# *IN RE BABY M*: THE STRUCTURE OF THE OPINION

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Much has been written, and will be written, about the celebrated opinion of the New Jersey Supreme Court in *In re Baby M.*[1] Much will be said about the legal doctrines contained in the opinion, about whether the conclusions are justified or not, and about whether or not the opinion is a genuine contribution to our jurisprudence.

The purpose of my comments is not to add to the reams of paper dedicated to a substantive analysis of the *Baby M* opinion. Rather, from the perspective of a practicing attorney in the field of domestic relations litigation, I shall attempt to give an overview of the opinion from the viewpoint of structural integrity and logical composition. I shall leave it to others to assess the substantive correctness of this most provocative decision.

From a structural viewpoint, the opinion is an excellent one. Indeed, it is the kind of opinion that lawyers love to receive and read, especially in their own cases, because there is no doubt whatsoever, right up front, as to the holding of the court. One does not have to wade through pages and pages of turgid and impenetrable prose to get to the holding of the opinion as is the case with so many opinions of the appellate courts. I congratulate Chief Justice Wilentz for the terseness and succinctness with which he capsulizes the court's holding in less than two pages of the opinion.

Indeed, one need not go beyond the second paragraph of the opinion in order to learn its expansive holding. As a convenience to the reader, I pause to set forth that all-important paragraph at length:

> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to

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[1] 109 N.J. 396, 537 A.2d 1227 (1988).

> women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child. We remand the issue of the natural mother's visitation rights to the trial court, since that issue was not reached below and the record before us is not sufficient to permit us to decide it *de novo*.[2]

From that simple statement the entire opinion unfolds in stages, each stage directly related to the correlative thought in paragraph two of the opinion. Indeed, paragraph two, which I consider the key of the opinion, could be used by future generations as a table of contents to the entire opinion.

Apart from the structural integrity and logical framework of the opinion, which seems to evolve more like literature than legal writing, the opinion evidences a traditional approach to new and perplexing problems. The Chief Justice and the associate justices of the New Jersey Supreme Court clearly recognized the challenging and heretofore unaddressed problems which were generated by the appeal. However, rather than taking an *avant garde* approach to these novel issues, the court wisely adopted existing case and statutory law to the matters in dispute.

With respect to the validity of surrogacy agreements, the court in very simple but unmistakable language branded them as unenforceable. Yet, on a parallel track, the court allowed for the possibility that voluntary surrogacy agreements, without the payment of money, could be valid. Of course, it requires no great insight to realize that there would be few if any takers under these circumstances. Therefore, the practical effect of the court's opinion is to sound the death knell to all surrogacy agreements, whether supported by monetary consideration or not.

And this is another indication of the direct and simple approach taken by the court. It flat out invited the legislature to act in this troubled area. Of course, whether or not the legislature accepts the challenge is problematical.

The entire opinion is characterized by the expression of judicial antipathy to the concept of paying money to acquire a baby. That the entire surrogacy arrangement smacked of commercial overtones is repeatedly mentioned by the court. One such instance is the observation by the court, probably unnecessary to the *ratio decidendi*,

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[2] *Id.* at 411, 537 A.2d at 1234-35.

that both William Stern and Mary Beth Whitehead came together because they responded to advertising by the Infertility Center of New York.[3] Furthermore, lest the court be accused of being overly protective of Mary Beth Whitehead (as some observers have noted), the court clearly balanced the alleged altruism of Mary Beth in purportedly wanting to give another couple the gift of life by tersely stating that it is clear that she also wanted the $10,000![4]

A disturbing inconsistency in the opinion, however, is found in the initial observation by the court that all parties were acting in good faith.[5] Yet the court later spoke of the fact that both parties clearly acted with an intent to circumvent this state's adoption laws.[6] This seems to be the only structural inconsistency in the entire opinion and, it is submitted, it is rather minor.

The lay press has characterized the supreme court opinion as being overly critical of the trial judge. I do not find this to be the case at all. Indeed, there are portions of the opinion in which the supreme court was very complimentary of the trial court's handling of this most difficult and perplexing case.

The court took a balanced approach to the issue of the respective character and fitness of the Sterns and Mrs. Whitehead. The supreme court pointed out that each parent had something to bring to Baby M, and that this would be the focus of a hearing on remand with respect to the issue of visitation. While the court did seem to gloss over the fact that Mary Beth had violated court orders by fleeing the state with the child during the early phases of the litigation, the court clearly stated that this was not a dominant or controlling factor.

The court's traditional approach to the case is manifest in all areas of the opinion. In invalidating the basic surrogacy contract, the court applied well-established statutory and case law prohibiting the exchange of money with respect to adoptions. The opinion is supported by ample precedent for the proposition that while private adoption placements are legal, they are very much disfavored by the law and require intense judicial scrutiny.

A possible criticism of the court's opinion is its inordinately lengthy treatment of the concept of an illegal adoption. The theme is repeated often during the opinion when it really had to be said only once. The court said all that had to be said, it is submitted,

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[3] *Id.* at 412, 537 A.2d at 1235.
[4] *Id.* at 413, 537 A.2d at 1236.
[5] *Id.* at 412-13, 537 A.2d at 1235.
[6] *Id.* at 413, 537 A.2d at 1236.

when it pointed out that William Stern paid Mary Beth Whitehead money for an adoption, not for her personal services. While unduly long, however, there is a parallel benefit from this explication of New Jersey law on adoption: it is a virtual restatement of the law on the topic and may serve to obviate long hours of research with respect to the law of adoption generally.

With respect to the termination of Mary Beth's parental rights by the trial court, the supreme court found that no reason in the record existed for such drastic action. The court pointed out that the "best interests of the child" criteria are not enough to terminate the rights of the natural parent.[7] This is a good, concise statement of the law of termination of parental rights and it is a great practical value to the bench and bar because it collects virtually all of the precedents into one opinion.

The court wisely avoided most constitutional issues, and decided those which it did on very narrow grounds. The court complied with the time-honored practice of avoiding constitutional issues wherever possible. While a whole panoply of constitutional rights were raised by both parties to the appeal, the two basic rights discussed by the court were William Stern's right to procreate and Mary Beth Whitehead's right to the companionship of her child.

The court, with unassailable logic, stated that William Stern's right to procreate was in no way infringed. Indeed, the court pointed out that he did father a child, and that therefore it was wrong for him to claim that his right to procreate was violated.

Mary Beth was said to have the fundamental and constitutionally protected right to the companionship of her child. There was no constitutional right in either party, however, to exclusive custody of the child.

The court could have waxed eloquent and discussed the constitutional issue at unnecessary length. It chose not to do so, and I, for one, applaud the decision. This opinion was not meant to be a law review article, although it certainly rivaled most law review articles in length. On the contrary, it was intended to be, and is, a logically progressive and evolving exposition of the rights and duties of natural parents, irrespective of how that parentage was mechanically achieved.

The traditional and practical approach was followed by the court with respect to its approach to the custody issue. The court

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[7] The court stated that "the parents' interests must also be considered; but that when all is said and done, the best interests of the child are paramount." *Id.* at 466, 537 A.2d at 1263.

broke no new ground in concluding that the child would be better off with William Stern as the primary custodial parent. This is where the "best interests" test comes into operation, not with respect to the draconian remedy of termination of parental rights. The court remanded for a plenary hearing on the issue of visitation. This, of course, comports with pre-existing case law.

The court's opinion with respect to custody and visitation makes clear that there is no real or discernible difference between the situation of William Stern and Mary Beth Whitehead, co-venturers in what was essentially a business deal, and the situation of formerly married and presently divorced spouses. The court makes this crystal clear in its opinion, and properly so. Once the court invalidated the surrogacy contract, the natural parents of a child are in the same position *vis-a-vis* that child as if they were married when the child was born, and subsequently divorced. This happens every day of the week and is routinely handled by our matrimonial courts. Indeed, this is precisely what has happened on remand to Judge Sween in Bergen County for a visitation determination.

In conclusion, while the opinion does appear to be somewhat too long, and although it is a bit melodramatic at times ("She had to have her child")[8] the opinion is quite readable and easy to digest.

Could the opinion have said the same thing in virtually one third its length? Probably. However, this was certainly a unique case and the emotion and pathos it generated could not be expected to be ignored by the New Jersey Supreme Court when it reviewed the evidence and constructed the opinion. In balance, the opinion will live on as an example of clear, forceful, logical and impressive legal writing by what is generally conceded to be the finest state Supreme Court in this country.

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[8] *Id.* at 465, 537 A.2d at 1262.