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RECENT DEVELOPMENT

IN RE ROBERTO D.B.: A GESTATIONAL CARRIER IS NOT REQUIRED TO BE LISTED ON A BIRTH CERTIFICATE BECAUSE THE MARYLAND EQUAL RIGHTS AMENDMENT DEMANDS THAT MARYLAND PATERNITY STATUTES, WHICH ALLOW MEN TO CHALLENGE PATERNITY, EXTEND TO WOMEN.

By: Patricia Calomeris

In a matter of first impression, the Court of Appeals of Maryland held that a gestational carrier is not required to be listed on a child's birth certificate. *In re Roberto d.B.*, 399 Md. 267, 923 A.2d 115 (2007). Furthermore, the Court held that Maryland paternity statutes do not violate the Maryland Equal Rights Amendment ("E.R.A."), because the process by which a male may challenge paternity may be employed by women as well. *Roberto d.B.*, 399 Md. at 283, 923 A.2d at 124. Lastly, the Court held that the best interest of the child ("BIC") standard did not apply to the instant case, because only one parent sought custody, and that parent was not found to be unfit. *Id.* at 285, 923 A.2d at 126.

On December 18, 2000 Roberto d.B. ("Roberto") initiated an *in vitro* fertilization procedure, in which his sperm fertilized two eggs from an egg donor. The eggs were implanted in another woman's uterus. Neither the egg donor nor the gestational carrier, who had no genetic connection to the two children ultimately born, intended to gain custody. Upon the birth of the children, the hospital submitted birthing information to the Maryland Division of Vital Records ("MDVR"), so that the MDVR could issue birth certificates for the children. The MDVR's policy requires that it report the gestational carrier as the mother on the birth certificate, unless a court order authorizes otherwise. Absent a court order in this case, the MDVR refused to grant Roberto's request to omit the gestational carrier's name from the birth certificates.

Consequently, Roberto petitioned the Circuit Court for Montgomery County to have the gestational carrier's name removed from the birth certificate, and to have the court authorize the MDVR to

report only his name. The gestational carrier, the putative appellee, joined Roberto in this petition. The circuit court denied Roberto's motion, and held that there was no Maryland case law that would allow it to authorize the omission of a mother's name from a birth certificate. The circuit court further held that it was in the best interest of the child to have a mother named on the birth certificate. Roberto appealed to the Court of Special Appeals of Maryland on grounds that Maryland paternity statutes, unless interpreted to extend to women, violated the E.R.A. The Court of Appeals of Maryland issued certiorari, prior to the commencement of proceedings in the Court of Special Appeals of Maryland, to examine the constitutional issue claimed by the appellant.

The Court of Appeals of Maryland reversed the circuit court and held that gestational carriers need not be listed as mothers on the birth certificates of children they carry to term. *Roberto d.B.*, 399 Md. at 285, 923 A.2d at 126. The Court of Appeals of Maryland determined that section 4-211 of the Health General Article of the Maryland Code ("section 4-211") does not prevent the Court from making such an omission. *Roberto d.B.*, 399 Md. at 278, 923 A.2d at 121-22. Section 4-211 states that authorization of a new birth certificate may be obtained if significant proof has been entered that the child was born in the state and a court has entered an order concerning the parentage of the child. *Roberto d.B.*, 399 Md. at 278, 923 A.2d at 121-22.

The Court of Appeals of Maryland interpreted section 4-211 to mean that Maryland law "accommodates, if not contemplates, a birth certificate on which the mother is not identified." *Roberto d.B.*, 399 Md. at 278, 923 A.2d at 121. The "parentage" language of section 4-211 does not set limitations as to which parent or how many parents must be listed on the birth certificate. *Roberto d.B.*, 399 Md. at 278, 923 A.2d at 122. Furthermore, the Court pointed out that the MDVR had no objections to removing the gestational carrier's name from the birth certificate, provided that this action was authorized by the Court. *Roberto d.B.*, 399 Md. at 294, 923 A.2d at 131.

Next, the Court of Appeals of Maryland held that because Maryland paternity statutes may be interpreted as extending to women, the statutes do not violate the E.R.A. *Roberto d.B.*, 399 Md. at 283, 923 A.2d at 124. The E.R.A. states that "[e]quality of rights under the law shall not be abridged or denied because of sex." *Roberto d.B.*, 399 Md. at 274-75, 923 A.2d at 120 (quoting Md. Decl. of Rights, art. 46). Roberto contended that section 5-1001 of the Family Law Article of the Maryland Code ("section 5-1001") lists the necessary steps for a

man to challenge paternity and emphasized that there is no language in this section, or other sections, that afforded women a similar procedure. *Roberto d.B.*, 399 Md. at 275, 923 A.2d at 120 (quoting MD. CODE ANN., FAM. LAW § 5-1001 (West 2006)).

In considering Roberto's contention, the Court found the E.R.A. prohibits "the granting of more rights to one sex than to the other." *Roberto d.B.*, 399 Md. at 283, 923 A.2d at 124. The Court relied on *Giffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998), to further conclude that imposing a burden on, or granting a benefit to, one sex and not the other, without substantial justification, is a violation of the E.R.A. *Roberto d.B.*, 399 Md. at 279-80, 923 A.2d at 122-23.

Furthermore, the Court reasoned that the paternity statutes, as written, did not contemplate the complexity of legal issues arising from modern reproductive technologies. *Id.* at 279, 923 A.2d at 122. Consequently, the language of the paternity statutes restricted, rather than protected, parents' rights. *Id.* at 279, 923 A.2d at 122. The Court, therefore, held that the paternity statutes must be "construed to apply equally to both males and females" to comply with the E.R.A. and keep up with new technology. *Id.* at 283-84, 923 A.2d at 124-25.

In response to the majority, the dissent argued that the majority created an "intent test" to determine parentage, which would allow women and men to deny parentage merely because they did not intend to be parents. *Id.* at 284 n.15, 923 A.2d at 125 n.15. In contemplation of this issue, the majority countered that a mother's denial of maternity must be based on her genetic relation to the child. *Id.* at 284 n.15, 923 A.2d at 125 n.15. The Court further noted that Maryland paternity statutes, as they are currently written, do not explicitly include intent as a factor for determination of parentage. *Id.* at 284 n.15, 923 A.2d 125 n.15.

Lastly, the Court of Appeals of Maryland held that the BIC standard was not applicable to the instant case. *Id.* at 285, 923 A.2d at 126. The Court opined that the BIC standard is typically used when there is a custody dispute between parents or third parties, or if a parent is found to be unfit. *Id.* at 285-91, 923 A.2d at 126-29. In rejecting the circuit court's decision, the Court held that in the instant case, the BIC standard is not applicable because there is no custody dispute among the parties. *Id.* at 292, 923 A.2d at 130. In this case, the gestational carrier wished to completely relinquish her maternal rights, and she established that she never intended to possess such rights. *Id.* at 292, 923 A.2d at 130. Additionally, the Court held that there was nothing in the record that would prove that Roberto was an

unfit parent, and so it was inappropriate for the circuit court to interfere with his request for relief by imposing the BIC standard. *Id.* at 292-93, 923 A.2d at 130.

In *In re Roberto d.B.*, the Court of Appeals of Maryland tackled an issue that has arisen due to modern technology. To accommodate the emerging trend of artificial reproduction and to avoid an E.R.A. conflict, the Court interpreted Maryland paternity statutes as extending to women. The Court's holding, however, may have addressed a matter of public policy that should be left to the legislature's determination. Therefore, this opinion suggests that Maryland courts may be pursuing a more active role of interpreting statutes in order to advance public policy, rather than leaving important family issues to the legislature. Furthermore, the case demonstrates how emerging reproductive options may cause an increase in cases that address non-genetic relation, and may effectuate change in custody and parentage laws in the future.