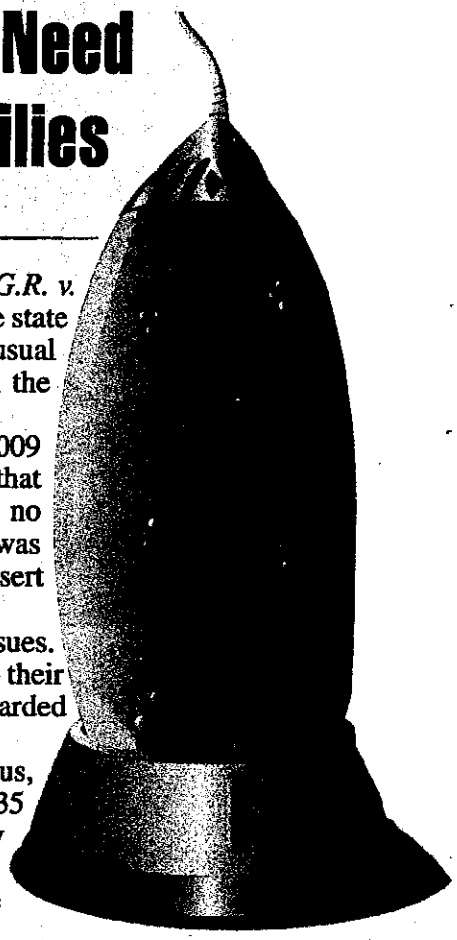
Unfortunate Saga Underscores Need To Recognize Three-Parent Families

By William S. Singer



The *New Jersey Law Journal* heralded the Dec. 13 decision in *A.G.R. v. D.R.H. & S.H.* as a "watershed case" that advanced the law in the state on surrogate reproduction and the rights of gay parents. The unusual facts in the case drew national media attention and commentary in the blogosphere.

The ruling represents the second step in a process started in 2009 when Hudson County Superior Court Judge Francis Schultz ruled that a gestational carrier is the legal mother of twins although she has no genetic link with them. Schultz found that the gestational contract was unenforceable and that the gestational carrier had a legal right to assert her maternity.

That decision left the parents to resolve custody and visitation issues. After a lengthy trial, Schultz gave sole legal custody of the children to their genetic father, S.H., who is married to his male partner. Schultz awarded the gestational carrier limited visitation rights.

Although the fight over custody and visitation was contentious, there is nothing revolutionary in the judge's decision. For more than 35 years, New Jersey courts have been deciding cases involving custody and visitation without regard to sexual orientation. Yet, while the victory by S.H. was not exceptional, other aspects of the case are more remarkable and worth considering before the headlines fade.

The facts in this case demonstrate why the practical choice of a gestational carrier is so crucial.

The facts in this case demonstrate why the practical choice of a gestational carrier is so crucial. In preparing to create their family, the biological father S.H. and his spouse A.D.R., the intended father, ignored all of the generally recognized guidelines in picking a gestational carrier. Responsible agencies and skilled attorneys know that there is a greater likelihood of a successful gestational surrogacy arrangement if the carrier:

- has already had one full-term pregnancy resulting in a live birth;
- is married or in a stable relationship and has a supportive environment;
- is under 40 years old; and
- shares the intended parents' values and understands their goals.

In this matter, A.G.R., the sister of D.R.H., was not married or in a stable rela-

---

Singer is with Singer & Fedun in Belle Mead, where he represents nontraditional families.

tionship, had never had a child and was older than 40. To accommodate her brother's desire to create a family, she agreed to uproot herself from Texas, where she had lived all her life, to migrate to New Jersey, where she lacked a support system. The court's opinion makes it obvious that A.G.R. was both emotionally vulnerable and physically overwhelmed at the time of the pregnancy. If the two men had made a more considered choice of a gestational surrogate, the distress of the parties and their offspring could have been avoided.

Equally troubling are some of the assumptions expressed by Schultz in his opinion. While the factually detailed decision shows that the judge gave careful, painstaking consideration to the testimony and that he recognizes the difficulty of deciding child custody cases and acknowledged the need for delicacy, discretion and sensitivity, some of his assumptions are disconcerting.

The court found that the twins are "special needs children" because they are biracial, have a gay parent and "were uniquely conceived through in vitro fertilization." While recognizing that the twins have no physical or learning disability, he held that "they are indeed special needs children," a finding that should not go unchallenged. Having a gay parent hardly qualifies a child as having special needs, as no creditable study has shown that children born to gay or lesbian parents are at a disadvantage and certainly does not put them in the category of having "special needs."

Further, there is no support for the court's claim that these children suffer some disability because they were conceived in vitro. The twins' conception is hardly unique; hundreds of thousands of children have been conceived through assisted reproductive technology in the past 30 years. It would be unfortunate if this opinion is remembered for stigmatizing children with a gay parent or born through the use of assisted-reproductive techniques.

There is one possible avenue the three adults could follow that would actually make this case a watershed event. Right now, A.G.R., the gestational carrier mother, and S.H., the biological father, are the twins' two legal parents. D.R.H, S.H.'s same-sex spouse, who was labeled as the intended father in the parties' original agreement, has been left without any legally defined role. Yet, the twins live with him and S.H.

Since the late 1980s, courts in several states, as well as in Canada and Australia, have recognized that children in these situations are at risk. If all of the adults who are acting as parental figures do not have legally protection of their parental rights, the children could lose that connection. To protect children in these circumstances, courts have recognized the concept of three-parent legal families.

If these parties really want to make New Jersey legal history and provide a proper resolution to this unfortunate saga, they should jointly ask a court to recognize the parentage rights of D.R.H. ■