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IN RE BABY: BLESSING OR PROBLEM CHILD?

Jacob Baggett[1]

"I got into this because the O'Briens needed my help. I never wanted a baby, but now . . . I just wish I could hold him in my arms, and never let him go."

Major Kira to Odo, discussing her surrogacy, Star Trek: Deep Space Nine: Season 5, ep. 12, "The Begotten"

INTRODUCTION

From legal and sociological perspectives, surrogacy arrangements, along with the accompanying contracts, remain hot topics of debate. In addition to a colorful body of jurisprudence, a New York Times article from September 2014 reported a story in which intended parents attempted to bribe a Connecticut surrogate to undergo an abortion procedure after having learned the developing fetus had heart and brain defects as well as a cleft palate.[2] Refusing to either accept the

[1] Jacob Baggett, Juris Doctor (2015) and former Editor-in-Chief of the Lincoln Memorial University Law Review.

[2] Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, September 17, 2014, available at http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-

bribe or undergo the abortion procedure, the surrogate fled to Michigan, where surrogacy contracts are illegal.[3]

The birth certificate listed the surrogate as the child's mother, despite the fact the surrogate had no genetic connection with the child.[4] Eventually, a family with other special-needs children adopted the child.[5] The New York Times article also provided several state-by-state diagrams which illustrated the complex legal landscape concerning surrogacy, aptly calling it a "maze."[6] Tennessee's lack of statutory guidance regarding surrogacy issues creates one of the dead ends within this nationwide maze.

Since the mid-1990's, the Tennessee General Assembly has remained entrenched in neutrality with regard to issues surrounding surrogacy. In 2014, the Tennessee Supreme Court (the "Court") realized its obligation to address these matters. While calling for legislative action, the Court addressed several surrogacy issues in *In re Baby* ("*Baby*"),[7] such as subject matter jurisdiction, public policy considerations of surrogacy contracts, and terms the parties' surrogacy agreement may legally contain. Of these issues, the most heavily emphasized was public policy.

Part One of this note discusses the relevant surrogacy arrangement terminology and outlines key statutes and cases detailing the nationwide legal maze of surrogacy. Part Two discusses the facts giving rise to *Baby*, the sources of Tennessee law examined, and the Court's analysis and holdings in *Baby*. Finally, Part Three examines Louisiana's legislative efforts as a case study exhibiting the various difficulties legislatures may experience when addressing surrogacy issues. These difficulties may lead a state's highest court to determine it has an obligation to act. The Tennessee Supreme Court did.

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face-a-maze-of-laws-state-by-state.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0. The article was published one day before the Tennessee Supreme Court released its opinion in *In re Baby*).

[3] *Id.*; MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *In re* Baby, M2012-01040-SC-R11JV, 2014 WL 4815211 (Tenn. Sept. 18, 2014).

PART ONE: BACKGROUND

I. TERMINOLOGY OF SURROGACY AGREEMENTS

This note concerns two types of surrogacy arrangements: traditional[8] and gestational.[9] Traditional surrogacy arrangements involve a woman, the surrogate mother, whose egg is fertilized by means of artificial insemination and the surrogate mother carries the fetus until birth for the benefit of another.[10] On the other hand, a gestational surrogacy arrangement involves the intended mother supplying her egg to be transferred, housed, artificially inseminated, and the fetus carried to term by another woman, the surrogate mother.[11] Gestational surrogate mothers have no genetic connection with the fetus.[12] However, in traditional surrogacy arrangements, the surrogate mother and the fetus are genetically connected.[13] It is this genetic connection which often ignites legal flames because the corresponding rights, if extinguished, must occur by proper legal procedure.[14]

A number of legal commentators have professed that gestational surrogacy "has rendered traditional surrogacy obsolete and unnecessary."[15] So, why do people continue to

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[8] BLACK'S LAW DICTIONARY 1582 (9th ed. 2009); *see also In re* C.K.G., 173 S.W.3d 714, 720 (Tenn. 2005).

[9] *See In re* F.T.R. 833 N.W.2d 634, 643 (Wis. 2013); 7 Samuel Williston, TREATISE ON THE LAW OF CONTRACTS § 16:22 (Richard A. Lord ed., 4th ed. 1992 & Supp. 2013); Christen Blackburn, Note, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 352 (2009) (also identifies and defines donative surrogacy which involves creating an embryo from the genetic contribution of one intended parent with that of an unknown donor's egg or sperm).

[10] *See* In re C.K.G., 173 S.W.3d at 720.

[11] *See id.*

[12] *Id.*

[13] *See id*.

[14] *See Baby*, 2014 WL 4815211 at *5.

[15] Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 690 (2000).

enter into traditional surrogacy arrangements when the gestational counterpart completely avoids the legal issues regarding the unborn's genetic connection with the surrogate mother? The reasons are numerous.

First, artificial insemination, the medical procedure utilized in traditional surrogacy,[16] is a relatively simple procedure which may be performed in the home.[17] The procedure involves using sperm, typically of the intended father, to impregnate the surrogate mother.[18] As a result, it is significantly less expensive than in vitro fertilization, the procedure used to initiate a gestational surrogacy.[19] The low cost and relative convenience of artificial insemination make it an attractive method for many surrogates and intended parents.[20]

Second, there are high success rates among surrogates with proven fertility, and the time between a failed artificial insemination attempt and the time another attempt may be made is a matter of weeks.[21] Conversely, in vitro fertilization, the time between implantation attempts often takes months.[22] Third, perhaps the most pertinent benefit of the traditional arrangement is the safety of both the mother and the unborn.[23] "The main risk to the [gestational] surrogate comes from the

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[16] Intrauterine (Artificial) Insemination (IUI), http://www.nyufertilitycenter.org/infertility_treatment/artificial_insemination (last visited Oct. 26, 2014).

[17] *Gestational vs. Traditional Surrogacy: A Comparative Study*, http://www.surrogatemothers.org/ gestational-vs-traditional-surrogacy-a-comparative-study (last visited Oct. 21, 2014).

[18] *Id.*

[19] *Gestational vs. Traditional Surrogacy*, *supra* note 16.

[20] Ashok Agarwal & Shyam S. R. Allamaneni, Chapter 36: Artificial Insemination, Section 6: Infertility and Recurrent Pregnancy Loss (Jan. 23, 2007), http://www.clevelandclinic.org/ReproductiveResearchCenter/.../agrach019.pdf.

[21] *Id.*

[22] *Id.*

[23] The Center for Bioethics and Culture Network, *Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies*, http://breeders.cbc-network.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf (last visited Oct. 21, 2014).

pregnancy itself, especially if she is required to carry multiple babies[.]"[24]

Additionally, gestational surrogates are administered a cocktail of prescription medications not involved in traditional arrangements.[25] Some of these medications come with potentially significant side effects.[26] In preparation for embryo transfer, the surrogate is administered hormones which inhibit the brain from secreting the natural hormones that control the menstrual cycle.[27] "The woman is put into a 'medical menopause,' so that the ovaries stop functioning and her menstrual cycle can be completely controlled[.]"[28] One of these hormones, Lupron, carries a Category X classification, which causes harm to the fetus if the surrogate mother becomes pregnant while taking the medication.[29] Despite the potential side effects of the medications, the desire for genetic linkage between the child and the intended parents is a compelling reason why gestational surrogacy is chosen over a traditional arrangement.[30]

II. FOREIGN STATUTES AND CASES

Foreign Statutes

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* (Gonadotropin releasing hormone (GnRH) agonists like Synarel or Lupron. Lupron is administered by injection while Synarel comes in a nasal spray).

[28] *Id.*

[29] *Id.*

[30] The American College of Obstetricians and Gynecologists, Ethics Committee Opinion Number 397, *Surrogate Motherhood*, p. 2, http://www.acog.org/~/media/Committee%20Opinions/Committee% 20on%20Ethics/co397.pdf?dmc=1&ts=20140324T1309556802 (last visited Oct. 21, 2014). [Eds. note: The American College of Obstetricians and Gynecologists issued Committee Opinion Number 660 replacing Committee Opinion Number 397, http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Family-Building-Through-Gestational-Surrogacy].

Some contracts cannot be enforced due to their illegal nature.[31] The word "illegal" in contract law has a broader meaning than simply contracts made for a criminal purpose.[32] "Illegal in the contract setting means . . . [that] the contract or clause involved is void as a matter of public policy, whether or not technically criminal."[33] As a matter of public policy, a contract or contractual term will be nullified if the arrangement violates the precepts of the society in which the court sits.[34]

Approximately one-third of state legislatures have provided statutory guidance regarding surrogacy contract formation and enforceability.[35] Of the legislatures that have spoken, three "camps" have formed.[36] In the first camp of states, all types of surrogacy contracts are prohibited.[37] One state even provides criminal penalties for forming such an arrangement.[38] The second prohibits traditional surrogacy contracts.[39] Finally, the third camp allows both traditional and gestational surrogacy contracts, subject to various regulations and specified limitations.[40] Tennessee's current surrogacy laws do not fit within any of these three established camps.[41] Instead, the current Tennessee statute essentially consists of a definition ending with an interpretational caveat found in the

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[31] Thomas D. Crandall & Douglas J. Whaley, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 620 (6th ed. 2012).
[32] *Id.*
[33] *Id.* (noting this potentially powerful theory is often forgotten by attorneys).
[34] *See id.*
[35] *Baby*, 2014 WL 4815211 at *8.
[36] *Id.*
[37] *See, e.g.*, D.C. CODE §§ 16-401(A)-(B), -402(a) (West 2013); MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013); N.Y. DOM. REL. LAW § 122 (surrogate parenting contracts declared contrary to the public policy of the state).
[38] MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013).
[39] *See, e.g.*, N.D. CODE §§ 14-18-05, -08 (West 2013); IND. CODE ANN. § 31-20-1-1(West 2013); NEV. REV. STAT. § 126.580 (2013) (limits applicable to gestational, rather than traditional surrogacy arrangements).
[40] *See, e.g.*, N.H. REV. STAT. ANN. §§ 168-B:1 to – B:32 (West 2013); VA. CODE ANN. §§ 20-156 to 20-165 (West 2013); WASH. REV. CODE ANN. §§ 22.26.210- .260 (West 2013).
[41] *See* TENN. CODE ANN. § 36-1-102(48)(A-C) (West 2014).

statutory section entitled "Adoption."[42] The statute provides that:

> (48)(B) "Surrogate birth" means:
>
> (i) The union of the wife's egg and the husband's sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or
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> (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;
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> (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.[43]

The Tennessee Supreme Court was not the only court which found itself without statutory guidance regarding surrogacy issues.

Cases in Other Jurisdictions

In the absence of guiding statutes, several well-known cases dealing with surrogacy contracts have arisen in jurisdictions other than Tennessee. Some state courts have

[42] *Id.*

[43] *Id.*

focused on whether a surrogacy contract embodies a traditional or gestational surrogacy arrangement.[44]

In *Johnson v. Calvert*, the California Supreme Court held gestational surrogacy contracts "differ[] in crucial respects from adoption[.]" [45] As a result, the monetary exchange, meant to compensate the surrogate for her services in gestating the fetus and undergoing labor, detailed within the gestational surrogacy contract was distinguishable from the California adoption statutes prohibiting payment for consent to adopt a child.[46]

In reaching that conclusion, the California Supreme Court pointed to the fact that the surrogacy arrangement was entered into prior to the child's conception, and as discussed above, the definition of gestational surrogacy rendered the surrogate without genetic connection to the child.[47] Therefore, the surrogate was not vulnerable to financial inducements to part with "her own expected offspring[,]" an element of the prohibitive California adoption statute[48] at issue.[49] Furthermore, the California Supreme Court was not persuaded by the argument that such contracts violate the public policy of California because the surrogate based her argument on the same prohibitive statute the court had just distinguished and thereby, rendered inapplicable.[50]

The Supreme Court of Ohio went a step further in *J.F. v. D.B.*[51] by holding that the public policy of the state remained uncrossed by gestational surrogacy contracts, even when a provision of the contract requires the gestational surrogate to refrain from asserting parental rights so long as the child was generated from another woman's egg.[52] After quickly dispensing with the issue at hand, the Ohio Supreme Court curiously used the final breath of its opinion to predict what it saw as an imminent traditional surrogacy question by stating:

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[44] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
[45] *Calvert*, 851 P.2d at 784.
[46] *Id.*
[47] *Id.*
[48] CAL. PENAL CODE § 273 (West).
[49] *Calvert*, 851 P.2d at 784.
[50] *Id.*
[51] J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007).
[52] *Id.* at 741- 42.

> [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. This case does not involve, and we draw no conclusions about, traditional surrogates and Ohio's public policy concerning them.[53]

In contrast, other state courts have articulated a blanket prohibition on surrogacy contracts.[54] In *Doe v. New York City Bd. of Health*, Mrs. Roe agreed to serve as a gestational surrogate for her sister, Mrs. Doe, who had been unable to bear children as a result of cancer.[55] "No consideration, except love and affection, [was] involved."[56] Prior to birth, Mrs. Roe and her husband sought judgment that the named biological parents should appear on each of the resulting triplet's birth certificates, and the New York City Board of Health and the New York City Department of Health & Mental Hygiene ("DOHMH") objected when it answered that doing such would violate New York's Domestic Relations Law.[57]

The DOHMH conceded that it would not oppose the post-birth amendment of the birth certificates, provided Mr. and Mrs. Doe established they were genetic parents of the triplets or the formal adoption proceedings were completed.[58] Mr. and Mrs. Doe were unwilling and proceeded with their pursuit of favorable rulings on their pre-birth motions.[59] As a final answer to those motions, New York's Superior Court held that any "surrogacy parenting contract is prohibited and unenforceable in [New York], even where no payment of funds is involved . . . . Domestic Relations Law makes no distinction

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[53] *Id.* at 742.
[54] *See, e.g.*, Doe v. New York City Bd. of Health, 782 N.Y.S.2d. 180 (N.Y. Sup. Ct. 2004).
[55] *Id.* at 182.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 183.
[59] *See id.*

between gestational surrogacy contracts and traditional surrogacy arrangements[.]"[60]

Moving from cases involving gestational arrangements to those dealing with traditional ones, in *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*,[61] the Kentucky Supreme Court held that traditional surrogacy contracts do not violate the state's statute prohibiting the buying and selling of children,[62] commonly known as "baby-selling statutes."[63] The court's articulated distinction rested on the fact that the agreement to bear the child was entered into before conception, and as result, the expectant, biological mother is free from external "financial inducements to part with the child."[64] The court elaborated:

> The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring. The problem is caused by the wife's infertility. The problem is solved by artificial insemination.[65]

In *In re F.T.R.*, the Wisconsin Supreme Court held that, aside from the termination of parental rights, traditional surrogacy contracts are enforceable under Wisconsin law as long as the agreement is in the "best interest" of the child.[66] The termination of parental rights by the parties' private contract was unenforceable because the surrogate had not consented to

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[60] *Id.* at 183 (citing N.Y. DOM. REL. LAW § 122 (McKinney 2014).
[61] Surrogate Parenting Assocs., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986).
[62] *Id.* at 211.
[63] KY. REV. STAT. ANN. § 199.590 (West 2014).
[64] *Armstrong*, 704 S.W.2d at 211.
[65] *Id.* at 211-12.
[66] *In re* F.T.R., 833 N.W.2d 634, 638 (Wis. 2013).

that contractual provision, and no basis for the involuntary termination of rights existed.[67]

The legal issues presented in Tennessee's *Baby* are most aligned with the textbook case of *In re Baby M*.[68] In that case, the New Jersey Supreme Court held that traditional surrogacy arrangements were contrary to the State's public policy based on its adoption, custody, and termination of parental rights statutes.[69] Initially, the New Jersey trial court, at the conclusion of a thirty-two-day trial, held that the adoption, custody, and termination of parental rights statutes were inapplicable to surrogacy contracts because the "Legislature did not have [those type of contracts] in mind when it passed those laws, those laws were therefore irrelevant."[70] The New Jersey Supreme Court disagreed and held the provisions at issue "not only directly conflict[ed] with New Jersey statutes, but also offend[ed] long-established State policies."[71]

Other than, perhaps, identifying the pulses of the nation's state courts and legislatures willing to speak to the relevant issues, the preceding cases have little authoritative weight because the issue of public policy requires the Tennessee Supreme Court to examine and weigh various sources of public policy of the state in which it sits. Thus, for the purposes of the issue of public policy, Tennessee law exists in a vacuum.

PART TWO: IN RE BABY

I. FACTS

A man (the "Intended Father") and woman (the "Intended Mother") (collectively "Intended Parents"), both Italian citizens who were unable to have children, turned to a surrogate (the "Surrogate"), a Tennessee resident, for aid.[72] The parties, both represented by legal counsel, contracted into a traditional surrogacy arrangement where the Surrogate, who

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[67] *Id.* at 640.
[68] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).
[69] *Id.* at 1240.
[70] *Id.* at 1237-8.
[71] *Id.* at 1240.
[72] *Baby*, 2014 WL 4815211, at *1.

supplied her own egg, was artificially inseminated by the Intended Father's sperm.[73] The Surrogate became pregnant in April of 2011.[74] During the pregnancy, the Intended Parents paid the Surrogate approximately $42,000 in medical expenses and legal fees.[75] The Surrogate also received an additional $31,000 for pain, suffering, and miscellaneous pregnancy and birth-related expenses.[76]

Prior to the birth of the child, all parties filed a joint petition asking a Tennessee juvenile court to declare the Intended Father as the genetic father of the child, grant custody to the Intended Parents, and terminate the parental rights of the Surrogate.[77] The petition was granted.[78] Less than a month later, the Surrogate gave birth to a girl (the "Child").[79]

The Intended Parents were present at the Child's birth.[80] Following professional medical advice, all agreed the Surrogate would breastfeed the Child for a short period of time.[81] Soon after the birth, the Intended Mother returned to Italy to care for her ailing parents.[82] The Intended Father, however, remained with the Surrogate to assist in the daily care of the Child.[83]

A week after birth, the winds shifted.[84] The Surrogate had bonded with the Child.[85] Consequentially, the Surrogate sought an emergency ex parte restraining order and injunction which claimed that "the birth of [the] Child did not meet the requirements of 'surrogate birth' under Tennessee law" because the Intended Parents had not yet married, a requirement which implicitly appears necessary under the

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[73] *Id.* at *2.
[74] *Id.* at *4.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at *5.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *See id.*

relevant statute because it uses terms such as "husband" and "wife."[86]

The Surrogate asked the sitting magistrate to vacate the order in which she had waived her parental rights, grant her temporary custody, and enter an injunction prohibiting the Intended Parents from removing the Child from the jurisdiction.[87] The same day motions were filed, the magistrate conducted a hearing.[88] At the conclusion of the hearing, the magistrate denied the Surrogate's motion for injunctive relief and ordered the Surrogate to relinquish physical custody of the Child to the Intended Father.[89]

Three weeks later, the Surrogate returned to the magistrate's court.[90] That day, the Intended Parents were married in Williamson County.[91] The Surrogate filed motions seeking to set aside the order waiving her rights.[92] After the second hearing, the Surrogate's motions were, again, denied.[93] She turned to the juvenile court, which affirmed the magistrate's decision.[94] The Surrogate then appealed the juvenile court's ruling to the Tennessee Court of Appeals.[95]

The Surrogate's argument was fourfold.[96] She argued that the juvenile court lacked subject matter jurisdiction; the surrogacy contract was invalid based on the unmarried status of the Intended Parents at the time of contracting;[97] the proceeding which terminated her parental rights was improper due to lack of counsel at the proceedings; and the juvenile court should have set aside the magistrate's custody order because

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[86] *Id*. (citing language used in Surrogate's "Emergency. . . Ex Parte Restraining Order and Injunction).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at *6.
[96] *Id.*
[97] TENN. CODE ANN. § 36-1-102(48)(A)–(C) (2014) (labels such as "husband" and "wife" are used; however, this statutory definition refers to a gestational surrogacy, not a traditional one as is at issue in Baby).

the magistrate failed to conduct a "best interest" analysis.[98] The Court of Appeals rejected each of the Surrogate's arguments.[99] These issues were accepted by the Tennessee Supreme Court as matters of first impression.[100]

II. SOURCES OF LAW EXAMINED IN *BABY*

The public policy concern of traditional surrogacy contracts is the main issue in *Baby*. Curiously, neither the Surrogate nor the Intended Parents raised or preemptively answered this contractual defense. Instead, the Court raised the defense *sua sponte*.[101] The Tennessee General Assembly, through a commission, last addressed major surrogacy issues in 1993; however, no substantive action was taken on this relatively new topic.[102] Surrogacy issues remained stagnant until 2014 when the Tennessee Supreme Court granted *Baby* discretionary review under Tennessee Rule of Appellate Procedure 11.[103] When the Tennessee Supreme Court confronted the public policy issue, the Court drew from many sources of state law.[104]

First, Tennessee's traditional principles of contract law were considered.[105] "Contract law in Tennessee plainly reflects the public policy allowing competent parties to strike their own bargains."[106] Tennessee also recognizes several common law contract defenses, including fraud,[107] duress,[108] undue influence,[109] mistake,[110] and incapacity.[111] Surrogacy contracts

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[98] *Baby*, 2014 WL 4815211 at *9.
[99] *Id.*
[100] *Id.*
[101] *See Baby*, 2014 WL 4815211 at *10.
[102] *See id.*
[103] *Id.*
[104] *Id.* at *11.
[105] *Id.* at *20.
[106] *Id.* (citing Ellis v. Pauline S. Sprouse Residuary Trust, 280 S.W.3d 806, 814 (Tenn. 2009)).
[107] *Id.* (citing Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297, 301 (Tenn. Ct. App. 2001).
[108] *Id.* (citing Rawlings, 78 S.W.3d at 301).
[109] *Id.* (citing 78 S.W.3d at 297, 301).
[110] Williams v. Botts, 3 S.W.3d 508, 509-10 (Tenn. Ct. App. 1999).
[111] McMahan v. McMahan, 2005 WL 3287475, *8 (Tenn. Ct. App. 2005).

are not free from these common law defenses, and each defense may be raised in an independent declaratory judgment action.[112] These defenses were inapplicable to the case at hand, and the Court held that "none prohibit the enforcement of traditional surrogacy agreements on public policy grounds."[113]

Second, the Court noted the neutrality of Tennessee's statute regarding surrogacy.[114] The statute, previously cited, amounts to a definition coupled with an interpretational caveat.[115] Save subsection (C), which expressed the Tennessee General Assembly's neutral stance, this statutory definition provided little help to the Court.[116] Further lessening its relevance was the fact that this definition describes a gestational surrogacy, not a traditional one, as in *Baby*.[117] The interpretational caveat to the statute states that none of the provisions "shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the [G]eneral [A]ssembly."[118] The Court analyzed the statute in *In re C.K.G.*, determining that the statute's caveat expressed a *neutral* "legislative stance" with regard to the enforceability of surrogacy arrangements not memorialized by written contract.[119] The Court could not interpret these neutral statutes to express unfavorable policy with regard to surrogacy arrangements.[120]

The Court next considered Tennessee's so-called "baby-selling" statutes.[121] Such statutes provide criminal penalties for illegal payments in connection with the surrender of a child or the placement of a child for adoption.[122] The Court agreed with other cases and commentary[123] distinguishing surrogacy

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[112] *See* TENN. CODE ANN. § 29-14-102 (West 2012).
[113] *Baby*, 2014 WL 4815211 at *11.
[114] *Id.*
[115] TENN. CODE ANN. § 36-1-102(48)(C) (West 2014).
[116] *See Baby*, 2014 WL 4815211 at *8-9.
[117] *Id.* at *9.
[118] *Id.* § 36-1-102(48)(C) (West 2014).
[119] In re C.K.G., 173 S.W.3d at 723 n.6. (Tenn. 2005).
[120] *Baby*, 2014 WL 4815211 at *11.
[121] TENN. CODE ANN. § 36-1-109 (West 2014).
[122] *Id.*
[123] *Armstrong*, 704 S.W.2d at 211 & n.2.; *See* 704 S.W.2d at 211; *see also In re* Baby Girl L.J., 505 N.Y.S.2d 813, 817 (Sur. Ct. 1986); Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should*

arrangements as payment "for the services of a surrogate in the conception of a child[,]" rather than payment for the surrender of the child.[124] However, the Court held that "[c]ompensation may not be contingent upon the surrender of the child or the termination of parental rights, and compensation is restricted to 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."[125]

The Court continued by discussing Tennessee's custody statute and relevant cases which include the proverbial "best interest" determination. If all are applicable, there are fifteen statutorily-enumerated factors that a judge must consider when making a "best interest" determination.[126] No such determination was made in the case of *Baby*, because the juvenile court ruled the surrogacy contract's waiver of such rights was proper under Tennessee law.[127] The Court disagreed.[128]

The Court held that the state's obligation to make such a determination could not be relieved by a provision of private contract.[129] In fact, the Court had previously decided the matter in *Tuetken v. Tuetken*.[130] As a result, the Court held the term to be improper and unenforceable.[131]

Consequentially, the Court scrutinized statutes involving legal parents and the methods that parental rights may be terminated.[132] In Tennessee, a woman may be properly termed a "legal parent" in two ways: being "[t]he biological mother of a child,"[133] or being "[a]n adoptive parent of a

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Surrogate Mothers Be Compensated for Their Services?, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 547(2007); Stacy Christman Blomeke, Note, *A Surrogacy Agreement That Could Have and Should Have Been Enforced: R.R. v. M.H.,* 689 N.E.2d 790 (Mass. 1998), 24 U. DAYTON L. REV. 513, 529 (1999).

[124] *Baby*, 2014 WL 4815211 at *14.

[125] *Id.* at *15.

[126] TENN. CODE ANN. § 36-6-106 (West 2014).

[127] *Baby*, 2014 WL 4815211 at *5.

[128] *Id.* at *15.

[129] *Id.*

[130] Tuetken v. Tuetken, 320 S.W.3d 262, 272 (Tenn. 2010).

[131] *Baby*, 2014 WL 4815211 at *16.

[132] *Id.* at *17.

[133] TENN. CODE ANN. § 36-1-102(28)(A) (West 2014).

child[.]"[134] In *Baby*, the Surrogate was the biological mother of the child, and thus, is the "legal parent" of the Child under Tennessee law.[135]

Under Tennessee law, legal parent's rights may only be terminated in one of three ways.[136] First, if a statutorily valid ground for termination exists and termination of the biological mother's parental rights is in the "best interest" of the child, an involuntary termination may be initiated.[137] Second, a biological mother may voluntarily extinguish her rights by signing a "surrender," a document which provides "that [a] parent or guardian relinquishes all parental or guardianship rights of that parent or guardian to a child, to another person or public child care agency or licensed child-placing agency for the purposes of making that child available for adoption[.]"[138] Finally, when a mother consents to adoption, her parental rights may be terminated as part of the adoption proceeding.[139] While the Court held these statutes did not evidence any public policy against the enforcement of surrogacy arrangements, the Court did hold that the termination of the Surrogate's parental rights through private contract was unlike any acceptable method of termination and thus, the term was unenforceable.[140]

III. *BABY*'S HOLDING & EPILOGUE

The Court held that traditional surrogacy arrangements, including the one at issue, did not violate the public policy of the State of Tennessee.[141] However, the private "best interest" determination and the private termination of parental rights of the traditional surrogacy contract were improper.[142] Thus, the Court affirmed the Court of Appeals with regard to the public

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[134] *Id.* § 36-1-102(28)(E) (West 2014).
[135] *Baby*, 2014 WL 4815211 at *17.
[136] *Id.*
[137] TENN. CODE ANN. § 36-1-113(c) (West 2014).
[138] *Id.* § 36-1-102(47); *see also In re* Angela E., 303 S.W.3d 240, 247- 48 (Tenn. 2010) (describing the required procedure for executing a surrender).
[139] *See* TENN. CODE ANN. §§ 36-1-102(15)(C), -117(g) (West 2014).
[140] *Baby*, 2014 WL 4815211 at *18.
[141] *Id.* at *19.
[142] *Id.*

policy issue, vacated the juvenile court's termination of the Surrogate's parental rights, and remanded the case to the juvenile court to determine visitation and child support.[143]

Although the record is unclear as to the exact date the Intended Father exercised and took physical custody of the Child,[144] an interview with the Surrogate's attorney, Shelley Breeding, revealed that the Intended Father reclaimed physical custody of the child the evening following the magistrate's denial of the Surrogate's emergency ex parte restraining order and injunction.[145]

On September 18, 2014, the day the opinion was issued, the Child was nearly three years old and resided with the Intended Parents in Italy,[146] and the Child continued to reside in Italy as of December 15, 2014.[147] The attorney for the Intended Parents, Benjamin Papa, and the attorney for the Surrogate, Shelley Breeding, stated that they were communicating with their respective clients to determine how each wanted to proceed in light of the Court's unexpected analysis and holding.[148] As a result of the Court's unexpected public policy analysis and holding, no motions by either side had been filed with the juvenile court to which the case was remanded.[149]

PART III: LEGISLATIVE DIFFICULTY

I. JUSTICE KOCH'S CONCURRENCE

Justice Koch, in his concurring opinion, agreed with the other members of the Court to the extent that the contract at issue, save the two invalidated provisions, did not violate the public policy of the State of Tennessee. However, he disagreed

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[143] *Id.* at *24.
[144] *Id.* at *8, n.4.
[145] Telephone Interview with Shelley Suzanne Breeding, Partner, Breeding & Lodato, LLC (Dec. 15, 2014).
[146] *Baby*, 2014 WL 4815211 at *8, n.4.
[147] Breeding, *supra* note 144.
[148] *Id.*; Telephone Interview with Benjamin Papa, Attorney-Mediator, Founding Member, Papa and Roberts, PLLC (Dec. 20, 2014).
[149] Papa, Attorney-Mediator, Founding Member, Papa and Roberts, PLLC (Dec. 20, 2014).

with the holding that traditional surrogacy contracts do not violate the Tennessee's public policy, generally.[150] In his view, the Court should have tailored its holding to the facts of the case, refrained from pronouncing a general rule, and thereby, deferred the general rule to legislative determination.[151] Justice Koch stated:

> [t]he legal rules governing [surrogacy in Tennessee] are ambiguous, if not non-existent, and they need to be clarified . . . . While the desire to bring some order to the ambiguity is commendable, the case-by-case approach the courts must use is less effective in circumstances like this than the far more dynamic ability of the General Assembly to address . . . Tennessee's acceptance or rejection of surrogacy contracts as a matter of public policy[.][152]

Surrogacy in Tennessee is "big business[,]"[153] and the need for clear guidance is undoubtedly great and growing,[154] and the Court emphatically called for legislative action.[155] However, one could argue the narrow holding Justice Koch advocates would provide a great deal of the needed clarity while simultaneously relieving the Court of the responsibility of determining the public policy of Tennessee regarding surrogacy as well as and any resulting political backlash.[156]

Justice Koch's concurrence would provide sufficient boundaries for practitioners to guide their clients through the traditional surrogacy contract formation process, (i.e., this

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150 *Baby*, 2014 WL 4815211 at *29 (Koch, J., concurring).
151 *Id.*
152 *Id.*
153 *Baby*, 2014 WL 4815211 at *27 (Koch, J., concurring) (citing Debora L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception* 3 (2006)).
154 *See id.*
155 *Baby*, 2014 WL 4815211 at *26.
156 Mohamed Akram Faizer, *Exacerbating the Divide: Why the Roberts Court's Recent Same-Sex Jurisprudence Is an Improvident Use of the Court's Judicial Review Powers*, 24 U. Fla. J.L. & Pub. Pol'y 395, 396 (2013) (emphasizing the power of more narrow court holdings).

contract term is proper and enforceable, and this one is not).[157] In addition, the narrow holding would show the Court passed on opportunity to declare a general rule, effectively demonstrating the Court's powerful reluctance to be the governmental branch which invalidates such agreements.[158] As a result, practitioners and citizens of Tennessee would need only watch (or advocate in) one governmental branch, the Tennessee General Assembly, for a general rule, and in the meantime, they may carry on aiding their clients, intended parent(s) or surrogate, through the surrogacy process.[159]

Of course, there is no guarantee the General Assembly will expressly and clearly address the topic soon or ever. Since the General Assembly last spoke to the issue in the mid-1990's, it has had approximately twenty annual opportunities to address the topic.[160] However, a history of legislative inactivity, even coupled with a likelihood of future inactivity, perhaps, does not obligate a state's highest court to announce a general rule.[161] In footnote twelve of his concurring opinion in *Baby*, Justice Koch states:

> [T]he courts' response to legislative inaction, whether inadvertent or intentional, should always be tempered by the admonition in Article II, Section 2 of the Constitution of Tennessee that persons belonging to one branch of government should avoid exercising the powers properly belonging to the other branches. The better course at this juncture would be accredit the presumption, albeit rebuttable, that the members of the General Assembly, like other public officials, will discharge their duties in good faith.[162]

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[157] *See Baby*, 2014 WL 4815211 at *28-9 (Koch, J., concurring).
[158] *See id.* at *27.
[159] *See id.*
[160] *Id.* at *10.
[161] *Id.* at *27, n.12 (Koch, J., concurring).
[162] *Id.* (citing *See* State *ex rel.* Comm'r of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001)).

To save the Court from public and political backlash, one could further argued that a court so high in the judicial system should be wary of expressing an opinion beyond what may be required, even if such an opinion would please a significant segment of the population.[163] The immediate judicial outcomes should not "solely be evaluated according to their apparent desirability."[164] "Instead, decisions should also be evaluated according to their institutional legitimacy, their jurisprud[ential] soundness, and finally, the manner in which these decisions will affect and interact with both [the] U.S. government and society."[165]

Regarding the *Baby* decision, the immediate judicial outcome is that traditional surrogacy contracts expressly withstand public policy scrutiny. Lawyers who practice in a directly or indirectly related field find it desirable. Lawyers dealing with surrogacy contracts also gain a great deal of guidance with which they will use to guide their clients. Additionally, future surrogates in traditional arrangements are protected by the invalidity of contractual terms that deprive them of parental rights by private agreement, and proponents of surrogacy gained a much-desired legal victory which will set heavy precedent for an entire state.

Next, institutional legitimacy and jurisprudential soundness appear to be intertwined. Unlike the legislative branch, the judiciary's power is predicated on its ability to find support for a decision, i.e., its ability to base its decision on pre-existing law, whether it be statutory, case law, or a mixture of several sources. Without a base of precedent or fair interpretation of an existing statute, the judicial decision and, by extension, the issuing court's legitimacy may be questioned.

In *Baby*, the Court found, cited, and fairly evaluated many relevant sources of state law, including the Tennessee Constitution, relevant Tennessee statutes, Tennessee cases, and sources of contract principles adopted in Tennessee cases. Thus, having tethered its decision to a collection of existing law, the Court's answer and its legitimacy as body are unlikely to be questioned by the reasonable critic. Furthermore, it is unlikely that the *Baby* decision will cause inter-governmental

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[163] Faizer, *supra* note 155, at 411.

[164] *Id.* at 396.

[165] *Id.*

acrimony because the opinion takes no power from the Tennessee General Assembly. It can do what it has always had the power to do—pass laws detailing the requirements for valid surrogacy contracts within the state. Indeed, the Court encouraged the legislature to make a definitive statement on the issue.

As far as the decision's effect on society, the impact is much more speculative. The polar options are either that it has no effect, or that overnight, surrogacy becomes a politically-charged banner issue causing many state election swings during the next cycle. In reality, it is likely to be somewhere in-between. In any event, the citizens of Tennessee, through their representatives, will have an opportunity to speak.

The argument against the Court's broader holding would conclude by stating that legislative inaction is sometimes a consequence of living in a democracy. What is the cause of legislative inaction regarding surrogacy? Perhaps surrogacy-related problems are not high on the agenda of the citizens of Tennessee. If surrogacy-related issues were as pressing as commentators claim, legislative efforts, such as those in Louisiana, may be more likely to occur.

II. LOUISIANA'S LEGISLATIVE EFFORTS

The Louisiana State Legislature recently attempted to comprehensively address its surrogacy issues; however, its struggles exemplify the difficult position in which courts are placed when waiting on adequate legislative guidance. Louisiana State Representative Joseph Lopinto, R-Metairie, filed House Bill 187 on February 17, 2014.[166] Louisiana State Senator Gary Smith, D-Norco, sponsor of the corresponding Senate Bill, is the father of two children born through gestational surrogacy arrangements that were formed and signed outside Louisiana.[167] Senator Smith said the Bill helps

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[166] Louisiana State Legislature, H.B. 187's Bill Information, http://www.legis.la.gov/legis/BillInfo.aspx?i=223852 (last visited Oct. 26, 2014).

[167] Emily Lane, *Bobby Jindal Again Vetoes Bill Allowing for Legal Surrogacy Births in Louisiana,* http://www.nola.com/politics/index.ssf/2014/05/bobby_jindal_ag

families become complete.[168] He continued, "[i]nfertility is so private and personal, and . . . this Bill would . . . help[] (parents with fertility problems) to be able to have a biological child of their own" within Louisiana.[169]

After sailing through the Louisiana House Committee on Civil Law and Procedure with a 10-0 vote, the Louisiana House passed the Bill with a vote of 80-14.[170] The Louisiana Senate Judiciary Committee then picked up the Bill.[171] Following the adoption of amendments, the Senate Judiciary Committee passed the Bill with a vote of 22-11.[172] Barely any resistance was encountered on the Senate floor during the 72-7 vote.[173]

One of the first provisions declares traditional surrogacy contracts, termed "genetic surrogacy" contracts within the Bill, "absolutely null."[174] First, the Bill mandates that gestational surrogacy contracts shall be written.[175] After memorialization, the contract must be signed by the "gestational mother," the gestational mother's husband, if applicable, and the intended parents.[176] With such an uncertain statutory requirement, one could argue that the Bill would exclude single parents from legally contracting with a surrogate.[177]

Second, the Bill states that the gestational surrogacy contract is enforceable only if the contract is approved by a court "in advance of in utero embryo transfer[.]"[178] The surrogate must be at least twenty-five and no older than thirty-

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[168] *Id.*

[169] *Id.*

[170] H.B. 187's Bill Information, *supra* note 165.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] H.B. 187, Reg. Sess. § 2719 (La. 2014); Enrolled House Bill 187, http://www.legis.la.gov/legis/ViewDocument.aspx?d=904605 (last visited Oct. 26, 2014).

[175] H.B. 187, Reg. Sess., at § 2720.

[176] *Id.* at § 2720A.

[177] *See id.*

[178] *Id.* at § 2720B.

five years old[179] and have previously given birth to at least one child.[180] Next, the Bill forbids the surrogate from receiving compensation for her services.[181] Compensation, as defined in the Bill, means "a payment of money, objects, services, or anything else having monetary value."[182] However, compensation does not include reimbursement of actual expenses[183] to the gestational mother or payment for goods or services incurred by the intended parents as a result of the pregnancy.[184] If the contract is for "compensation," the contract "shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy."[185]

Furthermore, the Bill would prohibit a contractual term requiring the gestational mother to consent to terminate the pregnancy "for any reason[.]"[186] "Any reason" includes prenatal diagnoses of actual or potential disability, impairment, genetic variation, or any other health condition, gender discrimination, and "for the purposes of the reduction of multiple fetuses."[187]

After the Bill received bicameral affirmation, it reached the desk of Governor Bobby Jindal, who sought counsel from, most notably, Reverend Gene Mills, President of the conservative Christian non-profit organization called Louisiana Family Forum.[188] Reverend Mills "told his contact within the administration, 'I could not advise Bobby sign this bill.'"[189] Reverend Mills cited two "irreconcilable differences" which led to his advisement that Governor Jindal veto the bill.[190]

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[179] *Id.* at § 2720.1(1).
[180] *Id.* at § 2720.1(2).
[181] *Id.* at § 2720C.
[182] *Id.* at § 2718(1).
[183] *Id.*
[184] *Id.*; *contra Baby*, 2014 WL 4815211 at *21 (permitting reasonable payments for the pain, suffering, and other expenses related to the pregnancy and birth).
[185] *Id.* at § 2720C.
[186] *Id.* at § 2720D.
[187] *Id.*
[188] Lane, *supra* note 166; Louisiana Family Forum, About, http://www.lafamilyforum.org/about/ (last visited Oct. 26, 2014).
[189] Lane, *supra* note 166.
[190] *Id.*

To Reverend Mills, the in vitro fertilization process involved in gestational surrogacy births generated the first irreconcilable difference.[191] According to Reverend Mills, the destruction of excess fetuses was "[t]echnically . . . abortion."[192] However, the Bill expressly makes a contractual term requiring the surrogate to have such excess fetuses removed unenforceable, while saying nothing about the surrogate consenting to such a procedure in the absence of the contractual requirement to do so. In an interview, Reverend Mills confirmed that this outside-the-contract circumvention is where his first concern with the legislation stemmed.[193] Reverend Mills said he questioned how effectively this provision would be enforced stating that the "police arm, especially within the [in vitro fertilization] industry" is simply not there.[194]

The second irreconcilable difference Reverend Mills cited was the language of the statute that was intended to prevent "commercial surrogacy," i.e., when a surrogate is paid to carry the child.[195] The Reverend "believed [that the] restrictions he requested be written into the Bill to ban surrogacy-for-pay were insufficient."[196] This so-called irreconcilable difference is more difficult to understand because, again, the Bill expressly prohibits such a term.[197] Reverend Mills elaborated during an interview by stating "the [surrogacy for-pay] restrictions were too vague."[198] He continued by expressing concern that "[i]n such new area of the law, such vague language could be a detriment . . . to altruistic surrogacy[,]" or surrogacy done for no pay or reimbursement of expenses.[199]

Reverend Mills, and perhaps others, counseled Governor Jindal to veto the Bill, and the Bill was officially

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[191] *Id.*

[192] *Id.*

[193] Telephone Interview with Reverend Gene Mills, President, Louisiana Family Forum (Dec. 9, 2014).

[194] *Id.*

[195] Lane, *supra* note 166.

[196] *Id.*

[197] H.B. 187, Reg. Sess., at § 2720C.

[198] Mills, *supra* note 192.

[199] *Id.*

vetoed on May 30, 2014.[200] The veto pushed the issue back to the legislative realm for a potential supermajority override; however, Louisiana Representative Joe Lopinto, the bill's sponsor, surrendered just two days after Governor Jindal's veto.[201] Despite the overwhelming support in both houses, Representative Lopinto decided not to attempt to override the Governor's veto because such an action would place the funding of other bills in jeopardy.[202]

Representative Lopinto's loss in the final legislative leg has not deterred Louisiana lawmakers, who envision surrogacy-related legislation on the horizon.[203] The Bill's failure to secure the Governor's signature notwithstanding, the deliberative process succeeded when a constructive, in-depth discussion took place. A similar discussion may happen within the Tennessee General Assembly if the concern of the citizenry were high enough.

CONCLUSION

Save the complex custody determination, child support calculation, and parenting plan for the immediate parties, the Tennessee Supreme Court's holding in *Baby* is relatively uncontentious. The Court grappled a difficult legal question, a task with which it is familiar. After predicating its power on an assemblage of existing law, reasonable questions of jurisprudential soundness and institutional legitimacy are non-existent. The decision is unlikely to stir inter-governmental hostility, and properly, the opinion fervently calls for legislative action.

The nearly successful legislative efforts of Louisiana exhibit the frustration some may have with the deliberative process. Preemptory legislative action regarding hotly-contested social issues is a rarity. In *Baby*, the Court, after documenting twenty years of legislative action and strongly noting the damage such prolonged inaction was causing, saw its obligation clearly — to prevent further damage.

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[200] H.B. 187's Bill Information, *supra* note 165.
[201] Lane, *supra* note 166.
[202] *Id.*
[203] *Id.*