SHORT FORM ORDER

INDEX No. 09-19430

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9-14-09
MOTION DATE 1-6-10
ADJ. DATE 2-10-10
MNEMONIC: # 002 - MG; CASEDISP
003 - MD

MARC N. FEIGENBAUM, ELAINE B. FEIGENBAUM, CARLY MACOMBER and CHRISTOPHER MACOMBER, Plaintiffs, - against - NEW YORK STATE DEPARTMENT OF HEALTH and ST. CHARLES HOSPITAL, Defendants.	MELISSA B. BRISMAN, ESQ., LLC Attorney for Plaintiffs Feigenbaum One Paragon Drive, Suite 158 Montvale, New Jersey 07645 RUMBOLD & SEIDELMAN, LLP Attorneys for Plaintiffs Macomber 116 Kraft Avenue Bronxville, New York 10708 ANDREW M. CUOMO, ESQ., Attorney General By: Lori L. Pack, Esq. 300 Motor Parkway, Suite 205 Hauppauge, New York 11788

Upon the following papers numbered 1 to 33 read on these motions for dismissal and a declaratory judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 26 - 29 ; Notice of Cross-Motion and supporting papers__; Answering Affidavits and supporting papers 13 - 19; 20 - 23; 30 - 33 ; Replying Affidavits and supporting papers 24 - 25 ; Other__; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion by the defendant State Department of Health for dismissal and this motion by the plaintiffs for a declaratory judgment are consolidated for the purpose of this determination; and it is further

ORDERED that this motion by the defendant State Department of Health for an order pursuant to CPLR §3211 (a)(7) dismissing the instant action is granted; and it is further

ORDERED that this motion by the plaintiffs for summary judgment is denied.

This is an action for declaratory relief in which the plaintiffs Feigenbaum, the biological parents of a child who was carried by a gestational surrogate, Carly Macomber, (who is a co-plaintiff with her husband in this lawsuit) seek a declaration that the plaintiff Elaine B. Feigenbaum is the child's legal mother and that the biological parents' names should appear on the child's birth certificate. In the alternative, the plaintiffs seek a declaration that Article 8 of the Domestic Relations Law (hereinafter DRL) and Family Court Act §§ 517 and 542 (hereinafter FCA) violate the Equal Protection and Due Process clauses of the United States and New York State Constitutions.

Elaine B. Feigenbaum had a history of medical complications rendering her unable to conceive and carry a child successfully to term. The plaintiff Carly Macomber, a friend of Elaine B. Feigenbaum, had successfully delivered her own children, was aware of how much the Feigenbaums wished to conceive a child and offered to carry the pregnancy without any payment. Following an in vitro fertilization (IVF) of Elaine B. Feigenbaum's eggs with Marc N. Feigenbaum's sperm, three resulting embryos were transferred to Carly Macomber's uterus and in late October 2008 Carly Macomber was confirmed to be pregnant with the Feigenbaums' biological child. Then, on June 19, 2009, Carly Macomber delivered the child at St. Charles Hospital (hereinafter Hospital)[1] in Port Jefferson, New York. On June 24, 2009, the Macombers each executed a Relinquishment of Parental Rights. Also, on said date, with no opposition from the State Department of Health (hereinafter DOH), Marc N. Feigenbaum was declared the legal father of the child pursuant to an order of paternity of this Court.

Within five days of the child's birth, the Hospital submitted birth registration documentation to the DOH identifying Carly Macomber as the legal mother of the child. The documentation did not name a father for the child.

The DOH now moves for dismissal of the complaint based on lack of subject matter jurisdiction and failure to state a cause of action. The DOH asserts that a declaration of maternity proceeding does not legally exist and that such a declaration would contravene New York's statutory and case law and New York's long-standing public policy as expressed in Article 8 of the DRL of prohibiting surrogate parenting arrangements. In addition, the DOH asserts that the plaintiffs cannot demonstrate that Article 8 of the DRL and FCA §517 and §542 are unconstitutional and void.

The plaintiffs' arguments in opposition to the defendants' motion and in support of their position include that the Court has the inherent power to declare maternity and that requiring Elaine B. Feigenbaum to proceed with an adoption places an undue burden on her ability to exercise her fundamental right to bear and raise children, is lengthy and thus contrary to the interests of the child, and leaves Carly Macomber burdened with the legal responsibility for the child. In addition, the plaintiffs move for summary judgment declaring Elaine B. Feigenbaum to be the mother of the child and ordering the DOH to amend the child's birth certificate removing Carly Macomber's name and replacing it with Elaine B. Feigenbaum's name.

Here, this Court has subject matter jurisdiction pursuant to Article 8 of the DRL to consider this matter inasmuch as it relates to a surrogate parenting arrangement. DRL §122 provides that surrogate parenting contracts are contrary to New York's public policy and are void and unenforceable. A surrogate parenting contract, as defined in DRL §121 (4), may be, as in this case, an oral agreement that does not involve any payment of compensation (*see*, Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, CPLR §21). It is significant that there is no statute specifically providing for declarations of maternity even though Article 8 of the DRL concerns surrogate parenting contracts. In contrast, DRL § 73 expressly provides that a child born by artificial insemination performed by someone

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[1] The Court's computer records indicate that a stipulation of discontinuance as to the Hospital was filed on July 10, 2009.

authorized to practice medicine in New York will be deemed the legitimate birth child of a consenting husband and wife. "[T]he Legislature could have enacted similar legislation to protect the rights of biological parents involved in a fertilized ovum implantation procedure. It has not. The Legislature's silence cannot be construed as an imprimatur to the courts to legislate" (***Andres A. v Judith N.***, 156 Misc 2d 65, 591 NYS2d 946 [Fam Ct, Queens County 1992]). Nor can DRL § 124 concerning proceedings regarding parental rights, status or obligations be interpreted as providing for a declaration of maternity. Courts may not legislate under the guise of interpretation (***Bright Homes, Inc. v Wright***, 8 NY2d 157, 162, 203 NYS2d 67 [1960]). The designation and determination of the genetic mother as the legal mother of a child born to a surrogate or gestational or birth mother is a matter that must be addressed by the Legislature.

As to the constitutionality of Article 8 of the DRL and of paternity proceedings and orders of filiation pursuant to Article 5 of the FCA, legislative enactments are presumed valid and one who challenges a statute bears the burden of proving the legislation unconstitutional beyond a reasonable doubt (*see*, ***Rochester Gas and Elec. Corp. v Public Service Commission of State of New York***, 71 NY2d 313, 525 NYS2d 809 [1988]). "Paternity proceedings, brought pursuant to article 5 of the Family Court Act, have a twofold purpose: to determine paternity and to secure support for the child" (***Department of Social Services on behalf of Katherine McL. v Jay W.***, 105 AD2d 19, 23, 482 NYS2d 810 [2nd Dept 1984]; ***Matter of J.***, 50 AD2d 890, 377 NYS2d 530 [2nd Dept 1975], appeal dismissed 39 NY2d 741, 384 NYS2d 775 [1976]). Pursuant to FCA, "[i]f the court finds the male party is the father of the child, it shall make an order of filiation, declaring paternity." There is always only one father of a child, the genetic father, and there is a proceeding to establish paternity, not merely to formally acknowledge the legal father, but primarily to determine his legal obligations concerning the welfare and support of the child (*see*, ***L. Pamela P. v Frank. S.***, 59 NY2d 1, 5, 462 NYS2d 819 [1983]; ***Department of Social Services on behalf of Katherine McL. v Jay W.***, 105 AD2d at 23-24).

However, in the context of surrogate parenting arrangements, there are two mothers, the genetic mother, who like a father provides genetic material, and the surrogate or gestational or birth mother, who provides her body to carry the fertilized ovum enabling its development, giving it nourishment for nine months, then giving birth. The law recognizes as mothers both female participants in the creation and development of the child. DRL §121 (1) defines "birth mother" and DRL §121 (3) defines "genetic mother." The plaintiffs seek to transform a paternity proceeding into a maternity proceeding so as to formally identify and designate the genetic mother as the legal mother to obtain custody of the child, which is not the same as acknowledging the identity of the legal father to ensure support for the child. The Equal Protection and Due Process clauses require equal treatment of persons similarly situated and does not prohibit dissimilar treatment of persons dissimilarly situated (***Matter of Jarrett***, 230 AD2d 513, 660 NYS2d 916 [4th Dept 1997], *appeal dismissed* 90 NY2d 935, 664 NYS2d 272 [1997], *lv denied* 91 NY2d 804, 668 NYS2d 559 [1997], *cert denied* 524 US 918, 118 S Ct 2301 [1998]). Under the subject circumstances, the genetic mother and genetic father are not similarly situated (*see*, *id.)*.

To allow the genetic mother to become "equal" to the genetic father and obtain an "order of maternity" would involve an automatic selection from among the two mothers, the two female participants in the development of the child, and consideration of only the genetic mother, leaving the surrogate or gestational or birth mother in an unequal position of being unconsidered and unrecognized and resulting in her extensive contributions and involvement in the development of the child being expunged. Its effect would be to place the surrogate or gestational or birth mother in exactly the same position as the genetic mother in this case. Although the plaintiffs in this matter seek this result, there may be instances where the surrogate or gestational or birth mother wants to be recognized as a mother of the child and actively involved in raising the child and providing for its welfare together with the genetic mother. Given the complex interrelationship of mothers and child that surrogate parenting arrangements engender, the parties herein already have available to them an adoption proceeding, rather than a non-existent maternity proceeding, that can take into account such complexities, recognize the existence of the two mothers, and one mother can formally adopt the child from the other mother and be formally identified as the legal mother (*see*, DRL § 124; *see also*, Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, CPLR 124). Thus, neither mother's due process rights are violated (*see generally*, ***In re Seasia D.***, 75 AD3d 548, 905 NYS2d 643 [2nd Dept 2010]).

The Court is cognizant of the difficult position of the plaintiffs and is sympathetic to their arguments. However, the Court is constrained to follow the law as it currently exists. The plaintiffs have available to them alternate relief in the form of adoption of the child by Elaine B. Feigenbaum together with the issuance of a new birth certificate (*see*, Public Health Law § 4138).

Therefore, the instant declaratory judgment action is dismissed for failure to state a cause of action and the request by the plaintiffs for summary judgment is denied. The Court declares that at this juncture and pursuant to Article 8 of the DRL Elaine B. Feigenbaum is solely the genetic mother of the child and that Article 8 of the DRL and the FCA do not violate the Equal Protection and Due Process clauses of the United States and New York State Constitutions.

Dated: October 22, 2010

Peter Kloeckner
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**