

November 2015

Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements

William J. Giacomo

Angela DiBiasi

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Contracts Commons](#), [Family Law Commons](#), [Sexuality and the Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

William J. Giacomo and Angela DiBiasi, *Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements*, 36 Pace L. Rev. 250 (2015)

DOI: <https://doi.org/10.58948/2331-3528.1916>

Available at: <https://digitalcommons.pace.edu/plr/vol36/iss1/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements

Honorable William J. Giacomo with Angela DiBiasi, Esq.

I. Introduction

Advances in reproduction technology raise difficult legal questions concerning the enforceability of surrogacy parenting agreements. By way of example, consider the recent divorce and custody battle involving television talk show host and comedian Sherri Shepherd. She and her then-husband entered into a surrogacy agreement whereby a donor egg was fertilized *in vitro*¹ with the sperm of Shepherd's husband, and later implanted in a surrogate to carry the child.² By this surrogacy

* Honorable William J. Giacomo (B.S. Boston College, J.D. Pace University School of Law) is a Justice of the Supreme Court, 9th Judicial District and an Adjunct Professor at Pace University. Angela DiBiasi, Esq. is a Principal Court Attorney for the Supreme Court, 9th Judicial District.

* An earlier version of this article was originally published in the July/August 2015 issue of the New York State Bar Association Journal.

1. See *In vitro fertilization*, WIKIPEDIA,

http://en.wikipedia.org/wiki/In_vitro_fertilisation (last visited Oct. 9, 2015).

In vitro fertilization . . . (IVF) is a process by which an egg is fertilized by sperm outside the body *in vitro* ('in glass') The fertilized egg (zygote) is cultured for 2-6 days in a growth medium and is then implanted in the same or another woman's uterus, with the intention of establishing a successful pregnancy.

Id.

2. See generally Hollie McKay, *Can Sherri Shepherd Walk Away from Unborn Surrogate Child?*, FOX NEWS (July 22, 2014), <http://www.foxnews.com/entertainment/2014/07/22/can-sherri-shepherd-walk-away-from-unborn-surrogate-child/>.

arrangement, the egg donor and Sherri Shepherd's husband are the biological parents with a genetic tie to the resulting child. After conception, Sherri Shepherd and her husband filed for divorce. Shepherd is the financial "breadwinner" of the marriage who does not want custody, parenting rights or child support obligations based on the fact that she did not give birth and has no genetic connection to the resulting child. These legal proceedings are further complicated by the fact that Sherri Shepherd filed for divorce in New Jersey (which has a similar stance to New York in deeming surrogacy agreements as unenforceable), while her husband filed for divorce in California (which recognizes the enforceability of surrogacy agreements).³ The laws governing surrogacy agreements in the aforementioned states yield contrary results on the issue. The governing law in this area is new and evolving and, as such, the allocation of the legal rights and responsibilities depend on which state has jurisdiction over the matter. This article will discuss the basic types of surrogacy agreements and examine the legal distinctions of their enforceability under New York and California law.

II. Background on Surrogacy Agreements

There are two forms of surrogacy: gestational and traditional. "In a gestational surrogacy, the surrogate mother is not genetically related to the child. Eggs are extracted from the intended mother or egg donor and mixed with sperm from the intended father or sperm donor in vitro."⁴ Sherri Shepherd and her then-husband entered into a form of gestational surrogacy agreement. As such, neither Sherri Shepherd nor the surrogate have a genetic tie to the resulting child. In contrast, under a traditional surrogacy agreement, "the surrogate mother is artificially inseminated with the sperm of

3. See generally Andrea Peyser, *Unborn Child Faces Uncertain Fate in Sherri Shepherd's Divorce War*, N.Y. POST (July 14, 2014, 2:31 AM), <http://nypost.com/2014/07/14/unborn-child-faces-uncertain-fate-in-sherri-shepherds-divorce-war/>.

4. See Jenn Z., *Definitions and Types of Surrogacy*, SURROGATE MOTHERS ONLINE, <http://www.surromomsonline.com/articles/define.htm> (last visited Aug. 26, 2015).

the intended father or sperm donor. The surrogate's own egg will be used, thus she will be the genetic mother of the resulting child."⁵

A written surrogacy agreement is usually executed by the parties seeking a surrogate and the surrogate who will carry the resulting child. The terms of the agreement include the surrogate mother's obligation to carry the child in exchange for certain compensation paid to the surrogate. A traditional surrogacy agreement, where the surrogate mother provides her egg and is the biological mother of the resulting child, includes a waiver whereby the surrogate agrees to terminate her parental rights. The parties to a surrogacy agreement also agree to specific terms regarding medical care, finances, travel expenses, and the like to be paid by the parties seeking the surrogate.⁶

III. Comparative Analysis of Enforceability of Surrogacy Agreement

A. *New York Law*

The issue of surrogate parenting contracts has been a controversial one in New York and action to address the issue was commenced by the New York State Legislature in 1992 in the wake of *Matter of Baby M*,⁷ after several lower courts in New York reached somewhat conflicting determinations.⁸ The Legislature enacted Domestic Relations Law § 122 effective July 1993 to address the issue. The *Matter of Baby M* case filed in New Jersey involved a traditional surrogacy parenting agreement where

5. *Id.*

6. See generally *Free Online Legal Forms from All Law – Family Documents – Surrogate Parenting Agreement*, ALLLAW, www.alllaw.com/forms/family/surrogate_parenting (last visited Aug. 26, 2015) (examples of traditional surrogacy agreements); see generally *Sample Traditional Surrogacy Contract*, SURROGATE MOTHERS ONLINE, www.surromomsonline.com/articles/ts_contract.htm (last visited Aug. 26, 2015).

7. See *In re Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).

8. 45 N.Y. JUR. 2D DOM. REL. § 330.

a married woman had been inseminated with . . . a ‘purchasing’ father’s sperm who agreed to pay the woman a \$10,000 fee. After the birth of the child, the woman refused to give up the child. While the trial court decreed enforcement of the surrogacy contract, the New Jersey Supreme Court held that the contract was unenforceable as against public policy.⁹

New York subsequently codified Domestic Relations Law § 122, stating that “[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”¹⁰ Domestic Relations Law § 121(4) defines a “surrogacy parenting agreement” as an agreement in which “(a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and (b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.”¹¹ Interestingly, the legislature did not state that such agreement was entered into in exchange for any monetary compensation. Furthermore, Domestic Relations Law § 124 provides that “the court shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations”¹² when determining parental issues relating to the resulting child. In other words, the fact that the surrogate mother bore a child pursuant to a surrogacy agreement cannot be used against her in a court of law if she seeks custody or parenting rights to the resulting child.

Referring back to Sherri Shepherd’s surrogacy scenario, New York law (which is similar to New Jersey law) favors Shepherd since New York deems surrogacy agreements void and against public policy. Shepherd, as the financial

9. Alan D. Scheinkman, Practice Commentaries, N.Y. DOM. REL. LAW § 122 (McKinney 2015).

10. N.Y. DOM. REL. LAW § 122 (McKinney 2015).

11. *Id.* § 121(4).

12. *Id.* § 124(1).

'breadwinner' spouse, could be successful in avoiding child support or parental obligations pertaining to the child resulting from an unenforceable surrogacy agreement. Her ex-husband and the egg donor, as the child's biological parents, could potentially be subject to statutory child support and parental obligations.

Two cases involving parental rights of a stepparent and a spouse in a same-sex couple raise related issues worth noting. In *Monroe Dept. of Social Services ex. rel. Palermo v. Palermo*,¹³ the Monroe Department of Social Services appealed a Family Court Hearing Examiner's determination that the respondent/stepfather had no support obligations for his stepchildren, although he was directed to maintain "family" medical insurance coverage for his stepchildren. The court ultimately held that the respondent/stepfather was not obligated to pay child support for the stepchildren, absent showing that the county social services department was unable to recover support from the children's biological fathers. In this case, the biological fathers' identities were known by the social services department, and the court noted that one stepchild was born of an extramarital relationship entered into by the mother years after she separated from the respondent/stepfather.¹⁴ While the stepparent scenario is distinguishable from the surrogacy scenario since the stepparent did not contractually arrange to bring the child into the world, it should be noted that in reviewing this stepparent situation the court similarly held that the biological parents have the primary responsibility for the child.¹⁵

In the recent case of *Wendy G-M v. Erin G-M*,¹⁶ a same-sex marital couple entered into an agreement whereby one of the female spouses was inseminated with a donor's sperm, resulting in the birth of a child. The birth mother filed for divorce. Her spouse (who is not biologically connected to the child) sought access to the resulting child. Applying New York

13. *Monroe Cty. Dep't of Soc. Servs. ex rel. Palermo v. Palermo*, 596 N.Y.S.2d 252 (N.Y. App. Div. 1993).

14. *Id.* at 253 (internal citations omitted).

15. *Id.*; see 46 N.Y. JUR.2D DOM. REL. § 901.

16. *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845 (Sup. Ct. 2014).

common law, the court held that she was presumed to be a parent of the child conceived from artificial insemination and born during the marriage of the same-sex couple, which marriage had occurred in another state before New York enacted its Marriage Equality Act.¹⁷ The court found that “New York’s public policy strongly favors the legitimacy of children, and the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law.”¹⁸ This case is distinguishable from a surrogacy scenario in that it dealt with issues pertaining to the legitimacy of children and, as such, recognized parentage beyond biological ties to the resulting child. However, the court did not make a determination on the enforceability of the assisted reproduction agreement.

B. *California Law*

Contrary to New York, California recognizes the enforceability of surrogacy contracts. California’s favorable approach to surrogacy agreements is acknowledged in surrogacy parenting agreement standardized forms which contain a choice of law provision designating the applicability of California for dispute resolution.¹⁹ In fact, such forms oftentimes specifically reference the California Supreme Court’s decision in *Johnson v. Calvert*.²⁰

The *Johnson v. Calvert* case involves a *gestational surrogacy* agreement where the egg is extracted from the intended mother, sperm extracted from the intended father, implanted into the surrogate, and thus the surrogate has no biological connection to the child.²¹ After the birth, the “husband and wife brought suit seeking declaration that they were legal parents of child born of [a] woman in whom [the]

17. *Id.* at 858.

18. *Id.* at 848 (internal citations omitted).

19. See generally *Sample Traditional Surrogacy Contract*, SURROGATE MOTHERS ONLINE, www.surromomsonline.com/articles/ts_contract.htm (last visited Aug. 26, 2015).

20. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

21. *Id.*; see Jenn Z., *Definitions and Types of Surrogacy*, SURROGATE MOTHERS ONLINE, <http://www.surromomsonline.com/articles/define.htm> (last visited Aug. 26, 2015).

couple's fertilized egg had been implanted.”²² The trial court held that husband and wife, as the biological and contractually intended parents, were the legal parents of the resulting child, and the surrogate had no parental rights to the child.²³ The surrogate appealed the trial court's determination, which was upheld by the Court of Appeals for the Fourth District and the Supreme Court of California.²⁴ The Supreme Court of California's decision examined the Uniform Parentage Act (the “Act”), which was repealed in 1994 and replaced with equivalent provisions in the Family Code.²⁵ Under California Family Code, a woman may establish maternity by proof of genetics, child birth, or adoption.²⁶ In applying this standard, both the wife (as the egg donor) and the surrogate (as the child-bearer) had legitimate maternity claims via genetics and child birth respectively. The court broke this “tie” in favor of the wife (as egg donor) who, prior to conception, was the intended mother to raise and care for the child.²⁷ In its ruling, the court stated that surrogacy agreements are not inconsistent per se with public policy, and recognized that the gestational surrogacy agreement was a factor to be considered by courts when determining parental rights under the circumstances presented.²⁸ The *Johnson v. Calvert* case “illustrates that gestational surrogacy poses fewer legal risks because the surrogate has no genetic tie to the child and consequently is less likely to be granted custody if she revokes her consent.”²⁹

It is important to recognize a key distinction between the gestational surrogacy which was the subject of the *Johnson v. Calvert* case versus Shepherd's gestational surrogacy

22. *Johnson*, 851 P.2d at 776.

23. *Id.* at 778.

24. *Id.*

25. *Id.* at 779 n.5 (“[e]ffective January 1, 1994, [California] Civil Code sections 7000-7021 have been repealed and replaced with equivalent provisions in the Family Code.”) (citing 1992 CAL. STAT. ch. 162, § 4); see CAL. FAM. CODE §§ 7600-50 (West 1994)(effective Jan. 1, 1994).

26. *Johnson*, 851 P.2d at 782; see CAL. FAM. CODE §§ 7610[a], 7601[c], 7555 (West 2015).

27. *Johnson*, 851 P.2d at 782.

28. *Id.* at 787.

29. Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL'Y 279, 284-85 (2011).

arrangement. The *Johnson v. Calvert* case involved a gestational surrogacy agreement where the *egg is extracted from the intended mother*, and thus the surrogate has no biological connection to the child.³⁰ Under such circumstances, the court held that the legitimate maternity claims of Mrs. Calvert as the genetic mother and intended mother under the terms of the surrogacy parenting agreement prevailed. In contrast, Sherri Shepherd's gestational surrogacy arrangement involved an egg donor who is the genetic mother, and a surrogate who carried and delivered the child. This gestational surrogacy scenario raises unique issues of parental rights between the egg donor with a genetic tie to the child, the intended mother who initiated the procedure which resulted in the child, and the surrogate who carried and delivered the child.

*In re Marriage of Moschetta*³¹ was a case of first impression for the California Court of Appeals to determine parental rights of a child born of a *traditional surrogacy* agreement after the intended parents had separated. Pursuant to the parties' traditional surrogacy agreement, the wife/intended parent had no genetic tie to the child since the surrogate provided the egg fertilized by the husband's sperm and carried the child to term. After the Moschettas took the child home, Mrs. Moschetta filed for legal separation and sought a determination that she was the 'de facto mother' entitled to custody of the child. The surrogate joined in the proceeding also asserting parental rights to the child.³² "At [the 1992] trial no party asked the court to enforce the surrogacy contract; all agreed it was unenforceable. At the time they did not have the benefit of *Johnson v. Calvert*, which held that *gestational* surrogacy contracts do not, on their face, offend public policy."³³ The trial court deemed the surrogate the child's legal mother. In the wake of *Johnson v. Calvert*, Mr. Moschetta appealed that determination. The appellate court upheld the trial court's

30. *Johnson*, 851 P.2d at 778.; see Jenn Z., *Definition and Types of Surrogacy*, SURROGATE MOTHERS ONLINE, <http://www.surromomsonline.com/articles/define.htm> (last visited Aug. 26, 2015).

31. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (1994).

32. *Id.* at 895.

33. *Id.*

determination that the biological surrogate mother was the legal mother of the child, thus leaving the intended mother Mrs. Moschetta without parental rights.³⁴ The court distinguished this case from *Johnson v. Calvert* since this case did not have the conflicting legitimate maternity claims based upon the Act's standard factors; rather, the Moschettas' surrogate was both the genetic mother and birth mother of the resulting child and she did not consent to an adoption of the child by the intended mother. Accordingly, the appellate court held that it would be inappropriate to consider the validity of the surrogacy agreement where the Act resolved the parentage issue as the surrogate was both the genetic and birth mother of the child.³⁵

In 1998, the California appellate court reexamined related issues in *Buzzanca v. Buzzanca*.³⁶ The Buzzanca couple had an embryo genetically unrelated to them arranged for in vitro fertilization into a surrogate to carry to term. Prior to birth, Mr. Buzzanca filed for divorce and sought no responsibility to the child upon birth. The trial court held that the child had no legal parents since the child had no connection by birth or genetics.³⁷ The appellate court overturned the trial court and held that the Buzzanca couple were the legal parents, finding that genetic connection was not determinative. Rather, the court found that the parties' intentions rendered the Buzzancas the legal parents, thus Mr. Buzzanca was responsible to the child upon birth. The appellate court stated that the Buzzancas initiated and consented to the procedure which resulted in the birth of a child and, as such, are estopped from denying their parental obligation to the child.³⁸

34. *Id.* at 902-03; see Cynthia E. Fruchtman, *Whose Pregnancy Is It?*, CAL. LAW. (Jan. 2013), <https://ww2.callawyer.com/clstory.cfm?pubdt=NaN&eid=926465&evid=1>.

35. *In re Moschetta*, 830 Cal. Rptr. 2d at 900-01; see RICHARD A. LORD, 7 WILLISTON ON CONTRACTS § 16:22 (4th ed. 2010).

36. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 283 (1998).

37. *Id.* at 282.

38. Elaine A. Lisko, *California Appellate Court Holds Divorcing Spouses Who Were Intended Parents of Child Resulting from Anonymous Egg and Sperm Donors and Brought to Term by Surrogate to Be Legal Parents of Child*, HEALTH L. & POL'Y INST. (Apr. 8, 1998), <http://www.law.uh.edu/healthlaw/perspectives/Reproductive/980408Child.html>.

In applying the current applicable laws in the State of California, Sherri Shepherd could assert the position that her gestational surrogacy arrangement is distinguishable from the *Johnson v. Calvert* case since she is neither the genetic biological mother nor the child-bearing mother, and her only role was as a signatory to the surrogacy agreement. Her ex-husband could rely on the *Buzzanca* holding to assert that he and Sherri Shepherd were the intended parents under the surrogacy agreement and thus are the legal parents responsible for child support obligations, irrespective of the fact that the intended mother (Sherri Shepherd) has no biological connection to the child.³⁹

C. Other States' Laws Governing Surrogacy

Each state has varying approaches to surrogacy contracts. Examples of states generally considered as favoring enforceability of surrogacy agreements include California, Illinois, Arkansas, Maryland, and New Hampshire.⁴⁰ States that deem surrogacy contracts as void and against public policy include New York, Indiana, and Michigan.⁴¹ Some states, such as Utah, favor enforcing only gestational surrogacy contracts, while other states—such as Oklahoma—favor enforcing surrogacy contracts which do not require compensation.⁴² Several states have not set forth any clear directives on the issue.⁴³

39. See *In re Buzzanca*, Cal. Rptr. 2d at 282; see also *Artificial Insemination-Legal Aspects*, CTR. FOR SURROGATE PARENTING, INC., <http://www.creatingfamilies.com/intended-parents/default.aspx?id=100&type=>.

40. See *Surrogacy Laws by Country*, WIKIPEDIA, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country (last visited Aug. 26, 2015).

41. See *Surrogacy Laws by State*, ALL ABOUT SURROGACY (2013), <http://www.allaboutsurgacy.com/surrogacylaws.htm>; cf. Lisko, *supra* note 38.

42. *Surrogacy Laws by State*, *supra* note 41.

43. *Id.*

IV. Conclusion

Undoubtedly, the outcome of legal disputes involving the enforceability of traditional surrogacy agreements depends on which state's court has jurisdiction over the matter. If New York has jurisdiction, women who find themselves in Sherri Shepherd's position as the financial "breadwinner" spouse could successfully argue that they have no child support or other parental obligations pertaining to the resulting child of a surrogacy agreement deemed unenforceable by Domestic Relations Law § 122. The surrogate who carried and delivered the child could likewise assert that she has no obligations to the child resulting from the unenforceable surrogacy agreement. Sherri Shepherd's ex-husband and the egg donor, as the biological parents, would likely retain parental rights and bear the child support obligations for the resulting child.

On the other hand, if California has jurisdiction, the determination of parental rights is more complicated. A litigant who finds herself in Sherri Shepherd's position could assert that their gestational surrogacy agreement differs from the one involved in the *Johnson v. Calvert* case in that the intended mother has no connection to the child by genetics or child birth. As such, it could be argued that the court should look to the egg donor (as the genetic mother) and the surrogate (as the child bearer) when determining parental rights and obligations to the resulting child. Conversely, a litigant who finds herself in Sherri Shepherd's ex-husband's position could rely on the *Buzzanca* holding to assert that the surrogacy agreement is enforceable and, accordingly, he and his ex-wife (as the intended parents) should be deemed the legal parents of the resulting child since they were personally responsible for setting the medical procedures in motion to create their child, irrespective of the fact that the intended mother has no genetic connection to the child.

The potentially differing outcomes reveal a need for further legislation in light of advances in reproductive technology and in the interest of consistency. "Although uniform approaches to surrogacy agreements have been

suggested, none [of them] have been generally accepted.”⁴⁴

A. *Post Script*

Subsequent to the submission of this article for publication, a Pennsylvania court obtained jurisdiction over the Sherri Shepherd litigation. Following a hearing, the court held that Sherri Shepherd, as the intended mother under the surrogacy agreement, is the legal mother of the resulting child. The ruling has implications on child support and parental obligations which have yet to be resolved.⁴⁵ Notwithstanding, this article’s comparative analysis on New York and California laws governing surrogacy and their applicability to similarly-situated persons remains relevant.

44. LORD, *supra* note 35, at n.29.

45. See Emily Strohm & Diane Herbst, *Inside Sherri Shepherd’s Surrogacy Ruling: What Happens Next*, PEOPLE (Apr. 22, 2015, 2:30 PM), <http://www.people.com/article/sherri-shepherd-legal-mother-surrogate-baby-lamar-sally>.