

Children's Law Center of Indiana



Paternity

12/27/10

In ***In Re Paternity of M.F.***, 938 N.E.2d 1256 (Ind. Ct. App. 2010) (Crone, J. concurring in part and dissenting in part), the Court affirmed the trial court's denial of Mother's petition to establish Father's paternity of the older child. The Court reversed the trial court's holding that a valid, enforceable contract existed which prohibited Mother's petition to establish Father's paternity of the younger child and remanded with instructions to grant Mother's petition to establish Father's paternity of the younger child. In 1996, Mother and female Life Partner, with whom Mother was cohabitating in a committed, long-term relationship, arranged that Mother's friend, Father, would provide sperm to impregnate Mother so that Mother and Life Partner could have a child. After the older child was conceived, but a few weeks before the child's birth, the parties signed a Donor Agreement prepared by Mother's attorney. The Donor Agreement, consisting of six pages and twenty-four paragraphs, included: (1) a waiver and release by Mother in which she waived all rights to child support and financial assistance from Father; (2) Father's waiver of all rights to custody and visitation with the child and agreement that Mother shall have sole custody of the child; and (3) a mutual agreement to refrain from initiating, pressing, aiding, or proceeding upon an action to establish legal paternity of the child due to be born in September 1996. The younger child was born to Mother seven years later, in 2003. Mother's and Life Partner's relationship ended around 2008, when the children were approximately twelve and five years old, respectively. Mother filed for financial assistance, which led to the IV-D Prosecutor of Fayette County filing a Verified Petition for Establishment of Paternity on Mother's behalf on March 9, 2009. Father's response to the petition cited the Donor Agreement as the basis of his defenses. DNA testing established that Father was the biological father of both children. Following a hearing on November 13, 2009, the trial court denied the petition to establish paternity as to both children on contract grounds. Essentially, the court held that the contract is valid and does not contravene sound public policy; therefore, Mother is prohibited by contract from seeking to establish paternity in Father. Mother appealed.

The Court opined that Mother failed to prove that insemination with respect to the older child incurred in such a way as to render the Donor Agreement unenforceable and void as against public policy. The trial court did not error in denying Mother's petition to establish paternity for the older child. *Id.* at 1260-61. The Court observed that the parties concede that all of the contract elements, namely an offer, an acceptance, consideration, and a manifestation of mutual assent are present here. *Id.* at 1259. The Court opined that a contract of

this nature, i.e., one between a sperm donor and a recipient regarding conception of a child, presents a different question with respect to contractual viability. *Id.* The Court examined *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994), in which the Indiana Supreme Court noted that other jurisdictions which have addressed support issues arising from situations involving artificial fertilization have done so via the adoption of statutes based on the Uniform Parentage Act (UPA) and the Uniform Status of Children of Assisted Conception Act (USCACA). *M.F.* at 1259. In *Straub* the Supreme Court noted, “[t]he majority of states adopting [similar] legislation...hold that the donor of semen...provided to a licensed physician for use in the artificial fertilization of a woman, is treated under the law as if he...were not the natural parent of the child thereby conceived.” *Straub* at 600. *M.F.* at 1259. In *Straub*, the Court held that the agreement failed on several counts, including: (1) insemination was achieved via intercourse (“there is no such thing as ‘artificial insemination’ by intercourse”); (2) the agreement appeared as a “traditional attempt to forego this child’s right to support from [the donor]; and (3) the agreement contained “none of the formalities and protections which the legislatures and courts of other jurisdictions have thought necessary to address when enabling childless individuals to bear children.” *Straub* at 601. *M.F.* at 1259. The Court concluded that *Straub* may be fairly read as endorsing the view that sperm donor contracts may be valid if they conform with the requirements of the Uniform Acts. *M.F.* at 1259. The Court looked to *Jhordan v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986), which set out the requirements of California legislation modeled after the UPA. The California Court in *Jhordan* determined that the agreement was not valid because the parties did not involve the services of a licensed physician as provided in the California statute. *M.F.* at 1259. The Court in *M.F.* found that the manner of conception was relevant to the viability of the Donor Agreement. *Id.* at 1260. The Court opined that, per *Straub*, if insemination occurred via intercourse, the Donor Agreement would be unenforceable as against public policy. *M.F.* at 1260. Mother contended that Father failed to prove that insemination did not occur via intercourse. Father contended that Mother failed to prove that insemination occurred via intercourse, thereby rendering the Donor Agreement void and unenforceable. The Court concluded that, because Mother sought to avoid the contract, the case is governed by the rule that a party who seeks to avoid a contract bears the burden of proof on matters of avoidance. *Id.* at 1260. The Court opined that Mother bore the burden of proving the manner of insemination rendered the Donor Agreement unenforceable, but there was no indication in the appellate materials or the hearing of the manner in which Mother was inseminated with the first pregnancy. *Id.*

The Court held that: (1) a physician must be involved in the process of artificial insemination, and the semen must first be provided to the physician; and (2) a written instrument memorializing the arrangement must be sufficiently thorough and formalized.

Id. at 1260, n.1. The Court opined that the requirement that the semen first be provided to a physician obviates the possibility of last-minute decisions. *Id.* at 1261. The Court also said that the written instrument “must reflect the parties’ careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import.” *Id.* The Court noted the following concerning the Donor Agreement: (1) it was prepared by an attorney; (2) it acknowledged rights and obligations, waiver, mutual consent not to sue, a consent to adopt, a

hold-harmless clause, mediation and arbitration, penalties for failure to comply, amending the agreement, severability, a four-corners clause, and a choice-of-laws provision; and (3) it contained a legal construction provision in which each party acknowledged and understood that legal questions may be raised which have not been settled by statute or prior court decisions and that certain provisions may not be enforced by a court. Id. at 1261-62. The Court stopped short of endorsing the Donor Agreement as setting a minimum threshold with respect to content and form. Id. at 1262. The Court added that, due to the lack of statutory law and the paucity of decisional law in this area, parties who execute a less formal and thorough agreement than this one do so at their own peril. Id.

The Court concluded that the Donor Agreement could not be construed to apply to further children conceived as a result of artificial insemination involving Mother and Father; therefore, the trial court erred in denying Mother's petition to establish Father's paternity of the younger child. Id. at 1263. The Court found numerous manifestations of intent throughout the Donor Agreement that applied only to the older child. Id. The Court concluded that the Donor Agreement, which specifically and only applied to the child due to be born on September 19, 1996 (the older child), could not be construed to apply to future children conceived as a result of artificial insemination involving Mother and Father. Id. The Court opined that the trial court erred in holding that a valid, enforceable contract existed prohibiting an action to establish paternity of the younger child in Father. Id. In view of the fact that DNA testing established, and Father concedes, that he is the biological father of the younger child, the Court remanded the case, instructing the trial court to grant Mother's petition to establish the younger child's paternity. Id.

The Court noted that although Father invoked the Donor Agreement and prevailed on that basis as to the older child, Father did not prevail in his argument that the Donor Agreement prevented paternity proceedings for the younger child. Father, therefore, was not entitled to attorney fees under the Donor Agreement. Id. at 1263-64.