FAMILY LAW—SURROGACY CONTRACTS—NEW JERSEY SUPREME COURT OFFERS A BARREN FUTURE FOR SURROGATE PARENTING—*In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

The right to determine when and if to have children has long been a subject for the courts, and "is at the very heart of . . . constitutionally protected choices."[1] Case law, however, does not always keep pace with developing science. Most all previous decisions concerning the right to procreate have involved traditional reproductive relationships. The issue of protected rights in surrogacy contracts came kicking and screaming into the American consciousness in the form of a small baby girl dubbed "Baby M." Nowhere has the need for courts and legislatures to stay current with biomedical science been more dramatically demonstrated than in the two years of turmoil which surrounded Baby M's future.[2]

In February 1985, Mary Beth Whitehead entered into a surrogate parenting contract with William Stern, agreeing to bear his child through artificial insemination.[3] The contract stipulated that Mr. Stern and his wife, Elizabeth, wanted a child but that she

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[1] Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977). In *Carey*, the United States Supreme Court held that, absent a compelling state interest, a New York law prohibiting the sale of contraceptives to minors was unconstitutional. *Id.* at 681-82. The Court, in an opinion authored by Justice William Brennan, reasoned:

> The decision whether or not to beget or bear a child . . . holds a particularly important place in the history of the right of privacy . . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Id. at 685 (emphasis omitted) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (concluding that Massachusetts law prohibiting distribution of contraceptives to unmarried persons violates constitutional right to equal protection under the laws)). *See also* Roe v. Wade, 410 U.S. 113 (1973) (state law prohibiting abortion violates the right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (state law prohibiting use of contraceptives violates the right of marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (state law mandating sterilization of "habitual criminals" violates equal protection clause of the fourteenth amendment).

[2] *See, e.g.*, *No Other Hope for Having a Child*, 109 NEWSWEEK 50 (Jan. 19, 1987); *Who Keeps 'Baby M'?*, 109 NEWSWEEK 44 (Jan. 19, 1987); *Whose Child is This?*, 129 TIME 56, Jan. 19, 1987; Schneider, *Mothers Urge Ban on Surrogacy as Form of 'Slavery'*, N.Y. Times, Sept. 1, 1987, at A13, col. 1.

[3] *In re* Baby M, 109 N.J. 396, 410-11, 537 A.2d 1227, 1234-35 (1988).

was infertile.[4] It further provided that Mrs. Whitehead would turn over the child to the Sterns upon delivery, taking whatever steps necessary to terminate her parental rights so that Mrs. Stern could adopt the child.[5] While Richard Whitehead, Mrs. Whitehead's husband, was a party to the contract, Mrs. Stern was not.[6] Mr. Whitehead promised to take all steps "necessary to rebut the presumption of paternity" pursuant to New Jersey's Parentage Act.[7] The contract stipulated that Mrs. Stern would be the child's sole custodian should Mr. Stern die before the birth.[8] In addition, the agreement provided that Mr. Stern would cooperate with the artificial inseminations, and would pay $10,000 to Mrs. Whitehead upon delivery of a child to him.[9] After the con-

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[4] *Id.* at 411, 537 A.2d at 1235. The Sterns met as University of Michigan graduate students and were married in 1974, after each had earned a Ph.D. *In re* Baby M, 217 N.J. Super. 313, 335, 525 A.2d 1128, 1138 (Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). Mr. Stern's parents were the sole family survivors of the Holocaust and when they died, he "became the only surviving member of all branches in his family." *Id.* While the couple had discussed the possibility of having children early in their relationship, when Mrs. Stern began medical school they decided to postpone a family until her pediatric residency was completed. *Id.* at 336, 525 A.2d at 1138-39. At trial, it was disclosed that Mrs. Stern had been diagnosed during her pediatric residency as having a mild form of multiple sclerosis which she feared would be exacerbated by a pregnancy. *Id.*, 525 A.2d at 1139. She was not infertile, as the contract stated. *Baby M*, 109 N.J. at 411, 537 A.2d at 1235.

[5] *Baby M*, 109 N.J. at 412, 537 A.2d at 1235. The contract's sole purpose was "that 'of giving a child to William Stern, its natural and biological father.' " *Id.* at 423, 537 A.2d at 1241. The fee to be paid to Mrs. Whitehead was defined as "compensation for services and expenses and in no way . . . a fee for termination of parental rights or a payment in exchange for consent to surrender a child for adoption." *Id.* at 423-24, 537 A.2d at 1241. The contract further stipulated that no fee would be due should the child die prior to the fourth month of gestation, and the Sterns were only liable for $1,000 if the child were to be stillborn. *Id.* at 424, 537 A.2d at 1241.

[6] *Id.* at 412, 537 A.2d at 1235. At the time of trial, the Whitehead finances were in disarray as Mrs. Whitehead's sister was foreclosing on the Whitehead's second mortgage on their home. *Id.* at 457, 537 A.2d at 1258. There was evidence that Mr. Whitehead suffered from alcoholism. *Id.* After the trial court proceeding, but before the New Jersey Supreme Court rendered its decision, Mrs. Whitehead conceived another man's child, divorced Richard and married the father of her unborn child. *Id.* at 461 n.18, 537 A.2d at 1260 n.18.

[7] *Id.* at 412, 537 A.2d at 1235 (citing N.J. STAT. ANN. §§ 9:17-43(a)(1), -44(a) (West Supp. 1987)). The Parentage Act provides in pertinent part:

> A man is presumed to be the natural father of a child if . . . [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce.

N.J. STAT. ANN. § 9:17-43(a)(1) (West Supp. 1987).

[8] *Baby M*, 109 N.J. at 412, 424, 537 A.2d at 1235, 1241.

[9] *Id.* at 412, 537 A.2d at 1235.

In a separate agreement, Mr. Stern also promised to pay the Infertility Clinic of

tract was signed, several artificial inseminations were performed.[10] Mrs. Whitehead conceived, and on March 27, 1986, gave birth to Baby M.[11]

Wanting to keep the surrogacy agreement private, the Whiteheads appeared to all at the hospital as the proud parents.[12] The birth certificate listed the baby's name as Sara Elizabeth Whitehead, and Richard Whitehead was designated her father.[13] To respect Mrs. Whitehead's request that their arrangement remain secret, "the Sterns visited the hospital unobtrusively to see the newborn child."[14] During one visit, the Sterns told Mrs. Whitehead that they had decided to name the baby "Melissa."[15] Upon hearing the name, Mrs. Whitehead broke into tears and questioned whether she could part with her child.[16] She spoke of how the baby resembled her older daughter,[17] and indicated that her prior agreement to relinquish custody of the baby was causing her great difficulty.[18]

Mrs. Whitehead turned over the infant to the Sterns on March 30, 1986, during a meeting at the Whitehead home.[19] For the Sterns, this "was a time of joyful celebration" and the culmi-

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New York (ICNY) $7,500. *Id.* ICNY actively solicited potential surrogate mothers and matched them with infertile couples. *Id.* Both Mrs. Whitehead and the Sterns had been drawn to ICNY by its newspaper advertisements. *Id.* at 413, 537 A.2d at 1236. The Sterns had considered and rejected adoption because of the long delay involved and because of their age and differing religious backgrounds which they perceived to be stumbling blocks to adoption approval. *Id.* Mrs. Whitehead came to ICNY for monetary rewards and "to give another couple the 'gift of life.' " *Id.* She had been involved in an unsuccessful attempt to conceive for another couple through ICNY before being introduced to the Sterns. *Id.* at 414, 537 A.2d at 1236. Prior to being matched, ICNY had arranged for a routine psychological examination of Mrs. Whitehead to evaluate her suitability to be a surrogate. *Baby M*, 217 N.J. Super. at 343, 525 A.2d at 1142. Although the examiner expressed concern over her ability to actually part with a child after birth, she was recommended for the program. *Id.* Neither the Sterns nor the Whiteheads were told of the evaluator's reservations. *Baby M*, 109 N.J. at 437, 537 A.2d at 1248.

[10] *Baby M*, 109 N.J. at 414, 537 A.2d at 1236.

[11] *Id.* Mrs. Whitehead's pregnancy was "uneventful." *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 414-15, 537 A.2d at 1236.

[16] *Id.* at 414, 537 A.2d at 1236.

[17] *Id.* The Whiteheads have a son and a daughter, Ryan and Tuesday. *Baby M*, 217 N.J. Super. at 339, 525 A.2d at 1140. At the time of Baby M's birth, the children were ages 11 and 10, respectively. *Id.* After Tuesday's birth, the Whiteheads agreed that Mr. Whitehead would have a vasectomy to preclude further pregnancies. *Id.*

[18] *Baby M*, 109 N.J. at 414, 537 A.2d at 1236.

[19] *Id.* at 414-15, 537 A.2d at 1236.

nation of endless planning for the baby's arrival in their lives.[20] They looked forward to the years of watching the baby they called "Melissa" grow.[21] While aware of Mrs. Whitehead's emotional turmoil, they did not fully realize its depth or its implications.[22]

Within hours of giving up the baby, "Mrs. Whitehead became deeply disturbed, disconsolate, [and] stricken with unbearable sadness" over the loss of her child.[23] She was unable to sleep or eat, and thought of nothing but the absent baby.[24] The following day, Mrs. Whitehead visited the Sterns and told them of her anguish.[25] Surprised and frightened by her reaction and fearing a suicide attempt, they agreed to return the baby to her for one week.[26] The Sterns would not have the baby in their home again for four months.[27]

After realizing that Mrs. Whitehead had no intention of returning the child, Mr. Stern filed a complaint for enforcement of the surrogacy contract; custody of the child; termination of Mrs. Whitehead's parental rights; restraint on any interference with custody; and approval of the baby's adoption by Mrs. Stern.[28] The complaint alleged that Mrs. Whitehead had breached the contract and had threatened to take the baby out of the state in order to avoid legal intervention.[29] It further alleged that Mrs. Whitehead, if given prior notice of the application for an order of custody, would leave the state prior to a hearing.[30] An *ex parte*

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[20] *Id.* at 415, 537 A.2d at 1236.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*, 537 A.2d at 1236-37.

[27] *Id.*, 537 A.2d at 1237.

[28] *Id.* at 415, 417, 537 A.2d at 1237. Mrs. Whitehead telephoned the Sterns on April 1, 1986, to inform them that she was visiting relatives and would be unreachable. *Baby M*, 217 N.J. Super. at 348, 525 A.2d at 1145. Mrs. Whitehead had taken the five-day-old infant to her parents' home in Florida. *Id.* Nine days later she returned to New Jersey and told the Sterns she would return the baby to them on April 12. *Id.* at 349, 525 A.2d at 1145. By April 12, Mrs. Whitehead had changed her mind, but permitted the Sterns to visit the child. *Id.* During the visit, she announced her decision to keep the child and threatened to leave the country if faced with legal action. *Id.* She refused to let Mr. Stern "hold the baby one more time," and threatened to call the police if the Sterns did not leave. *Id.* On April 20, 1986, the Whiteheads put their home up for sale, "indicating in the listing that they might be relocating to Florida." *Id.*

[29] *Baby M*, 109 N.J. at 415-16, 537 A.2d at 1237.

[30] *Id.* at 416, 537 A.2d at 1237.

order was granted, and a process server, the police and the Sterns went to the Whitehead home to execute the order.[31] While Mrs. Whitehead argued with the group over the baby's proper name, the baby was handed through an open window to Mr. Whitehead and he fled.[32]

The Whiteheads immediately went to Florida with Baby M.[33] Thereafter, Mrs. Whitehead called the Sterns on several occasions to discuss the situation. Mr. Stern recorded the conversations which revealed "an escalating dispute about rights, morality and power;" Mrs. Whitehead also threatened to kill herself and the child, and falsely accused Mr. Stern of molesting her other daughter.[34]

Ultimately, the Sterns discovered the Whiteheads' location and obtained a Florida court order requiring the return of the child.[35] Florida police enforced the order, forcibly taking Baby M from her grandparents' home and returning her to the Sterns.[36] The prior ex parte order of custody for the Sterns pendente lite was reaffirmed on the trial court's consideration of certified representations of both parties.[37] Pending a final decision, Mrs. Whitehead was allowed limited visitation with the child,[38] and a guardian ad litem was appointed.[39]

In response to the Sterns' suit, the Whiteheads filed a counterclaim for custody of the child and damages for fraud.[40] Based on traditional contract analysis, they alleged that the contract was one of adhesion and unconscionability, and was illusory.[41] They also argued that the surrogacy agreement was void because it left the child unprotected; that it violated public policy concerns by

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31 *Id.*

32 *Id.*

33 *Id.* The family initially stayed with Mrs. Whitehead's parents. *Id.* During the following three months, to avoid apprehension, they lived in some twenty different locations. *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 416-17, 537 A.2d at 1237.

39 *See id.* at 420, 537 A.2d at 1239. The guardian *ad litem* was appointed to protect Baby M's best interests. *Id.* at 420-21, 537 A.2d at 1239.

40 *Baby M*, 217 N.J. Super. at 329, 525 A.2d at 1135. The misrepresentations and omissions which constituted the basis for the allegation of fraud included: Mrs. Stern was not infertile; the Whiteheads were never informed that Mrs. Stern had multiple sclerosis; and Mrs. Whitehead was never told the results of her psychological examination. *Id.* at 379, 525 A.2d at 1161.

41 *Id.* at 376, 384, 525 A.2d at 1159, 1163.

exploiting women, denigrating human dignity by producing children for money, undermining the traditional family unit, and creating an elite economic group which would use the poor to achieve their purposes; and that it violated state adoption and other child benefit laws.[42]

At trial, Superior Court Judge Harvey Sorkow upheld the validity of the surrogate contract, terminated Mrs. Whitehead's parental rights and visitation, granted sole custody to Mr. Stern; and allowed Mrs. Stern to adopt the baby.[43] Judge Sorkow reasoned that since the various state statutes involved did not specifically address surrogacy contracts, they were inapplicable.[44] After analyzing the individual interests involved and the court's authority, Judge Sorkow held that while such contracts were valid, specific performance could be granted only on a finding that placement with the father was in the best interest of the child.[45] The judge concluded that the best interests of Baby M dictated such a finding.[46]

Mrs. Whitehead appealed and the New Jersey Supreme Court granted direct certification.[47] The supreme court reversed, holding that a surrogacy agreement requiring compensation was illegal and invalid.[48] The court also decided that it was in Baby M's best interests for Mr. Stern to retain custody.[49] Thus, the court voided both the termination of Mrs. Whitehead's parental rights and the adoption by Mrs. Stern, and remanded the matter for a determination concerning Mrs. Whitehead's visitation.[50]

This case, challenging the enforceability of a surrogacy contract, presented a novel issue for New Jersey courts[51] and the na-

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[42] *Id.* at 371, 525 A.2d at 1157.

[43] *Baby M*, 109 N.J. at 417, 537 A.2d at 1237-38.

[44] *Id.* at 418, 537 A.2d at 1238 (citing *In re* Baby M, 217 N.J. Super. 313, 372-73, 525 A.2d 1128, 1157-58 (Ch. Div. 1987)).

[45] *Id.*

[46] *Id.* at 417-18, 537 A.2d at 1238.

[47] *Id.* at 419, 537 A.2d at 1238 (citing *In re* Baby M, 107 N.J. 140, 526 A.2d 203 (1987)).

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

[49] *Id.*, 537 A.2d at 1234.

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

[51] *Baby M*, 217 N.J. Super. at 375, 389, 525 A.2d at 1159, 1166. The trial court noted that "there is no law governing surrogacy contracts in New Jersey and the laws of adoption do not apply to surrogacy contracts." *Id.* at 375, 525 A.2d at 1159. The court also observed that New Jersey had no stated public policy concerning surrogacy. *Id.* at 389, 525 A.2d at 1166.

tion.[52] While there have been other occasions where surrogate mothers have insisted on revocation of surrogacy agreements, these matters were settled out of court with the mothers retaining custody.[53] Three states, however, had previously addressed how their adoption statutes related to surrogacy.[54]

In *Doe v. Kelley*,[55] the Michigan Court of Appeals considered whether the state adoption code prohibiting an exchange of consideration in conjunction with an adoption applied to surrogacy agreements.[56] In *Doe*, a married couple brought suit alleging that sections of the state adoption code were unconstitutional infringements on their right to privacy in having a child.[57] The court held that a surrogacy contract, which seeks to modify the legal status of a child, namely "its right to support, intestate succession, etc.," is not "within the realm of the fundamental interests protected by the right to privacy."[58] While the court

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[52] Sherman, *N.J. High Court Faces Solomonic Baby M Choice*, The Nat'l L.J., Sept. 28, 1987, at 8, col. 1.

[53] Taub, *Amicus Brief: In the Matter of Baby M*, 10 WOMEN'S RTS. L. REP. 7, 9 (1987) (citing Galen, *Surrogate Law*, The Nat'l L.J., Sept. 9, 1986, at 10, col. 2).

[54] *See infra* notes 55-78 and accompanying text.

[55] 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

[56] *See id.* at 170-72, 307 N.W.2d at 439-40.

[57] *Id.* at 172, 307 N.W.2d at 440. The Michigan statute in question provides:

> (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
>
> (a) The placing of a child for adoption.
>
> (b) The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
>
> (c) A release.
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> (d) A consent.
>
> (e) A petition.
>
> (2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

MICH. COMP. LAWS § 710.54 (1979). In addition, a related Michigan statute provides that "[a] person who violates any of the provisions of section[] . . . 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony." MICH. COMP. LAWS § 710.69 (1979).

[58] 106 Mich. App. 169 at 174, 307 N.W.2d at 441.

observed that the decision to have a child was a constitutionally protected interest,[59] it reasoned that interest was not compromised by the adoption code as the code did not preclude a couple from engaging a surrogate mother, but only from paying her.[60]

The Kentucky Supreme Court reached an opposite conclusion in *Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky ex rel. Armstrong*.[61] In that case the Kentucky Attorney General sued Surrogate Parenting Associates, Inc. (SPA), seeking revocation of its corporate charter and alleging that its surrogate parenting procedure violated state adoption laws.[62] SPA operated a clinic which, like the Infertility Clinic of New York (ICNY),[63] assisted in matching infertile couples to surrogate mothers.[64] The typical contract between the surrogate and the biological father called for termination of the surrogate mother's parental rights after delivery, for payment of a fee to both the mother and SPA, and for custody to be vested in the biological father.[65] It further provided that the surrogate's husband agreed to relinquish his claim to the child.[66] The court rejected the attorney general's argument that because the adoption code specif-

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[59] *Id.* at 173, 307 N.W.2d at 440-41 (citations omitted). The court stated:

> While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, see *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 53 L.Ed. 2d 484 (1977), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child—*i.e.*, its right to support, intestate succession, etc. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

Id.

[60] *Id.* at 173-74, 307 N.W.2d at 441.

[61] 704 S.W.2d 209 (Ky. 1986).

[62] *Id.* at 210. The relevant statutes prohibited the purchase, sale or procurement for purchase or sale of a child for adoption purposes or the filing of a petition seeking voluntary relinquishment of parental rights within five days after a child's birth, and invalidated consent for adoption given within five days after a child's birth. KY. REV. STAT. ANN. § 199.590(2) (Baldwin 1984); KY. REV. STAT. ANN. § 199.500(5) (Baldwin 1984) (amended July 1, 1984); KY. REV. STAT. ANN. § 199.601(2) (Baldwin 1984) (repealed July 1, 1987).

[63] *See supra* note 9 and accompanying text.

[64] *Surrogate Parenting Assocs.*, 704 S.W.2d at 210.

[65] *Id.*

[66] *Id.* at 210-11.

ically referred to in vitro fertilization without mentioning surrogacy, the legislature, by its silence, prohibited surrogate parenting.[67] The court determined that the Kentucky legislature "intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child."[68] Concluding that surrogacy agreements are entered into before a child is conceived,[69] the court held that such contracts were outside the purview of the adoption code and not in violation of other state law.[70] In dicta, however, the court observed that under Kentucky law a surrogate mother can revoke her contractual consent to relinquishment of parental

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[67] *Id.* at 212. The attorney general relied on the following statutory provision, contained in a section captioned "Advertisement soliciting children for adoption prohibited—Charging fees prohibited—Sale or purchase of children prohibited—In vitro fertilization not prohibited by this section—Adoption fees including attorney's fees must be approved by court:"

> Nothing in this section shall be construed to prohibit in vitro fertilization. For purposes of this section 'in vitro fertilization' means the process whereby an egg is removed from a woman, then fertilized in a receptacle by the sperm of the husband of the woman in whose womb the fertilized egg will thereafter be implanted.

See Surrogate Parenting Assocs., 704 S.W.2d at 212 (quoting KY. REV. STAT. ANN. § 199.590(2) (Baldwin 1984)); KY. REV. STAT. ANN. § 199.590 (Baldwin 1984). In rejecting this assertion, the Kentucky court reasoned:

> The Attorney General contends that by including this "in vitro" fertilization procedure in the statute while leaving out the surrogate parenting procedure presently under consideration, the legislature was legislating against surrogate parenting. We do not divine any such hidden meanings. All we can derive from this language is that the legislature has expressed itself about one procedure for medically assisted conception while remaining silent on others. To this extent the legislature puts its stamp of approval on tampering with nature in the interest of assisting a childless couple to conceive. The "in vitro" fertilization procedure sanctioned by the statute and the surrogate parenting procedure as described in the Stipulation of Facts are similar in that both enable a childless couple to have a baby biologically related to one of them when they could not do so otherwise. The fact that the statute now expressly sanctions one way of doing this does not rule out other ways by implication. In an area so fundamental as medically assisting a childless couple to have a child, such a prohibition should not be implied.

Surrogate Parenting Assocs., 704 S.W.2d at 212.

[68] *Surrogate Parenting Assocs.*, 704 S.W.2d at 211. "[T]he central fact in the surrogate parenting procedure is that the agreement is entered into *before* conception." *Id.*

[69] *Id.* The court asserted that the issue of whether surrogate parenting offends public policy and therefore should be prohibited is a determination which must be made by the legislature, not the courts. *Id.* at 213. As current legislation did not foreclose surrogate agreements, the court refused to intervene. *Id.* at 214.

[70] *Id.*

rights and custody up to five days after giving birth.[71]

New York was the third state to consider the relationship between surrogate contracts and state law in *In re Adoption of Baby Girl L.J.*,[72] in which the litigants asked the court to approve adoption of a baby born as the result of a contractual arrangement between the biological father and a surrogate mother.[73] The contract, prepared by an attorney who represented the father, called for payment of $10,000 to the mother and $3,500 to the attorney.[74] The New York court determined that "such arrangements are not void, but are voidable because the individual State's adoption statutes, which are designed to safeguard the best interests of the child, take precedence over any agreement between the parties."[75] Concluding that New York laws did not "expressly foreclose" parenting agreements, the court approved both the adoption of the baby by the wife of the biological father and payment to the surrogate mother as well as payment of her

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[71] *Id.* at 213. The court asserted:

> SPA has freely acknowledged that the initial contractual arrangements regarding the mother's surrender of custody and termination of parental rights are voidable. The surrogate mother's consent given before five days following birth of the baby is no more legally binding than the decision of an unwed mother during her pregnancy that she will put her baby up for adoption. The five days' consent feature in the termination of parental rights statute . . . and in the consent to adoption statute . . . take precedence over the parties' contractual commitments, meaning that the surrogate mother is free to change her mind. The policy of the voluntary termination statute and the consent to adoption statute is to preserve to the mother her right of choice regardless of decisions made before the birth of the child. This policy is not violated by the existence of the contractual arrangements previously made. The policy of these statutes is carried out because the law gives the mother the opportunity to reconsider her decision to fulfill the role as surrogate mother and refuse to perform the voluntary termination procedure. Should she elect to do so, the situation would be no different than had she never entered into the procedure. She would be in the same position vis-a-vis the child and the biological father as any other mother with a child born out of wedlock. The parental rights and obligations between the biological father and mother, and the obligations they owe to the child, would then be the rights and obligations imposed by pertinent statutes rather than the obligations imposed by the contract now vitiated.

Id. at 212-13. *See supra* note 62 for pertinent text of statute.

[72] 132 Misc. 2d 972, 505 N.Y.S.2d 813 (N.Y. Sur. 1986).

[73] *Id.* at 972-73, 505 N.Y.S.2d at 814.

[74] *Id.* at 973, 975, 505 N.Y.S.2d at 814, 818.

[75] *Id.* at 977, 505 N.Y.S.2d at 817. The court observed that "[i]f violations of the adoption statutes are found in the terms of the parenting agreement, the court may find the contract illegal and deny the petition for adoption." *Id.*

attorney's fees.[76] The court, however, expressed its "strong reservations about these arrangements both on moral and ethical grounds,"[77] and commended the issue to the legislature's attention for appropriate action.[78]

Against this sparse decisional background, the New Jersey Supreme Court rendered its decision in *In re Baby M.*[79] In a unanimous opinion authored by Chief Justice Wilentz, the supreme court held that parenting agreements which compensate the surrogate mother violate the law and public policy of New Jersey.[80] In so doing, the court rejected the argument that such compensation is for the mother's services and not for the right to adopt the baby,[81] and opined that such arrangements will be validated only where a woman voluntarily acts as a surrogate without compensation and not pursuant to a binding agreement to surrender the child.[82] The court noted that its decision in no way precluded future legislative action to permit surrogacy contracts.[83]

Chief Justice Wilentz began his analysis with a detailed comparison of the surrogacy contract and New Jersey adoption statutes.[84] Citing statutory law which prohibits the exchange of

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[76] *Id.* at 974, 978-79, 505 N.Y.S.2d at 815, 818.

[77] *Id.* at 978, 505 N.Y.S.2d at 817-18. The court stated:

> [T]he court requests the Legislature to review this serious problem in order to determine whether statutory provisions should be made to allow or disallow the payments requested herein and the practice of surrogate parenting. Accordingly, copies of this decision have been sent to the Law Revision Commission and the chairmen of the Judiciary Committees of the Senate and Assembly.

Id., 505 N.Y.S.2d at 818.

[78] *Id.*, 505 N.Y.S.2d at 818.

[79] 109 N.J. 396, 537 A.2d 1227 (1988).

[80] *Id.* at 411, 537 A.2d at 1234. Chief Justice Wilentz wrote: "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 women." *Id.*

[81] *Id.* at 422, 537 A.2d at 1240. The court stated: "We have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead." *Id.*

[82] *Id.* at 411, 537 A.2d at 1234. The court opined that the public policy and laws of the state would not be offended if a woman decided to be a surrogate mother, as long as she was neither compensated nor contractually bound to surrender her baby. *Id.*, 537 A.2d at 1235.

[83] *Id.* The court observed: "[O]ur holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts." *Id.*

[84] *Id.* at 423-34, 537 A.2d at 1240-46.

money in connection with adoptions[85] except by state-approved, non-profit agencies,[86] the *Baby M* court characterized the surrogacy contract as an "illegal and perhaps criminal" attempt to circumvent the statute.[87] Rejecting the Sterns' argument that the payments to Mrs. Whitehead and the infertility clinic that assisted in this venture[88] were solely for services, the court found that the money was "paid and accepted in connection with an adoption."[89]

The court then turned to the issue of Mrs. Whitehead's agreement to relinquish parental rights.[90] The court explained that because of the finality of termination of parental rights, New

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[85] *Id.* at 422, 537 A.2d at 1240 (citing N.J. STAT. ANN. § 9:3-54 (West Supp. 1987)). The New Jersey Parentage Act 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
>
> (1) Pay, give or agree to give any money or any 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.

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

[86] "Approved agency" is defined as "a nonprofit corporation, association or agency, including any public agency, approved by the Department of Human Services for the purpose of placing children for adoption in New Jersey." N.J. STAT. ANN. § 9:3-38(a) (West Supp. 1987).

[87] *Baby M*, 109 N.J. at 422, 537 A.2d at 1240.

[88] *See supra* note 9 and accompanying text (discussing the role of the infertility clinic).

[89] *Baby M*, 109 N.J. at 424, 537 A.2d at 1241. *See also supra* note 5 and accompanying text (discussing the contract's fee stipulations). The court emphasized the various fee arrangements in the contract, which were dependent on whether the child was carried to term and born healthy. *Baby M*, 109 N.J. at 424, 537 A.2d at 1241. The court also stressed that contracting for such fees is a high misdemeanor under New Jersey law, which is punishable by imprisonment for three to five years. *Id.* at 425, 537 A.2d at 1241 (citing N.J. STAT. ANN. § 9:3-54(c) (West Supp. 1987); N.J. STAT. ANN. §§ 2C:43-1(b), -6(a)(3) (West Supp. 1987)). *See also supra* note 85. The court noted that the statutory prohibition is strong because of "[t]he evils inherent in baby bartering," *id.* (citing N. BAKER, BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTION 7 (1979)), and because "[t]he negative consequences of baby buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother." *Id.*, 537 A.2d at 1242.

[90] *Baby M*, 109 N.J. at 425-29, 537 A.2d at 1242-44.

Jersey statutory requirements concerning termination are stringently applied, and permit termination only in specific enumerated instances:[91] in an action by an approved agency,[92] in an action by the Division of Youth and Family Services (DYFS),[93] or in a private placement adoption.[94] The court determined that all relevant statutes and case law mandate that where there is no voluntary, written surrender to DYFS or to an approved agency, termination of parental rights in the context of a private-placement adoption would be granted only on a substantial showing of ne-

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[91] *Id.* at 426, 537 A.2d at 1242. The supreme court stated:

> Our law, recognizing the finality of any termination of parental rights, provides for such termination only where there has been a voluntary surrender of a child to an approved agency or to the Division of Youth and Family Services ("DYFS"), accompanied by a formal document acknowledging termination of parental rights, or where there has been a showing of parental abandonment or unfitness.

Id. (citing N.J. STAT. ANN. §§ 9:2-16, -17 (West 1976); N.J. STAT. ANN. § 9:3-41 (West Supp. 1987); N.J. STAT. ANN. § 30:4C-23 (West 1981)).

[92] *Id.* The court pointed out that termination by an approved agency could proceed only upon proof of a parent's written surrender of a child, forsaken parental obligation, death or insanity. *Id.* (citing N.J. STAT. ANN. §§ 9:2-16, -17, -19 (West 1976)). Without parental consent, the court noted that there must also be proof of "willful and continuous neglect or failure to perform the natural and regular obligations of care and support of a child." *Id.* (quoting N.J. STAT. ANN. § 9:2-13(d) (West 1976)).

[93] *Id.* The court observed that absent formal surrender or written consent to termination, DYFS may only seek to terminate parental rights upon a showing "that the best interests of such child require that he be placed under proper guardianship." *Id.* at 426-27, 537 A.2d at 1242 (citing N.J. STAT. ANN. §§ 30:4C-20 , -23 (West 1976)). The court also stressed that the threshold for the best-interests test for termination of parental rights far exceeds the custodial best-interest standard. *See id.* at 427, 537 A.2d at 1242. According to the court, DYFS

> must prove, by clear and convincing evidence, that "[t]he child's health and development have been or will be seriously impaired by the parental relationship," that "[t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm," that "[t]he court has considered alternatives to termination," and that "[t]he termination of parental rights will not do more harm than good."

Id. (citations omitted). Thus, the court posited that in a termination of parental rights case there must be "a most substantial showing of harm to the child." *Id.*

[94] *Id.* The court asserted that "there must be a finding of 'intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future' " for judicial approval of the termination of a natural parent's rights in a private-placement adoption. *Id.* (quoting N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1987)). The court, noting that it had previously distinguished requirements for termination in private-placement adoptions and requirements for approved agency adoptions, reiterated its prior determination that in private placement, while neither voluntary surrender nor consent is a statutory consideration, there can be no termination absent evidence of forsaken parental obligations. *Id.* at 427-28, 537 A.2d at 1243 (citing Sees v. Baber, 74 N.J. 201, 213, 377 A.2d 628, 634 (1977)).

glect or abandonment.[95] The *Baby M* court rejected the Sterns' contention that such a showing was unnecessary where the petitioner, Mrs. Stern, was a stepparent.[96] The court also declined to accept the Sterns' argument that the Parentage Act empowered the trial court to terminate Mrs. Whitehead's rights based solely on the child's best interests.[97] Finding that the legislature's carefully crafted termination statutes demonstrated intent not "to allow termination to be achieved by one short sentence in a contract," Chief Justice Wilentz held the contract clause unenforceable.[98] He further ruled that because termination of Mrs. Whitehead's parental rights was improper, the adoption by Mrs. Stern was invalid.[99]

The court then noted the lack of a contractual provision allowing Mrs. Whitehead to revoke her consent to termination of her parental rights and relinquishment of custody.[100] The court observed that the state statutes only provide for irrevocable consent in narrowly prescribed circumstances involving surrender to DYFS or an approved agency,[101] and that consent may be re-

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

96 *Id.*

97 *Id.* at 429 n.6, 537 A.2d at 1243 n.6. The New Jersey Parentage Act, N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1987), deals with situations where the parentage of a child is in dispute. The Parentage Act provides in pertinent part:

> The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, the repayment of any public assistance grant, or any other matter in the best interests of the child.

N.J. STAT. ANN. § 9:17-53(c) (West Supp. 1987). The court reasoned that termination of parental rights differed from the areas to which the Parentage Act was directed. *Baby M*, 109 N.J. at 429 n.6, 537 A.2d at 1243 n.6. The court also opined that had the New Jersey Legislature intended such a major shift in the standards governing termination, it would have stated so expressly. *Id.*

98 *Id.* at 429, 537 A.2d at 1243-44. The court 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.

Id.

99 *Id.*

100 *Id.* at 429-34, 537 A.2d at 1244-46.

101 *Id.* at 434, 537 A.2d at 1246. The court asserted that "[t]here is only one irrevocable consent, and that is the one explicitly provided for by statute: a consent to surrender of custody and a placement with an approved agency or with DYFS."

voked in private-placement adoptions.[102] Thus, the court held that the irrevocable nature of the contract was "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."[103]

The court next considered public policy issues.[104] Asserting that it was against settled law, the court repudiated what it characterized as "the contract's basic premise" — that parents can make a pre-birth decision as to custody.[105] The court also found the contract contrary to the New Jersey policy that children, whenever possible, remain with and be raised by both natural parents.[106] The court posited that the surrogacy contract violated the state's policy that natural parents have an equal right to a relationship with the child, as the surrogacy contract's sole purpose was to give Mr. Stern, the father, the exclusive right to Baby

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Id. *See supra* notes 92-97 and accompanying text for a discussion of statutory requirements concerning termination of parental rights.

[102] *See Baby M*, 109 N.J. at 433-34, 537 A.2d at 1245-46. With regard to revocability of consent, the court referred to its holding in *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977). *Baby M*, 109 N.J. at 433, 537 A.2d at 1246. In *Sees*, a mother changed her mind about surrendering custody in a private adoption two days after giving her newborn infant to adoptive parents. *Sees*, 74 N.J. at 204, 377 A.2d at 630. The supreme court held that despite a knowing consent, the natural mother had the right to revoke consent in a private-placement adoption and was entitled to the return of the child even though a year had passed since he had been given to his adoptive parents. *Id.* at 220, 225-26, 377 A.2d at 638, 641. The court determined that "since there is no statutory obligation to consent [in a private-placement adoption], there can be no legal barrier to its retraction." *Id.* at 215, 377 A.2d at 635. Consent was significant only as to whether the child had been abandoned or whether there had been a forsaking of parental obligations. *Id.* at 213, 220, 377 A.2d at 634, 638.

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

[104] *Id.* at 434-44, 537 A.2d at 1246-50.

[105] *Id.* at 434, 537 A.2d at 1246 (citing Fantomy v. Fantomy, 21 N.J. 525, 536-37, 122 A.2d 593, 598 (1956); Sheenan v. Sheenan, 38 N.J. Super. 120, 125, 118 A.2d 89, 92 (App. Div. 1955) (stating that "[w]hatever the agreement of the parents, the ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as *parens patriae*")). The court observed that "[t]he fact that the trial court remedied that aspect of the contract through the 'best-interests' phase does not make the contractual provision any less offensive to the public policy of this state." *Id.* at 435, 537 A.2d at 1246.

[106] *Id.*, 537 A.2d at 1246-47. In making this determination the court relied upon the stated purpose of the prior adoption act, which declared "it is necessary and desirable . . . to protect the child from unnecessary separation from his natural parents." *Id.*, 537 A.2d at 1247 (quoting N.J. STAT. ANN. § 9:3-17 (West 1976) (repealed 1977)). While it noted that this purpose is not explicitly stated in the present statutes, the court posited that "this purpose remains part of the public policy of this State." *Id.* (citations omitted). The *Baby M* court pointed to the traumatic circumstances surrounding the breakdown of the surrogacy agreement at bar as proof of the need for such a policy. *Id.* at 435 n.9, 537 A.2d at 1247 n.9.

M by terminating the rights of Mrs. Whitehead, the mother.[107] The court also determined that the surrogacy contract contravenes various statutory policies in that there was no knowing and voluntary waiver of parental rights by Mrs. Whitehead,[108] the Sterns' interests were not fully served,[109] the child's best interests were disregarded,[110] and, it was baby selling.[111] The Chief Jus-

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[107] *Id.* at 435-36, 537 A.2d at 1247. The court relied on the Parentage Act which stipulates that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *Id.* (quoting N.J. STAT. ANN. § 9:17-40 (West Supp. 1987)). The court also pointed to the Parentage Act's prefatory statement by the Assembly Judiciary Committee that "regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other." *Id.* at 436, 537 A.2d at 1247 (quoting ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY & DEFENSE COMM. STATEMENT to Senate No. 888, 1983, c. 17, 200th Leg., 2d Sess. (1983)).

[108] *Id.* at 436-37, 537 A.2d at 1247-48. The court emphasized:

> Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction.

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

The court also criticized the sufficiency of the legal advice given to Mrs. Whitehead, particularly because the attorney she retained was referred by and under agreement with ICNY to act as counsel to all surrogate candidates. *Id.* at 436, 537 A.2d at 1247. The court disapprovingly noted ICNY's failure to disclose the results of Mrs. Whitehead's psychological examination to her or to the Sterns. *Id.* at 437, 537 A.2d at 1247. The Chief Justice asserted that ICNY's failure to warn either party of Mrs. Whitehead's potential inability to surrender the child was motivated by greed. *Id.*, 537 A.2d at 1247-48. Such a disclosure, the court observed, might have prevented the ensuing years of trauma. *Id.* *See supra* note 9 and accompanying text (discussing Mrs. Whitehead's psychological evaluation).

[109] *Baby M*, 109 N.J. at 437, 537 A.2d at 1248. The court observed that while only the Sterns' interests were served by the contract, even the Sterns were not sufficiently protected to the extent public policy requires. *Id.* The Sterns were not aware of the natural mother's "genetic makeup," her psychological and medical history, nor their parental responsibilities. *Id.*

[110] *Id.* The court posited that the child's best interests were totally disregarded as the contract failed to consider the Sterns' fitness as the custodial parents, Mrs. Stern's fitness as an adoptive mother, whether the Sterns were better suited than Mrs. Whitehead to care for the child, and the effect upon the baby of separation from its natural mother. *Id.*

[111] *Id.* at 437-38, 537 A.2d at 1248. The supreme court explored the asserted differences between surrogacy and adoption, and rejected the contention that surrogacy agreements involving monetary compensation do not pose the same risks as the use of money to secure an adoption. *Id.* at 438, 537 A.2d at 1248-49. The court observed that, unlike adoption, surrogacy arrangements would not exist without payment; that surrogacy is attributable to the use of money, while adoption is not; that in surrogacy, unlike adoption, a mother is drawn to "the highest paying ill-

tice concluded that although surrogacy's long-term effects on all involved are unknown, they are potentially devastating.[112] Thus, for policy reasons the court determined that a surrogate's agreement to sell her baby is void because "[i]ts irrevocability infects the entire contract as does the money that purports to buy it."[113]

After deciding that relinquishment of parental rights cannot be contractually based, the court considered existing statutory justifications for termination of Mrs. Whitehead's parental rights.[114] The court reasoned that as there was no showing of intentional abandonment, substantial neglect or unfitness, the statutory standards for termination had not been met.[115] To the contrary, the trial court had expressly found Mrs. Whitehead to be a fit mother.[116]

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suited adoptive parents," rather than an approved agency; and, that while in a private-placement adoption a mother's consent to surrender all rights to her child is revocable, in surrogacy it is irrevocable and given so early in the transaction that it could never be a fully informed decision. *Id.* at 438-39, 537 A.2d at 1248. The court noted that while the initial inclination is to be more sympathetic to the woman carrying an unwanted pregnancy than to a surrogate who intentionally became pregnant, further reflection reveals that the "essential evil" is identical—taking advantage of the circumstances (a need for money or unwanted pregnancy) in order to deprive a woman of her child. *Id.* at 439, 537 A.2d at 1248-49. The court further asserted that the profit motive inherent in surrogacy "predominates, permeates, and ultimately governs the transaction," *id.*, 537 A.2d at 1249, and that surrogacy breeds the potential for exploitation of low-income women, *id.* at 439-40, 537 A.2d at 1249. Finally, the court concluded that Mrs. Whitehead's assent to the terms of the contract was not dispositive, because "in a civilized society, [there are] some things money cannot buy." *Id.* at 440, 537 A.2d at 1249.

[112] *Id.* at 441-42, 537 A.2d at 1250. The court observed:

> The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct. Literature in related areas suggests these are substantial considerations, although, given the newness of surrogacy, there is little information.

Id. at 441, 537 A.2d at 1250 (citations omitted).

[113] *Id.* at 442-44, 537 A.2d at 1250. The court relegated similar discussions by other jurisdictions to a footnote. *See id.* at 442 n.11, 537 A.2d at 1250 n.11; *supra* notes 55-78 and accompanying text (discussing surrogacy case law in Michigan, Kentucky and New York). In the United Kingdom, only revocable surrogacy agreements arranged without brokers are legally permissible. *Baby M*, 109 N.J. at 442 n.11, 537 A.2d at 1251 n.11.

[114] *Baby M*, 109 N.J. at 444-47, 537 A.2d at 1251-53.

[115] *Id.* at 445, 537 A.2d at 1252.

[116] *Id.* "The trial court never found Mrs. Whitehead an unfit mother and indeed affirmatively stated that Mary Beth Whitehead had been a good mother to her other children." *Id.*

The Chief Justice noted that while a child's best interests are determinative of custody, those interests are an insufficient basis for termination of parental rights.[117] Also, surrender of a child coupled with consent to a private-placement adoption, the court stated, does not mandate termination of a natural parent's rights.[118] While recognizing that statutory interpretation must be flexible enough to accommodate individual circumstances,[119] the court held that nothing in the instant case justified termination of Mrs. Whitehead's rights.[120]

The *Baby M* court also considered the constitutional ramifications of surrogacy.[121] While acknowledging that the right to procreate is a fundamental interest protected by the state and federal constitutions, the court rejected the assertion that the right extended to the nurturing, companionship, custody and care following birth.[122] Stating that the right to procreate did not extend beyond the act of conception, whether by artificial insemination or sexual intercourse, the court found no constitutional basis to uphold Mrs. Stern's claim of custody.[123] The court further observed that an individual's right to privacy and self-determination must be tempered by the effect those rights, if exercised, will have on innocent third parties.[124]

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117 *Id.* (citing New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 603, 512 A.2d 438, 444 (1986); *In re* Adoption of Children by D, 61 N.J. 89, 97-98, 203 A.2d 171, 175-76 (1980)).

118 *Id. See supra* note 102 and accompanying text.

119 *Baby M*, 109 N.J. at 445, 537 A.2d at 1252. The natural parents' constitutional and statutory rights also must be considered. *Id.* (citing New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 512 A.2d 438 (1986)).

120 *Id.* at 447, 537 A.2d at 1253.

121 *Id.* at 447-52, 537 A.2d at 1253-55.

122 *Id.* at 448, 537 A.2d at 1253. The court observed that while such rights "may also be constitutionally protected, . . . [they] involve many considerations other than the right of procreation." *Id.*, 537 A.2d at 1253-54.

123 *Id.*, 537 A.2d at 1254.

124 *Id.* at 449, 537 A.2d at 1254. The court referred to the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), to support this conclusion. *Baby M*, 109 N.J. at 449 n.13, 537 A.2d at 1254 n.13. In *Roe*, the Court held that while a woman's decision to have an abortion was protected by the right to personal privacy, that right was not absolute and was subject to limitations imposed by a state's interests in protection of medical standards, health and prenatal life. Roe v. Wade, 410 U.S. 113, 154-55 (1973). In *Baby M*, the New Jersey Supreme Court analogized this balancing of individual and state interests with its own decisions in cases involving termination of life-support systems, and court-ordered life-saving procedures, and determined that a similar balancing of interests was appropriate in the instant case. *Baby M*, 109 N.J. at 449 n.13, 537 A.2d at 1254 n.13. The court observed that "the parties' right to procreate by methods of their own choosing cannot be enforced without consideration of the state's interest in protecting the resulting child." *Id.*

The court rejected Mrs. Stern's claim concerning deprivation of equal protection under the laws of New Jersey.[125] The Sterns urged that just as New Jersey law grants full parental rights to the infertile husband of a woman impregnated by a sperm donor, a similar right should be recognized when the wife is the infertile spouse.[126] Reasoning that "a sperm donor simply cannot be equated with a surrogate mother," the court summarily rejected this argument.[127]

The court declined to decide the right-to-companionship question raised by Mrs. Whitehead, declaring the issue moot in light of its decision that her parental rights were improperly terminated.[128] The court warned in dicta, however, that future legislative measures to validate surrogacy agreements should consider the fundamental right of a mother to the companionship of her child.[129] A statute making the mother's consent revocable for a limited time following birth, the court opined, would be more likely to pass constitutional muster than a statute which made consent immediately irrevocable.[130] The court further observed that a voluntary and knowing surrender of a child could significantly erode the strength of a parent's claim to companionship "to the point where a statute awarding custody and all parental rights to an adoptive couple, especially one that includes a parent of the child, would be valid."[131]

As to custody, the court declared that while the claims of both parents are given equal weight, the sole determining factor would be the child's best interests.[132] It rejected the claim that,

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125 *Baby M*, 109 N.J. at 449-50, 537 A.2d at 1254-55.

126 *Id.* at 450, 537 A.2d at 1254 (citing N.J. STAT. ANN. § 9:17-44 (West Supp. 1987)).

127 *Id.* The court observed, however, that had Mrs. Whitehead contributed an egg to be implanted in Mrs. Stern, an equal protection argument in relation to the statute might have been implicated. *Id.*, 537 A.2d 1254-55.

128 *Id.*, 537 A.2d at 1255.

129 *Id.* at 452 n.16, 537 A.2d at 1255-56 n.16.

130 *Id.*

131 *Id.*

132 *Id.* at 453, 537 A.2d at 1256. The court posited:

> With the surrogacy contract disposed of, the legal framework becomes a dispute between two couples over the custody of a child produced by the artificial insemination of one couple's wife by the other's husband. Under the Parentage Act the claims of the natural father and the natural mother are entitled to equal weight, *i.e.*, one is not preferred over the other solely because it is the father or the mother. The applicable rule given these circumstances is clear: the child's best interests determine custody.

Id. (citing N.J. STAT. ANN. § 9:17-40 (West Supp. 1987)) (footnote omitted).

regardless of Baby M's best interests, custody should be awarded to the natural mother to discourage future surrogacy contracts.[133] The court also refused to disregard factors concerning custody simply because they flowed from the original, and allegedly erroneous, *ex parte* award of custody to the Sterns.[134] While the court agreed that it was possible that the *ex parte* order may have facilitated the development of facts affecting the outcome, it asserted that an award of custody based on "some hypothetical state of facts," rather than as the facts actually exist would be improper.[135]

The supreme court, relying on the testimony of eleven experts,[136] contrasted the family lives, personalities and characters of the parties.[137] The court found that Baby M's "prospects for a wholesome, independent psychological growth and development

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[133] *Id.* at 454, 537 A.2d at 1257. The court reasoned that holding the contract unenforceable was adequate deterrence of future surrogacy agreements, and the child's interests need not be sacrificed in order to further emphasize the point. *Id.* at 454-55, 537 A.2d at 1257.

[134] *Id.* at 455, 537 A.2d at 1257. *See supra* notes 31-39 and accompanying text for a discussion of the *ex parte* order and the circumstances surrounding its entry.

In determining custody, the court considered the Sterns' continuing custody of Baby M for more than one year. *Baby M*, 109 N.J. at 455-56, 537 A.2d at 1257. It also considered Mrs. Whitehead's erratic behavior as demonstrated by her flight to Florida; "her willingness to use her children for her own aims" as shown by her threats to murder Baby M and to falsely accuse Mr. Stern of sexually abusing her oldest daughter; her manipulativeness as indicated by her threats of suicide; and her unsettled family life as demonstrated by the innumerable moves from hotel to hotel in Florida. *Id.*

The supreme court noted that while not relevant to the case at bar, *ex parte* custody orders *pendente lite* should be entered in favor of the father, in cases where the natural parents disagree as to custody at a child's birth, "only in an extreme, truly rare, case." *Id.* at 462, 537 A.2d at 1261. The court asserted that in any future surrogacy disputes, the natural mother should retain custody pending litigation unless the father's *ex parte* application for custody *pendente lite* contains "proof of unfitness, of danger to the child, or the like, of so high a quality and persuasiveness as to make it unlikely that" his application would fail. *Id.* at 462-63, 537 A.2d at 1261. Absent the requisite showing, the matter should be listed for argument on notice to the surrogate mother. *Id.* at 463, 537 A.2d at 1261.

[135] *Id.* at 456, 537 A.2d at 1258. The Whiteheads argued "that had the trial court not given initial custody to the Sterns during the litigation, Mrs. Whitehead not only would have demonstrated her perfectly acceptable personality . . . but would also have been able to prove better her parental skills along with an even stronger bond than may now exist between her and Baby M." *Id.*, 537 A.2d at 1257. While noting that the argument had "considerable force" because the initial award of custody may have been erroneous and may have affected its present custody determination, the court ruled that it had to consider the child's *actual* best interests, "even if some of the facts may have resulted in part from legal error." *Id.*, 537 A.2d at 1257-58.

[136] *See Baby M*, 217 N.J. Super. at 355-69, 525 A.2d at 1148-56.

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

would be at serious risk" if she was placed with the Whiteheads.[138] The court questioned the stability of the Whitehead family and finances,[139] Mrs. Whitehead's domination of her two older children, her contempt for professional counseling, and her potential inability to explain to Baby M at the appropriate time honestly and sensitively the circumstances surrounding her origin.[140] The Chief Justice determined that the Sterns would be stable, supportive and best suited to help Baby M come to terms with her origin.[141] Therefore, the court affirmed the trial court's award of custody to the Sterns.[142]

As to the issue of Mrs. Whitehead's visitation, the court declined to make a *de novo* determination because of the insufficiency of the record below.[143] It remanded the matter to the trial court for a hearing and decision solely on this issue.[144]

Finally, the supreme court asserted that *unregulated*, nontraditional methods of reproduction have the potential for causing great harm and suffering.[145] While reiterating that New Jersey laws do not allow the type of contract used in this case, the

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[138] *Id.* at 458, 537 A.2d at 1259. The court observed that while the Whiteheads would love Baby M, her life would "be too closely controlled by Mrs. Whitehead." *Id.*

[139] The court reasoned that Mrs. Whitehead's pregnancy by another man, divorce, and subsequent remarriage, "suggests less stability in the Whiteheads' lives." *Id.* at 461 n.18, 537 A.2d at 1260 n.18. While the court stated that these new developments had not affected its decision, when the case was remanded on the issue of visitation, the trial judge was ordered to consider these new circumstances. *Id.* at 461 n.18, 463 n.19, 537 A.2d at 1260 n.18, 1261 n.19. *See supra* note 6 and accompanying text.

[140] *Baby M*, 109 N.J. at 457-58, 537 A.2d at 1258-59.

[141] *Id.* at 458-59, 537 A.2d at 1259.

[142] *Id.* at 459, 537 A.2d at 1259. While affirming the trial judge's decision, the supreme court criticized him for judging Mrs. Whitehead "rather harshly." *Id.* The supreme court reasoned that her resistance to the *ex parte* order and her resulting actions were understandable in light of her bond with the newborn infant. *Id.* The supreme court also criticized the trial court's emphasis on the Whiteheads' and Sterns' differing educational goals for Baby M, stating that while this was a legitimate consideration, "a best-interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life." *Id.* at 460, 537 A.2d at 1260.

[143] *Id.* at 463, 537 A.2d at 1261.

[144] *Id.* The court ordered that on remand the matter be heard by a trial judge other than Judge Sorkow, the original trial judge, because of his potential commitment to his findings. *Id.* at 463 n.19, 537 A.2d at 1261 n.19 (quoting New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 617, 512 A.2d 438, 452 (1986)). The court also observed that the guardian *ad litem*'s suggested five-year delay of visitation was most unusual and possibly bordered on termination, but could be ordered if the proof supported such a long-term postponement. *Id.* at 466-67, 537 A.2d at 1263.

[145] *Id.* at 468, 537 A.2d at 1264.

court observed that voluntary surrogacy agreements, achieved without compensation and providing the natural mother with an opportunity for revocation, are not illegal.[146] Noting that the New Jersey Legislature may desire to undertake "the difficulties of legislating on this subject,"[147] the court observed that the implications of new reproductive technologies could be successfully addressed only when "society decides what its values and objectives are in this troubling, yet promising, area."[148]

The court's decision, even assuming it was appropriate for the fact-specific Whitehead/Stern situation, offered little guidance or hope for the future of surrogate parenting. The court showed minimal sensitivity, and arguably some hostility, toward reproductive technology and those segments of society that might take advantage of the solutions it offers. If there is to be any future for alternative procreation techniques, prompt legislative intervention is essential.

In straining to implement its desired result, the court overstepped acceptable limits of legislative interpretation by the judiciary. A more enlightened approach would have been to admit that current statutes neither contemplated nor addressed surrogacy. This was the approach taken by courts in New York[149] and Kentucky.[150] Both states refused to attribute prescience to their respective legislatures' regulation of adoption. The Kentucky court correctly recognized that "[i]f there are social and ethical problems in the solutions science offers, these are problems of public policy that belong in the legislative domain, not in the

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146 *Id.* at 468-69, 537 A.2d at 1264.

147 *Id.* at 469, 537 A.2d at 1264.

148 *Id.* The court posited:

> If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms. We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—*in vitro* fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse.

Id.

149 *In re* Adoption of Baby Girl L.J., 132 Misc. 2d 972, 505 N.Y.S.2d 813 (N.Y. Sur. 1986). *See supra* notes 72-78 and accompanying text.

150 Surrogate Parenting Assocs., Inc. v. Commonwealth of Kentucky *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986). *See supra* notes 61-71 and accompanying text.

judicial."[151]

It is difficult to understand how adoption laws enacted by the New Jersey Legislature over thirty years ago could possibly be stretched to cover the questions raised by modern reproductive technology.[152] It is even more baffling how a surrogacy arrangement never addressed by the legislature could be "illegal and perhaps criminal."[153] That surrogacy opens up the proverbial Pandora's box is undisputed. But as the lid has been raised, judicially wishing away the problem is not an appropriate solution.

The supreme court, concerned with the rights of surrogate mothers, asserted that the contract was "potentially degrading to women."[154] What is actually degrading is the court's implication that there are some types of contracts that women are incapable of understanding, negotiating or signing. Equally distressing is the court's perpetuation of the stereotype that a woman's only true talent is mothering and that the bond between her and the child is mystical to the point of defying reason.[155]

The court is also mistaken when it equates surrogacy with baby selling.[156] The laws which prohibit fees for adoption were directed at black market adoptions, where the sale of children occurred in an unsupervised environment with no protections for the child. While the contract between the Sterns and the Whiteheads could have provided more safeguards for them and the yet-to-be-conceived child, nothing in the transaction resembled

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151 *Surrogate Parenting Assocs.*, 704 S.W.2d at 213.

152 The New Jersey Supreme Court is not alone in its hesitancy to embrace new forms of reproduction. While artificial insemination has been used in this country since 1884, Eisenman, *Fathers, Biological and Anonymous, and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law*, 45 OHIO ST. L.J. 383, 385 n.25 (1984), courts in the United States and abroad as late as 1963 considered the act adulterous and the resultant child illegitimate. Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1644 (1984); Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 477-79 (1983).

153 *Baby M*, 109 N.J. at 411, 422, 537 A.2d at 1234, 1240. *See supra* notes 86-87 and accompanying text.

154 *Baby M*, 109 N.J. at 411, 537 A.2d at 1234.

155 *See id.* at 453 n.17, 537 A.2d at 1256 n.17. While the court acknowledges that the law provides for "equality in custody claims," it negates this concept in the same paragraph by stating: "This does not mean that a mother who has had custody of her child for three, four, or five months does not have a particularly strong claim arising out of the unquestionable bond that exists at that point between the child and its mother; in other words, equality does not mean that all of the considerations underlying the 'tender years' doctrine have been abolished." *See id.*

156 *See id.* at 437-39, 537 A.2d at 1248-49.

the evil the legislature sought to combat by enacting adoption statutes.

The most unsatisfying portion of the opinion dealt with the federal constitutional issues.[157] And, indeed, this is the shoe still waiting to drop. It is now almost a legal cliche that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[158] The *Baby M* court held that "[t]he custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation."[159] This conclusion is debateable.[160] Somewhere within the right to procreate and the right to choose not to have children,[161] must necessarily lie the right to parent. Otherwise, the biological father truly has no rights and the female half of the union is, as a matter of law, given supremacy. This flies in the face of equal protection guarantees, and "there may be constitutional limits to the state's power to restrict collaborative reproduction."[162]

Legislatures must rectify quickly the damage caused by this decision, rather than be chilled into inaction.[163] While the New

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157 *See id.* at 447-52, 537 A.2d at 1253-55. *See also supra* notes 121-31 and accompanying text.

158 Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977). *See supra* note 1 and accompanying text.

159 *Baby M*, 109 N.J. at 448, 537 A.2d at 1253. *See supra* note 122 and accompanying text.

160 Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 410 (1983). Robertson states that:

> Childrearing is a rewarding and fulfilling experience, deserving respect whether or not the person who rears also provided the genes or bore the child. To deny someone who is capable of parenting the opportunity to rear a child is to deny him an experience that may be central to his personal identity and his concept of a meaningful life. Although childrearing is not, strictly speaking, reproduction, it is such an essential part of the reproductive experience that freedom to enter or leave the rearing role should be considered part of the freedom to procreate.

Id.

161 *See* Roe v. Wade, 410 U.S. 113 (1973).

162 Robertson, *Surrogate Mothers: Not So Novel After All*, 13 HASTINGS CENTER REP. 28, 32 (1983). Robertson observes that:

> It should follow that married persons also have a right to engage in noncoital, collaborative reproduction, at least where natural reproduction is not possible. The right of a couple to raise a child should not depend on their luck in the natural lottery, if they can obtain the missing factor of reproduction from others.
>
> If a married couple's right to procreative autonomy includes the right to contract with consenting collaborators, then the state will have a heavy burden of justification for infringing on that right.

Id.

163 Within a day of the court's decision, repercussions were apparent. Death was predicted for a bi-partisan bill in the New York Legislature which would have legal-

Jersey Supreme Court expressly stated that it failed to find any statistics to support the Sterns and trial court's assertion that "ten to fifteen percent of all couples are infertile,"[164] other research has been more fruitful. "An estimated fifteen to twenty percent of American couples of childbearing age are infertile."[165] To slam the door on these couples (for whom adoption may not be feasible or desirable), condemning them to a choice between breaking the law or foregoing parenthood, is an untenable resolution of this dilemma.

In drafting legislation on surrogacy agreements, law makers must be attuned to the unique problems and issues inherent in surrogacy. While it is not the purpose of this note to propose legislation, one flaw of surrogacy contracts, highlighted by the New Jersey Supreme Court, is deserving of mention — the contracting parents must be screened so that the child's best interests are truly protected.[166]

The legal system has decided the future of Melissa Elizabeth Stern. Hopefully, it has not sealed the fate of hundreds of other Melissas who, without legislative intervention, will remain unknown both to parents who long to hold them and society which might benefit from their presence.

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ized surrogate contracts. Before the *Baby M* decision, the bill was supported by both the New York Assembly and Senate, and was "[e]yed as a model by legislators across the country." Zeldis, *Baby M Ruling Changes Picture for N.Y. Surrogate-Mother Bill*, N.Y.L.J., Feb. 5, 1988, at 1, col. 1.

[164] *Baby M*, 109 N.J. at 452 n.16, 537 A.2d at 1255 n.16.

[165] Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243, 244 (citing Griffin, *Womb for Rent*, 9 STUDENT LAW. 28, 29 (April 1981); Handel & Sherwyn, *Surrogate Parenting*, 18 TRIAL 57, 58 (1982)).

[166] *Baby M*, 109 N.J. at 437, 537 A.2d at 1248. *See supra* note 110 and accompanying text.