SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
FRANCIS B. SCHULTZ
JUDGE

Hudson County Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306

December 23, 2009

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Re: A.G.R. v. D.R.H. & S.H.
Docket # FD-09-1838-07

Dear Counsel:

Enclose kindly find the court's Opinion dated December 23, 2009.

Very truly yours,

Francis B. Schultz

Francis B. Schultz, J.S.C.

FBS/kr
Enc.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

A.G.R.,

Plaintiff,

V

D.R.H. & S. H.,

Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION- FAMILY PART
DOCKET # FD-09-001838-07

OPINION

Argued: November 30, 2009

Decided: December 23, 2009

Harold J. Cassidy, Esq. on behalf of the Plaintiff (The Cassidy Law Firm).

Alan S. Modlinger, Esq. on behalf of the Defendants (Lowenstein Sandler PC).

Daniel A. D'Alessandro, Esq., Law Guardian on behalf of the minors L.H. and T.H.

FRANCIS B. SCHULTZ, J.S.C.

The questions presented to the court involve the legal validity of a contract to be a gestational carrier, a consent to judgment of adoption, plaintiff's claim to the

entitlement of the status of a parent, plaintiff's claim to a constitutionally protected right under the due process clause to have a relationship with the children and plaintiff's claim under the Constitution of New Jersey to have a right to a relationship with the children. Additionally, defendants seek a declaration that defendants are entitled to the legal status of parents of the children involved. The essential facts of this case are not in dispute and the matter is ripe for summary judgment.

Defendants D.R. and S.H. are a gay male couple who are legally married under California law and who registered their domestic partnership in New Jersey pursuant to the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1 *et seq*. D.R. is the brother of plaintiff A.G.R., a woman. D.R. and S.H. decided to have children but wanted to have some genetic link to the child or children. After various options were considered involving A.G.R. it was decided and agreed that S.H. would provide the sperm which would be used to fertilize eggs donated by an unknown woman, with the fertilized embryos then being implanted into A.G.R. who would then carry the fetus to birth. At one point it appears that A.G.R. was to use her own eggs, however, they were determined not to be appropriate. Thus, there would be no genetic link between A.G.R. and the children in the strict sense of that term. On December 5, 2005, A.G.R. signed a document entitled "Information Summary and Consent Form – Gestational Surrogacy". Another document entitled "Contract between a Genetic Father, and Intended Father, and a Gestational Carrier" was signed on February 28, 2006 by A.G.R., D.R. and S.H. On February 28, 2006, plaintiff A.G.R. signed a "Waiver of Right to Retain Independent Counsel" and on October 15, 2006, plaintiff signed a "Consent to Judgment of Adoption" in favor of D.R.

The embryo transfers were performed on March 1, 2006. The embryo transfers were performed by Dr. Susan Treiser. The embryos for implantation were fertilized three to five days before the March 1, 2006 embryo transfer. On October 4, 2006, plaintiff A.G.R. gave birth to twin girls at the Jersey Shore Medical Center in Neptune. Plaintiff visited with the babies in the hospital and periodically after they left the hospital until sometime in January 2007, when this visitation stopped. At the time of the signing of the gestational contract and throughout the pregnancy until birth, plaintiff A.G.R. lived in New Jersey, most of the time on property owned by her brother, D.R. From late March 2007 until the present, A.G.R. had substantial parenting time with the twins and had three full days a week of parenting time since September 2007 up until the present. This was pursuant to court orders entered March 19, 2007, March 30, 2007, and September 14, 2007. All parties are either domiciled in New Jersey or are residents of New Jersey and the jurisdiction of this court is not in dispute.

There is dispute between the parties as to some of the conditions surrounding the relationship between A.G.R. and the defendants. These issues involve the economic dependence of A.G.R. on the defendants, whether or not the defendants actually offered money or even paid money in exchange for A.G.R.'s services in connection with this matter and the emotional state of A.G.R. at various times. These issues though unresolved at the present need not be resolved in order for this court to resolve the legal

issues presented today. A.G.R. and her brother D.R. are originally from Texas and A.G.R. moved to New Jersey shortly before the medical procedures began.

A legal analysis of the rights involved in this matter unquestionably begins with an understanding of In the Matter of Baby M, 109 NJ 396 (1988). In that decision the New Jersey Supreme Court in a unanimous opinion held that surrogacy agreements made under the conditions that existed in that case (as well as any contracts that were "coerced" by the surrogacy agreement) were void as a matter of law. It should be noted that the surrogacy agreement involved in Baby M pertained to a surrogate mother whose eggs were indeed utilized, as opposed to the instant matter where the eggs were supplied by an unknown woman then fertilized before being transplanted into plaintiff. The lack of plaintiff's genetic contribution to the makeup of the twins is one of the main arguments raised by defendants in contending that Baby M is not applicable to the instant matter.

This opinion will assume the reader's familiarity with Baby M as it is clearly "required reading" here. However, there are portions of the Baby M decision that must be highlighted.

Baby M held that the surrogacy contract involved was invalid as it was in direct conflict with existing statutes and in conflict with public policy as expressed in statutes and decisional law, Baby M, supra, 109 N.J. at 421, 422. Formal agreements to surrender are allowable only if they occur after birth and after counseling are offered, Baby M, supra, 109 N.J. at 422, referring to then existing statutory and administrative code provisions. If the original contract for surrogacy was invalid then any other agreements growing out of it and due to "coercion of contract" would also fail legitimacy, Baby M, supra, 109 N.J. at 422.

Surrogacy agreements, at least those involving the payment of money were clearly against public policy in that they conflicted with criminal laws prohibiting the use of money in connection with adoption, Baby M, supra, 109 N.J. at 423. These agreements (which did not involve surrender to DYFS or an approved agency) were also in conflict with laws requiring proof of parental unfitness before termination could be granted, Baby M, supra, 109 N.J. at 428. These agreements were also contrary to laws that make surrender of custody and consent adoption revocable in private placement adoptions, Baby M, supra, 109 N.J. at 433, 434.

Supporting the Court's dislike of surrogacy agreements was the fact that the fitness of the adoptive parents, the medical history of the birth mother, the feelings of the birth mother, the impact of separation on the child and the best interest of the child seemed not to have been included within them, Baby M, supra, 109 N.J. at 437, 441, 442.

The Court held that termination can only be by an approved agency or by DYFS. However, a private placement adoption (by statute) does not involve a surrender of parental rights. If there was no termination of parental rights there can be no adoption, Baby M, supra, 109 N.J. at 428. The only situations that allow for the dispensing of the need to prove abandonment or neglect involve surrenders to DYFS or an approved

agency, Baby M, supra, 109 N.J. at 428. A contract alone, even though entered voluntarily and with the intent of all parties, cannot terminate parental rights, Baby M, supra, 109 N.J. at 429. The Court found that the New Jersey Legislature would not have been so specific about termination of parental rights if one short sentence in a contract was sufficient to do it, ibid. Simply put, there cannot be an irrevocable consent to an adoption in a private adoption setting, Baby M, supra, 109 N.J. at 430. Contractual surrender of parental rights does not exist in the statutes, Baby M, supra, 109 N.J. at 433.

The Court noted that even the Parentage Act, N.J.S.A. 9:17-38 to 59, bars an agreement that one party promises not to seek paternity, Baby M, supra, 109 N.J. at 433. The Court was also concerned about the fact that surrogacy contracts are made before the mother knows the strength of her bond with the child, Baby M, supra, 109 N.J. at 437.

The genetic makeup of the infant as it relates to the birth mother was only mentioned once in Baby M. It was in connection with one of the unaddressed concerns regarding surrogacy contracts, that particular unaddressed concern being consideration of the birth mother's psychological and medical history, Baby M, supra, 109 N.J. at 437. If the Baby M Court felt that its holding was only limited to situations involving a genetically linked birth mother, such concerns were never stated within the opinion. Baby M also held that children should remain with and be brought up by both of their natural parents, Baby M, supra, 109 N.J. at 435.

It was pointed out in Baby M that the Parentage Act was silent as to acknowledging surrogacy agreements and that Court suggested that the silence of the Legislature suggested that the Legislature chose not to recognize surrogacy, Baby M, supra, 109 N.J. at 441 n. 10. If that interpretation of the Legislature's silence is correct, the additional twenty-one years of silence as to surrogacy agreements speaks even louder.

It also was the position of the Court that surrogacy as a whole is bad for women even if in any one particular case the surrogacy agreement is entirely satisfactorily to all parties involved, Baby M, supra, 109 N.J. at 442. Baby M did not find a constitutional right for a surrogate mother to the companionship of her child only because that issue was moot since the surrogacy contract was invalid and the parental rights were not properly terminated, Baby M, supra, 109 N.J. at 450, 451. The Parentage Act gave both the birth mother, because she gave birth to the child, the status of parent as well as the man who contributed the genetic link, Baby M, supra, 109 N.J. at 453. This is because "the natural mother, may be established by proof of her having given birth to the child," N.J.S.A. 9:17-41(a), and "the natural father may by established ... on a blood test or genetic test," N.J.S.A. 9:17-41(b).

Essentially the Supreme Court had no difficulty with surrogacy agreements so long as there was no payment and so long as the surrogate mother is given the right to change her mind, Baby M, supra, 109 N.J. 468, 469. While the Baby M decision did not distinguish between "gestational" carriers and "surrogate" mothers the Court was well aware of the preservation of sperm and eggs and of embryo implantation, Baby M, supra, 109 N.J. at 469.

In moving for summary judgment the defendants claim that because A.G.R. has no genetic link to the children that the instant matter is distinguishable from Baby M. This trial judge disagrees. The public policy considerations enumerated above from Baby M are far reaching and unrelated to a strict genetic connection. The lack of plaintiff's genetic link to the twins is, under the circumstances, a distinction without a difference significant enough to take the instant matter out of Baby M. This court recognizes the many cases cited by defendants from other jurisdictions holding that "gestational carriers" do not have parental rights or at least not when confronted by others claiming to have rights over the children born to the gestational carrier. An example of this would be a California Supreme Court case Johnson v. Calvert, 851 P. 2d 776 (1993). A review of that case is appropriate. In the California case the "intentions as manifested in the surrogacy agreement" were of great importance to the Court, Johnson, supra, 851 P. 2d at 782. In Baby M the voluntary nature of the parties (thus obviously implying their intent) was of no consequence, Baby M, supra, 109 N.J. at 440, 441. The majority in the California case felt that the best interests of the child was "repugnant" as a consideration since it involved unnecessary governmental interference, Johnson, supra, 851 P. 2d at 93 n. 10. The best interests of the child were repeatedly mentioned as a concern in Baby M. The surrogacy contract in California is not inconsistent with California public policy, Johnson, supra, 851 P. 2d at 783, while it clearly is inconsistent with public policy in New Jersey. The California case took the position that it is disrespectful toward women to not allow them to enter into agreements of this nature, Johnson, supra, 851 P. 2d at 785, whereas New Jersey law takes a clearly different position that agreements of this nature have a "potential for devastation" to women, Baby M, supra, 109 N.J. at 443.

The California court recognized that under their Parentage Act the gestational carrier was a mother since she gave birth, but that the "intended" mother was also a mother under the Act because her eggs were used and thus there was a genetic link. That court had to "break a tie" unlike the instant matter.

If the underlying principles in California were consistent with the principles in New Jersey then the reasoning in the California case upholding the gestational carrier agreement might have been tempting. However, New Jersey's law as expressed in Baby M and the California case had so many conflicting underpinnings that this judge sees no reason to follow the California law or that of other jurisdictions for the same reason.

"The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from it's mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness;" Baby M, supra, 109 N.J. at 441, 442. Would it really make any difference if the word "gestational" was substituted for the word "surrogacy" in the above quotation? I think not.

The parties' intent in voluntarily entering into the surrogacy agreement was of no significance under Baby M. This clearly suggests that arguments derived from intent such as detrimental reliance and estoppel would be of no significance either.

The plaintiff's motion for summary judgment is granted in as much as the court holds that plaintiff A.G.R. possesses parental rights under New Jersey law with respect to the twins L.H. and T.H. and that the gestational carrier agreement signed on February 28, 2006, is void and serves as no basis for termination of parental rights of the plaintiff and the consent to judgment of adoption is void and that the parental rights of plaintiff A.G.R. remain in effect and have not been terminated. The court also finds that defendant S.H. is the legal father of the twins L.H. and T.H., N.J.S.A. 9:17-41b.

Summary judgment is denied as to all other issues that were raised in the summary judgment motions. An Order accompanies this opinion.

FILED

DEC 23 2009

FRANCIS B. SCHULTZ, J.S.C.

A.G.R., Plaintiff, V D.R.H. & S. H., Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION- FAMILY PART
DOCKET # FD-09-1838-07

ORDER

The Court having considered cross motions for summary judgment and having considered the papers submitted, the arguments of counsel at oral argument on November 30, 2009, and for the reasons expressed in this court's opinion of December 23, 2009, it is on this 23rd day of December 2009, **ORDERED** that summary judgment is **GRANTED** as follows:

1) Plaintiff AGR possesses parental rights under New Jersey law with respect to the twins LH and TH;

2) The gestational carrier agreement signed on February 28, 2006, is void and serves as no basis for termination of parental rights of the plaintiff;

3) The "Consent to Judgment of Adoption" signed on October 15, 2006, is void; and

4) The parental rights of plaintiff AGR remain in effect and have not been terminated.

5) Defendant SH is entitled to the legal status of father of LH and TH.

IT IS FURTHER **ORDERED** that summary judgment is **DENIED** as to all other issues raised in the motion for summary judgment, and

IT IS FURTHER **ORDERED** that a copy of this order shall be served upon all parties within seven days of the date hereof.

Francis B. Schultz
FRANCIS B. SCHULTZ, J.S.C.