Case No. 16-55968

United States Court of Appeals
for the
Ninth Circuit

MELISSA KAY COOK, INDIVIDUALLY and MELISSA KAY COOK, AS GUARDIAN *AD LITEM* of BABY A, BABY B and BABY C

Appellants

v.

CYNTHIA ANN HARDING, M.P.H.; JEFFREY D. GUNZENHAUSER, M.D., M.P.H.; DEAN C. LOGAN; EDMUND G. BROWN, JR., GOVERNOR of the STATE of CALIFORNIA; KAREN SMITH, M.D., M.P.H., ALL IN THEIR OFFICIAL STATE CAPACITIES; C.M., an ADULT MALE BELIEVED to be the GENETIC FATHER of BABIES A, B and C; KAISER FOUNDATION HOSPITAL, PANORAMA CITY MEDICAL CENTER, and PAYMAN RASHAN, SENIOR V.P. and PATIENT ADMINISTRATOR of PANORAMA CITY MEDICAL CENTER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION, HONORABLE OTIS D. WRIGHT, II, US DISTRICT JUDGE (Case No. 2:16-CV-00742-ODW (AFM))

BRIEF ON BEHALF OF APPELLANTS MELISSA COOK, INDIVIDUALLY and MELISSA COOK, AS GUARDIAN *AD LITEM* of BABY A, BABY B and BABY C

THE CASSIDY LAW FIRM
Harold J. Cassidy* (NJ SBN: 011831975)
Email: hjc@haroldcassidy.com
750 Broad Street, Suite 3
Shrewsbury, NJ 07702
Telephone: (732) 747-3999
Fax: (732) 747-3944
*Admitted *Pro Hac Vice*

BUCHALTER NEMER
A Professional Corporation
Michael W. Caspino (SBN: 171906)
Robert M. Dato (SBN:110408)
Email: mcaspino@buchalter.com
18400 Von Karman Avenue, Ste. 800
Irvine, CA 92612-0514
Telephone: (949) 760-1121
Fax: (949) 720-0182

Attorneys for Appellees Melissa Cook, Individually and Melissa Cook, As Guardian *Ad Litem* of Baby A, Baby B and Baby C

On the Brief:
HAROLD J. CASSIDY, ESQ.
ROBERT M. DATO, ESQ.
MICHAEL W. CASPINO, ESQ.
JOSEPH R ZAKHARY, ESQ
THOMAS J. VIGGIANO, ESQ.

CORPORATE DISCLOSURE STATEMENT

Appellants are individuals, and Rule 26.1 concerning Corporate Disclosures is not pertinent as no corporation is an appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES CITED

STATUTES CITED

CONSTITUIONAL AUTHORITIES

OTHER LEGAL AUTHORITIES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The Plaintiffs-Appellants filed a complaint asserting a claim under 42 U.S.C. §1983 challenging the constitutionality of California's "Gestational Surrogacy" Statute, Cal. Fam. Code §7962. They assert that the statute is violative of their Substantive Due Process and Equal Protection Rights guaranteed under the Fourteenth Amendment of the Constitution of the United States, both on its face and as applied to Melissa Cook, Baby A, Baby B and Baby C. Thus, the United States District Court for the Central District of California had jurisdiction under 28 U.S.C. 1331 and/or 28 U.S.C. 1343. The relief sought is authorized by 28 U.S.C. §2201-2202. Venue was properly in the U.S. District Court for the Central District of California under 28 U.S.C. §1391.

This appeal seeks relief from the final order, opinion and judgment of the Honorable Otis D. Wright, II, U.S.D.J., entered on June 6, 2016, granting the Motions to Dismiss the Complaint based upon the Federal Abstention Doctrine, which resolved all issues as to all parties and is a final order. The Notice of Appeal was timely filed on July 5, 2016.

The Court of Appeals has jurisdiction under 28 U.S.C. 1291.

QUESTIONS PRESENTED

In a case brought by the biological mother of triplets pursuant to 42 U.S.C. §1983 challenging the constitutionality of California's "Gestational Carrier" Statute, in which she asserts that that Statute used to terminate her constitutionally protected relationship with her children violates the Fourteenth Amendment Due Process and Equal Protection Rights of the children and her own Fourteenth Amendment Due Process and Equal Protection Rights:

1. Does the *Younger* Abstention Doctrine prohibit the Federal Court from exercising its jurisdiction because there was a case in the State Court (in which no judicial action of any kind had been taken) at the time the Federal case was commenced?

2. Does the *Younger* Abstention Doctrine prohibit the Federal Court from exercising its jurisdiction because subsequent to the commencement of the Federal action, the State Court entered an Order of Termination but had refused to give any opportunity to the mother and children to litigate any of their claims at all, refused to provide a hearing and refused to consider their Counterclaim containing their Federal Claims?

3. Does the *Younger* Abstention Doctrine prohibit the Federal Court from exercising its jurisdiction where the state has no legitimate state interest at stake, and

no interest in enforcing a gestational contract to give a fifty year old single, physically impaired, man three children who he stated he was not capable of raising?

STATEMENT OF THE CASE

A. Nature of the Action

The Complaint filed by Appellants challenges the constitutionality of California's "Gestational Carrier" Statute, Cal. Fam. Code §7962 as violative of Plaintiffs' Due Process and Equal Protection Rights guaranteed under the Fourteenth Amendment, on its face and as applied to Melissa Cook and Babies A, B and C. 3ER 297-298, 367-376,[Second Amended Complaint (SAC), ¶¶ 1; 195-222].

The case arises out of a "gestational surrogacy" contract dated June 3, 2015 entered into between Plaintiff-Appellant Melissa Cook, a 47 year old woman and C.M., a single, 50 year old man living in Georgia who is deaf and does not speak. 3ER 305,315 [SAC ¶¶19,47].

After a triple embryo transfer resulted in Appellant Cook becoming pregnant with triplets, C.M. repeatedly demanded that Ms. Cook abort one or more of the unborn children because he could not raise three children. 3ER 320-327 [SAC ¶¶67-90].

Following a long dispute, Cook determined that it was not in the children's best interest and contrary to her obligations to the babies, for her to surrender the three

children to a man who clearly could not care for them. 3ER 327 [SAC ¶90]. She had offered to raise one or more of the children in light of his inability to raise them all, but C.M. stated his intent to give up at least one of them to a stranger in an adoption. 3ER 327 [SAC ¶91].

Appellant filed suit in the California District Court and this separate action in the Federal District Court. In both instances, the Complaint focuses on Federal Constitutional claims. They both set out, in detail, §1983 claims asserting that California's Gestational Surrogacy Statute, which would enforce the surrogacy contract despite the fact that C.M. is not capable of raising the children, violates the Substantive Due Process and Equal Protection Rights of the children, and those of Melissa Cook, guaranteed by the Fourteenth Amendment.

The Federal District Court dismissed Appellants' Complaint based upon the Court's erroneous understanding of the limited abstention doctrine espoused in *Younger v. Harris*, 401 U.S. 37 (1971).

The District Court ignored the Supreme Court's controlling decision in *New Orleans Pub. Serv. v. Council of City of New Orleans* (*NOPSI*), 491 U.S. 350 (389) and *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 585 (2013) which emphasized that the *Younger* Abstention is limited to three narrow circumstances, none of which apply to this case.

B. Statement of Facts

1. Facts Relating to the Underlying Dispute

Plaintiff Melissa Cook is now 48 years old. 2ER 223[Declaration of Melissa Cook (hereafter "Cook"), ¶1]. Surrogacy International ("S.I.") is a California surrogacy broker which solicited Plaintiff to act as a surrogate for C.M., a single fifty year old man. Plaintiff has never met C.M. or spoken with him on the telephone. 2ER 224-225[Cook, ¶¶9-11]; 3ER 314-315 [SAC ¶¶44-45]. C.M. is deaf, has never been married, and lives in Georgia with two elderly parents. His mother is ill, confined to bed, and needs nursing care. 3ER 305, 314-315 [SAC ¶19; ¶¶44-47]. C.M. does not speak. 2ER 287[Affidavit of Eduardo Alford ¶7]. C.M. is a postal worker who has stated that he is not capable of raising three children. S.I., which brokered the arrangement, did not arrange for a home study to determine whether C.M. was capable of raising any children, let alone triplets. 3ER 315-316[SAC ¶¶46-49].

S.I. is partly owned and operated by an attorney, Robert Walmsley, who drafted the seventy-five page surrogacy contract signed by Cook and C.M. By the terms of the contract, ova donated by an anonymous woman was to be fertilized with sperm donated by C.M., and Plaintiff was to submit to a long series of hormone injections, and an "embryo transfer," was to carry the children to term, give birth and surrender

the children to C.M. Melissa Cook's parental rights, and the rights of the children, were to be terminated pursuant to Family Code §7962, and C.M. was to be declared the only legal parent of the children. 3ER 316[SAC ¶50].

On April 16, 2015, a month and a half before the surrogacy contract was signed, C.M. sent Plaintiff an email acknowledging that there could be three children born and he was committed to accept responsibility to raise all three. 2ER 225[Dec. Cook, ¶12]. That August, when Plaintiff was pregnant, C.M. again wrote "We might get three embryos successfully hook up [sic]." 2ER 225[Cook, ¶13]; 3ER 316-317[SAC ¶51].

On June 13, Melissa Cook started a drug regimen required by the surrogacy contract to prepare her body to accept the embryo transfers. 2ER 225-226[Cook, ¶¶15-19]. That drug regimen and the fertility techniques used in surrogacy arrangements, posed significant risks to Plaintiff and the children. 3ER 317-319[SAC, ¶¶54-62]; 2ER 198-204[Declaration of Anthony Caruso, MD., ("Caruso"), ¶¶7-27]. At the request of C.M., three male embryos were transferred on August 17, 2015. 2ER 226[Cook, ¶20]; 3ER 320[SAC, ¶¶64-66]. On August 31, it was determined that all three were viable. 2ER 226[Cook, ¶21].

On September 16, 2015, C.M. first mentioned an abortion. On September 17, C.M. sent an email to Fertility Institute, which monitored Plaintiff's pregnancy:

> "Please try to make her (Melissa's) visits less often, because I get a bill that costs me a lot of money. ... It causes me financial problems not to be able afford triplets (sic) maybe even twins that worries me so bad for real." 2ER 226[Cook, ¶23]; 3ER 320-321[SAC, ¶68].

On September 18, the infertility clinic wrote to C.M. that because the pregnancy was such a high risk, Melissa had to be seen each week, noting that the risk came with C.M.'s decision to request that three embryos be transferred. 2ER 226-227[Cook, ¶24]; 3ER 321[SAC, ¶69]. That day C.M. wrote to Walmsley, stating:

> "I *cannot afford to continue M.'s to visit weekly* (sic) in the fertility institute because of our contract that *I never anticipated something such worse (sic) like draining my finances so fast. ... I do not want to abort twin babies, but I felt that is such possible (sic) to seek aborting all three babies*. I do not want to affect Melissa's health. *I do not have any more money in the bank, and my job does not pay great biweekly*." (Emphasis added). 2ER 227[Cook, ¶25]; 3ER 321-322[SAC, ¶70; ¶72].

Plaintiff became anxious as she began to realize that C.M. was not capable of properly caring for the children. 2ER 227-228[Cook, ¶¶26-29]; 3ER 321-322[SAC, ¶72].

When she saw that C.M. could not raise the children, on September 21, Plaintiff wrote to C.M. stating:

> "You need to make a decision if you want any of these babies so that I know what to expect. I have been really upset and nervous and anxiety ridden." 2ER 228[Cook, ¶30]; 3ER 322[SAC, ¶73].

In response, C.M. wrote, "I said I always would want twin babies." Plaintiff

wrote to C.M. stating that they had to make a plan for the third baby and that she would, in order to assist him, raise all the children herself for a few months after birth. In April, 2015, C.M. had told Plaintiff that he would want her to care for the children for a few weeks after birth. In September she first realized that he may not be able to care for them at all. 2ER 228[Cook, ¶31]; 3ER 322[SAC, ¶¶74-75].

On September 22, 2015, in response to C.M.'s earlier email, Plaintiff wrote:

> "Do you even know what you want/can do? Are you able to afford and love and have the support to care for all three babies? You need to realistically look at the situation in hand. They will most likely come early and I will try my best to go as long as possible. ...We have to do what's best for these babies." 2ER 228[Cook, ¶32]; 3ER 322[SAC, ¶76].

C.M. wrote to Plaintiff that day that he wanted an abortion and was exercising a term under the contract for a "Selective Reduction,":

> "*I would decide to select - reduct (sic) one of three babies*, soon as I need to tell my doctor and my lawyer before 14th to 17th weeks. ... I will tell them 3 weeks ahead before November 9 that *I would look for twin babies*." (Emphasis added). 2ER 228-229[Cook, ¶33]; 3ER 322-323[SAC, ¶77].

On September 23, Plaintiff advised C.M. that she would not "abort any of them...I am not having an abortion. They are all doing just fine." 2ER 229[Cook, ¶34]; 3ER 323[SAC, ¶78].

Both C.M. and Walmsley made it clear that the reason that C.M. wanted the

abortion was because he was not capable of raising three children. Plaintiff continued to refuse to abort any of the babies. On October 28, C.M. mentions, in an email, that he may "start looking agencies for adoptive parents (sic)." On November 12, Plaintiff reported to C.M. that Baby B was kicking and that she heard the babies' heart beats. She wrote that if he wanted to raise only two of the children that she "would love to raise and love" the third child. In response to Plaintiff's offer to raise the third child, C.M. wrote that he "would encourage" her to "consider selection reduction (sic)." 2ER 229-230[Cook, ¶¶35-38]; 3ER 323-324[SAC, ¶¶79-82].

On November 16, 2015, C.M. wrote to Plaintiff and advised her that "... *I had decided*, after looking at all issues, *to pursue reduction*," failing to acknowledge that Plaintiff offered to raise the third child. He added "*I know my decision* is not welcomed to you (sic) but I hope you understand. ..." On November 24, C.M. wrote to Plaintiff and stated: "*My decision made is, requires a selection reduction* (sic). I am so sorry." On November 27, C.M. wrote to Melissa again stating "*I made my decision which is best*. ..." (All Emphasis added). 3ER 324-325[SAC, ¶¶83-84]; 2ER 230-231[Cook, ¶¶39-41].

On September 24, Walmsley wrote to Lesa Slaughter, an attorney who was supposed to review the contract with Plaintiff, stating: "Triplets for a married couple is hard enough. Triplets for a single parent would be excruciating; triplets for a single

parent who is deaf is - well beyond contemplation." Slaughter responded: "agreed." 3ER 325[SAC, ¶¶85-86]; 2ER 231[Cook, ¶¶42-43, (Cook Exhibit 19)].

On November 20, C.M.'s attorney wrote to Plaintiff threatening to sue her for large money damages if she continued to refuse to have an abortion. He cited as a reason an abortion was necessary was that "C.M. is a single male and is deaf." 3ER 326[SAC ¶88]; 2ER231-232[Cook, ¶45, (Cook Exhibit 21)]. On November 13, Slaughter, being paid by C.M., wrote to Melissa and advised her, incorrectly, that C.M. had a right to demand an abortion and that Plaintiff was liable if she refused. 3ER326-327[SAC ¶89]; 2ER 232[Cook, ¶47].

Late November, 2015, Plaintiff learned for the first time that S.I., and Walmsley admitted that they never did a home study of C.M.'s living arrangement. 2ER 232-233[Cook, ¶49]. Plaintiff advised C.M. that she would not abort a child and that she would raise the child herself. C.M.'s response was that he intended to surrender the child to a stranger. 3ER 327[SAC ¶91]; 2ER 232-233[Cook, ¶49]; 2ER 215-217[Declaration of Harold Cassidy ¶¶7-14].

2. The Mother-Child Relationship

Throughout the pregnancy, Plaintiff bonded with the children and the children bonded with her. 3ER 332-337[SAC, ¶¶106-116]. Melissa Cook is the mother of Babies A, B and C, as a matter of biological fact, and she and the children had an

existing relationship during the pregnancy. That relationship during the pregnancy was greatly beneficial to the children, and destruction of the bond and relationship between them is harmful to the children. 3ER 332-340[SAC ¶¶106-121]; 2ER106-124[Declaration of Alma Golden, M.D. ("Golden") ¶¶11-51.]. A mother provides an essential benefit throughout the early and late stages of childhood. 3ER 340-351[SAC ¶¶122-138];2ER 79-91[Declaration of Miriam Grossman, M.D. ("Grossman") ¶¶9-45]; Golden, *supra*. The physiological relationship between mother and child is unique and it is obvious that without it, the babies would not be procreated. But this unique physical relationship has a significant impact on the mother as well as the children. It has recently been confirmed that the mother's relationship with her children during pregnancy results in significant changes in the mother's brain, and studies confirm that such changes are detectable in eleven different parts of her brain. Hoekzema, E., et al., "Pregnancy Leads to Long-lasting Changes in Human Brain Structure," Nature Neuroscience, 19 Dec. 2016; doi:10.1038/nn.4458. These changes in the mother's brain are believed to prepare her to better respond to her child's needs. *Id.* These physiological changes, in part, explain the differences between the way mothers and fathers provide care for a child. 3ER 344-351[SAC, ¶¶127-137]. It is cruel to deliberately plan to deprive the children of their mother. 3ER 346-351[SAC, ¶¶130-137]. The breaking of the bond between

Melissa Cook and the three babies is detrimental to the welfare of the children. *Id*. *See* also, Bystrova K, Ivanova V, Edborg M, Matthiesen AS, Ransjo-Avidson AB, Mukhamedrakhimov R, Uvnas-Moberg K, Widstrom AM. (2009), Early Contact Versus Separation: Effects on Mother-infant Interaction One Year Later, Birth 36(2), 97-109.; Hardy LT. (2007), Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications, Journal of Child and Adolescent Psychiatric Nursing, 20(1), 27-39; Shonkoff JP, Garner AS, The Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics; Siegel BS, Dobbins MI, Earls MF, et al. (2012), the Lifelong Effects of Early Childhood Adversity and Toxic Stress, Pediatrics. 129(1): e232-46.

The only criteria used to give sole custody of the children to C.M., is that C.M. paid for the children, despite the fact he was not capable of raising them. 3ER 352-353[SAC ¶¶143-144]. The use of a woman as a so-called gestational carrier is intrinsically exploitive and harmful to the woman as well as the child. 3ER 353-365[SAC ¶¶146-185]; 2ER 150-159[Declaration of Barbara K. Rothman, Ph.D., ("Rothman"), ¶¶9-36]. It is also exploitive of the women (and children) because the IVF techniques in embryo creation and transfer places the women at far greater risk of physical harm than normal pregnancy, and places the children at greater risk for

anomalies. 2ER 198-199[Caruso, ¶¶6-9]. The exploitive and detrimental nature of the arrangement is also evident in subjecting the mother to abnormal and significant risks of the drug regimin to which she is subjected. 2ER 201-203[Caruso, ¶¶18-25]; 3ER 317-319[SAC ¶¶54-62]. The exploitive nature of the agreement is exacerbated by the common practice of demanding "selective reduction," which poses great risk for the child and for the mother. 2ER 199-201; 203-204[Caruso, ¶¶10-17; ¶27].

C. Procedural History and Rulings Under Review

The Plaintiff-Appellant was the first party to file an actionin the Superior Court of California. C.M. filed a Petition in the Children's Court the next day, falsely claiming the matter was uncontested. Appellant filed a Verified Answer and Counterclaim to that Petition on February 1, 2016, and filed the Complaint in this action on February 2, 2016, before any action was taken by the Court on C.M.'s Petition.

1. Proceedings in the State Court

(a) Initial Pleadings and Proceedings

On January 4, 2016, Melissa Cook filed a Civil Complaint in the Superior Court of California, on her own behalf and on behalf of the three children. 2ER 291[Declaration of Michael Caspino, Esq. ("Caspino"), ¶3]. Plaintiff sought a Declaration that California's Gestational Surrogacy contract was unconstitutional as

violative of the rights of Melissa Cook and the three children she carried, sought injunctions and custody based on the best interests of the children. Complaint, *M.C. v. C.M.* (LC103726). It was served on C.M. at his home in Georgia on January 5, 2016. 2ER 291[Caspino, ¶4]. On January 7, 2016, Michael Caspino appeared *ex parte* seeking a temporary restraining order precluding C.M. from filing an uncontested Petition for termination of Melissa Cook's parental rights. C.M.'s attorney appeared. 2ER 291[Caspino, ¶4.]

Despite the fact that C.M. was served with M.C.'s Complaint on January 5, and he was notified of the *ex parte* hearing on January 6, Mr. Walmsley filed a Petition (BF054159), representing that the Petition was uncontested and that Plaintiff wanted her parental rights terminated. 4ER 543["Appearance, Stipulations, and Waivers Form FL-130" ("The parties agree that this cause may be decided as an uncontested matter;" "The parties waive their rights to notice of trial ... and the right to appeal;" and that "both parties have signed waiver of rights.")]. C.M. also submitted a "stipulation for entry of judgment" which stated: "The parties further agree that the Court make the following orders: The Court finds the non-existence of the parent-child relationship between respondent and the children to be born ...” 4ER 545, and a "Declaration for Default or Uncontested Judgment" which stated "the parties have stipulated that the matter may proceed as an uncontested matter." 4ER

553. The form of judgment submitted stated that the case was uncontested. 4ER 555. Those representations were made at a time when C.M. and Walmsley knew that Plaintiff contested placement of the children with C.M. 2ER 291[Caspino, ¶5].

C.M.'s Petition states: "All parties have agreed that at all times relevant, the intent of each and every party to the surrogacy agreement was that the Petitioner is the natural, genetic, and sole legal parent of the children..." 4ER 531[Pet. ¶9]. That statement was false. C.M. also signed a sworn Declaration stating that he believed that Plaintiff was willing to relinquish her parental rights. 4ER 540[Dec of C.M. ¶10]. C.M. knew that was a false statement based upon communications with Plaintiff. Based on those false statements, the Children's Court scheduled a proceeding for entry of an uncontested judgment terminating the rights of Melissa Cook and the children for February 9, 2016. 2ER 291[Caspino ¶5]. On January 7th, the Honorable Russell Kussman struck Plaintiff Cook's Complaint, instructing Cook to file her Complaint in the Family Court. 2ER 291[Caspino, ¶6].

On February 1, Melissa Cook filed her Verified Answer to C.M.'s Petition, Separate Defenses, and Verified Counterclaim. 2ER291[Caspino,¶7]; 4ER 459-526[Answer and Counterclaim]. Plaintiff's Verified Answer denied that Plaintiff wanted her rights terminated. Plaintiff's Verified Counterclaim contained twelve causes of action, seeking among other things: (a) Declaratory Judgment that Melissa

Cook is the mother of Baby A, Baby B, and Baby C; (b) Declaratory Judgment that Fam. Code §7962 violates the Due Process and Equal Protection rights of Baby A, Baby B, and Baby C guaranteed by the Fourteenth Amendment of the United States Constitution as it is applied to them, and on its face; (c) Declaratory Judgment that Fam. Code §7962 violates the Due Process and Equal Protection rights of Plaintiff guaranteed by the Fourteenth Amendment of the United States Constitution as it is applied to her, and on its face; (d) Declaratory Judgment that the surrogacy contract cannot form the basis to terminate Plaintiff's parental rights and the children's relationship with their mother; and related injunctive relief and an Order awarding immediate legal and physical custody of Baby C to Melissa Cook and scheduling a hearing to place Baby A and Baby B based on their best interests.

The Plaintiff filed her Complaint in the Federal District Court the next day on February 2.

(b) The Proceedings in Children's Court on February 8 and 9, 2016

After filing her Verified Answer, Separate Defenses and Verified Counterclaim in the Children's Court on February 1, Plaintiff filed an *Ex Parte* Application on February 4, seeking a continuance of the uncontested hearing scheduled for February 9th, and other relief. 2ER 291[Caspino, ¶8]; 4ER 445-458[*Ex Parte* Application]. That *Ex Parte* Application disclosed that Plaintiff had filed a Verified Answer and

Counterclaim, and that C.M. had no intention of raising all three children, that he was probably not capable of raising any children, and that he intended to surrender at least one child to an "adoption." 4ER 449-453[*Ex Parte* Application].

The Children's Court scheduled the hearing on the Ex Parte Application for February 8th. What ensued was a stunning denial of any semblance of Due Process. Judge Amy Pellman denied Plaintiff's application for the continuance, proceeded as if the Petition was uncontested with Cook's consent, and summarily ruled that C.M. was entitled to a judgment terminating the relationship between the three children and Melissa Cook. 3ER 396-402[Transcript of court proceedings 2/9/16, Pp.91:16-97:28];

The Court stated that she was unaware that a Verified Answer and Counterclaim had been filed, despite the fact it was referenced in the application and a copy had been hand delivered to her Court Clerk on February 1st. 3ER 389-390[Transcript of court proceedings 2/9/16, Pp.25:26-26:2]; 3ER 412-413[Transcript of court proceedings 2/8/16, Pp.16:16; 16:27-28; 17:15; 17:27-28].

Judge Pellman barred Melissa Cook from producing any evidence. 3ER 410[Transcript of court proceedings 2/8/16, P.14:11-21]. Counsel for Cook asked if the Court would take any evidence on Cook's allegations that C.M. did not intend to, and cannot, accept, legal responsibility to raise the children. The Court responded:

> "There's no need for home study. There's no need for representation of the children. There's no need for any of that under the code," stating that is "not relevant to my particular hearing." 3ER 410-411[Transcript of court proceedings 2/8/16, Pp.14:26-15:1; 15:2-3].

When counsel asked whether the well-being of the children was going to be considered by the Court. 3ER 411[Transcript of court proceedings 2/9/16, P.15:6-9], Judge Pellman stated:

> "...*What is going to happen to these children once they are handed over to C.M., that's none of my business. It's none of my business. And that's not part of my job*." (Emphasis added). 3ER 412[Transcript of court proceedings 2/8/16, P.16:3-6].

The Court observed a best interests determination is required in other actions, but "surrogacy" is the one exception. 3ER 412[Transcript of court proceedings 2/8/16, P.16:6-8].

The summary disposition of the entire case, without discovery, evidence, the opportunity to present Mrs. Cook's case, and without C.M. being required to answer the allegations of the Counterclaim, was stunning. There was a total deprivation of Due Process in a proceeding that terminated the fundamental constitutional rights of Melissa Cook and the three babies she carried. Mr. Caspino inquired: "I ask how the court is going to dispose of our Counterclaim ..." 3ER 412[Transcript of court proceedings 2/8/16, P.16:9-10].

The Court then admitted that the entire case was disposed of without the Court

ever reviewing Melissa Cook's Verified Answer and Counterclaim. 3ER 412-413[Transcript of court proceedings 2/8/16, Pp.16:16; 16:27-28; 17:15; 17:27-28]. On February 9th, Mr. Caspino advised the Judge that on February 8th, the Court Clerk advised him that the Verified Answer and Counterclaim were indeed in the Court's file. 3ER 389-390[Transcript of court proceedings 2/9/16, Pp.25:26-26:2]. He again asked the Court: "May I inquire as to how the Court is handling our Counterclaim." 3ER 390[Transcript of court proceedings 2/9/16, P.26:3-5].

The Court refused to consider the Verified Answer and Counterclaim incorrectly stating that she was only dealing with a "petition to determine parentage. That's it." 3ER 392[Transcript of court proceedings 2/9/16, P.28:1]. The Verified Answer and Counterclaim demonstrated why the Court could not enter such an order, yet Judge Pellman refused to consider them. The Court insisted that the hearing on C.M.'s petition continue uncontested and conclude before she addressed the Counterclaim. 3ER 393[Transcript of court proceedings 2/9/16, P.84:22-24]. Judge Pellman then stated:

> "And so, therefore, the Court denies, if there are counterclaims ...the Court denies them." 3ER 394[Transcript of court proceedings 2/9/16, P.89:10-12].

It was clear from this and other comments that the Court never read or knew the content of the Verified Answer and Counterclaim. The Court never explained the

basis for the "denial," whatever "denial" was intended to be or mean, and then entered the Final Judgment terminating the rights of the three children and those of Melissa Cook. 3ER 394-396[Transcript of court proceedings 2/9/16, Pp.89:10-91:15].

The Court signed the form of the Order for an uncontested proceeding originally submitted by C.M. with the Petition. That Order did not recite that Melissa Cook opposed the petition, or that she filed a Verified Answer and Counterclaim. It did not even recite that Mr. Caspino appeared on behalf of Melissa Cook. The order contained the same typographical errors and incorrect statements of law as those in the original order submitted by C.M. The two orders are identical. See and compare, 4ER 557-563[Verified Petition, Pp.1-7] with 4ER 437-443[Judgment, P.1-7]. The Judgment states, contrary to the actual facts, as admitted by C.M. and as attested to by Plaintiff, that:

> "At all times relevant, the intention of each of the Parties was that the Petitioner, C.M., Jr., would be the sole parent of the Children that Respondent/Surrogate, M.C. is carrying and who are due to be born on or about May 4, 2016. Each of the Parties also intended that the Respondent, M.C. would not have any rights, parental, legal, financial or otherwise, toward said children." 4ER 439[Judgment, P.3].

To date, no California Court has addressed the Federal Constitutional issues, and even if the California Court of Appeal were to reverse the Order of the Children's Court it would only result in a remand to the Children's Court to consider the Federal

issues for the first time. There can be no decision on the merits by a State Court until more than a year and a half after the Federal District Court dismissed Appellants' Complaint, and there may never be one.

Following the proceedings of February 9, Plaintiff gave birth on February 22, 2016. That day, Defendant Kaiser took it upon itself to enforce the State Court's Order, and refused to even allow Plaintiff to see any of the three babies as they were being born. She was not permitted to know their condition, or even their weights. The hospital posted two security guards to prevent Plaintiff from seeing the children. The security guards kept track of everyone who visited Plaintiff and required that visitors show identification. 2ER 233-234[Cook, ¶¶53-56]; 2ER 292[Caspino, ¶¶12-14].

C.M. stayed in Georgia while the children were in the hospital for seven weeks without a parent. 2ER 234[Cook, ¶58]. The entire experience was dehumanizing to Plaintiff, and after she left the hospital, she refused to accept any of the $19,000 she was owed by C.M., under the terms of the contract, because it felt like she was taking money in exchange for the children she had come to love. 2ER 234[Cook, ¶57; ¶59]. Shortly after February 9, the Plaintiff filed a Notice of Appeal in the California Court of Appeal, and on March 30, Melissa Cook filed a Petition for a Writ of Supersedeas. On April 14, the Court of Appeal denied the Petition for the Writ and vacated the Stay

Order. 2ER 294[Caspino, ¶ 22].[1]

2. Proceedings in the Federal District Court

The Complaint filed in this case on February 2, 2016, Federal Constitutional issues. It is a challenge to the constitutionality of the State Statute under which the "gestational carrier" contract is enforceable, and as such, the Federal Court is the proper Court in which the case should proceed.

All of the Defendants filed motions to dismiss the complaint solely on the basis that a case was pending in the State Court, and that the *Younger* Abstention Doctrine required dismissal of Cook's Federal Complaint.

Oral argument was conducted before Judge Otis Wright, III, on May23, 2016. (*See*, transcript of proceedings).

On June 6, 2016, Judge Wright entered a Final Order dismissing the Complaint based upon the *Younger* Abstention Doctrine. The District Court failed to address the

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[1]Plaintiffs-Appellants can proffer that upon remand it can be shown that the three babies were scheduled to be discharged from the hospital on or about April 22, 2016. However, when C.M. arrived at the hospital, the doctors and staff would not release the children directly into his care. The hospital required C.M., because of his demonstrated inability, to keep the children in the hospital for an additional 7 to 10 days so the hospital could give him parenting classes. At the end of that period, his incompetence was such that the hospital provided multiple doctors and nurses to fly to Georgia with him to insure they arrived safely. On the first evening alone with the babies in Georgia, C.M. took them to a local hospital and Georgia's children's services conducted an investigation. These facts are relevant to the constitutional issues upon remand.

controlling unanimous decision of the U.S. Supreme Court in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 585 (2013).

Summary of Argument

The California "Gestational Surrogacy" Statute, Cal. Fam. Code §7962, violates the fundamental Due Process Liberty Interests and Equal Protection Rights of Baby A, Baby B and Baby C guaranteed by the Fourteenth Amendment of the US Constitution.

Melissa Cook is both the biological mother of the three children, and is their only legal mother under California law. By virtue of that fact and by virtue of having been appointed Guardian *ad Litem* of Babies A, B and C, by the Court in this case, she has the legal standing to litigate the rights of the children.

The California Statute also violates Melissa Cook's own Fundamental Due Process Liberty Interests and her Equal Protection Rights. She has a right to litigate these issues in a §1983 action and the fact that she had filed a claim in the State Court (in which no judicial action was taken) the day before the Complaint was filed in this case, does not deprive the Federal Court of its jurisdiction under the *Rooker-Feldman* Doctrine.

The District Court's dismissal of this case based upon the *Younger* Abstention Doctrine was reversible error. This case does not fall within the three narrow

circumstances in which the Federal Court should abstain under *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) and *Sprint Comm., Inc. v. Jacobs*, 134 S.Ct. 584 (2003).

Even if this case fell within one of those exceptions, the fact that the Appellants were given no opportunity to be heard in the State Court, and the fact there are no important state interests involved, would require the Federal Court to exercise its jurisdiction.

Legal Argument

Introduction

I. Melissa Cook is the Mother of Babies A, B, and C, as a Matter of Fact, and She is Recognized as their Legal Mother as a Matter of Law[2]

As a matter of biological fact, Plaintiff is the mother of the three children, who bonded both physiologically and psychologically with them and they with her. She has had an existing relationship with the children. Dec. Golden, ¶¶11-51; Dec. Grossman, ¶¶ 9-45; SAC, ¶¶106-138.

Plaintiff is also the legal mother of the children. Cal. Fam. Code §7610(a) recognizes that the mother who carries and gives birth to children is, in fact, the

[2]Questions of law on a Motion to Dismiss are reviewed *de novo*. That standard is applicable to all of the issues on this appeal. *U.S. v. Ziskin*, 360 F.3d 934 (9th Cir. 2003)

mother, and her legal status is established by proof of that fact. §7610(a) states: "The parent and child relationship may be established as follows: (a) between a child and the natural parent, it may be established by proof of having given birth to the child..." §7601(a) defines "natural parent," as "a non-adoptive parent established under this part (part 3) whether biologically related to the child or not."

This recognition that Melissa Cook is the natural mother is not the result of a legal fiction in the form of a presumption. Fam. Code §7962 does operate to rebut certain enumerated statutory presumptions, but §7610(a) is not so enumerated. Nor can it be, because it is not a rebuttal presumption, but recognition of a biological fact.

Some of the Defendants incorrectly assert that *Johnson v. Calvert,* 5 Cal.4th 84 (1993), held that a surrogate mother who was not genetically related to the child she carried was not the child's legal mother. The opposite is true.

Johnson overruled the Court of Appeal's conclusion in that case, that because Ms. Johnson was not genetically related to the child she bore, she could not be the "natural" mother and, therefore, her giving birth could not form a basis as "legal" mother. The *Johnson* court held that the lack of a genetic relationship did not preclude a woman who gives birth from being the legal mother. *Johnson, supra*, 5 Cal.4th at 92, fn. 9. That holding has since been codified by Cal. Fam. Code §7601, subdivision (a).

Thus, §7962 can only be understood to recognize a properly executed gestational surrogacy contract as a legal basis to terminate the rights of the children and their mother even against the mother's wishes and even if such termination is not in the best interests of the children.

II. The District Court has Jurisdiction. This Case Presents a Number of Federal Constitutional Issues of First Impressions, which The Federal Court is Uniquely Qualified to Determine

This action is brought pursuant to 42 U.S.C. §1983. The District Court has jurisdiction under 28 U.S.C. 1331 and/or 28 U.S.C. 1343 and the relief sought is authorized by U.S.C. §§2201-2202.

A. California's Gestational Surrogacy Statute, Violates the Constitutional Rights of Baby A, Baby B, and Baby C

1. Plaintiff Melissa Cook has the Standing to Litigate the Constitutional Rights of the Three Children

The District Court entered an Order dated February 12, 2016, appointing Melissa Cook the Guardian *ad Litem* of Babies A, B and C, authorizing her to litigate the rights of the three babies.

Independent of that Order, Melissa Cook possesses the legal standing to vindicate the constitutional rights of Baby A, Baby B, and Baby C. *Caplin &*

Drysdale v. United States, 491 U.S. 617 (1989) best explains the criteria to establish one person's standing to litigate the constitutional rights of another:

> "When a person ... seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations ... point to permitting the litigant to advance the claim? ...To answer [the second] question, our cases have looked at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff, supra* 428 U.S. at 113-118,...; *Eisenstadt v. Baird*, 405 U.S. 438, 443-446,...(1972)." 491 U.S. at 624, FN3.

Plainly, there is an Article III case and controversy. Melissa Cook has suffered an injury-in-fact by having her rights terminated. As for the prudential question, there could be no more intimate relationship, or one more beneficial to the two participants, than that between a mother and her children. Their interests are so interwoven that the termination of the rights of one operates to terminate the rights of the other.

Likewise, the children have no ability to assert their own rights, and they are uniquely dependent upon their mother to assert their rights for them. In fact, Plaintiff Cook is the only person who can assert their rights because their other legal parent, C.M., is the party who seeks to terminate the children's rights, and asserts interests in direct conflict with those of the children.

Finally, the outcome of this litigation necessarily impacts the rights of the

children. If Plaintiff fails in her effort to establish and maintain her rights, the children's right to their relationship with their mother, as well as their other substantive and procedural Due Process and Equal Protection Rights, will all be adversely affected. Melissa Cook has standing to litigate their rights.

2. §7962 VIOLATES THE CHILDREN'S SUBSTANTIVE DUE PROCESS RIGHTS

INTRODUCTION

The Due Process Clause of the Fourteenth Amendment guarantees more than fair process, and some of the liberties it protects are substantive in nature. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "The clause protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

The Due Process Clause protects those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Supreme Court has stated that these rights deemed fundamental liberties are those "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). They are those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); See also, *Smith v. Organization of Foster*

Families, 431 U.S. 816, 845 (1977).

Baby A, Baby B, and Baby C have two fundamental liberties that were violated by §7962 and the court's order enforcing the surrogacy agreement: (1) their liberty interest in their relationship with their mother; and (2) their liberty interest to be free from commodification and the purchase of them and exclusive control and custody over them.

(a) The Statute Violates the Fundamental Liberty Interests of Baby A, Baby B, and Baby C in their Relationship with Their Mother

The California Court terminated the children's relationship with their mother despite the fact that the mother was perfectly fit, desired to raise the children, did not want the child-mother relationship to be terminated, and the genetic father did not want, and refused to accept, the responsibility to raise one or more of the children.

It is well settled that a child has his own Fundamental Liberty interest in establishing and maintaining his relationship with his mother. The parent and child have reciprocal rights, and both have a protected interest in maintaining their relationship. *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987) (Rev'd on other grounds). *Smith* held that the Supreme Court decisions which recognized a substantive Due Process Liberty Interest in the parent-child relationship

> "...logically extend to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship." *Id*. at 1418.

The Ninth Circuit Court of Appeals has stated that "parents and children have a well-elaborated constitutional right to live together without government interference." *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1999). *Lowry v. City of Riley*, 522 F.3d 1086, 1092 (10th Cir., 2008), stated: "[a] child has a constitutionally protected interest in a relationship with her parent."

The right to maintain the relationship between a parent and a child is one which is an intrinsic natural right – not derived from government, but arising by virtue of the dignity of the person. *Smith v. Organization of Foster Families*, 431 U.S. 816,845 (1977). The Supreme Court has stated that the constitution protects the "sanctity" of these familial relationships. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

In this case, there is no justification, or any legitimate governmental interest, in taking the children out of the arms of their perfectly fit mother who wants to care for them. That is especially true, as here, when the court terminates the children's relationship with their mother and enters a Judgment making the genetic father the

sole parent despite his stated intention to give one or more of the children up for adoption.

The complete lack of any legitimate governmental interest in California terminating the children's substantive Due Process Rights is illustrated by the court declaring it was "none of the court's business" what happened to the children and determining what was in the children's best interest was "not my job." The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). (Emphasis in original). It is an unconstitutional deprivation of the children's Due Process Rights to treat the contract, signed on May 31, 2015, as an irrevocable waiver of the future rights of the children; a "waiver" of their rights made by someone else, before they even existed, and one which was revoked when their mother realized that "waiver" was harmful to them.

(b) The Statute Violates the Children's Rights to be Free From Commodification and sale and the State Sanctioned and State Enforced Purchase of Their Familial Rights and Interests

The Act authorizes commodification of the children, and their purchase and sale without regard for their best interests. The California Court held that it does not

matter what befalls the children after the court turns the children over to C.M., even if he then turns them over to a stranger – or worse.

That total control of the children given to C.M. to do with them whatever he desires, was accomplished only because of the payment of money by C.M. to all involved. Complaint, ¶¶141-144; ¶¶168-173.

Throughout the history of our Nation, the relationship between mother and child has been revered as one having intrinsic worth and beauty as the touchstone and core of all civilized society. The Supreme Court has held that the courts had a duty to preserve the "sanctity" of such relationships. *Moore, supra*, at 503. Thus, there has been, in this nation, a long and strong prohibition against the purchase and sale of the rights of children and their mothers to their familial relationships.

> For instance, California Penal Code §181 states in pertinent part:
> "Every person…who buys or attempts to buy...or pays money…to another, in consideration of having any person placed in his or her custody, or under his or her control…is punishable by imprisonment…for two, three or four years."

C.M. pleads that the controlling factor in the placement of the children is "intent," that the parties "intended" that he have sole custody and parentage. That begs the question. C.M.'s "intent" is hard evidence that he is paying, not for children whose lives have intrinsic value to come into the world, but for the possession and control of the children. It was a plan intended to give him total control over the

children.

He bargained not for fertilization and birth of children, but rather for total possession which takes on indicia of ownership: the children can never get to know their mother, and he will do with them exactly what he wants, in the manner he alone decides, free from court scrutiny and the scrutiny of their mother. It can be said of any illegal sale of a child that the purchaser "intended" to have custody.

The Fourteenth Amendment's guarantee of liberty is surely offended because control having ownership qualities derived solely in exchange for money commodifies the children, and the children's relationship, which offends all civilized notions of freedom and liberty. Under the contract, used as a basis to terminate the children's rights, C.M. paid only for healthy children, children who lived for at least six months, and payment increased based upon the number of children delivered. [SAC ¶¶174-177].

In the history and tradition of this Nation, the central focus of all child rearing has been the welfare of the children, and in the placement of children the interests of the children are paramount; those of the parent are subordinate. *See*, *Goodarzirad v. Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026; *In re Marriage of Russo* (1971), 21 Cal. App. 3d 72, 85; *Smith v. Smith* (1948), 85 Cal. App. 2d 428, 434. In that history and tradition, contracts between parents to give primary custody to one parent

over the other have never been enforceable without the court holding a trial to determine what is in the child's best interest. *In re Marriage of Jackson* (2006), 136 Cal. App. 4th 980, 990; *Goodarzirad, supra* at 1027.

So ingrained in our tradition is the concern for the best interests of children, that in *Ford v. Ford*, 371 U.S. 187, 193 (1962), the United States Supreme Court held that a state is not bound by the full faith and credit clause under Art. IV of the Federal Constitution when the judgment entered by one state awarding child custody was based on a contract between two parents without regard to the children's best interests. "Virginia Law, like that of probably every state in the union, requires the court to put the child's interests first." *Id*. at 193.

C.M. may attempt to justify the payments as a payment for services, but that assertion is contradicted by the fact that anything short of complete sole parentage is less than what he bargained for. This fact is demonstrated by C.M.'s acknowledgment that he cannot raise at least one of the children, yet insists upon complete ownership of that child to dispose of as he sees fit – in an adoption or otherwise.

§7962 violates the children's liberty guaranteed by the Fourteenth Amendment of the United States Constitution.

3. §7962 Violates the Children's Right to the Equal Protection of the Law

Once a state acts to protect some individuals, it must act even-handedly and provide protection to all unless there is a legitimate state interest promoted by the denial to the excluded class. *Harper v. Virginia*, 383 U.S. 663, 665 (1966); *N.J. Welfare Rights Organ. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73; *Griffin v. Illinois*, 351 U.S. 12 (1956).

"Those who are similarly situated must be similarly treated." *Plyer v. Doe*, 457 U.S.202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949).

In *Harpe*r, the Court held that where a benefit is protected by the state, a classification which excludes some individuals from protection of a fundamental interest must be strictly scrutinized. 383 U.S. at 670. See also, *Carrington v. Rash*, 380 U.S. 89 (1965); *Weber*, 406 U.S. at 172. "Classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even where a statute merely provides greater protection of a fundamental right for some relative to others, only a compelling interest can justify the classification. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Baker v. Carr*, 369

U.S. 186 (1962). See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Carey v. Brown*, 447 U.S. 455 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

Thus, the classification which defines the excluded individuals must, where fundamental personal rights are involved, be justified by a compelling state interest. *Weber v. Aetna*, 406 U.S. 164, 175 (1972); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); Tussman, at 364, 366, 344-348.

In order for a classification to withstand strict scrutiny, the classification had to be necessary to achieve a "legitimate overriding purpose." *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192, 194 (1964).

Here California has created a class of children who are denied protection of their fundamental liberty interest in their relationship with their mother, denied protection of their interest in not being treated as a commodity, and denied protection of their interest in being placed based upon their best interests. The classification created by §7962 are those children who are the subject of a contract which denies them of their fundamental rights and interests only because some adult (who may not be genetically related to the children) paid money to obtain exclusive parental rights and control over them.

As noted, Cal. Penal Code §181 states that "every person...who buys, or attempts to buy, any person or pay money...to another, in consideration of having any person placed in his or her custody, or under his or her power or control...is punishable by imprisonment...for two, three or four years."

Cal. Penal Code §273 states that it is a misdemeanor for "any person to pay, offer to pay...money or anything of value for the placement for adoption or for consent to an adoption of a child."

In every instance (except in surrogacy), California has held that regardless of the intent or plan of the adults, a child can be placed by court order only based upon what the court determines is in the child's best interests.

California requires that placement of adopted children must be in the child's best interest, and has established significant procedural safeguards. See, Cal. Fam Code §8600, et seq. Before a court can enter an order of adoption, the court must determine that the "interest of the child will be promoted by the adoption." *Id*. at §8612.

"It is the cardinal rule of adoption proceedings that the court consider what is for the best interests of the child." *In re Laws' Adoption*, 201 Cal. App. 2d 494, 498 (Ct. App. 1962) (citing *Adoption of Barnett*, 54 Cal.2d 370, 377 (1960)). "'The welfare of the child can never be excluded from the issues, no matter what

preliminary action its parent or parents may have taken.'" *Id.* at 501 (quoting, *Ex Parte Barents*, 222 P.2d 488, 492 (1950)).

Indeed, so important is the court's independent evaluation of the best interests of the children when considering the termination of one parent's rights, that "a court cannot enter a judgment terminating parental rights based solely upon the parties' stipulation that the child's mother or father relinquishes those rights." *In re Marriage of Jackson* (2006), 136 Cal. 980, 990.

A judgment based upon a contract or stipulation between parents of minor children is void when the court has not made an independent determination of what is in the child's best interest. See, *Goodarzirad v. Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026 (citing *In re Arkle* (1925) 93 Cal. App. 404, 409, and *Anderson v. Anderson* (1922) 93 Cal. App. 87, 89).

Thus, under California Law, a contract between two adults agreeing to place custody in one or the other is not enforceable, and the child can be placed only based upon a court determination of what is in the child's best interests.

> The legislature finds and declares that it is the public policy of this state to assure that the health, safety and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. Cal. Fam. Code §3020(a).
>
> The only exception to these prohibitions is found in §7962, which authorizes

the termination of the children's rights. As the California Children's Court observed, there is no requirement that there be any determination that the child's best interests be served.

California has no legitimate state interest of any kind, let alone a compelling one, to create a class of children who are deprived of their mothers. The mother-child relationship is intrinsically beneficial to the child and the state has no interest in promoting its destruction and enforcing a plan made before the children were conceived to deprive the children of the benefits of that relationship.

The state has no interest of any kind to enforce, by court order, the placement of a child with an unfit care giver, when the child's mother is ready, willing and able to care for the child.

Most importantly, it is not a legitimate interest of the state to terminate the rights and interests of the children in order to accommodate the desire of a fifty year old Georgia man at the children's expense. The focus of all child rearing, including in California, is on the welfare of the children, not the desire of an adult at the children's expense. This one departure from that commitment violates the children's Equal Protection Rights.

The Statute and the Judgment it produced violates the Equal Protection Rights of the children and the judgment is void. *Fuentes v. Shevin*, 407 U.S. 72 (1972);

Goodarzirad at 1026.

B. §7962 Violates the Substantive Due Process and Equal Protection Rights of Melissa Cook and All Other "Gestational" Surrogate Mothers

1. The Statute Violated the Substantive Due Process Fundamental Liberty Interests of Melissa Cook and Those of Other "Gestational" Surrogate Mothers

(a)

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland, supra*. This is an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting

the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380,398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16.

The U.S. Supreme Court has made it clear that a mere genetic connection to a child is not, by itself, a basis for constitutional protection under the Fourteenth Amendment. It is the relationship which is protected and there is no more important or intimate relationship between two human beings than that between a pregnant mother and the child she carries. Maintaining that relationship is protected as a Fundamental Liberty Interest. *See*, discussion and cases cited *Essentially a Mother,* William and Mary Journal of Women and the Law, Winter, 2007.

It is a *per se* violation of Mrs. Cook's and the children's substantive Due Process liberty interests for California to terminate their rights based upon a document signed before the rights and before the children even existed. As such, the contract would constitute a prospective irrevocable waiver of a future right before Plaintiff knew the facts which demonstrated that surrender of the children to C.M. was harmful to them, before she knew he would not accept legal responsibility for the children, before he demanded abortion of one or more of the children, before she knew he would give them away, and before she had a full understanding and

knowledge of the depths of her bond with, and love for, the children. She revoked that waiver when she understood the actual facts.

In other contexts, the United States Supreme Court has held that a waiver of a constitutional right must be voluntary, knowing, and intelligently made. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Brady v. United States*, 397 U.S. 742, 748 (1970). To be effective, the waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Here we are dealing with the greatest right a mother may have in all of life other than her own right to life itself. The surrogacy contract does not advise the mother that she has rights which she is forever giving up. In fact, all of the language in the contract tells her that she has no rights at all. However, even if the contract made explicit disclosures of all of the rights being waived, the contract could not form the basis to terminate either the rights of the children or their mother. Fundamental rights of a child cannot be waived before the child exists, or be waived by an adult if such waiver, later revoked, was a promise to consent to the termination of their rights to their substantial detriment.

As for Melissa Cook, a waiver of her rights, if that is what the contract is purported to be, was not informed, knowing or intelligent. It was waived before she

had rights to waive. She could not anticipate the facts which subsequently developed. More importantly, she could not waive her right to challenge the constitutionality of the basis of the termination of her rights. In the strictest sense, her "waiver" was not voluntary because her rights were terminated against her will, and by compulsion of a contract applied to events that were unforeseen.

(b)

Melissa Cook has a fundamental liberty interest in not being exploited. Surrogacy embodies deviant societal pressures, the object of which is to destroy her interests as a mother to satisfy the interests of third parties who have personal interests that conflict with those of the mother and her children. Surrogacy exploits women by treating the mother as if she is not a whole woman. It assumes she can be used much like a breeding animal and act as though she is not, in fact, a mother. It demands that she detach herself from her experiences and her bond, love, and sense of duty to herself and her child. It expects a mother to prevent the bonding process despite the fact that this natural process is both physiological as well as psychological. It uses the mother as an object without regard for the harm it can cause her or the children. It allocates all of the risk, guilt, physiological and psychological pain to her and isolates her in her distress by placing the responsibility of termination of the children's rights entirely upon her. 2ER 150-159[Rothman, ¶¶9-

36]. In the process of this exploitation, gestational surrogacy subjects the pregnant mother and the children to significant physical and psychological risks. 2ER 197-203[Caruso].

It was for these reasons that all of Europe bans surrogacy and the European Parliament has recently reaffirmed its condemnation of surrogacy as a human rights violation. European Parliament's Annual Report on Human Rights, Nov. 30, 2015. ("[European Parliament] Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial gain...[as a human rights violation]"). at P. 16.

Such denigration cannot be enforced consistent with Plaintiff's substantive Due Process rights and there is no compelling interest of the state which is advanced by such exploitation and denigration.

2. The Statute Violates the Equal Protection Rights of Melissa Cook and All Other "Gestational" Surrogate Mothers

Plaintiff is a member of a class of pregnant mothers who is denied the same substantive and procedural protections provided by California to women similarly situated.

As a general matter, women who promise, before birth, to surrender their parental rights, enjoy strictly enforced protections. A pregnant mother voluntarily surrendering her rights in an adoption is not bound by an agreement she signs before the birth of the child. Only an agreement signed after she leaves the hospital following the child's birth can be used as a basis to terminate her relationship with the child. Cal. Fam. Code §8801.3(b)(2). Even if the mother signs such a post-birth consent, the mother has thirty days to revoke the consent. Fam. Code §8814.5(a). The mother can request immediate return of the child. Fam. Code §8815(b).

That is the law in all voluntary terminations except for a mother who signed a "gestational" surrogacy agreement before the child is conceived. Because the statute terminates a fundamental liberty, California must demonstrate a compelling state interest to justify the classification. See, II C above.

The purpose of California's refusal to enforce pre-birth agreements is precisely because facts change, the pregnant mother's experience changes, and the mother's understanding of what is best for the children can change. All of those considerations present in voluntary surrender of rights in other contexts, are present for a "gestational" surrogate and in this case.

If, in fact, C.M. paid Melissa Cook for "gestational" services, those "services" were performed at birth. Selling her rights is not a service and the prohibition against

money in exchange for parental rights is just as applicable in this case (where the children need their mother), as it is in other contexts. See, e.g. Cal. Penal Code §181; Cal. Penal Code §273. California's denial of the protection of these laws violate Melissa Cook's Equal Protection Rights.

III. The California Family Court Violated the Procedural Due Process Rights of Baby A, Baby B, and Baby C, and those of Melissa Cook by Entering a Judgment Without a Pre-Judgment Hearing

The complete denial of procedural Due Process is pertinent to questions of whether abstention by a Federal Court is appropriate, an issue discussed in Point IV below.

Judge Pellman involuntarily terminated the rights of the three babies and those of their mother against Melissa Cook's will. The Children's Court refused to give Plaintiff a hearing, refused to consider her Verified Answer and Counterclaim, and denied her a right to produce evidence or witnesses to demonstrate why she was entitled to relief.

In *Santosky v. Kramer*, 455 U.S. 745,(1982) the United States Supreme Court held that a state cannot terminate a parent's rights unless the basis for the termination is proven by clear and convincing evidence.

The termination of Plaintiff's rights does not merely "infringe" her rights, it

ends them. The fact that a private citizen, C.M., sought termination of Mrs. Cook's rights and not the state, is irrelevant. It was the state, through its court, which entered the order of termination and it was incumbent upon the court to adhere to the same standards of Due Process as those required if the state were initiating the termination. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

These substantive rights were terminated without any procedural Due Process. "Due Process...calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The magnitude of the rights being infringed dictates the need for the greatest of protections, especially, as here, the state's interest is essentially non-existent. See, e.g. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Regardless of the standard to be employed, Judge Pellman, enforcing §7962 gave Plaintiff and the children no Due Process of any kind.

> "...[T]here can be no doubt that at a minimum [the Due Process Claim] requires that deprivation of life, liberty or property by adjudication is [an] opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Judge Pellman construed §7962 to mean that C.M. was entitled to proceed as if his petition was uncontested and Plaintiff had no right to be heard regardless of the facts or the unconstitutional deprivation of her rights and those of the children.

The Judge denied Melissa Cook any pre-judgment hearing on her Verified Answer and Counterclaim. This is the plainest and gravest form of a denial of Due Process and the Judgment is void. *Fuentes v. Shevin*, 407 U.S. 67 (1972). It was a separate violation for the court to enter a Judgment of Termination without requiring C.M. to prove the basis for termination by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982); M.L.B. v. S.L.J., 519 U.S. 102 (1996).

IV. This Court has Jurisdiction in this Case, and Abstention is Inappropriate Under Established Controlling Principles

This case is brought under 42 U.S.C. §1983 and the US District Court has original jurisdiction pursuant to 28 U.S.C. §1331 and §1343.

A.

The District Court dismissed the Complaint based upon the *Younger* Doctrine. The fact that there was a pending State Court action on February 2, 2016, when the Federal Complaint was filed, does not strip the District Court of its jurisdiction.

Rooker-Feldman Doctrine, enunciated in *Rooker v. Fid. Trust Co.*, 263 U.S. 413(1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) does not apply to this case, and its import was explained in *Exxon Mobil Corp. v. Saudi Pasic Indus. Corp.*, 544 U.S. 280 (2005), as applying to very narrow circumstances. The mere fact that there was a case pending between M.C. and C.M. in the State Court

(Melissa Cook's Counterclaim was filed on February 1, 2016) when the Federal Complaint was filed on February 2, is completely irrelevant to whether *Rooker-Feldman* deprives the Federal Court of jurisdiction. *Exxon Mobil Corp*. held that the *Rooker-Feldman* Doctrine applies only to "cases brought by State-Court losers complaining of injuries caused by State Court Judgments *rendered before the District Court proceedings commenced and inviting District Court review and rejection of those judgments*." *Exxon Mobil Corp.*, 544 U.S. at 284 (emphasis added). *Rooker-Feldman*, simply put, precludes a litigant to use a Federal Court as an Appellate Court after a State Judgment is entered. *Exxon* explained "neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a State Court reaches judgment on the same or related question while the case remains *sub judice* in a Federal Court." *Id*. At 292. This Court has proper jurisdiction.

B.

The District Court dismissed Appellants' Complaint based entirely upon the Abstention Doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), stating that "The court finds that no exception to *Younger* exists, and thus this court is barred from offering the relief Cook seeks." Dist.Ct. Opin., P.18. This was error. The Court actually states the exact opposite of the *Younger* Doctrine. The Federal District Court is required to exercise its jurisdiction *unless* the case falls within three narrow

exceptions.

In *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989)(*NOPSI*), the U.S. Supreme Court evaluated its prior *Younger* jurisdiction, and itemized three categories of cases that constitute "exceptional circumstances justify[ing] a federal court's refusal to decide a case in deference to the States: (1) ongoing "state criminal prosecutions;" (2) "civil enforcement proceedings;" and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *NOPSI*, 491 U.S. at 368 (citations omitted).

In a unanimous decision, The Supreme Court recently reaffirmed its ruling in *NOPSI*, noting that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging[,]' [and] [p]arallel state court proceedings do not detract from that obligation." *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).) *The Sprint Communications, Inc.* Court emphatically held "that Younger extends to the three 'exceptional circumstances' identified in *NOPSI*, *but no further*." *Sprint Communications, Inc.*, 134 S. Ct. at 594 (emphasis added).

None of the three exceptions to the Court's exercising of its jurisdiction identified in *NOPSI* and *Sprint* exist in this case.

The *Sprint Communications* case stated, in the most powerful of terms, that the District Court is obligated to exercise its jurisdiction. The District Court, in this case, did not even review or mention *Sprint*, and did not abide by its mandates

The District Court mentions *NOPSI* only in passing, and completely misstates its holding. The District Court incorrectly stated that "Describing *Younger* solely in terms of those (three) limitations (identified in *NOPSI*) ignores the current breadth of the doctrine, which counsels abstention where important state issues are at play." In other words, the District Court in this case disagreed with the Supreme Court's ruling in *NOPSI*. By refusing to limit the *Younger* Abstention Doctrine to the three narrow exceptions identified by the Supreme Court in *NOPSI*, the District Court in this case did exactly what the unanimous Court forbade in *Sprint Communications*: the District Court refused to exercise its jurisdiction when the Court was required to do so.

Plainly, there is no underlying state criminal prosecution or civil enforcement proceeding. See, e.g. *Younger*, 401 U.S. 37 (ongoing criminal prosecution) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceeding). This case is also dissimilar from the third exceptional category - civil proceedings which involve orders critical to a state's ability to perform its judicial functions. As the 9th Circuit Court of Appeals explained, such court orders "involve the administration of the state judicial process-for example, an appeal bond requirement, a civil contempt

order, or an appointment of a receiver." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (citations omitted).

In *ReadyLink Healthcare, Inc*., the 9th Circuit held that *Younger* abstention did not apply, because that case, in contrast to cases which involved the administration of a state judicial process, involved "a 'single state court judgment' interpreting an insurance agreement and state law, not the process by which a state 'compel[s] compliance with the judgments of its courts.'" *Id*. at 759 (quoting, *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F. 3d 876, 886 (9th Cir. 2011)). Like *ReadyLink Healthcare, Inc. and Potrero Hills Landfill, Inc.*, the sole order at issue here resulted from a complete lack of Due Process and the Children's Court order has nothing to do with how California State courts compel adherence to their judgments. Accordingly, this case does not involve an order in furtherance of the state's ability to perform its judicial functions, so it does not fall within any of the three exceptional categories of cases which would support the application of *Younger*.

C.

The District Court appears concerned that after this case was commenced, the State Court entered an Order terminating Appellants' rights. However, the fact that the California Children's Court entered a Judgment on February 9, does not bring this case within *Younger*. In fact, that Judgment was the result of a complete denial of

Procedural Due Process that renders the Order, under the circumstances, unconstitutional and void.

The Children's Court did not consider the federal constitutional claims at all, and those issues and the contested claims relating to the issuance of the birth certificates were not actually litigated. As such, there is no preclusive effect to the Children's Court's order, and all the issues raised in the federal court complaint must be litigated in this case. The denial of Due Process is amply set forth above.

The District Court acknowledged that the State Family Court refused to consider the Federal claims. However, the District Court held that because there is a theoretical possibility that a higher court may remand the case back to Judge Pellman to consider the Federal claims, the Federal Court must abstain. 1ER 26[Dist.Ct. Opinion, P.21].

It is an incorrect notion that a competent Federal Court with jurisdiction over substantial Federal Constitutional claims must get out of the way, and leave for a State Court the Federal questions which that Court refused to address, which denied all semblance of Due Process and which is ill equipped to determine the Federal law. If there is a remand by a higher State Court, it will go back to the Family Court Judge again, a court which did not grasp the fact that Appellants had Federal claims in the first place.

The Order entered by the Family Court in this case, was unconstitutional by virtue of the complete lack of Procedural Due Process. It is not simply that the State Court erred on the merits of the case, the Family Court never decided the issues and never provided any Due Process. Under such circumstances, the Order, for the Court's purposes, is void. *Shevin v. Fuentes*, 407 U.S. 67 (1972).

That Order is entitled to no deference.

Pursuant to 28 U.S.C. §1738, Federal Courts are required to give full faith and credit to state court judgments, and to render "the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chem. Const. Corp*., 456 U.S. 461, 466 (1982). However, "the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue." *Id*. at 480-81 (quoting, *Allen v. McCurry*, 449 U.S. 90, 95 (1980)). "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Id.* at 481 (quoting, *Montana v. United States*, 440 U.S. 147, 164, n.11 (1979)). A State must "satisfy the applicable requirements of the Due Process Clause. *A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and*

credit to such a judgment." *Id*. At 482 (emphasis added).

Under California law, if five requirements are met, "relitigation of an issue of law or fact" is barred. *ReadyLink Healthcare, Inc.*, 754 F.3d at 760. One of those five requirements is that the issue sought to be precluded "must have been actually litigated in the former proceeding." *Id*. at 760-61 (emphasis added) (quoting, *Lucido v. Superior Court*, 795 P.2d 1223, 1225 (1990) (en banc). To be "actually litigated," the parties must have been given "the opportunity to present full cases." *Id*. at 761 (quoting, *Lucido*, 795 P.2d at 1225).

In this case, although the constitutional claims and issues relating to the constitutionality of the Surrogacy Statute and issuance of birth certificates were raised in Melissa Cook's Verified Answer, Separate Defenses, and Counterclaim, the Children's Court refused to consider those pleadings before entering the final order, treating C.M.'s Petition as if it were uncontested and as if Melissa Cook wanted her rights terminated. Melissa Cook was not permitted to introduce witnesses, and the court flatly refused to consider the best interests of the children, stating that such considerations were "irrelevant" and "none of the Court's business." Therefore, none of the issues surrounding the Children's Court's order was "actually litigated," so the order has no preclusive effect, and the District Court's ability to consider the issues before it is not constrained by the Children's Court's constitutionally infirm order.

The District Court relies heavily upon *Moore v. Sims*, 442 U.S. 415 (1979) mainly for the proposition that the Plaintiff had to show "exceptional circumstances" that threatened the Plaintiff's rights before the Federal Court may exercise its jurisdiction.

Yet, that is the very position that the Supreme Court found to be error in *NOPSI*. The *NOPSI* Court emphatically stated:

> It has never been suggested that Younger requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States. *Colorado River Water Conservation Dist. v. United States*, 424 U.S., at 817, 96 S.Ct., at 1246; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 U.S. 1, 25, 103 S.Ct. 927, 942, 74 L.Ed.2d 765 (1983); cf. *Moore v. Sims, supra*, 442 U.S., at 423, n. 8, 99 S.Ct., at 2377, n. 8.

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368, 109 S. Ct. 2506, 2518, 105 L. Ed. 2d 298 (1989).

The District Court's reliance upon *Moore*, is the result of misconstruction of *Moore*.

Moore v. Sims states:

> Appellants argue that the Federal District Court should have abstained in this case under the principles of *Younger v. Harris, supra*. The Younger doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and

> immediate irreparable injury to the federal plaintiff. *Samuels v. Mackell*, 401 U.S. 66, 69, 91 S.Ct. 764, 766, 27 L.Ed.2d 688 (1971). That policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman v. Pursue*, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), the basic concern—that threat to our federal system posed by displacement of state courts by those of the National Government—is also fully applicable to civil proceedings in which important state interests are involved. *As was the case in Huffman, the State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in Huffman, "in aid of and closely related to criminal statutes*." *Id*., at 604, 95 S.Ct., at 1208.

(emphasis added) *Moore v. Sims*, 442 U.S. 415, 423, 99 S. Ct. 2371, 2377, 60 L. Ed. 2d 994 (1979).

Thus, the reason *Moore* abstained was because that case, unlike this one, fell into one of *NOPSI's* three exceptions. *Moore* was a case in which the state was in the process of protecting young children from criminal abuse. The state of Texas took custody of the children and the state action was in aid of and closely related to criminal statutes. This case has none of the indicia of the three *NOPSI-Sprint* exceptions to the court's exercise of its jurisdiction.

The District Court further erred in its analysis. For instance, in finding that California had "important state interests," the District Court stated that it thought that "Cook is asking this court to redefine parenthood under state law, and surely no area of law is of greater interest to the state than that devoted to the domestic realm." 1ER 26[Order and Opinion of June 6, 2016, P.21].

Cook seeks no such thing. She does not ask this Court to redefine motherhood at all. She is, as a matter of fact, the biological mother of the babies, and under California law, she is the mother who is recognized as the legal mother of the children. *See*, Point I, Pp. 23-25, *supra*. She simply wants to assert her parental rights which the state recognizes and attacks the constitutionality of the statute which enforces termination of her rights and those of the children. No court can possibly say that the state has an "important" and legitimate interest in enforcing a plan in advance of conception that deliberately deprives a child of a mother; that the state has a legitimate interest in creating a class of women as breeders, and a class of motherless children; that the state has any semblance of an interest, legitimate or otherwise, to provide women to be used by a man in Georgia to procreate for him; or any interest in providing children to a single man who is unable to raise them. There are no "important state interests" here, and even if there were, that fact would be relevant to the constitutional analysis of whether those interests were sufficiently compelling to force termination of the children's rights and those of their mother.

The Court also thought that because this case involves parental rights, that the "Domestic Relations" exception to federal jurisdiction would apply. However, the overwhelming majority of Circuit Courts which have addressed the issue directly, including the Ninth Circuit, have held that the domestic relations exception applies

only to diversity cases, not federal-question cases. *See, Flood v. Braaten,* 727 F.2d 303, 307 (3'rd Cir. 1983); *AGG v. Flanagan*, 855 F.2d 336, 339 (6th Cir. 1988); *Atwood v. Fort Peck Tribal Court Assiniboine,* 513 F.3d 943, 945 (9th Cir. 2007); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997); *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997).

In reaching its conclusion that the state had an important state interest to protect, the District Court relied, in part, upon *Gilbertson v. Albright*, 381 F.3d 965 (9th Circuit 2004)(*en banc*). The facts and reasoning of that case are inapplicable to this one.

When Appellants filed their Complaint in the Federal Court in this case, they did not seek to enjoin the Court or enjoin court proceedings. It was a straight §1983 action seeking to enjoin state actors. In *Gilbertson*, the state was a party to the action in question. That is not the case here. The Plaintiff in *Gilbertson* was objecting to the state's pursuit of legitimate state interests in the context of the exercise of government actions uniquely that of the state. In this case, a private citizen, C.M. was attempting to use an unconstitutional statute to compel the termination of the rights of the children and their mother.

The *Gilbertson* Court emphasized that for *Younger* to apply there must be an adequate opportunity in the state proceeding to litigate the constitutional challenges.

Gilbertson at 973.

There was no opportunity afforded Appellants to present the constitutional claims at all, and by no means could it be said that Judge Pellman provided an "adequate opportunity" to litigate. Even the District Court recognized that fact.

CONCLUSION

The Motions to Dismiss filed by the County State Defendants, Dr. Karen Smith, and the Hospital Defendants must be denied. The Motion to Dismiss filed on behalf of Governor Brown, should be granted as unopposed.

Plaintiffs-Appellants request oral argument. This case involves questions of first impression concerning important constitutional issues.

Dated: January 11, 2017

Respectfully Submitted,
THE CASSIDY LAW FIRM
Harold J. Cassidy* (NJ SBN: 011831975)
By: /s/ *Harold J. Cassidy*
Harold J. Cassidy
*Admitted Pro Hac Vice

BUCHALTER NEMER, P.C.
Robert M. Dato (SBN: 110408)
By: /s/ *Robert M. Dato*
Robert M. Dato

Michael W. Caspino (SBN: 171906)
By: /s/ *Michael W. Caspino*
Michael W. Caspino

INDEX TO ADDENDUM

West's Annotated California Codes
Family Code (Refs & Annos)
Division 12. Parent and Child Relationship (Refs & Annos)
Part 7. **Surrogacy** and Donor Facilitators, Assisted Reproduction
Agreements for Gestational Carriers, and Oocyte Donations (Refs & Annos)

Effective: January 1, 2017

West's Ann.Cal.Fam.Code § 7962

§ 7962. Assisted reproduction agreements for gestational carriers; requirements; actions to establish parent-child relationship; rebuttal of presumptions; judgment or order; confidentiality; presumption of validity

Currentness

(a) An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information:

(1) The date on which the assisted reproduction agreement for gestational carriers was executed.

(2) The persons from which the gametes originated, unless donated gametes were used, in which case the assisted reproduction agreement does not need to specify the name of the donor but shall specify whether the donated gamete or gametes were eggs, sperm, or embryos, or all.

(3) The identity of the intended parent or parents.

(4) Disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns. If health care coverage is used to cover those medical expenses, the disclosure shall include a review of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the gestational carrier, third-party liability liens or other insurance coverage, and any notice requirements that could affect coverage or liability of the gestational carrier. The review and disclosure do not constitute legal advice. If coverage of liability is uncertain, a statement of that fact shall be sufficient to meet the requirements of this section.

(b) Prior to executing the written assisted reproduction agreement for gestational carriers, a surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing.

(c) The assisted reproduction agreement for gestational carriers shall be executed by the parties and the signatures on the assisted reproduction agreement for gestational carriers shall be notarized or witnessed by an equivalent method of affirmation as required in the jurisdiction where the assisted reproduction agreement for gestational carriers is executed.

(d) The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.

(e) An action to establish the parent-child relationship between the intended parent or parents and the child as to a child conceived pursuant to an assisted reproduction agreement for gestational carriers may be filed before the child's birth and may be filed in the county where the child is anticipated to be born, the county where the intended parent or intended parents reside, the county where the surrogate resides, the county

where the assisted reproduction agreement for gestational carriers is executed, or the county where medical procedures pursuant to the agreement are to be performed. A copy of the assisted reproduction agreement for gestational carriers shall be lodged in the court action filed for the purpose of establishing the parent-child relationship. The parties to the assisted reproduction agreement for gestational carriers shall attest, under penalty of perjury, and to the best of their knowledge and belief, as to the parties' compliance with this section in entering into the assisted reproduction agreement for gestational carriers. Submitting those declarations shall not constitute a waiver, under Section 912 of the Evidence Code, of the lawyer-client privilege described in Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

(f)(1) A notarized assisted reproduction agreement for gestational carriers signed by all the parties, with the attached declarations of independent attorneys, and lodged with the superior court in accordance with this section, shall rebut any presumptions contained within Part 2 (commencing with Section 7540), subdivision (b) of Section 7610, and Sections 7611 and 7613, as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.

(2) Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers, the court shall issue a judgment or order establishing a parent-child relationship, whether pursuant to Section 7630 or otherwise. The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633. Subject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the **surrogacy** agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. Upon motion by a party to the assisted reproduction agreement for gestational carriers, the matter shall be scheduled for hearing before a judgment or order is issued. Nothing in this section shall be construed to prevent a court from finding and declaring that the intended parent is or intended parents are the parent or parents of the child where compliance with this section has not been met; however, the court shall require sufficient proof entitling the parties to the relief sought.

(g) The petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition filed in the office of the clerk of the court pursuant to this part shall not be open to inspection by any person other than the parties to the proceeding and their attorneys and the State Department of Social Services, except upon the written authority of a judge of the superior court. A judge of the superior court shall not authorize anyone to inspect the petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, or power of attorney or deposition, or any portion of those documents, except in exceptional circumstances and where necessary. The petitioner may be required to pay the expense of preparing the copies of the documents to be inspected.

(h) Upon the written request of any party to the proceeding and the order of any judge of the superior court, the clerk of the court shall not provide any documents referred to in subdivision (g) for inspection or copying to any other person, unless the name of the gestational carrier or any information tending to identify the gestational carrier is deleted from the documents or copies thereof.

(i) An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.

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(s) Harold J. Cassidy

Attorney for Plaintiff-Appellant Melissa Cook

Dated: January 11, 2017

9th Circuit Case Number(s) 16-55968

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