
OPINION NO. 83-001

Syllabus:

In executing its enforcement responsibilities under R.C. 5103.17, the Department of Public Welfare may reasonably conclude that a person or organization not licensed by the Department as a child-placing agency pursuant to R.C. 5103.03 is prohibited by R.C. 5103.17 from engaging in any of the following activities:

1. the solicitation of women to become artificially inseminated with the sperm of men who remain anonymous to them, for the purpose of the women bearing children and surrendering possession of the children and all parental rights to such men and their spouses;
2. the negotiation, for a fee, of a contract between such men and women for the purpose of the women bearing children and surrendering possession of the children and all parental rights to such men and their spouses; and
3. the arrangement for payment of the women involved in these transactions.

To: Kenneth B. Creasy, Director, Department of Public Welfare, Columbus, Ohio
By: William J. Brown, Attorney General, January 3, 1983

I have before me your request for my opinion concerning "whether a person or group, not licensed by this department as a private child-placing agency, is in violation of R.C. Section 5103.17 if the person or group engages in activities which might be characterized as brokering for the services of 'surrogate' mothers." In your letter of request you state that an organization has been established in Ohio by an Ohio resident which engages in one or more of the following activities:

[1] solicits women to become artificially inseminated with the sperm of men who remain anonymous to them, [2] for a fee negotiates a contract between such men and women for the purpose of the women bearing children and surrendering possession and all parental rights to such men and their spouses, [3] arranges for payment of the women involved in these transactions.

You wish to know whether any of the above-described activities would bring the unlicensed broker organization and persons performing these activities on the organization's behalf within the proscription of R.C. 5103.17.¹

R.C. 5103.17 reads:

No persons, organizations, hospitals, or associations which have not been approved and certified by the division of social administration for the placement of children for adoptions or in foster homes shall advertise that they will adopt children or place

¹See R.C. 2901.23 and R.C. 2901.24 which deal with criminal liability of organizations and their officers, agents, or employees.

them in foster homes, hold out inducements to parents to part with their offspring, or in any manner knowingly become a party to the separation of a child from its parents or guardians, except through a juvenile court commitment.

The division of social administration shall enforce this section and sections 5103.15, 5103.16, and 2151.39 of the Revised Code. (Emphasis added.)

(The approval and certification required by this section are provided for in R.C. 5103.03.) R.C. 5103.17 is a criminal statute, the violation of which may lead to a fine of not less than five hundred nor more than one thousand dollars or imprisonment for not more than six months, or both. R.C. 5103.99(B).

Of course, I cannot render a verdict as to the criminal guilt or innocence of a particular person or organization. Only a court of law may make such a decision. I can only express my opinion as to whether a given set of facts, if proven in court, could constitute the violation of a criminal statute. My opinion is rendered only for the purpose of the Department of Public Welfare's consideration in determining whether it should take further action in enforcing R.C. 5103.17.

In analyzing your questions I bear in mind the statutory, as well as the common law, requirement that criminal statutes must be strictly construed against the state and liberally construed in favor of an accused. R.C. 2901.04(A). See City of Washington Court House v. McStowe, 45 Ohio St. 2d 228, 343 N.E.2d 109 (1976); State ex rel. Moore Oil Company v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919). However, I am also aware of the judicial admonition that while criminal statutes must be strictly construed against the state, they must not be so construed in disregard of or so as to destroy the plain and ordinary meaning of their terms. Harrison v. State, 112 Ohio St. 429, 147 N.E. 650 (1925), aff'd, 270 U.S. 632 (1926).

With these general principles in mind, I turn now to an examination of the applicability of R.C. 5103.17 to the activities of the surrogate parent organization and those persons acting on its behalf. The first activity mentioned in your letter is the solicitation of women to become artificially inseminated with the sperm of men who remain anonymous to them. I understand from the surrogate association's attorneys that the association is engaged in activities which bring "the surrogate mother's and natural father's legal representatives together to pursue their clients' respective interests." Even if this is the full extent to which the association participates in the transaction, it appears such actions might be considered by the Department as violations of the prohibition found in R.C. 5103.17 against any person or organization "knowingly becom[ing] a party to the separation of a child from its parents." In construing a statute, "the plural includes the singular." R.C. 1.43(A). Thus R.C. 5103.17 may be read to prohibit a person or group from being a party to the separation of a child from one parent. Even though the association is merely involved in bringing the representatives of the surrogate mother and natural father together, the association and its representatives are aware of the purpose of such meeting, and receive compensation for their services, the purpose of which is the eventual surrender of a child by its mother.² It is the purpose or function of the association to serve as an intermediary between the natural father and mother so that the child's parents may accomplish the mother's surrender of the child to the father yet remain anonymous to one another. Thus, I conclude that the Department of Public Welfare, in executing its enforcement responsibilities under

²I presume that it is within the parties' contemplation that the natural mother will surrender custody of the child to the natural father and his wife, and consent to the adoption of the child by the natural father's wife, thereby relinquishing all of her parental rights to the child. See R.C. 3107.03(D)(1); R.C. 3107.06; R.C. 3107.15. See also R.C. 3107.14(D) (court may dismiss adoption petition if it finds child was placed in violation of law or if the adoption is not in the best interests of the child); R.C. 2151.03(E) (a child whose parents place or attempt to place the child in violation of R.C. 5103.16 or R.C. 5103.17 may be deemed "neglected").

R.C. 5103.17, may reasonably determine that an association and its representatives which engage in bringing together the legal representatives of the natural father and natural mother with the purpose of the mother giving her child to the father and his wife may be engaged in activity prohibited by R.C. 5103.17 by "knowingly becom[ing] a party to the separation of a child from its parents."

The question arises, however, whether an exception to the language of R.C. 5103.17 should be implied in the case where an association is a party to the separation of a child from one parent with the intent that the child is to be given to the other parent,³ rather than to a legal stranger. Assuming arguendo that the natural father may directly work out an arrangement with the natural mother for the relinquishment of the child to him and his wife, see R.C. 3107.10(E) (accounting requirements and payment limitations in adoption proceedings inapplicable to stepparent adoption); see also R.C. 3107.13 (in stepparent adoption, child must live in home at least six months before a final decree of adoption is issued or an interlocutory order of adoption becomes final); R.C. 5103.16 (placement requirements in adoption proceedings inapplicable to stepparent adoptions), I find nothing which would indicate that an implied exception to the plain language of R.C. 5103.17 may be found for a third person who acts to accomplish the separation of a child from the child's mother, even though such child would be surrendered to the natural father. R.C. 5103.17 absolutely prohibits a person or group from acting to separate a child from the child's parent, without reference to the person to whom the child will be given.

The other activities mentioned in your request are: the negotiation, for a fee, of a contract between a man and woman, for the purpose of the woman becoming artificially inseminated with the man's sperm, bearing a child, and surrendering possession and all parental rights to the man and his wife; and the arrangement for payment of the woman involved in this transaction.⁴ Again, I find that these activities appear to come within the plain language of R.C. 5103.17 prohibiting any person or organization from "hold[ing] out inducements to parents to part with their offspring, or in any manner knowingly becom[ing] a party to the separation of a child from its parents." Again, I can find nothing to indicate that there is an implied exception to R.C. 5103.17 for third party individuals or associations who are acting to accomplish the separation of a child from the child's natural mother in order to place the child with its natural father.

I wish to reiterate at this point that in rendering the above conclusions, I am expressing no opinion as to the criminal guilt or innocence of a particular group or individual. The preceding discussion is provided merely as a legal analysis of the

³ I assume for purposes of this discussion that there is no dispute as to parentage. See R.C. Chapter 3111.

⁴ I understand that there may be a factual dispute between the Department and the association's attorneys as to whether the association is actually engaged in these activities. However, since I am making no conclusions as to the association's criminal liability, but am only analyzing the applicability of R.C. 5103.17 to various sets of circumstances, I need not determine whether the association is actually engaged in these activities.

questions presented for the consideration of the Department of Public Welfare in determining the extent of its enforcement responsibilities under R.C. 5103.17.⁵

In conclusion, it is my opinion, and you are advised, that in executing its enforcement responsibilities under R.C. 5103.17, the Department of Public Welfare may reasonably conclude that a person or organization not licensed by the Department as a child-placing agency pursuant to R.C. 5103.03 is prohibited by R.C. 5103.17 from engaging in any of the following activities:

1. the solicitation of women to become artificially inseminated with the sperm of men who remain anonymous to them, for the purpose of the women bearing children and surrendering possession of the children and all parental rights to such men and their spouses;
2. the negotiation, for a fee, of a contract between such men and women for the purpose of the women bearing children and surrendering possession of the children and all parental rights to such men and their spouses; and
3. the arrangement for payment of the women involved in these transactions.

⁵I note that, according to the terms of R.C. 5103.17, the prohibitions set forth therein do not apply to persons, organizations, hospitals, or associations which have been approved and certified by the Division of Social Administration of the Department of Public Welfare for the placement of children for adoptions or in foster homes. R.C. 5103.03, which governs such certification and approval, provides that the Department of Public Welfare "shall annually pass upon the fitness of every benevolent or correctional institution, corporation, and association, public or private, that . . . places children in private homes," and requires annual reporting to the Department by such entities. See 7 Ohio Admin. Code Chapters 5101:2-3 through 5101:2-11 (containing provisions governing certification). Even as the Department may reasonably conclude that the activities which you have described constitute violations of R.C. 5103.17, it appears that the Department may reasonably conclude that they constitute the placing of children in private homes, and, thus, that an association which carries out such activities is eligible for certification pursuant to R.C. 5103.03. See, e.g., 7 Ohio Admin. Code 5101:2-3-01(B) (" '[a]gency' means an organization which places children in homes apart from their parents or legal guardians"). Of course, to be certified, an association must meet applicable requirements, see 7 Ohio Admin. Code Chapter 5101:2-5 (Child Care Agencies), and there may be some question whether the activities you have described come within existing provisions. See, e.g., 7 Ohio Admin. Code 5101:2-5-01(E)(2)(a) ("No agency shall accept a surrender from a parent unless it has first offered casework services to: (i) Safeguard the child against unnecessary separation from his parents. . ."), 5101:2-5-01(E)(2)(b) ("No agency shall accept a surrender. . .that is made before the child is born"), 5101:2-5-01(E)(3) ("Coercion prohibited: No agency shall secure or attempt to secure the surrender of a child by its parents through threats, intimidation, or offers of gain or reward"), 5101:2-5-01(E)(7) ("Study of child: Each agency shall complete a study of a child before he is placed for adoption. The study shall include: (a) A complete physical examination of the child").