

The Best Interest Of The Child Standard and Considerations In Third Party Reproduction in the United States

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There are certain standards relating to the rights of parents with respect to their children that have existed under U.S. law for decades. The introduction of Assisted Reproductive Technologies (ART) and third party reproduction, have required us to reassess those standards in the context of parental rights relating to families created through these new medical techniques. We are no longer just evaluating two parents having a child together, but are faced with potentially six parties involved in the “creation” of a child. It is within that framework that we examine old tenets of law.

One such standard is the “best interest of the child.” All states use a “best interest of the child” (referred to also as “BIC”) standard in disputed custody cases. This is a rather amorphous standard, and one that lends itself to judges’ subjective beliefs about what is best for children. There are some factors, though, that a judge will usually consider such as age of the child, each parent’s living situation, relationship with the child and willingness to support the other’s relationship with the child, continuity and stability, abuse or neglect and, in some states, the sex of the parents. No single factor is more important necessarily than another.

What is best for a child also comes into consideration in the context of an adoption. The goal of an adoption is to provide for what is best for the child; it is child-centered, and indeed the primary focus is an examination of what is in the child’s best interest. Some attorneys practicing in the area of ART would argue that it is an alternative to family building and therefore is similar to adoption. Their argument is that ART is designed to advance the best interests of the child, so the processes and requirements for an adoption, including the consideration of what is in the best interest of the child, should inform the ART process. However, this author would disagree with that argument. ART at its core is not the same as adoption. It is a pathway to parenthood, initiated by an intended parent with the goal to have a child of his or her own, sometimes with the assistance of a third party, such as a gestational carrier (or surrogate).¹ It is not the case that a person is seeking to become a parent of someone else’s child, but rather seeking to become a parent of their own child.

There is very little case law addressing whether the best interest of a child is relevant in a gestational surrogacy context. Only the Maryland Court of Appeals has directly addressed this issue. However, discussed below, in addition to the Maryland case, are cases from three other states in which the courts have looked at various issues relating to gestational surrogacy. Although the courts put forth different theories for determining whether the gestational carrier has

¹ For purposes of this paper, the discussion is focused on gestational surrogacy as differentiated from “traditional” surrogacy. In traditional surrogacy, the surrogate’s egg is fertilized by way of intrauterine insemination - more commonly known as artificial insemination. A traditional surrogate has a genetic relation to the child she carries. In gestational surrogacy, the surrogate bears no genetic relation to the child she carries. There are significant legal and medical distinctions between the two.

any parental rights, none of the opinions asserts that the best interest of the child has any impact on the decision.

It should also be noted that the American Society of Reproductive Medicine (ASRM) has promulgated guidelines for the evaluation of all parties in a third party reproduction case.² These guidelines focus on ensuring appropriate medical standards and that parties have knowledge of all of the risks, benefits and alternative treatments so that they can make informed decisions. The guidelines do not include a “fitness to be a parent” evaluation in the context of intended parents building their family through third party ART, nor has there ever been a suggestion that such an evaluation is relevant in this context.

I. In re Roberto D.B. Equal Protection Argument and Third Party Reproduction

In *In re Roberto D.B.*, the Maryland Court of Appeals examined the BIC standard in the context of determining whether the name of a gestational carrier was required to be on the child's birth certificate. In finding that the BIC standard should not be applied, the Court noted that:

"A court faced with a question of child custody upon the separation of the parents may continue the joint custody that has existed in the past, or award custody to one of the parents, or to a third person, depending upon what is in the *best interest of the child.*' *Taylor v. Taylor*, 306 Md. 290, 301, 508 A.2d 964, 969 (1986) (emphasis added). The use of the BIC standard is highly dependent on the circumstances surrounding the case; that is, the BIC standard is not always applied uniformly or in the same way, even when the case involves parental rights of some sort."

923 A. 2d 115; 399 Md. 267, 286 (2007).

The Court found that “the best interests of the child ("BIC") standard does not apply to the unusual circumstance in the case *sub judice*. While we have noted previously that 'the controlling factor in adoption and custody cases is . . . what best serves the interest of the child,' *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 113, 642 A.2d 201, 208 (1994), it is clear that the context in which the issue arises is significant in determining the standard by which to evaluate the situation." *Id.* at 286.

In analyzing the case, the Court looked at another case, *McDermott V. Dougherty*, in which both parents sought custody and stated:

“each parent possesses a constitutionally-protected fundamental parental right. 385 Md. at 353, 869 A.2d at 770. Under Maryland Code (1984, 2006 Repl. Vol.) § 5-203(d)(2) of the Family Law Article, we observed, neither parent has a superior right to exercise the right to provide 'care, custody, and control' of the children. 385 Md. at 353, 869 A.2d at 770. Because each parent neutralizes the other's right, 'the best interests of the child (remains) as the *sole standard* to apply to these types of custody decisions.' 385 Md. at 353, 869 A.2d at 770. Where, however, we explained ' . . . the dispute is between *a fit parent and a private third party*, . . . both parties do not begin on equal footing in respect to rights to 'care, custody, and control' of the

² See ASRM Practice Guidelines Jan 2013 “Recommendations for Gamete and Embryo Donation: A Committee Opinion.”

ASRM Practice Guidelines Sept. 2014 “Revised minimum standards for practices offering assisted reproductive technologies: A committee opinion.”

ASRM: Oversight of Assisted Reproductive Technology. 2009

children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child.' 385 Md. at 353, 869 A.2d at 770. (emphasis added). Accordingly, this Court also noted that typically, the 'best interests of the child' standard is applied to disputes between natural fit parents, 'most often arising in marriage dissolution issues between . . . two constitutionally equally qualified parents,' 385 Md. at 354, 869 A.2d at 771, and not between parents and non-parents. Once the State inserts itself into the parenting situation, by reason of the unfitness of the parents or as a result of other circumstances, the 'best interest of the child' standard is applied. 385 Md. at 355, 869 A.2d at 771." (footnotes omitted).

The Court went on to note, citing McDermott, that "the non-constitutional best interests of the child standard, absent extraordinary (i.e., exceptional) circumstances, does not override a parent's fundamental constitutional right to raise his or her child when the case is between a fit parent, to whom the fundamental parental right is inherent, and a third party who does not possess such constitutionally-protected parental rights. In cases between *fit natural parents* who both have the fundamental constitutional rights to parent, the best interests of the child will be the 'ultimate, determinative factor.' . . . In respect to third-party custody disputes, we shall adopt for Maryland, if we have not already done so, the majority position. In the balancing of court-created or statutorily-created "standards, ' such as 'the best interest of the child' test, with fundamental constitutional rights, in private custody actions involving private third-parties where the parents are fit, absent extraordinary (i.e., exceptional) circumstances, the constitutional right is the ultimate determinative factor; and *only if the parents are unfit* or extraordinary circumstances exist is the 'best interest of the child' test to be considered, any contrary comment in . . . our cases, notwithstanding. 385 Md. at 418-419, 869 A.2d at 808-809."

In the *Roberto* case, again, the Court actually looked at the BIC in the context of third party reproduction, and found that:

"In the case sub judice, a third party desires to relinquish parental rights, not assert them. There simply is no contest over parental rights. *There is no issue of unfitness on the part of the father. Moreover, there is nothing with which to measure the father's ability to be a parent against, in order for a trial court to rule that it is not in the best interests of the child to grant the father the relief he seeks.* Accordingly, the implication by the trial court that the BIC standard should be used in the case sub judice is inappropriate, and its use by the trial court was error."

In re Roberto D.B., 399 Md. at 293 (emphasis added).

The findings of the Roberto case implies that the BIC standard is not relevant to the medical and psychological evaluations that are standard in proceeding with any gestational surrogacy or gamete donor case. In fact, the lower court in Roberto tried to use the BIC standard to say that it was not in the best interest of the child to remove the gestational carrier's name from the birth certificate, as had been requested by all parties (in recognition of the intent of the gestational carrier agreement and the fact that the intended parent was a single man and the gestational carrier had no intent to be a parent of the children she carried and delivered for the single intended father). The Court of Appeals made clear that the BIC standard had no place whatsoever in the context of the gestational surrogacy case. Although the ruling by the Court of Appeals in In re Roberto D.B. effectively enforces the surrogacy contract because the decision mirrors the parties' intent (see below discussion of the "intent" test), the case does not create an intent to procreate test for all women giving birth in Maryland.

II. Theories of Parental Rights Determinations

An examination of cases that have addressed conflicts between a surrogate and intended parents is informative regarding whether the best interest of the child is relevant in the gestational surrogacy context.

When a surrogate breaches a surrogacy agreement by refusing to surrender the child to the intended parents, the primary question the court has to answer is: who are the legal parents of the child conceived as a result of the surrogacy agreement? If the court treated the surrogacy contract as just another contract, the court's main concern would be making the non-breaching party whole. However, when a surrogate breaches, the judge may choose to look consider the relevance of family law. If the case were treated as any custody dispute, the court would make its decision by applying the best interests of the child standard. But in a surrogacy case, the court must first adjudicate the parental status of the surrogate (or non-status) and intended parents before reaching the question of whether the BIC standard is applicable. In the cases discussed below, the courts reached their decisions based *only* on the parental status. The courts relied upon three different tests to determine whether the surrogate or the intended mother should be deemed the legal mother of the child.

1. The Belsito Genetic Theory of Parental Rights

In most states, a woman will be recognized as a child's mother if she gives birth to that child, and may only place that child with another by complying with the statutory adoption requirements. Provisions of state adoption statutes vary, but most have several requirements in common. First, the biological parent must give written consent to an adoption. Second, the court must approve an adoption even if it is a private adoption. As a part of that approval process, the court has the authority to order the home of the adoptive parents to be evaluated to ensure that the adoption is in the child's best interests. In states that follow the Uniform Adoption Act ("UAA"), the biological mother cannot give her consent to adoption prior to the birth of the child and has a specified period of time to rescind consent. The majority of states have statutes prohibiting a mother from granting irrevocable consent to an adoption before the child's birth or some period after the birth. The purpose of such laws is to ensure that the mother's consent is knowing, voluntary, and without duress. Adoption statutes are usually construed in ways that protect the rights of biological parents to an existing child – their child.

Some courts have found that in a gestational surrogacy case the biological mother is the child's legal mother unless she takes steps to give the child up for adoption (or there might be no biological mother where there is an egg donor, but in either event the gestational carrier is not a parent because she has no genetic tie to the child). *Belsito v. Clark*, 67 Ohio Misc. 2d 54 (Ct. Com. Pl. 1994) illustrates that this theory applies even in situations where the surrogate does not breach the terms of the agreement. In that case, doctors successfully implanted in Carol Clark an embryo created using eggs from her sister, Shelly, and sperm from her brother-in-law, Anthony. Prior to the child's birth, a hospital representative informed Shelly that Carol would be listed on the child's birth certificate as the birth mother. In addition, Shelly found out that since Carol was not married to Anthony, the child would be deemed a non-marital child. Since they were the child's biological parents, Shelly and Anthony did not want to be forced to adopt their own child. Consequently, Shelly and Anthony filed an action asking the court to adjudicate them as the child's legal parents. They also asked the court to order the hospital to put their names on the child's birth certificate as the birth parents. In light of their marital status, the establishment of their parentage would have legitimized the child. The court concluded that biology makes a

person a legal parent. Thus, the persons who supply the genetic material used to conceive the child are the child's biological and legal parents. In this case, Shelly was recognized as the child's legal mother because she was the child's biological mother. If the surrogate had breached the contract, the court would have ordered her to surrender the child to the intended parents.²

2. The Gestational Theory of Parental Rights

In determining maternity, at least one court relied upon the medical fact that the woman who gestates the child forms a special bond with that child. According to that argument, the gestational surrogate nurtures the embryo for forty weeks and helps to “grow” the child. Courts that take that approach apply the gestation test to recognize the surrogate as the legal mother of the child. The surrogate's role as a gestator qualifies her to be the child's legal mother. Thus, the contract is irrelevant. Once her status as a gestator makes her the legal mother, these courts refuse to force the surrogate to give up that title simply because she signed a contract promising to do so.

The New Jersey case of *A.H.W. v. G.H.B.*, 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000), illustrates this gestation theory of maternity. Andrea and her husband, Peter, were unable to conceive a child naturally. After Gina, Andrea's sister, agreed to serve as a gestational surrogate for the couple, doctors successfully implanted an embryo, created using Andrea's eggs and Peter's sperm, into Gina's uterus. Before Gina gave birth to the child, Andrea and Peter asked the court to adjudicate them as the child's legal parents so that their names could appear on the child's birth certificate. Even though Gina supported the petition, the court did not grant their request. Instead, the court reasoned that the efforts Gina took to make sure the child was born entitled her to be classified as the child's gestational mother. Because Gina was the child's gestational mother, the court held that Gina was the child's legal mother.³ In reaching its decision, the court emphasized that a strong connection is formed between the woman and the child during the pregnancy and at birth. As a consequence, gestation is the controlling factor in adjudicating maternity and not who supplies the genetic material. However, this decision was reached in a state that had no legislation specifically governing gestational surrogacy. The court determined that, in the absence of such legislative guidelines, it needed to follow the only statute that could be interpreted to address the issue, which was the statute regarding the procedures to be followed when a mother chooses to give up her child for adoption. The court specifically stated that it would be better if the legislature would clarify the rights and responsibilities of the parties in surrogacy cases.

3. The Johnson Intent to Procreate Theory of Parental Rights

One of the primary purposes of the law is to protect people's reasonable expectations. In surrogacy agreements, as with other contracts, the parties expect to receive the thing for which they bargained. The surrogate promises to gestate and to surrender the child to the intended parents. In exchange, the intended parents promise to pay the surrogate's expenses and to abide by other terms of the agreement. Based upon the terms of the contract, the intended parents believe that they will be recognized as the legal parents of the resulting child. Courts apply the intent test attempt to fulfill that belief. Application of the “intent” test permits the court to identify and carry

² The court did not address the case where neither the intended parent nor the gestational carrier provided the genetic material since this was not the issue before the court.

³ *Id.* at 953-54 (holding that, because of the special bond between gestational mother and child, Gina held the parental rights and could only transfer those rights with her consent seventy-two hours after the birth).

out the wishes of the parties involved in the process. The court's goal is to make sure that, in the absence of a mutual mistake, the parties get the benefit of their bargain by honoring their expectations.

The *Johnson v. Calvert* case provides an example of this approach.⁴ Mark and Crispina Calvert signed a surrogate contract with Anna Johnson. According to the provisions of the agreement, Anna was to gestate the couple's embryo. The parties agreed that Anna would give up all rights to the child and turn it over to the couple. Thus, Crispina was to be the child's legal mother. During the pregnancy, Anna's relationship with the couple deteriorated. Consequently, Anna threatened to keep the child if the Calverts did not immediately pay her the remainder of the money they owed her. The Calverts responded by filing an action asking the court to adjudicate them as the legal parents of the unborn child. When Anna filed her own lawsuit seeking to be recognized as the child's legal mother, the court consolidated the cases.

Anna's claim to the child was based on her role as the gestator and birth mother. Crispina contended that, since the child was conceived using her eggs, she should be recognized as the legal mother. The California Supreme Court concluded that both women had legitimate claims to the child. Nonetheless, the court ruled that the child could only have one legal mother. The court held that the appropriate test for determining the identity of the legal mother of the child was the "intent" test. Specifically, the court stated, "She who intended to procreate the child - that is, she who intended to bring about the birth of a child that she intended to raise as her own - is the natural mother under California law." The Calverts intended to have a child from their genetic material. They carried out that intent by having an embryo created using his sperm and her egg, and that embryo was implanted in Anna. Anna agreed to assist the Calverts in carrying out their intentions. The child would not exist if the Calverts had not acted on their intentions. The court did not recognize Anna's argument that she should be permitted to keep the child because it conflicted with the parties' originally expressed intentions. The court used the information in the contract to ascertain the parties' intent and sought to protect the expectations of the parties. The key factor in determining maternity was intent and not genetics, although genetics was not a conflicting factor in the case.⁵

4. Best Interests of the Child Parental Rights "Test"

The dissenting justice in *Johnson v. Calvert* and some legal commentators have argued that the correct maternity test to apply is the best interests of the child test.⁶ Under that test, the court would consider the best interests of the child when determining whether the surrogate or the intended mother should be recognized as the child's legal mother. The dissent maintained that the court was obligated to have the households and lifestyles of both women evaluated in order to decide which placement would be in the child's best interests. Under this theory, the court would ignore the existence of the contract, the intent of the parties and the biological connection, and resolve the case in the way that "protected" the interests of the child.

⁴ 851 P.2d 776 (Cal. 1993).

⁵ The court did not address the issue of parental rights in a traditional surrogacy arrangement. However, a later California decision indicated that the existence of a traditional surrogacy agreement would have changed the outcome of the case. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900-01 (Ct. App. 1994).

⁶ *Johnson*, 851 P.2d at 798; Hurwitz, *supra* note 60, at 129; Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. Louisville L. Rev. 371, 375, 406-12 (2011).

III. Conclusion

As stated in the majority opinion in *In re Roberto*, “what has not been fathomed exists today.”⁷ Laws must be viewed in light of medical advances and cannot remain stagnant. Collaborative reproduction through ART is now not only possible, but is also growing exponentially as a way to build a family. Infertile individuals wanting to have a child can and do seek the assistance from women who are willing and able to act as their gestational carriers/surrogates. If this option is not available, given the difficulties of adopting today, the infertile individuals would effectively lose their right to procreate. It is clear from the Supreme Court cases dealing with the right to procreate, that this right is not subject to a fitness test.⁸ The ASRM guidelines clearly take this approach. The one state court that directly addressed this issue also came to that conclusion. The other courts that dealt with gestational surrogacy cases did not agree on the basis for determining parental rights, but in setting forth their theories for determining parental rights none of them suggested that fitness of the intended parents should be a factor.

Most legislative schemes are out of step with the realities of medical advances (other than the few states that have enacted gestational carrier statutes). That means that when a court is faced with a case involving a gestational surrogacy arrangement and must make a determination of parental rights, often times the court must grapple with how to make such an evaluation and what principles apply. These cases may resemble a custody dispute, because the decision determines who will parent the child, but the standards for making that determination should not be the same. The child in question was not conceived by the gestational carrier with the intent to be a parent of that child; the intent was for the intended parent to have their own child. The best interest of the child evaluation is misplaced in these cases. Further, examining these cases based on the same standards as a child custody case would ignore the expectations of the parties that entered into an informed arrangement together. It would be beneficial to the parties building families through ART, and most importantly to the children born through this collaborative process, for the state legislatures to enact clear guidelines that honor the intent, and respect the well-established rights, of the parties involved.

⁷ 923 A.2d 115, 122 (Md. 2007) (illustrating the “age” of the Maryland paternity statute by articulating that it does not provide for a situation where the parents are unmarried, much less a situation where children are conceived through assisted reproductive technology).

⁸ See the ABA paper entitled “The Individual Right to Procreate,” part of this presentation.