

CALIFORNIA SURROGACY -- A GAY PRIMER

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An increasing number of gay men are turning to surrogacy as a way of bringing children into their lives. The legalities of creating a parent-child relationship in this manner are somewhat complicated, given the ambivalence of California toward surrogacy contracts. Although some lawyers will tell you that intent to parent in and of itself can create a parent-child relationship, I have grave doubts about the current legal validity of this position, and recent appellate court decisions have reinforced my concern. Assuming that your goal is to provide the strongest legal protections possible for your family, I believe it is important to take a closer look at California law as it effects surrogacies before deciding how to proceed.

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 registered domestic partners, 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 removed 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 had a biologically-based claim to maternity. The California Supreme Court has never addressed the issue of whether intent alone is enough to establish parental rights absent a biologically-based connection with 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 Moschetta's 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 recent 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 decided in August, we would finally know what the rules are for same-sex couples using assisted reproductive technologies to procreate. 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 rule on whether these judgments are actually valid and has, in a footnote to *Kristine H.*, said that nothing in their ruling precludes third parties from challenging the validity of the judgments.

Given this uncertainty, here is my strong recommendation: for gay male couples using surrogacy to procreate, get a pre-birth judgment of paternity on behalf of the genetic father. (Where a gay couple has mixed their sperm, so it is unclear who the genetic father is, blood tests can be done to determine paternity or, if the couple is committed to keeping the genetic father unknown, both men ultimately may have to adopt the child.) If your surrogate is married, use the paternity action as a way to terminate her husband's parental rights. Then, after the baby is born, do a domestic partner adoption on behalf of the non-biological father and file a petition to terminate the surrogate's rights as part of the adoption proceeding. Although this is a more cumbersome way to achieve full legal parentage in both partners than recommended by some surrogacy agencies, it is by far the safest method because it clearly follows the rules as set out by the California Family Code and the courts. In my opinion, this is the *only* way to provide both fathers and the child with the security of knowing that their legal parent-child relationships do not rest on a theory of parentage that has yet to be adopted or approved by either the California Supreme Court or the Legislature.

Although I believe that the above method is the safest, I am aware that many gay couples want (or even need) to have something in place protecting both of them before their baby is born. For gay parents who require a pre-birth judgment of parenthood for health insurance reasons – or for whom having something making you both legal parents at the time of your child's birth seems essential – the alternative to the procedure described above is to seek a pre-birth order that both of you are parents, based on *Buzzanca's* "intentional procreation" theory and – if you are registered domestic partners – based on the legal principle that children born to domestic partners should be considered children of both members of the partnership. However, judges and lawyers in Northern California join in a strong recommendation that gay couples follow their pre-birth parentage action with a post-birth domestic partner or second parent adoption, to provide increased protection to the couple and the child.

Deborah Wald is a family law attorney in San Francisco, CA, with over 10 years experience representing LGBT parents and their children. To find out more about her practice, visit www.waldlaw.net.