CALIFORNIA SURROGACY -- A GAY PRIMER

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An increasing number of gay men are turning to surrogacy as a way of becoming parents. Gay men creating families in this way stand at the crossroads of *two* rapidly evolving areas of law: the law of assisted reproduction, and the law of gay family recognition. California courts remain somewhat ambivalent about surrogacy, and our Legislature has mostly dodged the issue. Although some lawyers will tell you that intent to conceive in and of itself is enough to create a parent-child relationship, I continue to have concerns about the legal validity of this position – particularly where gay families, with our own vulnerabilities, are involved – and recent appellate court decisions have reinforced my concerns. With my history as an adoption attorney, and knowing that adoptions are honored all over the country and all over the world, I have historically preferred the adoption route to the "intended parentage" route, because it has felt safer. But recent experience has made me question that preference, because it leaves the non-biologically-related parent at risk for a longer period of time. Assuming that your goal is to provide the strongest legal protections possible for your family, I believe it is important to take a close look at California law as it affects surrogacy before deciding what court procedures to use to establish your parent-child relationship(s).

A BRIEF OVERVIEW OF CALIFORNIA SURROGACY LAW:

(1) It is an established principle of family law that you cannot either create or negate parentage via contract. The reason for this is that contracts are, by definition, between adults; and the right to have parents lies with the children. So adults cannot contract away a child's right to a parental relationship; nor can adults create such a relationship by contract alone. This is a fundamental concept of family law that California has refused to abandon in the surrogacy context, and arguably renders all surrogacy contracts unenforceable.

(2) There are three key appellate decisions in California that define our state's position on surrogacy: *Johnson v. Calvert; In re Marriage of Buzzanca; and In re Marriage of Moschetta.* All address surrogacy law in the context of heterosexual, married couples. After the California Supreme Court's recent rulings on three lesbian custody cases, it is safe to assume that the court would apply these decisions to same-sex registered domestic partners and to same-sex married couples, if not to any committed gay couple, but the applicability of surrogacy law to same-sex couples has never been explicitly addressed by any California appellate court. To briefly summarize the three cases:

a. ***Johnson v. Calvert*** (1993) 5 Cal.4th 84: Mark and Crispina Calvert wanted to have a child. Crispina had viable eggs, but could not carry a baby to term. Her eggs were surgically retrieved and then fertilized *in vitro* with Mark's sperm, and the resulting embryo was implanted in the womb of Anna Johnson. After a number of disagreements between the parties, Anna decided she wanted to keep the baby, and the case went to the California Supreme Court. HELD: Both Anna and Crispina are "natural" mothers, Anna being the gestational mother and Crispina being the genetic mother. When two women have equally valid claims to maternity, the "tie-breaker" is intent at the time of conception. Since Crispina intended to be a mother at conception and Anna did not, the Court honored these intents and found that Crispina was the baby's legal mother. [NOTE that the issue of intent only came into play as a "tie-breaker" where each mother already

the child.]

b. ***In re Marriage of Moschetta*** (1994) 25 Cal.App.4th 1218: Robert and Cynthia Moschetta wanted to have a child. Cynthia was sterile. Elvira Jordan agreed to be inseminated with Robert's sperm, and to carry the baby to term for them. Pursuant to the agreement, Elvira was to allow Robert sole custody, and was to consent to adoption of the child by Cynthia. However, when the Moschettas broke up during her pregnancy, Elvira decided to keep the baby, although when the couple reconciled she relented and allowed the baby to go home with them. Seven months later, the Moschettas broke up for good. Cynthia petitioned the court, arguing that Cynthia -- not Elvira -- was the baby's legal mother, based on the terms of the surrogacy contract and the fact that the baby had lived with Cynthia for most of its short life. HELD: *Johnson v. Calvert* did not apply, since Elvira was both the genetic and the gestational mother and Cynthia had no biological connection to the child. Established public policy requires that women giving up their babies for adoption have a time after the baby is born within which they can change their minds, and Elvira was entitled to this same protection. Legally, Elvira was the mother and Robert was the father, and the case was remanded for a determination on visitation and custody based on the best interests of the child. Ultimately, the child was placed with Robert, who subsequently moved out of state, and contact with both potential mothers gradually ceased. [This is a Court of Appeal decision. The Supreme Court did not review it.]

c. ***In re Marriage of Buzzanca*** (1998) 61 Cal.App.4th 1410: John and Luanne Buzzanca wanted to have a child. Both were infertile. They had the eggs of an anonymous egg donor fertilized with the sperm of an anonymous sperm donor, and the resulting embryos were implanted in the womb of a paid surrogate. When the Buzzancas filed for dissolution of their marriage during the pregnancy, Luanne indicated that the baby (not yet born) was a child of the marriage; John indicated that there were no children of the marriage, maintaining that he should not be held legally responsible for a child that was not genetically his and was not

genetically his wife's and was not even being gestated by his wife. The trial court agreed with John, finding that the baby had *no legal parents*. However the Court of Appeal found differently. HELD: The Court of Appeal found that when a married couple -- unable to procreate on their own -- causes the conception of a child by use of medical technology, with the intent to parent the child, they will be held to the status of legal parents regardless of genetics. The Court of Appeal explicitly declined to rule on whether the same rules would apply outside the context of marriage.

THE IMPACT OF THE RECENT SUPREME COURT RULINGS:

The 2005 California Supreme Court rulings in *Elisa B. v. Superior Court, Kristine H. v. Lisa R.* and *K.M. v. E.G.* were a huge victory for lesbian and gay parents and our children, in that the Court clearly ruled that (1) a child can have two "natural" parents of the same sex; and (2) a person who intentionally causes the conception of a child and then sticks around to raise the child will, at some point, be recognized as a legal parent. However, in its rulings on two of the cases involving applicability of the Uniform Parentage Act to same-sex couples intentionally conceiving children together, the Court had the opportunity to embrace the "intentional conception = parentage" approach of *Buzzanca* and declined to do so. In fact, *Buzzanca*, upon which advocates of establishing legal parentage based on intent rely heavily, was only mentioned once in the Supreme Court rulings. More troubling for surrogacy attorneys are (1) the fact that the Supreme Court cited *Moschetta* with approval for the principle that where there is no tie between two women claiming maternity, intent is not a relevant issue (see *K.M. v. E.G.*); and (2) the Court's refusal to rule on the validity of a pre-birth judgment of parentage in *Kristine H. v. Lisa R.*, instead only finding that the parties to the parentage action cannot themselves challenge the judgment after changing their minds years later.

SO WHAT ARE THE RULES??

Advocates (including myself) had hoped that once the Supreme Court ruled on the trio of lesbian custody cases in 2005, we would finally know what the rules are for same-sex couples using assisted reproduction to become parents. Unfortunately, that is not the case. The cases left intact the legal principle that *either* gestation or genetics can be used to establish legal motherhood, so any woman carrying a child has a claim to legal maternity. We also know that a "traditional surrogate" is really a mother under California law, with a right to joint custody of the child if she chooses to assert that right (*Moschetta*). What we don't know is if a "gestational surrogate" has the same right to assert maternity, based on her gestational connection with the child; nor do we know whether the *Buzzanca* intent test would come into play at all with a gay male couple, given that there is no "tie" to break between possible *mothers*. (In *K.M.* -- which involved a lesbian couple who had participated in an egg-sharing procedure whereby one woman provided the eggs, which were fertilized *in vitro* with donor sperm and then implanted into the womb of the other woman -- the Supreme Court found that: "K.M. does not claim to be the twins' mother *instead* of E.G., but *in addition to* E.G., so we need not consider their intent in deciding between them.… [*Johnson* intent test does not apply when '[t]here is no "tie" to break.']") Finally, we know that pre-birth judgments of parenthood -- once the statute of limitations has run for challenging them -- will be valid as to both parties to the judgment (i.e. the couple petitioning to be recognized as parents); but the California Supreme Court has explicitly declined to

their ruling precludes third parties from challenging the validity of the judgments.

To further complicate things, the parentage of a newborn is determined in the state in which the baby is born, so all of the above analysis only applies to babies born in California. For gay men using surrogates who reside in other states, the ability to create a parent-child relationship from birth will depend on the law of the state in which the surrogate gives birth. I regularly encounter gay couples who have contracted with surrogates in states that do not support gay families – such as Texas, Ohio, and Alaska – believing that they could obtain pre-birth judgments rendering them both parents, only to discover that the states where their babies are born will not acknowledge two men as parents of the same child. This problem does not necessarily go away even once the child is back in California, since birth certificates are issued by the state of birth. This means that a California gay male couple who, for example, has a baby in Texas via gestational surrogacy, will *never* get a birth certificate with both fathers' names on it, even once they have a final judgment establishing them both as fathers under California law, because Texas simply will not issue such a birth certificate.

MY RECOMMENDATIONS:

Up until recently, my strong recommendation to gay male couples having children together through surrogacy was to get a pre-birth judgment establishing the paternity of the biological father (and rebutting the legal presumption that the surrogate's husband is the father), and then to do a 2nd parent/domestic partner adoption after the baby is born to establish the paternity of the non-biological father. This approach uses clearly established legal procedures, and does not require any creative license from the courts. However, recent events in my law practice have caused me to reconsider this recommendation.

After almost 15 years advocating for lesbian and gay families with children, I am deeply saddened to report that I am currently in litigation on my first dad vs. dad gay parentage dispute. In this case, the biological father of twins is arguing – on the eve of the twins' 3rd birthday – that he is the children's only legal parent and that his partner – who was present for the twins' birth and stayed home to raise them for the first 18 months of their lives – is not a father. This litigation has forced me to revise my thinking.

I now recommend that gay male couples having children together through surrogacy – and whose babies are being born in jurisdictions that allow them the opportunity to establish both men as fathers before birth – take advantage of the pre-birth parentage procedure to make sure both men are acknowledged as legal parents from the get-go.

That said, I still worry about both the durability and the portability of judgments of parentage that are based on intent alone, especially for unmarried and unregistered gay partners. The world still is not particularly accepting of gay men parenting young children, and all gay parents still need to be proactive about protecting our families. So, for gay couples that have the financial ability to do so, I continue to recommend that the non-biological father complete an adoption once his baby is born, to assure that he will be recognized as a father in every state and country in the world, and under all possible circumstances. This means that the non-biological father – having already been adjudged a legal parent – will be adopting his own child, but California law allows for a man to adopt his own child under certain circumstances, and I am confident that this is one of them. This option, while it may appear somewhat daunting at first glance, is often made affordable by the federal adoption tax credit, and will allow both parents true equal status forevermore.

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