BABY M: A NON-CONTRACT CONTRACT CASE

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I INTRODUCTION

Surrogacy contracts for money are illegal and contrary to the public policy of the State of New Jersey. This is the conclusion reached by the New Jersey Supreme Court in the long awaited decision in *In re Baby M*.[1] The court found that the payment provision in the contract was illegal because it violated the New Jersey statute prohibiting the exchange of money for the adoption of a child,[2] and because it was inconsistent with the public

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[1] *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988). This is the most celebrated of the so-called surrogate contract cases.

William Stern and Mary Beth Whitehead, residents of New Jersey, entered into an agreement, with the aid of the Infertility Center of New York, so that Mrs. Whitehead would bear Mr. Stern's child. Mrs. Whitehead was to be artificially inseminated with Mr. Stern's sperm. She obligated herself to give Mr. Stern custody of the infant conceived through this arrangement. Mrs. Whitehead was to give up all parental claims to the infant, and, in return, she was to be paid a fee of $10,000. While Mrs. Whitehead's husband was a party to the contract, Mr. Stern's wife was not. It was the specific intent of the parties that Mrs. Stern would subsequently adopt the infant. Mrs. Whitehead changed her mind, however, and desired to keep custody of the infant. Contrary to the agreement, Mrs. Whitehead named the baby Sara Elizabeth, while Mr. Stern named her Melissa. *Id.* at 411-15, 537 A.2d at 1235-36.

While the court speaks of the arrangement as a "surrogacy contract" and refers to the mother as a surrogate mother, it stated that "the natural mother [is] inappropriately called the 'surrogate mother.' " *Id.* at 411, 537 A.2d at 1234.

[2] *See* N.J. STAT. ANN. § 9:3-54 (West Supp. 1988). This section provides:

a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith

(1) Pay, give or agree to give any money or valuable consideration, or assume or discharge any financial obligation; or

(2) Take, receive, accept or agree to accept any money or any valuable consideration.

b. The prohibition of subsection a. shall not apply to the fees or services of any approved agency in connection with a placement for adoption, nor shall such prohibition apply to the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child, or to the acceptance of such reimbursement by a parent of the child.

c. Any person, firm, partnership, corporation, association or agency violating this section shall be guilty of a high misdemeanor.

Id.

policy that custody be determined by the best interests of the child.[3]

The first step in the court's analysis was the determination that the contract was illegal based on its position that despite an attempt to disguise the nature of the transaction, the arrangement between the Whiteheads and Mr. Stern[4] was clearly one intended as "a private placement adoption for money."[5] In the court's view, the entire contract was simply a clever attempt to get around the adoption statutes.[6]

Language in the opinion appears to suggest that a surrogacy contract which is not for money would be permissible. Chief Justice Wilentz, writing for a unanimous court, concluded:

> We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.[7]

Beyond the statutory analysis, the court took a second step and concluded that the pre-birth determination of custody violates the

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[3] *Baby M*, 109 N.J. at 434, 537 A.2d at 1246.

[4] The court addressed the fact that Mrs. Stern was not a party to the contract:

> Although Mrs. Stern was not a party to the surrogacy agreement, the contract gave her sole custody of the child in the event of Mr. Stern's death. Mrs. Stern's status as a nonparty to the surrogate parenting agreement presumably was to avoid the application of the baby-selling statute to this arrangement.

Id. at 412, 537 A.2d at 1235 (citing N.J. STAT. ANN. § 9:3-54 (West Supp. 1988)). *See supra* note 2 for text of pertinent statute.

[5] *Baby M*, 109 N.J. at 425, 537 A.2d at 1241. The court's full statement was:

> Mr. Stern knew he was paying for the adoption of a child; Mrs. Whitehead knew she was accepting money so that a child might be adopted; the Infertility Center knew that it was being paid for assisting in the adoption of a child. The actions of all three worked to frustrate the goals of the statute. It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.

Id. at 424-25, 537 A.2d at 1241.

[6] As stated by the court:

> This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition of the payment of money in connection with adoptions exists here.

Id. at 437-38, 537 A.2d at 1248.

[7] *Id.* at 468-69, 537 A.2d at 1264.

public policy of the state. When a custody dispute arises, public policy requires it to be adjudicated on the basis of the child's best interests rather than the private contractual arrangement.

The question this comment addresses is whether the court's suggestion that a surrogacy contract without the exchange of money is not prohibited may survive its determination that public policy requires custody disputes to be decided by the best-interests-of-the-child standard. My analysis of the *Baby M* opinion suggests that the implementation of public policy regarding custody inescapably leads to the conclusion that all surrogacy arrangements are unenforceable, even if they do not involve the exchange of money.

The term "contract" is generally used to describe an agreement between parties which sets up mutual rights and obligations. The corresponding rights and obligations must be enforceable in order to find that a contract exists.[8] Unenforceable arrangements are not contracts, they are simply unenforceable agreements. If the surrogate mother is free to change her mind about granting custody of the child to the father, then the arrangement involves nothing more than a statement by her of her present intent to make a gift[9] in the future. Custody of the newborn is the gift to be made. Can the parties accomplish by gift what they may not arrange for via contract?

II TERMS OF THE GIFT

What conditions would the parties to a surrogacy arrangement wish to set down in order to give effect to their wishes? The conditions will be determined by their respective goals.

The father's goal is to obtain custody of the child. He will want to assure himself of the fact that the woman inseminated with his sperm is healthy and that she will continue to remain healthy during the course of her pregnancy. He will want to receive some assurances that the woman is sufficiently stable so that she will not change her mind about giving up the child.

The surrogate's goal is to perform a good deed. She introduces herself into the situation as someone who understands another's need to be a parent and wishes to share the gift of life

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[8] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Id.*

[9] The term "gift" is descriptive of the transfer involved. The donor transfers a right freely and without a legal obligation to do so. A gift is not effective until the transfer is actually made. *See* BLACK'S LAW DICTIONARY 619 (5th ed. 1979).

with others.[10] To achieve these goals, the parties will wish to reach a basic agreement that reflects their wishes.[11]

The father will want the surrogate to agree to the following:

1. The surrogate agrees to undergo a physical examination.
2. The surrogate agrees to a psychological examination.[12]
3. The surrogate agrees to be artificially inseminated.[13]
4. The surrogate agrees to be under the care of, and adhere to the instructions of an obstetrician.
5. The surrogate agrees that the child will be turned over to the father at birth, or shortly thereafter.[14]

To avoid violating the principles announced in *Baby M*, the agreement must also provide that:

1. The surrogate has the right to change her mind and decide not to surrender the child to the father.[15]
2. The surrogate volunteers to undertake the arrangement without any payment.

While the parties will wish to avoid the conclusion that their arrangement includes an exchange of money, there are several economic considerations. Who will pay for the various examinations? Who will pay for the insemination procedure? Who will pay for the health expenses during pregnancy and for the birth costs? Should the surrogate be paid for time lost from work or for childcare if she has other children at home? The agreement should be supervised by an attorney. Who will pay the attorney costs? Will payment of all or any of these costs by the father lead to the conclusion that consideration has been paid by the father in exchange for the child?[16] The

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[10] The New Jersey Supreme Court discussed the positive motives of a surrogate mother as well as the money factor. *Baby M*, 109 N.J. at 438-39, 537 A.2d at 1248-49. *See also id.* at 413, 537 A.2d at 1236. "Mrs. Whitehead's response apparently resulted from her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the 'gift of life') . . . ." *Id.*

[11] The Stern-Whitehead agreement will not be addressed directly since the court has declared that particular agreement to be invalid.

[12] The mental health of the surrogate is a critical concern. Chief Justice Wilentz makes it clear that an agreement that does not allow the mother the right to change her mind would not be valid. Consequently, the father will want to have the surrogate's stability tested to protect himself against her changing her mind.

[13] This particular provision could prove to be especially difficult since it might take several attempts to achieve a pregnancy.

[14] The parties will need to agree to comply with all of the relevant statutory provisions concerning termination of parental rights and adoption.

[15] *Baby M*, 109 N.J. at 468-69, 537 A.2d at 1264. For a discussion concerning the adoption phase of surrogacy arrangements, *see infra* note 28 and accompanying text.

[16] *See* N.J. STAT. ANN. § 9:3-54 (West Supp. 1988) (prohibiting the exchange of

courts or the legislature will need to give guidance for these questions, should there ever be a surrogate agreement that does not violate public policy.

The agreement must also deal with controversial issues such as the possibility of an abortion. This is necessary because it is possible to discover conditions for which one or more of the parties may wish an abortion.[17] Moreover, the parents may differ on the question of the morality or propriety of abortion.[18] What if the father dies prior to the birth? Who makes the decisions concerning life-threatening conditions? What, if any, is the role of the husband of the surrogate mother? What, if any, is the role of the wife of the genetic father? Who, at least in the situation of the *in vitro* fertilization of her egg with the father's sperm, is the mother of the child?[19]

Each of these questions present formidable obstacles, but none necessarily leads to the conclusion that an agreement may not be reached. While the task of answering these and other questions is awesome, the parties may nevertheless reach a satisfactory arrangement. However, the *Baby M* decision requires that the terms of the agreement must also withstand the scrutiny of the public policy analysis which is independent of the economic issues. These interesting questions may be moot if public policy forbids all surrogacy arrangements.

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money for an adoption). *See also supra* note 2 for text of statute. The cited language also seems to imply that the exchange of money is also prohibited for reimbursing costs unless it is done through an approved agency. While this issue may be worth pursuing, it is outside the scope of this comment.

[17] Amniocentesis makes possible the discovery of congenital defects. The possibility of such a finding is that the parties will specifically have to provide for it in the agreement.

[18] An interesting question arises concerning whether the parties may contract away the mother's right to choose to abort the fetus, as the law presently provides. The moral implications are beyond the scope of this comment. It is, however, difficult to imagine a court enforcing an agreement denying the mother the right to abort. Simultaneously, the implications for those whose religion forbids abortion are immense.

[19] There are several different possibilities regarding surrogacy:

1. Father's sperm; wife's egg; implantation in a third person who will be the host mother.
2. Father's sperm; third party's egg; wife is implanted with fetus after it is fertilized *in vitro*.
3. Woman is artificially inseminated with sperm from third party donor with the intent to raise the child as her husband's.

Each of these possibilities raises questions of custody as well as questions of maternity and paternity.

III PUBLIC POLICY

In addition to concluding that the Stern-Whitehead arrangement was in fact a case of baby buying, the court further held that:

> The surrogacy contract's invalidity . . . is further underlined when its goals and means are measured against New Jersey's public policy. The contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody.[20]

That public policy is an appropriate consideration in the area of contract law is not disputed.[21] The task is to delineate the relevant policy. Chief Justice Wilentz posited that this task is a simple one:

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[20] *Baby M*, 109 N.J. at 434, 537 A.2d at 1246.

[21] Professor Corbin states:

> There is still another source of "illegality," besides statute and judicial decisions. That source is the great common background of life from which come both legislation and common law. It is the prevailing practices of the community of people and their notions as to what makes for the general welfare. Bargains are judged by the folkways and mores of the time. A bargain may be illegal because it is contrary to "Public Policy" as that is understood by the judges and administrative officers.

6A A. CORBIN, CORBIN ON CONTRACTS § 1374, at 6 (1962). "Judicial refusal to enforce a promise because it violates some standard of public policy has early roots in the common law." C. KNAPP & N. CRYSTAL, PROBLEMS IN CONTRACT LAW 577 (2d ed. 1987).

This principal is carried forward into our modern law of contracts in section 178 of the Second Restatement of Contracts, which states:

> (1) A promise or other term of an agreement is unenforceable on the grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
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> (2) In weighing the interest in the enforcement of a term, account is taken of
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> (a) the parties justified expectation,
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> . . . .
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> (c) any special public interest in the enforcement of the particular term.
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> (3) In weighing a public policy against enforcement of a term, account is taken of
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> (a) the strength of that policy as manifested by legislation or judicial decisions,
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> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> (d) the directness of the connection between the misconduct and the term.

RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

"the child's best interests determine custody."[22] At what point is this determination to be made? Can the parties agree to that which they believe will be in the best interest of the child, or is it always a determination for the courts?

Public policy determinations need to be made at two points. First, we need to look at the determination of custody as between the father and the surrogate mother. Second, we need to look at the adoption of the baby by the wife of the father. In order to deal with the adoption, we must also look at the termination of the surrogate mother's parental rights.

A. Custody

An argument can be made that the parties themselves may be able to determine the issue of custody, especially when we consider that the arrangement is between someone who desperately wants a child and someone who merely wants, or is willing, to bear the child. Without indicating in any sense that the birth mother lacks the capacity or interest to warrant custody, the interest of the father and his wife may indicate strong capacity in caring for the child. This, however, does not consider the possibility that the birth mother may change her mind once the baby is born, and at that point she will have all the emotional stimulus needed to demonstrate similar capacity. When the birth mother wants custody, the fact that the father is desperate to have a biological[23] child does not make him more fit than the birth mother to have sole custody.

Any pre-birth determination of custody would have to take into account the overall circumstances of both the mother and the father (and probably his wife) at the time of the birth of their common offspring. A failure to consider the circumstances of the parties would mean that there is no way to determine what is in the best interests of the child, for the interests of the child are inextricably connected to what the parents are capable of providing.[24] At best, the agreement would have to be a good-faith pro-

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[22] *Baby M*, 109 N.J. at 453, 537 A.2d at 1256.

[23] The reason that an individual chooses the surrogacy route is based on the rejection of adoption as a viable alternative. In some cases it is because the procedures for adoption are cumbersome and lengthy. In others, it is because there is a deep desire to have a biological child by one or both spouses. In the *Baby M* decision we are told that the Sterns opted for surrogacy for the latter reason. *See Baby M*, 109 N.J. at 413, 537 A.2d at 1235.

[24] This is not to suggest that this is merely an economic decision; it is, rather, to be made on the basis of all of the circumstances.

jection over time of what the child's best interests would be.[25]

A cynic might be tempted to suggest that the father will endeavor to find a woman whom he feels might be genetically fit to be the surrogate mother of his child, but whom might not pass the best-interests-of-the-child test in the eyes of a court. This is especially true when we look at the court's determination that the attempt to terminate the parental rights of the mother, in order to allow the father's wife the opportunity to adopt the child, conflicts with New Jersey statutes that require a finding of unfitness or intentional abandonment.[26] Any attempt to contractually determine the best interests of the child cannot be in good faith since it does not take into consideration the possibility that the surrogate mother may change her mind.[27] Additionally, when we analyze the projections made, we must do so in connection with the actual conditions of the parties at the time that the determination concerning custody is made. Consequently, the most that the parties can hope for is the conclusion that the court agrees with their determination to the extent that a de novo review of their circumstances concurs with the agreement of the parties. That the agreement must be in good faith is merely a recognition of a duty which has become a part of our modern law.[28]

B. Adoption

The goal of the surrogacy arrangement is to have the father's

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[25] One might be tempted to conclude that this analysis is similar to that of a liquidated damages clause in a contract. Liquidated damage agreements are upheld when they are understood to be good faith projections of damages. The parties arrive at an agreed figure based on the difficulty of establishing the exact amount of damage caused by a future breach.

Section 356 of the Second Restatement of Contracts states:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981). The parties to a surrogate contract would be held to a similar standard. The projections that need to be made are difficult to calculate in terms that would satisfy the best interests standard.

[26] *Baby M*, 109 N.J. at 427, 537 A.2d at 1242 (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1988)).

[27] We need to keep in mind that the goal will always be to give custody to the father. To state this as a conclusion means that everything that is agreed to is geared to that end. How can an agreement which is geared to a specific goal be in the best interests of the child? It is the goal which serves as the impulse for the determination and not the child's best interests.

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); U.C.C. § 1-203 (1977).

wife adopt the child born to the surrogate mother. There cannot be an adoption by the father's wife without first terminating the parental rights of the surrogate mother. New Jersey law articulates a number of conditions that must be satisfied before parental rights are terminated: "In order to terminate parental rights under the private placement adoption statute, there must be a finding of 'intentional abandonment or a very substantial neglect or parental duties without a reasonable expectation of a reversal of that conduct in the future.' "[29]

Furthermore, the legislature has provided the exclusive means by which an individual may irrevocably give up her child for adoption.[30] A failure to comply with the statutory requirements results in the mother's right to revoke her consent to the adoption.[31] Private placement is not the proper procedure for an irrevocable consent.[32] Consequently,

> [t]he provision in the surrogacy contract, agreed to before conception, requiring the natural mother to surrender custody of the child without any right of revocation is one more indication of the essential nature of this transaction: the creation of a contractual system of termination and adoption designed to circumvent our statutes.[33]

The agreement between the parties to the surrogacy arrangement would have to set up a situation the aim of which would be to encourage the determination that the surrogate mother is deemed to have abandoned or neglected the child.[34] Either of these alterna-

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[29] *Baby M*, 109 N.J. at 427, 537 A.2d 1242 (quoting N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1988)).

[30] *Id.* at 432, 537 A.2d at 1245 (citing N.J. STAT. ANN. § 30:4C-23 (West 1981)). The court stated that the Division of Youth and Family Services (DYFS)

> is empowered to "take voluntary surrenders and releases of custody and consent to adoption[s]" from parents, which surrenders, releases, or consents "when properly acknowledged . . . shall be valid and binding irrespective of the age of the person giving the same, and shall be irrevocable except at the discretion of . . . [DYFS] or upon order of a court of competent jurisdiction."

Id. (quoting N.J. STAT. ANN. § 30:4C-23 (West 1981)).

[31] The *Baby M* court noted that stringent requirements for a voluntary irrevocable surrender to an approved agency are set forth in Section 9:2-16 of New Jersey Statutes Annotated. *Id.* at 430-31, 537 A.2d at 1244-45 (citing N.J. STAT. ANN. § 9-2-16 (West 1976)). Surrender may be set aside, however, "upon proof of fraud, duress, or misrepresentation." N.J. STAT. ANN. § 9:2-16 (West 1976).

[32] *See Baby M*, 109 N.J. at 433-34, 537 A.2d at 1246 (citing Sees v. Baber, 74 N.J. 201, 213-15, 377 A.2d 628, 634-35 (1977). The *Baby M* court observed that "consent in a private placement adoption is not only revocable but, when revoked early enough, irrelevant." *Id.* at 434, 537 A.2d at 1246.

[33] *Id.* at 434, 537 A.2d at 1246.

[34] The court stated:

tives is clearly violative of public policy, since fostering one or the other would be unacceptable contractual conditions.[35] The court held as much when it stated:

> In this case a termination of parental rights was obtained not by proving the statutory prerequisites but by claiming the benefit of contractual provisions. From all that has been stated above, it is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract.[36]

IV CONCLUSION

As I have argued in this comment, I do not believe that a surrogacy agreement can survive the public policy scrutiny discussed in the court's opinion. It is possible that parties who wish to enter into this type of arrangement will be able to do so since there is no way to police all activity. However, once a dispute arises, the agreement will be meaningless. At that point, one of the parties will seek the help of the courts, thus triggering the principles of the *Baby M* decision.

At no point in this comment have I discussed my opinion concerning the court's decision. I have intentionally chosen to concentrate on the impact of the opinion. Some may agree with the court, others I am sure will disagree. In the end, however, we

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> Our statutes, and the cases interpreting them, leave no doubt that where there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect. That showing is required in every context in which termination of parental rights is sought, be it an action by an approved agency, an action by DYFS, or a private placement adoption proceeding, even where the petitioning adoptive parent is, as here, a stepparent.

Id. at 428, 537 A.2d at 1243 (citations omitted).

[35] The parties would not wish to avoid this result by simply having the natural mother's legal relationship to the child kept intact. To do this would be contrary to the purpose for which the parties entered into the agreement. Further, it is unlikely that either party would wish to deal with the host of new problems raised by such an arrangement.

[36] *Id.* at 429, 537 A.2d at 1243-44. Clearly, the parties could also get around this entire situation by arranging for the baby to be turned over to an adoption agency first. This, however, leads to other problems, which in effect makes the surrogacy arrangement meaningless. Or, is this perhaps the way to deal with surrogacy generally?

are all bound by this decision until the court chooses to overturn itself. The court has thrown down the gauntlet to the legislature. If surrogacy is to survive as an alternative to adoption, then the legislature must act.