

## FAMILY LAW

# Gestational Surrogacy Contracts Enforceable in NJ 30 Years After 'Baby M'

By Tracy Julian

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

### 'In the Matter of Baby M' and Surrogacy Law Prior to the GCAA

In *Baby M*, the New Jersey Supreme Court unanimously found surrogacy contracts to be illegal and unenforceable on the grounds that such agreements are contrary to established laws related to termination of parental rights, nonpayment in adoptions, and

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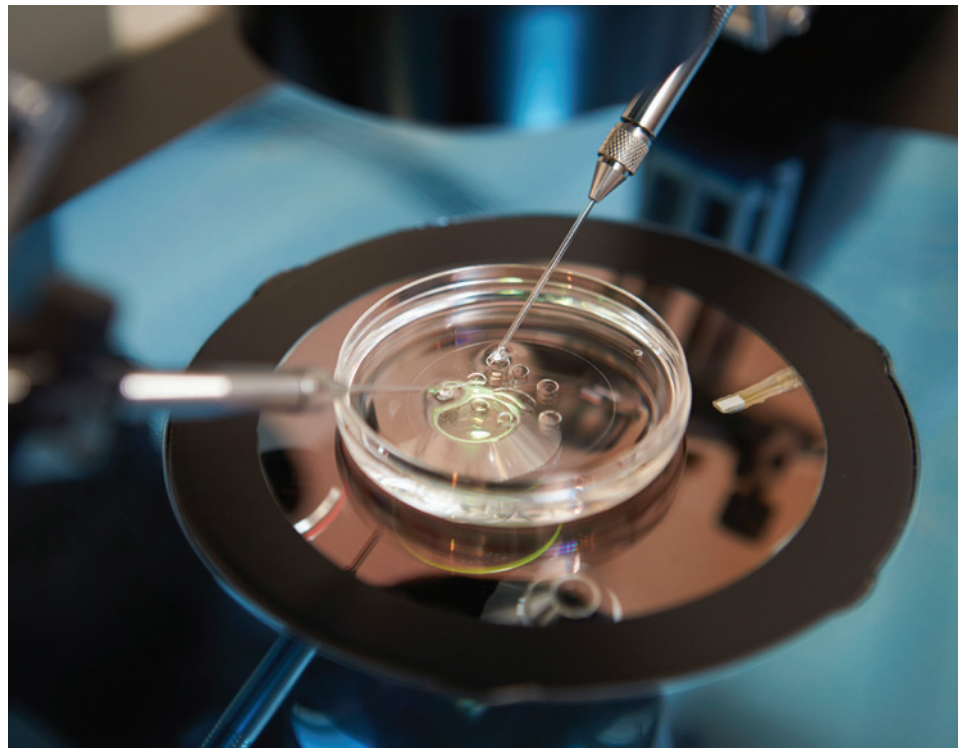


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the right to revoke consent in private adoptions. *Id.* at 411. The *Baby M* matter involved a contract to artificially inseminate a woman with the sperm of a man who was not her husband. The contract called for the natural father of the child to pay the surrogate mother \$10,000 after she gave birth and surrendered the child to him. She agreed to cooperate in any way necessary to effectuate termination of her parental rights, and the parties planned for the natural father’s wife to adopt child.

the child, however, she immediately regretted her decision and requested additional time with the baby. The parties agreed to give her a week with the child out of concern for her mental health. Thereafter, the surrogate refused to return the baby to the natural father and his wife. Four months later, the child was forcibly returned to the father via court intervention and approximately two years of litigation ensued between the parties.

While the *Baby M* court recognized the challenges infertile couples

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

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

gestational surrogacy in enacting the Gestational Carrier Agreement Act.

### **Gestational Carrier Agreement Act (2018)**

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

- *Defined Terms:* In the gestational surrogacy process, the parties utilize in vitro fertilization to implant a woman with a pre-embryo (fertilized egg prior to 14 days of development) formed with the egg from another woman fertilized with the sperm from an unrelated man. The woman, referred to as the "gestational surrogate," has no biological relationship to the fetus. The gestational surrogate carries the baby to term, and once born, the baby becomes the legal child of the "intended parents."

The Act defines "intended parent" as any person who enters into a gestational carrier agreement with the intention of becoming the legal parent of the child resulting from the agreement—and includes persons who are single, married, or in a civil union or domestic partnership.

- *Prerequisites:* A GCAA contract must be in writing and executed by the gestational carrier, her spouse

or partner, if she has one, and each intended parent. If the intended parent is married or in a civil union or domestic partnership, both parties must meet the GCAA requirements and execute the agreement. The parties must only enter into the agreement after they complete the requisite physical and psychological screenings and prior to any additional medical procedures related to the implantation of the pre-embryo.

In addition, the GCAA articulates certain criteria the gestational carrier and intended parents must each meet prior to executing a gestational carrier agreement. Specifically, the carrier must: (1) be at least 21 years of age; (2) have previously given birth to at least one child; (3) have completed a medical evaluation; (4) have completed a psychological evaluation approving her suitability to serve as a gestational carrier; and (5) have retained an attorney, who has consulted with her about the terms of the gestational carrier agreement and the potential legal consequences. The intended parents may pay for the services of the carrier's counsel, but the attorney must form an independent relationship with the carrier.

In addition, the Act requires that the intended parents: (1) complete a psychological evaluation approving the intended parent's suitability to participate in a gestational carrier agreement; and (2) be represented by independent counsel.

- *Substantive Terms:* The GCAA requires the agreement to expressly identify the rights and obligations of the gestational carrier and each of the intended parents. With regard to

the gestational carrier, the agreement must articulate that the carrier will: (a) undergo a pre-embryo transfer and attempt to carry and give birth to the child; and (b) surrender custody of the child to the intended parent immediately upon the child's birth. If the gestational carrier is married or has a partner, the agreement must also state that the spouse or partner is also obligated to surrender custody of the child. In addition, the contract must provide that the intended parents will: (a) accept custody of the child immediately upon the child's birth; and (b) assume responsibility for the support of the child immediately upon the child's birth.

With regard to medical care and financial obligations of the parties, the agreement must state that the carrier has the right to medical care of her choice and that she must notify the intended parents of her choice of medical provider in writing. The parties are required to set forth the financial obligations of the parties in the agreement and provide that the intended parent will be responsible for the carrier's reasonable expenses. The carrier may waive that requirement, but must do so in writing.

Provided the parties follow the requirements of the GCAA, their gestational carrier agreement will be entitled to a presumption of enforceability. In the event the agreement fails to provide

for any of the requisite terms, the court will determine parentage of the child resulting from the purported agreement consistent with the intent of the parties.

• *Procedure to Establish Rights of Parentage:* If the requisite GCAA terms are met, the intended parents will become the legal parents of the child immediately upon birth, and the gestational carrier will not have parental rights. Consequently, there is no need for the intended parents to "adopt" the resulting child and the gestational surrogate and her spouse or partner need not experience a termination of parental rights.

In order to clearly establish the legal parent-child relationship, the intended parent must file a Complaint for Order of Parentage in the Superior Court, Chancery Division, Family Part, after the gestational carrier becomes pregnant. They may file in the county of the child's anticipated birth or the county of residence of either the intended parent or gestational carrier.

The Act requires that the intended parents attach the following documents to the complaint: (1) an affidavit by the gestational carrier and her spouse or partner that they have entered into a gestational carrier agreement pursuant to the GCAA and agree to be bound by the agreement after consultation with legal counsel; (2) affidavits of representation of the attorney for the intended parent and the attorney for the gestational

carrier and her spouse or partner; and (3) a statement from the medical facility which performed the in vitro fertilization. If the matter is contested, the court will schedule an expedited hearing in closed court with only necessary individuals present.

If a medical or laboratory error occurs and the resulting child is not genetically related to the intended parent, the intended parent will nonetheless be the legal parent of the child. In that event, a genetic parent has the right to file a complaint in court challenging parentage within 120 days of the child's birth.

## Conclusion

The New Jersey Supreme Court recognized the challenge of infertility and promise of reproductive biotechnology in 1988. Since that time, the plight of infertility has grown exponentially, and society has become more aware and supportive of the unique reproductive challenges of LGBTQ individuals and couples. Strides in reproductive biotechnology over the last three decades provide families facing these challenges today with more options than existed three decades ago. In passing the Gestational Carrier Agreement Act (2018), New Jersey has provided new legal options to those seeking reproductive assistance in the form of gestational surrogacy. ■