

Sultan

Constitutional Law I

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In February 1985, William Stern and Mary Beth Whitehead entered into a so-called surrogacy contract whereby she agreed to be artificially inseminated with his sperm and renounce all rights in any child born of that insemination. The parties agreed that Elizabeth Stern, William's physician-wife (who felt childbirth posed significant health risks to her because of self-diagnosed multiple sclerosis) would adopt the child. In return for Ms. Whitehead's undertakings, William agreed to pay all Mary Beth's pregnancy and childbirth expenses plus \$10,000 upon delivery of the child to him. She would receive none of the \$10,000 if a fetus died during early pregnancy and only \$1,000 if the baby was stillborn. The contract described all payments owed by William Stern as "compensation for services."

After several artificial inseminations, Mary Beth became pregnant. Her "uneventful" pregnancy resulted in the birth of a baby girl on March 27, 1986. After turning the baby over to the Sterns on March 30, Mary Beth received their permission to care for the child temporarily. When the Sterns suspected she would not voluntarily return the baby, they obtained an ex parte New Jersey court order for the child's return. Before it could be served, Mary Beth fled with the infant to Florida. After locating Mary Beth four months later, the Sterns obtained and enforced a Florida decree ordering the child's transfer. Back in New Jersey, the Sterns sought specific enforcement of the contract, seeking termination of Mary Beth's parental rights and adoption by Elizabeth Stern.

The "Baby M" case was difficult because both parties had strong arguments that a decision for the other side would seriously intrude on their rights. The Sterns argued surrogacy was the only way they could safely have a child who was genetically related to at least one of them. Ms. Whitehead, on the other hand, argued that enforcement of the contract would destroy her family without any post-birth consent on

her part or a finding that she was an unfit parent. (Such findings of fitness are normally required before a child can be adopted.)

After a lengthy hearing, the trial court found for the Sterns, ordering the termination of Mary Beth's rights and adoption by the Sterns. Mary Beth appealed to the New Jersey Supreme Court. In a lengthy opinion, the court found the contract unenforceable and, therefore, reversed the parental rights termination and the adoption. The court, however, found that the Sterns should retain custody of Melissa.

In one sense, Baby M was a hard case. Some will view it as proof of the old saw about hard cases making bad law. More likely, though, it will be the catalyst for new law. The well-written, thorough opinion of the New Jersey Supreme Court was undoubtedly designed to prod legislatures throughout the country to deal with surrogacy. The court, inviting such a response, stated: ". . . . the Legislature [may] deal with this most sensitive issue as it sees fit, subject only to constitutional restraints."

As a recent graduate of the University of Dayton Law School, you are employed by the Judiciary Committee of the Ohio State Senate. One of the Committee members asks you to evaluate a legislative proposal he intends to submit. Studying the proposal you learn that he will propose the following:

1. General approval of the contract of surrogacy by a state official before the artificial insemination was performed, including the amount of money, if any, that will change hands.
2. Determination by the Family Law Division of the Court of Common Pleas that the intended Parents would be fit (similar to the kind of finding required before approval of an adoption)
3. A period of six months after insemination during which the surrogate mother might recant and keep the child.

What CONSTITUTIONAL issues do these proposals present? How will these probably be resolved? Why will they probably be so resolved?
