *Baby* court remanded the case "to determine visitation and child support."[258] Perhaps the court was trying to send the traditional surrogate a message *sub silentio*. Not only would her compensation be limited,[259] but the agreement itself would be considered as a factor in the best interests analysis determining custody[260] and the surrogate refusing to surrender her parental rights might be responsible for child support.[261]

Ironically, while the Tennessee Supreme Court reversed the intermediate appellate court with respect to the termination of the surrogate's parental rights,[262] the *Baby* court otherwise affirmed the intermediate appellate court.[263] However, the intermediate appellate court had not reviewed a trial court resolution of a custody dispute[264] because it held that the surrogate already surrendered her parental rights.[265] So, too, the trial court had awarded custody to the intended father after having wrongly terminated the surrogate's parental rights.[266] No best interest analysis was performed.[267] This means that the Tennessee Supreme Court had both insisted that the best interests test controls when awarding custody in surrogacy cases[268] and affirmed the juvenile court's grant of custody,[269] notwithstanding the absence of the best interests analysis.

Perhaps the Tennessee Supreme Court was implicitly suggesting that the child's best interests would be served by not relitigating custody.[270] Prospectively,

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[258] *Id.* at 840.

[259] *Id.* at 827.

[260] *See id.* at 833 ("[T]he juvenile court was entitled to consider the terms of the contract and the parties' expressed intent as to the best interests of the Child.").

[261] *Id.* at 840.

[262] *Id.* ("Because there was no cognizable basis for the termination of the Surrogate's parental rights, we vacate that portion of the Consent Order.").

[263] *Id.* (["O]therwise, the judgments of the juvenile court and Court of Appeals are affirmed.").

[264] *In re Baby I*, No. M2012–01040–COA–R3–JV, 2013 WL 245039, at *6 (Tenn. Ct. App. Jan. 22, 2013) ("This is not a custody dispute."), *aff'd in part, rev'd in part*, 447 S.W.3d 807 (Tenn. 2014).

[265] *Id.* ("[T]he surrogate has already given up her parental rights.").

[266] *In re Baby II*, 447 S.W.3d at 812 ("We vacate the portion of the juvenile court's order terminating the parental rights of the surrogate.").

[267] *See In re Baby I*, 2013 WL 245039, at *6 ("[T]here is no best interest analysis.").

[268] *See In re Baby II*, 447 S.W.3d at 829.

[269] *Id.* at 812 ("We . . . otherwise affirm the judgments of the juvenile court and the Court of Appeals.").

[270] *See id.* at 829.

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however, courts will need much more guidance when deciding the extent to which the surrogacy contract should be considered in a best interests analysis. Absent that guidance, one might expect some courts to give it great weight while other courts would give it comparatively little weight, which would create great inconsistency in the jurisprudence and undercut the kind of certainty and predictability that the court seems to value.

IV. CONCLUSION

Up until fairly recently, there seemed to be a growing consensus across the states that gestational but not traditional surrogacy contracts were enforceable. However, decisions in different states have cast doubt on that understanding. Some courts are unwilling to enforce gestational surrogacy agreements even when uncontested, while other courts are giving substantial effect to traditional surrogacy agreements.

The state supreme courts in Wisconsin and Tennessee upheld the enforcement of traditional surrogacy agreements except insofar as they required termination of the surrogate's parental rights. That exception is important. The surrogate may well retain rights to visitation at the very least, and the courts did not address whether subsequent attempts to gain custody or increase visitation should be analyzed as they would be in other cases where each of a child's biological parents has married someone else. Nor did the courts address how a dispute between the intended mother and the surrogate should be handled if the biological father dies or has his rights terminated.

In Wisconsin, the traditional surrogacy parenting agreement should be enforced unless doing so is contrary to the child's best interests,[271] whereas in Tennessee the agreement will be enforced if it promotes the best interests of the child.[272] It is simply unclear whether these standards differ as a practical matter; nor is it clear how much weight should be given to the existence of the surrogacy agreement in the initial determination of the child's best interests.

Both state supreme courts suggest that although parental rights termination provisions are invalid, surrogacy contracts are otherwise enforceable if they promote the best interests of the child. Yet, surrogacy contracts as a general matter contemplate no required visitation with the surrogate, which neither supreme court explicitly addressed.

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[271] *In re* F.T.R., 833 N.W.2d 634, 642 (Wis. 2013).

[272] *In re Baby II*, 447 S.W.3d at 829.

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If the question is not whether, but how much, visitation the surrogate will have (assuming that she is not awarded custody), then it is unclear what is meant when the courts say that such contracts are enforceable except with respect to parental rights termination. If the surrogate can be denied all visitation, then it is uncertain how the surrogate can retain parental rights since the privileges and presumptions associated with that status do not attach. Further, if courts enforce the contract by only permitting the surrogate extremely limited contact, then (depending on state law) the child may be placed with someone who is a virtual stranger if, for some reason, the surrogate is called upon to play a primary parenting role.

The state supreme courts have been given a difficult task. With insufficient guidance from their respective legislatures, they have been asked to resolve the complicated issues that are implicated in surrogacy contracts. However, it seems clear that in several instances courts have not thought through some of the ramifications of the positions they have adopted. While attempting to create a more predictable jurisprudence, these courts have instead made matters more uncertain and left would-be contracting parties even more confused about what they might reasonably expect. Regrettably, the goals of clarity and consistency in the surrogacy context have been undermined and seem even less likely to be attained anytime soon.

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