

THE PARADOXICAL TRIANGLE

In Boston they ask, How much does he know? In New York, How much is he worth? In Philadelphia, Who were his parents? Mark Twain

To lose one parent....may be regarded as a misfortune; to lose both looks like carelessness. Oscar Wilde

The honorable Justices of the Supreme Court were having their weekly in-camera session. Its four members were: Chief Justice Landfrei, a most capable administrator who was blessed with an ability to discern all sides of an argument but had difficulty in arriving at an independent decision; Justice Eichel, someone with an ardent sense of justice that often emerged in a very emotional and passionate manner; Justice Madame Cool who was well named because of her sang-froid and the ultra analytical manner in which she arrived at decisions; and lastly, Justice Solomon, also well named, since he was the most venerable, oldest and wisest member of the Court. Since the Court only had four members, all its decisions had to be unanimous. Usually, the Justice who felt most strongly about the issue in question, or the one who made the most compelling argument won the day.

The Chief Justice opened the proceeding by a detailed description of the case under consideration.

“This is a most curious and, for us, unique litigation. It is rare that a multi-litigant case arrives before us. Usually, these are resolved in lower courts. This one has three litigants, each of which is at odds with the other two. Only one of them will be happy with our verdict. There does not appear to be any way this could have been resolved out of court. More is the pity!

This is a distinctive case for another reason. There have been awesome advances in bio-medical technology. Our Law has no precedents for it. We have no real understanding of it. However, we have been given the onerous chore of deciding a case with all sorts of twists and turns on the basis of the Law as we know it. I must emphasize that we are not here to invent new Law, as tempting as that may be. I guess this case fell to us because the legislature and the Lower Courts had no stomach for it. This was due, I suspect, to the public uproar and the attendant publicity it got. We must also keep in mind that in our judicial system, this, its court of final appeal, renders only unanimous decisions. This case may be a difficult one for us because of that constraint.

On the surface, the case appears simple enough. Mr. and Mrs. Seed could not have any children of their own through normal means for two reasons. Mrs. Seed belonged to a family with a long record of genetic disorders. Her DNA indicated clearly that she too was a carrier of a defective gene and although she had not suffered its usual consequences, there was a strong likelihood that any progeny of hers would be afflicted with a horrible and fatal disorder. Secondly, Mrs. Steed had undergone a hysterectomy and could not host a fetus. I guess they could have adopted. They appear to be a loving couple who would make good parents. However, they chose to take a different route. Mr. Seed, in particular, wanted a child that he could claim was his naturally. The Seeds then met Ms. Donati, a woman who bore a strong resemblance to Mrs. Steed and who was willing to part with some of her healthy ova for financial gain. Again with a monetary inducement, next they convinced Mrs. Mere, a close friend, to allow an embryo formed

by Ms. Donati's ovum and Mr. Steed's sperm to be implanted into her uterus for her to bring to term. Mrs. Mere had given birth to three infants with no difficulty whatsoever.

All was going swimmingly and then the roof fell in. However, before proceeding with the calamitous events that ensued, I should mention something that may or may not have import. The Steeds are a mixed race, that is a black/white, couple. Mrs. Steed is a stunning blonde while Mr. Steed is a very handsome man of Black African origin.

Mrs. Mere Was in her seventh month when both she and Ms. Donati high-handedly announced that they wished to renege on the deal they had made with the Steeds. Ms. Donati claimed that since she was the natural genetic mother of the embryo, the child was hers and once born should be immediately handed over to her. She also asserted that the contractual deal she had made should be nullified because of the immorality of the situation and that, in any case, no contract of any sort could be found binding when a part of her body was involved. Well, just about at the same time, Mrs. Mere claimed that the child should go to her since she would have brought the embryo to term, providing it with nourishment, warmth and shelter over a period of nine months in a uterine environment that was uniquely hers as it is with all natural mothers. One can simply imagine how the Steeds responded to this startling change in events. In any case, each of these litigants immediately sought out the best legal minds they could find. It did not take long for the media to exploit this newsworthy story with accompanying arguments, debates and polls. The TV medium seemed to discover a plethora of instant bioethical experts who were given an inordinate amount of air-time expressing a very diverse range of opinions. To this day, the argument rages on. It is up to us to resolve this issue and to do it quickly since the birth should occur in about ten days. Now does anyone wish to start making an input?"

As was his wont, Justice Eichel, was the first to make his views heard.

"I do not think there is any doubt as to where the child should go and that is to the natural genetic mother. There are two reasons. First our natural and cultural history dictates that a child is the progeny of its biological parents. This is of crucial importance because knowledge of biology indicates that a child will resemble its genetic parents, physically and psychologically, making it easier for them to be sound parents, although there is no guarantee of this. Our biology and culture command that it is the mother that serve as the primary care giver. In this case, the natural father and mother are not wedded to each other. Unless someone can clearly show that Ms. Donati is unfit to be a parent, then the child should be hers. I suggest that some accommodation to allow the hereditary father visiting rights should be given serious consideration, although I think that this might prove to be difficult because of his and his wife's expectations and also probable resentment of Ms. Donati. The second reason is more fundamental. No matter the type of contract, everyone is entitled to change their mind when some aspect of their body is involved. I might sign a piece of paper agreeing to give one of my kidneys for a transplant. However, I have every right to change my mind. That ovum belongs to Ms. Donati and therefore anything that becomes attached to it is her property, no matter what prior agreement took place."

There was silence for a few minutes as the other Justices considered Justice Eichel's views and how to respond to them. Finally, in her usual, cool and detached manner, Madame Justice Cool countered.

"I find much merit in many of the views you have put forth Justice Eichel. However, I must demur from your position. A careful examination of the arguments that Ms. Donati and Mrs. Mere have put forward will reveal why I cannot agree with your judgment. The bottom line of Ms. Donati's position is that the ovum used to create the embryo in question belongs to her and that therefore any subsequent development of it also is hers. I agree that the ovum, in question, is hers as long as it remained untouched in some test tube. However, the moment it was fertilized by Mr. Seed's sperm, it was no longer an untouched ovum but a new life entity to which she was not entitled to make any claim of sole ownership. If she cannot claim to be the singular proprietor of this embryo, obviously her claim to the subsequent infant soon to emerge is very questionable. Since she did agree to forfeit any ownership of the child to the Steeds, it strikes me that they have a prior legitimate claim, particularly after paying for that privilege. Therefore my position is that Ms. Donati's claim should be denied.

Now, I find that Mrs. Mere's petition has more merit than Ms. Donati's. The old saying, 'Possession is nine points of the law,' may be operative in this instance. This fetus, this embryo is certainly in her possession at the present time. It is well lodged in her uterus. It is attached to her uterine wall where it receives warmth, shelter and nourishment. The question is, 'Does this entity remain hers once it emerges from her womb?' That is the rub to her application. For me, her claim did pose a bit of a quandary until I compared it to a very common occurrence. Bed and Breakfast establishments, Inns, Hostels, Hotels, Motels, etc., also offer food, shelter, warmth and food, for financial gain. Is there really any difference between what these establishments do and the reasons they do it and what Mrs. Mere has done and her reasons for doing it? Obviously the answer is negative. Does a hotel have any claim on a customer who has left the establishment after paying what was due? Again the answer is negative. Therefore, I can only conclude that Mrs. Mere does not have a satisfactory claim on the child she is carrying, once it emerges from her womb. I am aware that many of my sex will take strong exception to the preceding judgment, however, I feel that it is the correct one.

That leaves the Steeds as the last litigant. I cannot find any reason to deprive them of the child in question. After all they paid for it, Mr. Steed is the natural father and there is no reason to believe they will be anything other than loving and nurturing parents. I therefore move that the child, once born, be handed over to them."

Chief Justice Landfrei and Justices Eichel and Cool waited expectantly for Justice Solomon to provide a solution as he nearly always did when the Court seemed to be in a quandary. A few minutes passed. Justice Solomon appeared to be deep in thought. Finally he spoke up.

"As you are well aware, most of my values usually coincide with Justice Eichel's. However on this occasion I must side with you, Justice Cool, at least as far as a formal decision from this Court is involved. Legally and logically, the points you made stand up and I reluctantly concur with them. The world is what it is and it dictates that your approach is the only feasible one. Therefore my vote is to send the newborn to the Steeds.

However, I strongly feel that there is much more to all this than just the compulsory arbitration between these litigants. First of all, let us attempt to identify this child's true parents. My first thought was that, somewhat uniquely, this child has three parents, namely, the genetic mother and father and the woman carrying the embryo to term. I

quickly realized that I had omitted Mrs. Steed, ergo the child really has four parents with two that are racially different, lending a further reason for the following extrapolations.

Why stop here? Why not include all those responsible for the technology that was critical in creating this situation? Indeed, let us go further and include all those providing care. Without adequate funding by tax dollars none of this would have occurred. Thus, why not include all in the society we inhabit? Our society does not exist in a vacuum so why not include all the nations of the world? It seems that collectively the human race is the parent of all children and each of us is the child of all those parents. Perhaps a better way of putting it, is that, in reality, all members of the human race are part of a unity. But why stop there? Why not include all living things? Yet living things do not exist in a vacuum either. Therefore, aren't we at one with the whole world and does that make the world a living organism as has been posited by some? But this world exists in a solar system, which exists in a galaxy, which exists in a universe, which in turn may be one of an infinite number. Doesn't that mean we are a unity with all of existence? Actually this is not a new revelation. The proponents of Quantum Mechanics have long postulated that 'Everything is connected to everything else'. Isn't it a pity that we have not got a clue about how to incorporate all of this in legislation, in philosophy, in religion, or even to live harmoniously in keeping with this possibility? Hopefully, we will learn."

Jack Basuk

April 11, 2001

<http://www.jackbasuk.com>