IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0376

LINN COUNTY NO. EQCV08415

P.M and C.M

Plaintiffs-Counterclaim Defendants-Appellees

vs.

T.B. and D.B.

Defendants-Counterclaimants-Appellants.

APPLICATION FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY, IOWA
HONORABLE CHRISTOPHER L. BRUNS, DISTRICT COURT JUDGE

DEFENDANTS-COUNTERCLAIMANTS-APPELLANTS' FINAL BRIEF

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case. This case involves questions pertaining to whether a surrogate mother contract is enforceable over the objection of the birth mother under Iowa law and public policy, and whether state enforcement of such a contract violates the Due Process and Equal Protection rights of the child and/or her birth mother.

Iowa R.APP. PRO 6.1101(2)(C) applies because the case presents at least ten questions of first impression, including: whether a birth mother who carries a baby to term and gives birth, but who is not genetically related to the child, is, in fact, a biological mother of the child; whether that birth mother is the "legal" mother under Iowa law; whether so-called "gestational" surrogacy contracts are enforceable in Iowa despite the fact there is no enabling statute; whether the contract's enforcement violates Iowa's statutory scheme and public policy; whether enforcement of the contract violates the Fourteenth Amendment Substantive Due Process and Equal Protection rights of either the baby, or the mother, or both.

Iowa R.APP. PRO 6.1101(2)(d) & (f) applies because the case presents urgent issues of broad public importance concerning the rights and interests of children and their mothers which require ultimate determination and guidance

by the Iowa Supreme Court.

Iowa R.APP. PRO 6.1101(2)(a) applies because certain Iowa statutes, as construed by the District Court, violate two of the child's ("Baby H") Fourteenth Amendment Substantive Due Process Fundamental Liberty Interests, the child's Equal Protection Rights and violates two of T.B.'s Substantive Due Process Rights and her Equal Protection Rights.

Iowa R.APP. PRO 6.1101(2)(b) applies because the decision of the District Court conflicts with this Court's opinion of *In re The Marriage of Witten*, 672 N.W. 2d 768 (Iowa 2003).

STATEMENT OF THE CASE: NATURE OF THE ACTION, PROCEDURAL HISTORY AND DISPOSITION

A. Preliminary Statement and Nature of the Action

This case presents a number of questions of first impression both under Iowa Law and under the Fourteenth Amendment of the United States Constitution, relating to the enforceability of a surrogate mother contract.

Twin baby girls, Baby K and Baby H, were born thirteen weeks prematurely to T.B. on August 31, 2016. A216 Immediately after their birth, T.B. resided at the hospital and spent twelve hours a day with the babies while they were in the neonatal intensive care unit. A218 Because of prematurity and birth weights (1 pound 9ozs. and 1 pound 10ozs.) the babies' lives were in danger. T.B., as the legal mother of the babies, listed as such on their birth certificates, made medical decisions for the children in consultation with the NICU medical team. Baby K died at the age of seven days, and Baby H needed operations. A217

On October 24, 2016, P.M. and his wife, C.M., filed a petition to enforce a "gestational" surrogacy agreement entered into with T.B. and her husband.

On October 31, 2016, a preliminary injunction, obtained *ex parte,* was served on T.B. in the NICU where T.B. breast fed Baby H and where she had

stayed with Baby H since her birth two months earlier. A63.

P.M. alleged that he was genetically related to the child born to T.B., that his wife C.M. was not genetically related to the child, and sought termination of T.B.'s parental rights based upon the a surrogacy contract. A41

T.B. and her husband, D.B., filed an answer, additional defenses, and counterclaim on November 15, 2016, maintaining that: (1) she was, in fact, the mother of baby H; (2) she was the legal mother under Iowa law; (3) the surrogacy contract was unenforceable, and could not form a basis to terminate T.B.'s parental rights because Iowa has no statute making the contract enforceable, and such enforcement would violate Iowa's statutes and public policy; (4) any state court order enforcing the contract violates the Substantive Due Process and Equal Protection rights of Baby H; and (5) such order violates T.B.'s Substantive Due Process and Equal Protection rights. A121

B. Procedural History, Course of Proceedings and Disposition in the Iowa District Court

P.M.'s and C.M.'s petition sought termination of the rights of, and relationship between, T.B. and Baby H, born to T.B. on August 31, 2016,

based exclusively upon the surrogacy contract. A41 T.B. and D.B. did not know the petition was filed until they were served an *ex parte* injunction effectively terminating the rights of T.B. and Baby H. A63; A217

By that date, Baby H was two months old and had bonded with T.B. during the pregnancy, and for the two months following birth, while T.B. was with Baby H every day. T.B. provided breast milk for the baby, and before October 31, 2016, was actually breast feeding the baby.

T.B. was named on the birth certificate as Baby H's mother, mothered the child for two months, and made all necessary medical decisions for the baby for those two months she was in the NICU.

The preliminary injunction prohibited T.B. "from acting inconsistently with the terms of the gestational carrier agreement," and forbade T.B. from forming a relationship with the baby. It was impossible for T.B. to comply with those provisions. She already had a relationship with the child during the pregnancy and afterwards. The preliminary injunction, in effect, forbade T.B. from filing the counterclaim raising her arguments why enforcement of the contract violated the constitutional rights of Baby H and those of T.B.

As a result of the preliminary injunction, T.B. was forced to leave the hospital and Baby H was left without her mother and anyone to make medical

decisions for a baby born 14½ weeks premature. T.B. filed a motion to vacate the preliminary injunction. *See*, 11/2/16 motion.

On November 4, 2016, a second judge, Honorable Mary Chicchelly, appointed a Guardian *ad Litem* (GAL) to make medical decisions.

On November 15, 2016, T.B. and D.B. filed an answer, defenses and counterclaim. By order entered November 23, 2016, the District Court denied T.B.'s motion to vacate the injunction.

In its order denying T.B.'s motion to vacate, the District Court failed to address any of the six constitutional arguments advanced by appellants. The District Court only stated "[t]he court is not convinced that the gestational surrogacy agreement at issue in this case violates Baby H's or T.B.'s constitutional rights." A171 The Court's reasoning concerning why plaintiffs were likely to succeed on the merits was equally deficient and did not address T.B.'s substantive arguments. A171

Because of the harm to Baby H resulting from her separation from her mother, T.B. quickly sought *pendente lite* custody, on the papers submitted and strictly upon legal issues. *See*, Transcript Nov. 28, p.31, line13-p.32, line1. The matter was scheduled before a third judge, for November 28, 2016.

By that date, T.B. had filed a motion to dismiss P.M.'s petition for

failure to state a claim and for summary judgment. *See*, Motion 11/16/16. P.M. subsequently filed a motion for summary judgment. Motion 11/18/16.

On November 28, 2016, the Honorable Christoper L. Bruns started the hearing by announcing that:

> "I'm convinced that under Iowa Law, the Iowa legislature and the Iowa Courts treat the biological connection between parents and the child – the genetic connection – as the defining factor whether a person is a parent of the child." Nov. 28, 2016, p.13, lines10-14.

Thereafter, the Court stated, without legal authority, that he must award custody to P.M. unless he is proven to be unfit. *Id.,* p.14, lines19-21; 23-25; p.17, lines 22-25.

T.B. argued that a fact finding hearing was premature because the relative rights of the parties had to be determined first. *Id.*, pp.25-27.

Despite the fact that the court held that T.B. had no rights, and the Court's acknowledgment that T.B. could not be prepared to prove unfitness, the Court took testimony anyway.

On December 7, 2016, the District Court ruled that: (1) T.B. was not a

biological parent of Baby H as a matter of fact because she made no biological contribution to the procreation of the child (a fact issue in dispute); (2) as a result, T.B. is not a legal parent of the child; (3) T.B. has no standing to seek custody; and (4) sole custody be awarded to P.M. A174

On February 21, 2017, the District Court denied T.B.'s motion to dismiss, and motion for partial summary judgment, and granted P.M.'s motion for summary judgment. A427

On the motions for summary judgment, the District Court held that T.B. was not a biological parent, or mother of Baby H and that the surrogacy contract is enforceable under Iowa law. The Court also ruled that enforcement of the contract does not violate either the Substantive Due Process rights or Equal Protection rights of Baby H, or T.B. *Id.*

T.B. filed a timely notice of appeal on all issues. A12

STATEMENT OF FACTS

A. General Background

T.B. and P.M. met after T.B. happened upon a "Craig's List" ad posted by P.M. and C.M. seeking a woman to act as a surrogate. A198

T.B. never met anyone who acted as a "surrogate," never knew anyone who "hired" a surrogate, never read anything about surrogacy, and, therefore, never knew anything about the experience. A198-199

T.B. did not consult an attorney, a doctor, or any other professional before she met with P.M. and C.M., who assured T.B. that they could afford to pay all costs of the arrangement. No licensed agency or other professional managed the arrangement. A199-200 Thus, there was no home study of the M's and no counseling for T.B.

They agreed to a plan for P.M. to obtain ova from an anonymous woman, have the ova fertilized with P.M.'s sperm and have a double embryo transfer using in vitro fertilization techniques for T.B. to carry the two babies to term and give birth. A52

The M's chose Midwest Fertility Clinic in Downer's Grove, Illinois to perform the in vitro fertilization and embryo transfers. Midwest insisted on a written contract between the parties as a condition for the transfers. A200

The M's hired a lawyer in Iowa to draft the contract. T.B. did not have an attorney. When T.B. signed the contract, she had no counseling of any kind, and no one explained to her the law or the medical risks for her and the babies. A200

B. Pertinent Contract Provisions

The contract recited that the M's would pay T.B. $13,000 to carry the babies and give birth, but payment was conditioned upon T.B. surrendering custody of a live child following birth and T.B. submitting to the termination of her parental rights. Payment to be made only after surrender and termination was clearly in exchange for the child and termination of T.B.'s parental rights. A53 ("However, upon *surrendering* custody of the child to the intended parents *and termination*, if any, of parental rights the gestational carrier and her husband, all consideration for services and expenses will be paid.") (Emphasis added.) A55

The contract anticipates that the M's would pay for all costs associated with C.M.'s adoption of the babies, all costs associated with the termination of T.B.'s parental rights and all costs of counseling for T.B. associated with the adoption process under Iowa law (600A.4 Sec.2). A54

The contract requires surrender of the babies to P.M. even if such

surrender is not in the children's best interests, and even if there are no legal grounds to terminate T.B.'s parental rights and the rights of the children. A148

C. T.B. was Advised that She Was the Legal Mother

All of the parties recognized that as the woman who carried the children, T.B. was, in fact, the mother of the children, and all believed that T.B. was the legal mother, requiring her to submit to termination of her rights and an adoption by C.M. Both Lori Klockau, the M's attorney, and C.M. told T.B. those facts. A201-202, She understood that that was why the contract, drafted by Klockau, recited the provisions for termination and adoption. A202

D. The Scientific and Medical Facts Relating to the Inherent Dangers of "Gestational" Surrogacy Arrangements, Pertinent to the Public Policy Issues, Statutory Construction, and the Constitutional Issues

While the District Court granted summary judgment on the basis that all material facts were "uncontested," every material scientific and medical fact was not only contested, but only T.B. provided evidence on those facts. That included evidence concerning the very fact on which the District Court based its entire legal analysis: the Court's erroneous factual assumption that T.B. did not make a biological contribution to the procreation of Baby H.

T.B. submitted five expert certifications, which reference extensive

scientific and medical journals and texts, in support of her own Motion for Summary Judgment and in opposition to that of P.M. P.M. failed to submit any expert testimony in opposition to T.B.'s motion or in support of his own. For purposes of both motions, T.B.'s evidence must be accepted as true. *Green v. Racing Assoc. of Cent. Iowa*, 713 N.W. 2d 234, 245 (Iowa 2006).

At the center of the "gestational" surrogacy agreement, is an intentional plan to deprive the child of the only mother she knew and strip the child of all of the essential benefits that the mother-child relationship provides the child. A296-312; A326-331; A121

To achieve this planned separation of mother and child , in "gestational" surrogacy arrangements IVF procedures and drug regimens are employed which place both the children and the mothers at significant risk for physical and psychological harm.

1.

The drug regimen to which the gestational surrogate is subjected is inherently dangerous to her. A398-399; A123-124 The daily injections over many weeks are painful. A203-204

The *in vitro* techniques used in gestational surrogacy pose far greater risks for both the children and the birth mother than when the child is

conceived through natural conception. The children are subjected to far greater risk for birth defects and other anomalies than by normal reproduction. A396-397 The birth mother who carries the children is subjected to greater risks than in normal pregnancy, especially since deliberate transfer of multiple embryos in an older women, such as T.B., poses special risks. A397 Resultant premature birth, common in multiples, cause significant risk of serious illness to the child. A296-297

The differences between artificial insemination and IVF procedures used in embryo creation and transfer are very significant. The substantial intrinsic risks of IVF support the Iowa's policy making the sale of a child in gestational surrogacy arrangement criminal while exempting artificial insemination arrangements from such liability. A411-414

2.

Pregnancy, and the relationship between a mother and her child during pregnancy, plays an important and essential role in forming the basis for a life-long loving relationship between a mother and her child, and the continued contact that a baby has with her birth mother after birth is extremely important for the child's physical and mental well-being. A296-312; A326-331; New Jersey Commission on Legal and Ethical Problems in the Delivery of Health

Care, State of New Jersey, "After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy," p.99 (1992).

3.

There is no greater biological participant in the process of procreation than that of the woman who carries the child. The bonding process between the pregnant mother and the children she carries during pregnancy is the same physical process and experience, whether or not the mother is genetically related to the children. As the body secretes particular hormones during pregnancy, a woman's psychological reaction may differ decidedly from her initial intention. Many longitudinal and cross-sectional studies have documented increases in maternal feelings of attachment to the child early in pregnancy and an even greater bond starting at eighteen weeks after conception.

Oxytocin, a nanopeptide hormone, has been frequently described as "the love and bonding hormone." Rising oxytocin levels are associated with human mother-child bonding. Maestripieri, D. (2001), Biological Basis of Maternal Attachment, Current Directions in Psychological Science, 10: 79-83. The number of oxytocin receptors in the expectant mother's brain multiplies dramatically in response to rising estrogen levels across pregnancy. A 301;

A329-331 In 2007, Psychological Science published results demonstrating the biological basis for maternal psychological responses to the fetus. First trimester levels of oxytocin predicted bonding-related thoughts and bonding behavior directed to the newborn. Women whose bodies were secreting more oxytocin early in the pregnancy were more psychologically attached to their infants. Stronger attachment involved positive energy directed towards the child, and maintenance of constant affectionate and stimulating bodily contact with the child. Mothers who had high oxytocin levels were also more preoccupied by thoughts of the infant, focusing on safety, and the infant's future, and providing maternal responses. Feldman, R., Weller, A., Zagoory-Sharon, O. Levine, A. (2007), Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding, Psychological Science, 18:11, 965-970; Levine, A., Zagoory-Sharon, O., Feldman, R., Weller. A. (2007), Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment, Peptides, 28: 1162-1169.

It is now known that pregnancy causes significant long-lasting changes in the mother's human brain structure in the regions of the mother's brain which subserve social cognition. Hoekzema, E., Baba-Müller, E., et al,

"Pregnancy Leads to Long-Lasting Changes in Human Brain Structure," Nature Neuroscience, pp.1-10, Dec. 19, 2016. Those changes provide support for the adaptive process serving the transition into motherhood. *Id.* at 2. There is no difference in the changes of the brain in women who conceive by natural means of conception and the changes in the brains of the pregnant mother not genetically related to the child who conceives by IVF techniques. *Id*. at 3. Changes in the brain structure alone can accurately determine that a woman had undergone pregnancy. *Id*. at 7. Fathers of newborns do not have such changes in the brain, and those changes are due to pregnancy. *Id*. At 8. These changes prepare the mother for her special role in responding to the needs of her child. *Id*.

Biologically, the developing fetus depends upon the mother who carries her, and is shaped by prenatal experiences in ways that profoundly influence the child's life after birth. Fetal growth and development is partially guided by genetic blueprints but is entirely dependent on maternal factors during the pregnancy. A296-307; Grossman, A326-331; A 334-336, A352-354; A415-417

Pregnancy involves a mother-child relationship and not the housing of embryos and fetuses. A348-354

4.

There are scientific facts made part of the record in the District Court which are essential in construing two relevant statutes in determining Iowa law.

First, there is a vast difference between in vitro fertilization and artificial insemination, and IVF poses many more risks which a policy maker would seek to avoid. A411-414

Second, there is no question that T.B. is a biological mother of Baby H as a matter of scientific and medical fact, and surely is a "biological party to the procreation of the child" (I.C.A. 600A.2(16)). A415-417; A296-312; A328-338

5.

A mother and her relationship with the child is of special and critical importance and provides benefits to the child she carried. A303-312; A332-338

6.

The use of the mother as a form of incubator, and the disregard for the mother's love and bond with the child she carries, is exploitive of the mother. The denigration of the role of pregnancy is a denigration of the woman. A354-

358

E. Facts Leading to T.B.'s Conclusion that Surrender of Baby H to P.M. was Not in the Baby's Best Interest

Initially the parties got along, traveling to Downer's Grove together. A204 On April 7, 2016, C.M. stated the M's didn't want to pay for T.B.'s medical bills as originally agreed, stating that they couldn't afford the payments. T.B. was 37 years old in a high risk pregnancy at the request of the M's. The M's, going back on their promises planted the beginnings of mistrust. A204-206

Eleven days later, T.B. began to bleed and went to the hospital for treatment. A sonogram confirmed she was carrying viable twins. She reported the news to the M's. Thereafter, C.M. complained that T.B. should not have sought medical treatment without first getting *permission* from C.M. A206-207

Thereafter, the M's told T.B. and her husband what they could or could not do, as if T.B. was their property. For instance, the M's ordered D.B. not to video any event concerning the pregnancy. They also demanded that T.B. stop seeing her doctor and only use the doctor at Midwest Fertility. C.M.'s behavior became increasingly controlling. A207

On April 13, C.M. confirmed T.B.'s worst fears when C.M. wrote to her stating: "We are in charge. We hired you..." A207 Three days later, C.M. demanded that T.B.'s husband no longer accompany her to doctor's visits, disregarding T.B.'s needs as a pregnant mother. A208 C.M.'s behavior which debased T.B. continued. On April 30, C.M. wrote to T.B. stating: "A carrier shouldn't act like that as the doctors told me they should be saying 'Yes Ma'am whatever you guys want to do.'" A208

After these mean spirited exchanges and demands, T.B. wrote back stating she didn't feel comfortable with direct communication and suggested that communications should go through attorneys. A209 C.M. responded with even nastier statements and taunts, saying T.B. had mental disorders. T.B. decided to retain a lawyer for the first time in order to communicate through the attorneys and reduce the stress she was experiencing, particularly since she was in a high risk pregnancy. A209

T.B. could not endure further abuse by C.M. Throughout June to mid-August by communications through the attorneys, T.B. made it clear that she intended to surrender the children to P.M. following birth. A209-212

During the summer, the M's had made false and outrageous allegations, but T.B., while disturbed by them, stayed the course and continued to

communicate through the attorneys and planned to surrender custody upon birth. A210-212

In mid-August, the M's took their mean spirited attack on T.B. to a greater level. On August 19, P.M. sent a hateful, disgusting, racist statement about T.B.'s husband to D.B.'s sister, stating, in part:

> "I didn't reaize (*sic*) ur (*sic*) brother was a dirty Mexican....He is a Dirty Fuken Mexican." A212

T.B. felt that no one would make such hateful comments unless they had hatred in their hearts. T.B. feared that P.M. would not be a good custodial parent to a child and no child should be taught such hatred. A212

On August 24, C.M. sent a lengthy hateful email to T.B. and her attorney. T.B. found all of this very stressful. She called C.M. to discuss it and became upset. In that conversation, C.M. used the hateful "N" word slur used to denigrate African Americans. A212-213 It was that day, August 24, that T.B. thought that it was probably not in the children's best interest that the M.'s be given custody of the babies. Yet, she was still ambivalent, and when she called P.M.'s attorney that day, she was still planning to turn the babies over. She told M's attorney that the babies were fine and T.B. and Klockau discussed how the birth certificates would have to be changed. Klockau told T.B. that

she was the legal mother of the babies and her husband was the legal father. A214

Late on August 24, T.B. concluded that it was not in the children's best interest to turn custody over to the M's. T.B. believed that she had a moral obligation to the babies, and later that day, told Klockau she decided she could not surrender the children to the M's. A215

Probably in part because of the stress created by the M's, the children were born a week later, on August 31, by emergency caesarian section fourteen weeks premature. T.B. loved the babies, and Baby H would remain in the NICU for three and a half months. The promises T.B. made in the contract were important to her, but she concluded it was more important to discharge her moral obligations to the children she carried, and had to do what was best for them. A216

T.B. was faced with a dilemma. She knew that at some point she had to let the M's know that the babies were born. She also knew the parties would wind up in court. But her immediate concern was for the babies. Baby H weighed one pound, ten ounces. Baby K, one pound, nine ounces. T.B. decided that the last thing the babies needed in September, 2016, was to be thrown immediately into a court fight. T.B. felt that she needed to focus on the

immediate needs of the babies, and to wait before she told the M's they were born. The babies needed peace, stability, and a loving mother to help care for them. She decided to exercise her rights as their mother to do what was best for them. Baby K died suddenly when she was seven days old. T.B. was grief stricken and cried for days. She felt guilty for feeling sad because she still had Baby H. When she felt joy with Baby H, she felt guilty because they had lost Baby K. A216-217

T.B. stayed at the hospital for the entire period from August 31 to November 7. She was in the NICU from 6:00 AM to 6:00 PM every day, provided the baby with breast milk, and later, when the baby was able, she breast fed her. A218-219

P.M. was 50 years old and C.M. a year younger. As of November 28, 2016, they had been married for three years. Both were married before and P.M. has two children, ages 21 and 17, with his first wife. C.M. has four children with her first husband, all over 18 years old.

P.M. testified that they wanted a "child together" at their advanced ages. However, he acknowledges that he knew when they married that they could never have a child together because C.M. had had a hysterectomy. Transcript, 10/28/16, p.237, l.9 to p.238, l.21.

LEGAL ARGUMENT

Introduction

The decision of the District Court granting summary judgment to P.M., if permitted to stand, would rewrite Iowa state law in a way that would irreparably alter and redefine the family, motherhood, the statutes that govern termination of parental rights, the rights of children, and the public policy underlying the statutory provisions governing those matters.

The Iowa legislature, which is well aware of the practice of gestational surrogacy agreements in some other states, has chosen not to pass a surrogacy enabling statute.

The District Court, without consideration of the scientific and medical evidence the court was obligated to accept as true, swept away the constitutional rights of T.B. and Baby H by simply stating those rights did not exist.

T.B. contends that it is beyond dispute that she was the mother of the child, as a matter of biological and scientific fact; that under Iowa law she is the "legal" mother of Baby H; that the contract is unenforceable in Iowa; and that enforcement of the contract would violate the Substantive Due Process and Equal Protection rights of Baby H, and those of T.B.

Point I

T.B. Is the Mother of Baby H as a Matter of Scientific and Medical Fact. As Such, T.B. Is the Legal Mother of Baby H under Iowa Law. T.B.'s Name Was Correctly and Properly Placed on the Baby's Birth Certificate.

A. Scope of Appellate Review

The scope of review on appeal from an Order granting Summary Judgment is for correction of errors of law. *Stew-McDevelopment, Inc. v. Fischer*, 770 N.W. 2d 839, 844 (Iowa, 2009); *Keokuk Junction Ry v. IES Indus, Inc.*, 618 N.W. 2d 352, 355 (Iowa, 2000). All reasonable inferences must be resolved in the most favorable light for the non-moving party, T.B. and D.B. *Sallee v. Stewart*, 827 N.W. 2d 128, 133 (Iowa 2013). This scope and standard of review applies to all of the issues raised in this brief.

B. Preservation of Error

The issues set forth under this point were raised in the District Court, and Plaintiff filed a timely Notice of Appeal. This preservation of error applies to all issues raised on this appeal in each point.

C. T.B. is the Mother of Baby H as a Matter of Biological and Scientific Fact

While the District Court's ruling that T.B. is not the "legal" mother of Baby H is not discussed until the end of the Court's decision (District Court

Ruling, pp.23-27, A449-453), all of the Court's reasoning which precedes it, about the contract's enforceability and whether enforcement of the contract violates the constitutional rights of T.B. and Baby H, is based upon the Court's conclusion that T.B. is not the "legal" mother of the baby. That determination was based upon the Court declaring that T.B. was not a biological mother as a matter of fact.

Although the Court's finding that T.B. is not a biological mother of Baby H is couched in terms of statutory construction, it was unmistakably an incorrect finding of scientific fact.

The District Court observed that I.C.A. 600A.2 defines a "biological parent" as "a parent who has been a biological party to the procreation of the child." (Citing ¶600A.2(3).) A449

The Court, thereafter, incorrectly equates the word "biological" with the word "genetic" as if the two words have the same meaning, and declared that T.B. was not a "biological" party to the procreation of the child.

Thus, in reality, the entire inquiry of whether T.B. is the "legal" mother of Baby H begins with a determination of whether she made a biological contribution to the procreation of the child.

Clearly she did. Discussion, Statement of Facts, Section D. *See also,*

Certifications of Golden, Grossman, Rothman, and both Certifications of Caruso. The Court was bound by the evidence produced by T.B. on that fact question.

The fact that T.B. is a biological mother of Baby H is material to a number of separate legal issues: (1) whether T.B. is the legal mother of the baby under Iowa law; (2) whether that biological relationship between T.B. and Baby H enjoys protection under the Fourteenth Amendment of the U.S. Constitution as a liberty interest of either Baby H or T.B. or both; and (3) whether the refusal to legally recognize the birth mother's relationship with the child violates the Equal Protection Rights of either.

The hospital recognized the obvious fact that T.B. was the biological mother of Baby H for the two months that T.B. resided at the hospital. That recognition was based on the reality that T.B. carried the child, bonded during pregnancy, gave birth, and had natural custody of the child following birth. The state recognized that fact when T.B.'s name was placed on the baby's birth certificate.

The inquiry about both T.B.'s legal status under Iowa law, and the separate question of whether T.B. has a protected Due Process liberty interest under the Fourteenth Amendment of the U.S. Constitution, begins with the fact

that T.B. is a biological mother with an existing relationship with the child beginning in *utero*.

This point was made clear by the U.S. Supreme Court in *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear"). The District Court brushed aside this controlling precedent of the U.S. Supreme Court, citing to a California decision which upheld a gestational surrogacy agreement under California law and policy. The District Court treated the California case as if it overruled the U.S. Supreme Court's decision in *Lehr* (which it obviously did not), stating that because *Lehr* was decided in 1983:

> "...the previously accepted legal doctrine recognized in *Lehr*, is no longer viable because birth does not necessarily equate to a genetic relationship. *Johnson v. Calvert*, 851 P.2d 776, 78 (Cal. 1993)."

In making this statement the Court erred as to both the U.S. Supreme Court precedent, as well as the meaning of the California *Johnson* case.

In 2001, eight years after *Johnson v. Calvert* was decided, the United States Supreme Court issued its opinion in *Tuan Anh Nguyen et al v. Immigration and Naturalization Service*, 533 U.S. 53 (2001), in which that

Court cited to *Lehr* approvingly for the fact that a woman carries and bears the baby makes her relationship clear. The *Nguyen* Court went even further by stating:

> "The first government interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth." *Id*. at 562.

Nguyen is a reaffirmation that the relationship between a mother and child during pregnancy and at birth are facts that identify a mother and distinguishes the role of a mother in human procreation from that of a father or other donor of genetic material.

The woman who gives birth is, in fact, a biological parent.

Second, the District Court completely misconstrues the California decision in *Johnson*. *Johnson* expressly held that a woman who was not genetically related to a baby she carried and bore was, in fact, a biological and natural mother of the child, and her giving birth – though not genetically related – was a biological fact that formed the basis for legal status as mother.

In *Johnson v. Calvert,* 5 Cal. 4th 846 (1993), the gestational surrogate claimed a superior legal parentage over the claim of motherhood advanced by

Mrs. Calvert, who was the genetic mother of the child with whom she had a relationship as the child's custodial mother. Mrs. Calvert was married to the genetic father. The *Johnson* court found that both Ms. Johnson and Mrs. Calvert had produced evidence that they were the natural biological mother of the child and both had valid claims to the legal status as mother. (5 Cal.4th at pp. 90, 92.) However, while both women would have had a valid claim if the other woman had not made a simultaneous claim, the court concluded it could award "legal" status to only one of the women at the expense of the other. (*Id*. at p. 92.) In that extraordinary circumstance, *Johnson* held that the original intent of the two women, coupled with the fact that the two genetic parents were a married couple, compelled placing legal status as mother in Mrs. Calvert. The only reason that Ms. Johnson was denied legal status was because, under California law, a second woman had a superior claim to that status and had exercised that claim. (*Id*. at p. 93.)

In fact, *Johnson* actually supports T.B.'s claim that she is the biological legal mother of Baby H. *Johnson* overruled the Court of Appeal's conclusion in that case, that because Ms. Johnson was not genetically related to the child she bore, she could not be the "natural" mother and, therefore, her giving birth could not form a basis as "legal" mother. The *Johnson* court held that a

woman who carries a child, despite the lack of a genetic relationship, is, in fact, a natural biological mother and lack of a genetic relationship did not preclude a woman who gives birth from being the legal mother. (*Johnson, supra*, 5 Cal.4th at p. 92, fn. 9.) That holding has since been codified by Family Code §7601, subdivision (a).

The District Court erred by ignoring the fact that T.B. was, as a matter of biological and scientific fact, the mother of Baby H, and there was, in fact, an existing biological mother-child relationship between T.B. and Baby H during the pregnancy. Where there is a biological relationship between mother and child, the state is not free to deny it by defining a mother as a legal mother in a way that ignores the facts.

> "To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Glona v. Amer. Guarantee and Liability Ins. Co*., 391 U.S. 73, 75-76 (1968).

A mother's unique relationship with the child she carries during pregnancy is the most intimate, most important, and one most worthy of protection. Their relationship is so intimate, that the unique bond between them, beginning as it does in utero, creates a human relationship which may be the most rewarding in all of the human experience.

D. T.B. is the Legal Mother of Baby H Under Controlling Iowa Law

T.B. is recognized in Iowa Law as the legal mother. T.B. was listed on the child's birth certificate as the mother of Baby H. That result was dictated by Iowa Administrative Code provisions, which accurately reflect Iowa law and there is no statutory or other authority to withhold legal status of mother from T.B.

Iowa Administrative Code §641.96.5(1) anticipates placing the name of the woman who gave birth on the birth certificate as the mother of the child, without inquiring about their genetic connection.[1]

In situations where the birth is the result of a gestational surrogacy arrangement, the Administrative Code recognizes the birth mother as the legal mother and her rights can be terminated only if she voluntarily relinquishes them like in an ordinary adoption.

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[1] There is no statute or case law in any state which requires a birth mother who carries a child to prove she is genetically related to the child to establish legal parentage.

On the other hand, cases that have addressed the issue have held that when the female donor of ova acts anonymously and does not raise her rights, the biological mother who carries the child is the legal mother despite not being genetically related. *In re C.K.G., et al*, 173 S.W. 3d 714 (Tenn. 2005) (holding gestational mother with no genetic relationship the legal mother); *Belsito v. Clark*, 644 N.E. 2d 760 (Ohio 1994) (when an ova donor does not assert rights, biological mother who gave birth is legal mother, at 767). As the *C.K.G.* Court observed, a ruling otherwise creates the "absurdity" and cruelty that leaves the children with no legal mother. *Id.*, at 729.

Until the gestational surrogate mother voluntarily acts to terminate her rights, her name is placed on the birth certificate like in all other births because she is the only legal mother the child has.

Under Iowa Admin. Code §641.99.15(1) which directs how and when the names on the birth certificate can be changed when the child was conceived in connection with a surrogacy agreement, states: "[a]ll live births shall be considered the product of the woman who delivered the live infant and she must be named as the birth mother on the original record submitted for registration." I.C.A. §144.1(11) defines "live birth" as "the complete expulsion or extraction from the mother of a product of human conception."

The woman who gives birth has always been treated as the mother of the child. See, generally, *Gartner v. Iowa Dept. of Public Health*, 830 N.W. 375, 346-347 (Iowa 2013).

A mother has always been defined as "a woman who gives birth to a child." See, e.g., American Heritage Dictionary, 5th Ed., Houghton Mifflin Harcort, New York 2011, P. 1149.

Under the Iowa Administrative Code, to change the mother's name on the birth certificate requires the mother to voluntarily relinquish her rights by voluntarily filling out forms for filing for "registration" under 99.15(2).

Iowa Admin. Code §641.99.15(6)(a) through (f) addresses the situation in the current case. When the Surrogacy Contract identifies two intended parents and the mother who gave birth is married, the Code explains the conditions for changing the names on the birth certificate, and how recognition of the "intended" parents must work.

In the case, as here, when the husband of the "intended couple" donated sperm, but the "intended" wife is not genetically related, it is possible for the "intended" husband to disestablish the mother's husband as father *only* if the mother agrees and voluntarily completes a parenting affidavit.

However, when the mother and her husband do not voluntarily agree to relinquish their rights the so-called "intended" husband has no greater rights than the putative father who seeks parenting time when the child is born to a woman named to another man. *Callender v. Skiles,* 591 N.W. 2d. 182, 191-192 (1999). He does not receive any rights by virtue of the contract.

Under Iowa Adm. Code §641.99.15(6)(f), the sperm donor's wife, as intended parent, must obtain a Judgment of Adoption pursuant to Iowa Code Chapter 600.

Thus, C.M. has no rights by virtue of the contract. She could only acquire parentage through an adoption proceeding which requires T.B. to

voluntarily gives up her rights.

It is obvious that T.B. is the only legal mother of Baby H and C.M. has no rights. The Administrative Code is not a substantive law that extends rights where they don't exist. It is only a mechanism to change names on a birth certificate if the mother wants to voluntarily surrender her rights. C.M. cannot adopt the child (as the contract anticipates) because there are no grounds to terminate T.B.'s rights.

Nowhere in Iowa's statutory scheme does it state that a mother's legal status must be established by proof of a genetic relationship with a child. The District Court provides no authority for that conclusion. The only requirement for a woman to establish that she is the mother of a particular child is to demonstrate that she gave birth.

The Court relied upon case law that distinguishes two men when they are contesting for legal status as father. In those instances, a genetic relationship is the only way that a man can demonstrate a "biological" connection with a child.

The Court cites to Iowa Code §232.2(39) and §600A.1. The first deals with Children in Need of Assistance (CINA), the second is in the Domestic Relations Code dealing with termination of Parental rights. §232.2(39) speaks

of a "biological" parent. §600A.1 also speaks of "biological" parents. The statute, as is the case throughout the Iowa Code, speaks of disestablishment of paternity. Under Iowa law, no mother can be "disestablished." That is undoubtedly because, as *Lehr v. Robertson* observes, there is no confusion about who the mother is. There is no need for testing, and the Iowa Statutory Scheme does not create an alternative method of determining the mother.

§600A.2 actually defines what a "biological parent" is. It states that "'biological parent' means a parent who has been a biological party to the procreation of the child."

As noted, T.B. is clearly a "biological party to the procreation of" Baby H.

The District Court held that T.B. was not a "biological" party to the procreation of the child.[2] This was error. If the legislature meant that the only parties to the procreation of the child who were legal parents were those who were genetically related, the legislature would have so stated. The District Court relied upon a definition of "biological" which includes "of or relating to

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[2] The irony of that holding is that the word procreated is derived from the Latin word "procreatus," meaning "to give birth." Stedman's Concise Medical Dictionary, 2nd ed., Williams and Wilkins, p.828.

biology or to life and living processes ..." That, of course is the meaning of "biological party," – one involved in the biology of the living process of procreation. Gestation is the biological process involved in procreation. Statement of Facts, Section D; Certs. of Golden, Grossman, Caruso and Rothman. The term "biological" does not have the same meaning as "genetic." A416-417

Likewise, the District Court considered "procreation" as "...the entire reproductive process of producing offspring." The entire process not only includes the gestational period, but the gestational period usually takes nine months, great care and great sacrifice. The father's contribution takes minutes by comparison. Fertilizing ova at the infertility center does not equate to procreation, and without T.B.'s substantial biological contribution there would have been no procreation. T.B. is a biological parent of Baby H by any definition, and specifically as defined by §600A.2.

That code provision refers to the woman who gives birth as the child's mother. It is that provision, upon which Iowa Administrative Code relies, which requires the state to place the name of the woman who gave birth on the child's Birth Certificate. I.A.C. §641-99.15(1) states that "All live births shall be considered the product of the woman who delivered the live infant and shall

be filed in the standard manner, with that woman named as the birth mother on the original record submitted for registration."

By equating the word "biological" with the word "genetic," the District Court replaced the language in the statute with its own. The Court is not free, "under the guise of judicial construction," to add or modify or change a statute's terms. *Schultze v. Landmark Hotel*, 463 N.W. 2d 47, 49 (Iowa1990).

Across the nation in every state but one, the fact that a particular woman gave birth is treated as proof that she is the biological mother of the child born to her, and she is given legal status as mother. This is true even in states which enforce gestational carrier agreements based upon the specified conditions outlined by those state's legislatures. There isn't a single state that requires a woman to prove that she is genetically related to her child in order to have legal status as the mother. Only South Carolina has no statute on point, but that state's case law suggests that the woman who gives birth is the mother of the child.

The states' treatment of the issue fall into two main categories: (1) states that have adopted some variation of the Uniform Parentage Act, which state that the mother-child relationship can be established by proof that the woman has given birth, and (2) states which have vital statistics statutes that

demonstrate their understanding that the woman who gives birth to a child is the child's mother. There is also a minority of eight states that do not address the issue in their parentage acts or vital statistics statutes, but assume in their statutes or case law that the woman who gives birth is the mother. *See*, Addendum setting fourth the National Survey of all 50 states attached to T.B.'s Resistance Brief filed in the District Court on 12/21/2016.

Point II

The Surrogacy Contract is Unenforceable Under Iowa Law. It's Enforcement is Inconsistent with Statutory Provisions and the Public Policy of Iowa.

Enforcement of the contract violates Iowa's statutory scheme and public policy.

A. Statutory Provisions

The Iowa legislature has chosen not to change the law of the state by passing a Gestational Surrogacy Enabling Statute to make those contracts enforceable. The legislature was well aware of the fact that some people enter into such arrangements as witnessed by its amendment to I.C.A. §710.11 decriminalizing surrogacy arrangements in those instances where "artificial insemination" is employed. That amendment evidences that the legislature

considered two separate issues in passing the statute: it would not enforce the surrogacy contract on the one hand, but found policy reasons to exempt a limited class of surrogacy arrangements from criminal liability.

Under Iowa Statutory Scheme, the only way a birth mother's parental rights can be terminated is by strict compliance with the provisions of Chapter 600 of the Adoption Code, or the provisions of Chapter 600A (Termination of Parental Rights). Under §600A.4(2)(g), a surrender of rights cannot be made until more than three days following the birth of the child. Even if such a surrender is made, the mother has four days to revoke the surrender. I.C.A. §600A.4(4). Even after the Judgment of Termination is entered, the mother has the right to seek an Order vacating the termination. I.C.A. §600A.9(2).

All of those safeguards are violated by the Surrogacy Contract. The "document" which the M's claim operate to form the basis for termination was not signed after the birth of the child, but before the child was even conceived.

The contract violates every statutory provision designed to provide safeguards against the exploitation of a woman and to ensure that a surrender of the Mother's rights was informed and voluntary.

In both instances there can be no termination of the mother's rights based upon the birth mother's consent unless she voluntarily relinquishes her

rights after birth. I.C.A. 600.7; I.C.A. 600A.4. There are no exceptions and a document signed before birth – indeed in this instance before conception – cannot form the basis for termination. I.C.A. 600A.4(g).

B. Public Policy Considerations

Not all contracts are enforceable. Those that violate public policy, that is where the state should not place its power through its courts behind a contract that is "injurious or contrary to the public good," or the interest of the culture at large. *Rogers v. Webb*, 558 N.W.2d 155 (1997).

The District Court's determination that the surrogacy contract is enforceable cannot be reconciled with this Court's prior decisions, particularly *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003), which held: (1) contracts involving reproductive decisions are not matters of judicial inquiry and enforcement; (2) judicial enforcement of an agreement regarding future family and reproductive choices violates public policy; and (3) judicial enforcement of an agreement regarding the planned use of human embryos violates public policy when one of the parties to the agreement changes his or her mind concerning that plan. *Witten*, 672 N.W.2d at 781-82.

As this Court in *Witten* explained:

> We think judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values. They also reveal awareness that such decisions are highly emotional in nature and subject to a later change of heart. For this reason, we think judicial enforcement of an agreement between a couple regarding their future family and reproductive choices would be against the public policy of this state. *Id.* at 782 (emphasis in the original).

T.B. had every reason and every right to change her mind and discharge her moral obligations to the children. *See*, Statement of Facts, Section E.

The contract in this case is a lawless enterprise designed to circumvent Iowa's Termination and Adoption Statutes and the public policies they support. The contract anticipates that the M's would use the courts to terminate the rights of T.B. and Baby H, and have C.M. adopt the baby without complying with the requirements of state statute.

The surrogacy contract violates Iowa's policy that the custody of the child must be placed based upon her best interests. *In the Interest of D.W.K.*, 365 N.W. 2d 32, 34 (Iowa 1985); *In the Interest of T.Q.*, 519 N.W. 2d 105, 106 (Iowa Ct. App. 1994); *In re D.S.*, 806 N.W. 2d 458, 464 (Iowa Ct. App. 2011).

The surrogacy contract is the purchase of a child. The M's promised to pay for complete custody of Baby H and termination of T.B.'s parental rights. The contract even goes so far as to state that the monetary compensation

promised would not be paid until T.B.'s rights were terminated and after the M's had sole custody of the child. The contract also violates the State's policy to promote the sanctity and stability of the family. *Callender v. Skiles*, 591 N.W. 2d 182, 191 (1999). State encouraged and state enforced deliberate destruction of the mother-child relationship violates that policy.

Enforcement of the contract also violates Iowa's public policy against the exploitation of women and children. (See discussion under Point IV).

The public interests implicated in this case evidence the solemn nature of public policies violated: that surrender of the rights of birth mothers must be free and voluntary following the birth of the child to protect the rights of both the mother and child (*see,* I.C.A. 600.7; I.C.A. 600A.4; *see, also*, *In the Interest of B.G.C.,* 496 N.W.2d 239 (Iowa 1993)); that the sacred relationship between mother and child be protected against termination unless in compliance with the strict mandate of Iowa's Termination Statutes; that children be placed based upon what is in their best interest; not upon agreement among adults; that children cannot be bartered or sold; and parental relationships cannot be terminated based upon payment of money.

These must be weighed against whatever interest the state may have to provide a woman for use by a 50 year old man who has six children between himself and his second wife, to bear another child for him.

The District Court suggested that the surrogacy contract should be enforced against the wishes of the birth mother and the child's best interests because she "knowingly and intelligently" made a decision to sign the contract. A444

The problem with that logic, of course, is that Iowa's statutory scheme and the carefully developed public policy which underlies it, has for decades taken that fact into consideration, and has forbidden the enforcement of a written agreement to surrender children before their birth.

The public policy questions which Iowa faces in this case are the same as those faced by the New Jersey Supreme Court in *In the Matter of Baby M*, 109 NJ 396, 537 A.2d 1227 (NJ1988), and those addressed by the New Jersey Bioethics Commission in a 178 page report, "After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy," The New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, 1992. There is no better or more detailed analysis of the policy considerations than that found in those two documents.

This Court's refusal to enforce the contract against the wishes of the birth mother does not prohibit entry into such contracts, but enforces existing statutes and public policy to let the birth mother make an informed and voluntary decision about the welfare of the child and her own rights after the birth of the child.

The terms of the surrogacy contract has as one of its principle aims the destruction and elimination of the mother-child relationship. It is intended to deprive the child of the mother who carried the child in *utero*, with whom the child bonded, and learned to know, and love. The cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty. This relationship, its unselfish nature and its role in the survival of the race, is the touchstone and core of all civilized society. Its denigration is the denigration of the human race.

The decision of the State of Iowa to set on any irreversible course that deprives children of their mother is not one for the court.

POINT III

State Court Enforcement of the Gestational Surrogacy Contract Would Violate the Substantive Due Process and Equal Protection Rights of Baby H Guaranteed Under the Fourteenth Amendment of the United States Constitution

A. T.B. has the Standing to Litigate the Constitutional Rights of Baby H

The United States Supreme Court best explained the criteria to establish one person's standing to litigate the rights of another in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989):

> "When a person ... seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations ... point to permitting the litigant to advance the claim? ...To answer [the second] question, our cases have looked at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff, supra* 428 U.S. at 113-118,...; *Eisenstadt v. Baird*, 405 U.S. 438, 443-446,...(1972)." 491 U.S. at 624, FN3.

Plainly, there is an Article III case and controversy. T.B. has suffered an injury-in-fact by the Court terminating her rights. As for the prudential

question, there could be no more intimate relationship, or one more beneficial to the two participants, than that between a mother and her child. Their interests are so interwoven that the termination of the rights of one operates to terminate the rights of the other.

Likewise, the child has no ability to assert her own rights, and sis uniquely dependent upon her mother to assert her rights for her. T.B. is the only person who can assert Baby H's rights because her father seeks to terminate her rights, and he asserts interests in direct conflict with the rights of Baby H

Finally, the outcome of this litigation necessarily impacts the rights of the child. If T.B. fails to establish and maintain her rights, the child's right to her relationship with her mother, as well as her other Due Process and Equal Protection Rights will be adversely affected. T.B. has standing to litigate the child's rights.

B. State Enforcement of the Contract Violates the Child's Substantive Due Process Rights

The Due Process Clause protects those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). These rights deemed

fundamental liberties are those "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). They are those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); See also, *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

Baby H has two fundamental liberties that would be violated by state enforcement of the surrogacy agreement: (1) her liberty interest in her relationship with her mother; and (2) her liberty interest to be free from commodification and the purchase of her and her custody and control.

1. The Order Enforcing the Contract Violates the Fundamental Liberty Interests of Baby H in Her Relationship with Her Mother

The District Court terminated the child's relationship with her mother despite the fact that the mother is perfectly fit, does not want the child-mother relationship to be terminated, thus depriving the child of the only mother she knew without any determination of what is in the child's best interest. Iowa has no legitimate interest to deprive the child of her mother.

It is well settled that a child has her own Fundamental Liberty interest in establishing and maintaining her relationship with her mother. The parent

and child have reciprocal rights, and a protected interest in maintaining their relationship. *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987) (Rev'd on other grounds). *Smith* held that the Supreme Court decisions which recognized a substantive Due Process Liberty Interest in the parent-child relationship

> "...logically extend to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship." *Id*. at 1418. *See, also,Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1999). *Lowry v. City of Riley*, 522 F.3d 1086, 1092 (10th Cir., 2008).

This Court has held that a child has a reciprocal right to her relationship with her mother under the Fourteenth Amendment of the U.S. Constitution. *F.K. v. Iowa Dist. Court*, 630 N.W. 2d 801,808 (Iowa 2001) (interpreting three U.S. Supreme Court decisions to support that conclusion, including *Lehr v. Robertson,* 463 U.S. 248 (1983)).

The right to maintain the relationship between a parent and a child is one which is an intrinsic natural right – not derived from government, but arising by virtue of the dignity of the person. *Smith v. Organization of Foster Families*, 431 U.S. 816-845 (1977). The Supreme Court has stated that the

constitution protects the "sanctity" of these familial relationships. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

In this case, the District Court held that Baby H had no right to her relationship with her mother at all. Ruling, A442, P.16. That determination was based upon the fiction that T.B. was not a biological mother of Baby H. *Id*. The state, however, is not free to ignore the actual facts because the "biological" relationship controls, not arbitrary "legal" lines. *Glona, supra* at 75-76.

The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). (Emphasis in original). It is an unconstitutional deprivation of the child's Due Process Rights to treat the contract, dated January 5, 2016, as an irrevocable waiver of the future rights of the child; a "waiver" of her rights made by someone else, before Baby H even existed, and one which was revoked when their mother realized that "waiver" was harmful to them.

2. The Statute Violates Baby H's Right to be Free From Commodification and Her State Sanctioned and State Enforced Purchase

A State Court Order enforcing the contract includes the determination that it does not matter what is in the child's interests, because P.M. promised to pay money for exclusive custody and control of whatever child was born to T.B.

Throughout the history of our Nation, the relationship between mother and child has been revered as one having intrinsic worth and beauty as the touchstone and core of all civilized society. The Supreme Court has held that the courts had a duty to preserve the "sanctity" of such relationships. *Moore, supra*, at 503. Thus, there has been, in this nation, a long and strong prohibition against the purchase and sale of the rights of children and their mothers to their familial relationships.

For instance, I.C.A. §710.11 states: "A person commits a Class "C" Felony when the person purchases or sells or attempts to purchase or sell an individual to another person."

§710.11 was amended in 1989 to add an exception to that criminal liability:

> "This section does not apply to a surrogate mother arrangement. For purposes of this section, a 'surrogate mother arrangement' means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple."

While that statement creates a very narrow exception for liability, that exception does not apply to the arrangement in this case. Artificial insemination was not employed in this case. IVF techniques and embryo transfer was used. There is a vast difference, and the dangers to the mother and child of the latter are far greater than the former. A410-411 The legislature never amended the statute to exempt this more dangerous form of surrogacy.

P.M. pleads that the controlling factor in the placement of the children should be the original "intent," of the parties. That begs the question. P.M.'s "intent" is hard evidence that he is paying, for fertilization and birth of the child, but rather for total possession which takes on indicia of ownership: by terms of the contract, the child can never get to know her mother, and he will take possession of her free from court scrutiny and the scrutiny of her mother. It can be said of any illegal sale of a child that the purchaser "intended" to have custody.

The Fourteenth Amendment's guarantee of liberty is surely offended because control having ownership qualities derived in exchange for money commodifies the children, and the children's relationship, which offends all civilized notions of freedom and liberty. *See*, *In the Matter of Baby M*, 537 A.2d 1227, 1248-49 (N.J. 1988).

In the history and tradition of this Nation in the placement of children the interests of the children are paramount; those of the parent are subordinate. *See*, *In the Interest of D.W.K.* 365 N.W.2d 32, 34 (Iowa 1985); *In the Interest of T.Q.*, 519 N.W. 2d 105, 106 (Iowa Ct. App. 1994); *In re D.S.* 806 N.W. 2d 458, 464 (Iowa Ct. App. 2011). In that history and tradition, contracts between parents to give primary custody to one parent over the other have never been enforceable without the court holding a trial to determine what is in the child's best interest. See, e.g. *In re Marriage of Jackson* (2006), 136 Cal. App. 4th 980, 990; *Goodarzirad v. Goodarzirad*, 185 Cal. App. 2d 1020 (1986).

So ingrained in our tradition is the concern for the best interests of children, that in *Ford v. Ford*, 371 U.S. 187, 193 (1962), the United States Supreme Court held that a state is not bound by the full faith and credit clause under Art. IV of the Federal Constitution when the judgment entered by one

state awarding child custody was based on a contract between two parents without regard to the children's best interests.

Enforcement of the contract violates the children's liberty guaranteed by the Fourteenth Amendment of the United States Constitution.

C. Enforcement of the Contract Violates Baby H's Right to the Equal Protection of the Law

Once a state acts to protect some individuals, it must act even-handedly and provide protection to all unless there is a legitimate state interest promoted by the denial to the excluded class. *Harper v. Virginia*, 383 U.S. 663, 665 (1966); *N.J. Welfare Rights Organ. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73; *Griffin v. Illinois*, 351 U.S. 12 (1956).

"Those who are similarly situated must be similarly treated." *Plyer v. Doe*, 457 U.S.202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

In *Harpe*r, the Court held that where a benefit is protected by the state, a classification which excludes some individuals from protection of a fundamental interest must be strictly scrutinized. 383 U.S. at 670. See also,

Carrington v. Rash, 380 U.S. 89 (1965); *Weber v. Aetna*, 406 U.S. 164, 172 (1972). "Classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even where a statute merely provides greater protection of a fundamental right for some relative to others, only a compelling interest can justify the classification. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Carey v. Brown*, 447 U.S. 455 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Thus, the classification which defines the excluded individuals must, where fundamental personal rights are involved, be justified by a compelling state interest. *Weber v. Aetna*, 406 U.S. at 175 (1972); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192, 194 (1964).

Here, enforcement of the contract creates a class of children who are denied protection of their fundamental liberty interest in their relationship with their mother, denied protection of their interest in not being treated as a commodity, and denied protection of their interest in being placed based upon

their best interests, only because some adult paid money to obtain exclusive parental rights and control over them.

In every other instance, Iowa has held that regardless of the intent or plan of the adults, a child can be placed by court order only based upon what the court determines is in the child's best interests. *In the Interest of D.W.K.*, 365 N.W. 2d 32, 34 (Iowa 1985). Children subject to a surrogacy contract would be the sole exception.

It is the cardinal rule of adoption proceedings that the court consider what is for the best interests of the child. *Id.; In the Matter of the Interest of L.B.T.,* 318 N.W.2d 200, (Iowa 1982); *In re the Adoption of B.J.H. B.J.G. and B.J.R.*, 564 N.W.2d 387, 392 (Iowa 1997).

No contract which enforces an agreement with respect to the future welfare of a child can be enforced in Iowa when the mother changes her mind. *In re Marriage of Witten*, 672 N.W. 2d 768 (Iowa 2003).

Enforcing such a contract against Baby H violates her Equal Protection Rights, because a fundamental right of the child is involved and Iowa has no legitimate state interest of any kind, let alone a compelling one, to create a class of children who are deprived of their mothers. The mother-child relationship is intrinsically beneficial to the child and the state has no interest

in promoting its destruction and enforcing a plan made before the child was conceived to deprive her of the benefits of that relationship. It is certainly not a legitimate interest of the state to terminate the rights and interests of the child in order to accommodate the desire of a man at the child's expense. This one departure from Iowa's commitment to protect the child's relationship with her mother, to protect against commodification, and to insure placement based upon the child's best interests, if taken, would violate the child's Equal Protection Rights. Any attempt to justify discrimination of Baby H by the state pretending that T.B. is not, in fact, a biological mother of Baby H, is a clear Equal Protection violation. *Glona*, *supra*, at 75-76.

POINT IV

Enforcement of the "Gestational" Surrogacy Contract Would Violate T.B.'s Substantive Due Process and Equal Protection Rights Guaranteed by the Fourteenth Amendment of the United States Constitution

A. The Enforcement of the Contract Would Violate the Substantive Due Process Fundamental Liberty Interests of T.B.

1. T.B.'s Right to Her Relationship with Her Child

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland, supra*. This is an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The entitlement to protection of this right is self-evident. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380,398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16. *Lehr* thus recognized the

mother's protected interest because during pregnancy the mother has an actual relationship with her child. To establish that she has a protected Due Process Right, T.B. need only establish that she had an actual relationship with the child by gestating her. For purposes of the constitutional issues, the "legal" status is irrelevant. *Glona, supra*, at 75-76.

In contrast to the birth mother, the genetic father does not always enjoy constitutional protection. The mere fact that a man is genetically related does not give rise to a liberty interest under the Fourteenth Amendment. *See and compare, Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammod*, 441 U.S. 380 (1979); *Quilloin v. Alcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983). The difference in the reproductive roles of the mother who carries the child and a person who "fathers" the child not only distinguish how their reproductive rights can be established, but justifies different treatment under the Fourteenth Amendment. *See*, e.g. *Tuan Anh Nguyen v. Immigration and Naturalization Services*, 523 U.S. 53, 62-73 (2001)(citing *Lehr v. Robertson*, *supra*). Thus, the District Court got it completely wrong: a genetic connection by itself does not give rise to a protected right; but gestation by itself does.

A state is not free to terminate a mother's right to her relationship with her child without meeting certain standards. For instance, a state court cannot enter an order terminating those rights unless the basis for such termination is proven by clear and convincing evidence. *Santosky v. Kramer*, 485 U.S. 745 (1982). That higher standard of proof of clear and convincing evidence is also required even when the state is not a party to the action because it is the state order which terminates the mother's rights. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Iowa follows *Santosky* and *M.L.B. In the Interest of B.G.C.*, 496 N.W. 2d 279, 244 (Iowa 1993) (citing Iowa Code 232.94).

Therefore, it is incumbent upon the State Court to insure that the proof of the factual basis for a termination of the mother's fundamental right to her relationship with her child is clear and convincing and all procedural safeguards must be in place to provide such assurances for the Court before the mother's rights are terminated.

The United States Supreme Court has pointed out that "'Courts indulge every reasonable prescription against waiver' of fundamental constitutional rights" and that we do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389 (1936)).

A waiver is ordinarily an intentional relinquishment of a known right. Id, at 464. The requirement that a waiver of a fundamental constitutional right is voluntary and fully informed is part of the substantive right itself. *Johnson v. Zerbst,* 304 U.S. at 464-65.

It would be a *per se* violation of T.B.'s and Baby H's substantive Due Process liberty interests for Iowa to terminate their rights based upon a document signed before the rights and before the child even existed. As such, the contract would constitute a prospective irrevocable waiver of a future right before Defendant-Counterclaimant knew the facts which demonstrated that surrender of the child to the M's was harmful to her, and before she had a full understanding and knowledge of the depths of her bond with, and love for, the child.

In the current case, the District Court declared that T.B. had no Substantive Due Process right to her relationship with Baby H because she was not a "legal" mother. However, even if the District Court ruling was deemed to be a correct interpretation of Iowa law – which it is not – failure to recognize existence of the mother's protected relationship would violate her Due Process Rights. The state is not free to create "legal" fictions at the expense of the constitutional rights of the mother and child. The Federal Constitution

concerns itself with the fact that T.B. had an actual relationship with the child of the nature of mother and offspring. The Fourteenth Amendment necessarily limits the legal lines or fictions a state may draw. *Glona v. American Guar. Liab. Ins. Co.,* 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue for the Equal Protection Clause necessarily limits the authority to draw such 'legal' lines as it chooses").

As for T.B., a waiver of her rights, if that is what the contract is purported to be, was not informed, knowing or intelligent. Under such a theory, the contract waived rights even before she had rights to waive. She could not anticipate the facts which subsequently developed. More importantly, she could not waive her right to challenge the constitutionality of the basis of the termination of her rights. In the strictest sense, her "waiver" is not voluntary because her rights have been terminated against her will by compulsion of a contract applied to events that were unforeseen.

2. Violation of T.B.'s Due Process Right to Be Free From Exploitation

T.B. has a fundamental liberty interest in not being exploited. Surrogacy agreements, if enforced embody deviant societal pressures, the object of which is to use the woman, and destroy her interests as a mother to satisfy the desires

of third parties. Surrogacy exploits women by treating the mother as if she is not a whole woman. It assumes she can be used much like a breeding animal and act as though she is not, in fact, a mother. It demands that she detach herself from her experiences and her bond, love, and sense of duty to herself and her child. It expects a mother to prevent the bonding process despite the fact that this natural process is both physiological as well as psychological. It uses the mother as an object without regard for the harm it can cause her or her child. It uses the woman as a commodity. It allocates all of the risk, guilt, physiological and psychological pain to her and isolates her in her distress by placing the responsibility of termination of the children's rights entirely upon her. *See*, Cert. of Rothman.

It was for these reasons that all of Europe bans surrogacy and the European Parliament has recently reaffirmed its condemnation of surrogacy as a human rights violation. European Parliament's Annual Report on Human Rights, Nov. 30, 2015. ([European Parliament]"Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial gain...[as a human rights violation]"). at P. 16.

See, *also*, Schanbacher, K. "India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women," Hastings Woman's Law Journal, Vol. 25:2, pp.201-220 (20140).

B. A Court Ordered Enforcement of the Contract Would Violate the Equal Protection Rights of T.B.

As a general matter in Iowa, women who promise, before birth, to surrender their parental rights, enjoy strictly enforced protections. A pregnant mother voluntarily surrendering her rights in an adoption is not bound by an agreement she signs before the birth of the child. Only a surrender signed at least seventy-two hours following the child's birth can be used as a basis to terminate her relationship with the child. I.C.A. §600A.4(f)(4)(g). Even if the mother signs such a post-birth consent, the mother has four days to revoke the consent. I.C.A. §600A.4(f)(4). The mother can request immediate return of the child. Even after a Judgment of Termination is entered, she has thirty days to move the Court. I.C.A. §600A.9 (2).

Enforcement of the Surrogacy Contract strips T.B. of the law's protections. Because the Order would terminate a fundamental liberty interest, Iowa would have to demonstrate a compelling state interest to justify the denial of legal protection. See, discussion of US Supreme Court precedent in Point

III C above. The state has no such interest to involuntarily terminate T.B.'s rights in order to satisfy the desire of a fifty year old man to destroy the mother-child relationship.

The purpose of Iowa's refusal to enforce pre-birth agreements is precisely because facts change, the pregnant mother's experience changes, and the mother's understanding of what is best for the children can change. All of those considerations present in voluntary surrender of rights in other contexts, are present for a "gestational" surrogate and in this case.

The District Court argued that T.B. is not similarly situated to other birth mothers whose rights cannot be terminated based on pre-birth consents. The Court claimed that T.B. is situated more like a man with no genetic relationship with the child. A446 Simply stating this proposition exposes it's weakness. Men and women are simply not similarly situated when it comes to human reproduction. *Lehr v. Robertson*, 463 U.S. 248, 259-60, n.16; *Tuan Anh Nguyen*, *supra* at 62-63. It is irrational to suggest otherwise.

T.B. gave exactly the same biological benefit to the baby in utero as all other mothers. She and the baby bonded like all other mothers. She went through the sacrifice of pregnancy and accepted all risks associated with it like all other mothers. The child knew her just as all other children know their

mothers during pregnancy and after birth. The child derived the same benefits from T.B. as all other children derive from other mothers. T.B. underwent the same physical changes as all other mothers, including increased oxytocin levels and dramatic changes in her brain just like all other mothers, including mothers genetically related to the child.

The District Court relied upon *Petition of Bruce*, 522 N.W.2d 67 (Iowa 1994), which involved an unmarried who was not genetically related to the child in question. The unmarried man who is not genetically related made absolutely no contribution to the procreation of a child and it is irrational to suggest that he is in a situation similar to that of a birth mother like T.B.

The prohibition against money in exchange for parental rights is just as applicable in this case, as it is in other contexts. Iowa's denial of the protection of these laws would violate T.B.'s Equal Protection Rights. The definitive analysis on this point was discussed in *The Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988). It is the ultimate teaching case for a situation such as this one where the State has consistently declined to change its policies and statutes governing termination and refuses to pass a Surrogacy Enabling Statute to enforce such contracts.

CONCLUSION

For the reasons stated, the ruling of the District Court must be reversed, the Final Order vacated, and the matter should be remanded for Entry of Judgment which declares: (1) that T.B. is the biological mother of Baby H; (2 that T.B. is the legal mother of Baby H; (3) that the gestational surrogacy agreement is unenforceable and cannot form the basis to terminate the relationship between T.B. and Baby H; (4) that enforcement of the contract violates the Substantive Due Process and Equal Protection rights of Baby H; (5) that enforcement of the contract violates the Substantive Due Process and Equal Protection rights of T.B.; (6) that the birth mother is presumed to have the right to custody of the child *pendente lite* unless she is unfit proven by clear and convincing evidence; and (7) directing that the Court should issue a scheduling order for discovery and schedule a trial to determine custody based upon the best interests of the child.

STATEMENT REQUESTING ORAL ARGUMENT

Defendants-Counterclaimants-Appellants hereby respectfully request that this case be submitted with oral argument.

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CERTIFICATION OF ATTORNEY'S COSTS

I hereby certify that the cost of printing the foregoing Defendants-Counterclaimants-Appellants' Proof Brief was $0.00 (inclusive of sales tax, postage and delivery).

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CERTIFICATION OF FILING

I hereby certify that on the 7th of September, 2017, I served the attached Defendants-Counterclaimants-Appellants' Final Brief by electronically filing it with the Clerk of the Iowa Supreme Court via the EDMS in accordance with the Chapter 16 Rules.

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CERTIFICATION OF SERVICE

I hereby certify that on the 7th of September, 2017, I served the attached Defendants-Counterclaimants-Appellants' Final Brief on all counsel of record by electronically filing it with the Clerk of the Iowa Supreme Court via the EDMS in accordance with the Chapter 16 Rules.

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CERTIFICATE OF COMPLIANCE

1. This Brief contains 13,842 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P.6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the X8 edition of WordPerfect in 14 point font plain style.

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