

In the September 2007 issue of Family Law News we published an article that analyzed the Court of Appeals' ruling on gestational surrogacy in *Roberto d.B.* That article is printed for you again, this time including an update on what has been happening in the lower courts in the 10 months since *Roberto d.B.* was decided, as courts have been asked to grant petitions for parentage in gestational surrogacy cases.

### **Gestational Surrogacy in Maryland – Alive and Well after *Roberto d.B.***

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*In re Roberto d.B.*, (May 16, 2007), Slip Op.

Facts: In this case, the Appellant, Roberto d. B, a single man, wanted to have a biological child. To do so, he turned to Assisted Reproductive Technology and arranged for his sperm and the ova of an anonymous egg donor to be fertilized by *in vitro* fertilization, then had the embryos transferred to the uterus of another woman with whom he had contracted to serve as his gestational carrier. A gestational carrier, in contrast to a traditional surrogate, has no genetic link to the child. She serves only as a uterine host. In Appellant's case, the fertilization was successful, the gestational carrier became pregnant with twins, and she delivered Appellant's children at Holy Cross Hospital in Silver Spring, MD. The hospital followed standard procedure with respect to the children's birth certificate application, submitting information to the Maryland Division of Vital Records listing the Appellant as the children's father and the gestational carrier as the children's mother. In Maryland, the attorneys for Intended Parents working with a gestational carrier will often obtain a pre-birth order of parentage to enable the hospital to submit the correct information of the child's parentage to Vital Records immediately upon the child's birth. There was, however, no such pre-birth order in this case.

The Appellant and the gestational carrier jointly petitioned the Circuit Court for Montgomery County to direct Vital Records to issue corrected birth certificates that would delete the gestational carrier's name, resulting in a birth certificate with a father's name but no mother's name. The Circuit Court refused, outlining two primary reasons: (1) there was no case law in Maryland that authorizes a trial court to issue a birth certificate without the mother's name; and (2) removing the mother's name would be inconsistent with the "best interests of the child" standard.

The Appellant appealed the decision to the Maryland Court of Special Appeals. Prior to proceedings in that Court, the Court of Appeals of Maryland, on its own motion, granted certiorari.

Issue on Appeal: The question on appeal was whether the name of a genetically unrelated gestational carrier must be listed as the mother on the birth certificate or whether, under these circumstances, a birth certificate could be issued listing only a father.

Holding: The Court concluded that the State may not require the name of a genetically unrelated gestational carrier to be listed as the mother on the birth certificate. Therefore, in a case with a

single father and a (genetically unrelated) gestational carrier, the birth certificate should properly list the name of the father only, with the name of the mother left blank. The lower court decision was therefore reversed and remanded.

### Reasoning of the Court

In a 4-3 decision that included two separate dissents, the Court first concluded that a trial court “may” order the issuance of a birth certificate on which no mother is named. The Court then concluded that when there is an egg donor, a genetically unlinked gestational carrier and a biological father, the trial court “must” order the issuance of a birth certificate that lists only the father and no mother. The Court reasoned that the Maryland’s Equal Rights Amendment forbids the granting of more rights to one sex over the other. Given that Maryland paternity statutes provide a means for a genetically unrelated man to disavow paternity, a genetically unrelated woman must similarly be allowed to disavow maternity. Otherwise, there would be an Equal Rights violation. Finally, the Court held that the “best interest of the child” standard (applied by the lower court) is typically applied in a dispute between two natural, fit parents and not between parents and non-parents, unless the natural parent is found to be unfit. Accordingly, the Court determined that the “best interest of the child” is inapplicable to the case at hand.

#### (1) Maryland Law Permits the Issuance of a Birth Certificate on which no Mother is Named

The Court concluded that Maryland law allows a trial court to order the issuance of a birth certificate without a mother’s name. Specifically, the Court noted that Maryland Code (1982, 2005 Repl. Vol., 2006) § 4-211 of the Health-General Article allows for the issuance of a birth certificate in a situation in which “a court of competent jurisdiction has entered an order as to the parentage, legitimation, or adoption of the individual.” (Emphasis in original.) The Court reasoned that by using the word “parentage” without regard to gender, the statute provided a court the basis to make finding of law in connection with either a mother or a father and to order that a birth certificate reflect its finding. Accordingly, the Court found that a trial court can authorize a birth certificate that does not list a mother’s name. The Court further noted that Vital Records had no objection to such a format, citing a letter approved by the Birth Section Chief of the Maryland Department of Vital Records, outlining the method already in place by which birth certificates are obtained in the case of gestational carriers without the name of a mother.

#### (2) Maryland’s Equal Rights Amendment would be Violated if a Genetically Unrelated Mother Could not be Removed from a Birth Certificate.

The Court found that any action by the State, which imposes a burden on, or grants a benefit to one sex and not to the other, without a substantial basis, violates the Maryland Equal Rights Amendment. The Maryland paternity statute outlines a procedure pursuant to which the State can establish paternity and thereby hold alleged fathers responsible for parental duties. The statute also provides a means for alleged fathers to disprove paternity, including through evidence supplied by a blood test or genetic test. If no genetic connection is found, a court in Maryland may declare that an alleged father has no parental status. The Court noted that the statute, as written, does not afford the same rights to women because it does not take into account all of the options provided in the current world made possible by Assisted Reproductive Technology. The Court explained:

*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 having 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 technology allows for that to occur. The paternity statute, clearly, did not contemplate the many potential legal issues arising from these new technologies, issues that will continue to arise unless the laws are rewritten or construed in light of 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.*

Slip Op. at 12.

Given that the Maryland's Equal Rights Amendment forbids granting more rights to one sex than the other, the Court found that the paternity statute must be construed to apply equally both to males and females. To find otherwise would effectively require the State to force unwanted and unintended legal, parental status on a woman despite her lack of a genetic connection. Specifically, a woman must be allowed to disprove maternity by the same means by which a man can disprove paternity, and the State must issue birth certificates that reflect this finding. More specifically, in a case like this one, the biological father is listed on the birth certificate and the gestational carrier is not.

### (3) The "Best Interest of the Child" Standard is Inapplicable

The Court rejected the lower court's suggestion that a "Best Interest of the Child" standard was applicable in this case. It explained that the Best Interests applicability is highly dependent on the circumstances of an individual case. After a lengthy review of case law, the Court identified two general scenarios in which the State ordinarily applies the Best Interests standard. The first is a situation in which two natural parents vie for custody of a child. Given that natural parents possess constitutionally protected, fundamental parental rights, in a custody battle each parent neutralizes the other's right and the State is left with the Best Interests standard in order to determine custody. Second, the Best Interests standard may be addressed in a dispute between a third party and a natural parent *if* the natural parent has been found to be unfit. In short, absent a finding that the natural parent is unfit, the constitutionally protected, fundamental parental rights of a natural parent automatically override the claims of a third party and the application of the Best Interests standard is unnecessary.

The Court found that the case at hand involved neither scenario. This was not a case in which two natural parents disputed custody or in which a third party sought custody over a natural parent that had been found to be unfit. In fact, the Court determined that there was no dispute whatsoever over parental rights. Moreover, in this case the only natural parent was Roberto d. B – and there was no finding or even an allegation that he was unfit. Accordingly, the Court ruled that the lower court was wrong to suggest that the Best Interests standard should be used.

## Dictum (and Analysis)

The Court emphasized in its ruling that its decision was narrowly crafted: *This opinion does not attempt to predict the future of reproductive technologies, it does not attempt to write policy on the topic of surrogacy, and it does not define what a “mother” is.* Slip Op. at n.15. Notwithstanding this laudatory statement, the Court then went on, in dictum, to discuss matters outside the scope of its narrow ruling. Most notably, the Court stated, somewhat off-handedly, in what could be entirely contradictory both to the ruling of the case (which implicitly approved a gestational carrier arrangement) and to countless lower court rulings in Maryland (in which gestational carrier arrangements are regularly reviewed), that *it requires noting that surrogacy contracts [sic], that is the payment of money for a child, are illegal in Maryland.* Slip Op. at 27-28. The Court cited as the basis for this statement two statutes that proscribe payments for the relinquishment of custody of a child and three reported decisions. Notably, neither the statutes nor the cases cited involved surrogacy in any fashion. Rather, all involved payments to a birth parent in exchange for the relinquishment of custody or parental rights.

There is no question that payment of money to a birth parent in exchange for the relinquishment of custody or parental rights is illegal under Maryland law. There is not, however, a single statute or case in Maryland holding that surrogacy contracts are illegal. Indeed, the only opinion at all before *Roberto* was a Maryland Attorney General's opinion, issued in 2000. While the Attorney General did opine that paying a fee to a traditional surrogate would raise a problem under Maryland's laws, he also concluded that the same problems would *not* be raised with a gestational carrier. 85 OAG 438 at n.22 (2000).

The Court in *Roberto* acknowledged that the gestational carrier or “genetically unrelated gestational host” was a “third party” with no fundamental, constitutional protected, parental rights and therefore is not a natural parent. Using the Court's own reasoning, therefore, a gestational carrier, as a third party, has neither parental rights nor the right to legal custody to relinquish. Therefore, her fee cannot be in exchange for the relinquishment of such rights – because she never possessed them. Indeed, the Court's inclusion of a letter from Vital Records, outlining the policy for the issuance of birth certificates that list only the names of single fathers with no mother listed, implies, at the very least, that the Court had some inkling that attorneys in Maryland have been obtaining birth certificates with a father's name and no mother's name in gestational carrier cases like this for some time.

Just as courts read statutes in a manner that is constitutional and internally consistent, it seems prudent to read the Court's decision in a manner that is internally consistent and consistent with the laws and case law that exists in Maryland. The *Roberto* case can be read in just such a manner if the dictum is read to suggest that *traditional* surrogacy contracts, in which the carrier is also the biological mother and receives a fee in exchange for relinquishing parental rights, are invalid under Maryland law. The Court's decision would then be internally consistent, as the dictum would be consistent with the holding. And the dictum would be consistent with the Attorney General's opinion, as well as with trial court rulings in Maryland in gestational carrier cases and with the stated policy of Vital Records. The Court said it was not making policy on surrogacy in general. Given that there have been no legislative or court proclamations outlawing gestational carrier agreements in Maryland, many members of the ART Bar hoped and assumed the Court meant what it said when it said it was not re-writing surrogacy policy.

It has now been 10 months since the *Roberto d.B* ruling and so far the lower courts that have been asked to rule on parentage orders in gestational surrogacy cases have demonstrated that it is the Court's holding and not its dictum that will govern their subsequent rulings. They have continued to grant parentage orders in Gestational Surrogacy cases. The ART Bar and the world of intended parents who can create families only via gestational surrogacy is, so far, sighing a collective sigh of relief – albeit still tentatively.

#### Dissenting Opinions:

##### (1) Dissent of Judge Cathell

In a strongly worded dissent, Judge Cathell finds that this is a matter solely for the Legislature. He states that he does not necessarily agree or disagree with the remedy fashioned by the majority, but instead takes issue with the majority's actions to fashion any remedy at all, which he suggests creates public policy and usurps the role of the Legislature. Judge Cathell explains that the Legislature is far better suited to evaluate the possible ramifications of allowing a birth certificate to be issued with no mother named. In support of his argument, Judge Cathell outlines a number of situations that could result -- including a birth certificate with no parents listed whatsoever -- warning that the many potential affects on a child cannot be properly assessed through a judicial ruling. Judge Cathell perhaps gives a hint of to how he feels, however, when in the first line of his dissent he refers to Assisted Reproductive Technology as “the process of manufacturing children.”

##### (2) Dissent of Judge Harrell, Joined by Judge Raker

Judge Harrell, joined by Judge Raker, likewise declined to comment on whether the majority opinion was correct, but dissented on the ground that the record before the court was insufficiently developed, and therefore concluded that the case should be remanded for further proceedings. He noted that a case with such potentially far-reaching implications requires a properly developed record, complete with extensive briefing on both sides of the issues and lower court findings on all the questions before the Court. Among other things, he would direct the trial court to appoint counsel for the children to determine whether it was, in fact, in their best interest to be declared motherless – before deciding whether that standard is inappropriate.

*Diane Hinson and Linda ReVeal are members of Creative Family Connections LLC, a law firm located in Chevy Chase, MD, that focuses exclusively on Assisted Reproductive Technology. Last year, through the use of gestational carriers and egg donors, their clients gave birth to 20 babies. At present, 15 babies are in utero, with many more in the early stages, with clients in the cycling or matching phases. Creative Family Connection's clients include single families, traditional couples, and same-sex couples.*