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Case Review Essay

The Case of Baby M: Love's Labor Lost

George P. Smith, II

An Expression of Love or Common Sense?

It has been estimated that in the United States some twenty thousand babies are born through artificial insemination by donor (AID) each year.¹ With the startling new advances in reproductive technology, or what has been termed "collaborative conception,"² it is now possible for a child to have up to five "parents": an egg donor, a sperm donor, a surrogate mother who gestates the fetus, and the couple who actually raises the child.³ What we now face, then—not only in considering the New Jersey Supreme Court's decision *In re Baby M*⁴ but in the whole area of the "new" reproductive biology—is, in the words of a popular columnist, a "mess."⁵

Interestingly, the enormity of this complex, multiparent scenario—which seems to be on its way to becoming a reality with *Baby M* and its anticipated progeny—was totally lost on Mary Beth Whitehead. "I just can't see how four people loving [Baby M], five people loving her, can hurt her,"⁶ she said recently. Ms. Whitehead's rather simplistic response to this "love scenario" was perhaps underscored by an equally legerdemonic New Jersey Supreme Court. The court called upon the parties to let their "undoubted love" and "good faith"

settle the vexatious issue of visitation "in the best interest of the child."⁷ To be effective, law must operate within a rational structure and not a vortex of sentimentality.⁸

More than love is needed to settle this dilemma; common sense—devoid of exaggerated emotionalism and imbued with an appreciation of hard facts and realities—is required. For example, how will the court draw up or supervise the complicated arrangements to share the child, arrange visits with her, and see that her needs are placed above those of the party litigants? How can the court gauge the attitudes of Ms. Whitehead's two sons, aged twelve and thirteen, toward their new half-sister? To what extent will Ms. Whitehead's divorce and her new marriage to Mr. Gould confuse Baby M and her sense of identity? Will exposure to Ms. Whitehead's parents add an unsettling dimension to the child's "best interests"?

Finally, how will Baby M be affected by the legions of inquiring journalists who will be following this lead story over the years, as she moves through childhood and into the stresses of adolescence? The ABC television network's recent production of "Baby M"⁹ will surely be playing the rerun circuit as Baby M Stern grows older, with updates on how she is relating to her two sets of parents. Given Ms.

Whitehead's background and temperament, front-page news stories about her "struggles" to visit her child (and possibly to revise the custody decree) can be anticipated over the years ahead—and this, all in the "best interests" of the child! Instead of promoting tranquility, the judiciary has agreed to preside over an "obvious human muddle" that will preserve the current "emotional shambles" for years to come.¹⁰

Parental Fitness

The trial court did not find Ms. Whitehead to be an "unfit mother"¹¹; indeed, it recognized her as a "good mother to her [two previous] children."¹² Yet her numerous failings of character (i.e., domineering attitude, impulsiveness, dishonesty, selfishness, and insensitivity),¹³ together with her financial instability, the modest employment opportunities of her husband, and his alcoholism, combined to create a "vulnerable household."¹⁴ The court concluded that in it "the prospects for a wholesome independent psychological growth and development would be at serious risk."¹⁵

Although the court acknowledged that Ms. Whitehead was capable of showing love and affection for Baby M,¹⁶ this—in itself—was insufficient to vitiate the weaknesses

of the Whitehead household. As the New Jersey Supreme Court concluded correctly, the application of the best-interest test "boils down" to a judgment call regarding the "likely future happiness of a human being."¹⁷

What I find disconcerting—given the tone of this analysis by the court—is the insistence that visitation rights should be considered for Ms. Whitehead. Factors judged undesirable and a threat to Baby M's "likely future happiness" when considering custody rights should also be of importance when considering visitation rights. The long-range influence and impact of Ms. Whitehead's contact with Baby M will be devastating for the child's psychosocial development.

The Supreme Court of New Jersey appears to be mystically devoted to the "sacredness" of biological motherhood—without a dispassionate and objective examination of the totality of the circumstances that give rise to it and the "benefits" of allowing it to continue and develop through visitation.

Toward a New Right of Familial Procurement

The courts have slighted or even refused to recognize the mental elements of procreation. Rather, they consider the biology of reproduction dominant over the psychology and, indeed, have traditionally given little consideration to the motivations of initiating parents.¹⁸ Thus, as might be expected, final decisions in surrogacy cases have failed to include accurate assessments of either the child's best interests or of adequate care for the child.¹⁹ Adequate care should be but a complement to best interests, not a separate standard. With this approach, the "mentally conceiving" (or "initiating") parents would be recognized, of necessity, as holding the priority of right to raise the child,²⁰ without extra-custodial visitation rights from the birthing

mother. Admittedly, before this approach could be validated, a new right of "familial procurement" would have to be structured. Judicial protection of the choice to procreate²¹ would be recognized as but a logical analogue to the "recognition of a fundamental interest in procuring assistance to overcome a personal inability to procreate."²² Absent the wide acceptance of this new or coordinate right, the best-interests test must, however, remain controlling.

Determining Best Interests

How should the test for the best interests of the child be developed and—for that matter—applied? Obviously, the test is fact-sensitive and defies a uniform standard of application. Yet a core set of factors may reasonably be employed to test the extent to which the best interests of the disputed child would be advanced in a given environment.²³ These are: the economic, physical, mental, social, psychological, or ethical harm that would befall or threaten the infant in either family; the social values that would be reinforced or impaired with placement of the child in either family; the suitability of the character of the opposing parties; the economic or social burden that custodial or visitation rights would impose on the parties *and* on the infant; and the practicability of the ultimate action (i.e., the ease of enforcement if the parties are in different jurisdictions).²⁴

Middle-class standards should never be considered a handicap or a negative value for a court to consider in determining who can give a child the most adequate care, which, in turn, will ensure that its best interests are advanced. Parents with good educations, attractive jobs, and financial security should—in the normal course of affairs—be able to afford a child better care and better opportunities for growth than

would a less advantaged family. It really is that simple.

If the goal of law is to maximize the welfare or utility of all human beings, a *prima facie* case could be posited for according children some measure of legal protection against their parents or those who would assert custodial rights.²⁵ Efficiency, emotional stability, and security are minimal investments for a child's development.²⁶

A Judicial Quandary

New Jersey Chief Justice Wilentz expressed fear about the long-term negative psychological impact of surrogacy on the child, the natural mother, the natural father, and the adoptive mother. His solution was to hold surrogacy contracts for money invalid and unenforceable. Yet by condoning visitation rights for Ms. Whitehead, the chief justice has given the traumas permission to build. The Sterns' parental authority will surely be undermined, and the stability and security the child so desperately needs will be jeopardized.²⁷

It was for these very reasons that Baby M's guardian ad litem—relying on the testimony of a number of her experts—recommended that Ms. Whitehead's visitation rights be suspended, with a re-evaluation after five years. Subsequently, without further expert testimony, she revised her position and argued that visitation should be suspended until the child attains majority. The court opined that the testimony of the guardian's experts was undeveloped on the issue of visitation, "really derivative of their views about custody and termination." Thus it decided that the kind, the conditions if any, and the circumstances of visitation should be determined on remand.²⁸

Seeking a Unity of Understanding

The New Jersey Supreme Court failed to consider surrogacy, the ter-

mination of parental rights, and custody and visitation rights as complementary or even inextricably linked issues. Rather than combining the testimony and other evidentiary proofs into one unified approach to the problem, the court segmented the proofs and did not build upon them. Such a synthesis would have avoided the confusion surrounding a "new" application and development of the best-interest test for visitation rights.

The child's adequate care and best interest are the paramount issues. There should be a unity of understanding on this point. Children have an interest not only in their legitimation (whether or not the surrogacy is validated) but also in the extent of their parents' custody and visitation rights. Courts must seek, when presented with cases such as *Baby M*, to achieve the proper balance of competing interests among the parents and the child. While it may well be "desirable for the child to have contact with both parents,"²⁹ the issue must be settled by application of the standard of reasonableness—not by a "standard" of emotionalism. If the court had employed this principle, it would have upheld Dr. Stern's adoption of *Baby M*, not overturned it.

My argument is simple and straightforward: the court should have realized that the evidentiary considerations and judicial analysis it used in awarding custody to Mr. Stern also supported the termination of Ms. Whitehead's parental rights altogether and the foreclosure of visitation until the child attained majority.

The court recognized the controlling mandate of the New Jersey statutes that premise such drastic action on a showing of "forsaken parental obligation" and either a "continuous neglect or failure to perform the natural and regular obligations of care and support of a child."³⁰ The caselaw shows that the health and development of a child must be

at risk of serious impairment by a continuation of the parental relationship before termination will be ordered.³¹

It is a common canon of statutory interpretation that statutes should be construed liberally so as to promote the ends of justice.³² Here, justice clearly demands assurance that the child's health and development will not be jeopardized or compromised. It is not an improper crossover or linkage to urge the courts to recognize this fundamental ideal. They should endeavor to develop and apply *uniformly* the test for the best interests of the child to cases involving termination of parental rights, custody, visitation, and the validity of surrogacy contracts.

The major—if not the sole—task for contemporary judges is to avoid the infusion of extra-constitutional *moral* and *political* norms into their deliberations. Rather, they should seek to translate the legislative morality of a questioned statute into a *practical* rule³³—i.e., reasonable implementation of the best-interests test. This should be the standard by which pertinent statutes in this field as well as general policy issues should be determined by the courts.

There is an obvious need to reform existing law in order—depending upon one's persuasion—to accommodate or to forbid artificial conception. More fundamental, however, is the need to equip the legal system to deal adequately now and in the future with the vexatious *human* problems entailed by the new reproductive technologies.³⁴

Structuring a New Framework

Since surrogate parenting is the biological counterpart of artificial insemination by donor (AID)—with the surrogate being thus equivalent to the semen donor—one might hope that the current laws controlling AID would provide a basis for regulating parenthood arrange-

ments in surrogacy. Such is not the case, however.³⁵

Existing statutory distinctions allow AID donors to be paid for sperm but deny payment to surrogate mothers. They thus may well be challenged as an unconstitutional denial of equal protection.³⁶ Further distinction might be found in separating cases

involving surrogating practices when there will be no genotypical relationship between the child and the individuals seeking its procreation and those cases in which a womb is "borrowed" to carry a child conceived by persons who will be the biological parents and who propose to integrate fully the child into their family.³⁷

Twenty-three jurisdictions currently prohibit financial compensation to surrogates, except for certain specific expenses, under state adoption laws.³⁸ A Michigan court has ruled payment to a surrogate based upon a contract to perform services invalid, deeming it a contract to sell a baby.³⁹ The Kentucky Supreme Court reached the opposite conclusion, based on constitutional grounds. It reasoned that surrogacy was not baby-selling, because the biological father had already established a legal relationship with the child.⁴⁰

Legislative Reforms

State legislatures are currently considering a number of proposals to legalize and/or regulate surrogate motherhood.⁴¹ In its 1988 mid-year meeting, the Family Law Section of the American Bar Association approved a Model Surrogacy Act that not only makes surrogacy contracts enforceable but also destroys the common-law presumption that the woman who bears a child is its legal mother. The model act approves a range of payments to the surrogate mother, from \$7,500 to \$12,500.⁴²

Outlawing surrogacy and creating stringent enforcement mechanisms would have the obvious effect of forcing a powerful black market to develop—particularly since the process of becoming a surrogate mother is not an exceptionally difficult one to master. A ban on surrogate motherhood in all forms would also be difficult and distasteful to enforce. Many enforcing agents might find it awkward to exact a penalty from a woman for becoming a mother, or to impose a prison sentence on those who promoted the pregnancy's advancement and implementation. Such measures would be offensive to basic public policy, which recognizes the family as the bulwark of society.⁴³

A second approach would be for states to structure a licensing procedure for surrogacy. Such a program would seek to protect the health and well-being of the child, together with the safety of the surrogate. It would define the contracting parents' rights and determine the extent of their potential liabilities as well as define the responsibilities of any intermediaries (doctors, lawyers, or family friends). A licensing board empowered to set, enforce, and implement standards could make any necessary administrative decisions.⁴⁴

Any comprehensive regulatory approach should have as its goal the greater protection of the children born with the new reproductive technologies.⁴⁵ Some have suggested that nothing less than a *new framework* is necessary, in order to correct the growing incoherence of legal mismatching by the courts that gives every indication of worsening as more and more "crafted," fact-sensitive opinions are made.⁴⁶

The dilemma we face is that a legislative framework for surrogacy may cause the number of such arrangements to increase alarmingly, with the risk that—absent statutory organization of the area—our chief goal of protecting the children will

suffer. Because of the political volatility of the issue, proposals to validate surrogacy contracts or to provide for their execution by legislation may meet strong opposition.⁴⁷

In the absence of a controlling statute, the courts should take an expansive view of the elements of adequate care as a complement to maintenance and promotion of the child's best interests and furthermore, when possible, steer clear of making custodial decisions on the basis of contract theory.⁴⁸

Toward a Delicate Balance

Although I find nothing abhorrent about the development of legislation validating surrogate contracts, I find greater comfort in having the courts seek a reasonable balance of competing interests in determining where the disputed child's best interests truly lie. The framework for principled decision-making that I have posited is more adaptable to the needs of equity than is contract law. Granted, a contract is the memorialization of the participating parties' intent and their operative standard of reasonableness. Yet flexibility must be assured, which can only be accomplished by applying the test for the best interests of the child, guided by rationality instead of emotionalism.

In the final analysis, the question remains: How can we achieve a balance between the benefits that the new reproductive technologies offer infertile couples and the risks of abuse inherent in the "solution"? This problem can only be addressed "when society decides what its values and objectives are in this troubling, yet promising area."⁴⁹

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