No. 17-

IN THE

# Supreme Court of the United States

M.C.,

*Petitioner,*

*v.*

C.M.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Under California's "Gestational" Surrogacy Enabling Statute, a woman who agrees to carry a child to term as a "gestational" surrogate, must surrender custody and submit to the termination of her parental rights in favor of an "intended parent," who is not required to be genetically related to the child. The statute requires a court to enforce the contract despite objections by the mother, despite any parental unfitness of the "intended parent," and regardless of whether enforcement of the contract is contrary to the children's best interests. As the Family Court in this case declared,"what happens to the children is none of the Court's business." In the present case, a triple embryo transfer was performed on M.C., a 47 year old California woman who gave birth to triplets. The children were born ten weeks prematurely. The "intended parent," a single 50 year old Georgia man, a deaf-mute who lives in his elderly parents' basement, repeatedly declared that he was not capable of caring for three children, and even demanded that M.C. abort one or more of the children. Nevertheless, California enforced the contract and removed the children from M.C. Although M.C. sought to protect the interests of the babies by filing a Counterclaim in the enforcement action, the California courts gave no prejudgment hearing to M.C. before terminating her rights and those of the children.

**Question No. 1**

Does the Due Process Clause of the Fourteenth Amendment protect the relationship a pregnant mother has with the child she carries in her womb, either as a liberty interest of either the mother or of the child, or both, whether or not the two are genetically related?

**Question No. 2**

Does California's "Gestational" Surrogacy Statute, used to strip children from the mother who carried them in her womb, who is a fit parent, and who wants to raise the children, and instead places them, without determining what is in the children's best interest or whether the "intended parent" is fit, with a single, 50 year old man who repeatedly stated that he was incapable of raising three babies, who had demanded that one or more of the children be aborted, and ultimately stated he would surrender at least one child for adoption, violate the Substantive Due Process Rights of the children guaranteed by the Fourteenth Amendment, on its face or as applied?

**Question No. 3**

Does the California "Gestational" Surrogacy Statute violate the Equal Protection Rights of Baby A, Baby B and Baby C, either on its face or as applied to Baby A, Baby B and Baby C, by(1) refusing to place the babies based upon their best interests, as the state does for all other classes of children; and (2) terminating the children's right to maintain their relationship with the mother who bore them despite the fact she wants to raise the children and she is a perfectly fit mother contrary to how the state treats all other classes of children?

**Question No. 4**

Does the California "Gestational" Surrogacy Statute violate M.C.'s Substantive Due Process Liberty Interests guaranteed by the Fourteenth Amendment (1) to maintain her relationship with the children she carried and gave

birth to; and (2) to be free from state promoted and state enforced exploitation of her, either on its face or as applied to M.C. under the facts of this case?

**Question No. 5**

Does the California "Gestational" Surrogacy Statute violate M.C.'s Equal Protection Rights, and those of all women similarly situated, either on its face or as applied to M.C. in this case, when the Statute does not provide any of the protections of her rights as the state provides to all other women in circumstances where the mother's parental rights are terminated on the basis that the mother "voluntarily" consented to such termination?

**Question No. 6**

Did California deny procedural due process under the Fourteenth Amendment, facially or as applied, when, pursuant to its "Gestational" Surrogacy Statute, the state denied M.C. and the three children a prejudgment hearing or any consideration of her Counterclaim, before terminating M.C.'s rights, those of the children and ordering removal of the children from M.C.?

## PARTIES TO THE PROCEEDINGS

The caption of the case, as it appears on the cover of this Petition, Contains the initials of the two parties to the California State Court proceedings, including the California Court of Appeal, and the California Supreme Court. The initials of the parties are used pursuant to state practice because infant children are involved. The full names of the parties appear in the unredacted portions of the record.

Petitioner is M.C., the 47 year old mother of three babies born ten weeks prematurely on February 22, 2016. The children were conceived with ova from an anonymous donor who is not a party to this case and whose identity has never been known by the parties.

M.C. filed a Counterclaim in her individual capacity on her own behalf, as well as in her asserted capacity as the Guardian *ad Litem* of the three babies, referred to in court papers as Baby A, Baby B and Baby C.

C.M., the Respondent, is a 50 year old man who lives in Georgia in the basement of the home of his two elderly parents. C.M. is deaf and does not speak. He is a postal worker who has never been married. His mother is confined to bed and in need of full time care, and his elderly father cannot help raise young children. C.M. signed a "Gestational" Surrogacy Contract with M.C. before the children were conceived. Following a triple embryo transfer performed in California, C.M. stated that he could not raise the children, first asked to have all three children aborted, and then made repeated demands that M.C. abort one of the children. After M.C. refused to

abort the children, C.M. announced he would sue her for money damages, and that he would surrender one of the children for adoption.

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*Smith v. City of Fontana*,
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*Smith v. Smith*,
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*Snyder v. Massachusetts*,
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*Stanley v. Illinois*,
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Cal. Fam. Code § 7962 . . . . . . . . . . . . . . . . . . . . . . *passim*

Cal. Fam. Code § 8612 . . . . . . . . . . . . . . . . . . . . . . . . . . .30

Cal. Fam. Code § 8801.3(b)(2) . . . . . . . . . . . . . . . . . . . . .35

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Cal. Penal Code § 273 . . . . . . . . . . . . . . . . . . . . . . . . .29, 35

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Feldman, R., *et al* (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 . . . . . . . . . . . 20

Hoekzema, E. *et al., Pregnancy Leads to Long-Lasting Changes in Human Brain Structure,* Nature Neuroscience . . . . . . . . . . . . . . . . . . . . . . . . . . 20

Maestripiere, D. (2001), *Biological Basis of Maternal Attachment*, Current Directions in Psychological Science, 10:79-83 . . . . . . . . . . . . . . . . . . 20

New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, State of New Jersey, *After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy* . . . . . . . . . 20-21

## DECISIONS AND ORDERS DELIVERED IN THE CASE

On February 9, 2016, the Superior Court of California entered a Judgment enforcing a Gestational Surrogacy Contract between M.C. and C.M., the Judgment cutting off the rights of M.C. and certain rights of the three children she carried. The Judgment was entered as an "*ex parte*" order despite the fact that M.C. filed an Answer, Special Defenses, and a Counterclaim that raised numerous factual and constitutional issues under the Fourteenth Amendment of the US Constitution. The Superior Court entered the Judgment after refusing to consider M.C.'s Counterclaim. (*See*, Judgment of February 9, 2016,40a).

On appeal, the California Court of Appeal, while holding that M.C. had legal standing to litigate the Federal Constitutional rights of the children, affirmed the Judgment of the Superior Court. (*See*, Opinion of California Court of Appeal, 1a). The Opinion of the California Court of Appeal is reported as *C.M. v. M.C.*, 7 Cal. App. $5^{th}$ 1188 (Ct. of Appeal, Div. 1, Cal. 2017).

The Petitioner timely filed her Petition for Further Review with the California Supreme Court, which denied that Petition on April 12, 2017. (*See*, Notice Denying Petition for Further Review, 49a).

## STATEMENT OF JURISDICTION

The Supreme Court of California filed its Order denying further review on April 12, 2017. This Court has jurisdiction under 28 U.S.C. §1257, as construed by *R.J. Reynolds Tobacco Co. v. Durham County, et al.*, 479 U.S. 130 (1986).

## STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Substantive and Procedural Due Process and Equal Protection Rights guaranteed by the Fourteenth Amendment of the United States Constitution. The constitutionality of California's "Gestational" Surrogacy Enabling Statute, Cal. Fam. §7962 and §7960, is implicated. Cal. Fam. §7962 imposes mandatory termination of the relationship between infants and the mothers who carry them against the will of the mothers, and even if such termination is not in the children's best interests. Cal. Fam. §7610 (a) and §7601(a) are relevant, and those statutes recognize that M.C. is, in fact, the biological mother of the children and, she is the legal mother of the children.

## STATEMENT OF THE CASE

### A. The Nature of the Action and Procedural History

#### 1. Nature of the Action

This is an action brought by C.M. to enforce a "Gestational" Surrogacy Contract expressly authorized by Cal. Fam. §7962. The agreement constitutes a plan, hatched two and a half months before the three children were conceived, which has as its central purpose deliberately depriving the three babies of the only mother they have. Under that plan, M.C. was exploited and subjected to a risky drug regimen, and a pregnancy that posed high risks to both M.C. and the three babies.

Shortly after confirmation of three viable embryos, C.M. announced that he was not capable of raising three children, and demanded that all three children be aborted. C.M., thereafter, changed his demand to the abortion of one child. Realizing that C.M. was not capable, nor desirous of caring for three children, in an effort to protect the children M.C. counterclaimed seeking custody of one or all of the children based upon their best interests.

M.C.'s Counterclaim raised multiple issues pertaining to the rights and interests of the children and those of M.C. arising under the Fourteenth Amendment of the United States Constitution.

**2. Procedural History**

The proceeding resulting in a judgment entered on February 9, 2016, terminating M.C.'s rights and those of the children had proceeded on a Petition for an uncontested termination despite the fact M.C. filed her Verified Answer, Affirmative Defenses and Counterclaim in response to C.M.'s Petition. The California courts refused to give M.C. a hearing or consider her Counterclaim and Defenses in this case, construing the Statute as barring M.C. from even litigating the constitutionality of the Statute.

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 M.C. sought custody based on the best interests of the children.

(1RJN, ex.1, pp.2-47). It was served on C.M. 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, counsel for M.C. 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, Counsel for C.M. 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). "The parties further agree that the Court make the following orders: The Court finds the non-existence of the parent-child relationship between respondent and the children to be born ..." (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: "All parties have agreed that at all times relevant, the intent of each and every party to the surrogacy agreement was that the Petitioner is the natural, genetic, and sole legal parent of the children..." (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. (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 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 M.C. guaranteed by the Fourteenth Amendment of the United States Constitution as it is applied to her, and on its face; (d) preliminary and

permanent Injunction, for among other things, prohibiting C.M. from removing the children from California; and (e) 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.

After filing her 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 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 and 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 without requiring C.M. to appear.

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).

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 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). Counsel again asked the Court: "May I inquire as to how the court is handling our Counterclaim." (RT 26:3-5).

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 Counterclaim 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). Once the court ruled that C.M. was entitled to Judgment, the court stated:

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

The Court never explained 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 C.M.'s attorney with the "uncontested" Petition.

M.C. filed a notice of appeal on February 23, 2016. (AA, ex.10).

The three children remained in the hospital for ten 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 ten 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.

**B. Statement of Facts**

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 M.C. 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 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 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 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., three male embryos were transferred on August 17, 2015. (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 and M.C., 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 when she realized that C.M. was not capable of 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. (AA, ex.2, pp.59-60, ¶37).

When she saw that C.M. could not raise the children, on September 21, M.C. 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). M.C. 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 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, M.C. 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. responded 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 M.C. that she was obligated to abort one of the babies because he was not capable of raising three children.

On September 24, Walmsley wrote to C.M.'s attorney 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." The attorney responded: "agreed." (AA, ex.2, p.61,¶46).

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, M.C. 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, 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 M.C. and advised that "*I had decided, after looking at all issues, to pursue reduction*." (Emphasis added). 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 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 for an abortion was that "C.M. is a single male and is deaf." (AA, ex.2, pp.61-62,¶48).

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). M.C. 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).

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).

M.C. gave birth on February 22, 2016, by an emergency Caesarean section. The babies were only 28 weeks post conception. Kaiser Hospital enforced the trial court's judgment. As the hospital personnel removed each baby from M.C.'s womb, they refused to allow M.C. to see any of the 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 M.C. (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 remained in the hospital. (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).

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### I. The California Court Decided Important Federal Questions Arising Under the Fourteenth Amendment of the United States Constitution Never Before Decided By, but Should be Settled By, this Court. The California Gestational Surrogacy Enabling Statute Implicates Some of the Most Important and Fundamental Rights and Interests of the Children and the Mothers who Carry Them. Its Deprivations of those Rights go to the Very Heart and Substance of the Intrinsic Nature of Those Fundamental Rights Guaranteed by the Fourteenth Amendment.

#### Introduction and Overview

There are numerous features intrinsic to all gestational surrogacy arrangements which, if enforced by a state, deprive children, and the mothers who carry them, some of their most precious fundamental liberty interests. There are features of the California Gestational Surrogacy Enabling Statute which further exacerbate that deprivation of their rights and interests.

All of the constitutional issues raised in this Petition were raised at the inception of this case were preserved throughout the litigation. There can probably be no better case which more directly and clearly presents the most important of constitutional issues implicated in such surrogacy contracts than this one.

### 1. The Deprivations Intrinsic to all "Gestational Surrogacy" Agreements

Intrinsic to all gestational surrogacy agreements, if enforced by a state, are certain deliberate deprivations of the rights of the children. They deliberately deprive the children of the mother with whom they bonded, who they learned to know, and with whom they had the most intimate of all human relationships. It deprives the child of the benefits they derive from their unique relationship with their mother, a relationship that begins in utero with the pregnancy which forms the basis for a life long loving relationship.

By their intrinsic nature, the agreements are the sale and commodification of the child. Usually, the only requirement to be an intended parent, is the ability to pay a surrogacy broker, pay the doctor and clinic which provide the IVF services, pay the lawyers involved, and pay the surrogate mother.

By their intrinsic nature, the surrogacy arrangements deprive the children of their right and ability to be placed with a parent based upon their best interests, and the children are given to the "intended parent" regardless of their fitness.

Because IVF procedures are employed, gestational surrogacy arrangements place the children at greater risk for genetic anomalies and other illness at a far greater rate than normal pregnancy.

Because it is customary to transfer multiple embryos, usually two or three, gestational surrogacy creates high risk pregnancies for the children invariably resulting in premature birth and all of the medical problems derived therefrom.

Intrinsic to all gestational surrogacy agreements, when enforced by a state, is the forced separation of the mother who carries the children, even in circumstances when the mother feels bound to discharge her moral obligations to the children, even when such separation is harmful to her and the children, and even if the separation is contrary to her and the children's best interests.

Intrinsic to all gestational surrogacy agreements, when enforced by a state, is the exploitation of the woman involved, exploited for their reproductive capacity, and exploited for the woman's financial needs.

Intrinsic to all such agreements is the exploitation of the women by subjecting them to the significant medical risks inherent in the forced drug regimen prior to embryo transfer, and high risk pregnancy where there are multiple embryo transfers.

Intrinsic to the agreements is the denial to the surrogate mother of all protections afforded all other women who agree to "voluntarily" surrender their parental rights: that no agreement before the birth of the child is enforceable; that no offers of money can be made in connection with the surrender of her parental rights; that she receive counseling that emphasizes that she has a right to change her mind and keep the child she carries if she decides it is what is best for her and the child; that

only a court order can terminate her rights after a hearing in which it is determined by clear and convincing evidence that she made a truly voluntary and informed consent following birth, as opposed to being forced by compulsion of a contract signed before conception and before she knew the depth of her bond and love for the child, and before she knew what was truly best for the baby.

All of these intrinsic harms of gestational surrogacy deprecates the fundamental rights of children and their mothers and destroys the most precious and intimate relationship in all of life.

#### 2. The Features of California's Statute Which Exacerbate the Deprivations

Cal. Fam. §7962 provides no protections of any kind either for the children or for the mothers who carry them. For a gestational surrogacy contract to be enforced under the statute, the only requirements are that the names of the parties must appear in the contract, they must sign it before the IVF process takes place, both parties must have an attorney to advise them about the terms of the contract, and the contract must recite that the surrogate mother's medical insurance company can demand that she reimburse it with any funds she is paid to act as a surrogate. *See*, Cal. Fam. §7962.

The statute was construed to mean that once the woman's signature is on the contract, she has made a prospective waiver of her constitutional rights and those of the children she carries, even the right to a hearing to challenge the constitutionality of the statute.

As a result, every harm to the rights and interests of the children and their mother is exacerbated. The statute, as construed by the California court in this case, makes it clear that the court cannot be concerned with "what happens" to the children. There is no limit on the number of embryos which can be transferred, so that a triple embryo transfer is permitted even though it places the mother at great risk, and the children at far greater risk for premature birth and significant illness than normal childbirth. The statute does not limit the age of the mother, so that a doctor, in this case, is authorized to perform a triple embryo transfer on a 47 year old woman placing her at risk resulting in the children being born ten weeks premature, requiring the children to spend eleven weeks in a neonatal intensive care unit.

Perhaps worst of all, the statute promotes an industry that sells children for profit which is entirely unregulated. The surrogacy brokers, driven by profit, are not licensed and are not regulated to insure that the "intended parents" are fit and capable of raising children. There is no regulation of the doctors and the amounts of money which the surrogacy brokers and the doctors receive is unlimited. There is no restriction or limit on the amount of money which can be offered a woman to act as surrogate, making it far more likely that women in financial need will be induced to engage in dangerous and distressing arrangements which violate her constitutional rights.

**A. 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 in California.**

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. That biological relationship is beneficial to both the mother and child. She has had an existing relationship with the children. Dec. Golden, ¶¶11-51; Dec. Grossman, ¶¶ 9-45; SAC, ¶¶106-138.[1]

It is for that reason that concern has been raised that deliberately planning separation of a mother and child will harm both. New Jersey Commission on Legal and

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1. There is now extraordinary scientific evidence concerning the close biological relationship between mother and child during pregnancy, far too vast to cite in this Petition. For instance, it is now known that oxytocin, a nanopeptide hormone frequently described as "the Love and Bonding Hormone," is secreted across pregnancy to create a strong physiological bond between mother and child. Maestripiere, D. (2001), *Biological Basis of Maternal Attachment*, Current Directions in Psychological Science, 10:79-83; Feldman, R. et al (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. It is now known that pregnancy causes significant long-lasting changes in the mother's human brain structure in the regions of the mother's brain which subserve social cognition, which provides support for the adoptive process serving the transition into motherhood. Hoekzema, E., et al., *Pregnancy Leads to Long-Lasting Changes in Human Brain Structure*, Nature Neuroscience, pp. 1-10, Dec. 19, 2016.

Ethical Problems in the Delivery of Health Care, State of New Jersey, *After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy*, pp. 99-105.

M.C. is also the legal mother of the children under California law. 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."

Across the nation in every state but one, the fact that a particular woman gave birth is treated as proof that she is the biological mother of the child, and she is given legal status as mother, even in states that enforce Gestational Surrogacy Statutes. *See* Appendix D.

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

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

M.C. possesses the legal standing to vindicate the rights of the Children. This 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*, 491 U.S. 617 (1989):

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

Plainly, there is an Article III case and controversy. M.C. has suffered an injury-in-fact by having her rights terminated. As for the prudential question, the interests of mother and child 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 dependent upon their mother to assert their rights for them. In fact, M.C. is the only person who can assert their rights because C.M., their father, 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.

The California Court of Appeal correctly held, in this case, that M.C. has the legal standing to litigate the constitutional claims on behalf of the three children. *See*, *C.M. v. M.C.*, 7 Cal. App. 5th 1188, 1205-07 (2d Dist., Div. 1, Cal. 2017).

**2. §7962 Violates the Children's Substantive Due Process Rights**

The Due Process Clause protects those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Supreme Court has stated that these rights deemed fundamental liberties are those "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). They are those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); See also, *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

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

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

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

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

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

The right to maintain the relationship between a parent and a child is one which is an intrinsic natural right – not derived from government, but arising by virtue of

the dignity of the person. *Smith v. Organization of Foster Families*, 431 U.S. 816-845 (1977). The Supreme Court has stated that the constitution protects the "sanctity" of these familial relationships. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

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

**(b) The Statute Violates the Children's Right to be Free From Commodification and State Sanctioned and State Enforced Sale**

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. Verified Answer and Counterclaim, (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*, at 503. Thus, there has been a long and strong prohibition against the purchase and sale of children and their right to their familial relationships.

California Penal Code §181 states in pertinent part:

> "Every person…who buys or attempts to buy... or pays money…to another, in consideration of having any person placed in his or her custody, or under his or her control…is punishable by imprisonment…for two, three or four years."

C.M. pleads that the 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.

He bargained not 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. 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, 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. *See*, Counterclaim ¶¶174-177.

In the history and tradition of this Nation, in the placement of children, the interests of the children are paramount; those of the parent are subordinate. *See, e.g. Goodarzirad v. Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026; *In re Marriage of Russo* (1971), 21 Cal. App. 3d 72, 85; *Smith v. Smith* (1948), 85 Cal. App. 2d 428, 434. In that history and tradition, contracts between parents to give primary custody to one parent over the other have never been enforceable without the court holding a trial to determine what is in the child's best interest. *In re Marriage of Jackson* (2006), 136 Cal. App. 4th 980, 990; *Goodarzirad, supra* at 1027.

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

C.M. purchased the children, and that fact is amply demonstrated by C.M.'s acknowledgment that he couldn't 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.

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

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

In *Harpe*r, the Court held that where a benefit is protected by the state, a classification which excludes some individuals from protection of a fundamental interest must be strictly scrutinized. 383 U.S. at 670. See also, *Carrington v. Rash*, 380 U.S. 89 (1965); *Weber*, 406 U.S. at 172. "Classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even where a statute merely provides greater protection of a fundamental right for some relative to others, only a compelling interest can justify the classification. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Carey v. Brown*, 447 U.S. 455 (1980); *v. City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

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 paid money to obtain exclusive parental rights and control over them.

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

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

In every instance, 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.

Before a court can enter an order of adoption, the court must determine that the "interest of the child will be promoted by the adoption." *Id.* at §8612; *In re Laws' Adoption*, 201 Cal. App. 2d 494, 498 (Ct. App. 1962) (citing *Adoption of Barnett*, 54 Cal.2d 370, 377 (1960)). "'The welfare of the child can never be excluded from the issues, no matter what preliminary action its parent or parents may have taken.'" *Id.* at 501 (quoting, *Ex Parte Barents*, 222 P.2d 488, 492 (1950)); *see*, Cal. Fam.§8612.

Indeed,"a court cannot enter a judgment terminating parental rights based solely upon the parties' stipulation that the child's mother or father relinquishes those rights." *In re Marriage of Jackson* (2006), 136 Cal. 980, 990; *see, also*, *Goodarzirad v. Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026 (citing *In re Arkle* (1925) 93 Cal. App. 404, 409, and *Anderson v. Anderson* (1922) 93 Cal. App. 87, 89).

California Law declares:

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

The only exception to these prohibitions is found in §7962, which authorizes the termination of the children's rights. Judge Pellman made that very observation. 2RJN, p.279, L.6-8.

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, to enforce the placement of a child with an unfit care giver, 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. This one departure from that commitment violates the children's Equal Protection Rights.[2]

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

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

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland, supra*. This is an interest in the

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2. 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.*, 700 A.2d 453 (Sup.Ct. Pa. 1997) where a single man unable to cope with the riggers of child rearing, killed the child a month after his birth.

"companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380,398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16; *see, also*, *Tuan Anh Nguyen, et al. v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

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

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. 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. *See*, e.g. *In the Matter of Baby M*, 109 N.J. 396 (1988).

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. ([European Parliament]"Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial gain... [as a human rights violation]"). at p. 16.

**2. 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 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. 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.

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 the "gestational" surrogate in this case.

Selling her rights is not a service and the prohibition against money in exchange for parental rights is just as applicable in this case (where the children need their mother), as it is in other contexts. See, e.g. Cal. Penal Code §181; Cal. Penal Code §273. California's denial of the protection of these laws violate M.C.'s Equal Protection Rights.

A large purpose of these protections is to guard against persons exploiting women by taking their children with uninformed or involuntary consents, and inducements with money. The Gestational Surrogacy Statute promotes the exploitation of women like M.C.

**CONCLUSION**

Certiorari should be granted in this case.

Dated: July 11, 2017

Respectfully Submitted,


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# APPENDIX

**APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, FILED JANUARY 26, 2017**

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

B270525

C.M.,

*Plaintiff and Respondent,*

v.

M.C.,

*Defendant and Appellant.*

January 26, 2017, Opinion Filed

(Los Angeles County Super. Ct. No. BF054159)

APPEAL from an order of the Superior Court of Los Angeles County. Amy Pellman, Judge. Affirmed.

Defendant and appellant M.C. (M.C.) appeals from a judgment declaring plaintiff and respondent C.M. (Father) to be the sole legal parent of triplet children (the Children) and finding that M.C. has no parental rights. M.C. was the gestational carrier for the Children, who

were conceived in vitro using Father's sperm and ova from an anonymous donor. Father and M.C. entered into the surrogacy arrangement pursuant to a written "In Vitro Fertilization Surrogacy Agreement" in 2015 (the Agreement). Each party was represented by separate counsel in negotiating the Agreement.

Despite the Agreement, during the pregnancy M.C. developed reservations about the arrangement. She sought rights as the Children's mother and custody of at least one of the Children. When Father filed a petition pursuant to Family Code section 7962 to be declared the sole parent of the Children, M.C. opposed the petition.[1] Following a hearing on the petition on February 9, 2016, the trial court entered judgment in favor of Father.

On appeal, M.C. raises various substantive and procedural challenges to the judgment. The challenges amount to an all-out attack on the constitutionality and enforceability of surrogacy agreements in California.

We conclude that M.C.'s arguments are foreclosed by specific legislative provisions and by a prior decision by our Supreme Court. In view of the well-established law in this area, our role on appeal is limited to reviewing whether the legislative requirements for establishing an enforceable surrogacy agreement were met in this case. We find no error in the trial court's ruling on that issue, and we therefore affirm.

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1. Subsequent undesignated statutory references are to the Family Code.

## BACKGROUND

### 1. The Agreement

M.C. executed the 75-page Agreement on May 31, 2015; Father executed the agreement on June 3, 2015. The Agreement identified Father as the "Intended Parent" and M.C. as "Surrogate."

M.C. was 47 years old at the time she entered into the Agreement. She represented in the Agreement that she has four children of "childcare age," and that she "has previously been a surrogate mother and is familiar with the undertaking." She stated that she did "not desire to have a parental relationship" with any children born pursuant to the surrogacy arrangement and that she "believes any Child conceived and born pursuant to this Agreement is/are morally, ethically, contractually and legally that of Intended Parent." The Agreement stated that the underlying intent of all parties to the Agreement was that "any Child conceived and/or born pursuant to the conduct contemplated under this Agreement shall be treated, in all respects, as the sole and exclusive natural, biological and/or legal Child of Intended Parent. It is also the intent of all Parties to this Agreement that Surrogate and her Partner shall not be treated as a natural, biological and/or legal parent of any Child conceived and/or born pursuant to the conduct contemplated under this Agreement."

The Agreement stated that the parties were "informed and advised of the California Supreme Court decision in

*Johnson v. Calvert*, and the Court of Appeal decision in *In re Marriage of Buzzanca*, and agree that these decisions apply to and govern this Agreement and the conduct contemplated thereby.[2] Specifically, each Party agrees that the intent to bear and raise the Child conceived and born pursuant to this Agreement shall be determinative of Parentage, to wit: that Intended Parent shall be treated as the legal, natural, and biological parent of any Child(ren) conceived and born pursuant to this Agreement." The parties further acknowledged that sections 7960 and 7962 "apply to this Agreement," and represented that "in entering into this Agreement they have taken steps to execute this Agreement in compliance with sections 7960 (as amended) and 7962."

The Agreement contained a disclosure that the "ova/eggs were provided by an anonymous donor," and that the embryos "will be created through the use of sperm provided by Intended Parent with ova/eggs anonymously donated to Intended Parent for his exclusive use." The parties agreed that "the donated ova/eggs shall be deemed as being the property of Intended Parent and as having come from Intended Parent."

In addition to describing the compensation that M.C. was to receive for her "discomfort, pain, suffering and for pre-birth child support," the Agreement addressed medical costs. It provided that medical expenses would be paid through a combination of "Surrogate's insurance

2. *Johnson v. Calvert* (1993) 5 Cal.4th 84 [19 Cal. Rptr. 2d 494, 851 P.2d 776] (*Calvert*); *In re Marriage of Buzzanca* (1998) 61 Cal. App.4th 1410 [72 Cal. Rptr. 2d 280] (*Buzzanca*) (discussed *post*).

and Intended Parent's direct payment for such uncovered costs."

M.C. promised in the Agreement that she would "freely and readily assist Intended Parent in legalizing his parent-child relationship with the Child." The parties stated their understanding that, "based upon the current law in the State of California, an action to terminate the Parental rights of Surrogate is not necessary and Intended Parent is entitled to a judicial determination of his Parentage, notwithstanding any objection to the contrary by Surrogate."

M.C. was represented by separate counsel, Lesa Slaughter, in negotiating the Agreement. Father agreed to pay the costs of M.C.'s counsel up to an amount of $1,000 for legal advice with respect to the Agreement and up to $500 for review and advice with respect to the legal documents "necessary to establish the Intended Parent's parentage." The Agreement contained a disclosure and waiver of the potential conflict of interest from Father's payment of M.C.'s legal counsel fees.

M.C. initialed each page of the Agreement, and her signature was notarized. Attorney Slaughter transmitted the executed and notarized Agreement to Father's counsel with a transmittal letter dated May 31, 2015. The letter stated that Slaughter had "independently represented [M.C.] and my consultation and review with her is now complete." She reported that her consultations with M.C. and M.C.'s signature to the Agreement "prove to me that my client has a clear and informed understanding of the

nature of the Gestational Surrogacy Contract and agrees to be fully bound by its terms." Slaughter provided her "full legal clearance to proceed with medication in this matter."

**2. Proceedings to Determine Parentage**

An embryo transfer took place on August 17, 2015. A subsequent pregnancy test confirmed a pregnancy, and an ultrasound on September 8, 2015, revealed that M.C. was carrying triplets.

On January 16, 2016, before the Children were born, Father filed a "Verified Petition to Declare Existence of Parent-Child Relationship Between the Children to be Born and Petitioner, and Non-existence of Parent-Child Relationship Between the Children to be Born and Respondent/Surrogate" (Petition). The Petition was supported by declarations from Father, Father's counsel, and a doctor who was responsible for the embryo creation and transfer procedure. Father also lodged a copy of the Agreement and filed a memorandum of points and authorities in support of the Petition (Memorandum).

Father's submission did not include a declaration from M.C. or her counsel. The Memorandum stated that "[i]n conjunction with the Petition it was anticipated Respondent, [M.C.], would comply with the [In Vitro Fertilization Surrogacy] Agreement and provide her Declaration in support of the Petition and a Stipulation admitting that she was not the parent of the Children at issue and did not wish to have a parental relationship with the Children. At this time that may not be."

A hearing on the Petition was noticed for February 9, 2016. On February 1, 2016, M.C. filed a 65-page verified answer and counterclaim responding to Father's Petition. The answer and counterclaim sought a range of relief, including that: (1) M.C. be declared "the legal parent and mother" of the Children; (2) Father be declared "not the sole parent" of the Children and "not entitled to the benefits" of section 7962; (3) M.C. be awarded sole custody of one of the Children, and a custody trial be scheduled to determine "what custody arrangement will be in the best interests" of the other two Children; (4) a declaration that section 7962 violates the due process and equal protection rights of the Children and of M.C.; (5) a declaration that the Agreement cannot form the basis for terminating the parental rights of M.C.; and (6) an order that Father submit to DNA testing to determine whether he is the genetic father of the Children.

The counterclaim described a series of e-mail communications from Father in which he allegedly sought to abort at least one of the fetuses, first for financial reasons and then out of an allegedly pretextual concern for the health of the Children. M.C. refused to abort any of the fetuses, stating that she is "pro-life." She offered to raise one of the Children.

The counterclaim also alleged that Father was single, 50 years old, deaf, employed as a postal worker in Georgia, and responsible for caring for his elderly parents, with whom he lives. M.C. alleged that Father is "not capable of raising three children by his own admission, and may not be capable of raising even one or two children." M.C.

claimed that she learned for the first time while pregnant that the organization that facilitated the surrogacy arrangement had never done a "home study" to determine whether Father "is capable of raising any children."

After filing the counterclaim, M.C. moved *ex parte* on February 4, 2016, to continue the date for the hearing on the Petition, requesting a schedule for discovery concerning Father's willingness and ability to raise the Children. The *ex parte* application recited many of the same factual allegations concerning M.C.'s communications with Father that were included in M.C.'s counterclaim.

The trial court heard the *ex parte* application on February 8, 2016. The court denied the application, finding that M.C. had been aware of the Petition for a month and the *ex parte* proceeding was therefore not justified. The court also summarized the content and the circumstances of the Agreement and the Petition, referred to the decisions in *Calvert* and *Buzzanca* and the requirements of section 7962, and observed that Father "has complied with these requirements other than submitting the declaration of [M.C.] and her attorney." Father's counsel indicated that he might have to call M.C.'s former counsel, Slaughter, to testify in lieu of a declaration.

The hearing on Father's Petition took place on February 9, 2016. Father's counsel explained that he had not been able to obtain a declaration from Slaughter because she had previously represented M.C. However, Father had served her with a subpoena and she was present in court. The court permitted her to testify.

Slaughter testified that she had “probably represented over a thousand surrogates.” She previously represented M.C. with respect to two surrogacy arrangements, including the Agreement with Father. M.C. initially waived the attorney-client privilege to permit Slaughter to testify about her representation, but then revoked the waiver when Father’s counsel began to question Slaughter concerning the first surrogacy arrangement. Over objections, the court permitted Slaughter to authenticate her May 31, 2015 transmittal letter, and to testify that the contents were “true and correct.” Slaughter also testified that it was her standard practice to review surrogacy contracts with her clients thoroughly and to discuss any questions they might have. When asked if she had employed her standard practice with M.C., Slaughter responded that she has “not varied my practice regarding surrogates or intended parents or egg donors, for that matter, whenever I undertake representation.”

On cross-examination, Slaughter testified that she had about 15 telephone conversations with M.C. concerning the surrogacy arrangement with Father, including revisions to the Agreement. She testified that she “withdrew my representation when … it became obvious [M.C.] was not following my legal advice.” Over objection, the trial court admitted the May 31, 2015 transmittal letter as an exhibit.

Prior to ruling on the Petition, the trial court also questioned M.C. under oath. In response to the court’s questions, M.C. confirmed that she had signed the Agreement and initialed each page.

### 3. The Trial Court's Ruling

The court found that Father "substantially complied" with section 7962, "the holding of the Supreme Court in *Johnson v. Calvert*, and the holding of" *Buzzanca*. Specifically, the court found that M.C. "read and reviewed every page of the gestational agreement"; that she initialed and signed "the Agreement"; that "her agreement was voluntary"; and that "all the other provisions of 7962 have been satisfied." The court entered a detailed judgment establishing that Father is the sole parent of the Children.

With respect to M.C.'s counterclaim, the trial court initially observed that it appeared to be "procedurally improper," and that the court did not believe that "counsel is even entitled to counterclaim." However, the court declined to strike the counterclaim. The court concluded that the documents M.C. submitted in support of the counterclaim were, "essentially, challenges to the petition." The court denied the counterclaim on the merits "even if it were proper."

M.C. filed her notice of appeal on February 23, 2016.[3]

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3. M.C. also filed a petition for a writ of supersedeas, which this court denied on April 14, 2016. In addition to these proceedings in state court, M.C. filed an action on February 2, 2016, in federal court, asserting various alleged constitutional violations. (See *Cook v. Harding* (C.D.Cal., 2016) 190 F.Supp.3d 921, ___ [2016 U.S.Dist. Lexis 73466, pp. *18–*20] (*Harding*).) The federal court dismissed that action on June 6, 2016, on abstention grounds. (*Id.* at p. *39.)

## DISCUSSION

Section 7962 establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an "assisted reproduction agreement for gestational carriers" contain: (1) the date on which the agreement was executed; (2) the identity of the persons "from which the gametes originated," unless anonymously donated; (3) the identity of the "intended parent or parents"; and (4) disclosure of how the "intended parents" will "cover the medical expenses of the gestational carrier and of the newborn or newborns." (§ 7962, subd. (a)(1)–(4).) The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties begin embryo transfer procedures only after the agreement has been fully executed. (§ 7962, subds. (b)–(d).)

An action to "establish the parent-child relationship between the intended parent or parents" and the child conceived pursuant to an assisted reproduction agreement may be filed before the child's birth. (§ 7962, subd. (e).) The parties are to "attest, under penalty of perjury, and to the best of their knowledge and belief," as to their compliance with section 7962 in entering into their agreement. (§ 7962, subd. (e).) A notarized agreement signed by all parties "with the attached declarations of independent attorneys" lodged with the court in accordance with section 7962 "shall rebut any presumptions" of parenthood contained in various specified code sections. (§ 7962, subd. (f)(1).)

Section 7962 also provides that, on petition by any party to a properly executed agreement, the court shall issue a judgment or order establishing "the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement," subject to proof of compliance with the section. (§ 7962, subd. (f)(2).) That judgment shall also establish that "the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children." (*Ibid.*) The judgment "shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section." (*Ibid.*)

In light of these well-defined criteria and procedures and despite the range of M.C.'s arguments, there are ultimately only two questions that determine the outcome of this appeal. First, did Father comply with the requirements for establishing a parent-child relationship and for terminating M.C.'s claimed parental rights under section 7962? Second, was the trial court's application of section 7962 here consistent with the constitutional rights of M.C. and the Children? We conclude that the answer to both questions is yes.

### 1. Standard of Review

Neither party addresses the appropriate standard of review to apply to M.C.'s challenges to the judgment. We employ well-accepted principles in reviewing M.C.'s various arguments. Most of M.C.'s arguments focus on the interpretation and constitutionality of statutes, which we review under a *de novo* standard. (See *Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816 [125 Cal. Rptr. 2d 836] [constitutionality of statute]; *In re D.S.* (2012) 207 Cal.App.4th 1088, 1097 [143 Cal. Rptr. 3d 918] [statutory interpretation].) To the extent that M.C.'s arguments involve a challenge to the trial court's findings of fact relevant to M.C.'s claimed parental rights, we apply the substantial evidence standard. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717 [57 Cal. Rptr. 3d 259] [applying substantial evidence standard to factual findings concerning biological father's right to object to adoption].)

### 2. M.C. Is Not Estopped from Challenging the Legal Effect or Validity of the Agreement

Before reaching the merits of M.C.'s arguments, we consider Father's claim that M.C. is estopped from making those arguments by the terms of the Agreement. Father argues that M.C. is precluded from claiming that she has any parental rights concerning the Children because she promised in the Agreement that she would not assert any such rights. In support, Father cites cases holding that parties can be estopped from seeking an unfair benefit by manipulating or taking inconsistent positions in judicial proceedings.

The principle involved in those cases does not apply here. Those cases focus on the need to protect the integrity of judicial proceedings.[4] The conduct that Father argues should result in estoppel here was not a position taken in a judicial proceeding but rather commitments made in a written Agreement before the Children had been conceived and before any judicial action had been initiated. What Father seeks is not estoppel, but rather enforcement of the Agreement. Father asks us to find the promises that M.C. made in the Agreement enforceable on their own terms, before even considering whether such summary enforcement is appropriate here under the governing statute and the constitutional arguments that M.C. has made.

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4. In *In re Griffin* (1967) 67 Cal.2d 343 [62 Cal. Rptr. 1, 431 P.2d 625], the court held that a defendant accused of a probation violation could not obtain dismissal as a result of his conduct in requesting a continuance that extended beyond the period of his probation. A contrary rule would "'permit the parties to trifle with the courts.'" (*Id.* at p. 348, quoting *City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 515 [170 P.2d 928].) *In re Marriage of Hinman* (1992) 6 Cal.App.4th 711, 716 [8 Cal. Rptr. 2d 245], held that a wife could not challenge a judgment in a dissolution action awarding joint custody of her two children from a prior marriage where she stipulated to the judgment. Similarly, in *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156 [33 Cal. Rptr. 3d 81, 117 P.3d 690], one lesbian partner was estopped from arguing that her estranged partner was not the parent of their child when she had previously stipulated to a judgment declaring them both the "'joint intended legal parents.'" (*Id.* at p. 161.) Again, the court was concerned that a contrary result would """"trifle with the courts."""" (*Id.* at p. 166, quoting *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1269 [284 Cal. Rptr. 18].)

We decline that approach. M.C.'s arguments challenge the proper interpretation and validity of the Agreement. Whatever the merits of those arguments, the doctrine of estoppel does not provide a ground to ignore them. We will not require enforcement of the Agreement without first considering whether it is enforceable. (Cf. *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1235 [30 Cal. Rptr. 2d 893] [there is "no doubt that enforcement of a surrogacy contract prior to a child's birth presents a host of thorny legal problems"]; *Buzzanca, supra*, 61 Cal.App.4th at p. 1422 ["There is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed in* a surrogacy agreement"].) We therefore reach the merits of M.C.'s appeal.

**3. The Trial Court Correctly Ruled That the Agreement Substantially Complied With the Requirements of Section 7962**

The Agreement contained all the information required by section 7962. It included: (1) the dates it was executed; (2) the source of the gametes to be used for the embryos (Father and an anonymous egg donor); (3) the identity of the intended parent (Father); and (4) disclosure of how medical expenses would be covered. (§ 7962, subd. (a).) Father and M.C. were represented by separate counsel in negotiating the Agreement. (§ 7962, subd. (b).) The parties' signatures were notarized. (§ 7962, subd. (c).) And M.C. did not undergo an embryo transfer procedure or begin medication to prepare for such a procedure until after the Agreement had been executed. (§ 7962, subd. (d).)

Father also substantially complied with the procedural requirements under section 7962 for summary determination of parentage pursuant to the Agreement. Father lodged a copy of the Agreement. (§ 7962, subd. (e).) Because M.C. opposed the petition to declare Father the sole parent, she did not provide a declaration attesting under penalty of perjury that the parties complied with section 7962 in entering into the Agreement. (*Ibid.*) However, she signed the Agreement itself under penalty of perjury, affirming that the contents of the Agreement were "true and correct except as to those matters which are based on information and belief, and as to those matters, we believe them to be true." The Agreement states that sections 7960 and 7962 "apply to this Agreement," and that the parties "are also informed and hereby represent that they have taken active steps to execute this Agreement in compliance with Sections 7960 (as amended) and 7962." M.C. also confirmed under oath at the hearing on the Petition that she had signed the Agreement and initialed each page.

Father also did not provide a declaration from M.C.'s lawyer for the Agreement, Slaughter, as required under section 7962, subdivision (f)(1) to rebut various statutory presumptions concerning parenthood. However, Father explained to the trial court that Slaughter was not in a position to provide such a declaration supporting the Petition in light of her prior representation of M.C., and he subpoenaed Slaughter to testify at the hearing on the Petition. At the hearing, Father elicited testimony from Slaughter showing that she had provided M.C. with independent representation with respect to the Agreement;

that M.C. had a "clear and informed understanding of the nature of the [Agreement];" and that she had entered into the Agreement "freely and voluntarily" and had agreed to be "fully bound by its terms."[5]

Under these facts, Father substantially complied with each requirement in section 7962 to obtain the orders concerning parenthood authorized by that section. The Agreement itself contained M.C.'s affirmation under oath that she intended to comply with section 7962 in entering into the Agreement. And Slaughter's testimony under oath was the functional equivalent of a declaration. Indeed, it was arguably a better procedural vehicle for testimony about M.C.'s capacity and intent, as it provided an opportunity for cross-examination.

In the analogous area of consent to adoption, courts have concluded that substantial compliance with regulatory requirements is sufficient to provide enforceable consent, so long as the purpose of the requirements is met. (See *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 540 [35 Cal. Rptr. 2d 291] [partial noncompliance with details of regulations for providing consent to

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5. In her opening brief, M.C. states that she contended below that she "did not receive independent legal advice concerning the contract." It is unclear whether she intended to raise this claim on appeal. If so, she has forfeited the claim, as she has not provided any argument or citations to authority or to the record in support. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal. Rptr. 2d 543, 897 P.2d 481].) We therefore need not consider whether her argument about the adequacy of the legal counsel she received was relevant to the requirements of section 7962 and, if so, whether the trial court erred in rejecting her argument below.

adoption did not vitiate consent where the "purpose of assuring voluntary and knowing decisionmaking by the parents" was fulfilled]; *Adoption of Baby Boy D.* (2001) 93 Cal.App.4th 1, 12–13 [112 Cal. Rptr. 2d 760] [evidence showed that birth mother "substantially complied with every reasonable objective of the statute and regulations" despite inadvertent failure to check one of the boxes on a consent form].) Similarly, the evident purpose of the detailed requirements in section 7962 is to ensure that the parties to an assisted reproduction agreement enter into the agreement knowingly and voluntarily. Where, as here, there is substantial compliance with section 7962's requirements showing that the parties' Agreement was knowing and voluntary, the purpose of the statute is met.

Despite the evidence that the Agreement complied with the requirements of section 7962, M.C. argues that it could not provide the basis to establish Father's parenthood under that section for several reasons. First, M.C. claims that, even if all the requirements of section 7962 are met, that is not sufficient to rebut the presumption of parenthood that is established by giving birth. Section 7610, subdivision (a) provides that "[b]etween a child and the natural parent," a parent and child relationship "may be established by proof of having given birth to the child." M.C. correctly points out that this subdivision is not included in the list of presumptions that are rebutted by lodging a notarized assisted reproduction agreement "with the attached declarations of independent attorneys" under section 7962, subdivision (f)(1).[6]

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6. Subdivision (f)(1) of section 7962 states that lodging an executed and notarized agreement and attorney declarations "shall

Neither the text nor the legislative history of section 7962 provides any indication of why the evidence of parenthood recognized under section 7610, subdivision (a) was omitted from the list of rebutted presumptions under section 7962, subdivision (f)(1).[7] Indeed, its omission seems inconsistent with the purpose of the provision. A claim that a gestational carrier is the "birth mother" is the argument one would most likely expect a surrogate to make to establish a parent and child relationship. In summarizing the bill that became section 7962, the Assembly Committee on the Judiciary explained that "if a woman undergoes in vitro fertilization, under a physician's supervision, using eggs donated on behalf

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rebut any presumptions contained within Part 2 (commencing with Section 7540), *subdivision (b) of Section 7610*, and Sections 7611 and 7613, as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children." (Italics added.) Thus, the list of rebutted presumptions includes only subdivision (b) of section 7610, which concerns establishing a parent and child relationship between a child and "an adoptive parent."

7. Father suggests that section 7962, subdivision (f)(1) does not mention section 7610, subdivision (a) because that subdivision does not actually create a presumption. The basis for this argument is unclear. The subdivision states that giving birth to a child may establish a parent-child relationship. Moreover, our Supreme Court in *Calvert* characterized section 7610, subdivision (a)'s predecessor statute (Civ. Code, former § 7003) as establishing a presumption of motherhood, and rejected the argument that the statute could not apply to a gestational carrier who is not genetically related to the child. (See *Calvert, supra*, 5 Cal.4th at pp. 92–93 & fn. 9.) Father also does not explain why, if section 7610 does not contain any presumptions, section 7610, subdivision (b) would be included in the list of rebutted presumptions under section 7962, subdivision (f)(1).

of intended parent or parents and the woman agrees to that in a writing signed by the woman and the intended parents prior to creation of the embryo, then the woman is not treated as the natural parent of the child and the intended parents are presumed to be the child's natural parents." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended April 26, 2011, pp. 1–2 (Assembly Analysis).) Similarly, an analysis by the Senate Judiciary Committee explained that the bill would provide that "any agreement that is executed in accordance with the provisions of the bill is presumptively valid and shall rebut any presumptions that the surrogate, and her spouse or partner, are the parents of the child." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended June 11, 2012, p. 4 (Senate Analysis).)

We need not attempt to resolve this apparent discrepancy. Whether or not section 7962, subdivision (f)(1) rebuts a presumption of parenthood based upon giving birth, the subsequent subpart of subdivision (f) makes clear that a surrogate has no parental rights when an assisted reproduction agreement complies with the requirements of the section.

Section 7962, subdivision (f)(2) states that, in ruling on a petition, "[s]ubject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties

with respect to, the child or children." This directive is quite clear. Compliance with the requirements of an assisted reproduction agreement and submitting the proof identified in section 7962 is all that is necessary to establish a parent-child relationship for the intended parent or parents and to extinguish any claim of parenthood by the surrogate.

M.C. argues that this subdivision does not support the trial court's order here because Father's alleged conduct in requesting an abortion of one fetus and allegedly threatening to surrender one of the Children through adoption showed that he did not "intend" to be a parent. Whatever its merits, the argument is foreclosed by the language of the subdivision, which provides that the "intended parent or intended parents *identified in the surrogacy agreement*" are to be declared the sole parents of children born to a surrogate. (§ 7962, subd. (f)(2), italics added.) There is no doubt here that Father was the intended parent identified in the Agreement.

The conclusion that Father is the intended parent for purposes of section 7962 is also supported by the definition of "'[i]ntended parent'" in section 7960, subdivision (c). That provision identifies an "intended parent" as an individual "who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction." The Agreement clearly assigns that responsibility to Father.

Apart from these explicit statutory provisions, M.C.'s argument is inconsistent with the apparent purpose of

section 7962 to provide a certain and reliable procedure to determine the parent-child relationship *before* the parties enter into a surrogacy agreement. (See Senate Analysis, *supra*, at p. 7 [as a result of the bill enacting § 7962, "intended parents, surrogates, and courts would arguably have a clear procedure to follow in creating and enforcing surrogacy agreements and determining parental rights"].) Permitting a surrogate to change her mind about whether the intended parent would be a suitable parent—or requiring a court to rule on whether the intended parent's conduct subsequent to executing an assisted reproduction agreement is appropriate for a prospective parent—would undermine the predictability of surrogacy arrangements. We agree with the observation of the federal court in *Harding*, that, were M.C.'s position to be accepted, we are "at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, 'decide' that the intended parent or parents are not up to snuff and challenge their parenting abilities in court." (*Harding, supra*, 190 F.Supp.3d at p. ___, fn. 9 [2016 U.S.Dist. Lexis 73466 at p. *23, fn. 9].)

**4. M.C.'s Constitutional Challenges Fail**

M.C. makes various constitutional arguments challenging the procedure for establishing a parent-child relationship under section 7962 and the legitimacy of surrogacy arrangements generally. It is important to note at the outset that our Supreme Court has already rejected constitutional challenges to surrogacy agreements and ruled that such agreements are consistent with the public

policy of California. (See *Calvert, supra*, 5 Cal.4th at pp. 95, 98–100.) Indeed, the Legislature's stated intent in enacting section 7962 was to codify the decisions in *Calvert* and *Buzzanca, supra*, 61 Cal.App.4th 1410. (See Assembly Analysis, *supra*, at p. 2 ["Case law in California makes clear that the intended parents are the natural parents and this bill clarifies and codifies that case law"]; Senate Analysis, *supra*, at p. 4 ["California case law establishes that even without a genetic link, the parties who intended to bring a child into the world are the child's legal parents [citing *Calvert* and *Buzzanca*]. This bill, with respect to surrogacy agreements, seeks to codify and clarify that case law by requiring parties to enter into surrogacy agreements, as specified, prior to the commencement of any medical treatment related to the surrogacy arrangement"].)

In *Calvert*, the court considered competing claims of parental rights by a surrogate and a husband and wife who contracted with the surrogate to give birth to a child for them. The child was conceived with sperm from the husband and an egg from the wife. The parties executed a contract providing that the child would be taken into the couple's home as "'their child,'" and that the surrogate would relinquish "'all parental rights.'" (*Calvert, supra*, 5 Cal.4th at p. 87.) The relationship between the parties deteriorated before the child was born, leading to competing lawsuits seeking a declaration of parental rights. (*Id.* at pp. 87–88.)

The *Calvert* court examined the competing parenthood claims under the Uniform Parentage Act (the Act), which

was the only statutory framework available at the time for assessing the parties' parenthood claims.[8] The court concluded that both the surrogate and the wife who donated her egg had plausible claims for parental rights under the Act. In that circumstance, the court gave effect to the parties' intent for parentage as expressed in their agreement. The court noted that, "[b]ut for their acted-on intention, the child would not exist." (*Calvert, supra*, 5 Cal.4th at p. 93.) The court observed that "[n]o reason appears why [the surrogate's] later change of heart should vitiate the determination that [the wife] is the child's natural mother." (*Ibid.*) The court rejected the public policy and constitutional objections that the surrogate raised to the parties' contract, concluding that giving effect to the parties' intent "does not offend the state or federal Constitution or public policy." (*Id.* at pp. 87, 95–100.)[9]

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8. The Act is now codified at section 7600 *et seq.*

9. In *Buzzanca*, the Fourth District Court of Appeal applied the reasoning of *Calvert* to a situation where a surrogate gave birth to a child conceived with the sperm and egg of anonymous donors at the instigation of a husband and wife who subsequently separated. In that case, neither the surrogate nor the husband claimed parental rights, and the trial court concluded that the child had *no* parents. The Court of Appeal reversed. The court held that the wife in that case was "situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child." (*Buzzanca, supra*, 61 Cal. App.4th at p. 1421.) Therefore, just as in *Calvert*, motherhood could plausibly be established in two women, and the conflict should be resolved by giving effect to the intention of the parties. (*Ibid.*)

M.C. attempts to distinguish *Calvert* and limit the scope of its holding by noting that the court in that case resolved competing claims of parenthood by two claimed *mothers*: The gestational carrier and the genetic mother of the child. The court acknowledged that "[b]oth women … adduced evidence of a mother and child relationship as contemplated by the Act," but concluded that "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible." (*Calvert, supra*, 5 Cal.4th at p. 92.) Here, of course, the dispute is not between two claimed mothers, but between a claimed mother and Father, the intended parent under the Agreement.

M.C.'s argument misses the broader implication of the holding in *Calvert*. The court held that it could give effect to the parties' intentions for the parentage of the child as expressed in their surrogacy contract because the agreement was "not, on its face, inconsistent with public policy." (*Calvert, supra*, 5 Cal.4th at p. 95.) That holding is ultimately dispositive for all of the constitutional arguments that M.C. raises here. Section 7962 permits the parties to a surrogacy arrangement to enter into a legally binding contract—subject to specific statutory safeguards—that determines the parentage of children conceived pursuant to the arrangement. There is no constitutional impediment to giving effect to the parties' intent expressed in such a contract.

**a. M.C. has standing to assert constitutional claims on behalf of the Children**

Father argues that M.C. does not have standing to assert the Children's constitutional rights on appeal because she is not a parent. Like his estoppel theory, this argument is inextricably bound up in the merits of M.C.'s appeal.

But for the Agreement, M.C. would have a colorable claim to motherhood based on the fact that she gave birth to the Children. (See § 7610, subd. (a); *Calvert, supra*, 5 Cal.4th at pp. 89–90; *Robert B. v. Susan B.* (2003) 109 Cal. App.4th 1109, 1115 [135 Cal. Rptr. 2d 785] [woman who gave birth to a child from an embryo belonging to another couple that was mistakenly implanted by a fertility clinic "clearly established a mother-child relationship by the undisputed fact that she gave birth" to the child].) Thus, Father's standing argument depends upon a conclusion that the Agreement is valid and that by executing it M.C. surrendered any claims to motherhood that she might have. One of the challenges that M.C. seeks to assert to the Agreement's validity is the claimed constitutional rights of the Children to a parent-child relationship with her. Whatever the merits of this claim, concluding that she has no standing to assert it because she is not a parent would assume that her argument fails before it is even considered. We do not believe that Father's standing argument compels such a circular result.

Father relies on the rule that only a "party aggrieved" has standing to appeal under Code of Civil Procedure section 902. That rule does not help him. We "liberally

construe the issue of standing and resolve doubts in favor of the right to appeal." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 948 [124 Cal. Rptr. 2d 688] [parent had standing to raise the sibling relationship exception to termination of parental rights].)

M.C. has standing to assert her own claimed statutory and constitutional rights to a parent-child relationship with the Children. (See § 7650, subd. (a) ["Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship"]; *Calvert, supra*, 5 Cal.4th at pp. 89–90; see also *In re Rauch* (1951) 103 Cal.App.2d 690, 694–695 [230 P.2d 115] [father had standing to appeal an order declaring his child to be a ward of the court despite a previous order appointing other relatives as guardians and giving them custody of the child].) M.C.'s interest in a relationship with the Children is intertwined with the Children's alleged interest in a relationship with her. She may therefore assert the Children's interests along with her own. "Where the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests. This is a matter of first party standing." (*In re Patricia E.* (1985) 174 Cal.App.3d 1, 6 [219 Cal. Rptr. 783] [father had standing to raise the issue of his minor daughter's right to counsel in a dependency proceeding because "independent representation of the daughter's interests impacts upon the father's interest in the parent-child relationship"], disapproved on other grounds in *In re Celine R.* (2003) 31 Cal.4th 45, 60 [1 Cal. Rptr. 3d 432, 71 P.3d 787].)[10]

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10. Father also relies on federal cases discussing whether parties had standing to raise constitutional claims under the

In other contexts, courts have found that persons who had no claim to be natural or genetic parents had standing to assert the interests of minor children. (*See*, *e.g.*, *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1314, fn. 24 [112 Cal. Rptr. 2d 692] [foster parents could raise the constitutional claims of a minor in a custody dispute under the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 *et seq.*) even though they did not themselves possess a fundamental interest in a relationship with the minor under a substantive due process analysis]; *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1152–1153 & fn. 7 [101 Cal. Rptr. 2d 364] [appellant could pursue a guardianship proceeding on behalf of a minor who previously lived with her and her partner, despite appellant's status as a nonparent who was a "former participant in a lesbian relationship"].) The fact that the Children are not parties to this appeal and therefore cannot assert their own interests provides further reason to consider M.C.'s arguments on their behalf. (Cf. *In re*

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constitutional and prudential standing requirements in *federal* court. He does not explain the relevance of those cases to this proceeding. To the extent such cases are analogous, they also do not support Father's argument. The United States Supreme Court has found that foster parents had standing to argue their view of the constitutional interests of minor children in a state's foster care procedures, even when the children and parents were separately represented parties. (*Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 U.S. 816, 841, fn. 44 [53 L. Ed. 2d 14, 97 S. Ct. 2094].) But for the Agreement, M.C. would have at least as much interest as a foster parent in the Children's alleged constitutional right to a parent-child relationship with her. (See *Calvert, supra*, 5 Cal.4th at p. 99, fn. 13 [citing *Smith* and noting that the trial court in *Calvert* had analogized the surrogate's relationship with the child to "that of a foster mother"].)

*Alexandria P.* (2014) 228 Cal.App.4th 1322, 1342 [176 Cal. Rptr. 3d 468] [*de facto* parents lacked standing to raise constitutional challenges to the ICWA on minor's behalf where the minor's counsel and guardian *ad litem* "sought an outcome consistent with the ICWA's requirements"].) We therefore proceed to the merits of M.C.'s constitutional claims.

**b. Procedural due process**

M.C. claims that the trial court denied her due process rights and the due process rights of the Children under the United States and California Constitutions by failing to consider her counterclaim and failing to give her a hearing prior to terminating her claimed parental rights. We reject the argument.

The record shows that the trial court gave M.C. the hearing that section 7962 contemplates. Section 7962, subdivision (f)(2) provides that, "[u]pon motion by a party to the assisted reproduction agreement for gestational carriers, the matter shall be scheduled for hearing before a judgment or order is issued." The trial court did conduct a hearing to determine if the requirements of section 7962 had been met. With respect to the one procedural element of the statute that had not yet been met—a declaration from M.C.'s former attorney—the court heard the attorney's testimony and permitted M.C. to cross-examine.

Section 7962 specifies that the only showing necessary to obtain an order establishing the parentage of the

intended parent(s) and extinguishing claims of parental rights by a surrogate is "proof of compliance with this section." (§ 7962, subd. (f)(2).) Upon such a showing, the judgment or order "shall terminate any parental rights of the surrogate and her spouse or partner *without further hearing or evidence*, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section." (*Ibid.*, italics added.) Thus, section 7962 does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself.

The trial court therefore properly denied M.C.'s counterclaim under section 7962, subdivision (f)(2) without further proceedings. The counterclaim did not challenge whether the Agreement fulfilled the requirements of section 7962 or allege that the Agreement was "not executed in accordance with" section 7962. Rather, it asserted broad claims challenging the legitimacy and constitutionality of surrogacy agreements and contesting Father's fitness and intention to be a parent. Under section 7962, subdivision (f)(2), no "further hearing or evidence" was required to consider such claims.[11]

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11. In attacking the legitimacy of section 7962 in her counterclaim, M.C. in fact acknowledged the limited showing necessary to terminate a surrogate's claimed parental rights under section 7962: "California's Surrogacy Enabling Statute, C.F.C. § 7962(f)(2) authorizes the court to terminate the parental rights of

M.C.'s procedural due process claim therefore amounts to a challenge to the constitutionality of section 7962. The crux of the claim is that the statutory scheme improperly permits a surrogate's parent-child relationship to be denied based only upon the intentions expressed in a surrogacy contract without further consideration of the surrogate's post-birth wishes, the intended parent's fitness to be a parent, or the best interests of the children. The substance of M.C.'s procedural due process claim is therefore indistinguishable from her substantive due process and equal protection claims, which are discussed below.

**c. Alleged violation of the Children's substantive due process rights**

M.C. argues that the termination of her claimed parental rights under section 7962 violates the Children's liberty interest in: (1) their relationship with their mother; and (2) freedom from "commodification." We conclude that both of these arguments are foreclosed by the court's opinion in *Calvert*.

M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children. Her argument amounts to a claim that she either: (1) had no right to make such a promise; or (2) was permitted to later change her mind about that promise based upon the best interests of the Children.

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[M.C.] based solely upon proof that the 'gestational' surrogate signed a surrogacy contract which complies with § 7962 and nothing more."

Both claims are inconsistent with the court's decision in *Calvert*.

The first claim is a direct challenge to the legitimacy of surrogacy arrangements. If a child's liberty interest in a relationship with its birth mother trumps the surrogate's right to enter into a contract agreeing to surrender the child to intended parents, then no surrogacy arrangement is possible. That 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.) It would also run afoul of the court's observation that "[t]he argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law." (*Id.* at p. 97.)

The second claim conflicts with the court's rejection of the adoption paradigm for surrogacy arrangements. By analogy to the statutes governing adoption, the surrogate in *Calvert* argued that a prebirth waiver of her parental rights was unenforceable. The court rejected that argument, concluding that "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." (*Calvert, supra*, 5 Cal.4th at pp. 95–96.) The court also held that a decision on the parentage of children born to a surrogacy arrangement is separate from determining custody based upon the best interests of the children, which should be left to the dependency laws. (*Id.* at pp. 93–94, fn. 10.)

The opinion in *Calvert* also precludes M.C.'s argument that surrogacy agreements impermissibly result in the "commodification" of children by permitting their sale. The court in *Calvert* expressly rejected the concern that "the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will." (*Calvert, supra*, 5 Cal.4th at p. 97.) Moreover, the court rejected the argument that payments to the surrogate in that case were in exchange for the surrender of her parental rights, instead concluding that they were "meant to compensate her for her services in gestating the fetus and undergoing labor." (*Id.* at p. 96.) Similarly, here, payments to M.C. under the Agreement were for the stated purpose of "compensation for her discomfort, pain, suffering and for pre-birth child support" and for living expenses. Moreover, M.C.'s argument that she could not enter into the surrogacy arrangement in exchange for compensation also amounts to a wholesale attack on the legitimacy of surrogacy contracts, which is inconsistent with the holding in *Calvert*.[12]

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12. M.C. argues that *Calvert* did not decide this issue because it only considered whether the payment of money to the surrogate in that case violated this state's public policy, not whether it was constitutionally permissible. The argument ignores the source of public policy against which the validity of contractual provisions is measured. A court's understanding of the public policy affecting a contract is generally derived from constitutional and statutory provisions. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777, fn. 53 [62 Cal. Rptr. 3d 527, 161 P.3d 1095] [courts "may, in appropriate circumstances, void contracts on the basis of public policy," but "'[t]he determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state

**d. Alleged violation of the Children's equal protection rights**

M.C. argues that denying a parent-child relationship between her and the Children violated the Children's right to equal protection under the United States Constitution. M.C. claims that permitting the children of surrogates to be "placed" with intended parents based only upon the intent of the contracting parties without considering the best interests of the children denies such children the consideration given to children in other contexts involving state-sponsored placement, such as adoption and marital dissolution proceedings.

While the court did not consider this argument directly in *Calvert*, we believe that the court's opinion in that case forecloses it. As mentioned, the court concluded that the determination of *parentage* is separate from the question of *custody*. (See *Calvert, supra*, 5 Cal.4th at pp. 93–94, fn. 10.) Whether a particular custodial arrangement is harmful to a child is a subject for the state's dependency laws, not for the law governing surrogacy contracts.[13]

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Legislature,'" quoting *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794 [345 P.2d 1].) In light of this relationship, M.C.'s claim that surrogacy arrangements could be consistent with California public policy and yet violate the United States and/or California Constitutions is illogical.

13. *Calvert* referred to California's dependency laws, which the court explained "are designed to protect *all* children irrespective of the manner of birth or conception." (*Calvert, supra*, 5 Cal.4th at p. 93, fn. 10.) Where, as here, an intended parent resides in another state, different dependency laws would likely apply, but the principle

As applied to M.C.'s equal protection argument, the court's conclusion means that a child's right to suitable *placement* by the state once born is not at issue. Rather, the issue is the extent of state control over individuals' decisions to give birth in the first place.

The court in *Calvert* recognized that the decision of the intended parents led to the birth of the child whose parentage was at issue. "But for their acted-on intention, the child would not exist." (*Calvert, supra,* 5 Cal.4th at p. 93.) A conclusion that children born to surrogates must be placed by the state using the same criteria that apply to adoptions or custody disputes would certainly affect—and perhaps eliminate—the willingness of intended parents to have children through surrogacy arrangements. "[I]t is safe to say that [the surrogate] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother." (*Ibid.*)

Thus, for purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare children born to surrogates with children *placed* through adoption or family courts. Of course, the state does not regulate who is permitted to

remains the same. One can imagine an extreme set of circumstances that might test the constitutional boundaries of section 7962's summary procedure, such as an intended parent with a history of child abuse who plans to take a child to another country that does not have a functioning dependency system. Hopefully such a case is hypothetical only. In any event, it is not the situation here.

give birth. "'[W]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?'" (*Harding, supra*, 190 F.Supp.3d at p. ___, fn. 9 [2016 U.S. Dist. Lexis 73466 at pp. *23–*24, fn. 9], quoting *J.R. v. Utah* (D. Utah 2003) 261 F.Supp.2d 1268, 1298, fn. 29.)

Thus, M.C.'s equal protection argument on behalf of the Children does not provide any ground for reversal.

**e. Alleged violation of M.C.'s constitutional rights**

M.C. argues that the trial court's order terminating her claimed parental rights violated her substantive due process and equal protection rights in several respects. Her arguments can be grouped into two categories for purposes of discussion. First, she claims that she has a constitutionally protected liberty interest in a relationship with the Children that she could not waive before their birth. She argues that permitting such a prebirth waiver would also violate her equal protection right to be treated similarly to mothers who surrender their children through adoption. Second, she argues that surrogacy arrangements are impermissibly exploitative and dehumanizing. Again, we conclude that these arguments are foreclosed by *Calvert*.

M.C. argues that *Calvert* did not hold that a surrogate can never have a liberty interest in a relationship with the child that she bears. She correctly points out that the

court's analysis in that case was colored by the need to weigh the surrogate's interests against the interests of the genetic mother, and that such balancing is not necessary here. (See *Calvert, supra*, 5 Cal.4th at p. 100 [the surrogate "fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by [the intended parents]"].)

We need not determine the scope of the court's ruling on this issue, because the opinion otherwise makes clear that a surrogate can permissibly contract to surrender whatever parental rights she has. The court held that the surrogacy contract in that case was consistent with public policy.[14] The court rejected the argument that "a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents" as antiquated and dismissive of a woman's "equal economic rights." (*Calvert, supra*, 5 Cal.4th at p. 97.) Here, as in *Calvert*, there is no suggestion that M.C., who had children of her own and had previously served as a surrogate, "lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract." (*Ibid.*)

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14. As discussed *ante*, we are not persuaded by M.C.'s assertion that "the public policy considerations raised in [*Calvert*] are not applicable to a constitutional challenge." We do not believe that our Supreme Court would have held that the surrogacy contract in *Calvert* was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right. Of course, the Legislature has also now expressed its view of the permissibility of surrogacy arrangements by enacting section 7962.

M.C.'s argument that, like mothers giving up children for adoption, she could not knowingly waive her parental rights until *after* she had given birth also fails in light of the Supreme Court's holding in *Calvert*. The court rejected the surrogate's argument in that case that the policies underlying California's adoption laws were violated by the surrogacy contract because it amounted to a "prebirth waiver of her parental rights." (*Calvert, supra*, 5 Cal.4th at p. 96.) The court concluded that "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." (*Ibid.*)

Finally, the court in *Calvert* expressly rejected the argument that surrogacy contracts violate public policy because they "tend to exploit or dehumanize women." (*Calvert, supra*, 5 Cal.4th at p. 97.) In particular, the court found that, "[a]lthough common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment." (*Ibid.*) More generally, "[t]he limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants." (*Ibid.*)

We therefore conclude that the Agreement did not violate the constitutional rights of M.C. or the Children. The trial court's ruling was consistent with the requirements of section 7962 and the court's decision in *Calvert*. M.C. has presented no ground to reverse the trial court's ruling.

**DISPOSITION**

The trial court's February 9, 2016 judgment is affirmed. Plaintiff and respondent C.M. (Father) is entitled to recover his costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

**APPENDIX B — JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, DATED DECEMBER 22, 2015**

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

Case No. BF054159

C.M.,

*Petitioner*,

vs.

M.C,

*Respondent*.

**JUDGMENT RE PETITION TO DECLARE EXISTENCE OF PARENT-CHILD RELATIONSHIP BETWEEN CHILDREN TO BE BORN AND PETITIONER, AND NON-EXISTENCE OF PARENT-CHILD RELATIONSHIP BETWEEN CHILDREN TO BE BORN AND RESPONDENT/SURROGATE**

Based upon the Petition to Declare the Existence of a Parent-Child Relationship, filed in the above-captioned matter; the Declarations filed in support thereof; the *Ex Parte* Application of the Petitioners filed herein; the Application for Entry of Judgment; the underlying Surrogacy Agreement as discussed within the pleadings;

and under the authority of the relevant provisions of the Uniform Parentage Act (*Family Code,* §§ 7600, *et seq.* and § 7962), the holding of the California Supreme Court in *Johnson v. Calvert,* (1993) 5 Cal. 4th 84, and the holding in *Buzzanca v. Buzzanca,* (1998) 61 Cal. App. 4th 1470, and for good cause shown:

**IT IS HEREBY FOUND, ORDERED, ADJUDGED, AND DECREED THAT:**

1. Each of the Parties: Petitioner, C.M., (hereinafter also referred to as "Petitioner" or "Intended Parent"), Respondent, M.C. (hereinafter also referred to as "Surrogate" and/or "Respondent"), have all submitted to the jurisdiction of this Court, and the Superior Court of the State of California, county of Los Angeles properly has subject matter jurisdiction over this matter and personal jurisdiction over the Parties.

2. The Children at issue, (hereinafter referred to as "Babies Moore") are due to be born on or about May 4, 2016. The Children, however, could be born earlier. Babies Moore were conceived by in vitro fertilization, by combining ova anonymously donated to the Petitioner, with the Petitioner's, C.M., sperm.

3. The resultant embryos were surgically transferred to the uterus of Respondent, M.C., by a physician pursuant to a Surrogacy Agreement entered into by each of the Parties. The Agreement provided that the Petitioner was to be treated in all respects as the natural and legal parent of any child conceived and born in relation to the transfer

of the embryos. The Agreement identified the intended parent and all other Parties to the surrogate undertaking; identified the providers of gametes; was signed under penalty of perjury and each of the Party's signatures was notarized. The Agreement also disclosed how the medical costs associated with the Surrogate and any child would be paid and set forth what health insurance was available and how any non-covered medical costs or liens would be paid. All Parties to the Agreement were independently represented by legal counsel before entering into the Agreement and were advised of their respective rights, responsibilities, and obligations under the Agreement and existing California law. The Petitioner has submitted to this Court a notarized copy of the IVF Agreement with the notarization attesting that the signatures, as appearing on the Agreement lodged with the Court, is the personal signature of the Party to whom it is subscribed and that the Agreement was executed on the indicated date.

4. At all times relevant, the intention of each of the Parties was that the Petitioner, C.M., 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.

5. The Court finds that Petitioner, C.M., is the natural, genetic, and sole legal Parent of the Children with which M.C. is currently pregnant and who are due to be born on or about May 4, 2016 or sooner and that he shall have all the rights, responsibilities and obligations of a parent toward the Children.

6. The Court finds that M.C. is not the natural, genetic, or legal parent/mother of the Children she is currently pregnant with and has no rights, responsibilities, or obligations toward said Children.

7. M.C. served as a gestational surrogate to assist Petitioner, C.M., having a child or children of his own.

8. It is in the best interests of the Children to declare the Petitioner the natural, genetic, and sole legal parent of the Children and place custody with the Petitioner forthwith.

9. Upon the birth of Babies Moore, physical and legal custody of the Children shall be, and is, awarded to C.M.

10. The Petitioner, C.M., is granted and shall have all powers, rights and authority concerning any and all decisions regarding the Children, whether born alive or not, including but not limited to any and all decisions concerning Babies Moore health and associated treatments, and any decisions concerning maintaining the Children on life support or resuscitation decisions, with the exception that if the Respondent, M.C.'s, health is also at risk, the Respondent, M.C., shall have the sole right and authority to make decisions concerning the Respondent, M.C.'s, own health and associated treatments, regardless of whether said treatment(s) may affect the health and safety of the Children. To the extent the Respondent/Surrogate has the option to obtain medical treatment on behalf of the Respondent/Surrogate which may not harm or adversely affect the Children's health and

safety, the Respondent/Surrogate shall pursue said medical treatment prior to implementing a medical plan/treatment(s) which may potentially jeopardize the health and safety of the Children.

11. The Parties are ordered to cooperate with each other, and facilitate any physician and/or medical facility and/or medical personnel (hereinafter collectively referred to as "medical personnel"), providing care to Respondent, M.C. and/or the Children at issue, permitting the Petitioner, C.M., to review all of the medical records of the Respondent, M.C., that in any way may relate to said Respondent's pregnancy and/or the prenatal and post-birth care of the Children, and such medical personnel communicating directly with the Petitioner, C.M., regarding all issues relevant to the pregnancy of said Respondent, the birth of the Children, and the pre-natal and post birth care and treatment of the Children.

12. The Parties are ordered to cooperate with the hospital where Respondent, M.C. gives birth to Babies Moore, in directing the preparation of the Child's respective birth certificates in accordance with the terms of this Judgment as follows:

A. Name the Children in accordance with the directions of the Petitioner, C.M., in all fields requiring the name of father/parent of certificate of live birth and associated birth certificate;

B. Record the relevant information required of such fields requiring the identify of father/parent inclusive;

C.

D. In the Section entitled "Mother/Parent," leave such section blank or, if such section must be completed, name the Petitioner, C.M., in such fields of certificate of live birth and the associated Birth Certificate and record Petitioner's place and date of birth in the corresponding fields as provided by the Petitioner, C.M.;

E. Allow Petitioner, C.M., to certify the certificate of live birth and associated birth certificate; or in the absence of Petitioner certifying the certificate of live birth or associated birth certificate, an authorized member of the hospital staff may certify the same in accordance with the terms of this judgment;

F. Record the information given by C.M. in fields of the Confidential Information for Public Health Use Only sections of the Birth Certificate related to the father since the embryos that were transferred into the uterus of the Respondent, M.C., and developed into "Babies Moore," were clinically cultured with the use of the sperm of the Petitioner, C.M.;

G. Record the word "withheld" in field 21, and insert dashes (*i.e.* "-") (or other approved designation) in fields of the Confidential Information for Public Health Use Only sections of the Birth Certificate related to the mother since the embryos that were transferred into the uterus of the Respondent, M.C., and developed into "Babies Moore" were clinically cultured with the use of ova donated to Petitioner, C.M., by an egg donor for his exclusive use;

H. Record the residential address of the Respondent, M.C., the "birth mother," in fields 24A through 24E, inclusive, of the Confidential Information For Public Health Use Only section of the Birth Certificate as provided by the Respondent;

I. Record the statistical information of the Respondent, M.C., the "birth mother," in fields 25A through 31, inclusive, of the Confidential Information For Public Health Use Only section of the Birth Certificate as provided by the Respondent; and

J. Enter the social security number, if any, of Petitioner, C.M., if any, under the item for "father/parent," or record the word "Withheld," or record other word(s) or symbol(s) procedurally required by the Department of Public Health, Office of Vital Records, where there is a single male parent as here.

13. If Petitioner is identified as the mother/parent on the original certificate of live birth or associated birth certificate, following issuance of the original birth certificate of the Children, said birth certificate shall be amended to delete the name of "mother/parent," to wit: the Petitioner, C.M., as the "mother/parent," and the relevant section pertaining to the "Mother/Parent," shall thereby be amended to state: "Parent" and set forth "Unknown" or "Withheld." The original birth certificate shall be immediately sealed, and a new birth certificate shall be reissued stating the name of Petitioner, C.M., recorded as the Children's "Father/parent" and the prior information provided for Mother, to wit: Social Security

Number, and date and place of birth, shall be added to the corresponding sections pertaining to father.

14. Upon issuance of the amended birth certificate, the original birth certificate shall be immediately sealed.

15. Pursuant to *Family Code,* § 7962(g), the Court orders that: "The petition, relinquishment, or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition filed in the office of the clerk of the court pursuant to this part shall not be open to inspection by any person other than the parties to the proceeding and their attorneys and the State Department of Social Services, except upon the written authority of a judge of the superior court." {*Family Code* § 7962(g)}

16. Pursuant to *Family Code,* § 7633, enforcement of this Judgment is stayed until the birth of the Child. Upon the birth of the Child, this judgment shall immediately be in full force and effect in all respects and shall continue in full force and effect thereafter.

I, C.M., hereby agree to the entry of the Judgment herein. I understand that upon entry of the Judgment I shall be declared, for all purposes, the legal parent of the child that the Respondent, C.M., became pregnant with on or about August 17, 2015, and is expected to give birth to on or about May 4, 2016, if not sooner (identified herein as "Babies-Moore" and/or "Children.")

Dated: December 22, 2015 /s/________________________
C.M., Petitioner

For good cause shown, **IT IS SO ORDERED, ADJUDGED AND DECREED.**

Dated: February 9, 2016 /s/______________________
JUDGE OF THE
LOS ANGELES
SUPERIOR COURT

## APPENDIX C — DENIAL OF REHEARING OF THE SUPREME COURT OF CALIFORNIA, DATED APRIL 12, 2017

SUPREME COURT OF CALIFORNIA

Case No. S240517

M. (C.)

v.

C. (M.)

April 12, 0217

Petition for review denied.

## APPENDIX D — SURVEY OF STATE LAWS

### SURVEY OF STATE LAWS THAT TREAT THE WOMAN WHO GIVES BIRTH AS THE LEGAL MOTHER OF THE CHILD BORN TO HER

In Alabama, "[t]he mother-child relationship may be established between a woman and a child by: (1) the woman's having given birth to the child...." Ala. Code § 26-17-201.

Alaska has no parentage act or other statute which defines the establishment of the mother-child relationship. In Alaska, a certificate of live birth must be filed within five days after the birth of the child. *See,* Alaska Stat. Ann. § 18.50.160. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, that, after expulsion or extraction, breathes or shows evidence of life.... " Alaska Stat. Ann. § 18.50.950.

In Arizona, "[a] person completing a birth certificate shall state the name of the woman who gave birth to the child on the birth certificate as the child's mother...." Ariz. Rev. Stat. Ann. § 36-334.

In Arkansas, "the mother is deemed to be the woman who gives birth to the child." Ark. Code Ann. § 20-18-401.

In California, the parent-child relationship "may be established by proof of having given birth to the child...." Cal. Fam. Code § 7610.

In Colorado, "[t]he parent and child relationship may be established between a child and the natural mother by proof of her having given birth to the child...." Colo. Rev. Stat. Ann. § 19-4-104.

In Connecticut, "[e]ach original certificate of birth shall be filed with the name of the birth mother recorded." Conn. Gen. Stat. Ann. § 7-48a.

In Washington D.C., a "mother-child relationship is established by a woman having given birth to a child." D.C. Code Ann. § 16-909.

In Delaware, "[t]he mother-child relationship is established between a woman and a child by: (1) The woman's having given birth to the child...." Del. Code Ann. tit. 13, § 8-201.

Florida has no parentage act or other statute which defines the establishment of the mother-child relationship. In Florida, a certificate of live birth must be filed within five days after the birth of the child. *See,* Fla. Stat. Ann. § 382.013. A "live birth," in turn, is defined as "the complete expulsion or extraction of a product of human conception from its mother, irrespective of the duration of pregnancy, which, after such expulsion, breathes or shows any other evidence of life..." Fla. Stat. Ann. § 382.002. In addition, Florida's juvenile justice code defines "a woman who gives birth to a child" as a parent. Fla. Stat. Ann. § 985.03.

Georgia has no parentage act or other statute which defines the establishment of the mother-child relationship. In Georgia, a certificate of birth for each live birth must be filed within five days. *See,* Ga. Code Ann. § 31-10-9. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes, or shows any other evidence of life." Ga. Code Ann. § 31-10-1.

In Hawaii, "[t]he parent and child relationship between a child and: (1) The natural mother may be established by proof of her having given birth to the child...." Haw. Rev. Stat. Ann. § 584-3.

Idaho has no parentage act or other statute which defines the establishment of the mother-child relationship. In Idaho, a certificate of birth must be filed within 15 days after the birth of the child. *See,* Idaho Code Ann. § 39-255. A "live birth" is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes, or shows any other evidence of life...." Idaho Code Ann. § 39-241.

In Illinois, "[t]he parent-child relationship is established between a woman and a child by: (1) the woman having given birth to the child...." 750 Ill. Comp. Stat. Ann. 46/201.

Indiana does not directly address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes. Rather, the Indiana statutes assume that the woman who gives birth to the child is the mother. *See,* Ind. Code Ann. § 16-37-2-2, *et seq.*

In Kansas, "[t]he parent and child relationship between a child and: (a) The mother may be established by proof of her having given birth to the child...." Kan. Stat. Ann. § 23-2207.

Kentucky has no parentage act or other statute which defines the establishment of the mother-child relationship. In Kentucky, a certificate of birth for each live birth must be filed within 10 days. *See,* Ky. Rev. Stat. Ann. § 213.046. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy which, after the expulsion or extraction, breathes, or shows any other evidence of life...." Ky. Rev. Stat. Ann. § 213.011.

Louisiana defines filiation as "the legal relationship between a child and his parent." La. Civ. Code Ann. art. 178. "Filiation is established by proof of maternity [and] [m]aternity may be established by a preponderance of the evidence that the child was born of a particular woman." La. Civ. Code Ann. art. 179 and art. 184.

In Maine "the mother is deemed to be the woman who gives birth to the child...." Me. Rev. Stat. tit. 22, § 2761.

Maryland has no parentage act or other statute which defines the establishment of the mother-child relationship. In Maryland, a certificate of birth must be filed within 5 days after the birth of the child. *See,* Md. Code Ann., Health-Gen. § 4-208. A "live birth" is defined as "the complete expulsion or extraction of a product of human conception from the mother, regardless of the period of gestation, if, after the expulsion or extraction, it breathes or shows any other evidence of life...." Md. Code Ann., Health-Gen. § 4-201.

Massachusetts does not directly address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes. Rather, the Massachusetts statutes assume that the woman who gives birth to the child is the mother. *See,* Mass. Gen. Laws Ann. ch. 46, § 1 and § 3C.

Michigan has no parentage act or other statute which define the establishment of the mother-child relationship. In Michigan, a certificate of birth for each live birth must be filed within 5 days. *See,* Mich. Comp. Laws Ann. § 333.2821. A "live birth," in turn, is defined as "the complete expulsion or extraction of a product of conception from its mother, regardless of the duration of the pregnancy, that after expulsion or extraction, whether or not the umbilical cord has been cut or the placenta is attached, shows any evidence of life...." Mich. Comp. Laws Ann. § 333.1071; *see,* Mich. Comp. Laws Ann. § 333.2804.

In Minnesota, "[t]he parent and child relationship between a child and: (a) the biological mother may be

established by proof of her having given birth to the child...." Minn. Stat. Ann. § 257.54.

Mississippi does not directly address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes. Rather, the Mississippi domestic relations statute assumes that the mother who gives birth to the child is the mother-in-fact and legal mother. *See,* Miss. Code. Ann. § 93-9-28.

In Missouri, "[t]he parent and child relationship between a child and: (1) the natural mother may be established by proof of the mother having given birth to the child...." Mont. Code Ann. § 40-6-104.

Nebraska has no parentage act or other statute which defines the establishment of the mother-child relationship. The Nebraska statute relating to adoption procedures, however, assumes that the mother who gives birth to the child is the mother. Neb. Rev. Stat. Ann. § 43-104.13.

In Nevada, "[t]he parent and child relationship between a child and: 1. A woman may be established by... proof of her having given birth to the child...." Nev. Rev. Stat. Ann. § 126.041.

In New Hampshire, "[a] person is the parent of a child to whom she has given birth...." N.H. Rev. Stat. Ann. § 168-B:2.

In New Jersey, "[t]he parent and child relationship between a child and: a. The natural mother, may be

established by proof of her having given birth to the child...." N.J. Stat. Ann. § 9:17-41.

In New Mexico, "[t]he mother-child relationship is established between a woman and a child by: (1) the woman's having given birth to the child...." N.M. Stat. Ann. § 40-11A-201.

New York has no parentage act or other statute which define the establishment of the mother-child relationship. In New York, a certificate of birth for each live birth must be filed within 5 days. *See,* N.Y. Pub. Health Law § 4130. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life.... " N.Y. Pub. Health Law § 4130.

North Carolina does not address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes, but the statute governing the establishment of paternity presumes that the woman who gives birth is the mother of the child. *See,* N.C. Gen. Stat. Ann. § 49-14.

In North Dakota, although surrogate agreements are void, the surrogate mother is deemed to be the mother of any child born pursuant to such an agreement. *See,* N.D. Cent. Code Ann. § 14-18-05.

In Ohio, "[t]he parent and child relationship between a child and the child's natural mother may be established

by proof of her having given birth to the child...." Ohio Rev. Code Ann. § 3111.02.

In Oklahoma, "[t]he mother-child relationship is established between a woman and a child by: 1. The woman's having given birth to the child...." Okla. Stat. Ann. tit. 10, § 7700-201.

Oregon has no parentage act or other statute which defines the establishment of the mother-child relationship. In Oregon, a report of birth for each live birth must be filed within 5 days. *See,* Or. Rev. Stat. Ann. § 432.088. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, that, after such expulsion or extraction, breathes or shows any other evidence of life...." Or. Rev. Stat. Ann. § 432.005. In addition, Oregon's domestic relations statute presumes that the woman who gives birth is the mother of the child. *See,* Or. Rev. Stat. Ann. § 109.125(l)(a).

Pennsylvania has no parentage act or other statute which defines the establishment of the mother-child relationship. In Pennsylvania, a certificate of birth for each live birth must be filed within a prescribed period. *See,* 35 Pa. Stat. Ann. § 450.401. A "live birth," is defined as "the expulsion or extraction from its mother of a product of conception, irrespective of the period of gestation, which shows any evidence of life at any moment after such expulsion or extraction." 35 Pa. Stat. Ann. § 450.105.

Rhode Island has no parentage act or other statute which defines the establishment of the mother-child

relationship. In Rhode Island, a certificate of birth for each live birth must be filed within four days. *See,* 23 R.I. Gen. Laws Ann. § 23-3-10. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after that expulsion or extraction, breathes or shows any other evidences of life..." 23 R.I. Gen. Laws Ann. § 23-3-1. In addition, Rhode Island's domestic relations statute presumes that the woman who gives birth to the child is the mother. *See,* 15 R.I. Gen. Laws Ann. § 15-8-1, *et seq.*

South Carolina does not address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes, and does not directly address the issue by case law. However, the South Carolina Supreme Court, in a case relating to the revocation of parental rights in the adoption context, assumed that the woman who gave birth was the mother. *See, McCann v. Doe,* 660 S.E.2d 500 (2008).

In South Dakota, "the mother is deemed to be the woman who gives birth to the child..." S.D. Codified Laws § 34-25-16.7.

Tennessee has no parentage act or other statute which define the establishment of the mother-child relationship. In Tennessee, a certificate of birth for each live birth must be filed within 10 days. *See,* Tenn. Code Ann. § 68-3-301. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of the

pregnancy, that, after expulsion or extraction, breathes or shows any other evidence of life..." Tenn. Code Ann. § 68-3-102. In addition, Tennessee's domestic relations statute presumes that the woman who gives birth to the child is the mother. *See,* Tenn. Code Ann. § 36-2-301, *et seq.*

In Texas, "[t]he mother-child relationship is established between a woman and a child by: (1) the woman giving birth to the child...." Tex. Fam. Code Ann. § 160.201.

In Utah, "[t]he mother-child relationship is established between a woman and a child by: (a) the woman's having given birth to the child...." Utah Code Ann. § 78B-15-201.

Vermont does not directly address the establishment of a mother-child relationship by way of a parentage act or within its vital statistics statutes. Rather, the Vermont statute relating to adoption procedures assumes that the mother who gives birth to the child is the mother-in-fact and legal mother. *See,* Vt. Stat. Ann. tit. 15A, § 2-401.

In Virginia, "[t]he parent and child relationship between a child and a woman may be established prima facie by proof of her having given birth to the child...." Va. Code Ann. § 20-49.1.

In Washington, "[t]he parent-child relationship is established between a child and... woman by: (1) The woman's having given birth to the child...." Wash. Rev. Code Ann. § 26.26.101.

In West Virginia, a certificate of birth for each live birth must be filed within seven days. *See,* W. Va. Code Ann. § 16-5-10. A "live birth," in turn, is defined as "the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life...." W. Va. Code Ann. § 16-5-1.

Wisconsin does not address the establishment of a mother-child relationship by way of a parentage act. Wisconsin's vital statistics statute, however, presumes that the woman giving birth is the mother. *See,* Wis. Stat. Ann. § 69.14.

In Wyoming, "[t]he mother-child relationship is established between a woman and a child by: (i) The woman's having given birth to the child...." Wyo. Stat. Ann. § 14-2-501.