



BABY M: AN UNREQUITED INVITATION

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INTRODUCTION

In re Baby M presented a truly groundbreaking fact pattern that had not yet been adjudicated in New Jersey, and has achieved a near iconic status, in New Jersey and across the country. Its legacy is somewhat surprising, though, since the case itself did very little in terms of announcing new law. In essence, the New Jersey Supreme Court found that the specific surrogacy contract at issue violated New Jersey law, yet it did not outlaw all surrogacy arrangements.¹ On the contrary, the Court left the door wide open, and invited the Legislature to provide greater clarity with regard to the use of surrogates.²

That invitation occurred over twenty years ago, and the Legislature has failed to accept. It has remained utterly silent, instead allowing the courts to deal with the myriad issues that arise with the advent of reproductive technologies. The appellate courts, in turn, have merely reaffirmed the basic principles underlying the *Baby M* decision, without providing our lower courts with the tools to decide issues that are tangentially related, yet wholly distinct from, the surrogacy arrangement at issue in that matter. This collective silence leads to innumerable problems for trial courts when compelled to decide difficult issues concerning reproductive rights. Inevitably, many trial courts turn to *Baby M* whenever faced with an issue involving reproductive rights, even though the case itself deals with only one manner of surrogacy – where the surrogate mother, who is also the genetic mother, is compelled to part with her child immediately upon birth.

¹ *In re Baby M*, 537 A.2d 1227, 1234-35, 1264 (N.J. 1988).

² *Id.*

This article will concentrate on one tangentially related issue: the use of pre-birth orders to establish parentage when parties utilize a gestational carrier instead of a traditional surrogate. In the context of this article, a gestational carrier refers to a woman who agrees to carry and bear a child on behalf of others, yet is genetically unrelated to the child. Trial courts often seek guidance from *Baby M* when faced with an application for a pre-birth order, despite the fact that the case has little to do with establishing parentage, and misinterpret both the Court's explicit holding and implicit intent. Whereas the Court in *Baby M* attempted to begin a dialogue, and expand our citizens' rights to engage in reproductive arrangements, the trial courts often make *Baby M* the final, overly restrictive word whenever reproductive rights are at issue.

THE HOLDING OF *BABY M*

Like many married couples, William and Elizabeth Stern wanted to start a family, but Mrs. Stern's health issues prevented them from doing so the traditional way.³ After becoming discouraged with the prospect of adoption, the Sterns responded to an advertisement by the Infertility Center of New York ("ICNY"), an entity that brokers surrogacy arrangements between prospective surrogate mothers and infertile couples.⁴ Mary Beth Whitehead, who also responded to an ICNY advertisement, appeared to have a genuine desire to help infertile couples and agreed to act as the Sterns' surrogate.⁵

Mr. Stern, Mrs. Whitehead, and her husband entered into a surrogacy contract with the following material terms⁶: 1) the surrogate would undergo artificial insemination using Mr. Stern's sperm; 2) she would carry the child to term, give birth to the child, and then surrender the child to the Sterns immediately upon birth; 3) thereafter, she would do whatever was necessary to terminate her maternal rights so that Mrs.

³ See *id.* at 1235.

⁴ See *id.*

⁵ *Id.* at 1235-36.

⁶ *Id.* at 1235.

Stern could adopt the child; 4) Mr. Whitehead agreed to do all acts necessary to rebut the presumption of paternity under the Parentage Act;⁷ and 5) the Sterns would pay Mrs. Whitehead \$10,000 after she delivered the child to them.

Mrs. Whitehead underwent artificial insemination, carried the baby to term, and gave birth to Baby M on March 27, 1986.⁸ Although she immediately began to experience misgivings, Mrs. Whitehead nonetheless abided by the contract and surrendered the child to the Sterns on March 30.⁹ The very next day, however, she confronted the Sterns at their home, detailed the extent of her suffering, and convinced them to let her keep the child for only one week.¹⁰ Mrs. Whitehead thereafter never voluntarily returned the child. Instead, she and her husband fled to Florida with Baby M, after Mr. Stern filed a complaint seeking enforcement of the surrogacy contract.¹¹ The Sterns pursued them for approximately three months and successfully regained custody.¹² The parties then engaged in a thirty-two day trial over a period of more than two months,¹³ ultimately resulting in the now famous Supreme Court decision.

Although the issue presented in *Baby M* was novel in that our courts had never been called upon to determine the validity of a surrogacy contract, the Supreme Court did not assert any novel propositions of law. The Supreme Court determined that “*this* surrogacy contract is invalid” because it conflicted with both New Jersey statutes and public policies.¹⁴ First, the court reasoned that the contract conflicted with our statutes prohibiting the use of money in adoptions (aka the “baby-

⁷ N. J. STAT. ANN. § 9:17-43a(1) (amended 1998) (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2); § 9:17-44a.

⁸ *Baby M*, 537 A.2d. at 1236.

⁹ *Id.*

¹⁰ *Id.* at 1236-37.

¹¹ *Id.* at 1237.

¹² *Id.*

¹³ *Id.*

¹⁴ *Baby M*, 537 A.2d at 1240 (emphasis added).

selling” statute).¹⁵ Second, the Court stated that the surrogacy contract was in conflict with statutes requiring proof of a biological parent’s unfitness or abandonment before her parental rights may be terminated, neither of which was properly established.¹⁶ Finally, the contract required Mrs. Whitehead to irrevocably surrender custody and terminate her parental rights, effectively even before the child was born.¹⁷ New Jersey statutes only permit an *irrevocable* surrender of custody and consent to terminate when an approved adoption agency or the Division of Youth and Family Services (“DYFS”) is involved, and only after the birth of the child.¹⁸ In a private placement adoption, the natural mother simply must have some opportunity to rescind her consent.¹⁹

With regards to public policy, the Court highlighted the following problems with the contract: 1) it allowed the natural parents to decide, before the child is even born, which one is to have custody of the child, when the “settled law” of New Jersey states that the best interests of the child shall determine custody;²⁰ 2) it guaranteed permanent separation of the child from one of its natural parents, whose rights are co-equal under the law, when our policy seeks that children remain with both natural parents whenever possible;²¹ 3) there was no inquiry whatsoever of the respective fitness of the parents, or of the best interests of the child;²² 4) and the use of money in the

¹⁵ *Id.* (citing N.J. STAT. ANN. § 9:3-54 (repealed 1993)).

¹⁶ *Baby M*, 537 A.2d at 1242-44 (citing, inter alia, N.J. STAT. ANN. § 9:2-13 (amended 1990) (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2); §§ 9:2-14 to -17; § 9:3-41 (amended 1993); § 30:4C-23).

¹⁷ *Baby M*, 537 A.2d at 1244.

¹⁸ *Id.* at 1244-45 (relying on §§ 9:2-14 to -17; § 30:4C-23).

¹⁹ *Baby M*, 537 A.2d at 1244.

²⁰ *Id.* at 1246 (citing *Fantony v. Fantony*, 122 A.2d 593 (N.J. 1956) (citations omitted)).

²¹ *Baby M*, 537 A.2d at 1246-47.

²² *Id.* at 1248.

transaction effectively tainted the entire arrangement.²³ As the Supreme Court summarized:

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.²⁴

Baby M clearly stands for the proposition that the rights of a surrogate, who is biologically related to the child she carries, may not be terminated by simple operation of contract immediately upon birth. A surrogate who is also the child's natural mother has certain rights that require adequate protection under New Jersey law. Termination of those rights must conform to New Jersey statutory law and public policy. Yet after setting forth this proposition of law, the case becomes little more than a run of the mill custody and visitation dispute between natural parents,²⁵ with the proper focus on the best interests of the child.²⁶ And our appellate courts have done well to limit *Baby M*s holding to cases involving custody, visitation and the termination of a natural parent's rights,²⁷ as opposed to

²³ See *id.* at 1250.

²⁴ *Id.* at 1250.

²⁵ Although the reported decision contained some discussion of the parties' constitutional claims, the court clearly indicated that its decision was in no way related to any constitutional analysis. *Id.* at 1253-54. Both parties essentially shared the same source when arguing their respective rights. The court found that the Sterns' purported right of procreation "does not extend as far as claimed by the Sterns." *Id.* at 1253. As for Mrs. Whitehead's right to the companionship of her child, the Court held "since we uphold it on other grounds . . . we need not decide that constitutional issue . . ." *Id.*

²⁶ *Baby M*, 537 A.2d at 1255-56.

²⁷ See, e.g., *Zack v. Fiebert*, 563 A.2d 58, 61 (N.J. Super. Ct. App. Div. 1989) (interpreting *Baby M* as setting forth the standard that applies in a custody dispute "between natural parents" (quoting *Baby M*, 537 A.2d at 1252)). See also, *W.W. v. I.M.*, 555 A.2d 1149, 1157 (N.J. Super. Ct. App. Div. 1989) (referring to *Baby M*s as "[t]he leading case on custody").

other issues falling under the broad rubric of reproductive rights.²⁸

To illustrate, the parties in *D.M.H.* were involved in a private adoption.²⁹ The biological mother voluntarily surrendered her newborn baby but, nearly a year after the surrender, objected to the adoption and filed a complaint for custody.³⁰ The court held that, since the case involved a private adoption, the court must find intentional abandonment on the part of the biological mother.³¹ In making its determination, the court properly looked to *Baby M* for what constitutes abandonment, whether surrender and consent were sufficient in and of themselves, and what factors establish a biological parent's reasonable "change of mind."³² *Baby M* became relevant precisely because the birth mother, who was also the child's natural mother, changed her mind.³³

²⁸ Although *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) was not a traditional custody, visitation and termination of parental rights case, New Jersey policy regarding the termination of parental rights as set forth in *Baby M* was highly relevant. *J.B.* involved a post-divorce dispute concerning the disposition of the parties' cryopreserved preembryos, where the wife sought destruction of the preembryos. *Id.* at 708-10. After discussing *Baby M*, the court then found that similar issues are implicated by "[e]nforcement of a contract that would allow the implantation of preembryos at some future date in a case where one party has reconsidered his or her earlier acquiescence." *Id.* at 718. Although custody and visitation were not an issue, as there was no child created yet, the court properly understood *Baby M* as applicable when evaluating the rights of a biologically related parent and how New Jersey law applies to that person's reproductive decisions. *See id.* at 718-19.

²⁹ *In re Adoption of a Child by D.M.H.*, 641 A.2d 235, 236 (N.J. 1994).

³⁰ *Id.* at 237-38.

³¹ *Id.* at 238-39.

³² *Id.* at 239-40.

³³ *V.K.* and *E.D.* also involved custody determinations and the issue of how to properly terminate a biological father's parental rights under New Jersey law. N.J. Div. of Youth & Family Servs. v. *V.K.*, 565 A.2d 706 (N.J. Super. Ct. App. Div. 1989); N.J. Div. of Youth & Family Servs. v. *E.D.*, 558 A.2d 1377 (N.J. Super. Ct. App. Div. 1989). Neither case involved a private adoption, but rather DYFS' attempts to either terminate parental rights or place the child in the temporary physical custody of a third party without yet arriving at the issue of termination. *Baby M* remains relevant for what legal standard applies when a biological parent asserts his or her parental rights and objects to the attempt to

The *Baby M* decision was so groundbreaking simply because the courts had never been called upon to determine the validity of a surrogacy contract. Yet apart from the novel factual scenario, the case was relatively unremarkable in terms of its holding, instead applying time-honored principles to an interesting fact pattern. After all, the principle that a contract between private parties will be declared void and unenforceable if it contravenes public policy has existed in New Jersey for well over a century.³⁴ Although the Court did add some clarity to the standards applicable when terminating a natural parent's rights, it left a long series of questions unanswered.

THE OPEN ENDED NATURE OF *BABY M*

Baby M is equally important in our State's jurisprudence for the issues the court did not decide. In fact, the court's language indicates that it considered the case to be somewhat limited, providing only "*some insight into a new reproductive arrangement: the artificial insemination of a surrogate mother.*"³⁵ This quotation demonstrates two important aspects of the case that many future courts have ignored: 1) the case itself deals solely with surrogate motherhood, the situation where the woman giving birth is genetically related to the child; and 2) even with regard to that limited factual scenario, the case was intended to be the first, not the last, word on the subject.

First and foremost, the New Jersey Supreme Court did not declare all surrogacy contracts void, as being against public policy, even though it certainly was empowered to do so. On the contrary, the court limited its holding to the contract before the court, inviting the future use of traditional surrogacy, provided that the rights of the genetically related birth mother are sufficiently protected:

We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate

terminate them. See *V.K.* at 715-16 (relying on *In re Baby M*, 537 A.2d 1227 (N.J. 1988)); *E.D.* at 1381-87 (same).

³⁴ See, e.g., *Brooks v. Cooper*, 26 A. 978 (N.J. 1893).

³⁵ *Baby M*, 537 A.2d at 1264 (emphasis added).

mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights.³⁶

In short, the court intended the case to be permissive and open the possibility of new reproductive arrangements.

Baby M also offers no guidance whatsoever on the use of gestational carriers. The distinction between a surrogate mother and a gestational carrier under New Jersey law has been expressed only once, by the Honorable Judge Koblitiz, while sitting as Presiding Judge of the Family Part of the Chancery Division in Bergen County:

Gestational surrogacy and surrogate motherhood are the two currently recognized forms of surrogacy arrangements. A “surrogate mother” is the genetic mother and gives birth to a child formed from her ova and either the sperm of the husband of an infertile couple, or that of a sperm donor. . . . In contrast, a surrogacy arrangement involving a “gestational carrier” is one where there is no genetic relationship between the woman giving birth and the fetus.³⁷

In fact, the Supreme Court in *Baby M* recognized the existence of “new reproductive biotechnology - in vitro fertilization, preservation of sperm and eggs, embryo implantation and the like,”³⁸ yet limited its decision solely to one subset of this technology – the use of a surrogate mother who was also genetically related to the child.

Unfortunately, in the wake of *Baby M*, many trial courts have attempted to find guidance in its language whenever an issue of reproductive rights arises.³⁹ Parties who utilize a

³⁶ *Id.*

³⁷ A.H.W. v. G.H.B., 772 A.2d 948, 950 (N.J. Super. Ct. Ch. Div. 2000) (citations omitted).

³⁸ *Baby M*, 537 A.2d at 1264.

³⁹ *E.g.*, Monmouth Cnty. Div. of Soc. Servs. for D.M. v. G.D.M., 705 A.2d 408 (N.J. Super Ct. Ch. Div. 1997) involved a consent order between divorced parties that terminated the father’s parental rights and relieved him of his support obligations. *Id.* at 409. The mother and child then sought public assistance, raising the issues of whether the biological father was permitted to avoid his support obligations and whether the custodial parent even had the right to waive the child’s entitlement to support. *Id.* Although the duty of a parent to support a child answered both issues in the negative, the court then engaged in a discussion of *Baby M* and the enforceability of contracts to

gestational carrier to have a child often file an application for a pre-birth order so that the intended mother will be listed on the birth certificate instead of the gestational carrier, who has no genetic link to the child and no desire to be responsible for its upbringing. This procedure first received the courts' imprimatur of approval ten years ago and has been used countless times since.⁴⁰

A.H.W. AND PRE-BIRTH ORDERS

In *A.H.W. v. G.H.B.*, a married couple sought to have a child, yet the wife was unable to carry a child to term.⁴¹ Pursuant to a "gestational surrogacy contract", a gestational carrier agreed to undergo an embryo implantation, without financial compensation, whereby embryos created by the sperm of the husband and the ova of the wife via in vitro fertilization were implanted into her uterus.⁴² The intended parents then filed a complaint to declare the maternity and paternity of the unborn child, and have themselves placed on the child's birth certificate.⁴³

The petitioning parties and the gestational carrier agreed that the intended parents should be listed on the birth certificate, and the gestational carrier never experienced a change of heart.⁴⁴ Despite the shared intent of the parties, the Attorney General's Office opposed the request on two separate grounds, based on the fact that the requested order would have placed the intended parents' names on the birth certificate

surrender parental rights. *Id.* at 411-12. The lower court neglected to take note of the fact that *Baby M* dealt with the attempt to enforce a contract *against* the biological parent, and restrict her rights, not an attempt *by* the biological parent to enforce the contract in his favor, and avoid his responsibilities. *Id.* This distinction is crucial to a proper understanding of *Baby M*, where multiple parties vied to accept the responsibility of parentage.

⁴⁰ See *infra* notes 41-56, 61-62 and accompanying text.

⁴¹ See *A.H.W. v. G.H.B.*, 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000).

⁴² *Id.*

⁴³ *Id.* at 950.

⁴⁴ See *id.* at 949.

immediately upon birth.⁴⁵ The Attorney General argued that this was contrary to the law prohibiting surrender of a birth mother's rights until seventy-two hours after birth.⁴⁶ Second, the Attorney General argued that the procedure violated the public policy of the State of New Jersey as expressed by the New Jersey Supreme Court in *Baby M*.⁴⁷

The Presiding Judge of the Family Part of the Chancery Division, Bergen County, agreed with the Attorney General's first argument, but disagreed that *Baby M* precluded enforcement of the gestational agreement,⁴⁸ provided that the birth mother was given an adequate opportunity to change her mind.⁴⁹ The court properly interpreted *Baby M* as solely prohibiting surrogacy for compensation, noting that the Supreme Court found "no offense to our present laws where a woman voluntarily and without payment agrees to act as a surrogate mother, provided that she is not subject to a binding agreement to surrender her child."⁵⁰ The problem with the requested pre-birth order, however, is that it had the practical effect of binding the gestational carrier to surrender the baby upon its birth.

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *A.H.W.*, 772 A.2d at 949.

⁴⁸ *Id.*

⁴⁹ *See id.* at 953-54.

⁵⁰ *Id.* at 953 (quoting *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (internal quotations omitted)). Although the *A.H.W.* case involved a gestational carrier as opposed to an actual surrogate mother, Judge Koblitz did not rely upon those portions of the *Baby M* opinion that were predicated upon Mrs. Whitehead's rights as a biological parent. *A.H.W.*, 772 A.2d at 952-53 (discussing *Baby M*). Judge Koblitz found that *Baby M* required some protection of the woman giving birth to the child, regardless of her biological connection, as a result of the changes that occur during the gestation process. *See A.H.W.* at 953-54. Although this finding is itself subject to some doubt, Judge Koblitz properly recognized the distinction between a surrogate mother and a gestational carrier, *id.* at 949-50, and that their rights are not automatically coequal, because of this distinction.

In recognition of the emotional and physical changes in the birth mother which occur at birth,⁵¹ New Jersey law prohibits these immediate surrenders, even if voluntary, and requires a seventy-two hour waiting period.⁵² The court noted that, although all parties were in complete agreement in the case before it, “[t]he problem case will present itself when a gestational mother changes her mind and wishes to keep the newborn.”⁵³ To sufficiently protect the rights of the gestational carrier, the court concluded any pre-birth order should incorporate this waiting period.⁵⁴ The gestational carrier may surrender her rights after seventy-two hours, which is a full forty-eight hours before a birth certificate must be prepared.⁵⁵ If she does so, the birth certificate would list the intended parents; if she does not, the parties would then litigate to enforce their rights.⁵⁶

In the wake of *A.H.W.*, many trial courts have entirely ignored the well-reasoned opinion authored by Judge Koblitz, which sought to remedy the problem highlighted by *Baby M.* These courts have instead wrongfully relied upon other, irrelevant portions of *Baby M.*, despite the fact that these cases often do not involve traditional surrogacy. To illustrate, in a

⁵¹ The notion that a birth mother will always form some bond with her fetus, even as a genetically unrelated gestational carrier, has received significant challenge in academic circles. Dr. Elly Teman has conducted extensive anthropological fieldwork among Jewish Israeli women to explore the complex relationship between intended mothers and gestational carriers who bear children for them. Dr. Teman has concluded that the gestational carrier is often emotionally disassociated from the fetus growing in her womb. Instead, the gestational carrier more often feels a strong emotional attachment to the intended mother, seeing herself as providing the ultimate gift for people in need. See DR. ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* (2010).

⁵² *A.H.W.*, 772 A.2d at 954 (citing N. J. STAT. ANN. § 9:3-41e (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2)).

⁵³ *A.H.W.* at 953.

⁵⁴ *Id.* at 954.

⁵⁵ *Id.*

⁵⁶ *Id.*

recent case currently pending before the Appellate Division,⁵⁷ a married, heterosexual couple “were unable to have a child through ‘traditional means.’”⁵⁸ The couple utilized the husband’s sperm, obtained a donated ovum, and contracted with a gestational carrier, who subsequently underwent a successful in vitro fertilization procedure.⁵⁹ As a result, neither the gestational carrier nor the intended mother had a genetic link to the child, while the intended father was also the biological father.⁶⁰

The parties collectively filed an application for a pre-birth order, seeking to have ALS listed as the mother on the birth certificate, since the gestational carrier had no desire to be deemed a parent under the Parentage Act.⁶¹ On July 2, 2009, the Honorable Charles W. Dortch, J.S.C. entered the appropriate pre-birth order indicating that the gestational carrier may surrender the child seventy-two hours after giving birth.⁶² As in *A.H.W.*, the Order would only become effective if the birth mother surrendered her rights after receiving the benefit of the seventy-two hour waiting period.⁶³ As in *A.H.W.*,

⁵⁷ *In re* Parentage of a Child by TJS & ALS, No. A-004784-09-T4 (N.J. Super. Ct. App. Div. filed July 13, 2010). [Ed. Note: The Appellate Division decided this matter on February 23, 2001. *In re* Parentage of a Child by T.J.S. & A.L.S., 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011). At the time of publication, a petition of certification had been filed with the New Jersey Supreme Court. *In re* Parentage of a Child by T.J.S. & A.L.S., No. 067805 (N.J. filed Mar. 15, 2011). The author was unable to make further edits addressing these developments prior to publication.]

⁵⁸ See *In re* Parentage of a Child by TJS & ALS, No. FA-04-0273-09-S, slip op. at 1 (N.J. Super. Ct. Ch. Div. April 1, 2010).

⁵⁹ *Id.* at 1-2.

⁶⁰ *Id.* at 2.

⁶¹ See *id.* at 2. The Parentage Act defines the parent and child relationship as “the legal relationship existing between a child and the child’s natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.” N.J. STAT. ANN. § 9:17-39 (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2).

⁶² See *In re* Parentage of a Child by TJS & ALS, No. FA-04-0273-09-S, slip op. at 1-2 (N.J. Super. Ct. Ch. Div. Apr. 1, 2010).

⁶³ See *id.*

no party to the agreement ever sought to enforce the agreement or have the agreement declared null and void.⁶⁴ On the contrary, as in *A.H.W.*, the New Jersey Attorney General intervened and sought to have the Order vacated.⁶⁵

Despite its prior approval of the pre-birth order procedure, the lower court reversed course and granted the Attorney General's motion.⁶⁶ The intended parents had raised a constitutional challenge to the Artificial Insemination Statute,⁶⁷ arguing that it conferred a right upon infertile men while denying that same right to infertile women.⁶⁸ Even though *A.H.W.* already sanctioned the pre-birth order procedure, and even though another trial court had already ruled in a reported decision that the Artificial Insemination Statute must be applied in a gender neutral fashion,⁶⁹ the trial court read *Baby M* as holding that the Statute did not violate equal protection principles.⁷⁰ The trial court deemed the Supreme Court's "constitutional analysis and findings . . . analogous [to] and persuasive" in a case involving a gestational carrier.⁷¹ As even a cursory reading of *Baby M* reveals, the Supreme Court expressly stated that its decision was not premised in any way upon constitutional considerations.⁷²

⁶⁴ *See id*

⁶⁵ *See id.* at 2.

⁶⁶ *In re* Parentage of a Child by TJS & ALS, No. FA-04-0273-09-S (N.J. Super. Ct. Ch. Div. Apr. 1, 2010) (order granting motion to vacate order of July 2, 2009).

⁶⁷ N.J. STAT. ANN. § 9:17-44(a) (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2).

⁶⁸ *See ALS* at 4.

⁶⁹ *See In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

⁷⁰ *In re* the Parentage of a Child by TJS & ALS, No. FA-04-0273-09, slip op. at 16 (N.J. Super. Ct. Ch. Div. Apr. 1, 2010).

⁷¹ *Id.* at 17.

⁷² *In re* Baby M, 537 A.2d 1227, 1253-54 (N.J. 1988).

More importantly, however, the trial court in *ALS* entirely ignored the fact that the genetic link was crucial to the Court's decision in *Baby M*. The proposed pre-birth order in *ALS* sought a judicial determination of parentage, given the fact the gestational carrier was not genetically related to the child and had no desire to become a "parent."⁷³ In short, the gestational carrier did not seek to avoid her parental responsibilities, nor did the intended parents seek to terminate her parental rights. The parties collectively argued that she was not a "parent" to begin with, as the term is defined under the Parentage Act, and that she should be permitted to relinquish any potential rights she may have after expiration of the seventy-two hour period.⁷⁴ *Baby M*, by contrast, involved a wholly different focus, since the surrogate's status as mother was undeniable, given the fact that she was giving birth to a genetically related child.⁷⁵ The question was simply whether a biologically related mother could be stripped of her rights immediately upon birth solely by operation of contract.⁷⁶

Other trial courts have displayed this misunderstanding as well. In *A.G.R. v. D.R.H. and S.H.*,⁷⁷ the defendants, a gay couple legally married under California law, entered into an agreement with D.R.H.'s sister to act as a gestational carrier, using a donated ovum and S.H.'s sperm.⁷⁸ Despite the factual dissimilarity, the Honorable Francis B. Schultz, J.S.C. stated, "A legal analysis of the rights involved in this matter unquestionably begins with an understanding of [*Baby M*]."⁷⁹

⁷³ See *ALS* at 2.

⁷⁴ See *id.* at 3 (citing N.J. STAT. ANN. §§ 9:17-39 to -59 (West, Westlaw through L.2011, c. 36, c. 38 and J.R. No. 2)).

⁷⁵ *Baby M*, 537 A.2d at 410-11.

⁷⁶ *Id.*

⁷⁷ *A.G.R. v. D.R.H. & S.H.*, No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.* at 3.

The court then continually referred to the Supreme Court's "dislike of surrogacy agreements" in general and supposed "position . . . that surrogacy as a whole is bad for women,"⁸⁰ when the Supreme Court undeniably circumscribed its holding, inviting future surrogacy arrangements that contain adequate safeguards. Judge Schultz concluded, "The genetic makeup of the infant as it relates to the birth mother was only mentioned once in *Baby M*. . . . If the *Baby M* Court felt that its holding was only limited to situations involving a genetically linked birth mother, such concerns were never stated within the opinion."⁸¹

The underlying problem was and is to ensure that the rights of all parties are adequately protected. The lower courts have merely assumed, however, without any underlying analysis, that the rights of a gestational carrier should be on equal footing with those of a true surrogate who also has a genetic link to the child. A forceful argument could be made that a birth mother who is also genetically related to the child has certain rights that simply must transcend those of a gestational carrier. Although our courts have held that a gestational carrier is more than just an "incubator,"⁸² the genetic link between a child and a traditional surrogate creates an additional level of connection that must be considered when evaluating their respective rights. The notion that all women will react in the same fashion when carrying a fetus, and that gestation itself is the ultimate linchpin regardless of genetic connection, smacks of paternalism.

Nonetheless, a gestational carrier's rights still require adequate protection under the law, and that is exactly what *A.H.W.* provides. It embodies complete and proper protection of the gestational carrier's rights in full accordance with the dictates of New Jersey law. The pre-birth order does not compel a gestational carrier to do anything against her will, but rather merely seeks to effectuate her intent and that of the intended parents. The pre-birth order merely states that if the gestational carrier does certain things, then there should be no legal impediment to placing the intended parents on the birth certificate. If, however, the gestational carrier were to have a

⁸⁰ *Id.* at 3-4.

⁸¹ *Id.* at 4.

⁸² *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000).

change of heart and failed to effectuate the relinquishment of her possible parental rights, then the pre-birth order would be null and void.

When and if a gestational carrier seeks to assert parental rights by refusing to surrender the child, or if the gestational carrier refuses to execute the relinquishment of her rights, the courts will then face an issue that has yet to be determined by an appellate court in New Jersey. The courts will need to create new law on the extent of a gestational carrier's parental rights, whether they are co-extensive with those of a biological mother, and whether abandonment or unfitness are required before termination may be ordered. But that situation has not yet materialized, and there is nothing within the *Baby M* decision itself to indicate that gestational carriers should enjoy the same rights as surrogates who are biologically related to the children they bear.

Ironically, the entire Pre-birth Order procedure was made possible precisely because *Baby M* did not outlaw surrogacy arrangements, and because *Baby M* dealt solely with traditional surrogacy. Practitioners rightly viewed *Baby M* as permissive and an attempt to encourage alternate reproductive arrangements, provided that the rights of the woman giving birth to the child were sufficiently protected. To effectuate this goal, proposed pre-birth orders protect the rights of the birth mother to the full extent required under New Jersey statutory law. The lower courts, however, have wrongly viewed *Baby M* as restrictive, failing to enter pre-birth orders on the basis of *Baby M*, even when the factual posture of the cases they are deciding bear little to no resemblance to *Baby M*.

THE NEED FOR APPELLATE GUIDANCE

The unfortunate legacy of *Baby M* rests in the fact that, however one interprets the case itself, the Justices undeniably extended an invitation to the New Jersey Legislature. Immediately after declaring that surrogacy is permissible in New Jersey, provided that there are appropriate safeguards, the Court stated, "[T]he Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints. . . . If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential

harms.”⁸³ The New Jersey Legislature has not accepted this invitation, nor has it done anything at all to add any clarity to the myriad factual scenarios that arise when reproductive rights are at issue.

Legislative silence on such complex issues, however, requires that our appellate courts step in to fill the void when given the opportunity to provide clarification. Our appellate courts have recognized their responsibility to make the law conform to social and scientific realities, even at the risk of “legislating from the bench.” In contrast to the outdated “Blackstonian conception of the nature of law and judicial decision-making,” where the law was seen as perpetual and immutable, our courts now hold:

It is now recognized that judicial decision-making is often creative and requires that judges, although in a strictly limited sense, ‘legislate.’ Thus, contemporary judicial decisions announcing a new rule of law are the product, not only of a re-evaluation of abstract principles of justice but also of practical considerations of current economic, social, and political realities, and the effect of the rules announced in those decisions upon current institutions.⁸⁴

Legislative inaction that deprives individuals of their rights requires courts to act affirmatively, “even in a sense . . . to encroach, in areas otherwise reserved to other Branches of government,”⁸⁵ being left with “no alternative” but to engage in “affirmative judicial action.”⁸⁶

This judicial responsibility is especially acute when confronted with novel medical technology that has escaped, for whatever reason, the attention of our legislative entities. Our Supreme Court has explicitly recognized, “Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities now available.”⁸⁷ However,

⁸³ *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988).

⁸⁴ *State v. Johnson*, 206 A.2d 737, 742-43 (N.J. 1965) (citations omitted).

⁸⁵ *Robinson v. Cahill*, 351 A.2d 713, 724 (N.J. 1975) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)).

⁸⁶ *Id.*

⁸⁷ *J.B. v. M.B.*, 783 A.2d 707, 715 (N.J. 2001).

even in the complete absence of any “guidance from the Legislature, [the courts] must consider a means by which [they] can engage in a principled review of the issues presented . . . in order to achieve a just result.”⁸⁸

The Legislature simply could not have contemplated the rapidly advancing technologies that currently enable assisted reproduction when it first enacted the Parentage Act twenty-seven years ago. Our appellate courts, however, are able to discern the policies, principles and purposes underlying currently existing legislative enactments, and apply them to factual scenarios the Legislature could not have envisioned. Because of their ability to respond to specific, defined factual disputes, these courts are able to conform existing law and social policy to the dictates of the modern world. As our lower courts continue to misinterpret the Supreme Court’s language in *Baby M*, and apply the case to factual situations and legal issues that are wholly dissimilar, the need for appellate action becomes all the more dire. Waiting for the Legislature to potentially deal with these issues is simply unacceptable, given the fact that New Jersey residents are the ones who suffer from this collective inaction.

CONCLUSION

Although this article has taken a critical look at how some lower courts have misapplied *Baby M*, it is not intended as an overall critique of the courts themselves. Unfortunately, there is simply little guidance in this field of the law, and our lower court judges have few tools and resources from which to draw in making their decisions. The Supreme Court has invited the Legislature to participate in this discussion. Since the lawmakers have chosen to decline this invitation, the appellate courts must do what any polite host would – continue the party in the Legislature’s absence. They owe the people of New Jersey, New Jersey practitioners and the trial court judges clear and reasoned standards for governing these cases. As the lower courts’ misapplication of *Baby M* makes clear, silence in this arena disserves the residents of our state, who are simply trying

⁸⁸ *Id.*

to construct families in the only way nature allows them and science enables them.