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IN THE INDIANA COURT OF APPEALS
CAUSE NO. _____

IN THE MATTER OF THE PATERNITY)	Appeal from the Porter Circuit Court
)	Case No. 64C01-0812-JP-1516
AND MATERNITY OF INFANT R.)	The Honorable Mary Harper, Judge

APPELLANTS' BRIEF

STATEMENT OF THE ISSUE

Whether allowing a man to establish that he is the father of a child, but not allowing a woman to establish that she is the child's mother denies the woman equal protection under the law?

STATEMENT OF THE CASE AND THE FACTS

The facts in this case are undisputed. T.G. and his wife V.G., the biological parents of a child born to V.G.'s sister February 19, 2009, appeal the trial court's denial of their agreed petition to establish their paternity and maternity.¹ December 24, 2008, the parties filed an agreed action to establish T.G.'s paternity and V.G.'s maternity (App 1). T.G., V.G., and V.G.'s sister D.R. all signed affidavits indicating that July 15, 2008, D.R. underwent embryo transfer, whereby T.G.'s sperm was combined with V.G.'s eggs, and the resulting embryo was transferred to D.R. D.R. indicated that she was not sexually active with any man in the weeks prior to or after the procedure. All parties agreed that T.G. was the father and V.G. was the mother. D.R. asked that the matter be summarily resolved (App. 2-6). Counsel for appellants tendered an order with the action (App. 8).

March 9, 2009, the court held a hearing on the case. The parties testified to the same thing that they had previously stated in their affidavits (App. 31-35). T.G. added that he and his

¹ The case was heard by the Juvenile Court Magistrate Edward Nemeth. The Honorable Mary Harper, Circuit Court Judge, adopted his findings and orders, and signed off on the order denying the requested relief.

wife had been married for 9 years, had been unable to conceive, and enlisted V.G.'s sister to be their surrogate, carrying their biological child (App. 33, l. 1-11). D.R. received no compensation for her altruism (App. 40, l. 10). The trial court initially indicated his favorable disposition to the matter, but wanted to "call the State" to get guidance on it (App. 36, l. 3-4). Counsel indicated that he had obtained identical court orders in many other counties throughout the State (App. 40, l. 1-3), and had been assisting similar clients for 25 years (App. 37, l. 12-14).

April 13, 2009, not having received a ruling on the matter, counsel filed a praecipe to withdraw the case from the trial court under TR 53.1 (App. ii, 9). April 22, the Clerk withdrew the case from the court and sent the matter to the Supreme Court for appointment of a special judge (App. ii, 10). May 8, 2009, the Supreme Court ordered the case returned to the trial court, ruling that it was more akin to a TR 53.2 matter, and claiming (incorrectly) that counsel had not tendered a proposed order to the court (App. 12). May 26, 2009, although the court accepted that D.R. was only the surrogate carrying the child, the court denied the motion, stating:

***The Court finds that Indiana law does not permit a non birth mother to establish maternity. Indiana law hold the birth mother is the legal maternal mother.

(App. 14). June 19, 2009, T.G. and V.G. filed their notice of appeal (App. 16), then amended it June 23, 2009 to correct a typographical error (App. 22). Because of the possibility of challenging the constitutionality of Indiana's paternity statute, July 13, 2009, counsel notified the Attorney General's office of the issue (App. 23).²

² As noted, this was, and remains, a non-adversarial case. There is no dispute as to the facts, and counsel does not know whether the Attorney General's office disputes that the trial court erred in his ruling. Since the Attorney General speaks for the State on constitutional challenges, it has been served with a copy of appellant's brief.

SUMMARY OF THE ARGUMENT

Indiana law expressly permits a man to establish that he is the father of a child. It has no corresponding mechanism to allow a woman to show that she is the child's mother. To hold that the absence of the ability to statutorily establish maternity means that it cannot be done is to deny equal protection under the law to women in general, and biological mothers in particular, who, because of nature's cruelty, are deprived of the ability to conceive and carry a child. Given Indiana's strong commitment to familial unity, this Court should hold that Indiana's paternity statute is unconstitutional as applied to appellants.

ARGUMENT

Introduction

Indiana's paternity statutes begin at I.C. 31-14-4-1, which allows a man or a woman to claim that the man is the father of her child, either born or while she is pregnant. A man is "presumed" to be the biological father of a child if he is married to the child's biological mother when she delivers or within 300 days after birth, if they tried to get married within such times but the marriage was void, or if the man proves through genetic testing that he is the child's biological father. I.C. 31-14-7-1. If a man who is not presumed to be the father acts like one to the child with the mother's consent, then a "rebuttable presumption" is created that he is in fact the biological father. I.C. 31-14-7-2. If a man executes a paternity affidavit swearing to be the father, then he achieves that status. I.C. 31-14-7-3. If an agreed or stipulated paternity action is filed (as was the case here), a court may summarily grant the petition "finding that a man is the child's biological father". I.C. 31-14-8-1.

Notably, if not understandably, absent from all of these sections is any reference to

determining **maternity**. It was not until fairly recently that medical technology allowed a woman who delivered a child *not* to be the child's biological mother. While surrogacy itself can be traced back to biblical times³, it was not until 1984 that the world's first birth through egg donation occurred. <http://www.ivfmeds.com/aboutivf/>. It is no surprise, then, that Indiana's paternity statutes lag behind ever-advancing infertility treatments. That they do so, however, does not relieve a court from applying the law in an equal manner to men and women.

Surrogacy typically involves one of three possible medical procedures: 1) a woman who agrees to carry and deliver a child for someone else is artificially inseminated with sperm from someone who is not her husband; 2) a woman receives an embryo achieved by combining the sperm and eggs from a husband and his wife; or 3) donor eggs are combined with a man's sperm and the embryo(s) is then transferred to the surrogate. See, <http://www.surrogatemothers.com/options.html>. In the first option, the surrogate is also the biological mother; in the second and third, she is not. It is the second procedure that was employed here. V.G. was capable of producing ovum, but she could not carry a child. Her sister D.R. graciously agreed to carry V.G.'s and T.G.'s child for them. Doctors combined the sperm and ovum from T.G. and V.G., and transferred the resulting embryo to D.R. who conceived, and delivered their child February 19, 2009 (App. 2-6).

The case presented to this Court is a simple one of first impression: must the name of the woman who delivers a child **necessarily** go on the child's birth certificate as the mother, even when all parties agree that she is not in fact the child's biological mother? If one changes the

³ "Here is Bilhah, my maidservant. Sleep with her so that she can bear children for me and that through her I too can build a family." Genesis 30:3

gender of the prior question to male, the answer obviously is no, and courts have allowed men or women to answer question in the negative for 150 years. Prosecutions for “bastardy,” where a man impregnated someone other than his wife date back to the early 1830s. See, e.g., *State ex rel Bell v. Allen*, 4 Blackf. 269, 1837 Ind. LEXIS 17 (1837). The first Indiana case to explicitly recognize that a man could establish paternity was *Phillips v. State*, 82 Ind. App. 356 (1925), where the Court cited an 1857 Pennsylvania case, *Dennison v. Page*, 29 Pa. 420, 72 Am.Dec. 644 (1857) for the proposition that the presumption of paternity was rebuttable. *Phillips*, at 360. Again, not surprisingly there has never been an Indiana appellate case where a woman sought to establish that she was the child’s mother.⁴

It is not that Indiana blinds itself to surrogacy. I.C. 31-20-1-1, *et. seq.*, effective since 1988, specifically recognizes that surrogacy exists, and it goes so far as to acknowledge that surrogacy may involve situations where a woman provides an egg to conceive a child. Regrettably, mere recognition of surrogacy’s existence without explicit Legislative guidance, in Judge Nemeth’s opinion, foreclosed the possibility of V.G. ever having a birth certificate with her name on it as the child’s mother.

Equal Protection

To deny V.G. the opportunity to have her name on her child’s birth certificate, while affording T.G., indeed encouraging T.G., to do the same not only violates her right to equal protection under the law, but it destroys family unity, and potentially has disastrous consequences should T.G. predecease his wife, leaving their child without a recognized legal

⁴ As noted at trial, counsel has been involved in dozens of cases throughout Indiana where precisely such an order was obtained. As will be argued, it is perhaps because to refuse to issue such an order so unquestionably denies a woman equal protection that the issue has never before arisen in the context of appellate review.

parent.⁵ Indiana has long valued family unity and integrity. Indeed, the destruction of that constancy is “one of the most severe action[s] that can be taken.” *R.M. v. Tippecanoe County DPW*, 582 N.E. 2d 417, 420 (Ind. Ct.App. 1991). Another Court has gone so far as to say:

Because the family unit is the foundation upon which any civilized society builds, preservation of that unit is in the public interest.

Barnes v. Barnes, 566 N.E. 2d 1042, 1046 (Ind. Ct.App. 1991), Conover, dissenting. One can hardly imagine a more compelling interest than having parental rights recognized by the State. In fact, those rights, and the ability to enforce them are Constitutionally protected:

...we have recognized that the right to raise one's children without undue interference from the State is protected by the Fourteenth Amendment to the United States Constitution.

In Re A.C., 905 N.E. 2d 456, 461 (Ind. Ct.App. 2009). The United States Supreme Court has also recognized that the parent-child relationship is Constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549 (1978). In order to establish such a relationship, however, where a child is born not of the marriage but to another woman, Indiana affords only a man the option of establishing parentage. Here, Indiana expressly allows T.G. to achieve that recognition while—according to Judge Nemeth—prohibiting V.G. from doing so. The disparity deprives V.G. of equal protection under the Fourteenth Amendment to the United States Constitution, and under Art. 1, §23 of Indiana’s Constitution.

The 14th Amendment specifies, in relevant part,

⁵ One could argue, as counsel has heard in the past, that V.G. simply could adopt her child, thereby obtaining a new birth certificate with her name on it. The notion that one must adopt one’s own child, simply because our Legislature has not caught up with the medical community, is offensive at best. To suggest that a woman, but not a man, must avail herself of one statutory scheme because another scheme is constitutionally deficient flies in the face of everything thought to be equal between the sexes.

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; ...nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Am. 14.

Indiana's Constitution contains similar language:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Ind. Const., Art. 1, §23. As T.G and V.G. will argue, Indiana's paternity statutes, as applied to them, should be subject to the highest level of scrutiny. Since "the right to have offspring" is "basic to the perpetuation of a race," *Skinner v. Oklahoma*, 316 U.S. 535, 536, 62 S.Ct. 1110 (1942), appellants will suggest that the right is meaningless if recognition of one's parental status with respect to such offspring is denied. Appellants also acknowledge that gender-based discrimination has not yet received a majority endorsement from the U.S. Supreme Court that entitles it to strict scrutiny analysis under the U.S. Constitution. See, *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973) [plurality of Supreme Court holds that sex is a suspect classification for equal protection purposes]. However, in *J.E.B. v. Alabama ex. rel. T. B.*, 511 U.S. 127, 114 S.Ct. 1419 (1994), the Court held that gender-based peremptory challenges could not survive a "heightened scrutiny" equal protection challenge, reasoning "the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial." *Id.* at 136-37. See also, *Heighler v. State*, 834 N.E. 2d 182, 195 (Ind. Ct.App. 2005). Irrespective of the level of analysis applied to appellants' claims, be it strict scrutiny or a "mid-level" review requiring "... some ground of difference having a *fair and substantial relation to the object of the legislation*" *In re Estate of*

Parson v. Grabert, 168 Ind.Ct.App. 580, 584, 344 N.E. 2d 317, (1976) (original emphasis), the differential treatment of men and women cannot survive constitutional muster.

When an equal protection challenge is made to a statute, the first inquiry is whether the classification involves a “suspect class” such as race, national origin, or religion, or burdens fundamental rights such as the right to vote, the right to free speech, access to courts, or procreation. If either of the latter are offended by the statute, the government must show that the challenged classification “is narrowly tailored to serve a compelling government interest.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). In this case, appellants would argue that the State must meet the highest standard of strict scrutiny to justify depriving V.G. of her right to receive governmental recognition of the parent-child relationship when it affords her husband that right. It makes no sense, and indeed cannot possibly be justified under any theory at all, to suggest that men can be named as parents of their children born by someone other than their wives, but women cannot. If the right to procreate means anything, and the U.S. Supreme Court holds that it does, it must follow that the results of such procreation must be afforded the same protection as the right itself. Since parents have a Constitutional right to raise their children absent government interference, *In re A.C.*, *supra.*, surely they must have what is, *a priori*, the right to establish the very relationship that gives rise to the right.

Even if heightened scrutiny is applied to V.G.’s claim, the State still cannot justify the disparate treatment of her. The purpose of Indiana’s paternity legislation, of any State’s paternity legislation, is to afford those persons who care enough about the biological origins of their offspring to prove that they are the parents. The question one would have thought Judge Nemeth could have easily answered—what possible reason could there be for *not* recognizing

V.G. as the mother?—fosters precisely all of the family values the paternity statute envisions: familial unity, legitimization, inheritance, and parental rights and duties. Even the trial court itself could come up with no reason—other than the judge’s inability to interpret the statute fairly—not to grant V.G.’s request. Under heightened scrutiny, other Indiana courts have struck down sex-based distinctions even when there was at least a plausible explanation for the differential treatment. In *Reilly et. al. v. Robertson et. al.*, 266 Ind. 29, 306 N.E. 2d 171 (1977), the court held that sex-based annuity benefits afforded Indiana teachers violated equal protection, even in the face of the argument that since women live longer than men there should be different benefits. Appellants, again, have argued that there could be no set of facts which could justify allowing T.G. to establish paternity but not allowing V.G. to establish maternity. They do not need to be so extreme in their arguments; after all, the State must show that there is some set of facts bearing a “fair and substantial relation to the object of the legislation,” *In Re Estate of Parson, supra*, 168 Ind. App. at 585. Even if the State could come up with such a set of hypothetical facts, none could trump V.G.’s desire (and the State’s concomitant interest in validating that wish) to be recognized as her child’s mother.

Although no Indiana case has yet to address the issue, one other court has. *In re Roberto D.B.*, 399 Md. 267, 923 A.2d 115 (Md. Ct.App. 2007), addressed a virtually identical question as the one *sub judice*. In *Roberto*, a single man whose surrogate underwent embryo transfer with donor eggs did not want the surrogate’s name on his children’s birth certificates. There—as here—the surrogate was not the biological mother. The only difference, a difference which actually goes in V.G.’s favor, was that there was no acknowledged biological mother at all since eggs had been donated to the surrogate. Confronted with the same ruling as Judge Nemeth’s—

that the woman who delivers a child is the child's mother, period—the Court held:

Because Maryland's E.R.A. forbids the granting of more rights to one sex than to the other, in order to avoid an equal right challenge, the paternity statutes in Maryland must be construed to apply equally to both males and females.

399 Md. At 283.⁶ The Court resolved the case in a way Judge Nemeth would not—it simply said that the statute “extend[s] the same rights to women and maternity as it applies—and works quite well—to men and paternity...” *Id.* at 284. In so holding, the Court succinctly summarized exactly what the trial court here was confronted with and chose not to resolve:

What had not been fathomed exists today. The methods by which people can produce children have changed; the option of having children is now available, using these methods, to people who otherwise would not be able to have children. Whether the reasons for not producing a child in the traditional sense are biological or not, adoption is no longer the only option. One can certainly imagine a married couple that is infertile, but wishes to have children of their own genetic makeup. Assisted reproductive technologies allow for that to occur. The paternity statute, clearly, did not contemplate the many potential legal issues arising from these new technologies. As it exists, the paternity statute serves to restrict, rather than protect, the relationships the intended parents wish to have with children conceived using these new processes.

Id. at 279.

V.G.'s desire to have children was inalienable, if not innate. The court's refusal to allow her to memorialize that right strikes at the heart of her ability to legally parent her child (and of her child's right to have her parent legally recognized). That the legal community has not caught up with the medical community does not absolve the courts from their obligation to apply our laws fairly and equally to both sexes. This case began when V.G.'s sister gave of herself in a

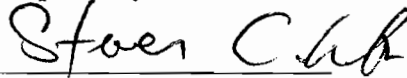
⁶ The Maryland Court of Appeals' resolution of the case presents an interesting option for this Court. Appellants recognize that if construction of a statute can save its constitutionality, such construction should be employed, *Studler v. Indiana BMV*, 896 N.E. 2d 1156, 1160 (Ind. Ct.App. 2008) at least in cases where the statute has been challenged on its face. If, so as to avoid a determination that the statute was unconstitutionally applied to appellants, this Court wishes to construe “paternity” to include “maternity,” it makes no difference to appellants whatsoever. They simply both wish to utilize Indiana's paternity statutes to obtain a birth certificate with their names on it as the parents of their child. The semantical distinction of declaring the statute unconstitutional as applied, or simply holding that Judge Nemeth's creativity was lacking is irrelevant from appellants' perspective.

way few people ever could, and in a way many people still do not understand. The question “How could a woman give up a child,” even if it was not her biological child, is one that counsel is confronted with on a daily basis. Perhaps the most telling answer to the question is what mothers who otherwise would never have been able to raise a child tell their children after women like D.R. provide the ultimate gift: “Although I could never carry you under my heart, I always carried you in my heart.” This Court is confronted with a myriad of cases, many of which are heart wrenching for many different reasons. **This** is a case that never had to be if V.G. would have been treated with the same dignity and respect as her husband. This Court can rectify that inequity simply and straightforwardly by holding that the statute as applied unconstitutionally deprives her of her right to be treated as an equal, that she should have had the same opportunity to show that she was her child’s mother as her husband had to show that he was the father, by ordering the trial court to recognize her maternity, and thereby do judicially what nature deprived V.G. of the ability to do biologically.

CONCLUSION

WHEREFORE, V.G. and T.G., by counsel, move that the trial court's denial of their agreed petition to establish paternity and maternity be reversed, that the court be ordered to grant said petition as tendered to it, that the statute allowing T.G. to establish that he is the father but not affording V.G. the opportunity to establish that she is the mother be declared unconstitutional as applied to them, or, alternatively, that it be interpreted to apply to each of them equally, and for all other just and proper relief.

Respectfully Submitted,



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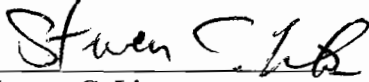
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Indiana Attorney General's Office by United States mail this 13th day of August, 2009.


Steven C. Litz

STATE OF INDIANA)
) SS:
COUNTY OF MORGAN)

Before me, a Notary Public, personally appeared Steven C. Litz, who acknowledged the execution of the foregoing, and who, after being first duly sworn, stated that any representations therein were true and accurate.

Witness my hand and seal this 13th day of August, 2009.




Notary Public