Case No:
B270525

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

C.M.,
Plaintiff and Respondent,
v.
M.C., etc., et al.,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT FOR LOS ANGELES COUNTY
HON. AMY PELLMAN, JUDGE • NO. BF054159

APPELLANTS' OPENING BRIEF (REDACTED)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION

Case Name: **C.M. V. M.C.**, ETC., ET AL. Court of Appeal No: **B270525**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c) & 8.498(d))

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Full Name of Interested Person / Entity	Party	Non-Party	Nature of Interest
None.			

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent of more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(d)(2).

Attorney Submitting Form	Parties Represented
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/s/ Robert M. Dato (Signature of Attorney Submitting Form)	June 7, 2016 (Date)

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INTRODUCTION

M.C., the mother of three babies born prematurely on February 22, 2016, appeals from a judgment dated February 9, 2016, terminating M.C.'s constitutionally protected relationship with her three children, and terminating the rights of the children.

This case involves one of the most egregious examples of a complete denial of Due Process, deprecating some of the most important substantive Due Process rights of newborn children and their mother.

The Court awarded sole parentage to C.M., a single 50-year-old man who lives in Georgia, who is unable to care for three children, who stated that he planned to give at least one child to a stranger in an adoption.

M.C. sought custody of the children based upon their best interests. The trial court construed Family Code §7962 to mean that a "gestational surrogacy" contract signed two and a half months before the children were conceived, and their protected relationship with their mother existed, operated as a complete waiver of all constitutional rights of the children and M.C.

Consequently, the Court denied M.C. and the children a pre-judgment hearing.

In refusing to hear any facts, evidence, legal argument or consider M.C.'s Answer and Counterclaim, the trial court stated from the bench:

> "… what is going to happen to these children once they (Baby A, Baby B, and Baby C) 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." (RT 16:3-6.)

M.C.'s Verified Answer denied the essential factual allegations of the Petition, and her Separate Defenses and her Verified Counterclaim established that enforcement of §7962 violated the children's and M.C.'s Equal Protection

and Due Process Rights guaranteed under the Fourteenth Amendment of the United States Constitution.

M.C. gave birth to the three babies on February 22, 2016, by an emergency Caesarean Section, in Kaiser Hospital in Panorama City, California. The three baby boys were 28 weeks old post-conception on the day of their birth and were not released from the hospital until April 20.

M.C. asserts that California's Gestational Surrogacy Statute violates the Substantive Due Process Rights of Baby A, Baby B and Baby C, violating their Fundamental Liberty Interests in their relationship with their mother; and the children's Due Process Liberty Interest to be free from commodification and state sanctioned and state enforced purchase of their familial rights, interests and control over their persons.

Under California's Gestational surrogacy Statute, children are purchased and placed with an adult designated as the so-called "intended" parent regardless of whether that adult is capable of properly raising or caring for the children, or whether such placement is in the best interests of the children; and regardless of whether their mother, who seeks to protect their welfare, is better able to care for the children and wishes to do so.

Among the constitutional issues of first impression is the Statute's violation of the children's Equal Protection rights. California refuses to place children of surrogate mothers based upon what is in their best interests, as it does for all other children in all other disputed situations. The California Statute has been construed to mean that it does not matter that placement with the "intended" parent is harmful to the children, and the children cannot be placed based upon their best interests.

This case also presents substantial Federal Constitutional issues involving issues of first impression concerning M.C.'s own Fundamental Due

Process Liberty Interests in her relationship with her three children she carried, and her Liberty Interests in not being exploited. The Statute also violates her Equal Protection Rights.

C.M. lives with two elderly parents, and his mother is bedridden requiring daily nursing care. When C.M. started demanding that M.C. abort one or more of the babies, he and the surrogacy broker stated that C.M. wanted an abortion because he was a single, fifty year old man who is deaf. He could not care for them. M.C. subsequently learned that he probably cannot speak and his elderly father, who owns the home in which C.M. lives, has stated that no babies can be brought into his home.

When C.M. first announced that he could not take care of three children, M.C. stated that she would help raise them. When C.M. demanded an abortion of one child, M.C. offered to take custody of that child. C.M. has insisted that he will surrender a child to a stranger in an adoption.

The judgment, entered without affording M.C. and the children a prejudgment hearing is void and cannot be enforced because it violates their Due Process Rights.

M.C. has bonded with the babies and they have bonded with her. Continued separation of M.C. and the three children is harmful to the children.

As expressed below, M.C. seeks vacation of the judgment, and remand for prosecution of her Counterclaim, which asserts in part: (1) she is, in fact, the mother of Baby A, Baby B, and Baby C, and she is the legal mother of the three children; (2) there is no legal basis under California law to terminate her rights since C.M. is not an "intended parent" within the definition of Family Code §7962 and §7960(c); (3) C.M.'s repeated statement that he is incapable of raising the children and will not accept legal responsibility for caring for the children requires a full hearing, following expedited discovery, to place the

children based on their best interests; (4) the "gestational surrogacy" contract cannot form the basis to terminate the rights of M.C. for the purpose of putting one or more children up for adoption; (5) that Family Code §7962 violates both the Due Process and Equal Protection rights of Baby A, Baby B, and Baby C and M.C. as it is applied to them and on its face; (6) that the Court violated the procedural Due Process Rights of the three children and those of M.C. by refusing to grant a proper hearing, failing to consider their Answer and Counterclaim, and failing to make findings of fact based upon clear and convincing evidence; and (7) that M.C. did not receive competent independent counsel required by §7962.

STATEMENT OF FACTS

A. Events Before the Court Proceedings of February 8 & 9, 2016

Appellant M.C. is 48 years old. See, Verified Answer and Counterclaim (AA, ex.2, p.53, ¶1). Surrogacy International (hereafter "S.I.") is a California surrogacy broker which solicited Appellant to act as a surrogate for C.M., a single fifty year old man. M.C. has never met C.M. or spoken with him on the telephone. (AA, ex.2, p.54, ¶¶4-5.) 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. (AA, ex.2, p.54, ¶¶6-7.) C.M. does not speak. See, Affidavit of Eduardo C. Alford ("Alford"). (AA, ex.5, p.144, ¶7.) C.M. is a postal worker who has stated that he is not capable of raising three children. (AA, ex.2, p.54, ¶8.) 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. (AA, ex.2, pp.54-55, ¶9.)

S.I. is partly owned and operated by an attorney, Robert Walmsley, who drafted the 75-page surrogacy contract signed by M.C. 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 M.C. 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. M.C.'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. (AA, ex.2, p.55, ¶10.)

On April 16, 2015, a month and a half before the surrogacy contract was signed, C.M. sent Appellant an email acknowledging that there could be three children born and he was committed to accept responsibility to raise all three. (AA, ex.2, p.55, ¶11.) That August, when Appellant was pregnant following the triple embryo transfer, C.M. again wrote "We might get three embryos successfully hook up [*sic*]." (AA, ex.2, p.55, ¶11.)

On June 13, M.C. started a drug regimen required by the surrogacy contract to prepare her body to accept the embryo transfers. That drug regimen and the fertility techniques used in surrogacy arrangements, posed significant risks to M.C. and the children. (AA, ex.2, p.56,¶¶14-16; Declaration of Anthony Caruso, M.D. [hereafter "Caruso"], 2RJN, ex.8, pp.386-392, ¶¶6-27.) At the request of C.M., the three embryos transferred on August 17, 2015, were all male. (AA, ex.2, p.58, ¶26.) On August 31, it was determined that all three were viable. (AA, ex.2, p.57, ¶25.)

On September 16, 2015, C.M. first mentioned an abortion. (AA, ex.2, p.58, ¶27.) On September 17, C.M. sent an email to Fertility Institute, which monitored M.C.'s pregnancy:

> "Please try to make her (M.C.'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." (AA, ex.2, p.58, ¶28.)

On September 18, the infertility clinic wrote to C.M., stating that because the pregnancy was such a high risk, M.C. had to be seen each week, noting that the risk came with C.M.'s decision to request that three embryos be transferred. (AA, ex.2, p.58, ¶29.) That same 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 [M.]'s health. *I do not have any more money in the bank, and my job does not pay great biweekly.*" (Emphasis added.) (AA, ex.2, p.58, ¶30.)

M.C. became anxious as she began to realize that C.M. was not capable of properly caring for the children. (AA, ex.2, p.59, ¶¶33-36.) In mid-September, C.M. began to demand that M.C. have an abortion of at least one of the three babies because he was incapable of raising them. (AA, ex.2, pp.59-60, ¶37.)

When she saw that C.M. could not raise the children, on September 21, Appellant 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." (AA, ex.2, p.59, ¶33.)

In response, C.M. wrote, "I said I always would want twin babies." (AA, ex.2, p.59, ¶34.) Appellant 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. (AA, ex.2, p.59, ¶35.) In April, 2015, C.M. had told Appellant that he would want her to care for the children for a few weeks after birth. (Declaration of M.C. in Opposition to Motions to

Dismiss [hereafter, "M.C. Declaration"], 2RJN, ex.7, p.342.) In September, she first realized that he may not be able to care for them at all. (AA, ex.2, p.59, ¶36.)

On September 22, 2015, in response to C.M.'s email earlier in the day, Appellant wrote to him:

> "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*." (Emphasis added.) (AA, ex.2, p.59, ¶36.)

C.M. wrote to Appellant that day stating 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.) (AA, ex.2, pp.59-60, ¶37.)

On September 23, M.C. advised C.M. that she would not "abort any of them...I am not having an abortion. They are all doing just fine." (AA, ex.2, p.60, ¶38.)

Thereafter, C.M. and Walmsley tried to convince Appellant that she was obligated to abort one of the babies. 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.

On September 24, Walmsley wrote to Lesa Slaughter, an attorney who was supposed to review the contract with Appellant, 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." (AA, ex.2, p.61,¶46.)

Later C.M stopped emphasizing his poverty and made an argument that carrying all three children to term would risk the health of the children. M.C. continued to refuse to abort any of the babies. On October 28, C.M. mentions, in an email, that he may "start looking agencies [*sic*] for adoptive parents." On November 12, Appellant 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 Appellant's offer to raise the third child, C.M. wrote that he "would encourage" her to "consider selection reduction [*sic*]." (AA, ex.2, p.60,¶¶39-42.)

On November 16, 2015, C.M. wrote to Appellant and advised her that "*I had decided, after looking at all issues, to pursue reduction*." (Emphasis added.) C.M. failed to acknowledge that M.C. offered to raise the third child. He added that "*I know my decision is not welcomed* to you [*sic*] but I hope you understand. ..." (Emphasis added.) On November 24, C.M. wrote to M.C. and stated: "*My decision made is, requires a selection reduction* [*sic*]. I am so sorry." On November 27, C.M. wrote to M.C. again stating "*I made my decision which is best. ...*" (Emphasis added.) (AA, ex.2, pp.60-61,¶¶43-44.)

On November 20, C.M.'s attorney (Walmsley) wrote to M.C. 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." Walmsley stated M.C. would be liable for C.M.'s mental distress "because of your decision not to honor his request for reduction." (AA, ex.2, pp.61-62,¶48.) On November 13, Slaughter, being paid by C.M., wrote to M.C. and advised her, incorrectly, that C.M. had a right to demand an abortion and she was liable if she refused. (AA, ex.2, 2, ¶49.)

In late November 2015, M.C. learned for the first time that S.I. and Walmsley admitted that they never did a home study of C.M.'s living arrangement. (AA, ex.2, pp.54-55, ¶9.) Appellant 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. (AA, ex.2, p.62, ¶¶50-51.)

Throughout the pregnancy, M.C. bonded with the children and the children bonded with her. The relationship between mother and child during the pregnancy was greatly beneficial to the children, and destruction of the bond and relationship between them is harmful to the children. (AA, ex.2, pp.65-70, ¶¶65-80); Declaration of Alma Golden, M.D. (hereafter "Golden") (RJN, ex.5, pp.228-254, ¶¶11-51.) A mother provides an essential benefit throughout the early and late stages of childhood. (AA, ex.2, pp.70-77,¶¶81-97); Declaration of Miriam Grossman, M.D. (hereafter "Grossman") (2RJN, ex.5, pp.276-289, ¶¶9-45); Golden, *supra*. The breaking of the bond between M.C. 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 employed by the trial court enforcing the contract 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. (AA, ex.2, pp.77-78,¶¶100-104.) The use of a woman as a so-called gestational carrier is extremely exploitative of her, treating her in an inhumane manner. The institution of surrogacy is intrinsically exploitive and harmful to the woman as well as the child. (Declaration of Barbara K. Rothman, Ph.D. [hereafter "Rothman"], 2RJN, ex.9, pp.406-415, ¶¶9-37.)

B. Factual Events Following Court Proceedings of February 8 & 9, 2016

On February 9, 2016, the trial court entered a judgment based upon a petition claiming to be uncontested, which contained sworn statements that M.C. wanted her rights terminated, when that fact was known to be false.

Following the proceedings of February 9, M.C. gave birth on February 22, 2016, by an emergency Caesarean section. The babies were only 28 weeks post conception. That day, Kaiser Hospital took it upon itself to enforce the trial court's judgment. As the hospital personnel removed each baby from M.C.'s womb, they refused to even allow M.C. 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 M.C. from seeing the children. The security guards kept track of everyone who visited Appellant and required that visitors show identification. (Declaration of M.C. in support of Opposition to Motions to Dismiss ["M.C. Declaration"], 2RJN, ex.7, pp.331-332, ¶¶53-57.)

C.M. stayed in Georgia while the children were in the hospital for eight weeks. (Declaration of C.M. in Opposition to Petition for Writ of Supersedeas [hereafter "C.M. Declaration"], p.5.) The entire experience was dehumanizing

to M.C., 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. (M.C. Declaration, 2RJN, ex.7, p.332, ¶¶58-59.) Shortly after February 9, M.C. filed a notice of appeal, and on March 30, M.C. filed a petition for writ of supersedeas. Within a couple of hours, this court issued an order temporarily staying the judgment. Despite that stay, Kaiser continued to refuse Appellant's requests to visit the children. (Declaration of Michael W. Caspino in Support of Opposition to Motions to Dismiss [hereafter "Caspino Declaration"], 2RJN, ex.10, pp.455-456, ¶¶17-22.) On April 6, the trial court refused to entertain an ex parte application to allow her to visit the children. (Caspino Declaration, 2RJN, ex.10, p.456, ¶20.) On April 14, this court denied the supersedeas petition and vacated the stay order. (Caspino Declaration, 2RJN, ex.10, p.456, ¶22.)[1]

PROCEDURAL HISTORY

A. Initial Pleadings and Proceedings

Despite the fact that M.C. has filed two separate complaints and multiple applications in state courts, those courts have refused to consider her complaints and refused to give her a hearing. The proceeding resulting in a judgment entered on February 9, 2016, terminating her rights and those of the children had proceeded on a petition for an uncontested termination despite M.C.'s complaint in civil court, and her verified answer, affirmative defenses and counterclaim filed in Children's Court in response to C.M.'s petition.

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[1] The judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a). (See Cal. Rules of Court, Rule 8.204(a)(2)(B).)

On January 4, 2016, M.C. filed a complaint in the Van Nuys Superior Court on her own behalf and on behalf of the three children. (Complaint, *M.C. v. C.M.* (LC103726), 1RJN, ex.1, pp.2-47.) That complaint sought a declaration that California's Gestational Surrogacy Statute was unconstitutional as violative of the rights of M.C. and the three children she carried in utero, and Appellant sought custody based on the best interests of the children. It also sought relief under state law. (1RJN, ex.1, pp.2-47.) It was served on C.M. at his home in Georgia on January 5, 2016. (AA, ex.5, pp.144-145; M.C.'s Declaration of Notice Regarding *Ex Parte* Hearing [hereafter "*Ex Parte* Notice"], 1RJN, ex.2, p.52.) 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 M.C.'s parental rights. Notice was given to C.M.'s attorney, Robert Walmsley, who appeared. (*Ex Parte* Notice, 1RJN, ex.2, pp.49-50.)

Despite the fact that C.M. was served with M.C.'s complaint on January 5, and that he was notified of the ex parte hearing on January 6, Mr. Walmsley filed a petition (BF054159), which represented that C.M.'s petition was uncontested and that M.C. wanted her parental rights terminated. ("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"]; AA, ex.1, p.23.) C.M. also submitted a "stipulation for entry of judgment" which stated: "The parties further agree that the Court make the following orders: [redacted]" (AA, ex.1, p.25), and a "Declaration for Default or Uncontested Judgment" which stated "the parties have stipulated that the matter may proceed as an

uncontested matter." (AA, ex.1, p.33.) The form of judgment submitted stated that the case was uncontested. (AA, ex.1, pp.35-36; pp.37-43.) Those false representations were made at a time when C.M. and Walmsley knew that M.C. contested placement of the children with C.M. (Alford, AA, ex.5, pp.144-145; *Ex Parte* Notice, 1RJN, ex.2, pp.49-50.)

C.M.'s Petition states: "[redacted]" (AA, ex.1, p.7, ¶12.) That statement was false. C.M. also signed a declaration stating that he believed that M.C. was willing to relinquish her parental rights. (AA, ex.1, p.16, ¶10.) C.M. knew that was a false statement based upon communications with M.C. and he and his attorney were assured that M.C. did not want her and the children's rights terminated in discussions with one of M.C.'s attorneys as early as November 30, 2015. (Declaration of Harold J. Cassidy in support of Motion for Reconsideration, 1RJN, ex.5, pp.309-311, ¶¶4-14.)

The trial court scheduled a proceeding for entry of an uncontested judgment terminating the rights of M.C. and the children for February 9, 2016. (AA, ex.4, p.141.) On January 7, the Honorable Russell Kussman struck M.C.'s complaint in civil court and instructed her to file her complaint in family court. (1RJN, ex.3, pp.108-111.)

On February 1, M.C. filed her verified answer to C.M.'s petition, affirmative defenses, and verified counterclaim. (AA, ex.2, pp.45-111.) M.C.'s verified answer denied the essential allegations of the petition, denying that M.C. wanted her rights terminated, and sought placement of the children based upon their best interests.

M.C.'s verified counterclaim contained twelve causes of action, seeking among other things: (a) declaratory judgment that M.C. is the legal mother of Baby A, Baby B, and Baby C; (b) declaratory judgment that Family 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 Family Code §7962 violates the Due Process and Equal Protection rights of Appellant 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 M.C.'s parental rights and the children's relationship with their mother; (e) preliminary and permanent Injunction, for among other things, prohibiting C.M. from removing the children from California; and (f) an order awarding immediate legal and physical custody of Baby C to M.C. and scheduling a hearing to place Baby A and Baby B based on their best interests. Under these circumstances, C.M.'s Petition could not be processed as an uncontested involuntary termination of Appellant's rights under §7962(e) and (f).

The day after filing her verified answer, affirmative defenses, and counterclaim, M.C. filed her complaint in federal district court for the Central District of California.

B. The Proceedings in Children's Court on February 8 and 9, 2016

After filing her verified answer, affirmative defenses and verified counterclaim on February 1, M.C. filed an ex parte application on February 4, seeking a continuance of the uncontested hearing scheduled for February 9. (AA, ex.3, pp.113-126.) That ex parte application disclosed that M.C. 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." (AA, ex.3, pp.115-126.)

The need for a continuance was made obvious. The relief sought by C.M. could not be granted as if it was uncontested, and could not be obtained without the court litigating the facts and legal issues raised by M.C. The facts and legal contentions of M.C. and the children were clearly set forth in the application. (AA, ex.3, pp.122-125.)

The trial court scheduled the hearing on the ex parte application for February 8. The court (Judge Amy Pellman) denied M.C.'s application for the continuance. The trial court then summarily ruled that C.M. was entitled to a judgment terminating the relationship between the three children and M.C. (RT 9:14-12:17.) The trial court proceeded as if the petition was uncontested, thus proceeding on the papers without requiring C.M. to appear, and held that all C.M. had to show in addition to what was in his petition, was that M.C. had legal counsel before the contract was signed. (AA, ex.8, p.167.)

The court demonstrated that it was not familiar with the contents of the ex parte application. The court stated it 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 the court clerk on February 1. (RT, 16:9-18:2; 25:26-26:5.)

Because the trial court had already decided that C.M. was entitled to a judgment based upon his uncontested petition, it barred M.C. from producing any evidence. (RT 14:11-18:6.) Counsel for M.C. asked if the court would take any evidence on M.C.'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 . . . . [It is] not relevant to my particular hearing." (RT 14:26-15:3.)

When counsel asked whether the well-being of the children was going to be considered (RT 15:6-9), the court 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.) (RT 16:3-6.)

The court observed a best interests determination is required in other actions, but "surrogacy" is an exception. (RT 16:6-8.)

The entire case was resolved in a summary disposition, without discovery, evidence, the opportunity to present M.C.'s case, and without C.M. being required to answer the allegations of the answer and counterclaim. M.C.'s attorney, Mr. Caspino, inquired: "I ask how the court is going to dispose of our counterclaim." (RT 16:9-10.)

The court then admitted that the entire case was disposed without the Court even knowing that there was a verified answer and counterclaim filed. (RT 16:11-18:2.) On February 9, Mr. Caspino advised the trial court that on February 8, the court clerk admitted that the verified answer and counterclaim were indeed in the court's file. (RT 25:26-26:2.) He again asked the Court: "May I inquire as to how the court is handling our counterclaim." (RT 26:3-5.)

Mr. Caspino argued that the court could not rule on termination without first addressing the factual and legal issues raised by M.C.. (RT 27:10-22.) The court refused to consider the verified answer and counterclaim, stating that it was only dealing with a "petition to determine parentage. That's it." RT 28:1.) The verified answer and cunterclaim demonstrated why the court could not enter such an order based upon both state and federal law, but the court refused to consider them. The court insisted that the hearing on C.M.'s

uncontested petition conclude before she addressed the counterclaim. (RT 84:22-24.) Judge Pellman then ruled that C.M. established the last missing fact on his uncontested petition. (RT 89:1-6.) The court then stated:

> "And so, therefore, the court denies, if there are counterclaims ...the court denies them." (RT 89:10-12.)

It appears that the court never read or knew the contents of the verified answer and counterclaim. The Court never explained the basis for the "denial," or whatever "denial" was intended to be or mean, and then entered the judgment terminating the rights of the three children and those of M.C. (RT 89:10-91:16.)

The court signed the form of the order for an uncontested proceeding originally submitted by Mr. Walmsley with the uncontested petition. That order did not recite that M.C. opposed the petition, or that she filed a verified answer and counterclaim. It did not even recite that Mr. Caspino appeared on behalf of M.C. 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. (Compare AA, ex.1, pp.37-43 with AA, ex.9, pp172-178.) The judgment states, contrary to the actual facts, as admitted by C.M. and as attested to by M.C., 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." (AA, ex.9, p.174, ¶4.)

That "finding" was factually incorrect, ignoring the sworn statement of M.C. and the admissions of C.M.

M.C. filed a notice of appeal on February 23, 2016. (AA, ex.10.) On March 30, 2016, M.C. filed a petition for writ of supersedeas. Within a couple of hours of its filing, this court issued an order temporarily staying the judgment and enjoined the parties from removing the children from California. Despite that stay, Kaiser continued to refuse M.C.'s requests to visit the children. (Caspino Declaration, RJN, ex.10, pp.455-456, ¶¶17-22.)

On April 6, the trial court refused to entertain an ex parte application seeking an order to allow M.C. to visit the children pending the supersedeas petition in this court. (Caspino Declaration, RJN, ex.10, p.456, ¶20.) On April 14, this court denied M.C.'s supersedeas petition and vacated the stay order. The three children remained in the hospital for eight weeks without them being permitted to have the comfort and nurture of their mother. C.M. admitted that he stayed in Georgia throughout the children's entire eight week stay in the hospital except for three days. (Declaration of C.M. in Support of Opposition to Petition for Writ of Supersedeas, p.5.) C.M. took the children to Georgia on or about April 20 or 21.

LEGAL ARGUMENT

Point I

The Trial Court Violated the Procedural Due Process Rights of Baby A, Baby B, and Baby C, and those of M.C. Guaranteed Under the Fourteenth Amendment of the United States Constitution as Well as Those Guaranteed by the Constitution of the State of California

The trial court terminated the rights of the three babies and those of their mother against M.C.'s will. It was an involuntary termination. The trial court refused to give M.C. and the children a hearing, refused to consider their verified answer and counterclaim, and denied her right to produce evidence and witnesses to demonstrate why she was entitled to relief.

A. Violation of the Fourteenth Amendment

In *Santosky v. Kramer* (1982) 455 U.S. 745, 758-759 the United States Supreme Court stated:

> *Lassiter* declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property right. 452 U.S., at 27, quoting *Stanley v. Illinois*, 405 U.S., at 651.

The termination of M.C.'s rights does not merely "infringe" her rights; it ends them. The fact that a private citizen, C.M., sought termination of M.C.'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.* (1996) 519 U.S. 102.)

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* (1972) 408 U.S. 471, 481.) 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. *(Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.) "The essence of Due Process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (*Id*. at p. 348.) The opportunity to be heard must be provided "at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552; see also *Boddie v. Connecticut* (1971) 401 U.S. 371, 377-379; *Goldberg v. Kelly* (1970) 397 U.S. 254, 267, quoting *Armstrong v. Manzo*, *supra.*)

Regardless of the standard to be employed, the trial court, enforcing §7962, gave M.C. and the children no Due Process of any kind.

> "...[T]here can be no doubt that at a minimum [the Due Process Clause] 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.)

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

The trial court denied M.C. and the children any pre-judgment hearing on their 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* (1972) 407 U.S. 67.) 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* (1982) 455 U.S. 745; *M.L.B. v. S.L.J.* (1996) 519 U.S. 1026.)

C.M. should not have filed an uncontested petition knowing that M.C. had advised him she would not consent to have the children's relationship with her terminated, and her having filed a complaint in civil court expressly stating that contention. He knew that he could not get her to sign the necessary waivers for the case to proceed as uncontested, yet represented to the court, under oath, that she had signed such papers anyway.

The trial court committed the gravest form of error by proceeding as if the matter was uncontested and by refusing to even look at M.C.'s answer and counterclaim, and by, apparently, even failing to review the *ex parte* application seeking a continuance. The judgment must be vacated and the

matter must be remanded for discovery and a trial on all relevant issues following dispositive motions. M.C. and the three children should be given access to each other by this court while the matter is pending in the trial court on remand.

B. Violation of the Procedural Due Process Rights of M.C. and the Three Children Guaranteed by the Constitution of the State of California

The California Constitution, Article 1, Section 7, subdivision (a) states that "a person may not be deprived of life, liberty or property without due process of law." Because the language in the California Constitution is virtually identical with that contained in the Fourteenth Amendment, our Supreme Court has "looked to the United States Supreme Court precedent for guidance in interpreting the contours of [California's] Due Process Clause." (*Today's Fresh Start v. Los Angeles County Office of Education* (2013) 54 Cal.4th 197, 212, citing *Morongo Band of Indians v. State Water Res. Cont. Bd.* (2009) 45 Cal.4th 731). Consequently, California essentially adopts the framework found in *Matthews v. Eldridge, supra*. (*Today's Fresh Start*, 54 Cal.4th at p. 213.)

Our Supreme Court has stated that the Due Process violation must be examined in the context of the "nature and magnitude of the interests involved," and in a proceeding to determine the relationship between a parent and a child, that the "interest in maintaining a parent-child relationship [is] a compelling one, ranked among the most basic of civil rights..." (*Sales v. Cortez* (1979) 24 Cal.3d 22, 27-28.)

> "For government to dispose of a person's significant interest without offering him a chance to be heard is to risk treating him as a nonperson, an object, rather than a respected, participating citizen." *People v. Ramirez* (1979) 25 Cal.3d 260, 267-268 (quoting Karst, Supreme Court, 1976 term forward: Equal

Citizenship Under the Fourteenth Amendment (1971) 91 Harv. L. Rev. 1, 5-11).

The Procedural Due Process Rights of Baby A, Baby B, and Baby C, and those of M.C. were violated by the trial court and the judgment must be vacated, and remanded with directions that M.C. and the three children be given access to each other while the matter is pending in the trial court.

Point II

M.C. is the Mother of Baby A, Baby B, and Baby C, as a Matter of Fact. She is Recognized as their Legal Mother as a Matter of Law, and the Gestational Surrogacy Contract, Under the Facts of this Case, Cannot Form a Basis to Terminate M.C.'s Parental Relationship with the Three Children.

A. M.C. is the Legal Mother of the Children

As a matter of biological fact, M.C. 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. (Verified Answer and Counterclaim, AA, ex.2, pp.65-77, ¶¶65-97.)

Appellant is also the legal mother of the children. Family Code §7610(a) recognizes that the mother who carries and gives birth to children is, in fact, the 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 M.C. is the natural mother is not the result of a legal fiction in the form of a presumption. Family 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 rebuttable presumption, but recognition of a natural fact.

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.

C.M. argued and the trial court held, incorrectly, that M.C. is not the legal mother of the children because the surrogacy contract conforming to §7962 "rebuts" the presumption created by §7610(a). It does no such thing.

Section 7962(f)(1) rebuts only those presumptions set forth in Part 2 and three sections of Part 3: subdivision (b) of section 7610, and sections 7611 and 7613, none of which apply here. Section 7962(f)(1) does not rebut subdivision (a) of section 7610, nor can it because section 7610(a) is an acknowledgment of a fact. The Legislature retained the recognition of the legal status of a woman who gives birth, the clearest and most indisputable fact that establishes an existing relationship between a child and an adult. That legislative intent is consistent with §7962(f)(2) which states that a judgment obtained under §7962 "shall terminate any parental rights of the surrogate…" If the "surrogate " had no parental rights because §7610(a) was rebutted, there would be no need for an order terminating them. Further, §7962, first enacted in 2012, was amended effective January 1, 2015, and the Legislature did not amend §7962(f)(1) to reference §7610(a).

The trial court operated under the mistaken belief that the *Johnson v. Calvert* (1993) 5 Cal. 4th 84 (1993) and *Buzzanca v. Buzzanca* (1998) 61 Cal.App.4th 1410 held that a mother in the position of M.C. was not the legal mother of the children.

In *Johnson*, the gestational surrogate claimed a superior legal parentage over the claim of motherhood advanced by Mrs. Calvert, who was the genetic mother of the child with whom she had a relationship as the child's custodial mother. She was married to the genetic father . Our Supreme Court found that both Ms. Johnson and Mrs. Calvert had produced evidence that they were the natural mother of the child and both had valid claims to the legal status as mother. (5 Cal.4th at pp. 90, 92.) The court concluded it could award legal status as mother to only one of the women at the expense of the other. (*Id*. at p. 92.) In that extraordinary circumstance, *Johnson* held that the original intent of the two women, coupled with the fact that the two genetic parents were a married couple, compelled placing legal status as mother in Mrs. Calvert. The only reason that Ms. Johnson was denied legal status was because a second woman had a superior claim to that status. (*Id*. at p. 93.)

In fact, *Johnson* actually supports M.C.'s claim that she is the legal mother of the children. *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 p. 92, fn. 9.) That holding has since been codified by Family Code §7601, subdivision (a.)

The issue of "intent" was relevant in *Johnson* only to resolve the competing claims to "legal" status as mother between two women who were in fact, the natural mothers of the child. Here, there is no other person who asserts any competing claim as legal mother, and C.M.'s claim as legal father is irrelevant to M.C.'s standing as legal mother. The trial court erred.

B. The Contract Cannot Form the Basis to Terminate the Relationship Between M.C. and the Three Children

The first fundamental fact upon which Family Code section 7962 authorizes termination of the surrogate's relationship with the children is that C.M. must prove that he is an "intended parent" within the meaning of the statute. He is not.

Fam. Code §7960(c) defines an "intended parent" as "an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction."

Section 7962 authorizes the court to use a "gestational surrogacy contract as a basis to terminate M.C.'s parental rights, under subsection (f)(2), only because C.M. is an "intended parent"within the meaning of the satute.

C.M. is not an "intended parent"under the Act because he did not manifest the intent to be legally bound as the parent of Baby A, Baby B and Baby C. Quite the opposite. C.M. has on various occasions stated that: (1) he could not raise three children; (2) on one occasion he stated that he may seek an abortion of all three children; (3) he demanded a selective reduction of at least one of the children because he was not capable of raising the children; (4) that his income was too small to provide for three children; (5) his attorney stated he could not raise three children because he was a "single man who is deaf;" (6) C.M. threatened to sue M.C. for money damages for failing to submit to aborting one of the children; and (7) C.M. stated multiple times that he would not accept legal responsibility to raise at least one of the children - refusing to be legally bound as the parent - and instead planned to give at least one of the children up for adoption. (AA 58:3 - 65:6.)

In addition to the fact that C.M. has repeatedly stated he did not want to be legally bound as a parent to one or more of the children, there is other

evidence that he is incapable of raising the children and incapable of accepting legal responsibility for the children.

California counsel for M.C. had a process server serve the federal complaint on C.M. on Thursday, February 4. That process server has signed an affidavit, now filed with the court, which stated that C.M.'s father, C.M. Sr., invited the process server into the house where C.M. lives. The server gave the summons and complaint to C.M., but could not speak to him because C.M. is totally deaf. C.M., Sr. had to act as an interpreter through sign language and C.M. could not speak. (AA 144.)

C.M., Sr. told the process server that they cannot bring three babies into their house and that they cannot raise any children in that house. C.M., Sr. was ambulatory but appeared to be in his mid to late 70s. C.M.'s mother is very ill and confined to bed. (AA 144.) C.M. has stated that nurses must come into the house to care for her.

During argument on February 8, the trial court stated that what happens to the children after M.C. is forced to surrender the children is not the court's concern.

It was incumbent upon the trial court to determine that C.M. actually had an intent to be legally bound as the parent of all three children. All evidence is that he does not, and the court should have required C.M. to appear and produce proof that he always had an intention to take responsibility of the children, and to produce evidence that he can discharge his legal duties to them.

Under the facts of this case, the contract cannot form a basis to terminate the rights of the children and those of M.C.

The contract certainly cannot form the basis to terminate M.C.'s right for the purpose of surrendering one or more of the children to adoption.

Termination of the mother's rights, for the purpose of the father giving the child up for adoption, is not a valid purpose of §7962. Such an effort violates Family Code §8801.3 because the natural mother, in an adoption, must reaffirm any intention to give up her rights only after she is discharged from the hospital. It also violates §8814.5, which gives the mother 30 days to revoke even a valid consent signed following the birth of the child.

C.M. is not an "intended" parent, and under no theory can the contract form the basis to terminate M.C.'s parental rights, especially for the purpose of giving a child up in an adoption.

In addition, M.C. contended that she did not receive independent legal counsel concerning the contract.

Point III

California's Gestational Surrogacy Statute, Family Code §7962, Violates the Constitutional Rights of Baby A, Baby B, and Baby C

A. Appellant M.C. has Standing to Litigate the Constitutional Rights of the Three Children

M.C. possesses the legal standing to vindicate the constitutional rights of Baby A, Baby B, and Baby C. The United States Supreme Court may have best explained the criteria to establish one person's standing to litigate the rights of another in *Caplin & Drysdale v. United States* (1989) 491 U.S. 617:

> "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 p. 624, fn. 3.)

There is an Article III case and controversy because M.C. 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, M.C. 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 M.C. 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. M.C. has standing to litigate their rights.

B. Section 7962 Violates the Children's Substantive Due Process Rights

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* (1992) 503 U.S. 115, 125.) "The clause protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" (*Ibid.*, quoting *Daniels v. Williams* (1986) 474 U.S. 327, 331.)

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* (1977) 431 U.S. 494, 503.) 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* (1934) 291 U.S. 97, 105.) They are those "implicit in the concept of ordered liberty." (*Palko v. Connecticut* (1937) 302 U.S. 319, 325; see also *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 845.)

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 exclusive control and custody over them.

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

The trial 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 does not want, and refuses to accept, the responsibility to raise one or more of the children. California has no legitimate interest to deprive the children of their constitutionally protected relationship with their mother.

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* 9th Cir. 1987) 818 F.2d 1411, 1419, revd. 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 p. 1418.)

The Ninth Circuit has stated that "parents and children have a well-elaborated constitutional right to live together without government interference." (*Wallis v. Spencer* (9th Cir. 1999) 202 F.3d 1126, 1136.) *Lowry v. City of Riley* 10th Cir., 2008) 522 F.3d 1086, 1092 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* (1977) 431 U.S. 816, 845.) The Supreme Court has stated that the constitution protects the "sanctity" of these familial relationships. *(Moore v. City of East Cleveland* (1977) 431 U.S. 494, 503.)

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* (1993) 507 U.S. 292, 302, 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.

2. The Statute Violates the Children's Rights to be Free From Commodification and the State Sanctioned and State Enforced Purchase of Their Familial Rights and Interests

The Act authorizes not only the termination of the children's constitutionally protected relationship with their mother, it requires the court – as the trial judge construed it – to do so without regard for the children's best interests. The 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. (AA, ex.2, pp.85-88, ¶¶137-155.)

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*, 431 U.S. at p. 503.) Thus, there has been, in this nation, a long and

strong prohibition against the purchase and sale of children and the purchase and sale of the rights of children and their mothers to their familial relationships.

For instance, 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."

That prohibition has been part of the fabric of the tradition of our national values.

C.M. argues 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. (AA 92-93, ¶¶174-177.)

In the history and tradition of this ntion, 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. (*In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 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*, 185 Cal.App.3d at p. 1027.)

So ingrained in our tradition is the concern for the best interests of children, that in *Ford v. Ford* (1962) 371 U.S. 187, 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 p. 193.)

C.M. may attempt to justify the payments as a payment for services, but that assertion is contradicted by the fact that he has demanded custody, and total control of the children, and anything short of complete sole parentage is less than what he bargained for. This fact is amply 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.

Section 7962 violates the children's liberty guaranteed by the Fourteenth Amendment of the United States Constitution.[2]

C. Section 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* (1966) 383 U.S. 663, 665; *N.J. Welfare Rights Organ. v. Cahill* (1973) 411 U.S. 619; *Weber v. Aetna* (1972) 406 U.S. 164; *Gomez v. Perez* (1973) 409 U.S. 535; *Levy v. Louisiana* (1968) 391 U.S. 68; *Glona v. Amer. Guar. & Liab. Ins. Co.* (1968) 391 U.S. 73; *Griffin v. Illinois* (1956) 351 U.S. 12.)

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

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 p. 670.; see also *Carrington v. Rash* (1965) 380 U.S. 89; *Weber*, 406 U.S. at p. 172.) "Classifications affecting fundamental rights are given the most exacting scrutiny." (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) Even where a statute merely provides greater protection of a fundamental right for some relative to

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[2] *Johnson v. Calvert, supra,* 5 Cal. 4th 84, did not address the question of whether payment for custody was a violation of the 14th Amendment. The only issue before the *Johnson* court concerning the payment of money was whether it violated the this state's public policy. But even on that issue, the court addressed the question in the narrow context of that case in which it was found that Ms. Johnson had no parental rights to be sold, and the children maintained their relationship with their legal mother.

others, only a compelling interest can justify the classification. (*Reynolds v. Sims* (1964) 377 U.S. 533, 561-562; *Baker v. Carr* (1962) 369 U.S. 186; see also *Shapiro v. Thompson* (1969) 394 U.S. 618; *Graham v. Richardson* (1971) 403 U.S. 365; *Mem. Hospital v. Maricopa County* (1974) 415 U.S. 250; *Carey v. Brown* (1980) 447 U.S. 455; *Grayned v. City of Rockford* (1972) 408 U.S. 104; *Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92; *Eisenstadt v. Baird* (1972) 405 U.S. 438.)

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* (1972) 406 U.S. 164, 175; *Clark v. Jeter, supra*, 486 U.S. at p. 461; Tussman, *supra,* at pp. 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* (1967) 388 U.S. 1, 11; *McLaughlin v. Florida* (1964) 379 U.S. 184, 192, 194.)

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, 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."

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, 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. Children subject to a surrogacy contract under §7962 are the sole exception. Ironically, the trial court made that very observation. (RT 16:5-8.)

California requires that placement of adopted children must be in the child's best interest, and has established significant procedural safeguards. (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. (§ 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* (1962) 201 Cal.App.2d 494, 498, citing *Adoption of Barnett* (1960) 54 Cal.2d 370, 377.) "'The welfare of the child can never be excluded from the issues, no matter what preliminary action its parent or parents may have taken.'" (201 Cal.App.2d at p. 501, quoting *In re Barents* (1950) 99 Cal.App.2d 748, 753.)

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.App.4th 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. (*In re Marriage of*

Goodarzirad, supra, 185 Cal.App.3d at p. 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. (Fam. Code, §3020, subd. (a).)

The only exception to these prohibitions is found in §7962, which authorizes the termination of the children's rights. There is no requirement that there be any determination that the child's best interests be served.[3]

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, and uniquely capable to care for the child.

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[3] The dangers of a state authorizing a surrogacy agreement which places a child with a single man without any regard for the children's best interests is illustrated by *Huddleston v. Infertility Center of America, Inc.* (Pa. Super. 1977) 700 A.2d 453, where a single man unable to cope with the riggers of child rearing, killed the child a month after his birth. While that is an extreme case, it illustrates the importance of placing the child based upon his or her best interests.

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 50-year-old Georgia man at the children's expense. The focus of all child rearing 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* (1972) 407 U.S. 72; *Goodarzirad* at p. 1026.)

Point IV

Section 7962 Violates the Substantive Due Process and Equal Protection Rights of M.C. and All Other "Gestational" Surrogate Mothers

A. The Statute Violated the Substantive Due Process Fundamental Liberty Interests of M.C. and Those of Other "Gestational" Surrogate Mothers

1.

The relationship between parents and their children has always been protected as fundamental. (*Moore v. City of East Cleveland, supra*, 431 U.S. at p. 503; *Santosky v. Kramer*, *supra,* 455 U.S. at pp. 753, 759.) 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* (1977) 431 U.S. 816, 845; *Moore v. City of East Cleveland, supra*.) This is an interest in the "companionship" with one's children. (*Santosky*, 455 U.S. at p. 759; *Lassiter v. Department of Soc. Serv*. (1981) 452 U.S. 18, 27; *Stanley v. Illinois* (1972) 405 U.S. 645, 651.)

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* (1983) 463 U.S. 248, 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 pp. 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 pp. 259-260; 260, fn.16.)

C.M. interprets *Johnson v. Calvert, supra*, 5 Cal.4th 84, to mean that a mother who is a "gestational" surrogate has no constitutional rights under the Fourteenth Amendment. That is not the holding in *Johnson*.

It should first be noted that this is the only one of the six constitutional issues raised in this case, which C.M. and the trial court assert *Johnson* addressed. *Johnson,* however, did not address the issue present here where the children are deprived of their only mother.

Again the factual differences in *Johnson* are critical. Mrs. Calvert was not only genetically related to the child, married to the child's genetic father, and a legal mother who asserted her rights, she also had an existing relationship with the child having raised the child following birth. Mrs. Calvert possessed constitutional rights under the Fourteenth Amendment. She asserted those rights and Ms. Johnson sought to have them terminated. The *Johnson* court faced the same dilemma on the issue of constitutional rights as it did on the issue of the statutory basis for status as legal mother: Both women had legitimate claims, which were mutually exclusive.

The *Johnson* court did not hold that no gestational carrier has a constitutionally protected interest in her relationship with her child, but rather that in that unusual context where there were two mothers competing for mutually exclusive status, Ms. Johnson did not enjoy protection. *Johnson* explained its resolution by stating that:

> "Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother. (*Johnson*, 5 Cal. 4th at p. 976.)

As the *Buzzanca* court would state it, again the "tie" would be "broken in favor of the intended parent." (*In re Marriage of Buzzanca, supra,* 61 Cal.App.4th at p. 1422.) Here, there is no tie to be broken. Appellant is the children's only mother, and she has the right to litigate her Fourteenth Amendment rights she has asserted.

It is a *per se* violation of M.C.'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 M.C. 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 one 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* (1966) 384 U.S. 436, 444; *Brady v. United States* (1970) 397 U.S. 742, 748.) To be effective, the waiver must be "an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

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 M.C., 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.

2.

M.C. 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. (Rothman Declaration, 2RJN, ex.9, pp.406-415, ¶¶9-37.)

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, at p. 16 [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]".)

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

B. The Statute Violates the Equal Protection Rights of M.C. and All Other "Gestational" Surrogate Mothers

M.C. 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, III C above.) The state has no such interest to involuntarily terminate M.C.'s rights in order to allow a single man in Georgia to give away one or more of the children, or to otherwise exercise control over them.

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.[4]

If, in fact, C.M. paid M.C. 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., Pen. Code, §§ 181, 273.) California's denial of the protection of these laws violate M.C.'s Equal Protection Rights.

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[4] The constitutional issue concerning the Equal Protection violation was not raised in *Johnson v. Calvert*. The public policy considerations raised in *Johnson* (5 Cal.4th at p. 96) are not applicable to a constitutional challenge.

CONCLUSION

The judgment entered below terminating the relationship between M.C. and Baby A, Baby B, and Baby C must be reversed, and the matter must be remanded for expedited discovery, motion practice and a hearing. This court should direct that immediately upon remand, the trial court enter an order granting M.C. and the three babies access to each other, and parenting time *pendente lite*.

Dated: June 7, 2016

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 13,459 words.

/s/

Robert M. Dato

PROOF OF SERVICE
(Code Civ. Proc., § 1013a, subd. (3))

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action; my business address is 18400 Von Karman Avenue, Suite 800, Irvine, California 92612.

On June 7, 2016, I served the Apppellant's Opening Brief on the interested parties in this action by placing true copies enclosed in sealed envelopes addressed as follows:

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California Supreme Court
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I am readily familiar with Buchalter Nemer's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelopes were placed for collection and mailing with postage fully prepaid at Irvine, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 7, 2016, at Irvine, California.

Raquel Moreno