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One Surrogate Birth for Man May Mean Nothing for Mankind

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Media reports abound about a lawsuit filed by a woman in California against a man in Georgia who hired her to carry children for him as a surrogate. Now 20+ weeks pregnant with triplets, the woman has sued to avoid her obligations under the surrogacy agreement, claiming that the agreement is invalid and the statute that enables surrogacy in the state is unconstitutional.

There are some dark aspects to this case, to be sure, and the conflict between the surrogate and the intended father reveals some of the challenges that can plague an ill-considered surrogacy agreement. However, one bad situation tells us little about the general wisdom of using surrogacy as a form of creating parent-child relationships, and does not provide any basis upon which to argue against the legality of the practice. It would be a mistake—as it usually is—to draw too many conclusions from one situation, and an especially big mistake to make law from a hard case.

M.C. v. C.M.

That the surrogate and the intended father have diametrically opposed names is perhaps a metaphor for their stances with respect to the three fetuses M.C. is carrying.

The basics of this arrangement do not seem to be in dispute. C.M. is a single man, almost

50 years old, who lives in Georgia. With the help of Surrogacy International, an agency that facilitates surrogacy arrangements by matching intended parents with donors, C.M. found M.C., a single, 47-year-old woman in California, with four children of her own, who agreed to serve as a surrogate carrier for him. The pregnancy was achieved through in vitro fertilization, with sperm from the intended father and eggs from an anonymous 20-year-old donor. She became pregnant with triplets.

The controversy—and M.C.'s lawsuit—arise out of C.M.'s alleged request that M.C. "selectively reduce" the pregnancy from triplets to twins, i.e. that she abort one of the fetuses. The surrogacy contract ostensibly gives the intended father the right to make that decision; he did, but she refused. Somewhere along the way, she decided she was not only pro-life, but opposed to surrogacy. And she filed a lawsuit asking to be named the sole custodian of "Baby C" (perhaps not a particular baby, but the one he allegedly did not want). And with respect to Baby A and Baby B, she asks to be declared their legal mother as well and for custody to be decided based on their best interests.

The facts surrounding this case are drawn largely if not exclusively from the complaint she filed in a California court. They have not, therefore, been proven or disproven, nor subjected, yet, to the adversarial process. But for purposes of analyzing her claims, we'll take them as true.

To whom do these children belong? This lawsuit comes down to a question about the validity and enforceability of the surrogacy agreement and, in the end, about parentage.

The Law and Practice of Surrogacy

Surrogacy—where one woman conceives and carries a child with the intent that someone else will raise it—dates at least to biblical times. The Old Testament tells of Abraham, whose wife's handmaid bore a child for him. Jealousy and conflict ensued.

Surrogacy in the modern world might also give rise to controversy, but it does so within a very different context. The babies, almost always, are conceived with reproductive technology instead of sex, and with the egg of a donor, rather than the surrogate. And these pregnancies take place pursuant to written contracts, which are drafted against a backdrop of parentage law—the rules and doctrines that determine a child's legal parents.

At core, a surrogacy agreement is a contract that provides special rules of parentage. Although a woman who gives birth to a child is usually presumed to be that child's legal mother, a valid surrogacy agreement rebuts that presumption. That same valid agreement also rebuts the usual presumption that the husband of a woman who gives birth is the child's legal father. And this contract replaces those traditionally presumed to

be the child's parents with the child's intended parents—those who commissioned the surrogacy with the intent that they would raise any resulting child. Intent, in other words, becomes the dispositive factor in parentage rather than biology or marriage.

The law of surrogacy dates only to the late 1980s, when the controversial *Baby M.* case catapulted the issue into the limelight. There, a traditional surrogate, one who provided both the egg and womb, refused to honor the agreement with respect to parentage. She led the intended parents and their lawyers on a chase that led to competing court actions in multiple states and a high-profile drama. The New Jersey Supreme Court, in the end, held that surrogacy contracts violated the state's public policy and could not be enforced. Surrogacy was tantamount to baby selling and did not sufficiently protect a surrogate who might change her mind. The court in that case was deciding a question of first impression; there were no prior cases, and the legislature had never spoken on the issue.

In the wake of *Baby M.*, many states began to consider the legality of surrogacy contracts. The landscape quickly filled, though with conflicting statutes and judicial decisions. New York, for example, enacted a complete ban on surrogacy, with little opposition, in 1992. But in California, the state's highest court enforced a surrogacy agreement in 1993, in *Johnson v. Calvert*, holding that the intended parents were the child's legal parents and that the gestational surrogate bore no legal relationship to the child.

In the intervening decades, many other states weighed in, some opposed, some supportive. To the extent a modern trend can be discerned, it is towards a "permit, but regulate" approach, under which the legislature that expressly authorizes surrogacy contracts, but constrains the circumstances in which they can be enforced. Illinois enacted the first of these laws in 2004, which imposes strict requirements on all the parties involved. A gestational surrogate must be at least twenty-one years old, and have given birth to at least one child already; she must receive physical and mental health evaluations, and legal counseling about the arrangements and its consequences. The intended parents must prove infertility, or some medical reason to resort to surrogacy. The surrogate must be permitted to choose her own physician. The intended parents can bargain for important rights; for example, they can insist that the surrogate give up drinking and smoking; and they can dictate the type and frequency of prenatal testing and care. This statute is a compromise that tries to answer common objections to surrogacy, but also to ward off battles over custody and parental status.

California, which has allowed surrogacy since the 1993 *Calvert* decision, now also has a surrogacy enabling statute. Effective January 1, 2015, the statute expressly provides for enforceable surrogacy contracts, within some modest constraints. It does not regulate the arrangements as intensely as Illinois's law does. But it does impose some requirements, such as independent legal counsel for each party and rules about disclosure of payments

and plans for health coverage. And it provides that a contract that complies with the statutory rules is "presumptively valid."

Is the Surrogacy Agreement in *M.C. v. C.M.* Likely to be Enforceable?

Assuming the facts alleged in M.C.'s complaint are largely true, this case does raise some red flags. People might react negatively to any number of facts, such as that 22 embryos were created for only one potential pregnancy; the embryos were "sex-selected" so the surrogate would only give birth to boys; the intended father is single, burdened by the care of elderly parents, and almost 50 years old; the surrogate is 47 years old and the single parent of four children; the intended father and surrogate never met in person nor spoke by phone, and they lived thousands of miles apart; the contract does not require the intended father to pay the surrogate's medical expenses, and yet her insurance does not cover the costs of surrogate pregnancy; the intended father asked the surrogate to stop going to the doctor so often because it was costing him too much money; he also asked her to abort one fetus and, when she refused, said he would place that child for adoption; and the father seemed to run out of money before pregnancy was even achieved.

Facts like these, fairly highlighted in media reports, might encourage people to oppose surrogacy—in all cases. But that would be hasty, especially if based on M.C.'s complaint, which is riddled with red herrings, misstatements of law, and bad arguments. For example, the complaint repeatedly assumes and refers to her as the children's legal mother, despite the fact that the surrogacy agreement rebuts the presumption that she is. It claims that M.C. is the mother of all three children "as a matter of biological fact," when the law (and probably science as well) cares only about genetic ties between parent and child. It complains that the children's placement should be determined by their "best interests"—the familiar standard from custody cases—without acknowledging that a parentage determination cannot constitutionally be based on that standard. It suggests that the intended father's inadequate funds mean the surrogacy contract is invalid, when such a fact could relate only, under standard contract law, to whether he breached its terms and not to whether it is valid or invalid. It likewise suggests that the burden and hardship of being pregnant makes the contract invalid. It suggests that an intended father forfeits his parental rights by expressing disinterest in the child, when those two facts are legally unrelated. It states in no uncertain terms that children have a constitutional right to be with their parents, when there is no such recognized right (nor could their be, given the prevalence of adoption). It suggests that men cannot parent their own biological children unless the state conducts a home visit and evaluates their ability to raise children. And let's not even get started on the pages and pages in the complaint arguing

that children need mothers more than fathers, and that the bonds created during pregnancy, even with achieved with a donated egg, are unbreakable.

Virtually none of the facts mentioned above are likely to be relevant, and certainly none of these legal arguments should carry the day. In fact, both are distracting from the questions that matter: whether the surrogacy agreement is valid and whether it has been breached by either party. Only by answering these two questions will a court be able properly to determine parentage of the triplets.

If the surrogacy agreement is valid and has not been breached, C.M. is the sole legal parent of all three children. The surrogacy agreement would sever any presumptive tie between the surrogate and the children; and the egg donor would be subject to a non-maternity rule both by agreement and by law. Regardless of whether he desired that one fetus be aborted, he would be the legal father of all three, entitled, constitutionally, to "care, custody, and control" of them. If he were to decide to place one or more for adoption, that would be his decision alone. If a child has only one legal parent, only that parent must consent to the surrender of parental rights before the child can be adopted by someone else.

If the surrogacy is invalid and cannot be enforced, the triplets would likely be deemed to have two legal parents—their biological father, who has the constitutional right to grasp the opportunity to parent, and their birth (though not biological) mother who has parental rights by statute (which could be supplanted only by a valid surrogacy agreement). Then, the court would have before it a plain-old custody fight between two unmarried parents. But what might make a court deem the agreement invalid? California has allowed surrogacy by judicial decision since 1993, and the legislature endorsed that position more than two decades later. Thus, the state of California does not maintain a public policy against surrogacy in general. Nor is a court likely to deem the statute that enables surrogacy unconstitutional; there is really no plausible argument on that point. The only reason the agreement might be deemed invalid is if the trial court determines that the requirements of the statute were not met.

And if the surrogacy agreement is valid, but has been breached—either by M.C. for refusing to abort the third baby or by C.M. for failing to make payments called for by the contract—then standard contract law would come into play. If C.M.'s failure to pay (an alleged, but not yet proven fact) is deemed material, a court may well conclude that M.C. is entitled to refuse to perform on the contract. In this context, that may mean she does not have to relinquish parental rights.

What about M.C.'s refusal to abort the third fetus? No court could constitutionally order her to seek an abortion, given constitutional protection for her right to make decision

about reproduction, but could a court order her to pay damages for breach—or allow C.M. to walk away from the contract and demand child support from her as a second legal parent? There is no law on this point, so we can only speculate. (A published ruling might be helpful, as most surrogacy contracts include this type of clause.) A court may well decide that even indirect enforcement of the abortion clause—by punishing M.C. with damages for refusing to allow C.M. to make that decision—violates public policy and cannot be enforced. But that would likely still leave the contract in place, just without that particular provision.

There are, as this discussion has made clear, different possible outcomes in this case. But there is no scenario in which the surrogate can simply claim one of the babies because the intended father had the gall, in her view, to demand that it be aborted. Parentage law, for all its complexity, can be reduced to a flow chart, and there is no path to that particular outcome.

Conclusion

A reasonable person might support surrogacy in general and yet find this particular arrangement to be a bit "sketchy," for lack of a better term. But the facts of one case should not tip the scales either way. Reasonable people could disagree about whether surrogacy should be allowed. But both sides should be informed by evidence about the general experience of surrogacy rather than any specific case.

While M.C.'s complaint urges the court to reject surrogacy because it allows "peonage" and allows women to be turned into "breeding animals," it says nothing about the studies of actual surrogates or their experiences. Studies show that surrogates generally are satisfied with the experience and, circumstances permitting, would do it again. Moreover, they tend to report that the relationship they develop during pregnancy is with the intended parents rather than with the child. Perhaps even more importantly, virtually all surrogacy arrangements are carried out without a hitch. The cases that make the news are genuine outliers. That fact needs to be part of the conversation.

Courts are certainly entitled to ask questions about the particular surrogacy in front of them, but we should make sure they are the right questions. To whom do these children belong?

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