STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR
FAMILY DIVISION

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SHANNON FORSYTH

Plaintiff

V File No. 07-000057-DC

ANYA BOWENS

Defendant

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OPINION AND DECISION

This is a custody dispute arising as a result of the following facts. The plaintiff and defendant were involved in a same sex relationship. The plaintiff wanted to have a child that was genetically related to her but did not want to undergo the birth process. She also wanted to participate in a process with the defendant of having a child between the two of them because of their committed relationship. The defendant already had one child from a natural birth process with her now deceased husband and wanted to have another child who was not genetically related to her due to family history of Lupus. Because she was in a committed relationship with the plaintiff she also wanted to participate with her in childbirth and child rearing.

On December 5, 2005 the parties entered into a surrogate parentage contract (not strictly as defined by MCL 722.853(i) because it provided specifically for retention of parental rights and co-parenting, but intended to be such an agreement) entitled "Contract Between Intended Parents" and entered into the record as exhibit 1. Pursuant to the terms of this contract the plaintiff donated her ova, which was then fertilized by an anonymous sperm donor. The fertilized egg was then implanted into the defendant uterus. The defendant carried the fetus through gestation to live birth on August 22, 2006. The child was given the name Andrew Forsyth and is now eight months old.

Not long after the child was born the parties committed relationship began to unravel and the complaint in this case was filed on January 9, 2007. At the time of the evidentiary hearing on April 25, 2007 the parties were still living in the same household with the

minor child but this is only occurring because of the uncertainty of the outcome of this case.

This fact situation is one of first impression in this State, and there is very little to assist this court by way of case law showing how other states have dealt with this issue. Those that do exist are not consistent in their treatment of the issue. Unlike this case most of those cases involve two parents who cannot have children together contracting with another woman to be implanted with the fertilized egg of that husband and wife, with the purpose of the husband and wife raising the child. A contract of this nature is void under MCL 722.851 et seq if it involves the agreement of the surrogate mother as defined in section 853 to release her parental or custodial rights to the child. The statute further creates a presumption that every contract provides as such whether or not expressly stated. In this case the parties specifically provided that they both intended to parent this child. However, this case is not about the enforceability of the contract. It is about the custody of the child. The Surrogate Parenting Act provides both parties standing to present this issue to the court under MCL 722.861.

Essentially according to exhibit 1 and the testimony of both parties it is apparent that the original intent was to create a situation where both parties participated in the maternity of Andrew, the plaintiff being genetically connected and the defendant actually giving birth to the child. The "contract" assumes that the defendant is the legal mother of the child as her name would appear on the birth certificate and then provided that the plaintiff would do a so called "second parent adoption" of Andrew so they both would have legal rights to the child. Under Michigan law such a procedure is not permitted (MCL 710.24 and In re Adams, 189 Mich App 540 (1991)) and the parties were unable to accomplish their goal.

The Surrogate Parenting Act does not address the central question as to whom the legal mother of the child is when a "Surrogate carrier" gives birth to a child. This is particularly important because the Act requires the court to address the best interest of the child as defined under section 3 of the child custody act being MCL 722.23. However in order to address these factors the court must first determine who the legal mother of this child is as that gives rise to certain statutory presumptions and standards of proof to be applied in making a custody determination.

MCL 722.853 defines a "participating party" as a biological mother, biological father, surrogate carrier or the spouses of any of them. It is noteworthy that the term "mother" is only applied to the person with the biological connection to the child. The woman carrying the child through gestation and birth is referred to as the surrogate carrier. MCL 722.853(f) defines a "surrogate carrier" as "the female in whom an embryo is implanted in a surrogate gestation procedure." And MCL 722.853(g) defines a "surrogate gestation" as "the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female" (emphasis added).

These definitions are significant as they distinguish a "surrogate carrier" from a "surrogate mother" as defined by MCL 722.853(h). A "surrogate carrier" is a female

who carries an embryo through gestation and birth but has no genetic connection to the child whereas a "surrogate mother" has a genetic connection to the child having conceived the child either naturally or through artificial insemination pursuant to a "surrogate parentage contract". The definition of a "surrogate parentage contract" in MCL 722.853(i) continues this distinction by stating that such a contract "means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation …". (Emphasis added)

Thus in the circumstances presented by the facts of this case the Surrogate Parenting Act establishes the plaintiff as the "biological mother" and the defendant as the "surrogate carrier". MCL 722.861 further does not establish which of the parties is entitled to temporary custody but provides that "the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise".

Since the Act does not specifically define or identify which of the parties in a case such as this is the legal mother this court must look to case law and statutes in other areas of the law which may help establish the legislatively intended public policy of this state in dealing with this issue. The only case of which this court is aware addressing this act is Doe v Attorney General, 194 Mich App 432 (1992). This case addresses the enforceability of a Surrogate Parentage Contract, which is not at issue here and therefore of no assistance in determining who is the legal mother of Andrew. As indicated above other states have dealt with this issue and the resulting decisions are not consistent with one another.

In J.F. v D.B, 2004 WL 1570142, the Pennsylvania Court of Common Pleas addressed the issue of standing in an action for custody by a biological father against a surrogate mother not genetically related to triplets, at issue was the standing of the surrogate mother. Although this case does not directly address the same issue before this court because MCL 722.861 creates standing for the parties, the Pennsylvania court addresses the state of the law nationwide on the issue of surrogate parenting. In it's opinion the Pennsylvania court indicates that there are 31 states that have either some type of surrogacy statute or case law setting forth the legality or illegality of such arrangements while 19 states including Pennsylvania are generally silent about surrogacy. Sixteen of the 31 states have made surrogacy illegal. Surrogacy is exempt from criminal baby selling statutes in 3 states. Seven states allow surrogacy with or without a contract, two of which Massachusetts and California require pre-birth orders that terminate the surrogate mother's parental rights and give custody to the intended parents. Illinois allows all persons involved in the process to be listed on the birth certificate. The Pennsylvania court found the surrogate had standing by likening her to a foster parent, a non-blood relative or a stepparent all of which had been granted standing in custody cases in that state.

The facts of K.M. v E.G., 117 P.3d 673 (2005) are similar to the facts of the case at bar however the California legislature has recognized surrogate parenting as legitimate and

provided statutory provisions addressing the situation before this court and as such the analysis is not pertinent here.

In McDonald v McDonald, 196 A.D.2d 7 (1994) the New York court held that where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother.

In Belsito v Clark, 644 N.E. 760 (1994) the Ohio court examined the issue of who is the legal mother of a child born pursuant to a surrogate agreement. That case involved a husband and wife who wanted to have a family however the wife had to undergo a hysterectomy and could not have children. The wife's sister having already had children of her own agreed to be a surrogate for the purpose of gestating a child biologically of the husband and wife. The wife's egg was harvested from her ovary and fertilized with the husband's sperm and implanted into the sister's uterus. All parties intended that the husband and wife would raise the child and the sister would have no connection to the child other than as aunt. When the time came for the birth of the child the parties were informed that under Ohio law the sister, being the birth mother, would be identified as the mother on the birth certificate. Further that because the sister was not married to the biological father he was not the legal father and his name could not appear on the birth certificate and the child would be treated as a child was born out of wedlock. Additionally for the biological parents to become legal parents they would have to adopt the child. As a result the biological parents filed suit for declaratory judgment asking the court to declare that it is unnecessary for them to adopt the child being carried by the surrogate because they are the genetic and natural parents of that child and are therefore entitled to be recognized as having the legal status of parents.

In addressing this issue the court recited from testimony taken in the trial court about what genetic connection if any could possibly exist between the surrogate and the child under these circumstances. The expert testimony cited by the court was that the fetus placed in the carrier sets up an entirely separate system from the carrier. The uterus provides only a means of nourishment to and a means of carrying waste away from the baby's system. The uterus provides a filtering system for the child. Blood between the carrier and the fetus is not exchanged during the pregnancy and there would be no genetic or blood tie to the surrogate host.

The issue before the court in that case is the same as the issue before this court: Who is to assume the legal status of natural parent of the child? In deciding this issue the court held that the law requires that because the plaintiff provided the child with its genetics, they must be designated as the legal and natural parents. In arriving at this conclusion the Ohio court addressed several factors and stated: "the analysis and law in support of that conclusion begin with the proposition that the law will impose the duties of a child-parent relationship and legal status of natural parents only upon those individuals who can be found to be a natural or adoptive parent." (p. 58)

The court further stated, "While various terms are used to identify a natural parent, a review of case law leads to the conclusion that 'natural parent' refers to the child and

parent being of the same blood or related by blood." "Further support may be found in the fact that comparison of the blood of both parent and child for a genetic or DNA resemblance has become a recognized means of establishing parentage." (p. 59)

The Ohio court further noted that in cases involving a maternity dispute, the female who gave birth to a child is considered the natural parent, noting that "the rational behind that rule of substantive law is that for millennia, giving birth was synonymous with providing the genetic makeup of the child that was born. … by successfully implanting an embryo into the uterus of a female who has become known as the 'gestational surrogate' or 'surrogate host', modern medicine has devised a way of separating birth from genetics. … The female who bears the child may not be the person who provides the genetic imprint for the child's development." (p. 59) The court then noted that it must therefore be assumed that the framers of those laws did not intend for the law to result in two mothers. In addition the law and society recognize only one natural mother and father. (Citing Michael H. v Gerald D., 491 U.S. 110 (1989).)

The Ohio court then examined cases from other states and at that time found cases in California and New York both of which examined the intent of the parties in making it's determination. The Ohio court found "neither case to be persuasive for the following three important reasons: (1) the difficulty in applying the … intent test; (2) public policy and (3) [the California case's] failure to recognize and emphasize the genetic provider's right to consent to procreation and to surrender potential parental rights." (pp. 61-62)

The Ohio court noted the practical problem with applying the California intent test. "Even when the parties have a written agreement, disagreements as to intent can arise. In addition, in certain fact patterns when intent is clear, the *Johnson* test of intent to procreate and raise the child may bring about unacceptable results. As an example, who is the natural parent if both a nongenetic-providing surrogate and the female genetic provider agree that they both intend to procreate and raise the child? It is apparent that the *Johnson* test presents problems when applied". (p. 62)

The Ohio court likened this procedure to that of adoption, and noted "in addition to protecting the interest of the mother, adoption law has attempted to protect the interest of the child. By agreement or otherwise, the natural mother is not free to surrender her child to whomever she wishes. Through the use of its *parens patriae* powers, the state closely supervises the process, and ultimately selects or approves of the new parents. … The underlying public policy is to provide for the best interest of the child … ." (p. 63)

The court then noted that to allow a surrogate to keep and raise the child by private agreement without sanction by the court amounts to "a private adoption process that is readily subject to all the defects and pressures of such a process." (p. 63)

The Ohio court then held: "If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents. … The birth test becomes subordinate and secondary to genetics." (p. 66)

In the case at bar this court is of the opinion that the decision in Belsito v Clark, supra is well reasoned and persuasive and that the public policy in Ohio as stated by that court is similar to the public policy of this state as it relates to this issue.

Michigan's Surrogate Parenting Act in MCL 722.855 provides that "a surrogate parentage contract is void and unenforceable as contrary to public policy. As indicated above, although the Act does not identify or address who the legal mother is in this context, it does define and distinguish a "biological mother" from a "surrogate carrier" in the context of the facts of this case.

Clearly the legislature has stated the concept of surrogate parenting is against the public policy of this state. However, because of the Act's silence as to the legal status of the parties this court must look to other areas of the law involving parentage and parents rights to determine the answer to this question.

One area of the law where the Michigan legislature has clearly identified that only a natural and biological parent will have the "duties of a child-parent relationship and legal status of natural parent" (Belsito v Clark, supra.) is in the paternity act. MCL 722.1003 provides that by signing acknowledgment of paternity a man is presumed to be the natural father of the child. (Emphasis added.) MCL 722.1007(g) further provides that the acknowledgement form must include that the acknowledgment waives "a trial to determine if the man is the biological father of the child". (Emphasis added)

In paternity cases the law only recognizes that a biological and natural father may petition to become the legal father and only a legal father may have the rights and duties of a parent. This is so even when the legal father is not the biological father because he was married to the mother at the time of conception or birth. The law allows however, for a court to determine that the child is not the issue of the marriage and thereby disestablish the paternity of the husband because he is not the biological father. MCL 722.711(a).

To establish paternity the MCL 722.716 provides for a determination of a biological connection to the child to be made through DNA identification profiling.

Another area of the law where the legislature has recognized a biological connection is in the area of intestate succession. MCL 700.2114(1) provides: "an individual is the child of his or her natural parents" unless adoption or termination of parental rights has occurred.

The Safe Delivery of Newborns Act provides that only a biological parent may file a custody action. (MCL 712.10) Further MCL 712.11 requires the court to order each party claiming maternity or paternity to submit to genetic testing.

In the Adoption Code the legislature has also identified the biological connection to the child as being required. MCL 710.31 speaks to the rights of the biological father. MCL 710.55 speaks to biological parents being able to solicit prospective adoptive parents.

Even the Child Custody Act requires that for a third party to have standing to file for custody that person has to be either a potential adoptive parent who has had the child in adoptive placement for six months or related to the 5th degree by blood, marriage or adoption. MCL 722.26c. The Act further defines a parent to be the natural or adoptive parents of the child. MCL 722.22(h).

With the exception of identifying the mother on a birth certificate (which is not provided for in the statute MCL 333.2801 et seq but presumed on the registration form to be the female giving birth to the child) every area of Michigan law dealing with parents or the rights of parents has in one form or another identified a parent as having a natural or biological connection to the child.

This taken together with the distinction between a biological mother and a surrogate carrier as defined in the Surrogate Parentage Act this court is of the opinion that the legislature of this state has established that it is the public policy of this state to identify a parent as a person with a biological connection to the child.

(It is also noted that in the absence of specific legislative provisions to the contrary the United States Supreme Court has held in Smith v Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) that there exists a "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction and basic human right".)

In the context of the case at bar the court finds that the plaintiff Shannon Forsyth has the biological connection to Andrew and is therefore the legal mother of this child. This finding creates a presumption under MCL 722.25 that the best interest of the child is served by awarding custody to her and further that the defendant takes the status of a third party with standing.

"In a dispute between a natural parent and a third party, the presumption that it is in the best interest of the child to be with the parent is paramount even against an established custodial environment with the third party and the third party must prove by clear and convincing evidence that it is in the best interest of the child to be with the third party." Hetzel v Hetzel, 248 Mich App 1 (2001). Thus even though the child has an established custodial environment with both parties the parental presumption lies with the plaintiff and the defendant must carry the burden of proof.

In determining the best interest of the child the court must examine the evidence in light of the statutory factors set forth in MCL 722.23; in doing so the court finds as follows:

(a) Both parties have love, affection and other emotional ties with the child and presumably the child being eight months old has a bond with both parties. The testimony clearly indicates that the defendant has been the one primarily responsible for the care of the child as she has stayed at home to care for the child and her daughter from her marriage while the plaintiff worked a regular schedule.

This has allowed the defendant and child more time to bond with the child than the plaintiff has had. The factor slightly favors the defendant.

(b) Both parties have the capacity and disposition to give the child love, affection and guidance. There was no evidence presented relative to religious education or practice other than testimony that the defendant wanted to have the child baptized and the plaintiff refused. The parties are equal on this factor.

(c) Both parties are capable and have the disposition to provide the child with the necessities of life including food, clothing, shelter and medical care. The plaintiff is gainfully employed as a deputized court officer in Wayne County and receives health care benefits from her employer. The defendant receives a pension as a result of her husband's death in the line of duty, which includes medical care. This pension is sufficient for her to provide for herself and her daughter as well as Andrew. The defendant has been the person who stayed at home and cared for the child on a day-to-day basis while the plaintiff worked. Given this fact this factor slightly favors the defendant.

(d) The child has lived with both parties since his birth as the parties have continued to live in the same house even after this petition was filed. The parties are equal on this factor.

(e) From the testimony it appears the plaintiff will be vacating the house in which she has lived with the defendant and the child as the house belongs to the defendant. There was no testimony that the plaintiff or the defendant intends to enter into another relationship with others any time soon. Thus each party would provide a home for the child as that of a single parent household. The defendant does have a daughter from a previous relationship and it appears that the daughter and Andrew are bonded with one another as a result of this fact this factor slightly favors the defendant.

(f) Regardless of ones position on the morality of the situation that gave rise to this case or of the parties decision to be involved in lesbian relationships and its impact on the child, the facts apply equally to both parties, as such they are equal on this factor.

(g) There was no evidence to suggest that either party was not mentally healthy except their inability to properly address their anger, which may be more of an issue of emotional stability than mental stability. Nevertheless this inability on the part of both may adversely impact each party's relationship with the child and appropriately addressing incorrigibility, as the child grows older. The plaintiff is also physically healthy. The defendant suffers from Lupus however this condition rarely presents itself to the point that renders the defendant from being unable to care for Andrew. As such the parties are equal on this factor.

(h) The child is too young for this factor to apply.

(i) The child is too young for this factor to apply.

(j) From the testimony of past conduct and agreements of the parties it appears that both parties are of fostering a relationship between the child and the other party. The events of the recent past however indicate animosity exists between the parties and their willingness to facilitate a relationship between the child and the other party at the current time is in doubt. The parties are equal on this factor.

(k) The defendant has had episodes of domestic violence against the plaintiff on several occasions during their relationship one of which resulted in arrest and prosecution for which she pled guilty. On these occasions the defendants daughter as well as Andrew were present. Although Andrew is too young for this to have left much of an impression the fact that the defendant's daughter was present demonstrates her lack of concern that children may witness and be impacted by such actions. After the evidence in the hearing on this case was finished the defendant applied to this court for a personal protection order against the plaintiff. This court did issue the order ex parte and then conducted an evidentiary hearing on whether to continue it. Both parties were present and represented by the same attorneys that participated in this instant case. After the hearing this court was satisfied that the plaintiff did present a reasonable danger to the defendant and the personal protection order was continued. The parties are equal on this factor.

(l) Given the courts the application of the facts to the factors, as set forth above it is apparent that the defendant has not carried her burden of proof relative to the issues before this court. That together with the decision of this court relative to the legal parentage of this child creates a situation wherein awarding custody to the plaintiff as the legal mother would technically leave the defendant as a mere third party with no rights or responsibilities toward this child at all. The court is persuaded by the defendants argument in her brief citing In Custody of H.S.H.-K., 533 N.W.2d 419 (1995) that the minor child has established a bond with the defendant for the same reasons cited by the Wisconsin court. Clearly the plaintiff consented to and fostered the defendant's formation and establishment of a parent-like relationship with the child; the defendant and the child lived together in the same household; the defendant assumed obligations of parenthood by taking significant responsibility for the child's care (being the primary caregiver) and development, including contributing toward the child's support, without expectation of financial compensation; and the defendant has been in a parental role for a length of time sufficient to have established a bonded, dependent relationship with the child that is parental in nature. Given all of this, severing all ties to the defendant would not be in the best interest of the child. MCL 722.27(1)(b) provides that the court may provide for reasonable parenting time of the child by the parties involved, or by others and MCL 722.27(1)(e) provides that the court may take any other action considered to be necessary in a particular child custody dispute. Given this the court will establish visitation between the defendant and the child.

It is the decision of this court that the plaintiff is the legal mother of this child and the Defendant has not net her burden of proving by clear and convincing evidence that it is in the child's best interest for her to have custody, as such the plaintiff is awarded full legal and physical custody of Andrew. Technically, this would mean that the defendant would have no absolute right to parenting time with the child given that there is no evidence that the plaintiff is an unfit mother (see Troxel v Granville, 12 S Ct 2054 (2000)). It also means that the defendant would have no responsibility to pay child support for the child, as she has no legal position relative to the child. However, under the unique facts of this

case it is the decision of this court that it is in the best interest of the child to maintain a relationship with the defendant. Therefore the defendant shall be awarded visitation with the child according to the standard St. Clair County Friend of Court schedule or more often, as the parties may agree. The defendant shall also pay child support pursuant to the Michigan Child Support Guidelines for the child as though she were an equitable parent (Van v Zahorik, 460 Mich 320 (1999)).
The issue of calculating support shall be referred back to the Friend of Court.

As indicated on the record each party shall pay one half the fee of the guardian ad litem. A custody order consistent with this decision shall be prepared by the plaintiff for entry with this court within fourteen days from the date hereof.

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Elwood L. Brown
Probate and Family Court Judge
Dated: June 1, 2007