

T.V. v New York State Dept. of Health

2010 NY Slip Op 30147(U)

January 15, 2010

Supreme Court, Nassau County

Docket Number: 6557/09

Judge: Thomas A. Adams

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33

NASSAU COUNTY

T.V., D.Y.-V., N.N., and R.N.,

Plaintiff(s),

MOTION DATE: 11/06/09

INDEX NO.: 6557/09

-against-

SEQ. NO. 3

NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant(s)

The defendant's motion, pursuant to CPLR 3211(a)(2) and (7), to dismiss the plaintiffs' May 18, 2009 amended complaint due to a purported lack of subject matter jurisdiction and failure to state a cause of action is determined as hereinafter provided.

The facts of this case are familiar and undisputed. As delineated within this Court's May 4, 2009 order, the plaintiff D.Y-V. underwent a hysterectomy in 1999 after it was discovered that her uterus was surrounded by a malignant tumor. Fortunately, her ovaries were undamaged and on August 18, 2008, following her 2007 marriage to the plaintiff T.V., a non-party, James Stelling, M.D., performed a successful in-vitro fertilization procedure which united her eggs with her husband's sperm. Approximately, a week later, on August 23, 2008, one of the resulting viable embryos was transferred into the uterus of a long-time friend, the plaintiff N.N., to act as surrogate.

Notwithstanding this courageous and extraordinarily generous act, N.N. objected to being declared as the child's mother on his birth certificate. On April 21, 2009, more than eight (8) months after the August 18, 2008 in-vitro fertilization procedure, but a mere thirteen (13) days prior to N.N.'s May 4, 2009 anticipated delivery date, the plaintiffs filed this declaratory judgment action (see CPLR §3001). Their initial pleading and contemporaneous order to show cause sought to enjoin the defendant from listing the birth parents, i.e., N.N. and her husband, the

plaintiff R.N., rather than the biological parents, i.e., D.Y.-V. and T.V., on the child's birth certificate. Moreover, the plaintiffs demanded judgment declaring D.Y.-V. and T.V. to be "the legal mother and legal father".

On April 21, 2009 the Court (McCarty, J.) struck the portion of the order to show cause which sought a temporary restraining order enjoining Winthrop University Hospital, a former defendant, from issuing a birth certificate identifying N.N. and R.N. as this child's parents pending the hearing and determination of that motion. After its April 30, 2009 submission, N.N.'s delivery date was advanced to May 1, 2009 at which time a healthy baby boy was born. Finally, on May 4, 2009 the birth parents, N.N. and R.N., relinquished their respective parental rights to the child and this Court (Adams, J.) denied the plaintiffs' motion to preliminarily enjoin the defendant from issuing a birth certificate listing them as the parents of the new-born baby boy. As discussed at greater length therein, that order noted, inter alia, the defendant's obligation, pursuant to Public Health Law §4130(2), to register the birth within five (5) days, the Legislature's unequivocal mandate, pursuant to Domestic Relations Law §122, declaring "surrogate parenting contracts" - whether compensated or not - to be void and against public policy and the plaintiffs' failure to establish the elements, i.e., a likelihood of success on the merits, an irreparable injury absent the injunction and a balancing of the equities in their favor, required for preliminary injunctive relief (see CPLR §6301; Aetna Ins. Co., v Capasso, 75 NY2d 860,862). Among the specifically identified defects in the plaintiffs' application was the availability of alternative relief, i.e., the acquisition of an order of filiation on behalf of T.V. (see Family Court Act §§517 and 542) and a prompt adoption accompanied by the issuance of a new birth certificate (see Public Health Law §4138).

In view of the circumstances, including, but not limited to N.N.'s substantial sacrifice, this Court subsequently accommodated the plaintiffs by expediting the issuance of an order of filiation to T.V. on May 13, 2009.

Their amended complaint (see Exhibit A to the September 24, 2009 affidavit of Dorothy Oehler Nese, Esq.), seeks a declaration that article 5 of the Family Court Act, and in particular §523

thereof, is violative of the due process and equal protection clauses of the state and federal constitutions because it is restricted to a determination of paternity. Otherwise stated, in light of the advent and increased frequency of births through surrogacy, the plaintiffs, in effect, seek to have this Court expand article 5 to include a determination of "maternity". More specifically, since the facts are undisputed, the plaintiffs demand, inter alia, a declaration that D.Y.-V. instead of N.N. is the child's "legal mother". In the interim, N.N. is alleged to be "saddled with legal responsibility for the child" (para.36) while D.Y.-V. is deprived of the rights of motherhood.

The defendant's motion asserts that this Court lacks subject matter jurisdiction to adjudicate the dispute (see CPLR 3211[a][2]) and that the plaintiffs' amended complaint fails to state a cause of action (see CPLR 3211[a][7]). The June 24, 2009 supporting affidavit of Peter Carucci, the supervisor of its Vital Records Section, avers, in pertinent part, that "Public Health Law §4.30 defines who the mother of a child is and considers the fact of birth, not genetics, in the determination" (para.22). Consequently, it is allegedly "always clear and undisputable who the mother is" (id.). Conversely, "who the father is is not defined and is not always clear. Hence, a legal mechanism is necessary when there is a dispute to determine who the father is" (para.23). In addition, to the extent that the relief sought by the plaintiffs is dependent upon a surrogate parenting contract, the defendant contends that Domestic Relations Law §122 renders the action a nullity (para.25) and that the provisions of the Family Court Act are not "a substitution for the adoption process" (para.29).

That branch of the defendant's motion, pursuant to CPLR 3211(a)(2), which seeks to dismiss the plaintiffs' amended complaint due to this Court's purported lack of subject matter jurisdiction is denied. Family Court Act §511 explicitly states, inter alia, that "the Family Court has exclusive original jurisdiction in proceedings to establish paternity" (see H.M. v E.T., 65 AD3d 119,124-125). However, a declaratory judgment action is the proper procedural vehicle to challenge the validity of a legislative enactment (see East Suffolk Development Corp. v Town Board of Town Riverhead, 59 AD3d 661,662). Here, a justiciable

controversy exists (at least with respect to D.Y.-V. and N.N.) as to the constitutionality of article 5.

To justify legislation that discriminates on the basis of gender, "it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of these objectives" (Grant v United States Dept. of Homeland Security, 534 F.3d 102,107 quoting Tuan Anh Nguyen v INS, 533 US 53,60). In sum, the defendant contends that article 5 does not violate the plaintiffs' equal protection and due process rights because, simply stated, a mother and father are not similarly situated since the mother's parental status "is verifiable from the birth itself" whereas "there is no such obvious or compelling proof of a father's status" (see Grant supra at 107 quoting Tuan Anh Nguyen supra at 62).

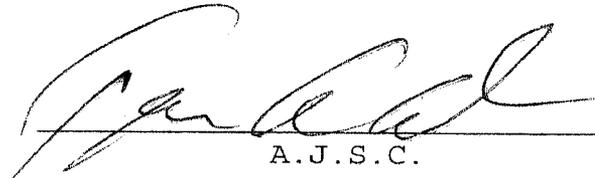
As the plaintiffs correctly note, neither Grant nor Tuan Anh Nguyen involved surrogate births. As a result, other courts in comparable circumstances have held that those state's statutes did, in fact, contravene their plaintiff's equal protection rights (see e.g., J.R., M.R. and W.K.J. v Utah, 261 F.Supp.2d 1268 [which found, inter alia, the requirement that surrogate mothers resort to the adoption process to be an undue burden in violation of their fundamental right to procreate] and Soos v Superior Court, 182 Ariz. 470 [which declared that in the surrogacy context "[t]he biological mother can prove maternity only through her genetic or biological link ... since the surrogate statute does not recognize the biological mother as the 'legal mother', she has no opportunity to develop a parent-child relationship. She must rely on her biology to protect her fundamental liberties"].

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). The facts as alleged in the complaint are accepted as true, the plaintiffs are accorded the benefit of every possible favorable inference and the Court need only determine whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83,88). However, even applying that liberal standard of review, the plaintiffs' amended pleading is fundamentally flawed. In the event the Legislature has failed to adequately contemplate

surrogate births, "the failure of Family Court Act article 5 to provide a vehicle for resolving the type of controversy involved here is to be redressed [by it] - which `created' and `wholly control[s]' paternity proceedings (Hough v Light, 275 App.Div. 299,300 [1949] - and not the courts (cf. Langan v St. Vincent's Hospital of N.Y., 25 AD3d 90,92,95 [2005])" (H.M v E.T. supra at 129). Moreover, an alternate remedy exists in the form of an expedited adoption which, notably, was capable of being completed far more expeditiously than this action.

Accordingly, that branch of the defendant's motion, pursuant to CPLR 3211[a][7], seeking to dismiss the plaintiffs' amended complaint due to its failure to state a cause of action is granted.

Dated: JAN 15 2010


A.J.S.C.
X X X

ENTERED
JAN 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE