Case Name:

Rypkema v. British Columbia

Between
Paul Bernard Rypkema and Terri Diane Rypkema,
petitioners, and
Her Majesty the Queen in Right of the Province of
British Columbia, the Ministry of the Attorney General
of British Columbia, The Director of the British
Columbia Vital Statistics Agency, and the Attorney
General of Canada, respondents

[2003] B.C.J. No. 2721 2003 BCSC
1784 Vancouver Registry No.
L021963

British Columbia Supreme Court
Vancouver, British Columbia Gray J.

Heard: June 11, 2003.
Judgment: November 28, 2003. (32
paras.)

Infants - Parents of-Nature of relationship - Parentage of children (incl. illegitimate children) - Birth - Registration of

Application by Rypkema for registration as the parent of a child born to a surrogate mother. Rypkema and his wife entered into a gestational surrogacy agreement in which a married woman agreed to be implanted with an embryo created from Rypkema and his wife's genetic material. The embryo was implanted, developed into a fetus, and was born. The surrogate mother and her husband released all interest in the child, surrendered custody and care to Rypkema and his wife, and intended Rypkema and his wife to be the child's parents. The Director of Vital statistics declined to register Rypkema and his wife as the child's parents on the ground that Rypkema's wife had not given birth to the child. The Vital Statistics Act defined birth as the expulsion of the product of conception from its mother.

HELD: Application allowed. The Director was ordered to register Rypkema and his wife as the child's parents. There were no competing parental claims to settle, and the surrogate mother and her husband surrendered and released all claims to the child. The costs and trouble of adoption were not justified. Accordingly, it was appropriate to register Rypkema and his wife as the parents. This would avoid the child being disadvantaged by difficulty in Rypkema's and his wife's ability to register him for school, purchase airline tickets, obtain a passport, assert his rights under the Benefits Act and Young Offenders Act, or act in other situations where registration as his parents would be an important means to participation in his life. Registration would affirm the parent-child relationship, and would provide presumptive proof of the relationship.

Statutes, Regulations and Rules Cited:

Benefits (Child Care) Act.

Canadian Charter of Rights and Freedoms, 1982, s. 15.

Vital Statistics Act, R.S.B.C. 1996, c. 479, s. 1.

Young Offenders Act.

Counsel:

Lawrence A. Kahn, for the petitioners.
Jeffrey M. Loenen, for the respondents Her Majesty the Queen in Right of the Province of British Columbia, The Ministry of the Attorney General of British Columbia, The Director of the British Columbia Vital Statistics Agency.

GRAY J.:-

INTRODUCTION

1 The petitioners are a married couple who entered into a gestational surrogacy agreement with another married couple. The petitioners contributed the required genetic material and their embryo was created. It was successfully implanted into the surrogate mother. Happily, the embryo developed into a child born in 2001.

2 The petitioners sought to register the child's birth with their names listed as mother and father. The Director of Vital Statistics declined to process the application on the basis that the female petitioner had not given birth to the child.

3 On June 11, 2003, the petitioners applied for an order declaring them to be the father and mother respectively of the child, and ordering that the birth registration maintained by the Vital Statistics Agency in relation to the child reflect that information. By the time of the application, the claim against the Attorney General of Canada had been dismissed by consent. The remaining respondents took no position with respect to whether or not the court should grant the order sought.

4 I made the order sought on June 11, 2003, with Reasons to follow. These are those Reasons.

5 The sole issue in the case was whether the court could and should declare the genetic parents of the child to be the parents for the purposes of the birth registration maintained by the Vital Statistics Agency.

FACTS

6 In 2000, the petitioners entered into a surrogacy agreement with another couple. It included the following:

(a) The wife of the other couple agreed to act as a surrogate mother of the embryo created by the genetic material of the petitioners;

(b) The intended surrogate mother expressly consented to terminating and renouncing any and all parental rights to the child and to do all acts necessary to rebut the presumption of maternity; and

(c) The intended surrogate mother further agreed to voluntarily recognize the petitioners as the custodial parents of the child, and to surrender custody of the child to the petitioners.

7 The surrogate mother is not receiving financial compensation for fulfilling that role.

8 The petitioners contributed the required genetic material and their embryo was created. It was successfully

implanted and a child was born, whose genetic parents are the petitioners. The surrogacy process included subjecting the proposed surrogate mother and the petitioners to physical and psychological screening.

9 The child has been in the care and custody of the petitioners since his birth.

10 The surrogate mother consented to the female petitioner being recognized and registered as the legal mother of the child.

11 The petition originally sought a declaration that the definition of birth under s. 1 of the Vital Statistics Act was discriminatory on the basis of sex and therefore in breach of s. 15 of the Canadian Charter of Rights and Freedoms. The application for that relief has been adjourned generally.

ANALYSIS

12 Section 1 of the Vital Statistics Act, R.S.B.c. 1996, c. 479 states as follows:

> In this Act:
>
> > "birth" means the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception in which, after the expulsion or extraction, there is
> >
> > (a) breathing,
> >
> > (b) beating of the heart,
> >
> > (c) pulsation of the umbilical cord, or
> >
> > (d) unmistakable movements of voluntary muscle,
> >
> > whether or not the umbilical cord has been cut or the placenta attached.

13 There do not appear to be any British Columbia cases concerning the parentage of a child born of a gestational surrogate mother. I set out below comments from the Supreme Court of Canada regarding the importance of birth registration, and refer to a recent federal bill which is not law. Next, I refer to three Canadian and three American cases regarding gestational surrogacy.

14 In Trociuk v. British Columbia (Attorney General) (2003), 14 B.C.L.R. (4th) 12, 2003 SCC 34, the Supreme Court of Canada dealt with the significance of birth registration. In that case, the court held that sections of the British Columbia Vital Statistics Act discriminated against biological fathers on the basis of sex, by providing biological mothers with sole discretion to include or exclude information relating to biological fathers when registering the birth of a child. The court held that the discrimination was not a reasonable limit prescribed by law which could be demonstratively justified in a free and democratic society under s. 1 of the Charter. The declaration of invalidity was suspended for a period of 12 months. If the constitutional defect has not been remedied following the 12 month period, the provision will be of no force and effect.

15 Madam Justice Deschamps, writing on behalf of the court in Trociuk, said as follows at paras. 15-16:

15. Parents have a significant interest in meaningfully participating in the lives of their children. In B.(R.) v. Children's Aid Society of Metropolitan Toronto (1994),[1995] 1 S.C.R. 315, at para. 85, La Forest J. wrote that "individuals have a deep personal interest as parents in fostering the growth of their own children". In a similar vein, Wilson J. in R. v. Jones, [1986] 2 S.c.R. 284 , (S.C.c.) at p. 319, wrote: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world."

16. Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life.

16 Parliament has twice considered a bill entitled The Assisted Human Reproduction Act. This bill would explicitly allow surrogacy contracts, provided that consideration is not paid to the surrogate mother.

17 The bill went to second reading at the senate but at the time of releasing these Reasons, the bill is not law.

(a) Canadian Cases

18 The issue of the parental status of the genetic mother has been considered in three Canadian cases. I will refer to them in the order they were decided.

19 In J.C. v. Manitoba (2000), 12 R.F.L. (5th) 274, 2000 MBQB 173, the court declined to make a declaration, in advance of the birth of the child, that a genetic mother was the mother of the child. The court noted that a declaration of parentage could be made after the preliminary step of giving "birth" under the Manitoba legislation. The court was of the view that the Department of Vital Statistics was set up to record the extraction from a mother of the product of conception. The court stated that the records of the Department of Vital Statistics should reflect the fact that the surrogate mother would be the individual giving birth to the unborn child. However, the court said that a declaration of parentage could follow the recording of that fact.

20 In L. v. P. (No. 0101-22025, Queen's Bench of Alberta, February 15,2002), the court declared the genetic mother to be the mother of the child born to a surrogate mother. In that case, the surrogate mother consented to the declaration that the genetic mother was the mother. The court suggested in obiter dicta that there might be a good argument that both the genetic mother and the surrogate mother were the biological mother.

21 In J.R. v. L.H., [2002] O.T.c. 764, the Ontario Superior Court of Justice declared that the genetic parents were biological parents and directed the registration of a statement of birth consistent with that declaration. As with the case at bar, all of the parties had entered into a gestational carriage agreement. All parties sought the orders on consent. The Ontario Vital Statistics Act defined birth in a similar manner to the British Columbia Act.

22 A further B.C. case addresses the benefits of birth registration in the name of a parent. In Gill v. Murray, [2001] B.C.H.R.T.D. No. 34,2001 BCHRT 34, Human Rights Tribunal Member Roberts held that the refusal of the Director of Vital Statistics to register same-sex partners as parents was discriminatory and breached the B.C. Human Rights Code. While the issue of discrimination is not relevant to the application before me, some statements in that case are of interest. At para. 81, Member Roberts said as follows:

> With the advent of various forms of reproductive technology, it is possible for a child to have legal social parents, biological parents, and a birth mother who is neither a legal social or biological mother. It is evident that the Birth Registration regime established by Vital Statistics has not kept up with reproductive technologies. The same-sex partner of the biological mother of a child is denied the presumptive proof of her relationship to the child, including the right to register her child in school, to obtain airline tickets and passports for her child, as well as denying her the ability to assert her child's rights with respect to a myriad of other laws, from the B.C. Benefits (Child Care) Act to the Young Offenders Act, unless she resorts to the adoption process.

(b) U.S. Cases

23 In three American cases, the court considered the status of the genetic mother.

24 In a case factually similar to the case at bar, J.R. v. Utah, 261 F. Supp. (2d) 1268 (D. Utah 2003) the plaintiffs challenged the constitutionality of a section in the Utah Code. The section prevented the Utah State Office of Vital Records and Statistics from issuing birth certificates naming the biological parents of the twins born to the gestational mother as the children's legal parents. The court held the parents had a parent-child relationship with the children by virtue of their genetic ties. The court held that upon presentation of biological evidence, the biological parents could not be prevented from being legally recognized as the children's parents.

25 In Soos v. Superior Court in and for County of Maricopa, 182 Ariz. 470 (Ct. App. 1994), the court held that an Arizona statute violated the equal protection clause of the 14th Amendment to the Federal Constitution. The statute allowed a biological father to prove paternity and automatically granted a surrogate mother the status as legal mother, but did not allow any means for a biological mother who donated the eggs to prove maternity.

26 In Soos, the biological parents entered into a contract with the gestational surrogate. Following in vitro fertilization, the surrogate became pregnant with triplets. During the pregnancy, the genetic mother filed a petition for dissolution of her marriage to the genetic father and requested shared custody of the unborn children. The genetic father/husband responded that the surrogate was the legal mother under the statute and the wife had no standing to request custody. The wife responded with a challenge to the constitutionality of the statute and the court agreed that the statute was unconstitutional.

27 The court held that the Arizona statute affected fundamental liberty and the interests of parental rights and the state had not shown any compelling interest to justify the dissimilar treatment of men and women similarly situated, being the biological father and the biological mother.

28 In Johnson v. Calvert (1993), 5 Cal. (4th) 84, the California court held that the gestational surrogate had no parental rights to a child born to her. The court held that there were two distinct ways to prove maternity under the California Family Law Code. One was proof of giving birth to the child and the other was by proving genetic consanguinity through blood tests. The court held that when two women can prove that they are the mother, as in the case of gestational surrogacy, the court held that the one 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."

(c) Discussion

29 While there is no B.C. case addressing the issue on this application, in ODriscoll v. McLeod (1986), 10 B.C.L.R. (2d) 108, Huddart L.J.S.c. (as she then was) held that the court had jurisdiction to make binding declarations of paternity. I conclude that the court must also have jurisdiction to make binding declarations of maternity.

30 Here, all parties intended that the genetic parents would be the child's parents and that they would raise

him as their child. The petitioners are the genetic parents and the social parents. The surrogate who gave birth to the child consents to the genetic mother being recognized and registered as the legal mother of the child, and surrendered custody of the child to the petitioners. This is not a case in which the court must determine which of two or more claimants is the parent.

31 Including the petitioners' particulars on the birth registration is an important means for the petitioners to participate in their child's life and for affirming the parent-child relationship. It will enable the petitioners to have the presumptive proof of their relationship to their child without the trouble and expense of the adoption process. It will enable them to register the child in school, obtain airline tickets and passports for him, and assert his rights under laws including the B.C. Benefits (Child Care) Act and the Young Offenders Act.

32 In these circumstances, it was appropriate to declare that the petitioners are respectively the father and mother of the child, and that the birth registration maintained by the Vital Statistics Agency reflects that information.