The Individual Right to Procreate and Gestational Surrogacy

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I. THERE IS A WELL ESTABLISHED RIGHT TO PROCREATE

Beginning in 1942, the Supreme Court has recognized, through a series of cases, that the right to procreate is a fundamental right protected by the Fourteenth Amendment. Further, the Supreme Court has held that any attempt by a state to limit this right will be subject to the strict scrutiny standard; meaning, the state must have a compelling interest and the limits must be narrowly tailored to protect those interests.

- Skinner v. Oklahoma, 316 U.S. 535 (1942). The Supreme Court recognized the right to procreate as "one of the basic civil rights of man" and invalidated a state statute requiring the sterilization of certain habitual offenders as an unconstitutional infringement on that right. The Court explained that, because "[m]arriage and procreation are fundamental to the very existence and survival of the race," forced sterilization of certain criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment (because it discriminates against criminals). The Court required strict scrutiny of any legislation that sought to impose involuntary sterilization.

Note: this was a departure from an earlier case, Buck v. Bell, 274 U.S. 200 (1927), that upheld the mandatory sterilization of the mentally handicapped in state institutions.

- Griswold v. Connecticut, 381 U.S. 479 (1965). The Court invalidated a state law that prohibited dispensing information about contraception to married couples. The Court found that married couples had a fundamental right to privacy, based on the Due Process Clause of the Fourteenth Amendment. The Court recognized zones of privacy through "penumbras" surrounding explicit fundamental rights, and determined that privacy itself is a fundamental right, even though it is not expressly stated in the Constitution.

- Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court extended the right to privacy to individuals, not just married couples, as it struck down a Massachusetts law banning the distribution of information regarding contraceptives to single people. Justice Brennan stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

- Carey v. Population Services International, Inc., 431 U.S. 678 (1977). The Court expanded the right to contraceptive access and information to minors. The Court stated, "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices" which include marriage, procreation, contraception, childrearing and education and family relationships. The majority

opinion specifically stated that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Further, "(t)he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." The Court thus confirmed the strict scrutiny standard for reviewing any legislation that infringed on the right to procreate.

Cases in which the Court has addressed the right to abortion have continued to confirm the Constitutional right to procreate. In Roe v. Wade, 410 U.S. 113 (1973), which established a woman's right to terminate a pregnancy, the Court stated that, although the Constitution does not expressly mention the right to privacy, such a right has been, and will continue to be, recognized by the Court as fundamental and "implicit in the concept of ordered liberty." The Court found that the privacy right is rooted in the liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

II. WHO HAS THE RIGHT TO PROCREATE AND DOES IT EXTEND TO ART?

All of the above cases involved state legislation that restrict the right to procreate, or the right to choose whether or not to procreate. The cases establish that the right to procreate is an individual right, so therefore it applies to every person, whether married or single, and, although this has not been specifically adjudicated, it is clear from other Supreme Court holdings that it would apply regardless of gender.

Further, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the recent case that legalized gay marriage, the Court held that "... the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." It is clear from this holding that the point of the decision was to extend to same-sex couples the same rights as enjoyed by married heterosexual couples. It follows that it would be a violation of the Due Process and Equal Protection clauses to treat same-sex couples differently than heterosexual couples with respect to the right to procreate. [1]

The right to procreate must include the right to use any medical advances and technology that allow a person who is infertile to have children. This, of course, is not an issue that the Supreme Court dealt with in the cases that established the right to procreate in the first instance. Assisted Reproductive Technologies (ART) as it exists today, enabling people to become parents that otherwise would not be

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[1] In its opinion, the Court explained the importance of marriage as it relates to children:

"A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, *procreation*, and education. See Pierce v. Society of Sisters, 268 U. S. 510 (1925); Meyer, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." Zablocki, 434 U. S. at 384 (quoting Meyer, supra, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, supra, at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae 22-27. (emphasis added)."

able to, did not exist at the time of the noted cases. The cases discussed below, in which state courts address the constitutionality of statutes that infringe on surrogacy[2], clearly indicate that this is indeed the view of the courts that have addressed this issue.

In this paper, we do not address the right to procreate balanced against the right not to procreate as it relates to frozen embryos, which has been addressed specifically by courts (the majority finding in favor of the right NOT to procreate, but not all finding the same). That particular issue focuses on the intent (as expressed in a written agreement or otherwise) and rights of the individual parties, and not the extent to which the state can infringe on a person's right to procreate in general – another topic for another day. The "surrogacy" issue is focused on the extent to which a state can limit a person's right to use surrogacy as a means to exercise their right to procreate.

Finally, it should be noted that the rights of the surrogate in a gestational surrogacy case are not about the right to procreate. She is not intending to have her child. She is agreeing to carry a baby so that someone else may have his and/or her own child. See Johnson v. Calvert, 851 P.2d 776 (Cal.1993), cert. denied 510 U.S. 874 (1993). So, the issue becomes the state interest in protecting her, which is clearly a real and valid interest.

III. WHAT RESTRICTIONS CAN THE STATE LEGISLATURE IMPOSE ON THE RIGHT TO PROCREATE?

There have been very few cases that have addressed gestational surrogacy and the right to procreate. As stated above, surrogacy certainly involves the exercise by the intended parents of that right. The cases that have looked at this issue have come to decisions based on different theories, so it is hard to provide any real, let alone definitive, answer to the question of what restrictions a state may impose on a person's right to procreate in the surrogacy context. The three cases discussed below have directly addressed the constitutionality of a state's restrictions on surrogacy.

- Doe v. Attorney General, 487 N.W.2d 484 (Mich. App. 1992). An action for a declaratory interpretation of the Surrogate Parenting Act brought by the intended parents and gestational surrogate. Although the holding of the court does not establish precedent because the court was analyzing the alleged vagueness of a specific statute that had already been amended, this is one of a small number of cases in which a court considered what compelling interests a state legislature might consider when enacting a law that restricts surrogacy arrangements. The court identified three such interests: (1) "preventing children from becoming mere commodities", (2) the best interests of the child, and (3) "preventing the exploitation of women, " noting that that "(w)omen in the lower economic strata could well become "breeding machines" for infertile couples of the upper economic bracket."

-Soos v. Superior Court in and for County of Maricopa, 897 P.2d 1356, 182 Ariz 470 (Ariz. App. Div. 1, 1994). A gestational carrier gave birth to a child conceived with an embryo using the gametes of the intended parents. When the parents divorced, the intended mother challenged the constitutionality of the Arizona statute. The gestational surrogate was not asking for custody. The court recognized that the statute was designed to stop "baby brokers" and the trafficking of human beings. The court determined that the strict scrutiny standard would apply. Making it clear that its ruling only applied to the situation

[2] The term "surrogacy" used herein is referring to gestational surrogacy in particular and not traditional surrogacy.

where both intended parents were the biological parents of the child, the court found that the statute violated the Equal Protection clause because the father had the right to rebut the presumption that the gestational surrogate's husband was the father of the child, but the mother was prohibited from challenging the presumption that the gestational surrogate was the mother. In the concurring opinion, the judge noted that the statute was unconstitutional because it imposed motherhood on the gestational surrogate, who did not want it, disregarded the interests of the child who should be with the parents that wanted him and was overbroad because it prohibited all surrogacy.

-J.R. v. Utah, 261 F. supp 2d 1268 (D. Utah, 2002). The intended parents and gestational surrogate sought to declare the Utah statute, which prohibited surrogate contracts "for profit or gain" an unconstitutional restriction on the right to procreate. They also claimed that the statute violated the Equal Protection clause because the presumption that the gestational carrier's husband was the father was rebuttable, but the presumption that the gestational surrogate was the mother could not be rebutted. The Utah State Office of Vital Records and Statistics named the gestational surrogate as the mother, and no one as the father (because the gestational surrogate was not married). The Office claimed that the right to procreate only covered natural procreation or procreation through artificial insemination and did not extend to surrogacy, and that the state had a legitimate interest in protecting the child and the gestational surrogate and avoiding the commercialization of childbirth. The court's reasoning is somewhat convoluted, but the court ultimately found that the statute unduly burdened the intended parents in the exercise of their procreative AND parental rights. The court considered the five "compelling interests" asserted by the Office of Vital Records and Statistics and found that 1) the statute went beyond the permissible narrow restrictions (with respect to protecting the best interests of the child and protecting the surrogate's physical health and emotional well being and her interest in a relationship with the child), 2) the interests asserted were not compelling (preventing custody disputes), or 3) the asserted interests involved facts not in dispute in the case (preventing the exploitation of women and preventing children from becoming commodities).[3]

There are other cases involving surrogacy statutes, but those involve instances where the court is resolving a dispute between the parties (intended mother, intended father and gestational surrogate) and do not focus on the constitutional issue. See, e.g., Belsito v. Clark, 644 N.E.2d 760, 67 Ohio Misc.2d 54 (Ohio Misc., 2005) (genetic parents must be designated as the legal and natural parents); Johnson v. Calvert, 851 P.2d. 776 (Cal. 1993), cert. denied, 510 U.S.874 (1993) (recognizing the intended parents, who were the genetic parents, as the natural parents based on the intent of the parties).

What can we take from these cases vis a vis restrictions that a state may impose on an individual's right to procreate in the context of gestational surrogacy?

1) All of the cases, including those that did not directly address the constitutional issue, accept the notion that the constitutionally protected right to procreate includes the right to access current medical technology, including the use of a gestational surrogate, in order to exercise that right.

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[3] The court noted that the Utah statute was enacted shortly after the Baby M case and contemplated traditional, but not gestational, surrogacy. In considering what the compelling state interests might be, it specifically took into account the differences in these two types of surrogacy arrangements, as well as the specific facts of the case.

2) A state cannot prohibit surrogacy (although clearly some do, but those have not been challenged in court), but there may be compelling state interests which would permit it to impose restrictions on the use of gestational surrogates.

3) It is probably clear what those compelling state interests are: preventing baby selling, protecting the interests of the child and protecting the surrogate, in these arrangements[4]. With respect to this, the following should be noted:

-There are already laws in effect which cover the issue of baby selling, such as the Trafficking Victims Protection Act, 22 U.S.C.A. §§ 7101-7113 (2000). The state cannot ban the payment of money for surrogacy services which compensate the surrogate for going through the fertility process, pregnancy and delivery, so long as the payment is not made for giving up parental rights.

- The interests of the child in a gestational surrogacy case, when determining whether the state has a compelling reason to limit a parent's right to procreate, are different from those considered in adoption cases. Although the courts that have addressed the state's interest in protecting the child have not elaborated on how that interest can legitimately be reflected in legislation, it is clear that such restrictions cannot impose conditions that relate to whether the parents are "acceptable" parents, their home is acceptable, etc. As explained in the paper "The Best Interest Of The Child Standard and Considerations In Third Party Reproduction in the United States" in great detail, the approach to determining the "best interests of the child" must be very different in an adoption or custody case than in a gestational surrogacy arrangement. First, it must be limited; it cannot impose a "fitness test" because that would be contrary to the Supreme Court's ruling on permitted restrictions on the right to procreate. Second, with surrogacy, the child does not yet exist, and it is the very determination of who the child's parent is from the start of any surrogacy arrangement that is critical in such an arrangement. To the extent that the legislature is focusing on the best interests of the child in enacting legislation that regulates surrogacy, the priority must be to have the determination of parentage made before, or very shortly after, birth. Further, the state needs to consider whether it is in the interest of the child to force parenthood on a surrogate or to take the child from the parents who so desperately wanted him or her.

- Although the state does have an interest in protecting surrogates, it can do this is a manner that does not infringe on the rights of the intended parents to procreate by requiring representation by counsel, mental and physical examinations and other provisions to ensure that the surrogate fully understands what she is doing.

4) Laws regulating surrogacy will also be scrutinized on the basis of compliance with the Equal Protection clause. The courts that have addressed the issue have found that intended mothers and fathers cannot be treated differently in terms of the ability to rebut the presumption of who is the mother or father. In some ways, this does not take into consideration the reality of the situation: it is always clear who has given birth, but not who the father is. So, these rulings must be seen as a recognition of the new medical reality that a woman is not the mother of the child simply because she has given birth to that

[4] The question of whether the state had a compelling interest in protecting intended parents was not discussed in the three cases presented here. However, it is clear that legislatures, when enacting laws regulating surrogacy, are concerned with protecting intended parents and are including provisions, such as requiring physical and psychological exams for both intended parents and surrogates or requiring that all parties receive counseling concerning the effects of surrogacy, that are meant to provide such protection.

child. See In Re: Roberto d.B. 923 A.2d 115, 399 Md. 267 (2007) (gestational surrogate who gave birth to a child does not have to be named as the mother on the birth certificate).

IV. WHAT CAN BE DONE TO ENSURE THAT STATES DO NOT ENACT LAWS THAT UNDULY BURDEN THE RIGHT TO PROCREATE WHEN USING A GESTATIONAL SURROGATE?

Similar to what happened in abortion cases, some states will continue to prohibit gestational surrogacy or impose restrictions that make it far too risky to attempt a surrogacy in the state. But, since it is not a national issue in the same way as abortion, at least not yet, there will be fewer people willing to challenge these laws. When it is not a question of fighting for a principle, with the support of well - funded national groups, real people who want to take advantage of surrogacy will just go to states where it is allowed. There is also not the added issue of cost: women who can't afford abortions may not have the money to go out of state to get one. But, for people who need to use surrogates, there is generally no significant additional cost to find a surrogate in a state where surrogacy is permissible. The fact that there have been so few cases challenging the state restrictions on surrogacy over the past 15 to 20 years supports this view, and given the above, there is no reason to believe it will change unless a group decides to take it on.

The individual right of a person to procreate with the assistance of a gestational carrier/surrogate is clearly an area, like gay marriage, abortion, divorce and others, where as practices change over time, the legislatures and the courts eventually should catch up with what is actually happening in society (or so we hope). Particularly in light of the legalization of same-sex marriage and the pressure that will create for even more surrogacy arrangements, coupled with the changes in medicine that make surrogacy more accessible and changes in society that remove any stigma related to the process, it would be expected that over time the laws and court decisions will change to reflect that reality.