

**Case No:  
B270525**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT, DIVISION ONE**

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

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

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**APPELLANTS' REPLY BRIEF**

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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))**

Use this form for the initial certificate when you file your first document in the Court of Appeal in civil appeals and writs, and for supplemental certificates when you learn of changed or additional information that must be disclosed. Also include a copy of the certificate in your principal brief after the cover and before the tables. If no entity or person is known that must be listed under rule 8.208(d), write "NONE".

(Check One)    **INITIAL CERTIFICATE**    **SUPPLEMENTAL CERTIFICATE**

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).**

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**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iv

LEGAL ARGUMENT . . . . . 1

POINT I     The Trial Court Violated the Procedural Due Process Rights of M.C. and Baby A, Baby B and Baby C. The Egregious Nature of the Deprivation of Their Due Process Rights Was Exacerbated by the Magnitude of the Fundamental Rights Involved. Appellee C.M. Fails to Even Address this Issue. The Case must Be Remanded for a Full Exploration of All of the Substantive, Factual and Legal Issues Presented in M.C.’s Answer and Counterclaim. . . . . 1

POINT II     M.C., in Fact, Had an Actual Biological Relationship with the Three Children She Carried, Which Made Her the Mother of Baby A, Baby B and Baby C, as a Matter of Fact, and She Is the Mother of the Children as a Matter of California Law. . . . . . 4

    A.     M.C. Had an Existing Relationship with Her Three Children She Carried and to Whom She Gave Birth, as a Matter of Fact. . . . . 5

    B.     M.C. Is the Legal Mother of Baby A, Baby B and Baby C, and M.C.’s Parental Rights and the Rights of the Three Children Can Be Terminated Only If There Is Proof, by Clear and Convincing Evidence, of Strict Compliance with Cal. Code §7962 and §7960, Subsection (c), and Only If Those Statutes, as Applied, Do Not Violate Any of the Substantive Due Process or Equal Protection Rights of the Children and M.C. . . . . 13

POINT III	<i>Johnson v. Calvert</i> , (1993), 5 Cal. 4 <sup>th</sup> 84, Did Not address or Resolve the Issues Pertaining to the Constitutional Rights of the Three Babies or Those of M.C. Presented in This Case. Nor has Any Other Case Addressed the Constitutionality of California’s “Gestational Carrier” Statutory Scheme, First Passed into Law in 2012.....	18
POINT IV	M.C. has the Standing to Litigate the Constitutional Rights of the Children. ....	21
POINT V	M.C.’s Claims Cannot Be Estopped Based Upon A Void and Unenforceable Contract Premised Upon An Unconstitutional Statute.....	22
	A. Estoppel .....	22
	B. Judicial Estoppel .....	25
CONCLUSION.....		25
CERTIFICATION OF COMPLIANCE.....		27
PROOF OF SERVICE .....		28

**TABLE OF AUTHORITIES**

**CASES CITED**

*Aguilar v Lerner* (2004) 32 Cal 4<sup>th</sup> 974. . . . . 25

*Bloomquist et ux. v. Haley et ux.*, (1928) 204 Cal 258 . . . . . 1, 2

*Fuentes v. Shevin* (1972) 407 U.S. 72. . . . . 4

*In re Marriage of Buzzanca* (1998) 61 Cal App 4<sup>th</sup> 1410. . . . . 23, 24

*In re Marriage of Hinman* (1992) 6 Cal App 4<sup>th</sup> 711 . . . . . 25

*In re Griffin* 91967) 67 Cal.2d 343. . . . . 24

*Johnson v. Calvert* (1993) 5 Cal 4<sup>th</sup> 846. . . . . 16, 18, 19, 20, 23, 24

*Kristine H v. Lisa R* (2005) 37 Cal 4<sup>th</sup> 156 . . . . . 25

*M.L.B. v. S.L.J.*, (1996) 519 U.S. 102. . . . . 4

*Santosky v. Kramer*, (1982) 455 U.S. 745 . . . . . 4

*Smith v. Organization of Foster Families* (1977) 431 U.S. 816. . . . . 20

*Stevenson Real Estate Services, Inc. v. CB Richards Ellis Real Estate Services, Inc, et ux.* (2006) 42 Cal Rtr. 3d 235 (2<sup>nd</sup> Dist.) . 1, 2

**STATUTES CITED**

Cal Code § 7601 . . . . . 15

Cal Code § 7610 . . . . . 15, 16

Cal Code § 7611 . . . . . 15

Cal Code § 7612 . . . . . 15

Cal Code § 7960 . . . . . 1

Cal Code § 7962 . . . . . 16, 17

**OTHER LEGAL AUTHORITIES**

The Fourteenth Amendment to the Constitution of the United States  
of America . . . . . *Passim*

Article 1, § 7 (a) of The Constitution of the State of California. . . . . 4

**OTHER AUTHORITIES**

Carter, C.S., & Altemuw, M. (1997) *Integrative Functions of Lactational Hormones in Social Behavior and Stress Management*, Annals of the New York Academy of Sciences, 807: 164-174 . . . . . 8

Carter, C.S., (1998) *Neuroendocrine Perspectives on Social Attachment and Love*, Psychoneuroendocrinology, 23, 779-818 . . . . . 8, 9

Feldman, R., Weller, A., Zagoory-Sharon, O. Levine, A, (2007), *Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding*, Psychological Science, 18:11, 965-970 . . . . . 8

Glynn, L (2010) *Giving Birth to a New Brain: Hormone Exposures of Pregnancy Influence Human Memory*, Pschoneuroendocrinology, 2010 Vol 35 (8) pp 1148-1155 . . . . . 9

Guellai B *et al* (2015) *Suprasegmental Information Affects Processing of Talking Faces at Birth*, Infant Behavior and Development 38 11-19 . . . . . 12

Kaitz, M *et al* (1987) *Mothers Learn to Recognize the Smell of Their Own Infant Within Two Days*, Developmental PsychoBiology 120 (6) 587-91 . . . . . 11

Kim, Pilyoun (2010) *The Plasticity of Human Maternal Brain: Longitudinal Changes in Brain Anatomy During Early*

<i>Postpartum Period</i> , Behavior Neuroscience, 2010, Vol 124 (5), pp. 695-700 . . . . .	9
Kim, Pilyoung, Strthearn, Lane, Swain, James E. (2016) <i>The Maternal Brain and its Plasticity in Humans</i> , Hormones and Behavior January 2016, Vol 77, pp. 113-23 . . . . .	9
Kinsley, C.H., Amory-Meyer, E. (2011) <i>Why the Maternal Brain?</i> Journal of Neuroendocrinology, Nov. 2011, Vol 23, p. 974 (10) . . .	9
Kochanska, G., Philbert, R.A. & Barry, R.A. (2009) <i>Interplay of Genes and Early Mother-Child Relationship in the Development of Self-regulation from Toddler to Preschool Age</i> , Journal of Child Psychology and Psychiatry, doi: 10.1111/j; 1469-7610.2008.02050.x. . . . .	13
Krueger C <i>et al</i> (2014) <i>Emergence and retention of Learning in Early Fetal Development</i> , Infant Behavior and Development 37 162-173. . . . .	12
Leckman, J and March JS (2011) Editorial: <i>Developmental neuroscience comes of age</i> , Child Psychology and Psychiatry 52:4 pp 333-338 . . . . .	10
Leng <i>et al</i> (2008) <i>Oxytocin and the maternal Brain</i> Current Opinion in Pharmacology 8:731-734. . . . .	10
Levine, A., Zagoory-Sharon, O., Feldman, R., Weller, A. (2007) <i>Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment</i> , peptides, 28: 1162- 1169 . . . . .	8
Laible, D.J. & Thompson, R.A. (2000), <i>Mother-Child discourse Attachment Security, Shared Positive Affect, Early Conscience Development</i> , Child Development 71 (5) 1424-1440 . . . . .	13
Mennella, JA (2001) <i>Prenatal and Postnatal Flavor Learning by Human Infants</i> , Pediatrics 107 (6) e88. . . . .	11

Noriuchi, M. Kikuchi, Y. & Senoo, A. (2008), <i>Functional Neuroanatomy of Maternal Love: Mother's Response to Infant's Attachment Behaviors</i> , <i>Biological Psychiatry</i> , 63:4, 415-423 .....	9
Oliveira-Pinto AV <i>et al</i> , (2014) <i>Sexual Dimorphism in the Human Olfactory Bulb: Females Have More Neurons and Glial Cells Than Males</i> PLOS ONE 9 911): e111733 .....	10
Santelli J <i>et al</i> (2006) <i>An Exploration of the Dimensions of Pregnancy Intentions Among Women Choosing to Terminate Pregnancy or Initiate Prenatal Care in New Orleans, Louisiana</i> , <i>American Journal of Public Health</i> 96;11 p 2009-2025 .....	10, 12
Schore A and Mcintosh J (2011) <i>Family Law and the Neuroscience of Attachment, Part 1</i> , <i>Family Court Review</i> , Vol 49:3 pp 501-512 ..	10
Sullivan R (2000) <i>Review: Olfaction in the Human Infant</i> <a href="http://www.researchgate.net/publication/242084746">www.researchgate.net/publication/242084746</a> . .....	10, 11
Uvnas-Moberg, K. (1997), <i>Physiological and endocrine Effects of Social Behavior and Stress Management</i> , <i>Annals of the New York Academy of Sciences</i> , 807, 146-163 .....	8, 9
Uvnas-Moberg, K. (1998) <i>Oxytocin May Mediate the Benefits of Positive Social Interaction and Emotions</i> , <i>Psychoneuroendocrinology</i> , 23, 819-835. ....	9
Vaglio S <i>et al</i> , <i>Volatile Signals During Pregnancy: A Possible Chemical Basis for Mother-Infant Recognition</i> , <i>Journal of Chemecology</i> 35:131-139 .....	11
Voegtline KM <i>et al</i> (2013) <i>Near-Term Fetal Response to Maternal Spoken Voice</i> , <i>Infant Behavior and Development</i> , 36, 526-533 .....	12
Weisfeld GE <i>et al</i> , (2003) <i>Possible Olfation based Mechanisms in Human Kin Recognition and InBreeding Avoidance</i> , <i>Journal of Experimental Child Psychology</i> 85;3 p279-295.....	11



## LEGAL ARGUMENT

### POINT I

**The Trial Court Violated the Procedural Due Process Rights of M.C. and Baby A, Baby B and Baby C. The Egregious Nature of the Deprivation of Their Due Process Rights Was Exacerbated by the Magnitude of the Fundamental Rights Involved. Appellee C.M. Fails to Even Address this Issue. The Case must Be Remanded for a Full Exploration of All of the Substantive, Factual and Legal Issues Presented in M.C.'s Answer and Counterclaim.**

It is an important starting point to note that Appellee C.M. does not dispute any of the sworn material allegations contained in Appellant M.C.'s Answer and Counterclaim (AA, Ex.2, Pp. 44-111), some of which are set forth in Appellant's opening brief. Those facts are material to the proper resolution of this case, and the trial court was required to accept all unrebutted material allegations as true. *Stevenson Real Estate Services, Inc., v. CB Richard Ellis Real Estate Services, Inc., et al.*, (2006), 42 Cal. Rptr. 3d 235, 239 (2<sup>nd</sup> Dist.); *Bloomquist et ux. v. Haley et ux.*, (1928), 204 Cal. 258, 260; Cal. Civ. Pro. §438.

Among those essential facts are: (1) that C.M. acknowledged that he did not want to accept responsibility for raising three babies (and he was not, therefore, an "intended parent" under CAL. Code §7960(c)) (AA, Ex.2, P.59, L.5 to P.60, L.1); (2) that he was not capable of raising three children because he was a single 50 year old man who was deaf (AA, Ex.3, P.120, L.14-15; P.115, L.13-14); (3) that he demanded that one or more of the children be aborted so that he could avoid the responsibility of raising three children (AA,

Ex.2, P.59, L.23 to P.60, L.1); (4) that he could not raise three children in his father's home where he lived (AA, Ex.5, P.145, L.2-4); (5) that M.C. refused to abort any of the babies and carried all three to term (AA, Ex.2, P.60, L.13-15); and (6) that, because he was incapable of raising three babies, he intended to give one up for adoption (AA, Ex.2, P.60).

C.M. didn't even file an answer to M.C.'s Counterclaim, and all of the allegations of the Counterclaim must be accepted as true. *Stevenson Real Estate Services, Inc., v. CB Richard Ellis Real Estate Services, Inc., et al.*, (2006), 42 Cal. Rptr. 3d 235, 239 (2<sup>nd</sup> Dist.); *Bloomquist et ux. v. Haley et ux.*, (1928), 204 Cal. 258, 260; Cal. Civ. Pro. §438.

In his respondent's brief, C.M. continues to maintain that his Petition should be treated as if it is uncontested and unopposed. He simply recites that his pleading makes allegations as if they are not denied in their essentials, or as if there was no answer or separate defense filed and served. *See*, RB, Pp.9-13.

In fact, C.M. and his attorney falsely claimed in the Petition and supporting affidavits, that M.C. wanted her rights terminated and that M.C. did not oppose her rights being terminated and C.M. being designated the sole parent of the three children M.C. carried, when they knew those statements were false.(AA, Ex.3, P.122, L.13-18; P.121, L.18-20).

The trial court agreed to oblige C.M. and treated C.M.'s Petition as if it was completely uncontested despite the fact that that court was made aware that: (1) M.C. was the first to file a complaint in the State Court on January 4, 2016 (AA, Ex.3, P.121, L.11); (2) that on January 5, 2016, M.C. filed an *ex parte* application seeking an order enjoining C.M. from filing an uncontested Petition in the Children's Court (AA, Ex.3, P. 121, L.11-16); (3) that C.M. was served with the Civil Complaint on January 5, 2016 (AA, Ex.7, P.163, L.23 to

P.164, L.2); (4) C.M.'s attorney was in court on M.C.'s *ex parte* Application on January 7, 2016, and made fully aware that M.C. opposed entry of an order against her, and sought to assert her rights and the rights of the children (AA, Ex.7, P.163, L.17); (5) M.C. filed an Answer and Counterclaim to the Petition on February 1, 2016 (AA, Ex.2, Pp.45-111; *See*, AA, Ex.2);(6) M.C. filed an *ex parte* Application before the Children's Court Judge on February 4, 2016, making it clear every aspect of the Petition was opposed (AA, Ex.3, Pp. 112-139); and (7) M.C. appeared in court through her attorneys to litigate her Answer and Counterclaim (Transcript dated Feb.8, 2016, P.16, L.9 to P.17, L.22).

There was no legitimate reason for C.M. and the trial court to proceed with an "uncontested" Petition and no valid reason to proceed as if the Petition was, in fact, unopposed. Before this Court, C.M. does not provide any legal reason for this case to have proceeded as unopposed and does not assert any legal grounds on which the Trial Court could do so.

In fact, C.M. does not even respond to POINT I of M.C.'s opening brief, that the Trial Court committed an egregious violation of the procedural due process rights of M.C. and Baby A, Baby B and Baby C, by refusing to consider the Answer, Separate Defenses, Counterclaim, and to deny them a hearing on the factual and legal issues they raised. *See*, PT.I, AOB, Pp.19-23.

The Trial Court acted as if the court thought that M.C. and the three babies were not entitled to any procedural due process because M.C. has signed the surrogacy contract before the children even existed. The court acted as if the contract, itself, terminated her rights and the rights of the children. Obviously, only an order of a court could terminate the rights of any of them, and only a court order could award parentage and custody.

It is too plain and axiomatic for extended discussion that a litigant has a right to be heard, and her Answer and Crossclaim must be entertained before a court can terminate her parental rights and those of the children she sought to protect. *See*, AOB, PT.1, Pp.19-23.

The court, in effect, held that M.C. and Babies A, B and C had no right to due process because of a paper signed before the children's existence, a document that C.M. alleged was a legal basis to terminate their rights, and which M.C. challenged under both State and Federal law.

This was reversible error. C.M does not even attempt to justify the lack of due process and presents his case as if it should be treated as uncontested. *See*, RB, Pp.9-13.

It is a basic tenant on which all other rights depend, that a litigant must be given a fair hearing to present her facts and legal arguments, and when there are fundamental rights involved, the procedural safeguards provided must reflect the magnitude of those rights. *M.L.B. V. S.L.J.*, (1996), 519 U.S. 102; *Santosky v. Kramer*, (1982), 455 U.S. 745; *Fuentes v. Shevin*, (1972), 407 U.S 72. The failure of the court to afford procedural due process violated, not just the Fourteenth Amendment of the U.S. Constitution, but it violated Art. 1, §7, subdivision (a) of the California Constitution. *See*, AOB, PT. I, Pp.19-23.

The judgment of the Children's Court must be vacated and the case must be remanded for disposition on the merits of all issues raised by M.C. in her pleadings.

## POINT II

**M.C., in Fact, Had an Actual Biological Relationship with the Three Children She Carried, Which Made Her the Mother of Baby A, Baby B and Baby C, as a Matter of Fact,**

**and She Is the Mother of the Children as a  
Matter of California Law.**

Appellee, C.M. argues that one basis for M.C.'s assertion that she is the mother of the three babies is that she "bonded" with the children. C.M. argues that there was no relationship between M.C. and the children because there was no bonding, relying upon a misinterpretation of a single outdated publication from 1992 that predated modern human bonding science. RB, P.46.

In addition to this apparent denial of an actual relationship between the mother and child, C.M. fails to address M.C.'s actual arguments which distinguishes this case from *Johnson v. Calvert*, (1993), 5 Cal. 4<sup>th</sup> 846, and he clings to an incorrect interpretation of *Johnson* and an incorrect interpretation of California Family Code to claim that M.C. is not the legal mother of the three children, and, in effect, argues that the children have no mother either in fact or under California Law.

Obviously, these factual and legal issues disputed by both parties should have been addressed and decided in the trial court and the case should be remanded for that purpose. C.M. is incorrect on both his assertions of fact and his legal argument.

**A. M.C. Had an Existing Relationship with Her  
Three Children She Carried and to Whom She  
Gave Birth, as a Matter of Fact.**

**1.**

M.C. set forth detailed allegations of fact asserting that she is, in fact, the mother of the children, in both her Answer and Separate Affirmative Defenses, and in her Counterclaim.

M.C. asserts in her Answer, that she is the natural mother of the three babies and had an existing relationship with them as a matter of fact. *See*, e.g. AA, Ex.2, P. 5, ¶¶12, 15; Affirmative Defenses, 1, 3, 4, 5, 6, 7, 8 and 9.

In her Counterclaim, M.C. not only clearly asserts that she is the natural mother of the children in fact, but she sets forth detailed factual allegations concerning the existing mother-child relationship between M.C. and Baby A, Baby B and Baby C. *See*, Counterclaim, Factual Allegations, Subsection B, “Facts Pertaining to the Existing Mother-Child Relationship Between Respondent-Counterclaimant, M.C., and Baby A, Baby B and Baby C.” AA, Ex.2, AA, Pp.65-70, ¶¶65-80. In that section of her Counterclaim, M.C. cites to numerous scientific journal articles and studies that prove the allegations contained in that section of the Counterclaim. The Counterclaim and the 11 or 12 studies cited, discussed the relatively newly discovered role of oxytocin and other peptides which establish a strong physical and emotional bond between the mother and child. All of these scientific studies were published after the single 1992 publication cited by C.M., which basically critiqued a couple of studies from the 1970's.

Further, M.C.'s Counterclaim set forth detailed allegations of fact supported by citations to scientific publications pertaining to the unique benefits that the children derive from the unique relationship with their mother, benefits to their development which cannot be provided by C.M. *See*, Counterclaim, Factual Allegations, Subsection C, “Mothers Provide an Essential Benefit for the Children. The Plan of Surrogacy International, Dr. Jeffrey Stenberg and C.M. to Intentionally Deprive Baby A, Baby B and Baby C of a Mother is Contrary to Their Best Interests,” AA, Ex. 2, AA, Pp.70-77, ¶¶81-97 (containing almost two dozen citations to scientific publications).

If anything, C.M.'s citation in his brief to a single publication from 1992, weighed against three dozen scientific citations supporting important allegations of fact, demonstrates the magnitude of the procedural due process violation of the trial court: there were contested facts of importance which were clearly set forth in detail in M.C.'s pleading.

Those facts are material to the State Court issues, as well as the Federal Constitutional issues raised by M.C. On another level, they demonstrate that there is no legitimate policy to deprive the children of the only mother they have just because a 50 year old man from Georgia prefers it that way without any regard for the children's best interests.

## 2.

It cannot be questioned that a pregnant woman has an existing relationship with the child she carries, and that the two of them undergo an important bonding process throughout pregnancy.

Oxytocin, a nanopeptide hormone, has been described as "the love and bonding hormone;" it is critical for the development of effective parenting in mammals. The secretion of oxytocin during pregnancy in women is similar to that in other female primates and mammals. There is a link between oxytocin and human mother-child bonding. Feldman and colleagues (2007) published the first empirical report on the topic, assessing oxytocin levels in sixty pregnant women during the first and third trimesters and during the early post-partum period. The study provided clear evidence of the biological basis for maternal psychological responses to the fetus. Specifically, first trimester levels of oxytocin predicted bonding-related thoughts and bonding behavior directed to the newborn. Women whose bodies were secreting more oxytocin early in the pregnancy were more psychologically attached to their infants. Stronger attachment involved positive energy directed towards the child, and

maintenance of constant affectionate and stimulating bodily contact with the child. Mothers who had high oxytocin levels were also more preoccupied by thoughts of the infant, focusing on safety and the infant's future. Feldman, R., Weller, A., Zagoory-Sharon, O. Levine, A. (2007), *Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding*, Psychological Science, 18:11, 965-970. Oxytocin is related to mental as well as behavioral aspects of bonding.

Other studies have demonstrated that rising oxytocin levels during pregnancy are associated with bonding process between a pregnant mother and her child. Levine and colleagues (2007) demonstrated that oxytocin plays an important role in the emergence of maternal responses. Levine, A., Zagoory-Sharon, O., Feldman, R., Weller, A. (2007), *Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment*, Peptides, 28: 1162-1169.

Oxytocin is one of nature's primary means for insuring maternal responses. The number of oxytocin receptors in the expectant mother's brain multiplies dramatically in response to rising estrogen levels across pregnancy. Surges in oxytocin levels occur during labor and as the infant travels through the birth canal, oxytocin levels are elevated further in the mother. Through the birth process the infant is imprinted on the mother and she experiences oxytocin-related feelings of calm and pain reduction. Carter, C. S., & Altemus, M. (1997), *Integrative Functions of Lactational Hormones in Social Behavior and Stress Management*, Annals of the New York Academy of Sciences, 807:164-174; Carter, C. S. (1998), *Neuroendocrine Perspectives on Social Attachment and Love*, Psychoneuroendocrinology, 23, 779-818; Uvnäs-Moberg, K. (1997), *Physiological and Endocrine Effects of Social*



*Contact: Integrative Functions of Lactational Hormones in Social Behavior and Stress Management*, Annals of the New York Academy of Sciences, 807, 146-163.; Uvnäs-Moberg, K. (1998), *Oxytocin May Mediate the Benefits of Positive Social Interaction and Emotions*, Psychoneuroendocrinology, 23, 819-835.

There are identifiable and specific neuroanatomical correlates of maternal-infant attachment. They can be seen in the post-partum brain and can be striking. Noriuchi, Kikuchi & Senoo (2008) found there are certain areas of the mother's brain that are specifically involved in the recognition of her infant, namely, the orbitofrontal cortex, periaqueductal gray, anterior insula, and dorsal and ventrolateral parts of the putamen. Noriuchi, M., Kikuchi, Y. & Senoo, A. (2008), *Functional Neuroanatomy of Maternal Love: Mother's Response to Infant's Attachment Behaviors*, Biological Psychiatry, 63:4, 415-423. The identification of these highly elaborate neural mechanisms is yet another confirmation of the strength and complex relationship between mother and child. See also: Kim, Pilyoun (2010) *The Plasticity of Human Maternal Brain: Longitudinal Changes in Brain Anatomy During the Early Postpartum Period*, Behavioral Neuroscience, 2010, Vol.124(5), pp.695-700; Kinsley, C. H. ; Amory - Meyer, E. (2011) *Why the Maternal Brain?* Journal of Neuroendocrinology, Nov, 2011, Vol.23, p.974(10); Kim, Pilyoung, Strathearn, Lane, Swain, James E. (2016), *The Maternal Brain and its Plasticity in Humans*, Hormones and Behavior, January 2016, Vol.77, pp.113-23; Glynn, L (2010) *Giving Birth to a New Brain: Hormone Exposures of Pregnancy Influence Human Memory*, Psychoneuroendocrinology, 2010, Vol.35(8), pp.1148-1155.

An explosion of neuroscientific research has confirmed attachment theory, and has demonstrated that a child's first bond is with his mother.

(Leckman J and March JS (2011) Editorial: Developmental neuroscience comes of age, *Child Psychology and Psychiatry* 52:4 pp333-338; Schore A and McIntosh J (2011) Family Law and the Neuroscience of Attachment, Part 1 *Family Court Review* Vol 49;3 pp 501-512 ) This primordial attachment starts during pregnancy. The infant recognizes, and is emotionally attached to, his mother, from before birth. He prefers her scent and the sound of her voice and heartbeat. He craves her closeness, especially at times of distress. She is his first care giver.

Pregnancy causes vast changes in the female brain that prime the mother to care and nurture her child in a responsive and sensitive manner. (See, for example: Leng et al (2008) Oxytocin and the maternal brain *Current Opinion in Pharmacology* 8:731-734). In all but the most extreme adverse circumstances, the mother is best suited to be the primary caregiver.

Researchers have reported that in reproductive-related behaviors, intentionality does not predict outcome. Even if a woman planned all along to give up her child after birth, that intentionality cannot, in general, overcome or defeat the powerful physiological and psychic processes of pregnancy that initiate distinct maternal cognitions and behaviors. (Santelli J. et al, 2006 An Exploration of the Dimensions of Pregnancy Intentions Among Women Choosing to Terminate Pregnancy or to Initiate Prenatal Care In New Orleans, Louisiana, *American Journal of Public Health* 96:11 p. 2009-2015).

Likewise, it cannot be doubted that a mother provides essential benefits to the children she carries.

Odors are a significant part of an infant's life, and through them the infant/mother bond continues to strengthen. At birth, smell is the most developmentally advanced of all the senses. Sullivan, R 2000 Review: *Olfaction in the Human Infant*, available at

[www.researchgate.net/publication/242084746](http://www.researchgate.net/publication/242084746). A newborn recognizes his mother's – and only his mother's - scent, and is soothed by it. During pregnancy, women develop a distinctive pattern of five volatile compounds that are released in the nipple and underarm areas. These chemicals pass into the amniotic fluid and the fetus is exposed to them from early in pregnancy, when the sense of taste begins to develop. After birth, the infant is attracted to, and soothed by, the mother's unique scent. It is partially because of this scent, that he can locate her nipple and be nourished ( Vaglio S et al 2009, *Volitale signals During Pregnancy: A Possible Chemical Basis for Mother-Infant Recognition*, Journal of Chemecology 35:131-139).

Women, particularly women of reproductive age, have a more acute sense of smell in comparison to men. (Oliveira-Pinto AV et al, 2014 *Sexual Dimorphism in the Human Olfactory Bulb: Females Have More Nuerons and Glial Cells Than Males* PLOS ONE 9 (11): e111733). Studies have found that 90% of mothers could recognize their baby's smell after only 10 to 60 minutes of exposure to their infant. (Kaitz, M et al., 1987 *Mothers Learn to Recognize the Smell of Their Own Infant Within Two Days*, Developmental Psycho Biology: 120(6): 587-91; Weisfeld, GE et al., 2003 *Possible Olfation Based Mechanisms in Human Kin Recognition and Inbreeding Avoidance*, Journal of Experimental Child Psychology 85:3 p279-295). Flavors from the mother's diet during pregnancy are transmitted to amniotic fluid and swallowed by the fetus. Consequently, the foods and drinks consumed by women during pregnancy impact the child's later food preferences. The child prefers the tastes of foods that are familiar to him from before birth, that is, the foods his mother ate during pregnancy (Mennella JA 2001, *Prenatal and Postnatal Flavor Learning by Human Infants*, Pediatrics 107(6):e88).

The fetus is surrounded by a rich auditory environment: the sounds of his mother's heart, breathing, gastro-intestinal system, and voice. The mother's voice is the most salient sound for the fetus, rising above other sounds by as much as 24 decibels. The fetal ear is well-equipped to hear, and is able to recognize his mother's voice in five seconds. He prefers not only his mother's voice, but its prosody. He prefers his mother's native language (Voegtline KM *et al* 2013 *Near-Term Fetal Response to Maternal Spoken Voice*, *Infant Behavior and Development*, 36, 526-533; Guellai B *et al*, 2015 *Suprasegmental Information Affects Processing of Talking Faces at Birth*, *Infant Behavior and Development* 38 11-19 Krueger C *et al* 2014 *Emergence and Retention of Learning in Early Fetal Development*, *Infant Behavior and Development* 37,162-173).

Researchers have reported that in reproductive-related behaviors, intentionality does not predict outcome. Even if a woman planned all along to give up her child after birth, that intentionality cannot, in general, overcome or defeat the powerful physiological and psychic processes of pregnancy that initiate distinct maternal cognitions and behaviors. (Santelli J. *et al*, 2006 *An Exploration of the Dimensions of Pregnancy Intentions Among Women Choosing to Terminate Pregnancy or to Initiate Prenatal Care In New Orleans, Louisiana*, *American Journal of Public Health* 96:11 p. 2009-2015).

There are extensive differences between males and females in the ability to interpret nonverbal communications and to empathically resonate with emotional states. Neuroscience indicates that pre and postnatally, the mother's right brain (the instinctive, emotional part of her brain that is sensitive to the infant's needs and non-verbal communication) is key to her role as primary caregiver. (Shore AN (2005) *Back to basics: Attachment, affect regulation, and the developing right brain: Linking developmental*

*neuroscience to pediatrics*. *Pediatrics in Review*, 26, 204-21128. Mothers provide a unique and essential benefit for the children they carry, give birth to, and raise. Attachment security in children has been found to be associated specifically with maternal sensitivity, responsiveness to distress, and appropriate stimulation. Consistent research findings demonstrate the importance of an early, secure attachment for the development of emotional regulation including regulating one's own emotional arousal as well as more complex executive capacities. Attachment security has also been found to contribute to early conscience development. Cole, P.M., Martin, S.E. & Dennis, T.A. (2004), *Emotion Regulation as a Scientific Construct: Methodological Challenges and Directions for Child Development Research*, *Child Development*, 75, 317-333; Schore, A.N. (2001), *Effects of a Secure Attachment Relationship on Right Brain Development, Affect Regulation, and Infant Mental Health*, *Infant Mental Health Journal*, 22, 7-66; Sroufe, L.A. (1996), *Emotional Development: The Organization of Emotional Life in the Early Years*, New York; Cambridge University Press; Laible, D.J. & Thompson, R.A. (2000), *Mother-Child Discourse, Attachment Security, Shared Positive Affect, Early Conscience Development*, *Child Development*, 71 (5), 1424-1440. Children who were insecurely attached to their mothers demonstrated poor self-regulation in toddler and preschool years, while those with secure attachments developed self-regulation. Kochanska, G., Philibert, R.A. & Barry, R.A. (2009), *Interplay of Genes and Early Mother-Child Relationship in the Development of Self-Regulation from Toddler to Preschool Age*, *Journal of Child Psychology and Psychiatry*, doi: 10.1111/j.1469-7610.2008.02050.x.

**B. M.C. Is the Legal Mother of Baby A, Baby B and Baby C, and M.C.'s Parental Rights and the Rights of the Three Children Can Be**

**Terminated Only If There Is Proof, by Clear and Convincing Evidence, of Strict Compliance with Cal. Code §7962 and §7960, Subsection (c), and Only If Those Statutes, as Applied, Do Not Violate Any of the Substantive Due Process or Equal Protection Rights of the Children and M.C.**

M.C. is the only mother of Baby A, Baby B and Baby C under California Law. *See*, AOB, P.II, A, Pp.23-26. C.M. doesn't actually respond to M.C.'s argument and analysis on this point. Instead C.M. misrepresents, in part, the argument M.C. does make, misstates controlling California Law, and confuses the gestational surrogacy contract with an Order of Termination as if the former is the same as the later.

In replying to C.M., it is helpful to identify three distinct issues which arise under California Law completely independent of whether enforcement of the contract constituted a violation of constitutional rights.

The first is whether M.C. is, in fact and in law, the mother of the three children. The second is whether the "gestational carrier" contract, itself, operates to terminate the rights of M.C. and the children, or whether it is only a document which potentially forms the basis for termination. The third issue is whether, under the facts of this case, the contract can operate as a legal basis to terminate M.C.'s rights and those of the three children. These are the distinct general issues under state law. Obviously, there is a fourth general group of issues pertaining to whether the statute, if used to terminate the relationship between M.C. and the three babies, violates any one or more substantive Due Process or Equal Protection rights of M.C. or the children.

**1.**

C.M. misstates M.C.'s reasoning why she is the legal mother of the children, stating that "Based on Subdivision (a) (of Section 7601) alone, M.C.

concludes she is presumptively the children's natural parent within the meaning of part 3..." (RB, 35).

Section 7601, Subd.(a) is not the basis for M.C. being the mother of the children, and surely M.C. does not rely upon it "alone" as the legal basis.

As M.C. has clearly and consistently argued, the fact that she carried and gave birth to the children is the fact which establishes her legal status. It is §7610(a) which recognizes that the mother who carries and gives birth to a child is, in fact, the mother of the child, and her legal status is established by proof of that fact. Nothing more is needed because that fact establishes legal motherhood.

The only relevance of §7601(a) is that it makes it clear that the fact that there may be no "genetic" relationship does not deprive the mother who carries the child, of her legal status as parent.

§7610(a) refers to the relationship of "natural parent" and that section read together with §7601 subd.(a), makes it clear that M.C. is the legal mother of the children. M.C. is clearly a non-adoptive parent.

§7610 subsection (a) makes it clear that nothing more than proving that M.C. gave birth is needed for M.C. to establish that she has a legal parent-child relationship. The plain language of the statute states that there are only two ways that the parent and child relationship can be established under the statutory scheme (other than by a judgment of adoption): (1) a woman gave birth to the child; or (2) by some other method created by part 3.

Thus, M.C. does not have to establish her legal status under any other portion of the act, and it is for that reason that the presumptions to which C.M. refers, like under §7611 and §7612 are irrelevant. Everyone other than the woman who gives birth, in order to establish a "natural parental" relationship, must establish it in a statutory basis other than §7610(a). The woman who

gives birth is undisputedly the legal parent of the child born, and that fact cannot be rebutted.

While this is the only possible interpretation of the statute, it is reinforced by two other authorities. In *Johnson v. Calvert*, (1993), 5 Cal. 4<sup>th</sup> 84, the California Supreme Court overruled the Court of Appeal in that case, which held that because Ms. Johnson was not genetically related to the child she bore, she could not be the “natural” mother and, therefore, the Court of Appeal held her giving birth could not form the basis as “legal” parent. The California Supreme Court held that the lack of a genetic relationship was irrelevant in the case of a woman who gave birth to the child and the lack of a genetic relationship did not preclude a woman who gives birth from being the legal mother. (*Johnson, supra*, 5 Cal. 4<sup>th</sup> at 92, FN9).

*Johnson* does not stand for the proposition that M.C. is not the legal mother of Baby A, Baby B and Baby C. That case involved two mothers who were natural parents under the act and their competing interests in their claim to legal parentage was resolved in favor of the genetic mother who had custody of the child and who was married to the child’s genetic father. That case has been adequately discussed in M.C.’s opening brief, and C.M. does not respond to M.C.’s showing of its irrelevance to this case. *See*, AOB 25, 26.

In addition, §7962(f) further supports this construction of the statute. §7962(f)(1) does not state that parentage under subdivision (a) of section 7610 is nullified. Quite the opposite. It does not address that provision while it addresses other sections of part 3 (and part 2) which the statute states the contract may nullify or rebut. This makes sense because the fact that a woman gives birth cannot be rebutted once that fact is established.

More importantly, the parental rights of a natural parent can only be terminated by a court order, a reality recognized by §7962(f)(2) which allows



for the termination of the surrogate's rights if the requirements of the statute are established and termination is otherwise appropriate.

This, of course, makes practical sense. If the minimum conditions of the statute are not met, the contract cannot be enforced under the state statute, and there would be no basis to terminate the mother's rights and the surrogate could contest for custody.

## 2.

Both the trial court and C.M. proceeded as if they believed that the mere signature on the gestational surrogacy contract, in and of itself, stripped M.C. of her parental rights. *See, e.g. RB, Point 2, Pp.20-30.*

The mere signing of a gestational carrier agreement before the children even existed does not, by itself, operate to terminate the mother's rights. It has no greater legal significance than the signing, by a parent, of a document relinquishing parental rights signed either before or after birth. The relinquishment of rights only forms the potential basis for a court to terminate parental rights. So, too, with the surrogacy contract – it is only, if all legal requirements are met, a basis for a court to terminate M.C.'s rights.

M.C. articulated both grounds under California Statutory law, and Federal Constitutional Law, why the contract in this case could not be a legal basis for the court to terminate the rights of M.C. and the three babies.

One fact alleged, pertinent to state law, was that C.M. was not an "intended parent" within the meaning of the statute. That question was a question of fact and M.C. provided sufficient sworn allegations to require a trial on that issue alone. The court refused to even consider the allegations of M.C.'s pleadings and acted under the mistaken belief that the court could treat the case as unopposed, and even offered to accept C.M.'s apparent contention

that the mere signing of a contract, by itself, stripped M.C. of all rights and standing.

This was error. That suggestion is analogous to holding that a mother who signed a relinquishment of parental rights in an adoption could not ever challenge the termination of her rights in court, even if the consent was involuntary, uninformed, the product of fraud, legally revocable, or termination was unconstitutional under the particular facts. C.M. said he couldn't raise the children, and did not intend to raise all three. The trial court ruled, incorrectly that what happened to the children was none of the court's "business."

M.C. and the three babies were entitled to their day in court.

### **POINT III**

***Johnson v. Calvert*, (1993), 5 Cal. 4<sup>th</sup> 84, Did Not address or Resolve the Issues Pertaining to the Constitutional Rights of the Three Babies or Those of M.C. Presented in This Case. Nor has Any Other Case Addressed the Constitutionality of California's "Gestational Carrier" Statutory Scheme, First Passed into Law in 2012.**

M.C. has previously distinguished, with significant clarity, *Johnson v. Calvert*, (1993), 5 Cal. 4<sup>th</sup> 84, from the current case. Despite that fact, C.M. continues to misstate and misinterpret *Johnson*, going so far as to assert that *Johnson* decided all of the issues presented in this case. That claim is completely incorrect.

First, M.C. asserts that the Surrogacy Statute under scrutiny, on its face, and especially as applied to the children under the facts of this case, violates two separate fundamental Due Process Liberty Interests of Baby A, Baby B and Baby C guaranteed by the Fourteenth Amendment of the United States

Constitution. *See*, AOB, PT.III B, Pp.30-35. Those issues were neither raised in *Johnson*, nor decided by the *Johnson* Court.

Nor can it be said that any determination in *Johnson* directly or even indirectly goes to the resolution of those constitutional rights. *See*, AOB, PT.III, A and B, Pp.28-35.

The constitutional right of the child not to be treated as a commodity was not raised or addressed in *Johnson*, and the policy consideration under California State Law embodied in the prohibition of exchange of money in connection with an adoption, was not pertinent and certainly not controlling to the constitutional issues presented in this case. *See, Johnson*, at 95-96. There is no adoption in this case and adoption, per se, is not part of the gestational carrier statutory scheme.

*Johnson* did not involve the Equal Protection Rights of the child. *See*, AOB, PT.III C, P.35-39. This case presents important issues pertaining to the best interests of the children, and the Equal Protection Rights of the children to be placed based upon what is in their best interests.

In fact, the Equal Protection Rights of M.C., raised in this case (*See*, AOB, PT.IV B, Pp.44-45), were not raised in *Johnson*. *See, Johnson*, at 98.

The only constitutional issue raised in *Johnson* concerned Anna Johnson's argument that she had a Fourteenth Amendment Due Process Liberty Interest which would be violated if the contract, in that case, was enforced.

However, in that case, as the *Johnson* Court explained, there were two women who "each presented acceptable proof of maternity." *Id.* at 93. Thus, the *only* reason the *Johnson* Court looked to "Intent" was because there were two women with "acceptable" proof of their claims, and under the law, the child could have only one legal mother. *Id.* at 93.

That is not the case here. M.C. is the only mother pressing her claim.

Anna Johnson pressed her constitutional claim in the teeth of Mrs. Calvert having been found to be the legal mother of the child who possessed her own constitutional rights. *Id.* At 98-99. *Johnson* pointed out that Anna Johnson's constitutional argument rested upon her being found to be the legal mother of the child, which the court found she was not. *Id.*

That holding is irrelevant here, and the rights of a mother in the position of M.C. was not determined in *Johnson*, and her constitutional challenge was not decided.

In *Johnson*, the surrogate attempted to supplant or replace another woman who had a superior standing, as the mother to the child. Recognition of Anna Johnson's relationship with her child as having constitutional protection would have been at the expense of Mrs. Calvert's constitutional rights which were established and superior.

The constitutional rights of one person cannot be recognized if such recognition are at the expense or denigration of the very constitutional rights of another person. *Smith v. Organization of Foster Families*, (1977) 431 U.S. 816, 846-47.

There exists no such conflict between two different mothers or women in this case. The children are entitled to a mother, have a right to maintain a relationship with their mother, M.C. is the only mother they have, and they only mother they knew.

Many of the issues presented in this case are fact intensive and they have been alleged in M.C.'s pleadings. Given the proper opportunity to be heard, M.C. can and will prove those material facts. In *Johnson*, some of Anna Johnson's factual contentions were rejected because, despite being given proper Due Process, she could not produce evidence that proved the facts.

This case presents serious factual issues concerning not only C.M.'s ability to raise the children, but the case raises facts that show that he did not want to raise all of them, and didn't intend to raise all of them. This case is not at all controlled by *Johnson* on any issues presented in this case.

#### **POINT IV**

#### **M.C. has the Standing to Litigate the Constitutional Rights of the Children.**

Just as C.M. did not contest the factual allegations of M.C.'s pleadings, he has not addressed the merits of M.C.'s legal arguments concerning the substantive Due Process and Equal Protection Rights of the three babies. Instead, C.M. only argues that M.C. has no legal standing to litigate the constitutional rights of the three children she was carrying when she filed her initial Complaint, and her Answer and Counterclaim to C.M.'s Petition in the Children's Court. *See*, RB, PT.4, Pp.47-53.

M.C. adequately addressed the issue of M.C.'s standing to litigate the children's rights in her opening Brief. *See*, AOB, PT. III A, Pp.28-29.

In his argument, C.M. does not mention any of the authority cited by M.C. in her Brief, and does not contradict the standards enumerated in M.C.'s Brief for establishing standing to litigate the rights of another. In fact, he merely recites them again.

C.M. argues that M.C.'s standing rests entirely upon her being declared the legal mother of the children. While she surely is the legal mother, her standing does not rest exclusively upon that legal conclusion. She meets all of the prudential conditions for standing. *See*, AOB, P.29. She certainly has sustained an injury in fact: her parental rights were terminated and she has been deprived of all access to the children she bore. Other than her own right

to live, there is probably no greater right of a mother than her right to her relationship with her children she carried and to whom she gave birth.

The most essential element in all of this is that other than M.C., there is no one who can raise and litigate the rights of the children. They were, and are, utterly helpless to do so themselves, and the rights of the children sought to be protected are in direct conflict with the interests asserted by C.M., the only other parent and adult with a cognizable relationship with the children.

If any one has the standing to litigate the rights of children, it is surely the woman who is carrying the children, whose lives she saved from the demands of a man who didn't want them, and it is she who has an interest and standing in seeing that the children's welfare, best interests and rights are preserved.

#### **POINT V**

#### **M.C.'s Claims Cannot Be Estopped Based Upon A Void and Unenforceable Contract Premised Upon An Unconstitutional Statute.**

Oddly, Respondent incorrectly argues that M.C.'s execution of the surrogacy contract not only prospectively and irrevocably waives her fundamental constitutional rights and those of her children who had not yet even been conceived, but serves to forever bar her from challenging the enforcement of that contract, the constitutionality of the "surrogacy enabling statute" upon which that contract is based, and the judgment of the trial court which enforced the contract without any semblance of procedural due process.

#### **A. Estoppel**

Respondent first argues that M.C.'s signature on a 68-page surrogacy contract drafted by Respondent's counsel estops her from challenging the contract's recitation of parental rights and purported applicability of *Johnson*

*v. Calvert and In re Marriage of Buzzanca*.<sup>1</sup> Respondent's argument, however, presupposes that the contract is both enforceable under the statute, and it assumes that the statute does not violate any of the Due Process and Equal Protection Rights of M.C. or the children. Far worse, it assumes that the signing of the contract precludes M.C. from litigating the facts which demonstrate it does not meet the minimum standards of the statute. Beyond that, C.M. assumes that signing the contract not only precludes M.C. from pointing out that the statute is unconstitutional, but he argues that she is not even entitled to Due Process so she can be heard on the issues.

One of the very issues raised by M.C. is whether the contract signed before the children were even in existence, can operate to waive either her rights or those of the children. According to C.M., as his argument goes, the contract waives her ability to even argue that it can't operate as a waiver of those substantive constitutional rights of the four of them. Merely asserting C.M.'s position exposes its absurdity.

Respondent particularly notes that the contract provides that M.C. will not attempt to form a relationship with her child. Both the surrogacy contract and Respondent, however, ignore the scientific evidence which demonstrates that the bonding between mother and child during pregnancy is both physiological and psychological in nature. *See*, PT.II above. The surrogacy contract cannot prevent that biological reality.

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<sup>1</sup> Respondent improperly suggests that M.C. was concealing from the court that she signed the surrogacy contract by failing to include it in the appellant's appendix. There is nothing "telling" about its lack of inclusion in the appendix. As Respondent knows, the version of the contract signed by M.C. was not provided to her until after that filing. Moreover, M.C. admitted that she signed the surrogacy contract in the Verified Answer and Counterclaim which the family court refused to consider. (AA, Ex. 2, Pp. 44-111).

In addition, the surrogacy contract cannot dictate, by reciting that *Johnson v. Calvert* and *In re Marriage of Buzzanca* apply, what case law will govern the rights of the parties. Parties to a contract cannot bind a court's determination of applicable law. Questions of law are uniquely within the province of the court, which must make its own determination. Nevertheless, for the reasons outlined at length in M.C.'s Opening Brief and in this Brief, neither *Johnson* nor *Buzzanca* apply to the facts of this case.

M.C.'s signature on the surrogacy contract does not estop her from challenging the constitutionality of the "surrogacy enabling statute," §7962. In support of its estoppel argument, Respondent cites *In re Griffin* (1967) 67 Cal.2d 343, 347, which stands for the proposition that a "party is estopped from arguing on appeal the trial court exceeded its jurisdiction if the party consented to it below." (*See*, Respondent's Brief, at P. 15.) Here, however, there is no challenge to the trial court's jurisdiction. The Court had jurisdiction. M.C.'s Complaint is that the Court did not exercise its jurisdiction at all as it pertains to M.C.'s pleadings. Rather, M.C. objects to the improper submission by Respondent – and treatment by the family court – of C.M.'s petition as uncontested. As highlighted at length above, both C.M. and the family court knew that M.C. had already filed a Verified Complaint in the Civil Division, and that she had filed a Verified Answer and Counterclaim in the family court. Despite this knowledge, in a stunning denial of procedural due process, the family court refused to consider the Verified Answer and Counterclaim, and instead processed C.M.'s petition as if it were uncontested. M.C. tried to submit to the Court's jurisdiction, but the Court refused to provide Due Process.



## **B. Judicial Estoppel**

Respondent further claims that M.C. is judicially estopped from contesting the terms of the surrogacy contract. However, as acknowledged by Respondent, the terms of the contract were never adopted by M.C. in any judicial or quasi-judicial proceeding, so the doctrine does not apply. *See, Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-87. Moreover, both cases cited by Respondent, *In re Marriage of Hinman* (1992) 6 Cal.App.4th 711 and *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, are readily distinguishable. In both those cases, the litigants instituted proceedings in court and stipulated to the terms of a judgment which they later sought to invalidate by arguing that the court lacked jurisdiction.

In this case, however, the legal proceedings were instituted by C.M. who improperly filed his petition as uncontested. Despite M.C.'s filing of a Verified Answer and Counterclaim, the family court refused to consider it, and treated the petition as if it were uncontested. Plainly, M.C. did not stipulate to the terms of the family court's judgment. Unlike *In re Marriage of Hinman* and *Kristine H.*, M.C. is not contesting the validity of a judgment that she procured. *See, Kristine H. v. Lisa R., supra*, 37 Cal.4th at p. 162. Therefore, the doctrine of judicial estoppel does not apply.

## **CONCLUSION**

The district Court denied M.C. and Baby A, Baby B and Baby C of all semblance of procedural Due Process. M.C.'s Answer, Affirmative Defenses and Counterclaim presented important factual and legal issues. The Court of Appeal must vacate the Judgment of the Children's Court and remand the case for discovery and a trial on the merits of the factual and legal issues presented by M.C.'s Answer, Affirmative Defenses and Counterclaim.



**CERTIFICATION OF COMPLIANCE**

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 7,475 words.

*/s/*

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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 September 21, 2016, I served the Appellant'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  
(through service on Ct. App.)

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 September 21, 2016, at Irvine, California.

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Raquel Moreno