# BABY M—THE REAL LOSER

*Harriet Johnson London**

Rarely has a court's decision attracted as much media attention and public interest as the trial level and supreme court decisions in *In re Baby M.*[1] The strong emotions and heated arguments raised by both advocates and opponents of surrogate motherhood have not subsided. Few people have hesitated to voice their opinions. The rights and needs of a woman who bore a child were pitted against the rights and yearnings of a childless couple. Each party has its staunch supporters. Many have expressed outrage at the role of the commercial middle-man.

In this emotionally charged setting, the New Jersey Supreme Court reviewed the trial court's opinion upholding the surrogate contract. From the outset, the supreme court's views were crystal clear. It condemned the practice of commercial surrogacy as "illegal, perhaps criminal, and potentially degrading to women."[2] It invalidated the Baby M contract as being in conflict with both the law and public policy of New Jersey. Although it granted custody to the baby's father, it "restore[d] the 'surrogate' as the mother of the child."[3] The issue of the mother's visitation was remanded to a different judge at the trial level.

The debate on surrogacy continues in the press, in academic circles, at cocktail parties, under the auspices of specially created commissions, and in legislatures across the country. Hopefully some consensus will be reached and regulation will be imposed in the area. Then people who seek to enter into these relationships can do so with some degree of certainty. No child will find itself as Baby M did, "[a] child [who], instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father."[4]

The effect on the baby is the most tragic part of this case.

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

2 *Id.* at 411, 537 A.2d at 1234.

3 *Id.*

4 *Id.* at 435, 537 A.2d at 1247.

She is the real loser. The supreme court discussed her best interests at length, but its decision served needs and interests of persons other than the child. Tremendous legal and policy issues were at stake and the court dealt with them decisively, keeping a careful eye on legal precedent. In the process, however, the child was done a great disservice. The court recognized her desperate need for security and stability; but by its refusal to sever Mary Beth Whitehead's parental bonds and its decision to preserve her visitation rights, it seriously undermined Baby M's chances of attaining that stability.

The court resolved the custody issue for the moment; but, as with all custody decisions, it will remain subject to change for the balance of the child's minority. Given the history of this case and the parties' positions, an emotional tug-of-war is almost guaranteed.

Baby M—Melissa Stern/Sara Whitehead—has two mothers:[5] Mary Beth Whitehead Gould, whose status as mother has been restored legally, and Elizabeth Stern, whom the court recognized as sharing de facto custody with her husband.[6]

The supreme court restored Mrs. Whitehead's full rights as the mother of Baby M, although it did not grant her custody of the child. The court was of the opinion that, "given her predicament, Mrs. Whitehead [had been] rather harshly judged—both by the trial court and by some of the experts."[7] There was no suggestion of Mrs. Whitehead's being unfit, although the court appears to have given credence to its summary of the experts' opinions in regard to her style of mothering and its impact on custody. "In short, while love and affection there would be, Baby M's life with the Whiteheads promised to be too closely controlled by Mrs. Whitehead. The prospect for a wholesome, independent psychological growth and development would be at serious risk."[8] The court went on to contrast this with more positive observations on the Sterns.

Under the court's decision, Mrs. Whitehead retains her maternal rights and the power to exert control over the child and

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[5] For a long time she also had two names. On her birth certificate she was listed as Sara Whitehead; the Sterns have named her Melissa Stern, and that was the name given her in the adoption judgment, which has been vacated. During the pendency of the trial, Mrs. Whitehead called her Sara during her visitation, and the Sterns called her Melissa. Mrs. Whitehead has agreed now to call her Melissa.

[6] *See Baby M*, 109 N.J. at 457, 537 A.2d at 1258.

[7] *Id.* at 459, 537 A.2d at 1259.

[8] *Id.* at 458, 537 A.2d at 1259.

her emotional development. There can be no question of Mrs. Whitehead's love for and attachment to the child; as her mother she will want to be a strong determining force in her life. This has the potential for serious conflict for the child, since Mrs. Whitehead will not be the only maternal influence in the child's life.

The child will be living with her father and his wife. Elizabeth Stern will continue to share day-to-day parenting with her husband. She will be there every day, loving the little girl and caring for her—a constant and stable presence in the child's life. She, with her husband, is the little girl's security. Courts, as well as psychiatrists, have come to recognize that the person who fills this place in a child's life becomes the child's psychological parent.[9] Mrs. Stern is functioning as the child's mother and will continue to do so, no matter what title the law assigns her. The court noted the strong relationship that already exists between the child and Mr. and Mrs. Stern.[10] It is likely that the child already regards Mrs. Stern as her psychological parent (mother) and will continue to do so. She and the Sterns are a family.

The supreme court was clearly comfortable with the idea of the Sterns raising the child and with their ability to nurture and protect the child while fostering her independence.[11] They found her future to appear "solid, happy, and promising with them."[12]

The original intention of the parties in this case was for the

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[9] *See* Sorentino v. Family and Children's Soc'y of Elizabeth, 74 N.J. 313, 378 A.2d 18 (1977) (*Sorentino II*); Sorentino v. Family and Children's Soc'y of Elizabeth, 72 N.J. 127, 367 A.2d 1168 (1976) (*Sorentino I*). In the *Sorentino* decisions, biological parents sought custody of a child who had been surrendered to a welfare agency by her mother shortly after birth, and had lived with prospective parents for nearly three years. *See Sorentino I*, 72 N.J. at 128, 367 A.2d at 1168-69. The trial court, having found evidence of duress and coercion by the agency upon the natural mother and having determined the biological parents fit, ordered the child returned to them. *Id.* at 129-30, 367 A.2d at 1169. The appellate division affirmed. *Id.* On appeal, the supreme court "remanded for consideration of the potential psychological injury to the child resulting from her removal "from the only real home [s]he ha[d] known." *Id.* at 133, 367 A.2d at 1171. Ultimately, in *Sorentino II*, the court awarded custody of the child to the adoptive parents, among other things, in recognition of the psychological bond that had developed between the child and the adoptive parents, and the likelihood of injury to the child resulting from the severance of that bond. *Sorentino II*, 74 N.J. at 320, 378 A.2d at 21. *See generally* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

[10] *See Baby M*, 109 N.J. at 458-59, 537 A.2d at 1259.

[11] *Id.*

[12] *Id.* at 459, 537 A.2d at 1259.

child to have one father and one mother. She was conceived and born with a very specific family constellation in the minds of both her biological parents. She was to be the daughter of William Stern and Elizabeth Stern, not Mary Beth Whitehead. Both her legal and emotional status would be clear. There would not be two mothers in psychological competition for her. Her biological parents entered into a contract to ensure this stability for her. The supreme court held that contract illegal and unenforceable; the child's status is anything but clear.

Once it had invalidated the contract, the supreme court viewed the case in a parent versus step-parent configuration governed by the laws and policies on adoption and termination of parental rights.[13] Their analysis of pertinent law will provide an excellent blueprint of the law in that area for years to come. They reiterated the basic principle that the best interests of the child alone cannot be the basis for a termination of parental rights. However, they went on to note that "[a]lthough the statutes are clear, they are not applied rigidly on all occasions."[14]

Clearly this was a case in which the statutes should not have been applied rigidly.[15] The child and the situation in this case are unique. The child's short life has been the subject of an unprecedented amount of publicity. The court itself expressed concern about a child's reaction to such unusual parentage and the commercialism surrounding it.[16] Experts expressed grave doubts about Mrs. Whitehead's ability to handle these problems appropriately with the child.[17] In addition, it seems likely, as previously discussed, that the child will continue to be at the center of both an internal and an external emotional tug-of-war, which will endanger her stability. A more overt tug-of-war may also take place. Custody has been given to her father, but such decisions are always subject to review and change. At any time during her minority, Mrs. Whitehead may move for custody of Baby M. Even if unsuccessful, such a move would further threaten the child's security and sense of permanence. Absent a termination

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[13] *See id.* at 445-46, 537 A.2d at 1252; *see also* New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 512 A.2d 438 (1986); *In re* Adoption of Children by D, 61 N.J. 87, 293 A.2d 176 (1972); *In re* Adoption of Two Children by J.J.P., 175 N.J. Super. 420, 419 A.2d 1135 (App. Div. 1980).

[14] *Baby M*, 109 N.J. at 445, 537 A.2d at 1252.

[15] The Court itself stressed that it "need not sacrifice the child's interest in order to make [a] point sharper." *Id.* at 454-55, 537 A.2d at 1257.

[16] *See id.* at 441, 537 A.2d at 1250.

[17] *See id.* at 457-58, 537 A.2d at 1258-59.

of parental rights there can be no guarantee that this will not happen.

The court has left the child open to the risk of severe psychological harm. Although the circumstances were different, and the court itself chose to read the cases differently, under the reasoning of *Sorentino v. Family and Children's Society of Elizabeth*[18] and its progeny, there was a valid basis for termination of parental rights in this case. The court gave insufficient consideration to the psychological dangers implicit in its failure to terminate parental rights. "The court cannot evade its responsibility, as *parens patriae* of all minor children, to preserve them from harm. The possibility of serious psychological harm to the child transcends all other considerations."[19] One is left, as was Justice Clifford in his dissent in *Sees v. Baber*, with a nagging feeling that despite the persuasiveness of its analysis, the court, in its attempt to ameliorate a result too harsh for Mary Beth Whitehead, has "visited tragic consequences upon the child."[20]

Mrs. Whitehead's parental rights are strong and protected, and her love is deep, but the need to protect the child is greater.

> There can be no solution satisfactory to all in this kind of case. Justice to both mother and child, the desired objective, can only rarely be attained where, as here, the best interest of one is only achieved at the expense of the other. Where courts are forced to choose between a parent's right and a child's welfare, they choose the child by virtue of their responsibility as *parens patriae* of all minor children to protect them from harm.[21]

In the highly public setting of *Baby M*, and in its desire to send a clear message on the evils of commercial surrogacy, the supreme court did not terminate parental rights. In refusing to do so it failed in its duty to protect the child.

Once the court had determined that there should be no termination, it dealt with the case in basically the same way as any other custody case. It found that in the best interests of the child custody should be given to her father. The supreme court then remanded the issue of Mrs. Whitehead's visitation with the child to the trial

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[18] *Sorentino II*, 74 N.J. 313, 378 A.2d 18 (1977).

[19] *Sorentino I*, 72 N.J. 127, 132, 367 A.2d 1168, 1171 (1976).

[20] Sees v. Baber 74 N.J. 201, 227, 377 A.2d 628, 641 (1977) (Clifford, J., dissenting). It should be noted, however, that Justice Clifford apparently did not share the same misgivings in the *Baby M* case.

[21] *In re* Guardianship of J.R., 174 N.J. Super. 211, 224, 416 A.2d 62, 68 (1980), *certif. denied*, 85 N.J. 102, 425 A.2d 266 (1980).

court because of the insufficiency of the record on visitation. The only testimony on visitation at the earlier trial came from experts presented by the child's guardian ad litem.[22] Two of the guardian's experts recommended suspension of visitation for a five year period, and the other recommended suspension for an undefined period.[23] The supreme court found these experts' views derivative of their focus on custody and termination of parental rights and therefore not compelling.[24] The experts expressed concern "that given Mrs. Whitehead's determination to have custody, visitation might be used to undermine the Sterns' parental authority and thereby jeopardize the stability and security so badly needed by this child."[25]

The court directed that the visitation issue be heard by a different trial judge. It laid out the "touchstones of visitation: that it is desirable for the child to have contact with both parents; that besides the child's interests, the parents' interests also must be considered; but that when all is said and done, the best interests of the child are paramount."[26] Having done so it continued: "We have decided that Mrs. Whitehead is entitled to visitation at some point, and that question is not open to the trial court on this remand."[27]

It is unfortunate that once the supreme court had found the record to be insufficient on visitation, it did not stop there. In the face of a record they themselves found insufficient, and in which the only testimony on visitation questioned the wisdom of any visitation in the near future, they stated flatly that Mrs. Whitehead is entitled to visitation at some point. It would have been better had they left the ultimate decision for the discretion of a trial judge after a full hearing. Under *Wilke v. Culp*,[28] cited by the court, visitation may be terminated where the relationship with the parent causes physical or emotional harm to the child.[29] The child's best interests are para-

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[22] *Baby M*, 109 N.J. at 464, 537 A.2d at 1262. The child will not be represented by a *guardian ad litem* on remand. The attorney who performed these duties has been discharged by the new trial judge. It is unfortunate from the perspective of both the child and the law that the child will not have independent representation at a hearing so vital to her interests. For cases discussing the importance of having a child represented by a *guardian ad litem*, see Wilke v. Culp, 196 N.J. Super. 487, 501-02, 483 A.2d 420 (App. Div. 1984); *In re* Adoption by J.J.P., 175 N.J. Super. 420, 428-29, 419 A.2d 1135, 1140 (App. Div. 1980).

[23] *Baby M*, 109 N.J. at 465, 537 A.2d at 1262.

[24] *Id.*

[25] *Id.* at 464, 537 A.2d at 1262.

[26] *Id.* at 466, 537 A.2d at 1263.

[27] *Id.*

[28] 196 N.J. Super. 487, 483 A.2d 420 (App. Div. 1984), *certif. denied*, 99 N.J. 243, 491 A.2d 728 (1985).

[29] *Id.* at 496, 483 A.2d at 425.

mount. The question of emotional harm should have been addressed; it is no longer open.

Mrs. Whitehead in her role as visiting mother will present the same potential for undermining and jeopardizing the child's stability suggested by the experts. Paradoxically, I would see substantially less danger in visitation if she were not the child's mother and did not have all the emotional baggage that accompanies motherhood. She is clearly a part of the child's history, an essential part of her "roots;" she will always be a significant person to the child—someone the child will know about and with whom she could develop a loving, though non-maternal, relationship. The problem will arise as the child sees two people in conflict for the same maternal role in her life.

The theory behind a temporary suspension of visitation seemed to have been that if the child enjoyed sufficient security in her early development and in her relationship with the Sterns, and if she gains some understanding of her origins,[30] she would be better able to deal with any conflicting emotions. It is difficult to gauge a time span for this; presumably her readiness would have to be monitored, and the monitoring itself might cause problems for the child. Eventually the child would be confronted with someone who was her mother, and intended to remain so, but who had become a stranger to her. At that point the parties and the child might well have been in a situation akin to that in *Sorentino*, and termination of Mary Beth Whitehead's parental rights could have become an issue once again; what was not allowed directly might come about indirectly.[31] That question has become moot.

On remand the case was assigned to Judge Birger Sween of the Bergen County Family Part for the sole purpose of defining visita-

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[30] In its examination of the Sterns as potential custodial parents of the child, the supreme court noted that Mr. and Mrs. Stern would try to determine rationally how to deal with problems with her, adding: "When the time comes to tell her about her origins, they will probably have found a means of doing so that accords with the best interests of Baby M." *Baby M*, 109 N.J. at 458-59, 537 A.2d at 1259. This was in contrast to doubts expressed by various experts about Mrs. Whitehead's "ability to explain honestly and sensitively to Baby M—and at the right time—the nature of her origin." *Id.*

[31] In *Sorentino II*, the child had been apart from her natural parents for so long, (three years), that the Court found no relationship to exist between them except that of blood. Having found no existing relationship to sever and following the policy of protecting the stability and permanence of the new family grouping, it opened the way for the lower court to terminate, a termination it would not allow in *Sorentino I*. *Compare Sorentino II*, 74 N.J. 313, 324-35, 378 A.2d 18, 23-24 (1976) *with Sorentino I*, 72 N.J. 127, 130-31 367 A.2d 1168, 1169-70 (1976).

tion. He issued his decision on April 6, 1988.[32]

In it he recognized Melissa's unique background and outlined for her parents and step-parents the roles they must now play in her life.

> Melissa's adjustment and the quality of her relationships with her parents and step-parents will depend largely on how well they accept and adjust to their respective roles. Mary Beth Whitehead Gould must accept and understand that Melissa is not Sarah and that her father and step-mother will be her parent-role models and provide the day-to-day, parental-child interaction which will largely determine what kind of person Melissa will become. They will make the parental decisions concerning her religion, education, and moral standards. William and Elizabeth Stern must accept and understand that Melissa will develop a different and special relationship with her mother, stepfather, siblings, and extended family, and that these relationships need not diminish their parent-child relationship with Melissa.[33]

He appointed a mental health professional to assist the parties in adjusting to the situation. Finding that Melissa's interests would be served best by "unsupervised, uninterrupted, liberal visitation," he set a gradually increasing visitation schedule.[34]

Under the terms of Judge Sween's order Melissa has been protected from public view, so nothing is known of the success of the visitation. It is now March 1989, and discussions of surrogacy and the Baby M case still result in heated arguments, but Melissa's fate no longer hangs in the balance. Judge Sween, in his sensitive decision, has done his best to ensure her future stability; I hope her families heed his counsel.

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[32] *In re* Baby M, 225 N.J. Super. 267, 542 A.2d 52 (Ch. Div. 1988).
[33] *Id.* at 270-71, 542 A.2d at 54.
[34] *Id.* at 269, 542 A.2d at 53.