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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,696

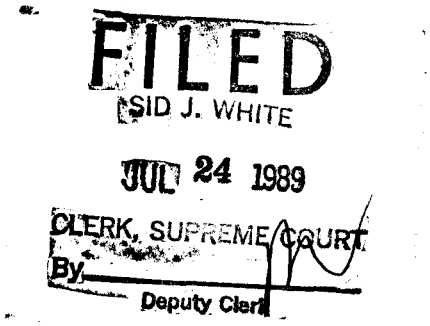
MICHAEL STEIN,

Petitioner,

vs.

PATRICIA (CLARK) FOSTER, and
BRENT FOSTER,

Respondents.
_____/



AMENDED BRIEF ON BEHALF OF AMICUS CURIAE
THE FOUNDATION ON ECONOMIC TRENDS

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INTEREST OF AMICUS CURIAE

Amicus curiae, Foundation on Ecomonic Trends, the parent organization of the National Coalition Against Surrogacy, has devoted itself over the past decade to attempting to ensure the proper regulation and oversight of biotechnology, including reproductive technology. The National Coalition Against Surrogacy's pro bono legal work and experience with numerous cases involving surrogacy contracts has provided it with knowledge and experience relevant to the jurisdictional and constitutional issues that arise when legally processing a surrogacy contract on an interstate basis. Therefore, amicus curiae may be able to elucidate for the court how and why this litigation was processed in Florida.

INTRODUCTION

This case represents an egregious example[1] of the legal processing scheme used by the surrogacy broker in this case, Noel P. Keane. The fraudulent and unconstitutional scheme ensures that a mother's parental rights to her child, borne pursuant to a surrogacy contract, will be terminated through an adoption.

The fraudulent legal scheme is rooted in a boilerplate surrogacy contract2 which requires that the mother sign any and all necessary documents, affidavits and the like in order to further the intent and purposes of the surrogacy contract. All attorneys allegedly representing the mother's interests are selected by Keane, who is the attorney for the father (by artificial insemination) and the prospective adoptive mother (herein referred to as the couple). The couple pays these attorneys to allegedly represent the mother's interests.

As required by the surrogacy contract, the mother signs a

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[1] The misuse of the Florida court system present in this case is not an isolated incident but, as noted by the appellate court, occurred previously in Stern v. Whitehead, No. 86-12060 (Fla. 11th Cir. September 4, 1986). The surrogacy broker in this case continues to process surrogacy contract adoptions in Florida unnoticed, as adoption hearings and records are confidential. (Sec. 63.162, Fla. Stat.)

[2] Despite the lack of any legal precedent holding that surrogacy contracts are enforceable against a mother's will, and the New Jersey Supreme Court decision In the Matter of Baby M. 109 N.J. 396, 537 A.2d 1227 (N.J. 1988), which struck down Keane's surrogacy contracts as unenforceable, Keane continues to promulgate surrogacy contracts. In fact, Florida (Sec. 63.212, ~~Fla. Stat.~~) and nine other states (Michigan, Nebraska, Louisiana, Indiana, Kentucky, Utah, North Dakota, Arizona, Washington state) have enacted legislation making surrogacy contracts unenforceable.

document drafted by and sent to her by the couple's attorney, Keane, which authorizes an attorney selected by Keane to represent her in legal proceedings initiated by the couple in Florida. Likewise, the mother also signs a consent to adopt document drafted by and sent to her by the couple's attorney, Keane. All other letters and legal paperwork from the mother's alleged attorneys are funneled through the couple's attorney to the mother. By minimizing, if not completely eliminating, the mother's direct contact with the attorney allegedly hired to represent her, the couple's attorney, also the surrogacy broker, maintains more, if not complete, control over what information and legal advice the mother will receive. Should the mother change her mind about the surrogacy arrangement, her ability to communicate this to her alleged attorney is severely limited. For added insurance that the mother will not attempt to assert her legal rights to her child, Keane's consent to adopt document contains a waiver of any further notice regarding the adoption proceedings. To keep the mother ignorant, the couple's attorney does not serve the mother with any notice of process in either the paternity or the adoption proceedings.

Finally, Keane chooses Florida as his forum of choice to process all adoptions stemming from a surrogacy contract because of Florida's less restrictive adoption procedures[3] and

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[3] At the time the adoption in issue was granted, Florida adoption laws did not contain a residency requirement, a distinct advantage to Keane who processes surrogacy contract adoptions on a national and international basis. Recognizing the misuse of the Florida court system by non-residents, the Florida legislature has since enacted a residency requirement for adoption. (Sec. 63.185, Fla. Stat.)

substantive law. Florida's distant location from Michigan, the state from where Keane solicits for women to become involved in a surrogacy arrangement, all but guarantees that the mother will not be present in the court to assert her legal rights to her child.

Within this fraudulent framework, unsuspecting Florida courts exercise personal jurisdiction over the mother through the attorney allegedly representing her, and unsuspecting Florida judges apply Florida's adoption laws rather than the laws of the state with which the parties have some relationship which, like Michigan's, may be more restrictive.

STATEMENT OF THE FACTS

The facts in the case relevant to the issues addressed in this brief are as follows. Respondent, Patricia (Clark) Foster, the natural mother, signed a "Surrogate Parenting Agreement" (Agreement) believing that she was represented by an independent counsel. Herbert A. Brail, Esq. signed an Acknowledgment of Independent Counsel indicating that he represented Foster. Brail was in fact an attorney in the law firm of Noel P. Keane, the surrogacy broker and attorney representing Petitioner Michael Stein, the purported father, and his wife Hayat Stein.

In a letter dated August 29, 1986 from the law offices of Noel P. Keane to Patricia Foster, Foster was advised that Robert M. Jasinski would be representing her interests in the adoption proceeding. This same attorney, Robert M. Jasinski, had filed the adoption petition and also appeared on behalf of Hayat Stein. Later, another attorney, who was a surrogacy broker in Florida, Michael Anderson, was hired by Petitioner to allegedly represent the interest of the mother, Respondent.

The Agreement was signed by all parties in Michigan, all parties were, and currently are Michigan residents, and the child who is the subject of this litigation, ----child---, was born in Michigan and has resided there at all times. No transaction or occurrence related to this litigation occurred in Florida.

SUMMARY OF ARGUMENT

Personal jurisdiction over Respondents and the judgment was obtained by fraud upon the court in that the attorneys, allegedly representing the Fosters, were in fact agents of Petitioner, hired by Petitioner to defeat any legal rights Respondent sought to assert.

In an attempt to defeat the laws of Michigan which would have required the mother to be informed of her legal rights by a judge before her consent to adopt could be executed, Petitioner's wife filed the adoption petition in Florida. The lower court violated Foster's 14th Amendment due process rights by applying Florida law to a case where no transaction or occurrence related to the litigation occurred in Florida.

ARGUMENT I

PERSONAL JURISDICTION OVER RESPONDENT AND THE JUDGMENT WAS OBTAINED BY FRAUD

The fraud in obtaining personal jurisdiction was comm tted upon not only Respondents, but upon the courts of Florida as well. The leading case on jurisdictional fraud Staedler v. Staedler, 78 A.2d 896, 28 ALR 2d 1291 (N.J. 1951) presented facts strikingly similar to the instant case. A husband and wife entered into an agreement, drafted by his attorney, regarding the disposition of their marital assets. The husband, who resided in New Jersey with his wife, then hired and paid for an attorney in Florida to represent her in divorce proceedings instituted in Florida. The husband mailed the wife documents which authorized the attorney selected by him to represent her in Florida, and requested tha she execute them. She did so in accordance with their agreement, which required her to execute any document necessary to give full force and effect to said agreement. The wife then retained truly independent counsel (a fact not present in the instant case) in New Jersey. The New Jersey Supreme Court found that,

> "Unquestionably [the divorce] was the product of fraud upon the jurisdiction of Florida in which both the appellant and Respondent participated and this fraud had its inception and is grounded in the agreement..." 78 A.2d 901,

and further held that the appearance of the Florida attorney hired and paid for by the husband to represent the wife was in reality an appearance by said attorney as an agent for the husband and not an appearance on behalf of the wife. In refusing to enforce the Florida decree the court stated,

> "...we do not believe that the full faith and credit clause of the Federal Constitution was ever intended to be used as a shield for...or to approve the acts performed pursuant thereto in cases where the ultimate purpose was to commit a fraud upon the jurisdiction of a court of one of the several sovereign states." 78 A.2d 901

Because Respondents had no contact with Florida and was not served with any notice of process, the lower court could not have exercised personal jurisdiction over Respondents, absent the fraud committed by Petitioner. Without personal jurisdiction, the judgment herein should be declared void.

The facts in the instant case are even more egregious than those in Staedler, supra, in that the Petitioner committed fraud not only upon the Florida courts, but also upon Respondents by obtaining the judgment herein. In DeClaire v. Yohanan, ***453*** So.2d 375 (Fla. 1984) the Florida Supreme Court followed the ruling in the seminal case on fraud, United States v. Throckmorton, 98 U.S. 61 (1878) wherein the court held,

> "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent as...where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat...[showing] that there has never been a real contest in the trial or hearing of the case..."

the judgment may be set aside. The fraud within the surrogacy scheme is pervasive, beginning with an unenforceable clause in the surrogacy contract requiring the mother to sign all documents necessary to carry out the contract, which the mother is deceived into believing is enforceable and ending with a judgment of adoption procured by attorneys hired to allegedly represent the

mother's interest, but in reality are agents of the couple conniving to defeat the rights of the mother. This court should reject this fraudulent jurisdictional scheme and uphold the appellate court's decision in this case to vacate the judgment of adoption.

ARGUMENT II

APPLICATION OF FLORIDA LAW IN THIS CASE VIOLATED RESPONDENT'S 14TH AMENDMENT CONSTITUTIONAL RIGHTS OF DUE PROCESS AND USURPED MICHIGAN'S SOVEREIGN AUTHORITY TO LEGISLATE REGARDING ITS CITIZENS

Keane's selection of Florida for processing Petitioner's surrogacy contract adoption represents the most blatant form of forum shopping. Keane must quickly obtain the mother's consent to the adoption before she changes her mind or has any time to discover her legal rights. Under Michigan law the mother must be informed of her legal rights by a judge or referee before her consent to adopt can be executed. (Michigan Adoption Code section 719.44(5)) By contrast, under Florida law a consent to adopt can be executed by affidavit in the presence of a notary and two witnesses. (Sec. 63.084(4), Fla. Stat.) However, because of this conflict of law, Florida's choice of law must be constitutionally permissable.

The U.S. Supreme Court stated in the leading case of Allstate Insurance Company v. Hague, 449 U.S. 302, 308, 312, 101 S.Ct. 633, 637, 640 (1981),

> "In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the

> contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation,"

and held

> "that for a State's substantive law to be selected in a constitututionally permissable manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

In Allstate, 449 U.S. 311, 101 S.Ct. 639, the court reviewed long-held U.S. Supreme Court precedents establishing this rule and described the cases of Home Ins. Co. v. Dick, 281 U.S. 397 (1930) and John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936) as "extreme examples" where forum states had improperly chose to apply its own laws based on one insignificant forum contact, namely that the parties bringing the suit nominally resided in the forum state. In those two cases, as in the instant case, all occurrences or transactions giving rise to the litigation occurred outside the forum state. The instant case is even a more extreme example of lack of contacts with the forum state in that all parties to the litigation have resided in Michigan at all times.

In a case involving an indigent's due process right to counsel in a termination of parental rights proceeding, the U.S. Supreme Court stated that a parent's interest in her child is an "extremely important one." Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 31, 101 S.Ct. 2153, 2161 (1981). While finding lack of counsel would not violate due process in every case the court noted,

> "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." Lassiter, 452 U.S. 33, 101 S.Ct. 2163.

This case expresses the importance and necessity for high due process standards in a termination of parental rights proceeding to ensure fundamental fairness. Not even the minimum constitutional requirements for due process were met here when the lower court unsuspectingly applied Florida law.

Recognizing the very importance of due process in adoption proceedings, the Florida legislature enacted Section 63.192, Fla. Stat. which states,

> "A judgment of court terminating the relationship of parent and child or establishing the relationship by adoption issued pursuant to due process of law by a court of any other jurisdiction...shall be recognized in this state..."

In Sherrer v. Sherrer, 334 U.S. 343, 354 (1948) the court stated, "...that under the Constitution, the regulation and control of marital and family relationships are reserved to the States" and recognized "...the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter..." Citing the Fifth Amendment due process clause, the court in Alton v. Alton, 207 F.2d 667, 677 (3d Cir. 1953), a leading conflicts of law case, held,

> "Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are

> in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere..."

The court here refers the need for states to respect the sovereignty of other states in order to ensure order in a federation of states, also the goal of the Full Faith and Credit Clause. Because all parties in this case resided in Michigan and all occurrences giving rise to the litigation occurred in Michigan, Florida has no state interest in determining the parental status of the parties involved. Florida "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." Phillips Petroleum Company v. Shutts, *472* U.S. *797, 822,* 105 S.Ct. *2965, 2980, (1985)* citing Dick, supra. By unsuspectingly applying Florida law, the lower court did not give faith and credit to Michigan laws thereby unintentionally usurping Michigan's sovereign authority to legislate regarding the termination and creation of parental rights in its citizens. This court should reject this blatant forum shopping and uphold the appellate court decision to vacate the adoption.

CONCLUSION

While adoption cases are sensitive, vacating this step-parent adoption will not immediately remove the 2 year-old child, ----------, from his home, but will merely permit the mother to seek visitation or custody in a custody suit.

It is respectfully submitted that the appellate court decision should be upheld because:

1. The trial court obtained personal jurisdiction and the judgment by fraud.

2. The trial court's application of Florida adoption law was unconstitutional.

Respectfully submitted,

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By: Robert D Arenstein

Dated: July 21, 1989

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Amended Brief has been furnished, by Federal Express, to Law Offices of Melvyn B. Frumkes & Associates, P.A., and Law Offices of Greene & Greene, P.A., Attorneys for Petitioners, 100 North Biscayne Boulevard, Miami. Florida 33132, and Buchbinder & Elegant, P.A., Attorneys for Patricia and Brent Foster, Commonwealth Building, 46 Southwest First Street, Miami, Florida 33130, this 21st day of July, 1989.

Robert D. Arenstein