CAN SURROGACY CO-EXIST WITH NEW JERSEY'S ADOPTION LAWS?

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In anticipating the New Jersey Supreme Court's decision in *In re Baby M*,[1] my initial impression was that the court should handle surrogacy as if it were adoption. Although arguably, "surrogacy was not a viable procreation alternative . . . when the laws of adoption were passed,"[2] the end result of both surrogacy and adoption is the same: a natural parent terminates his or her parental rights in favor of an adoptive parent. The supreme court similarly took this view and found that the surrogacy contract at issue in *Baby M* conflicted with the adoption laws of New Jersey.[3] While I agree with the reasoning employed by the court, I hesitate to reach the same result. Further, while this particular contract may have violated the state's adoption laws, I suggest that an agreement can be tailored to conform to the statutory provisions outlined in the court's three-part analysis.[4]

The supreme court first found that the presence of money in connection with a surrogacy placement violated those adoption laws proscribing such behavior.[5] This notion of "baby selling" is

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

2 *In re* Baby M, 217 N.J. Super. 313, 372, 525 A.2d 1128, 1157 (Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). Judge Sorkow stated that surrogacy contracts do not fall within the purview of the adoption laws. *Id.* at 372, 525 A.2d at 1157.

3 *Baby M*, 109 N.J. at 423, 537 A.2d at 1240.

4 While Chief Justice Wilentz found surrogacy contracts violated both the adoption statutes and public policy, this commentary will focus only on the statutory portion of the opinion.

5 *Id.* (citing N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1987)). The relevant statute provides in pertinent part:

> 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
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> (1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or
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> (2) Take, receive, accept or agree to accept any money or any valuable consideration.

N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1987).

quite possibly the most compelling argument against surrogacy. Indeed, the court stated that "[t]he evils inherent in baby bartering are loathsome for a myriad of reasons."[6] There are, however, persuasive arguments to counter this concern. The court did address some of these points, but was unmoved by them. This reluctance was prompted by a strict application of the adoption statute.

Commentators have suggested that any law which prohibits surrogacy is probably unconstitutional.[7] This idea evolves from a recognized fundamental right to procreate.[8] Since fertile couples enjoy this right to produce offspring, the nearly ten to fifteen percent of coitally infertile couples should similarly be afforded this protection.[9] The fact that money is paid should be of minimal concern. The remuneration is only compensating a volunteer who is enhancing an infertile couple's right to procreate. Further, the United States Supreme Court has ruled that a woman, such as a surrogate, has a right to control her own body.[10] This right should extend to provide procreation services for an infertile couple.

The New Jersey Supreme Court declined to validate the Sterns' service contract argument. While recognizing that great care was exercised to tailor the surrogacy contract to that of a personal service agreement, the court nonetheless found that the contract was a "private placement adoption for money."[11] Closer examination, however, reveals that this was not the case.

The contract matched a woman willing to bear a child with an infertile couple willing to pay her for the service. Opponents of surrogacy do not view the transaction as a personal service contract because the surrogate also provides a vital element of birth: the egg. Had the egg belonged to someone other than Mrs. Whitehead, a compelling argument could be made that the surrogate was merely providing the means for the birth of someone else's child. The situation is essentially the same, however,

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[6] *Baby M*, 109 N.J. at 425, 537 A.2d at 1241.

[7] *See, e.g.*, Handel, *Surrogate Parenting, In Vitro Insemination and Embryo Transplantation*, 6 WHITTIER L. REV. 783, 788 (1984).

[8] *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).

[9] Robertson, *Procreation Rights Ignored by Court*, 121 N.J.L.J. 318, 319 (1988). The supreme court, however, questioned this 10%-15% infertility rate suggested by the trial court. *Baby M*, 109 N.J. at 452 n.16, 537 A.2d at 1255 n.16 (citing *In re* Baby M, 217 N.J. Super. 313, 331, 525 A.2d 1128, 1136 (Ch. Div. 1987)).

[10] *See* Roe v. Wade, 410 U.S. 113 (1973).

[11] *Baby M*, 109 N.J. at 425, 537 A.2d at 1241.

even though Mrs. Whitehead provided the egg. The Sterns bought a surrogate's services and her egg. They did not pay for an adoption. The baby had not even been conceived when the contract was executed.[12] Thus, it seems clear that the statute cited by the supreme court is not applicable to situations such as this.

Although I maintain that the adoption laws of New Jersey should be applied to surrogacy, they should not be employed until there is a child *in esse*. The Supreme Court of Kentucky, in *Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky ex rel. Armstrong*,[13] is in accord with this view. In that case, the court held that since "the agreement to bear the child is entered into *before* conception" those statutes prohibiting baby selling for adoption purposes are not applicable.[14]

The prohibition against baby selling is grounded in the assumption that the offer of compensation to an expectant mother while she is in an "emotionally vulnerable state" may invoke a coerced agreement.[15] There is no such coercion in a surrogacy environment. The contract is executed well before the mother reaches an "emotionally vulnerable state" and other safeguards, such as the right to rescind,[16] should be available. The New Jersey Supreme Court is correct in its harsh evaluation of baby selling; however, surrogacy is not baby selling and should not be considered as such.[17] The court's application of the statute prohibiting the payment of money in connection with adoption to surrogate contracts is therefore in error.

The second tier of the court's statutory analysis is similarly flawed. Chief Justice Wilentz noted that, under current adoption laws in New Jersey, a parent can terminate his or her parental

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12 *Id.* at 414, 537 A.2d at 1236.

13 704 S.W.2d 209 (Ky. 1986).

14 *Id.* at 211-12.

15 Brief for *amicus curiae* National Association of Surrogate Mothers at 15, *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988) (No. A-39).

16 *See infra* notes 28-32 and accompanying text.

17 One commentator suggested a hypothetical illustration in which a court would probably rule that the scheme would not involve baby selling, yet the situation and result is no different than a surrogacy arrangement. Levy, *Some Child-for-Money Trades Are Legal*, 121 N.J.L.J. 322 (1988). This commentator stated:

> Suppose that after a divorce a custodial mother agrees to waive child support or to give her husband her share of the value of the family home and the father agrees to her second husband's adoption of the child; would the agreement be invalid because the father sold and the mother bought the stepparent adoption?

Id. at 322.

rights in one of three ways: upon surrender of a child to an approved agency;[18] upon an action commenced by the Division of Youth and Family Services,[19] or, in a private placement adoption, upon a showing of parental abandonment.[20] The court found that none of these methods had been met. Since neither an approved agency nor the Division of Youth and Family Services was involved in this case, no statutorily sufficient surrender had occurred. The supreme court, however, reasoned that the surrogacy arrangement was akin to a private placement adoption and a finding of "abandonment" must be present before parental rights could be severed.[21] The court apparently found no such abandonment. I disagree.

The surrogacy contract provided that Mrs. Whitehead would relinquish her parental rights to a child upon the execution of the agreement.[22] The supreme court stated that a contract cannot subvert the legislature's "clear" intent that only "intentional abandonment or a very substantial neglect,"[23] can terminate parental rights in a private placement adoption. The court failed to discuss why consent via contract cannot establish a suitable reason for termination. Prior case law, such as *In re Adoption of J.J.P.*,[24] appears to allow a parent to terminate her rights in a private placement adoption setting.[25] While the supreme court is correct that "[t]he Legislature would not have so carefully . . . restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract,"[26] it is also apparent that surrogacy was not anticipated by the New Jersey Legislature when the adoption laws were enacted.[27] Since the signing away of parental rights *is* consensual,

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[18] *In re* Baby M, 109 N.J. at 426, 537 A.2d at 1242 (citing N.J. STAT. ANN. § 9:2-16 (West 1976)).

[19] *Id.* (citing N.J. STAT. ANN. § 30:4C-23 (West 1981)).

[20] *Id.* (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1987)).

[21] *Id.* at 428-29, 537 A.2d at 1243.

[22] *See id.* at 470-74 app., 537 A.2d at 1265-68 app.

[23] *Id.* at 427, 537 A.2d at 1242.

[24] 175 N.J. Super. 420, 419 A.2d 1135 (App. Div. 1980).

[25] The court stated that: "Termination of parental rights is an extraordinary judicial remedy which will be granted only after intensive consideration of parental misconduct and, if appropriate, the welfare of the child." *Id.* at 426, 419 A.2d at 1139 (citation omitted). The court added: "Absent consent by both natural parents, adoption may not be granted unless the court finds 'intentional abandonment or very substantial neglect.' " *Id.* at 427, 419 A.2d at 1139 (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1987)).

[26] *Baby M*, 109 N.J. at 429, 537 A.2d at 1243-44.

[27] *See* Brief for Appellee at 95, *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988) (No. A-39).

absent coercion or fraud, there appears to be no reason why contracting for the termination of such rights should not fall under the "intentional abandonment" umbrella. Of course, the argument remains that a child cannot be abandoned until it is *in esse*, but common sense dictates that the answer is irrelevant. In surrogacy contracts, the mother is abandoning the right to keep the child when she agrees to perform the service. This should be sufficient to terminate her parental rights consistent with the adoption statutes.

The supreme court found yet another conflict with the third part of its statutory analysis. Specifically, Chief Justice Wilentz noted that the contract between the Sterns and Mrs. Whitehead did not give her the right to rescind. The dearth of such a provision violated the law requiring a right of revocation.[28] The court relied on *Sees v. Baber*,[29] in which the supreme court held that in private placement adoptions, consent may not only be revocable, but sometimes irrelevant.[30] It is interesting to note that *Sees* was decided before the present Adoption Act was enacted and that many of the statutes cited in that case have since been either repealed or changed. The present private placement adoption statute does not provide any time limits for the revocability of consent.[31] The right to rescind does not extend indefinitely, however, as once an adoption judgment is entered, all relationships between the previous parent and the adopted child are terminated.[32]

A right to revoke should be included in a surrogacy contract. While every precaution is taken so that the surrogate does not develop a desire to keep her child, it can happen. The possibility of a surrogate developing this strong maternal bond is real, as Mrs. Whitehead has demonstrated.[33] No amount of pre-screening and psychological counseling will eliminate this possibility. The surrogate, whether or not she provides the egg, is still the natural mother. Some provision should be made for her to reconsider her decision as in private placement adoptions.

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[28] *Baby M*, 109 N.J. at 429, 432-34, 537 A.2d at 1245-46.

[29] 74 N.J. 201, 377 A.2d 628 (1977).

[30] *Id.* at 213-15, 377 A.2d at 633-35.

[31] *See* N.J. STAT. ANN. § 9:3-48 (West Supp. 1987).

[32] N.J. STAT. ANN. § 9:3-50 (West Supp. 1987).

[33] *But see* Handel, *supra* note 7, at 788. Mr. Handel's firm represents clients involved in surrogate mother programs. *Id.* at 783. He observed: "We wonder about postpartum blues. We do not think we have a big problem with that. We find that the surrogates are not bonded with [the] child." *Id.* at 788.

Although the agreement is executed before the conception of the child, once the pregnancy commences, the situation changes for the surrogate. The feelings that accompany motherhood are not limited to those mothers that wish to keep their child. Counseling should be available during this period to enable the surrogate to fulfill her commitment of giving up the child. There is, however, no definite method to ensure that the surrogate will be willing and capable of doing so. A provision of revocability should be added to surrogacy contracts. The legislature is better equipped to establish a time frame for such revocation, but a period of at least one week following the birth should be allowed for the right to rescind the agreement.[34]

A revocability clause may appear inconsistent with the parental rights termination provision.[35] If a dichotomy exists, it is due to the unique nature of surrogacy. The laws of adoption should not be applied until there is a child in being. At that point, an adoptive mother and natural mother come into existence. Prior to birth, a mere personal services agreement between two people has been executed which should not be governed by any adoption laws.

It is apparent that surrogacy and the present adoption laws are not entirely consistent. The supreme court recognized this and left the door open for the legislature to act.[36] I agree that new adoption laws should be passed to encompass surrogacy. Statutes permitting the payment of money for services rendered in childbearing and the termination of parental rights via consent must be enacted. Present adoption practices, such as extensive screening of prospective parents, should be extended to prospective surrogates. Licensing of surrogate centers by the state to ensure adequate counseling and screening programs would similarly reduce the hazards presaged by the court. A brief period of revocation should also be available following birth to allow a surrogate to rescind the agreement. With these safeguards in place, the dangers anticipated by the court would be minimized and surrogacy could accomplish its worthwhile goal of providing infertile couples with children.

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[34] *Cf.* Surrogate Parenting Assocs., Inc. v. Commonwealth of Kentucky *ex rel.* Armstrong, 704 S.W.2d 209, 211-12 (Ky. 1986) (noting in dicta that statute invalidating adoptions prior to expiration of five-day consent period was permissible as applied to surrogacy).

[35] *See* notes 18-27 and accompanying text.

[36] *Baby M*, 109 N.J. at 411, 537 A.2d at 1235.