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*Traditional surrogacy agreements are not required to be in writing ...*

**In affirmance, the Third District held trial court did not err by finding surrogate, who was also the egg donor, was not a presumed parent of child, where surrogate and intended father entered into an oral surrogacy agreement in which surrogate agreed she would not be a legal parent to child**

***Miles v. Gerstein***

**(March 28, 2025, modified April 11, 2025)**

**California Court of Appeal 3 Civ C099438, 110 Cal.App.5th 88, 331 Cal.Rptr.3d 492, 2025 FA 2176, per Hull (Mauro, J., and Boulware Eurie, J., concurring). Sacramento County: Awoniyi, J., affirmed. For Sarah Miles (Appellant): Stephanie J. Finelli. For Jeffrey Gerstein (Respondent): Robert R. Walmsley, Marlea Frances Jarrette, and Shelley R. O'Brien. CFLP § G.166.5.**

Jeffrey Gerstein and Sarah Miles were neighbors who entered into a surrogacy agreement in which Sarah agreed to be surrogate for Jeffrey. Despite some initial reluctance, Jeffrey agreed to Sarah using her ova, instead of a separate ova donor. In November 2012, the parties reached a final agreement that provided Jeffrey would be the sole parent, Sarah would not be recognized as or assume the role of the child's mother, and Jeffrey would pay for all pregnancy-related expenses up to six months post-delivery as well as pay for a European vacation for Sarah. According to Jeffrey, the parties' agreement provided the child would call Sarah by her first name, instead of "Mom." Jeffrey further stated that the parties did not make a specific agreement regarding what contact Sarah would have with the child.

In December 2013, Sarah gave birth to E. According to Jeffrey, he agreed for Sarah to be identified as E.'s mother on the birth certificate at Sarah's request in order to prevent the line for "mother" being left blank. Jeffrey and E. stayed at Sarah's home for five days after E.'s birth. Thereafter, E. never spent the night at Sarah's home. For the next seven years, Jeffrey alone made all of the decisions relating to E. and assumed all financial responsibility for her. For example, Jeffrey alone selected doctors and dentists for E., made medical appointments for her, enrolled E. in schools, and arranged for E.'s extracurricular activities. Sarah would occasionally babysit E. and would occasionally spend time with E. at special events. E., however, never called Sarah "Mom."

**The parties' relationship deteriorates ...**

The parties' relationship deteriorated during the COVID pandemic. Beginning in 2020, Jeffrey started to restrict his interactions with everyone who was not immediate family. This resulted in Sarah visiting E. less, which in turn caused Sarah to claim that Jeffrey was not honoring their agreement. In May 2021, Sarah sent emails to Jeffrey stating that her relationship with E. was part of their agreement and was not optional. In response, Jeffrey stated that Sarah was not E.'s mother. Sarah disagreed, insisted that she was E.'s mother, and said that Jeffrey could not refer to her as a surrogate. Sarah then filed a petition to determine her parental relationship with E. Sarah also asked for joint legal and physical custody of E. Jeffrey filed an opposition.

After a trial that occurred during March 2023 and April 2023, the trial court (Sacramento County's Awoniyi) concluded the evidence did not support a finding that Sarah was the presumed parent of E. under [Fam C § 7611](#) [setting forth conditions giving rise to parentage presumption]. The trial court also found that it would not be in E.'s best interest for Sarah to enter E.'s life in the role of a parent. In support of its ruling, the trial court found that the parties entered into an oral traditional surrogacy agreement. The trial court further found that “conduct of the parties after [E.'s] birth and for the better part of seven to eight years supports the conclusion that an agreement existed, despite the fact it was never memorialized in writing.” Sarah appealed, but the Third District affirmed.

The justices began their analysis by describing the applicable law relating to the formation of contracts. Per [CC § 1550](#), contracts require: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. Per [CC § 1622](#), contracts may be oral unless they are specially required by statute to be in writing.

On appeal, Sarah argued that surrogacy contracts cannot be oral and, therefore, the parties' agreement was not an enforceable contract under [CC § 1622](#). More specifically, Sarah argued that [Fam C § 7960](#) governs surrogacy agreements and requires all surrogacy agreements to be in writing. Sarah also argued that the agreement did not have a lawful object and, therefore, did not satisfy the requirements under [CC § 1550](#).

**Traditional surrogacy agreements are not required to be in writing ...**

After examining the statutory scheme for surrogacy agreements, the justices concluded that [Fam C § 7960](#) does not require that all surrogacy agreements must be in writing to be enforceable. Instead, the writing requirement contained in the definition of “surrogate” in [Fam C § 7960](#) applies only to gestational carrier agreements and not traditional surrogacy agreements. In reaching this conclusion, the justices observed that [Fam C § 7960](#) recognizes two surrogacy types. First, “[t]raditional surrogate” refers to “a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents.” And second, “[g]estational carrier,” refers to

“a woman who is not an intended parent and who agrees to gestate a genetically unrelated embryo pursuant to an assisted reproduction agreement.” The justices further observed that Fam C § 7960’s definitions apply “[f]or purposes of this part,” which refers to Part 7 of Division 12 of the Family Code. Part 7 sets forth requirements for agreements for *gestational carriers*. As such, the justices explained that to extend the writing requirement contained in the definition of “surrogate” to all surrogacy agreements, would treat the phrase “for the purposes of this part” as surplusage. The justices found further support for their interpretation in the title to Part 7, noting that, in 2012, when Part 7 was amended to add the definition of surrogate, its heading was entitled “SURROGACY FACILITATORS AND ASSISTED REPRODUCTION AGREEMENTS FOR *GESTATIONAL CARRIERS*.” Finally, the justices agreed with the trial court that, “The Legislative framework does not sufficiently cover agreements pertaining to traditional surrogacy. [An] examination of the legislative intent pertaining to surrogacy agreements reveals only that the Legislature was concerned with gestational surrogacy agreements and their contents[.]” For these reasons, the justices concluded that traditional surrogacy agreements are not required to be in writing.

In reaching their conclusion, the justices rejected Sarah’s argument that if an oral agreement could suffice to form an enforceable surrogacy agreement, the Legislature would have expressly stated so. The justices observed that the statutes that Sarah relies on for this proposition “do not say that all oral agreements regarding assisted reproduction that the Legislature has not yet addressed are unenforceable, no matter how compelling the evidence that the agreement exists and was executed by the parties.” The justices also emphasized that [CC § 1622](#) provides, “[a]ll contracts may be oral, except such as are specially required by statute to be in writing.”

The justices next concluded that the surrogacy agreement did not lack a lawful object. In reaching this conclusion, the justices rejected Sarah’s argument that she is conclusively E.’s mother under [Fam C § 7610](#) [parent child relationship may be established by proof of having given birth to the child]. As noted by the justices, the statute says parentage *may* (not *shall*) be established by proof of having given birth.

The justices then concluded that public policy supports their conclusion that traditional surrogacy agreements are not required to be in writing. For example, as one legal commentator observed, “[h]onoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly with positive outcomes for parents and children alike.” After acknowledging the benefits of two-parent families (e.g., formation of such families minimizes the likelihood for the need for public support), the justices noted that “here there is no current threat that the public will need to support E.” The justices added that “California law has increasingly recognized the ability of persons to establish single parent households.”

Finally, the justices concluded the trial court’s ruling did not violate constitutional principles. First, the ruling did not violate Sarah’s fundamental right to parent, since Sarah never assumed the role

of a parent in E.'s life. For example, Sarah never financially supported E., made any decisions relating to E., or provided any overnight care for E. Moreover, several witnesses testified that Sarah disclaimed interest in parenting E. Second, Sarah's substantive and procedural due process rights were not violated, as amici curiae argued, by terminating her parental rights based on a "mere alleged oral agreement." The justices noted that not only did Sarah not assume the role of a parent to E., but the trial court did not make its decision based on a "mere alleged oral agreement." Instead, Sarah had ample opportunity to cross-examine witnesses and to present her own evidence of the terms of the agreement. And third, this oral surrogacy agreement did not violate equal protection principles by imposing "irrationally" greater requirements to create an enforceable gestational surrogacy agreement than a traditional one. On this point, the justices noted that [Fam C § 7962](#) [setting forth requirements for an assisted reproduction agreement for gestational carriers] does not provide the requirements for *all* gestational surrogacy agreements, only those pre-birth agreements that are deemed presumptively valid.

Accordingly, the Third District affirmed the trial court's judgment.

### COMMENT ...

Although the Third District held that an oral traditional surrogacy agreement is enforceable, this case highlights the need for a written agreement in all surrogacy cases. These agreements should clearly outline the parties' rights, responsibilities, and expectations. In his appellate brief, Jeffrey noted that he contemplated having a written agreement prepared, but he decided against it "because he trusted and relied on [Sarah's] representations." He added that he did not want to turn the surrogacy into a business transaction. Unfortunately, this opened the door to conflicting testimony about the role of Sarah in E.'s life. For Sarah's part, she argued the parties made an informal agreement that created a "non-traditional relationship." Of course, Sarah would later argue that surrogacy agreements must be in writing to be enforceable, a position the panel ultimately rejected.

### Library References

1 Witkin, Summary of Cal. Law (11th ed. 2024) Contracts § 640

Hogoboom & King, [Cal. Practice Guide: Family Law \(The Rutter Group\)](#), ¶ 7:450.1

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