

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

Plaintiffs-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,

Defendants-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))

**REPLY 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

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.

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**PRELIMINARY STATEMENT: ADDITIONAL PROCEDURAL
HISTORY IN THE STATE COURT CASE**

Since Appellant Melissa Cook filed her brief in this Court on January 11, 2017, there were two subsequent developments in the state court proceedings.

On January 26, 2017, the California Court of Appeal affirmed the Children's Court's judgment and rulings in their entirety. In the process, the California Court of Appeal did not address and decide the federal constitutional issues presented in Cook's Counterclaim, as explained below.

Thereafter, on April 12, 2017, the Supreme Court of California denied Melissa Cook's Petition for Review. Consequently, the case of C.M. v. M.C. is completely concluded in the state court without any of the eight federal constitutional issues raised by Melissa Cook being addressed on their merits.

LEGAL ARGUMENT

Point I

Under the Abstention Principles Enunciated by the United States Supreme Court in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) and *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (2013), the Federal Court is Required to Exercise Its Jurisdiction in this Case. The California State Court Proceedings have Now Concluded with the California Supreme Court's Refusal to Grant Review and the State Courts have Never Provided M.C. and the Three Children Any Hearing, and Never Directly

**Addressed the Federal Constitutional Issues Raised by
M.C.**

In this case, the United States District Court for the Central District of California entered an Order dismissing Melissa Cook's Complaint dated June 6, 2016 (Pacer Doc. 98, ID# 2190).

Subsequent to entry of that Order, on January 26, 2017, the California Court of Appeal issued its decision affirming the Children's Court's refusal to grant Melissa Cook and the three children a hearing, affirming the Children's Court's refusal to consider Plaintiff Cook's Answer and Counterclaim, affirming the Children's Court's determination that what was in the best interests of the children is irrelevant under California law and none of the Court's business, and affirming the permanent termination of the rights of the three babies and the termination of the parental rights of Melissa Cook. *See, C.M. v. M.C.*, 7 Cal. App. 5th 1188 (Ct. App., 2d D, Div-1).

On April 12, 2017, the California Supreme Court denied M.C.'s (Melissa Cook's) Petition for further review.

As a result, Melissa Cook and the three babies were never given a fact finding hearing of any kind, the case was never remanded for a hearing, and the federal constitutional issues raised by Melissa Cook in both this case and in the California Children's Court have never been directly addressed and decided.

A.

The U.S. District Court dismissed Melissa Cook's Complaint because the District Court thought that if, in theory, Melissa Cook could file an appeal from the total denial of Due Process in the trial court, that ability precluded the District Court from exercising its jurisdiction as to the federal issues.

The District Court stated:

“The Family Court interpreted section 7962 to bar consideration of Cook's constitutional claims – or consideration of any facts that do not touch on the four corners of the surrogacy contract itself. (Section 7962 Order.) Looking just to the Family Court's actions, then, it would appear that Cook has no recourse to present her federal claims in the state judicial system. But such a conclusion is misguided; Cook has every ability to – and, indeed, already has – appeal Judge Pellman's refusal to entertain Cook's constitutional arguments during the section 7962 hearing.

Judicial review is inadequate only when state procedural law bars presentation of the federal claims.” *Cook, et al v. Harding, et al.*, 190 F.Supp. 3d 921, 937 (2016) (Citation omitted).

It has been previously and adequately argued, both in the District Court and in this Court (*See*, Appellant's Brief, pp. 48-60), that the Federal District Court was unequivocally obligated to decide this case on the merits pursuant to the controlling principle of abstention enunciated in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) and *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (2013).

As noted, the District Court refused to exercise its compulsory jurisdiction on the theory that, while the state trial court refused to provide a hearing and refused to address the federal constitutional issues, maybe a state Appellate Court might do so. This dereliction of the District Court's duty was premised on the false assumption that the federal court must decline deciding federal issues because it was duty bound to get out of the way of the state court as long as there was some possibility that the state court will decide the federal issues in place of the federal court.

It seems unlikely that we could find a clearer violation of the Supreme Court's decisions in *NOPSI* and *Sprint* than that of the District Court in this case when it rendered its opinion on June 6, 2016.

B.

While what might have happened in the state court after June 6, 2016 was completely irrelevant to the fact the District Court clearly erred in refusing to exercise its jurisdiction, the state courts did nothing to reward the Federal District Court's faith that the state would address the federal issues which the federal court entrusted to it.

As noted, the California Supreme Court denied review, resulting in the state courts never providing Melissa Cook and the three babies a hearing. There was never a remand for a fact finding hearing, and never a remand for the Children's Court to consider Melissa Cook's Answer and Counterclaim and have the Children's Court

decide the issues raised.

1.

The California Court of Appeal found that the denial of a hearing concerning the fact issues raised by Melissa Cook pertaining to the children's best interests, and the factual standing of C.M. to assert his parentage based upon California's Gestational Surrogacy Enabling Statute was proper based upon the Children's court's interpretation of the statute. *See, C.M. v. M.C.*, 7 Cal.App. 5th at 1199-1203.

In an odd bit of logic, the California Court of Appeal concluded that the trial court did not violate the procedural Due Process rights of Melissa Cook and the three children by refusing to hold a hearing and failing to consider her Counterclaim – the Counterclaim which asserted violation of numerous federal constitutional right – because the statute did not permit the court to do so. *C.M. v. M.C.*, 7 Cal.App. 5th at 1207-1208.

In other words, the Court of Appeal affirmed the Children's court's holding that the statute bars all litigants from ever challenging its constitutionality.

That holding, in and of itself, is a clear violation of the Fourteenth Amendment Due Process Clause: California's statutes do not permit constitutional review of them.

Thus, not only as noted, the District Court's belief that it was required to defer to the state court to decide the federal issues was in error, its hope that the state court

would actually determine the federal issues was unrealized.

2.

The California Court of Appeal, despite having affirmed the Children's Court's refusal to entertain Melissa Cook's Answer and Counterclaim and Cook's constitutional claims, purports to address some of the constitutional issues anyway. *See, C.M. v. M.C.*, 7 Cal.App. 5th at 1208-1212.

However, the California Court of Appeal did not actually address the constitutional issues and arguments raised by Cook in her Counterclaim and on the appeal at all. Nor did the court decide them. That the Court of Appeal addressed these issues is illusory and an obfuscation.

The Court of Appeal did not address any of the U.S. Supreme Court decisions cited by Cook, or any of the substantive constitutional arguments.

Instead, the Court of Appeal relied entirely upon the California Supreme Court's opinion in *Johnson v. Calvert*, 5 Cal. 4th 846 (1993) which only held that a gestational surrogacy agreement was consistent with the public policy of the state of California.

The Court of Appeal starts by stating that Melissa Cook's argument pertaining to the litigation of two of the children's Substantive Due Process rights were both "foreclosed by the court's opinion in *Calvert*." *C.M. v. M.C.* at 1208. The Court of

Appeal held, while never directly addressing Cook’s constitutional arguments, that her arguments must fail because if she prevailed on her arguments, “[t]hat result would conflict with the fundamental holding in *Calvert* that surrogacy agreements are not inconsistent with public policy.” (*Calvert, supra*, 5 Cal. 4th at pp. 87, 95…)

This holding of the Court of Appeal completely misses the point. We know what California’s policy is. It is contained and embodied in the Gestational Surrogacy Statute under scrutiny. The question is not what California’s policies are, but whether enactment of those policies is consistent with the Fourteenth Amendment Due Process and Equal Protection Clauses.

A review of the Court of Appeal’s decision purporting to relate to Cook’s constitutional arguments reveals that that court *only* relied upon the *Calvert* decision. *See, C.M. v. M.C.* at 1208-1212. *Calvert*, however, did not address or decide a single one of the constitutional issues presented in this case. *C.M. v. M.C.*, 7 Cal.App. 5th at 1207-1208.

Thus, the hope of the District Court in this case, that the state court would address the federal constitutional issues in its place, went unrealized.

Melissa Cook raised claims pertaining to two separate violations of the Substantive Due Process Rights of the children, and a separate violation of the children’s Equal Protection Rights. Those constitutional issues were not raised in the

Johnson v. Calvert case, and the *Calvert* court did not address them. Thus, when the California Court of Appeal in *C.M. v. M.C.* relied exclusively upon *Calvert*, the Court of Appeal did not address or decide the federal issues raised by Melissa Cook in this case. They all remain unresolved.

Melissa Cook raised claims pertaining to two separate violations of her Substantive Due Process Rights under the Fourteenth Amendment, and a violation of her Equal Protection Rights. One of the Due Process claims and the Equal Protection claims were not raised in *Calvert*, and the *Calvert* court did not address them.

Thus again, those two federal constitutional claims were neither addressed nor decided in *C.M. v. M.C.* by the California Court of Appeal.

The second of Melissa Cook's Substantive Due Process Claims needs a bit of further discussion and further comment on *Calvert* is helpful.

By way of background, there is no question that Melissa Cook is the mother of Baby A, Baby B and Baby C, both as a matter of biological fact and as a matter of California law.

As a matter of biological fact, Appellant 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.

Appellant 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 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. 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 rebuttable presumption, but recognition of a natural fact.

The Children’s Court operated under the mistaken belief that *Johnson v. Calvert*, 5 Cal. 4th 84 (1993) and *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410 (4th Dist., Div. 3, 1998), held that a mother in the position of M.C. was not the legal mother of the children. Oral Opinion of Feb. 8. 2R. 323, L.5-325, L.1; Oral Opinion of Feb.9. 2R. 404, L. 20-22; Judgment, 2 R. 300, L. 21-23.

In *Calvert*, the gestational surrogate claimed 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 . The California 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. (*Id.* at 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 92.) In that extraordinary circumstance, *Calvert* 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 93.)

In fact, *Calvert* actually supports M.C.'s claim that she is the legal mother of the children. *Calvert* 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 *Calvert* court held that the lack of a genetic relationship did not preclude a woman who gives birth from being the legal mother. (*Calvert, supra*, 5 Cal.4th at 92, fn. 9.) That holding has since been codified by Cal. Fam. Code §7601, subdivision (a.)

The issue of “intent” was relevant in *Calvert* only to resolve the competing claims to “legal” status as mother between two women who were both 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 Appellants' standing as legal mother. The Children's Court erred.

In the unique context of the facts presented in *Calvert*, the California Supreme Court did address one single constitutional issue raised in that case. Ms. Johnson, the gestational surrogate, had argued that the enforcement of the contract in that case would violate her own Fourteenth Amendment liberty interest in her relationship with the child she bore. While it appears that Ms. Johnson raised a constitutional issue similar to one of the eight constitutional claims raised by Melissa Cook, it is by no means the same and *Calvert* did not decide the issue of Melissa Cook's constitutionally protected relationship with the children presented by this case.

Again, the factual differences in *Calvert* 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 *Calvert* 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 Calvert 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. The *Calvert* court explained its resolution by stating that:

"Anna's [Johnson] 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." *Calvert*, 5 Cal. 4th at 99.

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

Thus, the constitutional issues presented in this case were not decided by *Calvert*, and the California Court of Appeal did not address or decide a single one of the six constitutional claims pertaining to the Substantive Due Process Rights and Equal Protection Rights of Melissa Cook and the three children. Nor did the Court of Appeal address the arguments of Melissa Cook pertaining to the violation of her and her children's Procedural Due Process Rights.

Because of an odd analysis of the Gestational Surrogacy Statute, there is a

separate constitutional issue that needs to be decided by the Federal Court, one which was actually raised by Melissa Cook in her legal analysis: can the signing of a gestational surrogacy agreement, long before the children are conceived, before the mother's relationship with the child exists, operate as an irrevocable prospective waiver of the constitutional rights of the mother and the children before facts about the inadequacy of the abilities of the so-called "intended" parent are known and before the "intended" parent repudiates his intent to accept responsibility for the child.

CONCLUSION

The District Court erred in refusing to exercise its jurisdiction. The case should be remanded for discovery and further proceedings to have the case decided on the merits of the constitutional claims raised.

Dated: April 24, 2017

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

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

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STATEMENT OF RELATED CASES (CIR. RULE 28-2.6)

The undersigned, counsel for Appellants, certify under Cir. Rule 28-2.6, that there are no cases pending in the US Court of Appeals or Federal District Court that are related to this case.

(s) Harold J. Cassidy

Attorney for Plaintiff-Appellant Melissa Cook

Dated: April 24, 2017

9TH Circuit Case Number: 16-55968

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 24, 2017.

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