

SURROGACY AND A PREGNANT WOMAN'S CONSTITUTIONAL RIGHT TO MEDICAL AND PROCREATIVE CHOICE – A BRIEF SURVEY

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In analyzing the constitutional rights of surrogates, it seems prudent to assume that a surrogate – whether a traditional surrogate or a gestational carrier¹ – retains all the constitutional rights of any other pregnant woman up until the moment of birth. Whether this assumption is, in fact, true, may depend on a variety of factors including the laws of the state where the pregnancy occurs and the legal status of the fetus/child (e.g. whether a pre-birth judgment of parentage has been obtained, whereby the “Intended Parents” have been adjudicated the legal parents).²

In this article, we will briefly analyze (1) the nature (and limits) of the federal constitutional right of a pregnant woman, present in the United States, to control the pregnancy, including aborting the pregnancy if that is her choice; and (2) whether the constitutional right to control and/or abort a pregnancy is waivable, and if so how. Our interest is in illuminating ways that surrogacy practitioners can protect their clients’ rights and interests – be they representing the surrogate or the Intended Parents – by knowledgeable advisements to all parties, and by thoughtful drafting of written surrogacy agreements.³

THE RIGHT TO CONTROL AND/OR ABORT A PREGNANCY

To analyze the right to control – and/or to abort – a pregnancy, one must examine two separate lines of cases: the line of cases addressing a patient’s right to control her own medical care, and the line of cases addressing the constitutional right to abortion.

THE ABORTION RIGHT

While it is generally assumed that a surrogate’s right to abort a pregnancy (or not to abort a pregnancy) falls under the general constitutional right of pregnant women to procreative choice, there

¹ For purposes of this article, a “traditional surrogate” will be defined as a woman who has been impregnated pursuant to a surrogacy agreement, by non-sexual means, using the sperm of the intended father or a sperm donor but her own eggs, so that she is the genetic mother of the child. A “gestational carrier” will be defined as a woman who has been impregnated pursuant to a surrogacy agreement, by *in vitro* fertilization (IVF), with embryos created using sperm and eggs from someone other than herself, so that she had no genetic connection to the child. The term “surrogate” will be used to encompass both types of surrogacy.

² While many states allow pre-birth determinations of parentage in surrogacy cases, others do not. Still others – like California – will allow full adjudication of parentage prior to birth of the child, but stay all orders until the moment of birth. (See California Family Code § 7633: “An action under this chapter may be brought, [and] an order or judgment may be entered before the birth of the child, and enforcement of that order or judgment shall be stayed until the birth of the child.”) The California legislature’s refusal to allow pre-birth parentage judgments to go into effect prior to the moment of birth was specifically meant to avoid the legal and constitutional complexities caused by a situation where a woman is pregnant with a child that is not legally her own.

³ It is worth noting that many states are silent on whether surrogacy contracts are enforceable, void or voidable. See Darra L. Hofman, “Mama’s Baby, Daddy’s Maybe: A State-by-State Survey Of Surrogacy Laws and their Disparate Gender Impact,” 35 Wm. Mitchell L. Rev. 449 (2009). For purposes of this article, we will be assuming that the questions about constitutionality are being raised in states where surrogacy is legal, and surrogacy agreements are enforceable at least to some limited extent.

actually is no law that directly addresses the subject. Can Intended Parents prevent a surrogate from aborting a healthy fetus? Can they force a surrogate to abort an unhealthy fetus? Can they get financial damages if the surrogate refuses to follow their directives in this regard? Who *really* gets to decide, as a matter of law, whether to continue with a triplet or quadruplet pregnancy or whether to reduce to a singleton or twins? As ART practitioners, we speculate about the answers to these questions, and do our best to address the issues when we draft surrogacy agreements, but few of us have actually committed ourselves to researching the law in this area to try to determine what the “right” answers are – if “right” answers actually exist.

Any analysis of the United States constitutional right to abortion necessarily starts with *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the United States Supreme Court held that prior to fetal viability, a woman has a right – together with her physician – to decide to abort a pregnancy, and that the State cannot interfere in that right. However, the Court also affirmed that the State has a compelling interest in protecting human life, which must be balanced against the woman’s liberty right, and that “the ‘compelling’ point is at viability. ... If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.” (*Id.* at 163-164.)

The boundaries of a woman’s constitutional right to abort a pregnancy have been modified (and some would say undermined) in a number of ways since *Roe*, but the fundamental right remains intact. However, while the fundamental right remains for a woman to make the decision whether or not to abort a pregnancy, the right is far from absolute.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court held that even prior to viability, a state may enact regulations that express its concern for fetal life, and that encourage women to seek other options than abortion, as long as the regulations do not pose a “substantial obstacle” to a woman’s free exercise of her right to choose. However, the Court drew a line at requiring a husband’s consent before his wife can obtain an abortion. The Court’s language in this regard is illuminating, in the surrogacy context. As stated in the opinion of the 5-4 plurality:

It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s. The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. The Court has held that ‘when the wife and the husband disagree on this

decision [whether to abort a pregnancy], the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy ... the balance weighs in her favor.' (*Casey, supra*, 505 U.S. at 896.)

The Court went on to note that "[t]he husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. ... A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. ... A State may not give a man the kind of dominion over his wife that parents exercise over their children."⁴ (*Id.* at 898.)

It appears that, if a husband's consent is not required before a wife may abort their child, the consent of the "Intended Parents" cannot constitutionally be required either.⁵ Whether a couple who has contracted with a woman to bear a child for them – and has paid her for her gestational services – can sue for monetary damages if she terminates the pregnancy without their consent and in violation of the contract is a separate question. If monetary damages can be proven, and if the surrogate has sufficient assets to make collection of monetary damages a realistic possibility, then a civil suit for breach of contract may be well-advised. But a couple (or single) engaging in the surrogacy process should not expect a United States court to specifically enforce a contractual provision either compelling a surrogate to abort a fetus against her will, or preventing her from obtaining an abortion that she has decided is in her own best interest.⁶

THE RIGHT TO MEDICAL SELF-DETERMINATION

Separate from the right to abort or selectively reduce a pregnancy, pregnant women make a variety of medical choices that can impact the well-being of the fetuses they are carrying. Examples include whether – or how strictly – to follow doctors' bed rest orders; whether to take medications designed to prevent preterm labor; and whether to undergo a Caesarean Section or attempt a vaginal delivery.

⁴ It is worth noting that, in its opinion, the Court discussed with disapproval the concept that a husband could require that his wife notify him "before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking." (*Casey, supra*, 505 U.S. at 898.) Surrogacy practitioners would do well to review this decision and think more generally about the constitutionality of conduct restrictions routinely written into surrogacy agreements.

⁵ A contrary position could be argued, based on courts' frequent focus – in approving a woman's right to terminate an unwanted pregnancy – on the burden bearing children imposes on women beyond the moment of birth. For example, in his partial concurrence in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 94 (1976), Justice White wrote: "In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe v. Wade* mentioned only the post-birth burdens of rearing a child, and rejected a rule based on her interest in controlling her own body during pregnancy." To the extent this is the basis for the constitutional protection, an argument clearly can be made that the weight of state concern should rest with the Intended Parents – who will bear the full burden of raising any child born through the surrogacy process – and not the surrogate.

⁶ To the extent that a court could be called upon to enforce provisions of a surrogacy contract addressing abortion and selective reduction terms, the authors do not believe that a request to prevent an abortion would necessarily be treated the same as a request to compel an abortion. Given the State's interest in preserving and protecting human life, it seems conceivable that a state court would issue an injunction to prevent a paid, contractual surrogate from terminating the life of a healthy fetus based on a request by the genetic and intended parents. It seems inconceivable that a court would force an unwilling woman to undergo an abortion or selective reduction under any circumstances.

Surrogacy agreements often purport to limit the rights of surrogates to make these types of choices, instead giving decision-making power to the Intended Parents unless the surrogate's life or health is in danger. While these contractual provisions may be advisable, in order to align the expectations of the parties, they may be no more enforceable than the abortion and selective reduction provisions discussed above.

A person has a constitutionally protected right to refuse unwanted medical treatment or procedures. (*Cruzan v. Director, Mo. Health Dept.*, 497 U.S. 261 (1990). See also, *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614.) "This constitutionally secured right derives from a liberty interest found in the Fourteenth Amendment to the United States Constitution ... and, in California, from the right of privacy in article I, section 1 of the California Constitution. ... The right of patient autonomy has been described as 'the ultimate exercise of one's right to privacy.' ... This right to medical self-determination also derives from the legal doctrine of informed consent to medical treatment. ... A logical corollary of the doctrine is that a patient possesses the right not to consent and to refuse treatment." (*Donaldson v. Lungren, supra*, 2 Cal.App.4th at 1619-1620, internal citations omitted.)

This right to "medical self-determination" has been upheld in the case of pregnant women, even when the woman's choice clearly puts the fetus at grave risk. "[T]he State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus." (*In re Fetus Brown* (1997) 294 Ill.App.3d 159, 171.) See also *In re A.C.* (D.C. Court of Appeals 1990) 573 A.2d 1235; *Taft v. Taft* (1983) 388 Mass. 331.⁷ However, states are not unanimous on this point. See, e.g., *Jeffers v. Griffin Spalding County Hospital Authority* (1981) 247 Ga. 86 [where a court intervened at a hospital's request to authorize a Caesarean delivery and blood transfusion, where the mother's refusal – in the 39th week of pregnancy, and based on religious grounds – was almost guaranteed to cause fetal death]; *Crouse Irving Memorial Hospital, Inc. v. Paddock* (1985) 485 N.Y.S.2d 443 [ordering blood transfusions as necessary, over religious objections, to save the mother and a fetus that was to be prematurely delivered].

Where state courts have ordered competent pregnant women to undergo invasive medical procedures against their will, the decisions have almost invariably involved situations where the refusal of

⁷ The fact that – in surrogacy matters – any potential dispute would be between private individuals (the surrogate and the Intended Parents) and not between the pregnant woman and a hospital or state institution is unlikely to be relevant. In *Taft v. Taft, supra*, 388 Mass. 331, a husband went to court to try to obtain an order that his wife have her cervix stitched to prevent a miscarriage, based on a diagnosis that the wife had an incompetent cervix. Despite the husband's clear and cognizable interest in having his wife sustain the pregnancy (they had lost their previous pregnancy to miscarriage at 7 months), and despite the fact that the wife also professed to want the child she was carrying, the court found that it would be an unwarranted violation of her constitutional right to privacy to order the surgical procedure without her consent.

treatment was clearly and undeniably placing a viable fetus at severe risk. Given unanimous recognition that pregnant women retain a constitutional right to personal privacy and medical self-determination, it is highly unlikely that any court would intervene absent a truly critical situation. However, given that states have reached varying decisions on the rights of others (a husband, a hospital, presumably Intended Parents) to override a mentally competent pregnant woman's choices regarding her own medical care where the recommended treatment would not endanger the woman and would almost certainly save an otherwise-doomed fetus, attorneys representing Intended Parents would be well-advised to familiarize themselves with the laws on medical decision-making rights in the jurisdiction(s) where they practice. In this way, we can at least give accurate information to our surrogate and Intended Parent clients about the legal framework in which the surrogate pregnancy will occur.

CAN A SURROGATE WAIVE HER CONSTITUTIONAL RIGHT TO MEDICAL SELF-DETERMINATION?

Assuming, for purposes of this article, that a surrogate has the same rights to medical self-determination as any other pregnant woman – up to and including the right to terminate the pregnancy if she so chooses – the question remains whether she can waive those rights as part of a written surrogacy agreement.

Generally speaking, even fundamental constitutional rights can be waived. However, “[a] waiver of a fundamental constitutional right must be made knowingly, intelligently, and voluntarily, and with sufficient awareness of the relevant circumstances and likely consequences. A valid waiver connotes an intentional relinquishment or abandonment of a known right or privilege.” (16 C.J.S. Constitutional Law § 141.)

The waiver of a constitutional right is generally deemed to be knowing and intelligent if it can be clearly established that the person waiving the right had at least a basic understanding of the nature of the right being waived, and specifically agreed to relinquishment or abandonment of the right. Further, “[t]o be voluntary, a waiver of a constitutional right must not be the result of intimidation, coercion, or deception. A waiver is not voluntary when it is made under compulsion, judicial or otherwise, as by the imposition of a penalty on the exercise of the right.... Whether a constitutional right, privilege, or immunity has been validly waived depends on the totality of the circumstances and the facts of each case, including the background, experience, and conduct of the person allegedly making the waiver.” (*Ibid.*)

With this basic understanding of the law of constitutional waiver, and absent any case law specifically addressing the issue in the context of surrogacy, the authors make the following practical

suggestions: (1) To maximize the chances that a surrogate's waiver of her right to make choices about abortion or selective-reduction would be found both voluntary and intelligent by a court, the contract terms should be drafted with the greatest specificity possible. We would suppose that a surrogate's purported waiver of her right to make the choice whether or not to abort a pregnancy, without consent of the Intended Parents, is more likely to be upheld by a court if the waiver is stated explicitly as a waiver of a known, acknowledged constitutional right, and if it is kept within as narrow parameters as possible, e.g. where it is agreed in advance that the Intended Parents retain the right to compel termination of a pregnancy only if a physician determines that the fetus has congenital abnormalities that would be likely to cause severe and permanent disabilities or death.⁸ (2) The surrogate should be represented by an experienced and independent attorney, who is fairly compensated for the time taken to fully review the surrogacy agreement with the surrogate, and to assure that she fully understands its terms.⁹

CONCLUSION

Despite the unique aspects of gestational surrogacy – where the carrier is not genetically related to the child she is carrying – at the end of the day a surrogate is still a pregnant woman, and is almost certain to have the same constitutional rights as any other pregnant woman. For surrogacy practitioners to set appropriate expectations among the parties, it is important that we ourselves be as clear as possible about what these constitutional rights are, and about what is and is not legally possible.

Surrogacy agreements should spell out the hopes and expectations of both surrogate and Intended Parents with regard to medical matters, if for no other reason than to align expectations of the parties. It is critical that a surrogate who does not believe in abortion unless her life is in danger not be matched with Intended Parents who are not willing to have more than one child; it is equally important that Intended Parents who are clear that they will not selectively reduce absent serious fetal anomalies not be matched with a carrier unwilling to carry more than twins. The fact that agreements regarding abortion and selective reduction – as well as other intrusive medical procedures – are unlikely to be enforceable in a court of law makes them *more* important, not *less* important, because there will be nowhere to turn if a misunderstanding occurs.

⁸ We must reiterate here that we believe it extremely unlikely that a court would order an unwilling woman to undergo an abortion under any circumstances. Even with an effective waiver of the constitutional right to choose whether or not to continue the pregnancy, as a matter of contract law this aspect of a surrogacy agreement does not lend itself to "specific performance"; that is, while an action for damages might arise from a breach, a court is not going to actually order the surrogate to undergo unwanted surgery to comply with the contract terms.

⁹ The American Academy of Assisted Reproductive Technology Attorneys (AAARTA) requires all attorney members to agree to minimum ethics standards which include a commitment that surrogates will be represented by independent counsel, at least through the signing of the surrogacy contract, *and* that surrogate's attorney will be fairly compensated for the actual time spent representing the surrogate, rather than on a limited flat fee basis.

Attorneys working in the assisted reproduction arena must not shrink from our responsibility to educate ourselves on the legal parameters of the work we are doing, even when we are trying to give our clients guidance on legal questions that have not yet been decisively answered through legislation or litigation. If we do not take the time to try to figure out the constitutional ramifications of the choices our clients are making, as best as possible given limited guidance from the legislatures and the courts, we have fallen shy of our duties as lawyers.



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