

# The Surrogate Uterus: Baby M and the Bioethics Commission Report

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Governor Christie's recent veto of a "gestational" surrogacy bill should prompt us to look at the legal history of surrogacy and the terrible injustices that it causes.

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On August 8, 2012, New Jersey Governor Chris Christie issued an absolute veto of Senate Bill 1599, which would have created a statute enabling and enforcing so-called "gestational" surrogacy arrangements. The bill was sponsored by New Jersey State Senator Joseph Vitale, and substantially drafted by Melissa Brisman, a commercial surrogacy broker. If signed into law, it would have been the most radical surrogacy bill anywhere in the nation.

In public hearings, neither Brisman nor the bill's sponsors, nor anyone else, discussed the 177-page New Jersey Bioethics Commission report that condemned gestational surrogacy and strongly recommended against such an enabling statute. Governor Christie, in his veto statement, expressed grave concern that the supporters and sponsors of S1599 did insufficient study and consideration of the many problems that surrogacy poses, especially those discussed by the Bioethics Commission.

Some fervently believe that if gestational surrogacy laws were to be widely accepted they would irreparably change human civilization. Gestational surrogacy is now front and center for debate, not only in New Jersey, but across the nation. It demands attention. Motherhood itself is now on trial.

As the attorney who was chief counsel in the first contested surrogacy case in the United States that struck down surrogate mother contracts as unenforceable, argued before the New Jersey Supreme Court in 1987, who also won, on behalf of the mother, the first contested "gestational" surrogacy case and later represented gestational surrogate Angelia G. Robinson against commercial surrogacy broker Melissa Brisman, I'll address, in two parts, the legal history of surrogacy in New Jersey—a history that has national, even international, implications—and the terrible injustices to pregnant mothers that surrogacy causes, which have been exposed by both the New Jersey Bioethics Commission and the testimonies from the mothers themselves. Today's essay discusses the issues addressed in the famous first surrogacy case, *In the Matter of Baby M* (1988). Tomorrow's essay discusses some of Brisman's work as a surrogacy broker, especially in the case of Angelia Robinson.

The *Baby M* Case

In the *Baby M* case, Mrs. Whitehead, a married woman with an eleven-year-old son and an eight-year-old daughter, signed a contract with William Stern and his wife Elizabeth, who believed pregnancy and childbirth were medically inadvisable for her. Mrs. Whitehead, by the terms of the contract, was impregnated with Mr. Stern's sperm through artificial insemination. The child, born on March 27, 1986—named Sarah by Mrs. Whitehead, and Melissa by the Sterns—was genetically related to Mrs. Whitehead and Mr. Stern.

The surrogacy arrangement was made by a broker named Noel Keane. By the terms of the contract, the Sterns would pay Mrs. Whitehead \$10,000 following the birth. The contract forbade Mrs. Whitehead to have an abortion. Following the birth of her daughter, Mrs. Whitehead refused to give up custody to the Sterns. After a two-month trial, Judge Harvey Sorkow declared that the terms of the contract that required the termination of Mrs. Whitehead's parental rights, against her will, were enforceable. At the same time, Judge Sorkow ruled that the terms of the contract that prohibited terminating the life of the child by abortion were unenforceable. The child, he ruled, was the mother's to kill, but not hers to care for.

The surrogacy arrangement first started to unravel when Mrs. Whitehead was seven months pregnant. One evening, her daughter, then eight years old, was hugging her mother and rubbing her now round and protruding abdomen. The little girl blurted out, "Mommy, I want you to have a girl so I can have a baby sister."

That night and late into the morning, Mr. and Mrs. Whitehead were forced to discuss what it would be like for the children to see their mother turn over their baby sister in exchange for \$10,000. Their original plan, since Mr. Whitehead held a blue-collar job with a sanitation company, was to put the money aside for their children's education. Then they wondered how they could tell their daughter that they sold her baby sister so she could go to college.

About three years later, Dr. Ruben Pannor, one of the authors of *The Adoption Triangle*, told me of his television debate with Bill Handle, a surrogacy broker located in Los Angeles. Handle had a "happy" surrogate with him who spoke of the joys of "giving the gift of life" to a couple by acting as a surrogate mother. During a commercial break, Dr. Pannor turned to the surrogate and asked how her other children were doing. She started to tell him how they had to be put in therapy, and suddenly she broke down, crying hysterically. She could not continue on the program and was helped off the stage.

When the New Jersey Supreme Court reversed the trial court's ruling in the *Baby M* case, by a unanimous 7-0 decision, the surrogacy contract was declared unenforceable, in violation of New Jersey statutes and public policy. Chief Justice Robert Wilentz wrote the opinion, which many commentators described as "poetic" and "beautiful." That opinion has been studied in most law schools since that time, as it is a classic teaching case about the kinds of contracts which will not be enforced because they violate public policy. Sixteen separate policies and statutory provisions were violated in the *Baby M* case. Today, gestational surrogacy arrangements violate those same policies and statutes.

The central purpose of all forms of surrogacy contracts is to terminate the parental rights of the legal mother

who carries and bears the child, and to confer legal status as mother or parent on a different person—usually a stranger genetically unrelated to the child. Both termination of the mother's rights and legal adoption as replacement of the birth mother did not exist at common law and are creations of statutory law. They can be accomplished only by strict adherence to the provisions of the statutory schemes that authorize them. The effort to create surrogacy arrangements are not legally authorized in New Jersey by an enabling statute. In the absence of such an enabling statute, the Sterns and others since have tried to circumvent the requirements of the law by making a variety of legal arguments that have been rejected, as in *Baby M*.

The contract, the *Baby M* court observed, constituted a plan, in advance of conception, to deliberately separate a child from his or her mother. Our policies have always been that a child, to the fullest extent possible, should get to know, love, and be raised by both his or her natural parents. It is the traditional policy of every state that no consent to surrender a child to adoption made prior to the birth of the child is ever considered a legal basis to terminate a mother's rights if she wants to maintain her relationship with her child following birth.

The *Baby M* court made the following observations: private adoptions are disfavored; the surrogacy arrangement places a child without any regard for the child's best interests; it circumvents all laws that require counseling of the mother before she surrenders her rights; and the compulsion of the contract makes surrender of the child after birth not truly voluntary or informed. Beyond that, the arrangement exploits women as a "surrogate uterus" or an "incubator" and expects a mother to act as an inanimate object, which denigrates the woman in her role as mother.

The arrangement often achieves its forbidden goals with the corrupting influence of money. It has been a crime in all states to make offers of money in connection with adoption, or surrender of a mother's parental rights. The influence of money creates the potential for exploitation of the poor by the wealthy. It has been said that the millionaire's wife will not carry a child for the wife of the sanitation worker. A woman in financial need is particularly vulnerable, and her love for and sense of moral duty to her child, along with the child's best interests, are all subordinated to the corrupting influence of money, and the rigid compulsion of the terms of the contract.

One of Chief Justice Wilentz's memorable passages still has the power to stir passion:

There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. . . . There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.

Whether we will use our collective power through our courts to make someone perform under a contract against their will is always a question of whether forcing the person to comply is consistent with our values as embodied in our public policies. Thus, we do not require performance of a contract to murder; nor do we enforce a contract for a usurious rate of interest, or for the sale of body organs, and we certainly do not enforce a contract for the sale of a child; we have never forced a perfectly fit mother to separate from a child

she loves and wants, simply because she once said she would agree to separation after the child's birth.

*Baby M* was a powerful statement that clearly explained the sixteen policies and statutory provisions that rendered surrogacy contracts unenforceable and exploitative of women, and criminalized both monetary payments in adoption and placement of children for adoption without a license. After the *Baby M* case, most European countries quickly outlawed surrogacy.

### The New Jersey Bioethics Commission Report

At the end of the *Baby M* opinion, the New Jersey Supreme Court observed that the case highlighted many of the problems and evils of surrogacy—including the potential exploitation of women—but that the people and the culture must determine if our policies and laws, after careful consideration, should be changed, subject to constitutional constraints. Following the *Baby M* decision, the governor and the legislature asked the New Jersey Bioethics Commission to study the issue of whether laws should be changed to create a surrogacy-enabling statute.

The Bioethics Commission included psychologists, scientists, physicians, lawyers, healthcare providers, and other professionals from both ends of the political spectrum. The commission held public hearings and debates on the policy issues, and it employed a task force for purposes of research and field trips. After a process that took over four years to complete, the members issued their powerful 177-page comprehensive report.

I testified twice in the public hearings held by the commission's task force, both in 1988 and again in 1989. In October of 1990, I was appointed by the Democratic governor, James Florio, to the commission. The twenty-four commissioners unanimously adopted the report they sent to the governor, the legislature, and the chief justice in September 1992, which they titled, "After *Baby M*: The Legal, Ethical and Social Dimensions of Surrogacy."

The report strongly condemned all forms of surrogacy, including so-called "gestational carrier" arrangements, which were first employed in the late 1980s. It noted that every evil associated with surrogacy where the birth mother is genetically related to the child is also present in gestational surrogacy, where she is not genetically related. The commission strongly recommended that the state not pass an enabling statute that would legalize enforcement of any form of surrogacy arrangement.

Because the commission concluded that no legitimate policy could justify enforcing such arrangements, and that they were potentially harmful to the mothers and their children, it recommended that legislation be passed to discourage and deter the conduct, including a specific recommendation that commercial surrogacy be criminalized. While it was already a crime in New Jersey to make offers of money in connection with adoption, and it was criminal to help place children for adoption without a license—both done in typical surrogacy arrangements—the commission felt there should be unambiguous sanctions clearly directed at surrogacy arrangements.

If criminal and civil sanctions failed to deter, the commission recommended, in cases where the birth mother wished to assert her parental rights and made that intent known within ninety days after the child's birth, and a dispute over custody arose, that:

A legal presumption should be established, favoring custody by the birth mother, consistent with assuring satisfaction of the needs and welfare of the child. This presumption may be overcome by a demonstration, based on clear and convincing evidence, that the individual giving birth fails to meet minimal parenting standards necessary to satisfy the basic needs and welfare of the child. Such determinations should not be based on considerations of economics or social class.

All of these recommendations—that legislation should criminalize commercial surrogacy, declare both commercial and non-commercial surrogacy agreements unenforceable, and that courts govern the determination of parental rights by specially crafted rules that create a presumption of custody for the birth mother—were recommended for gestational carrier surrogacy agreements as well as those where the mother was genetically related to the child.

The proponents of the Brisman-Vitale “Gestational Carrier” statute falsely claim that gestational surrogacy uses new technology unavailable until relatively recently, and, therefore, the legislature should not be guided by *Baby M*. By making this false claim, they hoped to ignore the reasoning of that case, and ignore both the fact that gestational carrier agreements were used as early as the 1980s, and the commission's report, which recommended that gestational carrier agreements be outlawed.

The New Jersey Bioethics Commission Report discussed one gestational surrogacy case that was already in the courts in 1990. In that case, the contract was signed in 1989, and it was litigated in the California courts when the birth mother sued for the return of the child. By 1991, a whole year before the Bioethics Commission report was completed, that case had been decided by an appellate court. The Bioethics Commission considered all of the issues presented by gestational surrogacy and concluded that every evil present, when the surrogate mother is genetically related to the child, is also present when the surrogate is not genetically related to the baby to whom she gave birth.

All of the statutes and public policies identified and analyzed by the *Baby M* Court apply equally to the gestational surrogate mother arrangement. The *Baby M* opinion remains the best and most persuasive court opinion on policy considerations for surrogacy arrangements, and the New Jersey Bioethics Commission report is the most thorough and compelling analysis ever produced concerning surrogacy in general, and gestational surrogacy in particular. Earlier this year, many in the New Jersey Legislature attempted to ignore both, until Governor Christie stepped in. More on this tomorrow.

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