

# ASSISTED REPRODUCTION TECHNOLOGY AND SURROGACY

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## INTRODUCTION

### A. History

1. Baby M case: 1988.<sup>1</sup> This was the first (traditional) surrogacy case to come to the public's attention, as well as the attention of the United States Supreme Court. Custody was ultimately granted to the genetic father with visitation rights granted to the surrogate.
2. *In re: TR*, 1990<sup>2</sup> and *Seymour (IM) v. Stotski(S)*<sup>3</sup>, 1992, were the first Ohio cases to address the issue of surrogacy.
  - a. the parties did not have a written contract.
  - b. the parties used a sperm donor to inseminate the surrogate.
  - c. intended father (no genetic link) acknowledged paternity.
  - d. intended mother (no genetic link) brought a parentage action, which was dismissed for lack of standing, since intended mother was admittedly not the biological mother, nor was there a written agreement.
  - e. moral: have a written contract.
3. recently:
  - a. *JF vs. DB* (2006)<sup>4</sup>: surrogacy contracts are not against public policy and are therefore enforceable
  - b. *Nemcek v. Paskey* (2006)<sup>5</sup>: the probate court lacks subject matter jurisdiction to determine parentage actions.

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<sup>1</sup> In re **Baby M.** (1988), 109 N.J. 396, 537 A.2d 1227

<sup>2</sup> In re TR (1990) 52 Ohio St.3d 6. *Involved the Seymour v. Stotski parties. Addressed the need to protect surrogacy matters from media interest.*

<sup>3</sup> Seymour v. Stotski, (1992) 82 Ohio App.3d 87

<sup>4</sup> JF v. DB, (2006, Summit County) 165 Ohio App.3d 791, 848 N.E. 2d 873

<sup>5</sup> Nemcek v. Paskey (2006, Trumbull County) 137 Ohio Misc. 2d 1, 849 N.E. 2d 108

B. There is No Statutory Law in Ohio Concerning Surrogacy. See, 3111.89 Sections applicable to Non-Spousal Artificial Insemination: Sections 3111.88 to 3111.96 of the Revised Code Deal with Non-Spousal Artificial Insemination for the Purpose of Impregnating a Woman so That She can Bear a Child *That She Intends to Raise as Her Child*. These Sections Do Not Deal With the Artificial Insemination of a Wife With the Semen of Her Husband or *With Surrogate Motherhood*.<sup>6</sup>

C. Around the Country

1. permitted: six states allow individuals and couples to enter into surrogacy contracts: Arkansas, California, Illinois (gestational surrogacy only), Massachusetts, New Jersey (uncompensated surrogacy agreements only) and Washington (uncompensated surrogacy agreements only).
2. prohibited: the District of Columbia and 11 states prohibit surrogacy agreements in all or some instances. The District of Columbia and Florida prohibit surrogacy for all unmarried couples; Indiana and Louisiana prohibit traditional surrogacy; Michigan and Nebraska prohibit compensated surrogacy agreements; Nevada prohibits surrogacy for all unmarried couples; New York, North Dakota and Texas prohibit surrogacy for all unmarried couples; and Utah and Virginia prohibit surrogacy for all unmarried couples.
3. The remaining 34 states (including Ohio) have mixed or unclear laws and/or court case rulings on whether surrogacy agreements are allowed.<sup>7</sup>

## **TYPES OF SURROGACY AGREEMENTS**

A. Traditional

1. surrogate's egg and intended father's sperm
  - a. insemination by physician

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<sup>6</sup> See the case of *Turchyn v. Cornelius*, 1999 WL 689202. The ORC section relied upon in this decision (3111.37) was repealed, however, good analysis for paternal presumptions.

<sup>7</sup> <http://www.hrc.org/>

- b. home insemination
  - 2. surrogate's egg and donor sperm
- B. Gestational
  - 1. intended mother's egg and intended father's sperm
  - 2. egg donor egg and intended father's sperm
  - 3. egg donor egg and donor sperm

### **PARTIES TO A SURROGACY AGREEMENT**

- A. Surrogate
- B. Intended Father/Genetic Father
- C. Intended Mother/Genetic Mother
- D. Egg Donor (Anonymous or Known)
- E. Sperm Donor (Anonymous or Known)
- F. Domestic Partner
- G. Same Sex Domestic Partner

### **WHEN THE ATTORNEYS ARE NEEDED – AVOID GIVING MEDICAL ADVICE OR MATCHING**

- A. Draft Contract/Review Contract
  - 1. egg donor contract
  - 2. surrogacy/carrier agreement
- B. What to Look For/Put Into Your Contracts
  - 1. definitions: who are the parties to the contract
  - 2. purpose/intent: deliver a child for the benefit of IPs
  - 3. representations: everyone agrees to abide by the

contract

4. procedure: ivf or traditional
5. compliance:
  - a. psychological exams: who will be required and at whose expense
  - b. physical exams: what will be required and at whose expense
6. surrender of parental rights: contractual relinquishment by surrogate of parental rights
7. duties of carrier: proper care and nutrition; follow doctor's orders; communicate with IPs
8. expenses of carrier: paid by Ips; i.e. lost wages, child care, travel, doctor fees, pharmaceutical fees; housekeeping; insurance, uninsured medical expenses.
9. compensation: how much is surrogate being paid for *pain and suffering, discomfort, loss of consortium\*\**.
10. surrogate's fees: doctor's fees
11. additional expenses: maternity clothes; per cycle fee; invasive procedure compensation
12. legal fees: paid by IPs
13. assumption of the risk: surrogate knows risks of pregnancy
14. insurance
  - a. life: term policy taken by Ips to cover surrogate at Ips expense
  - b. health: surrogate to have insurance to cover procedures, labor, delivery; Ips to pay out of pocket, deductible, non-covered expenses and obtain COBRA if insurance is lost during pregnancy

- c. disability: term paid by lps for surrogate
15. naming the child: lps name child
  16. tax: consult accountant or tax preparer - be advised, in some states the IRS is deeming compensation under surrogacy contracts as taxable income
  17. custody: to lps at birth
  18. gender: lps accept child without regard to gender
  19. divorce: If lps divorce, which gets custody
  20. abortion/selective termination/death of a fetus: surrogate agrees to undergo procedure upon request of lps or doctor's orders - will be compensated for additional discomfort - death of a fetus surrogate still gets paid if after 32\* weeks – advise of constitutional issues
  21. medical testing: all agree to undergo and share results
  22. early termination of contract: under what conditions; of pregnancy - how is compensation paid
  23. breach: defines how the contract could be breached by all parties and what happens
  24. attorneys fees/costs: lps usually pay all attorney fees, even for surrogate
  25. independent legal counsel: surrogate needs attorney to review contract at lps expense
  26. miscellaneous
    - a. written changes must be in writing
    - b. consent: all parties consent to the terms of the contract
    - c. privacy: parties will not discuss the contract

d. severability: the contract can be enforceable in whole or in part

e. warranties: no one is guaranteeing anything

f. voluntary: the parties are all of sound mind and enter this agreement free of duress or financial hardship

g. governing law/jurisdiction/venue: Ohio

h. integrated contract: this is the whole contract - there are no miscellaneous parts

C. At the Confirmation of Pregnancy

1. determine the county of birth vs. county of residence for all parties

a. look for counties with prior experience

b. provide draft documents to the judge

c. know what the court wants before you file

2. determine the hospital of delivery

a. look for prior experience

b. contact their legal department

c. contact their records department

d. let them know you're coming

D. Determine the Appropriate Process

1. action for declaratory judgment

2. motion to bypass adoption

3. complaint for parentage

E. Get Your Documents in Order

1. complaint
  2. affidavits
    - a. surrogate
    - b. surrogate's husband
    - c. intended parents
    - d. doctors/nurses/embryologists/agency
    - e. egg donor if known
    - f. sperm donor of known
  3. waivers
  4. answers
  5. judgment entry
- F. Be Aware of Delivery Date
1. file six weeks prior to delivery
  2. obtain certified copies of judgment entry when possible and provide copies to all parties and the hospital

### **POST JUDGMENT**

- A. Social Security Card
- B. Birth Certificate
- C. Adoption
- D. Motion To Correct Birth Record

### **MISCELLANEOUS ISSUES**

- A. Compensation Taxed as Income
- B. What if the Surrogate Keeps the Baby



## BREACH OF CONTRACT –WHAT TO DO

### A. Few Ohio Cases

1. *Seymour v. Stotski* (1992) 82 Ohio App.3d 87 (Franklin County)
2. *Belsito v. Clark* (1994) 67 Ohio Misc.2d 54, 644 N.E.2d 760 (Summit County)
  - a. Declaratory Action filed in Probate Court
  - b. to determine the natural parents of child born to a surrogate
  - c. at that time, Probate Court had jurisdiction to acknowledge paternity under O.R.C. 2105.18
  - d. in January 1998, O.R.C. 2105.18 was repealed.
  - e. this was the first Ohio Appellate Court to adopt the two prong test in determining the law of gestational surrogacy
    - i. determine the genetic parents
    - ii. determine whether the genetic parents have waived or relinquished their parental rights.<sup>8</sup>
3. *Decker v. Decker* (2001) 2001 WL 1167475 (Hancock County)
  - a. one party to a same sex male couple seeks his sister to gestate child using donor sperm
  - b. brother and partner are HIV positive

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<sup>8</sup> “the individuals who provide the genes of that child are the natural parents,” and “[i]f the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents.” *Belsito*

- c. agreed the surrogate would always be known as the mother
  - d. no written agreement
  - e. upon birth, surrogate decides to keep the child with visitation rights to couple
  - f. Sister vs. brother for custody
    - i. trial court decided the male partner was "dad" and found that surrogate intended to surrender the child, court ordered shared parenting
    - ii. child was given last name of male partner
    - iii. appellate court ruled that the boyfriend was not the legal father.<sup>9</sup>
    - iv. appellate court further ruled that mother can designate surname of child when not married, and court could not award shared parenting when non-parent is seeking it.
4. *Rice v. Flynn* (2005) 2005 WL 2140576 (Summit County)
- a. plaintiff is egg donor v. defendant intended father and defendant surrogate
  - b. court issues order establishing parent-child relationship between egg donor and children born to surrogate, but lacks jurisdiction to granting parenting rights and to disestablish parent-child relationship between surrogate and children.
  - c. court upheld the application of the two-prong *Belsito* test and ordered the trial court to complete the second prong on remand, thus implicitly adopting the *Belsito* test as the prevailing law on gestational

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<sup>9</sup> Legal parentage, not to be confused with biological parentage, must be established before the issue of custody can properly be decided. *In re Adoption of Reams* (1989) 52 Ohio App.3d 52.

surrogacy, becoming the first appellate court in Ohio to do so.

d. very thorough review of full faith and credit analysis in custody cases.

5. *JF v. DB* (2006) 165 Ohio App.3d 791, 848 N.E. 2d 873 (Summit County)

a. biological dad vs. surrogate and surrogates' husband for money damages for breach of contract and return of child support

b. at the time of contract formation (as well as at the time the surrogate breached the contract), neither the surrogate or her husband had established parental rights under Ohio law. Therefore, there was no public policy issue in foregoing parental rights.<sup>10</sup>

c. genetic parents prevail

d. plaintiff is awarded attorney fees because of contractual term

e. Judge Slaby concurs but writes a separate opinion stressing the need for Ohio legislators to address the rapid technological advances of surrogacy.

f. court rules that a surrogacy contract does not violate public policy and is therefore enforceable.<sup>11</sup>

g. the indemnification clause in the surrogacy contract did not violate public policy

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<sup>10</sup> The Bimbers were not the children's parents, so the Bimbers had no parental rights to contract away. At the time the parties entered into the **surrogacy** contract, the Bimbers' legal status was as a disinterested third party, akin to a caretaker. The fact that they later obtained custody in a Pennsylvania court does not retroactively grant the Bimbers the status of parents at the time they signed or breached the contract. *JF V. DB*

<sup>11</sup> We first note that the concept of *surrogacy*, in general, has not been deemed to offend Ohio's public policy. It is the role of the legislature to define public policy. The Ohio legislature has not acted to limit or prohibit surrogacy. See R.C. 3111.89 (acknowledging "surrogate motherhood" without regulating it) *JF v. DB, id.*

6. *Nemcek v. Paskey* (2006) 137 Ohio Misc.2d 1, 849 N.E.2d 108 (Trumbull County)

- a. filed as a declaratory action
- b. court finds the probate court lacks subject matter jurisdiction to determine parentage actions.

7. ***J.F. v. D.B.* (2007) 116 Ohio St.3d 363 (Summit)**

- a. **First and only Supreme Court case addressing surrogacy**
- b. **no public policy of Ohio is violated when a gestational-surrogacy contract is entered into, even when one of the provisions prohibits the gestational surrogate from asserting parental rights regarding children she bears that are of another woman's artificially inseminated egg**

- B. No Statutory Assistance for Surrogacy
- C. Bottom Line: Rely on Genetics
- D. File in the Right Court.