THE *BABY M* DECISION: FACTS AND FICTIONS, BEFORE AND BEYOND

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Melissa Stern was conceived through the love of her parents, William and Elizabeth Stern, as surely as any other married couple has ever had a child. She deserves the secure and loving home that they so intensely desire to provide and the unfettered opportunity to grow and discover the wonder of life for which she was conceived. This is her birth right. Mary Beth Whitehead has done everything within her power to deny that right and to replace its promise with a legacy of emotional turmoil, bitterness, instability and uncertainty.

At the time of this writing, I have been engaged in the practice of surrogate parenting for twelve years. Through my offices there have been 203 surrogate births arranged: currently, there are another 47 pregnancies, and over 150 surrogates attempting to achieve a pregnancy. Of all these surrogate parenting arrangements there are three instances where the surrogate and couple have become involved in litigation over custody and the enforcement of their agreement. While statistics alone cannot serve as an adequate measure of "success" or "failure" in this most personal of human endeavors, the growth and statistical success of surrogate parenting arrangements is certainly a powerful indicia of their viability, the participants' good faith, and the integrity of the private, self-regulated programs that have facilitated those arrangements.

Thus, although the tragedy and importance of the *Baby M* case should not, indeed cannot be treated lightly, it should not and must not be considered without reference to the overwhelmingly positive results that have been achieved. In its recent decision, the Supreme Court of New Jersey gave scant recognition to that success when stating that in "many cases" surrogacy "may" bring satisfaction to both the infertile couple and the surrogate mother.[1] The fact is, it has and does give great satisfaction to all concerned in virtually every case.

The court concluded that "[w]ith surrogacy, the 'problem,' if one views it as such, consisting of the purchase of a woman's pro-

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[1] *In re* Baby M, 109 N.J. 396, 442, 537 A.2d 1227, 1250 (1988).

creative capacity, at the risk of her life, is caused by and originates with the offer of money,"[2] and that "[w]hatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction."[3] Having thus identified and defined "the problem," the court quickly found that all issues could be and are in fact resolved under existing adoption and parental rights legislation rendering the agreement void and throwing the whole matter of surrogacy safely back into the lap of the legislature. While it must be the goal of participants, practitioners, the judiciary and legislators to avoid recurrence of the protracted and heart-wrenching litigation that the *Baby M* case has entailed, the approach adopted by the court is sadly inadequate, unduly rigid and, in many important respects displays a lack of perception and a degree of insensitivity.

Before examining the court's application of existing law, however, it is essential to consider what has given rise to surrogate parenting as a reproductive concept and what is necessary to make that concept a reality. Only then can one fairly assess whether the court has correctly identified and addressed the issues surrounding surrogacy.

First and foremost, surrogacy exists in concept because of an intense desire by married couples to have children. Second, one must consider that there are a multitude of married women who are unable to conceive and/or bear children. Whether their "infertility" is due to medically unreasonable risk to mother or child (as with Mrs. Stern), or to medical impossibility (as in the case of a hysterectomy or sterility), the result is the same. Although there may be some disagreement over the precise numbers of our married population that suffer infertility, there can be no dispute that the percentages are significant. Third, among the reasons for this concept's existence is either, or both, the childless couple's desire to have a child who is biologically related to at least one of them and the present status of the adoption alternative. Both the supreme court and the trial court in *Baby M* noted the dearth of available adoptees and the frustrations of waiting couples, as well as the Stern's understandable desire to biologically perpetuate a family from which Mr. Stern was the last survivor.

It is thus clear that the initial "problem" is not surrogacy,

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[2] *Id.* at 438, 537 A.2d at 1248.
[3] *Id.* at 439, 537 A.2d at 1249.

but the infertility or childlessness that surrogacy attempts to overcome. In addition, it may be observed that surrogacy, as most commonly practiced, has not depended upon the development of any new medical technology but rather on the well established medical procedure of artificial insemination.

Where an infertility problem exists with the husband, artificial insemination has long been recognized and statutorily sanctioned as a procreative alternative for childless couples by using donated or purchased semen.[4] Few would suggest that the male semen donor is selling a child, while most would concede that he is selling the biological means, and/or performing a necessary service for creating a child.

The concept of surrogacy has become a reality and the practice of surrogacy exists today because, where the infertility problem exists with the wife, there are women willing to conceive and bear a child for a childless couple through the use of the same medical process. As with artificial insemination by donor (AID), it is certainly a fair statement that the paid surrogate is likewise "selling" her procreative capacity and/or services. However, those who would claim that the surrogate is in fact selling a child face a dilemma from which they are not easily extricated. They must either concede that we allow, even encourage, the male semen donor to sell his child, or acknowledge that the surrogate does not sell hers.

Contrary to the tone of the court's opinion, the legal issues in both surrogacy and AID are identical. In both instances, the objective is to make use of a third party's procreative capacity in order for an infertile couple to have a child. The semen donor is no less the biological parent than is the surrogate. Parental rights, custody, support obligations and constitutional protections of the right to procreate and to parent-child companionship are matters present in both situations.

By use of legal fiction, AID legislation conclusively settles all legal questions *ab initio* by declaring that the husband is the "father." The semen donor's rights and obligations are extinguished as are the child's rights vis-a-vis its biological father. Rights and obligations are created between the intended "father" and the child by operation of law. All of this is accomplished without the necessity of any court approval or opportunity for review at any stage in the process. All of this is

[4] *See, e.g.*, N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1988).

accomplished without concern for the donor's assurance of a sound medical history or the "parents" assurance that they are suitable to have and raise a child. And, all of this is accomplished without any inquiry as to the child's best interests.

Nonetheless, whereas the surrogate's participation is unquestionably more involved, these same issues have led to far more intense scrutiny and public debate. Because the surrogate must literally live with her decision and see its result, there is a greater concern for examining the adequacy of procedural safeguards, for assuring informed and voluntary consent, and for the surrogate's emotional well-being.

Faced with these questions, the court expressed a viewpoint that a woman's "willingness" to be a surrogate mother is, at its crux, obtained by the offering of money, and that in the absence of such compensation surrogacy will be unlikely to survive on any significant scale. In the court's opinion it then followed that the offer of money holds within it a potential for economic exploitation and that through coercion of contract and threat of financial loss any consent to relinquish a child to its father and consent to adoption by his wife is rendered inherently suspect and likely involuntary.

The New Jersey Supreme Court did not concern itself with the male semen donor's "willingness" or the question of his voluntary consent to relinquish any rights with his child. The legislature has relieved it of that burden. Neither did the court care to appreciate the fundamental similarity of the donor's and the surrogate's actions. By ignoring that similarity, the court was able to concentrate on the distinctions alone and to reach its conclusion that the money paid to a surrogate mother was paid for her child and destroyed the voluntary nature of her actions.

In my experience, while any particular woman's willingness to be a surrogate mother may be prompted by a variety of personal reasons and motivations, the offer of money alone is not a sufficient inducement to conceive and bear a child for someone else. From the most practical standpoint, there are many easier and less complicated ways to earn money, and there is no immediate financial reward to the surrogate who receives her compensation only upon termination of the pregnancy (whether by birth, miscarriage, etc.) Indeed, potential surrogates invariably express a genuine sense of gratification and satisfaction with the idea of helping an infertile couple have a child.

This is not to say that monetary compensation does not play

a significant, even vital role in the continued practice of surrogacy. It can hardly come as a surprise that most women would, and should, expect to receive some form of monetary compensation for nine months of pregnancy and child birth no matter how altruistic they may be.

The supreme court opined that "merely because conduct purchased by money [is] 'voluntary' [does] not mean that it [is] good or beyond regulation and prohibition"[5] and that there are values "society deems more important than granting to wealth whatever it can buy, be it labor, love or life."[6] By the same token, merely because money is *one* of the incentives for conduct does not necessarily mean that it is any less than truly voluntary, nor does it necessarily mean that it is bad or subject to unreasonable regulation and/or prohibition. Further, while society holds many things more dear than wealth, there is no societal value in denying it the good it can achieve.

In the court's perception (or lack thereof), the "essential evil" of surrogacy is that it takes advantage of a woman's circumstances (*i.e.*, the need for money), in order to take away her child. In reality, the participants' decision-making process as to custody and parental rights is affected little, if at all, by economic position. Not only is the lengthy time between the surrogate's pre-insemination agreement and realization of a fee sufficient to destroy the notion that she is in dire economic straits, but she is the potential provider of a scarce and personally valued resource. When the surrogate takes advantage of the competent and able assistance of counsel available to her she is of equal if not greater "bargaining" power. Moreover, if indeed the surrogate has a genuine "change of heart" subsequent to becoming pregnant, there is no amount of money and no strength of contractual "coercion" that will deter her from taking every legal recourse to set aside or alter her agreement. Witness: Mary Beth Whitehead.

Simply put, monetary compensation is not one of the problems in surrogacy. *The* problem is assuring that the surrogate's decision to bear someone else's child is reached with a full understanding of the consequences, and balancing the interests of the parties in the event of a dispute. Well-informed decisions can be achieved through sound procedural guidelines including the ready availability and assistance of qualified legal and psychological counsel. Certainly, those services were available to Mrs.

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[5] *Baby M*, 109 N.J. at 440, 537 A.2d at 1249.

[6] *Id.* at 440-41, 537 A.2d at 1249.

Whitehead and the supreme court's criticism that they were, in its opinion, inadequate, fails to recognize the surrogate's own responsibility to make full use of them. Still further, it is difficult if not impossible to imagine that any surrogate will even consider, let alone embark upon such an undertaking without realizing the momentous nature of her decision and without deep personal introspection. With such procedural safeguards in place, the identification and balancing of the parties' interests is not so easily avoided by the forced application of existing statutes, nor does it present the irreconcilable conflicts that the court imagines.

Key to the court's application of existing adoption and parental rights legislation is its failure to appreciate the importance of the fact that in the absence of the agreement there would be no child, and that in surrogacy, there is a home with a biological parent in which they are desperately wanted. Adoption is purely statutory and did not exist at common law. It is a legislatively created vehicle resting on the basic underlying policy of finding a suitable, permanent home and the benefits of a parent-child relationship for children who would otherwise have none. Whether the lack of such a home arises out of the death of the child's parents or their inability or unwillingness to provide a suitable home, the common factor is that a child in being is in need. Adoption statutes are, therefore, essentially remedial in nature.

Whereas the concept and practice of surrogacy is too recent to have been considered by the legislature when it enacted laws concerning adoption and termination of parental rights, it "strains credulity" to suggest that they were intended to address it. Thus, while the court posited that the New Jersey Parentage Act's[7] AID provision constituted a statutory exception to the application of those laws and suggested a legislative preemption in defining legally cognizable parent-child relationships, it may be argued with equal force and effect that the legislature was instead giving recognition to the fact that the underlying purpose of those laws has no bearing on collaborative reproduction and that the remedies then available at law were ill-suited, inappropriate and/or inadequate. Moreover, the piecemeal approach of the legislature to matters involving parent-child relationships cannot seriously be construed as a preemption of the entire field nor as a bar to judicially created remedies when that field expands beyond what the legislature could ever have anticipated. For example, such well-established concepts as *parens patriae* and *in loco*

[7] N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1988).

parentis are not dependent upon, yet co-exist and interact with legislative pronouncements. Indeed, it is one of the hallmarks of American jurisprudence that an invigorated and flexible judiciary, armed with the powers of equity, is charged with overcoming the shortfalls of legislative remedies.

In support of its rigid application of existing laws to matters beyond their intended purview, the New Jersey Supreme Court attempted to demonstrate that surrogacy violates the public policies set forth in those statutes. The policies identified by the court are: children should remain with and be brought up by both natural parents to the extent possible; the rights of natural parents are equal concerning their child; a child's best interests shall determine custody and consent to adoption and termination of parental rights should occur only upon informed voluntary consent (*after birth*) for the former, and only upon a showing of unfitness for the latter.

To the extent that the legislature has expressed these policies, it has to an equal extent already acknowledged and mandated by the AID statute that the circumstances of conception can and do change them. Moreover, from the child's perspective, the distinction between a semen donor in AID as a "parent" and a surrogate as a "parent" is one without difference so long as from or shortly after the time of birth their care and nurturing is provided by the intended parents. It matters little to newborn infants who is keeping them warm and dry, who is feeding them, and who is holding and comforting them; it matters a great deal that these are done and that a certain, consistent, stable and loving relationship is formed. Indeed, if a common thread can be found throughout the legislature's actions, it is a policy of securing, to the extent possible, a suitable and certain future for all children whether that is achieved by terminating unsuitable circumstances or giving recognition to the fundamental societal value of enabling married couples to have and raise children, even if not wholly their "own," as their own, whether by adoption or collaborative reproduction.

Second, only to the court's basic failure to perceive the import of how and why conception occurs in surrogacy, is its lack of faith in a woman's ability to weigh the consequences (both positive and negative) in making a decision to bear someone else's child. That a change of heart is possible, even inevitable, in an extreme minority of cases cannot be denied for it has in fact occurred. Such changes of heart have also occurred for women

who give their children up for adoption outside of the surrogacy context no matter how thorough the counseling and other safeguarding procedures have been. Indeed, is not the unwed poor mother's consent to release her child for adoption in fact truly less "voluntary" and given with infinitely less opportunity for considering the consequences at a time when she is free of external pressures? And yet, no one has or ever will suggest that adoption should be banned or that there does not come a time when, in the child's best interests, a consent given cannot be revoked.

There is an unmistakable tenor in the court's opinion that women who choose to become surrogates are not only likely to be of a lower economic class, but somehow less sophisticated and less capable in their ability to make an informed and voluntary choice in matters so fundamental as procreation. It is this attitude that leads the court to posit that it is the biological father who attempts to "destroy" the surrogate's parental rights when in reality it is she who exercises her right to relinquish any interest in the child. The question is, therefore, not whether the court can or should act to terminate rights, but whether the court can and should give effect to the surrogate's own decision.

Viewed in this light, where the surrogate has had the opportunity to receive professional assistance and guidance prior to signing a pre-insemination agreement, the interests of the child, the biological father and his wife, clearly outweigh any interest in revoking her agreement except in the most unusual and unique circumstances. Unlike the adoption scenario, the surrogate has exercised her right of procreation specifically for the benefit of another; she chooses, prior to conception, to relinquish any rights directly to the child's other biological parent; through the inducement of her promise, the biological father exercises the right of procreation through the surrogate for the specific purpose of raising a child in his home, with his wife; both husband and wife invest not merely money, but years of emotions and commitments in the anticipated pregnancy and child; and, most importantly, there is for the child an undeniable interest in a stable, certain future. Unlike adoption, where the right of procreation is not at issue, surrogacy entails the intentional and constitutionally protected exercise of that right. Unlike adoption, leaving the door open for a surrogate to renounce her decision after she has become pregnant holds within it the prospect of adversely affecting four lives. Closing that door serves to fur-

ther assure that the potential surrogate takes even greater care to remove any doubts in her mind prior to pregnancy.

Statutes dealing with adoption and termination of parental rights simply do not contemplate and, therefore, cannot accommodate a balancing of the salient interests in surrogacy. The unreasonable prohibition of monetary compensation effectively denies both the couple and the surrogate the exercise of their constitutional right of procreation as they individually and collectively choose. Finally, the fact that on a rare occasion conflicts will occur is hardly sufficient cause to insist upon an atmosphere of uncertainty for the surrogate, couple and child by rendering her decision completely revocable. Such an approach serves only to sacrifice the enormous benefits that surrogacy has and can afford in favor of an irrational assumption that women are incapable of appreciating the consequences of their intended actions and making an informed decision.

Surrogate parenting existed long before the celebrated *Baby M* case and will continue to grow into the future. While state legislatures in Louisiana and Nebraska have, respectively, acted to curtail and prohibit enforceable surrogacy arrangements, those in Arkansas and Nevada have facilitated the availability of this reproductive alternative as would model legislation recently approved by the American Bar Association.

Looking beyond the court's decision it can only be hoped that in other public arenas reason will prevail over expedience, and that the facts of surrogacy's promise will prevail over the fictions of its "problems."