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Surrogate Parenting and Fundamental Rights

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Introduction

As of September 1, 1988, Michigan became the first state to criminalize surrogate motherhood contracts involving gestational services.[1]

In late Summer 1988, the ACLU Fund of Michigan, through staff and cooperating counsel, filed a lawsuit challenging the Michigan statute on constitutional grounds. That litigation is pending in the Michigan Court of Appeals.[2]

While the legal issues move slowly through the courts, both sides of the issue claim their position as the one which most protects civil liberties. As with other reproductive freedom issues, one's position on surrogacy usually depends upon one's focus: the consenting adults or the child.

Careful analysis, however, leads to the conclusion that the interests of all the parties can be recognized and protected, without conflict. Reasonable state regulation will ensure protections, and provide mechanisms to fairly resolve the inevitable occasional dispute; state prohibition, and particularly criminalization, achieves no tangible benefits, instead forcing Michigan infertile couples

who desire children to take steps to avoid the law.

I. A FRAMEWORK FOR SURROGACY

After a review of all the interests involved in surrogate parenting arrangements, the most rational conclusion is that infertile couples and surrogate mothers have fundamental rights to enter into such arrangements. The couple has the right, without interference by the state, to make the most private decisions about reproduction, family planning, and intimate association. The surrogate has the freedom to provide an egg, and /or her gestational services, and to be reasonably compensated for her services. To prohibit compensation is to abolish surrogacy for all practical purposes.

The surrogate must, however, retain the right to change her mind from when she originally enters into the arrangement, and can choose to not relinquish her parental rights. So long as she has provided the service, she is entitled to the compensation even where she does choose to retain her parental rights. The payment is for her services, not the child. That somewhat anomalous situation will not arise frequently, as the clear intent of the surrogate when entering into the arrangement is to relinquish parental rights. If she should choose to retain her parental rights, the custody dispute is between the two natural parents, to be resolved in the same fashion that hundreds of custody disputes are resolved every day in Michigan--under a "best interests of the child" standard.

The state's interest in protecting the parties, including the child, can be accomplished through reasonable, narrowly tailored regulations. Those regulations could include medical screening;

minimums for compensation to the surrogate; adopting a "best interests of the child" standard for custody disputes; and disallowing judicially-enforcable relinquishment of parental rights by the surrogate. For the state to do as Michigan has done, prohibiting and even criminalizing surrogate arrangements for compensation, is for the state to improperly infringe upon the fundamental rights of Michgan citizens. The Michigan law not only deprives infertile couples and surrogates of their rights, it also threatens the privacy rights of all Michigan citizens.

II THE INTERESTS INVOLVED

There are four interests involved that must be reviewed and balanced in determining the proper regulations, if any, to be instituted by the state: those of the infertile couple; the surrogate; the child; and the state. As fundamental freedoms are unquestionably implicated, the state must show a compelling interest to justify interference.

A. The Infertile Couple

Typically, a surrogate parenting arrangement is initiated by an infertile couple. The most common situation is where the woman is infertile, though the man is able to fertilize an egg. Faced with an agonizing inability to adopt,[3] an infertile couple who desires a family has no options except surrogacy. Surrogacy takes several forms: the most common are the male's donation of semen to artificially inseminate a surrogate; and in vitro fertilization, involving fertilization of an egg (either from the male's partner, or from a surrogate) outside of the egg donor's body, and

placement inside a surrogate's womb for gestation. In either form, the conceived child is in part the product of the genetic matter of one of the ultimate parents.

The Supreme Court has recognized a fundamental right "whether to bear or beget a child."[4] The Court has recognized that right both within,[5] and outside of[6] marriage. The Court's line of privacy cases, starting with the rights surrounding contraception, explicitly recognizes the freedom of choice regarding future offspring.

Moreover, the Court has held several times that there is a "fundamental liberty interest" of natural parents in the care, custody and management of the child.[7]

Thus, the rights of the childless couple regarding private and intimate decisions involving family planning and reproduction, and intimate association with their child, are fundamental.

B. The Surrogate

Surrogacy arrangements also affect the fundamental privacy rights and reproductive freedom of the surrogate mother. A woman who chooses to be a surrogate by providing an egg, and/or her body for gestational services, or both, has a right to do so. As with any provider, she also has a right to be reasonably compensated for her services.

Michigan law permits men to sell their portion of the reproduction partnership to sperm banks;[8] to forbid women the same opportunity is to deprive women of equal protection of the law. To prevent undue economic coercion of surrogates, the state should place minimums on the amount of

compensation to be paid in much the same fashion as the state creates minimum wages for other providers.

The gestating surrogate must also retain the rights of personal lifestyle choices during the pregnancy, and to choose to terminate the pregnancy. A surrogate's constitutionally protected reproductive freedoms cannot validly be waived. A couple's screening of surrogates through personal interviews will best ensure a comfortable "fit" between the parties.

Similarly, a surrogate cannot validly waive her retention of parental rights. The state should simply disallow judicially enforceable agreements to relinquish parental rights.

C. The Child

A child has the right not to be treated as a commodity or chattel. To allow a child to be sold may well violate the 13th Amendment's prohibition of slavery and involuntary servitude.[9]

Moreover, a child's interest in receiving care and nurture should not depend on its health, sex, or the number of other children with which the child was born.

The state should ensure that the natural parents that have retained parental rights carry out their parental responsibilities. As with other family law issues, the state has already instituted judicial mechanisms to decide custody, support and visitation.

D. The State

The state has a legitimate interest in protecting the rights of the parties, including the

child. The state must do so in a fashion that does not improperly infringe upon the rights of the adult parties to a surrogacy arrangement. Reasonable regulations of such arrangements (such as those suggested in this article), narrowly tailored, can ensure that all interests are adequately protected.

III. PROBLEMS WITH THE MICHIGAN SURROGACY LAW

The Michigan statute is a classic example of government overreach. The law provides for misdemeanor penalties (up to one year in prison and/or a fine of up to $10,000) for "participating parties" to a surrogate parenting contract for compensation. Persons other than "participating parties" who induce, arrange, procure or otherwise assist in the formation of a surrogacy contract for compensation are subject to felony penalties (up to five years in prison and/or a fine of up to $50,000). By criminalizing surrogate parenting arrangements, and providing for severe criminal penalties, Michigan has simply exceeded constitutional limitations on the state's authority. Moreover, as long as the Michigan law remains valid, Michigan citizens who choose to enter into surrogacy arrangements will simply take steps to avoid the law.

The original Senate Bill was tie-barred to the South African Divestiture Bill; thus, the bill never received a full hearing on the floors of the Legislative Houses. That may explain the serious language problems in the law. "Surrogate parentage contract" is ambiguously defined; the language suggests that it is only those agreements where the surrogate's compensation is contingent upon her relinquishment of parental rights that are

prohibited. The bill's sponsor, however, insists that she intended for all arrangements to be outlawed, including those that provide compensation for gestational services only. The Attorney General of Michigan has subsequently joined in that rather skewed interpretation. It is a dispute over that interpretation that is the basis of the ACLU Fund of Michigan's litigation.

Thus, instead of instituting reasonable regulations of surrogacy arrangements, Michigan has acted precipitously and extremely. In doing so, the state has violated the constitutional rights of both infertile couples and surrogates, and threatened the rights of all Michigan citizens.

A. Due Process Problems

Because it effectively eliminates surrogate parenting arrangements, Michigan's law restricts the exercise of several rights which are fundamental under the Constitution, rights involving marriage, family, reproduction, children, and intimate association. Under the 14th Amendment, and its state constitutional conterpart, the government must demonstrate a "compelling state interest" to justify regulation in these areas. Furthermore, such regulation must be "narrowly drawn to express only the legitimate state interests at stake."[10]

Michigan fails to recognize the dual nature of surrogate motherhood arrangements, which provide for both relinquishment of parental rights, and gestational services. The state has overlooked the possibility of permitting compensation for gestational services alone, and disallowing judicially-enforced agreements providing for relinquishment of parental rights. It is possible to leave surrogate

motherhood intact as a reproductive option by forbidding pre-birth waiver of parental rights and by forbidding compensation for post-birth waiver.

Problems with custody of the child when the surrogate mother changes her mind are already covered by section 11 of P.A. 199 of Acts of 1988--legal custody is awarded based on the child's best interests. The physical and mental fitness of parties to surrogacy contracts can be regulated by provisions for health examinations, and personal interviews. Instead Michigan has chosen to completely eliminate one reproductive option for its citizens.

While Michigan has a compelling interest in regulating surrogate parenting arrangements, the state has pushed its regulation beyond the permissible boundary of its interest.

B. Equal Protection

Because the law outlaws only compensated surrogate motherhood, and retains compensated surrogate fatherhood through semen donation, Michigan's law denies women the equal protection guaranteed under the 14th Amendment and its state constitutional counterpart. To be permissible, sex-based classifications must be substantially related to the advancement of an important government interest.[11] Surrogate motherhood obviously involves a greater degree of physical and emotional involvement with the child than does surrogate fatherhood. However, the government interest in regulating parenting arrangements does not justify a degree of differentiation between the two which completely forecloses one method of surrogacy.

IV CONCLUSION

Surrogate parenting came to the public's attention when Mary Beth Whitehead initiated the infamous "Baby M" case. Whitehead had entered into a surrogacy arrangement, but changed her mind after the birth, and refused to relinquish her parental rights. The ensuing court battle, resulting in a decision by the New Jersey Supreme Court, received enormous media attention, and was ultimately the subject of the original American docudrama, the "TV Movie."

Shrill cries of "babyselling" were heard throughout the country. Articles appeared on Noel Keane, the "babybroker" attorney in Dearborn, Michigan. The Catholic Church condemned surrogacy. State legislators began to initiate legislation prohibiting, and as in Michigan even criminalizing, surrogacy arrangements.

The facts, however, simply do not support the extremist and emotional criticisms leveled at surrogacy. At the time of the Michigan ACLU's lawsuit, only 5 of the nearly 300 documented surrogacy arrangements had resulted in litigation. The vast majority of the arrangements had worked, allowing infertile couples fo form a family, and surrogates to perform a valuable service for reasonable compensation. The media did not, and still has not, focused on the parents and surrogates involved in these successful arrangements, who describe the "joy" and "miracle" of the results.

Neither infertile couples nor surrogates have organized to the point of wielding political power; thus, it is opponents of surrogacy that have been heard, and that have been able to push through restrictive legislation. Governor Blanchard, in signing Michigan's law, called the legislation

"imperfect," and troubling, yet there was no political reason for him to veto the bill. Fortunately, infertile couples and surrogates are gathering political strength. In the meantime, the fight is out of the political arena and in the courts.

In a world filled with unwanted children, who end up the victims of abuse and abject poverty, it is hard to imagine what is wrong with couples that badly want a child taking steps to form a family. Opponents of surrogacy tell these couples to accept God's cruel gift of infertility, or if they must, adopt. Yet these opponents do not answer how to deal with a 7-year wait for adoption, or why adoption is any more sensible than a process that results in a child that is actually biologically related to one of the parents.

Opponents of surrogacy say that the child must be protected from the trauma of being born to a surrogate, or an ensuing custody battle, yet they do not explain why that is any more traumatic than divorce and custody fights that occur every day, or the abuse and molestation that happens to unwanted children.

Opponents of surrogacy claim that it just isn't "natural," that it is meddling in God's master plan. Yet most of them do not reject the other miracles of medicine that have alleviated other forms of human suffering. And these opponents certainly do not respect the rights of others to have different religious convictions than their own.

Surrogate parenting is a legitimate option to infertility. It has successfully worked for hundreds of proud parents now blessed with children and families. In America people have certain fundamental rights concerning reproduction, and family planning, and basic privacy. When a few

vocal advocates (or even more than a few) attempt to impose their religious or moral values on the rest of us, the courts must exercise judicial review to protect all of our rights, and remind government of its limitations.

The fight over the right to enter into surrogate parenting arrangements will not end until the courts reaffirm these most basic American values.

NOTES

1. 1988 P.A. 199, MCLA 722.851, et. seq.

2. Doe v. Attorney General of Michigan, Civil Action No. 88-819032 CZ (Wayne Circuit Court); No. 113775 (Michigan Court of Appeals)

A second suit has been filed by the ACLU Fund of Michigan. See Coe v. Attorney General of Michigan, Civil Action No. 89-908112 CZ (Wayne Circuit Court)

3. There is typically a 5 to 7 year wait for adoption of healthy newborns for most couples.

4. Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972). See Skinner v. Oklahoma, 316 U.S. 535 (1942).

5. Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978).

6. Carey v. Population Services International, supra; Eisenstadt v. Baird, supra.

7. Santoskey v. Kramer, 455 U.S. 745, 753 (1982); Pierce v. Society of Sisters, 268 U.S. 510, (1925); Meyer v. Nebraska, 262 U.S. 390, (1923). See also, Robert v. United States Jaycees, 468 U.S. 609, 618-620 (1984); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

8. See MCLA 333.2824; MCLA 700.111.

9. Senate Fiscal Agency analysis of Senate Bill 228.

10. Roe v. Wade, 410 U.S. 113, 155 (1973). See also Zablocki v. Redhail, supra at 388.

11. Craig v. Boren, 429 U.S. 190, 197 (1976); Michigan Dept. of Civil Rights ex rel Forton v. Waterford Township Dept. of Parks and Recreation, 425 Mich 173, 190-194 (1986).

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