

1-1-1988

Baby M, Lawyers, and Legal Education

Joan Heifetz Hollinger
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>

 Part of the [Law Commons](#)

Recommended Citation

Baby M, Lawyers, and Legal Education, 37 Buff. L. Rev. 675 (1988)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Baby M, Lawyers, and Legal Education

JOAN HEIFETZ HOLLINGER*

IN response to Dean Manning, I want to express some concerns about avoiding certain kinds of difficulties our students' future clients may get into, and our ability to teach students how to help their clients achieve what they want without exploiting others. While raising these doubts, I nonetheless want to agree with him that this is precisely where a great deal of our attention ought to go. My skepticism derives in part from the belief that a great many of us have been trying to do just what Dean Manning has told us to do, and we find it frustrating to hear reports that our law graduates continue not to know very much about legal institutions or about what it is that lawyers actually do, and how they should and should not be doing it. Let me discuss a specific example which has drawn many people's attention in order to show just how formidable is the task that lies ahead of us.

My example concerns the ways in which lawyers, law professors and our whole society have been responding to the efforts of people to acquire children by non-traditional means, by resort to artificial insemination and to more complex medical techniques such as in-vitro fertilization or embryo transfer. Of particular interest are the ways in which we have attempted to cope with the problems posed by so-called surrogate parenting. Most recently, our attention has been riveted upon the *Baby M* case. The bitter controversy between the child's birth mother, Mary Beth Whitehead, who repudiated her earlier determination to relinquish all rights to her daughter, and the biological father, William Stern, who with his wife Elizabeth, were the infant girl's intended social parents. The problematic ruling of the trial judge ordering specific enforcement of the surrogacy agreement, and the forthcoming decision of the New Jersey Supreme Court on Whitehead's appeal from the trial court's ruling.¹

Surrogacy touches a number of discordant themes in our society, our culture and our legal system. As a woman who deliberately conceives and bears a child for the biological father and his spouse to raise, the "surrogate" gestator challenges our notions of what motherhood is all

* Professor of Law, University of Detroit School of Law.

1. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *rev'd. and rem'd.*, 109 N.J. 396, 537 A.2d 1227 (1988). In its refusal to enforce the Stern-Whitehead contract, the New Jersey Supreme Court expressed the same concerns as are raised in this comment about the problematic role played by attorneys in surrogacy arrangements. See text at 676-79 *infra*.

about, and our legal tradition of conclusively attributing to a woman who bears a child the legal status of "mother." Reactions to Mary Beth Whitehead are contradictory. She evokes sympathy because she is overwhelmed by the "natural" maternal feelings of not wanting to be separated from her newborn child, and because to many people, she symbolizes a broad class of indigent women who are vulnerable to becoming the mere uterine mechanisms for fulfilling the procreative desires of much wealthier men and women. Yet, from others, she evokes criticism for refusing to perform her contract and for basing her refusal on her powerful maternal instincts. She is said to be too maternal, someone who loved her child "too much" to abide by her agreement and let the child go.

In sharp contrast to Mary Beth, Elizabeth Stern symbolizes the contemporary "liberated" woman, who like so many of her generation, defers parenting while acquiring advanced degrees and pursuing a high-powered career. She then finds her hopes for a family shattered by the belated discovery that because of her age or some physical impediment, she cannot—or should not—conceive or bear a child. Many people empathize with Elizabeth, but others feel she got what she deserves for her act of hubris in trying to "have it all," by combining traditional male and female roles. Mary Beth evokes ambivalence because her self-esteem is so bound up with being a mother; Elizabeth evokes ambivalence because her self-esteem does not depend exclusively on being a mother.

Then there is William Stern, the biological and intended father, whose desire to perpetuate his blood line is either praised as an expression of "natural" male instinct, or condemned as exploitative of women, an exercise in "oppressive genetic patriarchy." Similarly, William's commitment to parenting, his eagerness to be actively involved in raising and nurturing his own child, is applauded by some as a welcome departure from traditional male roles, and as encouraging the emergence of a more gender-neutral concept of parenting. By contrast, others perceive his commitment to parenting as suspect, as "unnatural" for a man.

The *Baby M* saga presents a struggle that is painful not just for the specific individuals discussed here, but also for our legal system which is one of the arenas where the struggle is being fought. It is within the legal system that some prospects may exist for mitigating the harm already done, especially to the innocent child whose legal status and physical custody must be determined, and for avoiding these harms in other surrogacy arrangements. Unfortunately, it is also within the legal system

that we find some of the causes of the harms attendant upon the Baby M. dispute.

What is often missing in the heated public discussions of the *Baby M* and other surrogacy cases is an analysis of the role lawyers play in getting the individual participants into these potentially painful situations. In my view, the difficulties that arise in these arrangements are attributable in large measure to the failure of the attorneys who are instrumental in putting them together to do what they were taught to do in law school, or to the failure of those of us who teach law to offer appropriate instruction in the first instance on the scope of an attorney's responsibilities to clients, and to unrepresented parties. In a number of respects, the lawyering of someone like Noel Keane, whose Infertility Center of New York handled the Stern-Whitehead transaction, and who is involved in hundreds of other pending surrogacy arrangements throughout the country, leaves a great deal to be desired.

Whenever the performance of a contract may have severely detrimental consequences for one of the parties, special care is warranted to bring those risks to the attention of the party who may be disadvantaged. This is especially so when the potentially disadvantaged party has much less education, money or familiarity with complex business transactions than does the other party. In any situation calling for the waiver of fundamental rights—for example, waivers of claims against a spouse's estate, ante-nuptial agreements, consents to a child's adoption, service as a surrogate gestator — it is incumbent upon the lawyers who represent the more vulnerable parties to apprise them what it is they are agreeing to do, what it is they are agreeing to give up, and what consequences their actions will have, not simply for women and men in general, but for them in particular. If a woman's consent to serve as a surrogate gestator is not based on her prior receipt of such information, it will be subject to challenge as being insufficiently "knowing" or "informed." Moreover, it is incumbent upon the lawyers who represent the parties likely to gain the most from the transaction to promote their client's substantive goals without allowing them, either deliberately or inadvertently, to take unfair advantage of the more vulnerable parties.

Keane's failures to exercise this requisite special care are manifest in the circumstances surrounding the execution of Mary Beth's consent to the contract whereby William would pay her for her agreement to be artificially inseminated with his sperm, and to bear a child for him and his wife to raise. Keane's Infertility Center did not make it clear to Mary Beth that it was not her legal representative. It was plausible for her to

perceive the Center as her agent, acting on her behalf in any negotiations with the Sterns. After all, the Center told Mary Beth that her application was accepted soon after she replied to its advertisement for surrogates by sending in her photograph and a brief statement of why she wanted to bear a child for someone else. Although she later signed a disclaimer of her right to independent counsel, she had at least one "consultation" with a Center attorney about the legal ramifications of the surrogacy contract. Even if she understood that the Center was not her lawyer or her agent, Mary Beth may have believed the Center was a neutral broker between herself and the Sterns, an impartial intermediary committed to negotiating an agreement which fully served the interests of all the parties. Substantial confusion about its actual role characterized the relationship between the Center and Mary Beth.

In fact, Mary Beth was an unrepresented party. Keane's Center was not her lawyer, not her agent, not a neutral broker. The center was William's lawyer and his exclusive agent. It presented Mary Beth with a standard form contract with nearly all the benefits running expressly or implicitly to the Sterns, and virtually none, except for the payment for the delivery and relinquishment of a live child, going to Mary Beth. Pursuant to his signed agreement with the Center, William was to pay the Center a substantial non-refundable fee for handling all aspects of the proposed surrogacy agreement on his behalf. The Center did not appreciate—or denies—that as William's legal representative it owed him a duty not to undermine the integrity of the process by which the surrogacy agreement was negotiated and was to be performed. By failing to clarify its role to Mary Beth, the Center took unfair advantage of her status as the more vulnerable party and provided some of the grounds upon which she can challenge the validity of her consent. The Center also failed to fulfill its duty to its actual client, William Stern.

The Center's handling of the psychological evaluation of Mary Beth illustrates how it took unfair advantage of her as an unrepresented party and simultaneously, how it may have breached its duty to William. As part of its routine screening of potential surrogates, the Center asked Mary Beth to be interviewed by a clinical psychologist. The psychologist's report raised troubling questions about her capacity to give up an infant, about her relationships with her two older children and her husband, and about her propensity to act impetuously without reflecting on the consequences of her behavior. The Center did not disclose the contents of the psychological evaluations to Mary Beth. Without reaching the question of whether the Center had an obligation to share informa-

tion with her about the general risks associated with surrogacy, it is surely possible to insist that it had an obligation to advise her of what it had learned about the risks to her in particular. Because of the ambiguity of the Center's role in relation to her, Mary Beth had a reasonable basis for concluding that its silence meant that she was a suitable candidate for surrogacy. The Center's failure to warn her about her own potential inability to perform the surrogacy agreement makes it difficult to claim that her consent was fully "informed." Perhaps even more unsettling about Keane's Center, is that its failure to disclose the evaluation to the Sterns, who paid for it and for whose benefit it was presumably undertaken, suggests a callous, indeed a reckless disregard for the interests of its own clients.

A more complete analysis of the conduct of lawyers involved in surrogacy arrangements would entail discussion of the reciprocal relationships between the lawyers' behavior and the conflicting, typically indeterminate legal principles governing surrogacy in most jurisdictions. Also worthy of discussion is the extent to which the lawyers should be held accountable for serving the interests of the children produced by these arrangements. For this brief comment, however, I want to return to an issue I alluded to at the start. What can law schools do to convince our students that the kind of conduct described above is a disservice to clients, may breach at least an implied fiduciary duty to unrepresented and vulnerable parties faced with a loss of fundamental rights, and undermines the integrity of the entire legal system?

We must certainly begin with what Dean Manning has reminded us is the basic task of legal education: the teaching of analytical skills, intellectual skepticism, appreciation of the power of language to shape human relations, and attentiveness to process and procedure. But this is not sufficient. We need also to connect this classical ethos of the legal profession to a range of human sensitivities from which lawyers too often have been aloof. This aloofness is characteristic not only of many law school graduates who enter corporate or other highly specialized law firms. It is also notable among a substantial number of graduates of such law schools as SUNY Buffalo or the University of Detroit, where I teach. Many of these graduates end up in smaller firms with a diverse general practice, as house counsel for a local business, as public employees, or as solo practitioners. All must deal with a wide and unpredictable variety of clients whose legal problems often present intricate, emotionally charged personal issues like those in the Whitehead-Stern transaction.

Not at all easy are the tasks of inculcating in our graduates compas-

sion for their clients and the capacity to help them articulate and pursue their specific goals in ways that do not disregard the interests of others. This kind of instruction must not be relegated to "practical" courses in negotiating, counseling, mediating and the like, where it runs the risk of becoming merely a lesson book in tactics for outmaneuvering opposing counsel. In all of the courses we teach, and regardless of what teaching methods we espouse, we must strive to increase our own and our students' awareness that legal principles do not exist apart from the human situations from which they are derived and to which they must be applied. Until this sensitivity becomes part of the culture of our law schools, there is little hope that it shall find a prominent place in the practice of law.