Chapter 29-1

Assisted Human Reproduction And The Courts

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ASSISTED HUMAN REPRODUCTION AND THE COURTS

The case law has developed more fully in the United States and the leading decisions are discussed below.

1. Traditional Surrogacy

(In a traditional surrogacy, the woman who gestates and delivers the child is also the biological mother of the child.)

In re Baby M, 537 A.2d 1227, 109 N.J. 396

New Jersey, 1988

Facts:

In consideration of payment of $10,000, Mary-Beth Whitehead agreed to be artificially inseminated with the sperm of William Stern, whose wife, Elizabeth, feared that pregnancy might represent a serious health risk to her.

Almost immediately after the birth Ms. Whitehead felt she could not relinquish the baby, however she did so when the baby was 3 days old. She then became deeply distressed, to the point that she was threatening suicide. The following day she went to the Sterns and asked them to let her have the baby for a week after which she would be able to surrender her. The Sterns were concerned that Ms. Whitehead would harm herself and believed that she would keep her promise to return the baby. They let her take Baby M with her and when she subsequently refused to return her, obtained an ex parte order of custody. When the police came to enforce the order, Ms. Whitehead's husband slipped out the back door with the baby. He and Ms. Whitehead fled the jurisdiction, with Baby M, and went to Florida, moving from place to place to avoid apprehension over the next three months. Eventually the Sterns located her, filed supplementary proceedings in Florida and regained interim custody. Ms. Whitehead was granted limited access pending hearing of the Sterns' application to enforce the surrogacy contract. They sought an order for permanent custody, an order that Ms. Whitehead's parental rights be terminated and an order that Mrs. Stern be allowed to adopt Baby M.

There were no less than 55 intervenors at the hearing before the New Jersey Supreme Court. The unanimous decision of the seven judge panel was pronounced just prior to Baby M's 2nd birthday.

Decision:

The court invalidated the surrogacy contract as conflicting with law and public policy. Although they granted custody of Baby M to Mr. Stern on the principle of best interests of the child, they refused to terminate Ms. Whitehead's parental rights or to allow the adoption of Baby M by Mrs. Stern. They referred the issue of access back to the court below.

Per curiam:

"Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction."

"Worst of all, however is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother."

"This is the sale of a child, or, at the very least, the sale of the mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here."

2. Gestational Surrogacy

(In a gestational surrogacy, the ovum is donated and fertilized in vitro, then implanted in the uterus of the surrogate, who thereafter gestates and delivers the child).

Johnson v. Calvert, 5 Cal. 4th 84; 851 P. 2d 776; 19 Cal. Rptr. 2d 494;

California, 1993

Full panel of Supreme Court of California affirms judgment of Court of Appeal.

Facts:

A childless married couple contracted with a surrogate to gestate an embryo created from the ovum of the wife and the sperm of the husband (the wife had undergone a hysterectomy but her ovaries still produced eggs.) The consideration was $10,000, payable in instalments, the last one of which was to be paid six weeks after the child was born. When the surrogate was 6 months pregnant, she demanded accelerated payment of the remaining instalments and said that if she did not receive payment, she would not relinquish the child.

The intended parents sued for a declaration that they were the legal parents of the unborn child. The surrogate responded with a lawsuit claiming that she was the mother of the child and the two cases were consolidated.

After the child was born, a blood test excluded the surrogate as the genetic mother.

Decision:

The intended parents were declared to be the child's "genetic, biological and natural" parents, the surrogate had no parental rights and the surrogacy contract was legal and enforceable against the claims of the surrogate.

Even though the surrogate was a legal mother of the child by virtue of having given birth to her, the intended mother was the genetic mother. The American Civil Liberties Union submitted that the court should hold both mothers had legal status, but the court declined to do so, as this would diminish the role of the intended mother.

Reasoning:

"Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as

manifested in the surrogacy agreement. M.C. and C.C. are a couple who desired to have a child of their own genes but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. A.J. agreed to facilitate the procreation of M.C.'s and C.C.'s child. The parties' aim was to bring M.C.'s and C.C.'s child into the world, not for M.C. and C.C. to donate a zygote to A.J. C.C. from the outset intended to be the child's mother. Although the gestative function A.J. performed was necessary to bring about the child's birth, it is safe to say that A.J. would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why A.J.'s later change of heart should vitiate the determination that C.C. is the child's natural mother.

We conclude that although the Act recognized both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, 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."

Dissent

(Kennard, J.)

"In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. … The majority's resort to "intent" to break the "tie" between the genetic and gestational mothers is unsupported by statute, and, in the absence f appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. 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."

"The majority opinion is a sweeping endorsement of unregulated gestational surrogacy… The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case."

"in using the legal concept of intent to break the "tie" between the genetic mother and the gestational mother, the majority articulates a rational grounded in principles of tort, intellectual property and commercial contract law. But we are deciding the fate of a child. In the absence of legislation that is designed to address the unique problems of gestational surrogacy, the court should look not to tort, property or contract law, but to family law."

3. Attempts to Extend the Decision in Johnson v. Calvert

In re Marriage of Moschetta 25 Cal. App. 4th 1218

California Court of Appeal, 1994

Facts:

An infertile married couple entered into a contract with a surrogate to be impregnated with the husband's sperm and to terminate her parental rights and facilitate the wife's adoption of the child. Consideration was $10,000.

The surrogate became pregnant but within a few months, the couple began having marital problems and the husband told the wife he wanted a divorce just a few weeks before the baby was delivered. The surrogate learned of these marital problems while she was in labour.

The couple told the surrogate they would stay together and she released the child to them. However the couple separated seven months later and the husband took the child with him. The wife applied for custody and filed a petition to establish parental rights. The surrogate joined the proceeding. No party relied on the surrogacy agreement (this was prior to the decision in *Johnson v. Calvert*), all parties agreed that the agreement was unenforceable.

The original judgment (again, prior to *Johnson v. Calvert*), declared that the husband and the surrogate were the legal parents of the child and granted them joint custody.

The husband appealed, and sought a declaration that his ex-wife was the legal mother of the child on the basis of the decision in *Johnson v. Calvert*.

Decision:

In *Johnson v. Calvert*, the court held that where there is a "tie" between two mothers, the "tie" is to be broken by the parties' intent. Here there was no tie. The biological mother was also the gestational mother. The court held that the surrogacy contract could not be enforced against the traditional surrogate by the intended father to terminate her parental rights. The issue of joint custody was referred back to the lower court with directions.

Per Curiam:

"While we affirm the judgment so far as it vests parental rights in the surrogate mother, we are not unmindful of the practical effect of our decision in light of *Johnson v. Calvert.* Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in-vitro fertilization and embryo implantation or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, biology is destiny."

In re Marriage of Buzzanca

California Court of Appeal 1995

The husband and wife contracted to have an embryo genetically unrelated to either of them (or to the surrogate) implanted in a surrogate. After the baby was born, the husband and wife separated. The wife claimed that she and the husband were the legal parents of the child and sought custody and child support. The husband and the surrogate each made no claim for parental rights or responsibilities.

The trial court found that the child had no legal parents.

The court of appeal reviewed presumption of paternity cases and the decision in *Johnson v. Calvert.* The husband relied upon *Moschetta* for the proposition that the surrogacy contract could not be enforced to imbue him with parenthood.

The court held that "there is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed in* a surrogacy agreement."

The court quoted *obiter dicta* from *Johnson v. Calvert:* "In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability." The court specifically goes on to say that this is not limited to cases where the intended parents have a genetic link to the child.

4. Baby M, Redux

A.G.R. v. D.R.H & S.H.

Superior Court of New Jersey, December 2009

AR is the sister of DHR, a gay man who is married to SH. AR agreed to be a gestational surrogate carrying an embryo created from an ovum donated by an anonymous donor, fertilized with the sperm of SH. She gave birth to twin girls in 2006 and then claimed that the contract was invalid, notwithstanding that she had no genetic link to the children.

The court agreed on an interim basis, thereby extending the Baby M prohibition on traditional surrogacy contracts to gestational surrogacy contracts as well.

A trial of the issues is currently before the courts in New Jersey.

5. Other States

Massachusetts has declared that surrogacy contracts are unenforceable there *(R.R. vs. M.H. & another, 1997).*

Arizona has concluded that a statute purporting to govern surrogacy contracts was unconstitutional and violates the Equal Protection Clause of the constitution. (*Soos v. Superior Court, 182 Ariz. 470, 1994*)

6. Canadian Decisions

Canadian Courts have registered genetic parents on the registration of birth, even where a surrogate has been involved. The jurisprudence is reviewed in ***Rypkema v. British Columbia,*** 2003 BCSC 1784. In this case a gestational surrogate was implanted with an ovum from Mrs. Rypkema, fertilized *in vitro* with semen from Mr. Rypkema. The Surrogacy Agreement provided that the surrogate and her husband released all interest in the child, surrendered custody and care to Mr. and Mrs. Rypkema and intended the Rypkemas to be the child's parents. The Director of Vital Statistics refused to register the Rypkemas as the child's parents until ordered to do so by the Court.

Reasoning:

There were no competing claims to settle. The intention of all parties was given effect.

There has not been a decided case in circumstances where competing claims to parentage did exist. The unreported British Columbia case of W. v. T. (BCSC 2006, E053535, Vancouver Registry) presented competing claims, which were settled by mediation.

In that case, a married couple made an unwritten agreement for a traditional surrogacy with another couple. Although a formal Agreement was drafted and discussed, it was never finalized or signed. The evidence of the surrogate was that she was willing to have the child of the husband of the other couple on condition that there would be an ongoing relationship between the two families and that the intended parents would cover her expenses. For the first several months of the pregnancy the parties had a close relationship but this broke down shortly before the baby was born, over the issue of the birth mother's expenses.

Notwithstanding the breakdown in the relationship, the birth mother gave the baby to the intended parents soon after he was born. The intention was that she would consent to the baby's adoption by the intended mother but before that consent was signed, the intended parents made it clear that they wanted no further contact with the birth mother and her family and did not intend to have an ongoing relationship.

An interesting law suit was commenced and set for an early trial, but on the eve of the trial the parties attended mediation and settled on the basis that the birth mother would consent to the adoption of the baby by the intended mother and she and her family would have three visits of four hours each with the baby until his age 19. This case will be a subject of the panel discussion.