ELECTRONICALLY FILED SEP 12, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0376

LINN COUNTY NO. EQCV08415

P.M. and C.M.

Plaintiffs-Counterclaim Defendants-Appellees

vs.

T.B. and D.B.

Defendants-Counterclaimants-Appellants.

APPLICATION FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY, IOWA
HONORABLE CHRISTOPHER L. BRUNS, DISTRICT COURT JUDGE

DEFENDANTS-COUNTERCLAIMANTS-APPELLANTS' FINAL REPLY BRIEF

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ROUTING STATEMENT

Appellees P.M.'s and C.M.'s Routing Statement contains confusing and conflicting arguments, and is misleading as to material issues; thus warranting a reply.

P.M. and C.M. first argue that this case "should be transferred to the Court of Appeals" because it meets the criteria for transfer under App. Pro. 6.1101(3) (Appellee's Brief, p. 14, l. 4), while at the same time they argue that this Court should retain this case now because a Petition for Further Review is inevitable, implying that further review following a decision of the Court of Appeals is likely to be granted (Appellee's Brief, p. 14, l. 14-17).

It is a conflicting argument because the criteria for further review in this Court following a decision in the Court of Appeals is the same as the criteria for retention by the Supreme Court at this posture of the case. See, and compare App. Pro. Rule 6.1103(1) (b)(1) with 6.1101 (2)(b); 6.1103(1)(b)(2) with 6.1101(2)(a); 6.1103(1)(b)(3) with 6.1101(2)(f); and 6.1103(1) (b)(4) with 6.1101.(2)(d). Thus, if this case meets the criteria for further review under 6.1103(1)(b), this case meets the criteria for this Court to retain the case now under 6.1101(2).

Having first argued against retention, stating that T.B.'s contention that

this case presents questions of first impression with "urgent issues of broad public importance" does not warrant retention (Appellees' Brief, p. 14, l. 4-13), they then urge the Court to retain the case based upon Rule 6.1101(2)(d) (because the case presents "urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court").

In addition, having argued against retention because the principles which guide this case are "long recognized" and there is nothing new to be added to the law governing enforcement of contracts on the grounds of public policy (Brief, p. 14, l. 6-13), P.M. and C.M., nonetheless, argue that retention now is appropriate under App. Pro. 6.1101(2)(f) precisely because the case presents "substantial questions of enunciating or changing legal principles" (Citing App. Pro 6.11.1(2)(f)). Thus, P.M. argues that the controlling principles are both well settled and at the same time in the cross hairs of changing legal principles.

This inherent conflict and lack of logic may justify ignoring P.M.'s and C.M.'s Routing Statement altogether. However, they make incorrect and misleading statements and fail to address issues material to this Court's considerations to retain this case, requiring comment.

P.M. and C.M. state that it has long been recognized that whether a

mother who gives birth is recognized under Iowa law as the "legal" mother depends entirely upon whether she is "genetically related" to the child. That statement is incorrect. No Iowa Statute or decision of this Court or decision of the Court of Appeals ever established that the mother who gives birth to a child must prove that she is genetically related to the child to establish that she is the "legal" mother of the child. In fact, that statement, and the decision of the District Court on that issue, is in direct conflict with I.C.A. §600A.2 which makes it clear that "genetics" does not determine whether the mother who gives birth is a "legal" parent. Rather, as long as she carries the child, and in so doing has been a biological party to the procreation of the child, she is recognized as a "biological parent", which is the basis for legal parentage under Iowa law.

This illustrates why this Court should retain this case. The District Court demonstrated total confusion on these issues which have never been decided by this Court. There is a need for this Court to address this and other issues pertaining to the enforceability of a surrogacy contract under Iowa state law and the constitutionality of enforcement of surrogacy agreements under the Fourteenth Amendment.

What P.M. and C.M. do not address in their Routing Statement is

important in what it reveals.

This case presents six separate issues concerning the violation of the Substantive Due Process and Equal Protection Rights of Baby H and T.B. guaranteed by the Fourteenth Amendment of the United States Constitution. Those issues have not been decided by this Court – yet need to be – and have never been directly addressed and decided by any Federal Court, State Court of last resort, or State Appellate Court.

One of the Fourteenth Amendment liberty interests of T.B. requires the determination of whether a State has the power - consistent with the Fourteenth Amendment - to deny legal status as mother to a woman who has an existing relationship with the child during pregnancy, who carries and bonds with the child, with whom the child bonds, and who gives birth. The U.S. Supreme Court has stated that the Fourteenth Amendment dictates that the actual biological relationship controls whether there is a mother-child relationship protected by the Fourteenth Amendment, not a State-created legal fiction. *Glona v. Amer. Guaranteed and Liability Insur. Co.*, 391 U.S. 73, 75-76 (1968).

The State is not free to ignore the fact that the greatest biological contribution to the procreation of Baby H was made by T.B. and that she and

the baby had a relationship in which T.B. was the only mother the child knew and bonded with. The State is not free to ignore the essential importance that that experience and relationship has for both the child and her birthmother.

All of the constitutional issues presented in this case are of first impression, not just in this, but in all other jurisdictions, and all are of public importance.

P.M. and C.M. also ignore the fact that Iowa has never addressed the enforceability of surrogacy contracts as they relate to, and as they violate Iowa's termination and adoption statutes. C.M. wants the Courts to circumvent the termination statutes that require consent of the birth mother following birth by using the contract signed prior to conception as a basis to terminate T.B.'s parental rights, a basis with no authority in Iowa law and confer legal status as mother upon C.M. exclusively by virtue of her having been a party to the contract.

Despite their misleading statements and failure to address important issues in the Routing Statement, it appears that P.M. and C.M. want this Court to retain this case now.

STATEMENT OF THE CASE

For an accurate Statement of the Case, see Appellant T.B.'s Brief, p.3-8. Statements in P.M.'s and C.M.'s "Nature of the Case" are inaccurate and misleading. Under a "gestational" surrogacy agreement the birth mother does not necessarily carry the child for "people who provided the genetic material to make that child." Appellees P.M's and C.M's brief, p.15, l.4-5.

First, under such contracts the so-called "intended" parent(s) - that is the person or persons who pay for the child in exchange for exclusive custody - need not be genetically related to the child at all. While the sperm donor is often a contracting "intended parent", often one and sometimes both purchasers or "intended parents" are not generically related to the child. In this case C.M. is not genetically related to baby H. An absurd consequence of the District Court's ruling, if affirmed, is that Baby H has no legal mother. Neither the mother who carries the child nor the woman who made an anonymous donation of ova, under the Court's ruling are "legal" mothers of baby H.

While it may seem, upon first impression, that P.M.'s and C.M.'s statement that they are "people who provide the genetic material to make that child" is an unfortunate and clumsy turn of phrase, it is revealing. In nature, and in the use of the IVF techniques employed in this case, genetic material

does not "make a child". The ova donated by an anonymous woman was fertilized and the resulting embryo, while a whole, unique, living human being, is not a child, and procreation of the child cannot be completed without the substantial biological contributions of the mother who carries the child. Certifications of Dr. Golden (A289), Dr. Grossman (A324), Dr. Caruso (A394, A409), and Dr. Rothman (A345).

Yet that clumsy language actually exposes some of the inherent evils of these arrangements which cut against the public policy and the laws of Iowa and all notions of a civilized society. That is, the M's set out to manufacture a baby by exploiting two women, one who donated ova (which posed risks to her health) and one to biologically develop the child during gestation while that biological mother undergoes dramatic physical bodily changes, including changes in the physical structure of her brain, rising oxytocin levels, and complex chemical reactions with the embryo/fetus, all of which are designed by her nature to prepare her to bond with and care for the child during pregnancy and following birth.

The surrogacy arrangement is the purchase of a child, but as P.M. points out in his own way, it is the manufacture *and* purchase of a child, which is even worse. The purchase of a child, where circumstances may dictate that the

mother and child will likely be separated for other reasons, is offensive and universally condemned and prohibited. Gestational surrogacy involves every harm and evil found in the sale and purchase of a child, but is far worse, because it is a deliberate plan at the outset to deprive the child of her mother regardless of the child's best interests only to satisfy the desire of an adult; all driven and fueled by offers and payment of money to all involved – the IVF technicians, physicians, surrogacy brokers, ova donors and birth mothers.

The surrogacy arrangements like the one in this case denigrates the women involved, but also denigrates motherhood itself. It ignores the role of pregnancy in child rearing and ignores the benefit which pregnancy and bonding has for the child and the mother as care giver.

It is such a radical departure from the traditional notions of the institution of motherhood and family, and what is in the child's best interest, that it not only conflicts with Iowa's termination and adoption statutes and public policy, but if allowed to become widespread, surrogacy has the potential and power to irrevocably alter human civilization.

The Courts in Iowa are ill-suited, and it is beyond their role, to impose such a monumental alteration of the culture on the people of Iowa.

The issues require a deliberative process by a deliberative body. By

example, gestational surrogacy is criminalized in virtually all of the European nations resulting from legislative study. The European Union has declared gestational surrogacy to be a human rights violation and exploitive of women. *European Parliament Annual Report on Human Rights*, November 30, 2015, p. 16.

Here in the United States, it has long been recognized that the most comprehensive investigation, study, and legal and social analysis on the topic of surrogacy, including so-called gestational surrogacy, was conducted by the New Jersey Bio-Ethics Commission, which published a 178 report after three years of study and research, recommending criminalizing all forms of commercial surrogacy. *See,* New Jersey Bio-Ethics Report (1992) *"After Baby M, The Legal, Ethical and Social Dimensions of Surrogacy."*

The Court is not the kind of deliberative body properly suited to make such a momentous cultural determination and it is not the role of the Court to do so. It is first a question for the people to resolve through their elected legislative representatives. Legislative action is, of course, limited by the Fourteen Amendment of the United States Constitution. While determinations concerning enforcement of the contract is the prerogative of the legislature, the constitutionality of enforcement of such a contract is a matter for this Court.

It is noteworthy that this case comes to this Court on a Motion for Summary Judgement. There was no fact finding hearing of any kind with respect to the efficacy of enforcement of surrogacy contacts, the impact of such enforcement and harm to the child and her birthmother, or the impact on the culture at large. It is, with respect to the impact on the culture, critical to note that enforcement of such a contract is not so much about the individual parties in this lawsuit who seek to promote their own personal interests, as much as it is about the people of the State of Iowa who are asked to enforce the contract through their Courts without the ability of the Courts to make any judgement about the harms such enforcement would cause.

So this Court must first recognize that there has been no deliberative determinations of the aspects of the inquiry here presented; and in this case there has been no discovery, no expert testimony from P.M., who has produced no evidence of any kind on the scientific, ethical, and social dynamics of the questions involved.

The scientific and medical testimony provided by T.B.'s four experts was completely ignored by the District Court despite the fact that on a Motion for Summary Judgment the Court was bound to accept their presentations as true and accurate.

It is, therefore, not an overstatement to say that there has been no consideration concerning the most critical questions about the impact that enforcement of these contracts will have on the birth mothers, children, the culture at large, and all notions of family, motherhood, womanhood and the best interests of children. All of these considerations are inextricably interwoven with Iowa's Public policy and statutory scheme designed to protect the interest of women and children and the constitutional issues presented.

All of this illuminates the true nature of the case.

LEGAL ARGUMENT

Introduction

While there are many individual issues presented by this case there are four general areas of inquiry.

T.B. has maintained from the outset of this case that the entry of an Order terminating the relationship between T.B. and Baby H, and the enforcement of the contract violates the Substantive Due Process and Equal Protection rights of both Baby H and T.B.

In addition, whether T.B. is the mother of Baby H, as a matter of fact, and whether she is recognized as Baby H's "legal" mother under Iowa law, are two separate inquiries contested in this case.

Finally, the Question of whether the surrogacy contract, signed before conception and birth of Baby H, is enforceable under Iowa law and forms the basis to terminate the rights of Baby H and T.B. and their mutually beneficial relationship, despite the fact there is no surrogacy enabling statute in Iowa, and such termination violates the Iowa statutes authorizing termination of the mother's and child's rights, Iowa's adoption laws and the public policies of the State underlying them.

POINT I

The Order of the District Court Terminating the Relationship Between Baby H and T.B., and Enforcing the Surrogacy Contract Violates the Substantive Due Process and Equal Protection Rights of Both Baby H and T.B. Guaranteed by the Fourteenth Amendment of the United States Constitution.

Appellant T.B. has maintained that entry of a Court Order terminating her relationship with baby H, and the enforcement of the surrogacy contract violated the Substantive Due Process and Equal Protection Rights of both Baby H and T.B. (Counterclaim, Appendix at A121-163; Counts 4 and 5, p.8-10 at A154-156).

Such termination and enforcement of the contract violates Baby H's and T.B.'s fundamental liberty interests in her relationship with her mother, T.B. (Appellants' Brief, p.45-50), and it violates Baby H's Substantive Due Process Right to be free comodification, and state sanctioned and state enforced purchase of her, and her familial rights (Appellant's Brief, p.50-54).

Such termination and enforcement of the contract also violates Baby H's right to the Equal Protection of the Law guaranteed by the Fourteenth Amendment (Appellant's Brief, p.54-57).

In addition, such termination and enforcement violates T.B.'s

Substantive Due Process fundamental liberty interest in her relationship with Baby H (Appellants' Brief, pp.57-62); and it violates T.B.'s Due Process right to be free from State promoted and state enforced exploitation of her and her reproductive capacity (Appellate Brief, p.62-64).

The termination of T.B.'s rights and enforcement of the contract also violates T.B.'s Equal Protection Rights protected by the 14th Amendment (Appellant's Brief, ¶64-66).

Since Appellees P.M.'s and C.M.'s brief does not address or respond to any of the constitutional arguments of T.B., there is no argument of P.M. and C.M. to which Appellants need reply.

However, P.M. and C.M. do make an illogical argument that the mere fact that Iowa's Administrative Code authorizes issuance of birth certificates with the name of the man who donated sperm pursuant to a gestational surrogacy contract, those Administrative Code Provisions by themselves, and nothing more, establish that enforcement of the contract does not violate the Fourteenth Amendment Due Process and Equal Protection rights of T.B. or baby H. (Appellees P.M.'s and C.M's Brief, p.61-64.)

It is difficult to conceive of an argument which has less merit.

As discussed below, the Administrative Code does not purport to either

make surrogacy contracts enforceable, nor does it imply that State law renders those contracts enforceable.

However, even if a State had a surrogacy enabling statute which expressly enforces a surrogacy agreement, and administrative code provisions to assist in its implementation, their existence is merely the law or object of Constitutional scrutiny. P.M.'s argument is the equivalent of stating that no State statute or administrative code could ever be found to be unconstitutional, because their mere existence conclusively proves their constitutionality. Such a proposition so contradicts all of the hundreds of cases decided by the United States Supreme Court which has stricken state laws as violative of the Fourteenth Amendment that extensive discussion is not merited.

It does, however, serve a purpose to address P.M.'s incorrect assumption that I.A.C. 641-99.15 supports his argument that surrogacy contracts are enforceable as a matter of Iowa State Law, because it is pertinent to other non-constitutional state law issues. As it goes, P.M.'s argument is that, since the code authorizes alterations of birth certificates to reflect that P.M. is the father of the child, because he is genetically related, the surrogacy contract must be enforceable under Iowa law because he donated sperm under a surrogacy agreement.

The Administrative Code provisions actually have an opposite meaning of what P.M. attributes to them, because the code provisions recognize that a "gestational" surrogacy agreement cannot be enforced against the will of the birth mother. The birth mother's rights can be terminated only if she voluntarily consents to terminate following the birth of the baby.

I.A.C. 641-99.15(144) sets out procedures for "establishment of new certificate of live births following a birth by gestational surrogate arrangement." Code provision 641-99.15(1) states that despite the fact that there is a gestational surrogacy arrangement, "all live births shall be considered the product of the woman who delivered the live infant" and "that woman" shall be "named as the birth mother on the original record submitted for registration."

Under the pertinent code provisions, the birth mother's name cannot be removed or replaced on the birth certificate unless Iowa statutory provisions pertaining to termination of the mother's rights are followed.

I.A.C. 641-99.15(6) pertains to situations like the one in this case, where the "intended father is the biological father to the child," and "his spouse is not a biological parent."

Under this section, 99.15(6)(b), there is a mechanism for the "intended

father" who is a biological parent (genetic donor) to have his name placed on the birth certificate, replacing, by court order, the birth mother's husband. That specific provision is perfectly consistent with this Court's decision in *Callender v. Skiles*, 591 N.W. 2d 282 (Iowa 1999), in which this Court held that a genetic father has a right to replace the husband of the child's mother as the legal father of the child.

That section does not authorize removing the birth mother's name off of the birth certificate. The Administrative Code does not anticipate that a non-genetic, non-biological mother such as C.M. could have her name placed on the birth certificate based upon the contract alone.

Under 99.15(6)(f), the non-genetic spouse of the intended genetic father must strictly follow Iowa's Adoption Code, Chapter 600, in order to obtain an order recognizing her as a legal mother. She must go through a legal adoption and comply with the mandatory provisions of Chapter 600. A petition for adoption cannot be filed until after the birthmother's rights have been terminated. I.C.A. § 600.3. Termination of T.B.'s rights must be obtained in compliance with I.C.A. § 600A.1 *et seq.* The birthmother must sign a release of custody no earlier than 72 hours after the child's birth and has four days to revoke such consent. Thus, under Iowa Code 600A, the mother who gave

birth must voluntarily surrender her parental rights after the birth of the child for her rights to be terminated, and that "consent" is subject to subsequent revocation by her. Termination of the birthmother's rights can result only by entry of a court order following a hearing proving by clear and convincing evidence that the consent was voluntary, and only after C.M. demonstrates why an order allowing her to adopt the child, and have legal motherhood bestowed upon her, is in the child's best interests. I.A.C. 600.1 *et seq,* and 600A.1 *et seq.*

Thus, the Administrative Code provisions support the view that a "gestational" surrogate is, in fact, the mother of the child who enjoys legal status as mother.

An anonymous donation of sperm does not make a man a father, and the U.S. Supreme Court has stataed that it is the actual existing relationship between a father and a child which enjoys protection under the Fourteenth Amendment. The U.S. Supreme Court has made it clear that a man merely being genetically related to a child does not give rise to a protected liberty interest. *See and compare*, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammod*, 441 U.S. 380 (1979); *Quilloin v. Alcott*, 434 U.S. 246 (1978) and *Lehr v. Robertson*, 463 U.S. 248 (1983) which demonstrates that the extent of

the protection afforded a genetic father depends on the extent and strength of the actual relationship between the father and the child.

An anonymous donation of ova does not make a woman a mother any more than an anonymous donation of sperm makes a man a father, and under the decisions of the United States Supreme Court, neither such a man, nor such a woman, has any rights protected by the Fourteenth Amendment.

It has always been recognized that the fact a woman carries the child in utero, bonds with the child, has an existing relationship with the child during pregnancy and gives birth, is what makes a woman a mother of a child. An Anonymous donation of ova by a woman has never made that woman a mother of the child. In fact, a woman's unique relationship with the child during pregnancy is the most intimate, most important and one most worthy of protection.

This view of the mother's relationship is consistent with the holdings of the United States Supreme Court.

Since the interest protected by the Due Process clause of the Fourteenth Amendment is the interest in the relationship itself, a woman's interest in her relationship with that child she carried 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. *Lehr* thus recognized the mother's protected interest because during pregnancy the mother has an actual relationship with her child.

It is the carrying of the child which makes a woman the mother, and the bonding that takes place prepares her for her role as mother and care giver following birth.

The difference in the reproductive roles of the mother who carries the child and a person who "fathers" the child not only distinguishes how and when their parental rights can be established, but justifies different treatment under the Fourteenth Amendment between the woman who carries the child and gives birth and the man who fathers the baby. *See*, e.g. *Tuan Anh Nguyen v. Immigration and Naturalization Services*, 523 U.S. 53, 62-73 (2001)(citing *Lehr v. Robertson, supra*).

The existence of I.A.C. 641-99.15(6) is merely an administrative directive which recognizes that as long as a woman enters into a surrogacy

agreement, if she decides to voluntarily give up her parental rights in favor of the sperm donor's wife, the Department of Health has provided guidelines for an orderly mechanism to change the name of the legal mother as the baby's birth certificate. However, those guidelines make it clear that the wife acquires no rights by virtue of the existence of the contract and she must go through Iowa's adoption process, including voluntary termination of T.B.'s rights following birth, the same way as any other woman who is a stranger to a baby.

Termination of the rights of T.B. and Baby H to their mutual relationships, and enforcement of the contract violates their Fourteenth Amendment Due Process and Equal Protection Rights.

Point II

T.B., as the mother who carried Baby H, enjoys legal status as her mother under Iowa law.

Appellees P.M and C.M. argue that a mother who carries a child in utero throughout gestation and gives birth cannot be recognized as the "legal" mother of the child born to her based upon that fact. They argue that only a woman who is genetically related to the child can obtain legal status as a mother. Appellee's Brief, p.22-28.

That contention is based upon misconstruction of pertinent statutes, misunderstanding of law and failure to recognize certain facts.

First, Appellees argue that the word "biological" found in Iowa Code § 232.2(39) is synonymous with the word "genetic".

As previously noted the woman who gives birth is identified on the baby's birth certificate as the mother of the child. That is consistent with the understanding that a woman who carries the child through the gestational period has always been viewed as the party who made the greatest contribution to the child's procreation and her existing relationship with the child is clear.

Traditionally, a mother made two separate indispensable biologically contributions to the child's procreation, providing ova and providing for the

child's development by gestating the child in utero. This dual contribution of the mother dramatically distinguishes her role in procreation of the child. However, it was never her genetic contribution which distinguished her from the father, because both parents provided the genetics. The dramatic difference in roles - the difference which distinguished her as a mother – was the fact that she carried and gestated the child for nine months, a period during which she and the child simultaneously underwent breathtaking physical changes, development, and bonding that formed the basis for a life long loving relationship.

Iowa code 600A.2 defines a 'biological parent" as "a parent who has been a biological party to the procreation of the child". P.M. argues that the word "biological" is interchangeable with the word "genetics". It is not.

If the Legislature intended to deny legal status to a mother who gives birth because she was not genetically related, it would have simply stated that a "biological parent" is a genetic parent confirmed by testing. The phrase "party to the procreation of the child" would have no meaning as pure surplusage if P.M.'s construction were correct. But that phrase refers to the process of procreation including the usual nine months of gestation.

T.B. provided five Certifications from four experts who described the

indisputable biological contributions made by T.B. throughout the process of the procreation of Baby H. 2nd Certification of Dr. Caruso (A409); Certification of Dr. Golden (A289); Certification of Dr Grossman (A324); Certification of Dr. Rothman (A 345) and 1st Certification of Dr. Caruso (394).

When the Legislature defines a particular term or word, that definition is controlling even if that definition differs from common definitions of the term. The *Sherwin-Williams Co. v. Iowa Department of Revenue*, 789 N.W. 2d 417, 425 (Iowa 2010) (". . . the Legislature may act as its own lexiconographer . . . "); *State v. Fischer*, 785 N.W.2d 697, 702-703(Iowa 2010); *Hornby v. State*, 559 N.W.2d 23, 25 (Iowa 1997).

In interpreting a statute the Court must adopt the plain meaning of the words used in the statute. *State v. Steenhoek*, 182 N.W.2d 377, 379 (Iowa 1971). The Court is not free to substitute the word "genetic" for the word "biological".

P.M. quotes the District Court, which argues that if T.B. is recognized as a biological mother of the child, then there would be the resulting "absurdity" that the child has two "biological mothers." Appellee's Brief, p.25, citing District Court Ruling at 24, 25.

The problem with this argument is that Baby H did in fact have two

different women make indispensable biological contributions and both were biological parents to the procreation of the child. What that means is that there are two women who could prove a factual basis to seek "legal" status as a mother of baby H. In this instance, one of those women is unknown, and that ova donor does not seek legal status as mother, having deliberately waived any rights as an anonymous donor of genetic material the same as an anonymous sperm donor.

Had both women contended for legal status as mother, the Court would have to make a determination whether or not only one could have legal status and if so, which one.

The actual "absurdity" is the result reached by the District Court and the result urged by P.M. : Baby H has *no* legal mother at all.

That result could not have been the intent of the Legislature when writing I.C.A. 600A.2(3). The meaning of 600A.2(3) is clear and in this instance there are three biological parents to the procreation of Baby H. However, only one father and one biological mother seek legal status as "biological parent". Under the circumstances of this case, T.B. is the only legal mother of Baby H.

If 600A.2(3) was ambiguous - which it is not - then I.C.A. 54.6(5)

directs that the consequences of a given construction must be considered. If P.M.'s construction is adopted, Baby H has no legal mother, an absurd consequence which could not have been intended by the Legislature, especially since T.B. is clearly a biological party to the procreative process.

In the past, when faced with situations such as this one, Courts have held that when a female donor of ova acts anonymously and does not seek legal status, the biological mother who gives birth is the legal mother. Those Courts have observed that a contrary ruling creates the "absurdity" and cruelty of leaving the child with no legal mother. In re *C.K.G., et al*, 173 S.W. 3d 714 (Tenn 2005).

> "In cases such as this one, where a woman has become intimately involved in the procreation process even though sh has not contributed genetic material, factors other than genetics take a special significance". *Id* at 727

No opinion of any Iowa Court or any Iowa Statute states that a mother who gives birth must be genetically related to the child she carried to be recognized as the legal mother. P.M. incorrectly claims that what Iowa has "always" required proof of a genetic relationship. The cases P.M. relies upon only deal with men who can *only* establish a biological contribution to the child's procreation by providing genetic material. Appellee's Brief, p 26.,

citing *In re B.G.C.*. 496 N.W.2d 239 (Iowa 1993); *In re Marriage of Beth*ards, 526 N.W.2d 871 (Iowa Ct. App. 1994). The reasoning of those cases do not apply to a woman who establishes her relationship to the child by giving birth.

P.M. and C.M. also argue that the mother genetically related to the child is usually the "legal mother" (citing Black's Law Dictionary). Appellee's Brief p. 23-24. That statement is inaccurate.

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 born to her, and she is given legal status as mother. This is true even in states which enforce gestational carrier agreements based upon the specified conditions outlined by those state's legislatures. There isn't a single state that requires a woman to prove that she is genetically related to her child in order to have legal status as the mother.

The States' treatment of the issue fall into two main categories: (1) states that have adopted some variation of the Uniform Parentage Act, which state that the mother-child relationship can be established by proof that the woman has given birth to the child, and (2), states which have vital statistics statutes that demonstrates their understanding that the woman who gives birth to a child is the child's mother. There is also a minority of eight states that do not

address the issue in their parentage acts of vital statistic statutes, but assume in their statutes or case law that the woman who gave birth is the mother. For a complete listing of the state statutes and a short analysis of them, see Addendum "A" which is attached to T.B.'s Brief filed in the District Court on December 20, 2016, in Resistance to Plaintiffs Motion for Summary Judgment.

Two states are perfect examples of the principles involved. California, for instance, has the most liberal gestational surrogacy enabling statute by which gestational contracts are enforced. Cal. Fam. §7962 (and §7960). Despite that fact, California has expressly stated that a woman who is not genetically related to the child is the legal mother if she carries and gives birth. Cal. Fam 7610(a) states that the parent- child relationship may be established by showing the woman gave birth. In *Johnson v Calvert,* 5 Cal 4th 84 (1993), the California Supreme Court overruled the Court of Appeal and held that a woman who gives birth does not have to be genetically related to be recognized as the child's "legal mother". *Johnson,* at 92 fn 9. Thus, in California, even if there is a gestational carrier agreement, the gestational carrier will be given legal status as mother with full parental rights if one of the conditions for enforcement under Cal. §7962 is not met.

New Jersey also recognizes that a woman who gives birth is the "legal

mother" of the child. N.J. Stat. Ann. §9:17-41. P.M. cites to the Baby M case, implying that the surrogate is the legal mother where a child is conceived under a surrogacy contact *only* if the birth mother is genetically related. However, in New Jersey, even when the "gestational" surrogate gives birth, she is the legal mother of the child, she possesses parental rights, the contract is unenforceable, and the consent for adoption signed in compliance with the contract is void. *See*, *A.G.R. v. D.R. et al.*, Superior Court of New Jersey, Dec. 2009, electronically accessible at:

http://graphics8.nytimes.com/packages/pdf/nation
al/20091231_SURROGATE.pdf?mcubz=1.

Further, in New Jersey, even if the gestational carrier does not seek to assert her rights, and reaffirms the gestational surrogacy contract following the baby's birth, the gestational carrier is still the legal mother of the baby, the contract does not form the basis to terminate her parental rights, and the genetic father's wife must seek legal parentage under adoption statutes. *In the Matter of the Parentage of T.J.S., et al*,16 A.3d 306 (N.J. App. Div. 2011), *affirmed*, 54 A.3d 263 (N.J. 2012).

Only in the instance where the ova donor and the birth mother both being biological mothers, each simultaneously seek "legal" status as mother,

would a state such as Iowa have to choose between the two, would recognize only one of them as legal mother. That was the extraordinary situation faced by the California Courts in *Johnson v Calvert, supra.*

T.B. is the mother of Baby H, as a matter of fact, and is the only mother of Baby H as a matter of law, the genetic ova donor having waived her parental rights, thereby relinquishing her status as legal mother. *In re C.K.G.,* 173 S.W.3d 704, 729 (Tenn, 2005).

Point III

Enforcement of The Surrogacy Contract Violates Iowa's Statutes and Public Policy

P.M. contends that the surrogacy contract is enforceable because it does not violate the public policy of Iowa. However, we have noted that the Legislature has set up the exclusive method for terminating a birthmother's rights and for adoption by C.M. The contract is inconsistent with these statutes and the state's policy to protect women and children. The policy considerations here are similar to those addressed in *Baby M*, 537 A.2d 1227 (N.J. 1988) and *A.G.R., supra*.

Appellants cite to language found in *Johnson v Calvert*, 851 P.2d 776, 785 (Cal 1993) that the contract is not exploitive because a woman is capable of intelligently agreeing to enter into a contract. Appellee's Brief, p. 51. P.M.'s citing to that language in *Johnson* is an effort to deflect from the real issue.

States have always prohibited conduct which is harmful, despite the fact persons, including women, are intelligent human beings who normally can make judgments for themselves.

When physical safety and like considerations are involved, for instance,

states tell individuals that they must wear helmets while riding motorcycles, seat belts while driving, and, despite their intelligence, they cannot use heroin or other harmful drugs. In those instances, the State enforces its determinations which conflict with the decisions of private citizens. When it comes to enforcing a contract, the state's interests are even greater because contracts can only be enforced by the state through its Courts. Thus, contracts for the sale of a body organ and a contract with usurious interest rates are not enforceable.

Contracts for the sale of a child, no matter how intelligent the seller, is not enforceable, and is criminal. More to the point, a written promise by a pregnant mother signed before the birth of the child is not enforceable. I.C.A. § 600A.1 *et seq.* That unenforceability is not an insult to the intelligence of the woman, as if it constitutes a statement that she is unable to make intelligent decisions. It is a recognition (1) that circumstances may make her vulnerable to inducements and influences, and demands of other persons whose interests conflict with her own; (2) the magnitude of the potential harm to her and her child; and (3) circumstances change, as does the information a woman accumulates during the pregnancy and following birth, as well as better appreciation of her circumstances.

That last consideration is addressed by *In re Marriage of Witten,* 672 N.W. 2d 768 (Iowa 2003). P.M. misconstrues *Witten*. Where *Witten* speaks of the right of individuals to make reproductive decisions based on "their current views and values," the Court means that, despite the fact they had taken action to conceive a child with one view in mind, an individual has the personal right to change their mind about that matter based upon subsequent changing views. Hence, it is relevant that T.B. learned a great deal during her pregnancy and came to the realization that the babies' best interests were not advanced by surrendering custody to C.M. as an adoptive mother or giving exclusive custody to P.M.

Near the end of the pregnancy and immediately following birth, T.B. felt a strong moral obligation to do what was in the best interest of the children. The dynamic and powerful bond during the pregnancy and deep attachment and moral commitment the mother feels for the child provides an illumination of the experience in a way that alters her original intent. It is that kind of experience that Witten recognizes, which counsels against forcing a mother to stick to an original promise to surrender the child following birth, the kind of promise made before birth which Iowa's termination and adoption statutes refuse to enforce to protect the interests of mother and child.

Finally, if recognition of women's capability of making an intelligent decision is of concern, it is the intelligent decision made by T.B. following birth – that surrender was not in the child's best interest and she should preserve her rights – which must be honored. She was capable of making an intelligent decision for the child and for herself once she had a greater experience of their relationship, and more information about the M's as potential custodial parents.

CONCLUSION

T.B. is, as a matter of biological fact, the mother of Baby H. Under controlling Iowa law, she enjoys legal status as mother. The Court Order terminating the reciprocal rights of T.B. and Baby H and enforcing the surrogacy contract violates the Due Process and Equal Protection rights of both T,.B and Baby H. The decision of the District Court must be vacated and the matter should be remanded to the District Court with instructions that primary custody should be placed with T.B., absent a showing that she is an unfit parent by clear and convincing evidence. *See*, e.g., *In Matter of Baby M,* 537, A. 2d 1217, 1261 (1988).

STATEMENT REQUESTING ORAL ARGUMENT

Defendants-Counterclaimants-Appellants hereby respectfully request

that this case be submitted with oral argument.

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CERTIFICATION OF ATTORNEY'S COSTS

I hereby certify that the cost of printing the foregoing Defendants-Counterclaimants-Appellants' Final Reply Brief was $0.00 (inclusive of sales tax, postage and delivery).

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CERTIFICATION OF FILING

I hereby certify that on the 12th of September, 2017, I served the attached Defendants-Counterclaimants-Appellants' Final Reply Brief by electronically filing it with the Clerk of the Iowa Supreme Court via the EDMS in accordance with the Chapter 16 Rules.

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CERTIFICATION OF SERVICE

I hereby certify that on the 12th of September, 2017, I served the attached Defendants-Counterclaimants-Appellants' Final Reply Brief on all counsel of record by electronically filing it with the Clerk of the Iowa Supreme Court via the EDMS in accordance with the Chapter 16 Rules.

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CERTIFICATE OF COMPLIANCE

1. This Brief contains 6,909 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P.6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the X8 edition of WordPerfect in 14 point font plain style.

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