

Law Comes to the Aid of Norms

by [Kirby Olson](#) (June 2020)



Roy Lichtenstein, *Fastest Gun*, 1965, Richard Pettibone, 1965

I went to see a lawyer who had written a book on surrogate parenting law. The man was rumpel. He looked up and asked me to explain the circumstances of my visit.

“Normative standards are what contracts are about,” he offered. “As it turns out you have a verbal contract between your wife and the deceased. All surrogate parenting contracts are null and void in New York State so we are in legal no-man’s land,” he said.

He paused to reflect. There were hundreds of bound green volumes behind his desk. The man had a profound look on his forehead but had cunning eyes. I perceived a four o’clock shadow, but it was only nine o’clock in the morning. There was a strong smell of alcohol.

“The maximization of benefits to both parties is

what a contract ensures," Finkelstein intoned. "Dali wanted the baby as much as his wife?"

"I knew that they wanted a baby. I never agreed to the contract. My wife did this against my will. I wanted to nullify the contract by occupying the womb with a previous baby. My wife changed her mind."

"Let's call your wife on the phone to verify," he suggested.

The rumply man got out his cellphone. The conversation with my wife lasted two minutes.

The lawyer wrote details on a yellow legal pad and soon there were four pages covered with notes. He hung up, and asked for verification.

He scratched his head. He scratched his armpit. He scratched his crotch. He looked in several more bound green volumes. He took a long tug from a bottle of whisky. He stared long and hard at me to see if I had fudged any facts on him. He called a friend and spoke to him in some language.

"Did the baby show signs of robust health?" He asked.

"I will take your case gladly, but I cannot do it pro-bono. How much money have you got?"

I had a credit card, and the limit was five thousand dollars. I asked him if he would take half of ten thousand.

"So be it," Finkelstein said, and we shook hands.

I drove home. I couldn't tell Mari about all the developments or she would flip. She was attached to that baby.

The Trial

Months passed. It was now the beginning of March,

which is still cold in the Catskills. The car had broken down, and I could barely afford gasoline. I was on foot, walking toward the County Courthouse. I had a bag of M&Ms in my pocket and was popping them for breakfast. M&Ms had been developed in the First World War. The hard casing was a way to keep the candy from melting in soldiers' hands. Since the air was well below the freezing point this would not have been necessary but I enjoyed the aesthetic feel of the hard casing as my teeth crunched. I was thinking about the famous case of Baby M which had led to the termination of surrogate parenting contracts in New York State, and I enjoyed eating the M&Ms because it struck me as somehow fitting that it was a Monday and there were all these Ms. Surrogacy had been declared illegal in New York State because it conflicted with laws concerning parental fitness and the laws governing approved adoption. Herculeana was not fit to be a mother. Her health was so poor that one week of non-parenting had killed her. Secondly, she was perhaps a Christian in name but in practice she was a Nietzschean. God rest her soul. I popped a green M & M and ruminated on whether it tasted different from a red M&M.

I went over the facts of the case of Baby M because I thought that perhaps the case would be used as precedent. In the case of Baby M, in the late 80s, a woman who might have developed multiple sclerosis was afraid of bringing a baby to term so she contracted with another woman for ten grand. The woman who carried the other woman's baby fell in love with the baby and took off with it shortly after birth. She hid the child in Florida motel rooms. There was a conflict between the birth mother and the genetic mother and father, and the contract was discarded as illegal. This happened in New Jersey but it has affected canon law in New York State. Many eastern states have condemned surrogate parenting. New York State condemned it. The conflict was between those who saw the right to procreate as the basic right and those who saw the child's right to a normal upbringing with a genetic mother and father as the basic right. In the case of Baby M, the birth parent,

Mrs. Whitehead, was filled with an unbearable sadness that she did not know that she would feel before giving birth to Baby M. When asked to deliver her baby to the Stern family, which included the multiple sclerosis victim who was also the genetic mother of the baby, she fled to Florida. Parents develop deep attachments to a child, an attachment that cannot be qualified or understood as a commercial concern, and should not be understood by commercial standards. And so a struggle ensued as the courts attempted to figure out what arrangement was in the best interests of the child. The pitiful ten thousand dollars that Mrs. Whitehead, the birth mother, was offered for surrogate parenting was in conflict with the state's minimum wage allowances, which had further voided their contract. There were so many violations of state and national law that the judges went negative. Furthermore, the contract in the case of the Baby M stated that the child had to live at least four months or else all the money would be forfeit. The exploitation of Mrs. Whitehead was palpable, and the prostitution of the child-producing capacity, held sacred in common sense, led to a Solomonic judgment that the child's life would have to be parceled between birth mother and genetic parents. The birth mother did not know and could not know the intensity of her attraction for a baby as yet unborn, and once born, the chances of her changing her mind were multiplied exponentially.

I walked down through the late spring air through the barren trees observing the stone fences of the neighboring properties and the patches of dirty snow that lay scattered about as the weak April light struggled to betray the triple-dream of winter. I thought about the horrors of class discrepancies in which the poor were held as slaves by the wealthy and the bottom percentiles forced into unnatural couplings with the rich which amounted to prostitution with the upper percentiles. To give their own progeny a chance at the freedom that comes with having one's face fed regularly and a chance at an education the poor would do anything. I

popped a couple of M&Ms and entertained the communist option. As a Christian, the communist option offered substantial enticements. The worst of the drawbacks was the subordination of the church to the state, and the idea of the secular materialists that there was no God. I felt bitter toward Dali and Herculeana, but I didn't think of hatred as the answer nor did I want to destroy them. I only wanted to protect our baby. Besides, Herculeana was dead. The answer was in the legal realm. Our civil justice system might permit a remedy.

My hands were shaking. If we lost, we would lose our new baby and possibly there would be jail time. Dali would have an expensive and elegant lawyer and all I had was the local lawyer from some other country. In the bathroom of the Calcutta Motor Company I straightened my hair with a comb, and brushed my teeth with my finger to ensure that no chocolate pieces or other aspects of the M&Ms marred my dental aspects.

The grass remained dead on the courthouse lawn. Two men were discussing the left-leaning bias of the Civil war statue on the front lawn and I eavesdropped. They were the kind of men that had lots of keys hanging from their belts, and tape measures, and their hands were banged up from hard work. I saw their care to right the statue as a good omen. For far too long the country had leaned left. Another man on his knees was replacing the broken bricks on the sidewalk, tapping new ones in. Justice requires not only inner things such as prayer but outer things such as care for the physical structure of our symbolic buildings. I went through the metal detector at the opening of the courthouse –glad that Dali would not be able to sneak in a revolver. I had to put all my change and other pocket items into a tray, and then I went up the steps. There was a toy car that Falstaff played with, an Indian head coin that I found (dated 1888) while walking on the street with Falstaff, and a political button for Ralph Nader's campaign that I intended to put in my collection of anarchist memorabilia, and a pencil sharpener that I used on

trips in case the child's crayons lost their point, and so many other items such as a spoon with which I had once administered cough medicine to Falstaff. It bore a greasy trace of the liquid syrup and was wrapped in cellophane, and the lid of a baby food jar that I hadn't wanted to throw in the woods after giving Falstaff a jar of apple sauce.

The trial was sparsely attended. Dali sat on one side of the courtroom with his lawyer, and I sat on the other side. Another gentleman sat in the back. Three elderly women sat in the back with scarves over their heads knitting. I asked my lawyer who everybody was and he said the man was an expert witness. He didn't know the women, but said they came to every trial. Since Mari was due in a couple of weeks, we decided she should stay home. Falstaff spent the mornings playing with his wooden train near his mom's feet.

"The court is brought to order," the judge said. She asked us to rise and repeat something after her. I mumbled the words I had been asked to repeat. The lawyers went at it. Dali's lawyer was an expensive one with a fancy suit and Italian leather shoes. My own lawyer was a more humble affair, with a rumpled shirt, rumpled pants, and the remnants of a good legal education.

"We have many different motions to bring before your Honor," Dali's lawyer said. "We believe that the actions of the plaintiff and his wife have destroyed the lives not only of my client's wife Herculeana, but also of Herculeana's baby, Helena, who would have a better life with a richer dad."

A doctor from Cooperstown Hospital was produced by my lawyer as an expert witness. He said that at eight pounds the baby was normal. It was a healthy baby. As for Herculeana herself, she had already been in and out of emergency care for years. She had taken on the onerous task of motherhood, a task which no approved adoption agency would have permitted, and she had acted in direct defiance of the law.

I sneak-popped a couple of red M&Ms as the judge bent over to review papers. She had short hair and an air of common sense. Her piercing but calm and centered blue eyes pleased me. I liked the stately quality of the courtroom. There was no smell of mould. Around the courtroom stood the portraits of towering figures of illumination—including the figure of Charles Evans Hughes who had once worked and taught in Delaware County before going on to become the leading figure of the Supreme Court in Washington, DC.

Dali's lawyer put forward the notion that our child should be presented to him as a remedy for the erasure of his own infant, since our child had crowded out his own. In that Dali had no genetic claim on our child, the court ruled this out of keeping with constitutional law. Courts invariably awarded the baby to the mother who had the right to the companionship of her own children. Dali's lawyer tried to bring up the fact that we could have future babies while he couldn't, but this was ruled irrelevant, since there were millions of people in that circumstance and it didn't mean they got others' babies. Dali's reckless endangerment of his own wife showed poor judgment. Moreover, Dali's demands were not seen as in keeping with the wish to present a generally good outcome and so his request for permanent possession of our child was invalid.

"On the other hand," the judge concluded in turning to me, "I find that your acceptance of fifty thousand dollars from Mr. Dallitson to be forfeit in that it violates the laws of New York State as a surrogacy contract. We further fine you another 500 dollars which is the maximum allowed by the state for the first violation of the law."

The judge asked me if I had anything to say.

"No, your Honor. I have kept the money that Dali has given us in a separate account and can give it to the court officers this afternoon. I wonder if I could pay the 500

dollars over a period of a year as it might damage my existing children's grocery fund."

The judge paused.

The judge amended the terms of her conclusion, "All right, we do not wish to starve a child. Because you are a teacher at one of our nation's least endowed institutions, we agree to waive the payment of the 500 dollars, although you must forfeit to the state all money that was given to you under the terms of the surrogacy contract. You must therefore surrender the 50,000 dollars that Dali Dallitson paid, and you must do so within fourteen days. This case is hereby closed."

The gavel banged, and I shook hands with my lawyer. Working at Calcutta I had solidarity with Mother Theresa and other Christians who had sacrificed their lives in India to that benighted people suffering under the caste system. It did tend toward a vow of poverty. Jesus came to deliver the poor from caste systems, but somehow he hadn't gotten around to professors. I wasn't nearly as poor as those in India, and I could pay my debts and remain within the law, and also felt somewhat defensive about my institution, but why didn't I make more money?

I transferred the fees electronically to the lawyer's account and got a check from my bank and walked the half-block to the courthouse and delivered the check for 50 thousand and then walked home and spent much of the afternoon playing *Uno* with Falstaff. I prepped my spring lectures. I checked the locks and bolts on the doors and windows.

I wondered what Dali would pursue as an extra-legal remedy to his perceived injury. I told my lawyer I was scared and asked for a restraining order. My lawyer said that since Dali had only made a verbal assault that the police would be unable to protect us until Dali actually murdered us. My defense was in my own hands. I had three possible weapons.

There was a baseball bat, and there was a broken hammer. There was also an axe out by the woodpile. I went and took the axe and loosened the head of it so that if Dali decided to use it the axe blade would fly off. He would be left with a handle. I turned a light on the woodpile to highlight the axe. I would then be able to wallop Dali with the more effective baseball bat. A gun would be more effective. A gun, however, would take three days to procure.

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