

IN THE
INDIANA COURT OF APPEALS

No. 64A03-0908-JV-367

IN THE MATTER OF THE PATERNITY
AND MATERNITY OF INFANT R.

Appeal from the Porter Circuit Court

Cause No. 64C01-0812-JP-1516

The Hon. Edward J. Nemeth,
Magistrate

The Hon. Mary R. Harper,
Judge

BRIEF OF STATE OF INDIANA

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BRIEF OF STATE OF INDIANA

STATEMENT OF THE ISSUES

The State is filing a brief in this case because the Appellant has filed a Notice of Intent to Challenge Constitutionality of a Statute, Appellants' Appendix 23, and Indiana Code section 34-14-1-11 provides that when a statute is alleged to be unconstitutional, "the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

In this case involving a surrogate mother, the Appellants argue that Indiana's paternity statutes are unconstitutional as applied to the Wife, whose petition to establish maternity was denied because the trial court believed Indiana law does not permit a non-birth mother to establish maternity. The State submits that the trial court's order should be reversed, but not on constitutional grounds. Here, the married couple and surrogate mother all swore under oath that the couple were the biological parents of Infant R., and the surrogate mother did not assert any interest in the child as the birth mother.

The General Assembly recognizes the importance of family and children in our society, the responsibility of the State to enhance the viability of children and family in our society, the responsibility each person owes to the other, and the importance of strengthening family life by assisting parents to fulfill their parental obligations. And this Court has recognized that in exceptional cases a trial court must invoke its equitable power to establish the legal status of parents and children.

A. Did the Appellants fail to meet their burden of rebutting the presumption that Indiana's paternity statutes are constitutional?

B. As courts in other states have done, may this Court construe Indiana's paternity statutes to apply equally to men and women, thus avoiding a determination that the paternity statutes violate equal protection?

C. Under the narrow circumstances of this case, and given the clear public policy enunciated by the General Assembly regarding the importance of family and children, should the trial court have invoked its equitable power and issued an order that determined the legal status of the Wife as the mother of Infant R.?

STATEMENT OF THE CASE

Nature of the Case. A married couple who were unable to have children sought to establish their legal status as biological parents of a child carried by the wife's sister, who had been implanted with an embryo from the husband's sperm and wife's eggs.

Statement of Proceedings. On December 24, 2008, T.G. (Husband) and V.G. (Wife), a married couple, and D.R. (the Surrogate Mother), who was Wife's unmarried sister, filed an Agreed Petition to Establish Paternity and Maternity. Appellants' Appendix (App.) 1. The trial court conducted a hearing on the petition on March 9, 2009. App. 27.

Disposition. On May 26, 2009, the trial court entered the following order that denied the petition:

COURT ORDER – MAY 26, 2009

This matter comes before the Court on an Agreed Petition to Establish Paternity and Maternity filed herein on December 24, 2008. [T.G.] (husband) and [V.G.] (wife) used a surrogate mother ([D.R.]), sister of [V.G.] to assist them in reproduction.

The Court having had this matter under advisement and having considered the pleadings filed, Indiana Case Law, and Indiana Statutes now FINDS and RECOMMENDS as follows:

1. Prior to the birth of the child, the parties filed their Agreed Petition to Establish Paternity and Maternity on December 24, 2008, seeking to establish [V.G.] as the biological mother although she would not be the birth mother.
2. [D.R.], the surrogate mother, gave birth to a baby boy on or about February 19, 2009.
3. The Court finds that Indiana law does not permit a non birth [sic] mother to establish maternity. Indiana law holds the birth mother is the legal maternal mother.
4. The Court finds and recommends that the Agreed Petition to Establish Paternity and Maternity be denied.

ALL OF WHICH IS FOUND AND RECOMMENDED THIS 26th day of May, 2009.

/S/ Edward J. Nemeth
Magistrate, Porter Juvenile Court

The Court, having reviewed the findings and recommendations of the Magistrate, now APPROVES and ADOPTS same as the Order of this Court.

/S/ Mary R. Harper
Judge, Porter Juvenile Court

App. 14-15.

Husband and Wife filed their notice of appeal on June 19, 2009, initiating this appeal.

App. 16.

STATEMENT OF FACTS

Husband and Wife were married on October 2, 1999, and have since lived together as husband and wife. App. 5, Affidavit of T.G. and V.G., ¶ 1. Their efforts to have a child were unsuccessful. App. 33, Tr. 8. Husband and Wife went to a doctor who combined Husband's sperm and Wife's egg(s), resulting in an embryo or embryos. *Id.* The embryo(s) were transferred to the Surrogate Mother on July 15, 2008, resulting in her pregnancy. App. 5, Affidavit of T.G. and V.G., ¶ 2. The Surrogate Mother is Wife's sister. App. 31, Tr. 6. The Surrogate Mother was not married when she conceived. App. 4; Affidavit of D.R., ¶ 1. She had not been sexually active with anyone else in the weeks before or after the procedure when she embryo(s) were transferred. App. 32, Tr. 7. She had agreed to the procedure after much discussion and much thought. App. 31; Tr. 6. Her expected delivery date was April of 2009. App. 4, Affidavit of D.R., ¶ 2.

The Surrogate Mother acknowledged that Husband and Wife were the biological father and mother of the child she was carrying, and that she (the Surrogate Mother) was not the biological mother. App. 4, Affidavit of D.R. ¶ 3; App. 32, Tr. 7. Husband and Wife swore in open court that they were the child's biological parents and they intended to assume all rights and responsibilities that any biological parents would have. App. 33, 34; Tr. 8, 9. The Surrogate Mother joined with Husband and Wife in petitioning the trial court to establish the paternity of Husband and the maternity of Wife as to the child she was carrying as the birth mother. App. 1.

Infant R. was born on February 19, 2009. App. 31, Tr. 6. The hospital recorded the Surrogate Mother as the child's mother, and had Husband sign an affidavit that established his paternity. App. 35, Tr. 10. Hospital staff told the parties that without anything from a court

stating that Husband and Wife were the biological parents, they would consider the Surrogate Mother the mother until they heard anything different. *Id.*

SUMMARY OF THE ARGUMENT

A. The Appellants have the burden to rebut the presumption that Indiana's paternity statutes are constitutional. They have failed to carry this burden because they have not even shown that the trial court relied on the paternity statutes when it generally referred to "Indiana law" in its order. The court just as easily could have been referring to Indiana's surrogacy statutes, which disfavor surrogacy agreements. If the court viewed this case as a contest between the interests of Wife and the Surrogate Mother, the surrogacy statutes would have supported the trial court's determination that the Surrogate Mother, the birth mother, is Infant R.'s legal mother. However, the parties did not need to have the trial court enforce a surrogacy agreement because they all agreed that Husband and Wife were Infant R.'s legal parents.

B. To the extent the trial court did refer to the paternity statutes, this Court may follow the example of courts in Maryland and New York that, under similar circumstances, simply construed those states' paternity statute to permit the establishment of maternity, thereby arriving at a constitutional interpretation of the paternity statutes.

C. The parties all agreed that Wife was the biological mother of Infant F., were willing to assume all the responsibilities of parenthood, and the Surrogate Mother did not claim any interest in being recognized the child's mother. Under these circumstances, the trial court should have invoked its equitable power to establish Wife's legal status as Infant R.'s mother. This result is consistent with sound public policy that recognizes the importance of family and children in our society. It also is consistent with the purpose of a court of equity, which is to effect justice.

ARGUMENT

Standard of Review

This Court reviews the denial of a motion addressed to the equitable discretion of the trial court for an abuse of discretion. *Adoption of T.L.W. and T.S.W.*, 835 N.E.2d 598, 600 (Ind. Ct. App. 2005). To the extent the trial court based its ruling on its interpretation of Indiana's paternity statutes, such ruling involves a question of law that this Court reviews *de novo*. *Paternity of H.H.*, 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008).

Husband and Wife contend the paternity statutes are unconstitutional. In *Matter of Tina T.*, 579 N.E.2d 48, 56 (Ind. 1991), our Supreme Court stated the following as the standard of review in a case where a statute is challenged as unconstitutional:

Legislation under constitutional attack in this Court is clothed in a presumption of constitutionality. The burden to rebut this presumption is upon any challenger, and all reasonable doubts must be resolved in favor of an act's constitutionality. When a statute can be construed to support its constitutionality, such construction must be adopted.

Id.

ARGUMENT

A. The Appellants have not met their burden to show that the paternity statutes are unconstitutional; they have not even shown that the trial court applied these statutes.

The trial court simply held that "Indiana law does not permit a non birth mother to establish maternity. Indiana law holds the birth mother is the legal maternal mother." App. 14. The Appellants assume that the trial court's reference to "Indiana law" meant the paternity statutes at Indiana Code article 31-14. These statutes are silent regarding the establishment of maternity and, therefore, Appellants contend they violate Wife's equal protection rights. Appellants' Brief, pp. 5-11. The Appellants, of course, have the burden to rebut the presumption that the paternity statutes are constitutional. *Matter of Tina T.*, 579 N.E.2d at 56. They cannot

possibly satisfy that burden because they cannot conclusively show that the trial court even considered the paternity statutes as the applicable “Indiana law.”

Instead, the trial court may have looked at the statutes that directly address surrogacy agreements. These statutes show that the General Assembly generally disfavors surrogacy agreements. As relates to this case, Indiana law provides that “[t]he general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following: . . . (2) Become pregnant . . . (6) Waive parental rights or duties to a child.” Ind. Code § 31-20-1-1. Indiana Code section 31-20-1-2 provides that any such surrogate agreement formed after March 14, 1988, is void. If the trial court viewed this case as a contest between the rights of the Wife and of the Surrogate Mother, its application of the surrogacy statutes would have supported its conclusion that “Indiana law does not permit a non birth mother to establish maternity” and that “the birth mother is the legal maternal mother.” As discussed below, however, the trial court was not being asked to *enforce* a surrogacy agreement or to compare the rights of Wife and The Surrogate Mother.

This Court should hold that the Appellants have not met their burden of rebutting the presumption that Indiana’s paternity statutes are constitutional, based on their failure to show that the trial court applied those statutes when it ruled against them. A remand might be appropriate for the trial court to elaborate on the legal basis for its holding. *See Carter v. State*, 686 N.E.2d 1254 (Ind. 1997) (remanding for a new sentencing hearing when it was unclear which version of the applicable sentencing statute was applied by the trial court). Given the exceptional nature of this case, however, and to avoid delay, this Court should hold that, in the absence of any statute that specifically prohibited the trial court from granting the establishment

of maternity, the trial court should have exercised its equitable authority to grant Wife's petition.

See Argument C below.

B. If the trial court did apply the paternity statutes, this Court may interpret them in a manner that renders the statutes constitutional by concluding that they do permit establishment of maternity under the narrow facts of this case.

The Appellants discuss a Maryland case at pages 9 to 10 of their brief, *In re Roberto d.B.*, 399 Md. 267, 923 A.2d 115 (Md. Ct. App. 2007), for the proposition that paternity statutes may be interpreted to apply equally to males and females, thus avoiding an equal protection challenge. The State hesitates to endorse this degree of judicial activism, but acknowledges that courts in other states have construed paternity statutes to apply equally to males and females. *See also Adoption of Sebastian*, 879 N.Y.S.2d 677 (Surrogate's Court 2009), where a court found that New York's paternity statutes violated equal protection, but determined that the state's existing procedures for establishing paternity should be available for the determination of the legal parenthood of a genetic mother.

Given the specific circumstances of the case at bar, the State has no public policy interest in opposing a determination that Indiana's paternity statutes may apply to give the trial court authority to establish the Wife's maternity of Infant R. However, as discussed below, this course may be unnecessary.

C. To avoid deciding this case on constitutional grounds, this Court may determine that the trial court could have exercised its equitable authority to grant the petition to establish paternity.

If there is a non-constitutional ground on which to base a decision, a court should not decide constitutional issues. *Indiana Wholesale Wine & Liquor Company, Inc. v. State ex rel. Indiana Alcoholic Beverage Commission*, 695 N.E.2d 99, 106 -108 (Ind. 1998). Given the exceptional nature of this case, the trial court should have invoked its equitable jurisdiction. This

Court has recognized that, in cases involving children and families, courts have broad equitable power.

In *Paternity of P.S.S.*, 913 N.E.2d 765 (Ind. Ct. App. 2009), Riley, J., dissenting, this Court held that a trial court improperly found it lacked jurisdiction over a paternity action brought by a child, where a court had earlier determined in a divorce proceeding that the petitioner was a child of the marriage. Specifically, the Court found the trial court should have entertained the child's motion filed under Ind.Trial Rule 60(B).

We are faced with a minor bringing a paternity action – albeit facilitated by her next friend – to discover her parentage and biological heritage. Initially, the juvenile court dismissed her action on the ground that it lacked jurisdiction. Later, it also dismissed her motion for relief pursuant to Rule 60(B). Because of the substantial public policy concern in paternity actions that “[p]roper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons,” we find P.S.S.’s situation to be the inherent exceptional circumstance potentially justifying the extraordinary relief provided under Rule 60(B)(8).

913 N.E.2d at 768, quoting *In re S.R.I.*, 602 N.E.2d 1014, 1016 (Ind. 1992).

Similarly, Husband's and Wife's situation presents an inherent exceptional circumstance that would justify extraordinary equitable relief. In this case the undisputed facts show that Husband and Wife are Infant R.'s biological parents, that the Surrogate Mother has no interest in being deemed the biological mother, and that Husband and Wife intend to assume all rights and responsibilities that any biological parents would have. App. 33, 34; Tr. 8, 9. A court order is necessary, however, for the Wife to be legally established as Infant R.'s mother. Such an order would be consistent with the policy provisions at Indiana Code section 31-10-2-1, which include the policy to (1) recognize the importance of family and children in our society; (2) recognize the responsibility of the state to enhance the viability of children and family in our society; (3) acknowledge the responsibility each person owes to the other; (4) strengthen family life by assisting parents to fulfill their parental obligations.

The trial court did not identify any Indiana law that would prohibit the establishment of maternity under the facts of this case, and the State has not discovered any. The trial court has wide discretion in matters involving children and families, and it could have exercised its equitable power to grant relief. *See, e.g., Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000), where this Court held that split physical custody is not prohibited by statute and, indeed, the trial court is accorded wide discretion in custody decisions.

Courts of general jurisdiction have inherent powers beyond those conferred by statute. *Ratliff v. Stretch*, 30 N.E. 30, 31 (Ind. 1892); *Nealis v. Dicks*, 72 Ind. 374 (1880), 1880 WL 6344 at *1; *Hitt v. Carr*, 130 N.E. 1, (Ind. App. 1921). That a court of equity's right to exercise its inherent judicial powers beyond statutory authority is a well-settled principle that has been recognized by the Indiana Supreme Court time and time again. "The power of courts of general jurisdiction to grant equitable relief is not only conferred by our code of practice but has often been recognized as among their inherent powers, necessary to the complete administration of justice." *Ratliff*, 30 N.E. at 31. In fact, "[i]t is a mistake to suppose that courts possess only such powers as are expressly conferred upon them by statute. All courts of superior general jurisdiction possess judicial powers independent of legislation." *Curtis v. Gooding*, 99 Ind. 45, 1884 WL 5525 at *1. "The crowning purpose of a court of equity is to effect justice within the limits of its power, and it ought not to be deterred from doing so under the circumstances of a particular case, because such a practice, if made general, might become unsafe and result in harm, or because a precedent may be found to the contrary. It should be borne in mind that courts of equity are not bound absolutely by precedents, but is their duty to give effect to principles." *Hitt v. Carr*, 130 N.E. at 12.

This was the approach of the court in *Doe v. New York City Board of Health*, 5 Misc.3d 424, 782 N.Y.S.2d 180 (Sup. Ct. New York County 2004), which involved a gestational surrogacy agreement just like the one in this case. The New York court determined that a court of general jurisdiction in law and in equity has the power to issue an “order of maternity.” 782 N.Y.S.2d at 183. “[T]he [trial court] has jurisdiction over a novel dispute where no statutory provision takes it away.” *Id.* at 184. The court decided that “[u]nder the circumstances, the court may determine maternity. Based upon the record here, Mrs. Doe has established to a reasonable degree of certainty that she is the genetic mother, and Mrs. Roe has established her relinquishment of parental rights such that Mrs. Doe is entitled to such a declaration from the court.” *Id.* Similarly, in the case at bar, Wife has established that she is Infant R.’s biological mother, and the Surrogate Mother has established her relinquishment of parental rights through her testimony that she is not Infant R.’s biological mother.

In *Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285, 756 N.E.2d 1133 (2001), the Supreme Judicial Court of Massachusetts considered a case like this one, where a married woman was capable of conceiving a child but unable to bear and give birth to a child. She and her husband entered into an agreement with a “gestational carrier,” who had implanted in her uterus embryos created from the husband’s sperm and wife’s ova. When the couple sought a pre-birth court order declaring them to be the resulting child’s mother and father, the trial court dismissed the case because of a “lack of clarity and certainty as to this [c]ourt’s authority” to grant the relief sought. 435 Mass. at 286-87, 756 N.E.2d at 1135. The trial court specifically noted the absence of any controlling authority, having examined statutes relating to paternity and adoption actions.

The appellate court agreed and found that the paternity “statute is simply an inadequate and inappropriate device to resolve parentage determinations of children born from this type of gestational surrogacy.” *Culliton*, 435 Mass. at 290, 756 N.E.2d at 1137. The court also found that “the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements.” 435 Mass. at 291, 756 N.E.2d at 1138. However, the court did find that the trial court had “general equity jurisdiction” to consider the merits of the relief sought.

In the very particular circumstances of this case, this Court should hold that the trial court had general equity jurisdiction to consider the merits of Wife’s petition to establish maternity, and also to grant the relief sought. This result is consistent with Indiana’s public policy regarding children and families, and with the purpose of a court of equity, which is to effect justice consistent with guiding principles when the case at bar is not controlled by statute.

Ultimately, the General Assembly will have to grapple with the challenges resulting from the medical technology that expands the options for human reproduction. Not all surrogacy cases will be as clear-cut and amicable as the case at bar. As the court noted in *Culliton*, “[t]he Legislature is the most suitable forum to deal with the questions involved in this case, and other questions as yet unlitigated, by providing a comprehensive set of laws that deal with the medical, legal, and ethical aspects of these practices.” 435 Mass. at 293, 756 N.E.2d at 1139.

CONCLUSION

This Court should hold that the Appellants did not meet their burden of rebutting the presumption that Indiana's paternity statutes are constitutional. Given the exceptional circumstances of this case, this Court should reverse the trial court's decision and hold that Wife's petition to establish maternity should be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon the following counsel of record by deposit in the United States mail, first-class postage prepaid, on this 21st day of October, 2009:

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