Deciding to Let the Windmill Win: the Baby Jessica Adoption Case

Clark D. Cunningham*

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This case study about the Baby Jessica case is being co-presented with Nigel Duncan's paper, CREATING AN INTERNATIONAL, INTERACTIVE WEBSITE ON TEACHING LEGAL ETHICS AND PROFESSIONALISM.

When University of Michigan law professor Suellyn Scarnecchia met with the adoptive parents of Baby Jessica, she told them the chances of winning the custody struggle with Jessica's biological parents were "extremely low." Against all odds, Scarnecchia actually won the case on the merits at the trial level, only to lose on appeal to the Michigan Supreme Court on jurisdictional grounds. Although this "tilting at windmills" case can certainly be used to show how even losing in the courts can still make a long-term positive difference in society, (see footnote 1 below), I teach the case for a different reason. I have found in my legal ethics course that it is particularly when a lawyer takes on a seemingly hopeless and thankless cause and, even more so when the lawyer endures a heart-breaking loss, that the highest attributes of professionalism are revealed. (Let us remember that the most admired lawyer in American fiction, Atticus Finch in to Kill a Mockingbird, lost the murder trial and, perhaps even worse, his client so despaired of receiving justice that he was killed in an attempted jail break before Finch could perfect an appeal.) As described below, in the Baby Jessica case the lawyer took on one of the most difficult tasks a lawyer can face, persuading a client that it is time to give up the fight in light of what is best not only for the client but for others affected by the litigation.

The Baby Jessica case presents extraordinarily rich materials for teaching because there was a TV documentary that includes interviews with the lawyers and parties as well actual footage of the trial in addition to an eloquent autobiographical account by one of the clients, and an excellent magazine article. As powerful as these resources were in the classroom, the most valuable item though was an interview with Scarnecchia recorded after she was a guest speaker at my class in which she reflected with great candor about the challenging ethical and professional issues with which she had struggled.

At our panel discussion, Nigel Duncan and I will encourage the collection of similar materials about heroic lawyers from around the world – both written and audiovisual material such as oral histories – that can be disseminated on the International Website on Teaching Ethics and Professionalism. [For example, what could be a greater service to our profession than to capture Nelson Mandela's memories of his days of legal practice, especially reflection on the challenges he faced, while he is still with us?] Perhaps some of the other presentations being made at our panel can provide such case studies.

* W. Lee Burge Professor of Law & Ethics, Georgia State University College of Law (USA), and Director, National Institute for Teaching Ethics & Professionalism (NIFTEP). Email: cdcunningham@gsu.edu; Home Page: http://law.gsu.edu/ccunningham/ NIFTEP web site: http://law.gsu.edu/niftep/

The following case study is excerpted from a longer article: *How Can We Give Up Our Child?" A Practice-Based Approach to Teaching Legal Ethics*, 42 THE LAW TEACHER: THE INTERNATIONAL JOURNAL OF LEGAL EDUCATION 312 (2008) (special Issue on The Values of Common Law Legal Education).[**]

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> *The little girl they named Jessica was born February 8, 1991. It was now the last week of July, 1993, and she was almost 2 ½ years old. They were meeting with their lawyer. They had an incredibly difficult decision to make: whether seven days from now would be the last time they would ever see her.*

The preceding paragraph describes a critical moment in what is generally known as the "Baby Jessica Case," one of the most famous American family law cases of the past 20 years.[1] The clients are a couple who thought they had adopted an infant only to face a court ruling that they must return the child two years later to the biological father, who had not known about the adoption proceedings. The deadline for giving up Jessica is in seven days. Their only hope of ever regaining custody is a long-shot, protracted appeal to the U.S. Supreme Court. The lawyer believes that it would be best for them, for Jessica, and for the legal system not to pursue that appeal.

The American Bar Association (ABA), which serves as the accrediting agency for most law schools in the United States, requires that during the three years of post-graduate law school that constitutes American legal education students take a course in professional responsibility. Course coverage must include the ABA's Model Rules of Professional Conduct (Model Rules or "MRs"), approved by the ABA's governing body, the House of Delegates, with the intent that these rules will be adopted by each of the 50 states as obligatory on attorneys licensed to practice by that state. At many law schools this is the only required course after the first year. At my law school the course is typically taught in at least four different sections by different tenured faculty members and is taken during the second year. Each teacher has broad discretion in designing the content and teaching methodology. The meeting between lawyer and client in the

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[1] The case produced two separate state Supreme Court decisions – *In the Interest of B.G. C.*, 496 N.W.2d 239 (Iowa 1992); *In re Baby Girl Clausen*, 502 N.W.2d 649 (Michigan 1993); the trial court proceedings were covered by Court TV; the case was the subject of both a made-for-TV movie and a major magazine article – Lucinda Franks, "The War for Baby Clausen," *The New Yorker* 56 (March 22, 1993); and the highly publicized litigation prompted the promulgation of the Uniform Adoption Act. *See* Joan Heifetz Hollinger, "Adoption and Aspiration: The Uniform Adoption Act, the DeBoer–Schmidt Case, and the American Quest for the Ideal Family," (1995) *Duke Journal of Gender Law and Policy* 15 and Robby DeBoer, *Losing Jessica* (1994) (autobiographical account by the adoptive mother).

Baby Jessica case described above is reenacted by my students as the culminating simulation exercise in my section of this course.

My legal ethics course is organized around a series of in-class simulated client meetings that force the students to deal with issues of confidentiality, conflict of interest, and the division of control between lawyer and client. The simulations are paired with real life stories relating to the same issues. The Baby Jessica case is part of a unit that extends over three weeks.[2]

In the first week we simulate an initial meeting in December 1992 between the adoptive father, Jan DeBoer, and Suellyn Scarnecchia, a professor at the University of Michigan Law School Child Advocacy Clinic, to discuss whether the clinic would provide free representation to him and his wife. Half of the students in the class are assigned specific roles and responsibilities in relation to the Baby Jessica simulations. All these students must prepare to play the role of the lawyer – although only four students are chosen to play the lawyer role over the span of the three-week unit. In advance of class students became deeply familiar with the Baby Jessica case through reading excerpts from an extended magazine article, an autobiographical account by the adoptive mother, and one of the major court decisions in the case.

The simulated meeting is performed twice in the classroom by different students; the second student has not seen the first role play. The primary purpose of conducting two simulations based on identical instructions is to provide students with contrasting examples; the two simulations consistently differ in instructive and realistic ways.[3] We then discuss and contrast the two simulations in class and also view videotaped interviews with the parties and lawyers in the actual case as well as a portion of the custody trial that took place after the clinic agreed to represent the adoptive parents.

Both simulations are videotaped and posted on the course web site displayed with a running second-by-second time code. Students assigned to the Baby Jessica case then have two weeks to write a 5-7 page paper analyzing how well the lawyer learned the client's objectives, defined the scope of representation, explained the division of control between client and lawyer, identified potential conflicts of interest, and explained to the client the need to obtain the client's informed consent to representation in light of such potential conflicts. Students are required to analyze the videotapes closely, citing to specific segments by time code, something similar to what sociolinguists call discourse analysis, which involves repeated viewing of recorded speech events with attention to every detail.[4] Two or three of the best papers are then posted on the course web sites

[2] The students in the other half of the class have similar responsibilities for the "Simon Case" simulation, focusing on confidentiality issues, which takes place earlier in the semester. The Simon Case simulation is described in detail in Clark D. Cunningham, "How to Explain Confidentiality?" (2003) 9 *Clinical Law Review* 579. The course home page is http://law.gsu.edu/ccunningham/PR/

[3] The simulations themselves are never graded.

[4] As one student observed in a paper written for the course, "One doesn't usually have a chance to review an interview, much less review it dozens of times. It's particularly instructive to realize how

as examples, with the authors' identity removed; I endeavor to select papers which differ in their analysis and conclusions.

The first client meeting presents an obvious conflicts of interest problem when Jan DeBoer confides that he has a criminal history that he wants kept secret from the clinic's other prospective client, his wife. Students who role play the lawyer typically focus exclusively on this issue, missing other potential conflicts, including one specifically applicable rule, Model Rule 1.8(f). Most of their fellow students also miss these issues in the papers they write, in contrast to this excellent paper submitted the last time I taught the course:

> Effectual representation relies heavily upon the client's fundamental sense that his attorney will represent him with undivided loyalty. MR 1.7 ensures this trust through the prohibition of incompatible interests that may weaken allegiance. ... Conflicts arising from adverse legal interests between common clients are fairly straightforward. Material limitations, by contrast, are more subtle. Generally, the lawyer is materially limited whenever there is a significant risk that his ability to recommend or carry out a proper course of action will be impaired by other responsibilities or interests. ... [There were a] series of potential disqualifying material limitations neither attorney fully addressed. The first of such issues is Scarnecchia's receiving compensation for her work from the University of Michigan. Rule 1.8(f) states, "A lawyer shall not accept compensation for representing a client from one other than the client" without strict qualifications. ... Scarnecchia also needed to discuss how his/her own personal interests may create a disqualifying conflict. Rules 1.16(a)(1) and 1.7(a)(2) combine to preclude ... representation where "there is a significant risk that the representation of one or more clients will be materially limited by. . . a personal interest of the client." Here, Scarnecchia clearly states that she promotes a public policy interest in children's rights. To the extent that her interest in children's rights expand beyond the DeBoers' interest in securing custody of Jessica, Scarnecchia's interest creates a conflict requiring a reasonable belief that representation will be uncompromised as well as her clients' informed consent to proceed. Neither Scarnecchia raised this issue.[5]

Typically students who did recognize that there was a specific conflicts of interest rule triggered when someone other than the client was paying the lawyer nonetheless trivialized its significance in the Baby Jessica case, seeing the "informed consent" requirement as unproblematic because the client was eager to receive free legal

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inaccurate not only first impressions can be, but even tenth impressions." Quoted in "How to Explain Confidentiality," *supra* n. 43, 593.

[5] Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Wednesday Section) – Sample Paper S08W-Ex2-2a.

services from the law school clinic. Not, however, the student quoted above, who pointed out:

> Arguably, Jan understands that a third-party is paying for his representation or is at least offering services gratuitously. What he does not seem to understand is the nature of the conflict emanating from this agreement and Scarnecchia's need to obtain informed consent to proceed. Informed consent here requires Scarnecchia to explain the disparate interests that the University of Michigan and the DeBoers could have respecting the time spent on the case and case objectives ... Neither Scarnecchias addressed this potential conflict or obtained informed consent to proceed, leaving potentially devastating issues lying in wait.[6]

Most students also see no potential conflict between the lawyer's personal interests and those of the clients, since both lawyer and clients want "what is best for Jessica." But as another excellent paper from the same semester explained:

> Initially, the goals of the representation appear to be congruent: the DeBoers want "what's best for Jessica" and the goal of the clinic is to "take a public policy position on children's rights and teach students about important issues like this." However, it is a possibility that the clinic's goal of "taking a public policy position" could at some point come into conflict with "what's best for Jessica" as an individual, or that pressure from the University could have an effect. Scarnecchia should also recognize that her own interests as an advocacy lawyer, who seeks "to battle injustice," and to generally "raise interest in children's rights" could potentially conflict with her clients' specific goals for the well-being of their child.[7]

The second and third week of this unit are designed to demonstrates that ethical issues missed or trivialized in the first simulation are difficult and consequential.

In the third week students reenact the meeting described in the introduction that took place in late July 1993 between Scarnecchia and Jan DeBoer[8] about whether to appeal to the U.S. Supreme Court the decision of the Michigan Supreme Court ordering the DeBoers to give Jessica to her biological father by August 2, 1993.[9] During the second week of this unit we prepare for this counseling session by discussing a similar critical moment in the 1962 University of Mississippi desegregation case in which the

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[6] S08W-Ex2-2a, *supra* n. 47.

[7] Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Tuesday Section) – Sample Paper S08T-Ex2-2a.

[8] In both simulations I play the role of Jan DeBoer. In the Simon Case simulations earlier in the semester some of the students prepare to play the lawyer role, and the others are assigned the client role.

[9] In February 1993 the clinic won a custody hearing by persuading the trial judge that it was in Jessica's best interest to stay with the DeBoers, only for that decision to be reversed on jurisdictional grounds by the Michigan Supreme Court on July 2, 1993.

distinguished civil rights attorney Constance Baker Motley persuaded her client, James Meredith, to keep going in his law suit despite great personal risk.[10]

During the third week I am able to "bring" Suellyn Scarnecchia into the classroom by showing part of an interview I recorded with her in which she and I spent considerable time discussing the critical moment when she advised the DeBoers against pursuing the case further in the U.S. Supreme Court. Immediately after my students reenact this meeting, we view in class this videotaped discussion.[11] The students then write their second paper comparing their simulated advice to Jan DeBoer with how Scarnecchia actually handled the situation.[12]

As one of the exemplar student papers explains, “upon entering the historic meeting with the DeBoers, [Scarnecchia] had two questions in mind. First, would transferring Jessica a third time should the DeBoers prevail [in the Supreme Court] be in the child's best interest? Second, was the overwhelming risk of an adverse ruling from the Supreme Court that would create bad law for adoptive parents' and children's' rights nationwide worth taking?”[13] The same student recognized that addressing these questions implicated the most fundamental values of the legal profession:

> The Model Rules state that "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." The responsibilities are distinct, generating a complex of potentially opposing imperatives that Scarnecchia must balance in the instant case. ... While a lawyer's concurrent responsibilities are usually harmonious, the circumstances here potentially create a tension ... Resolution depends upon the independent exercise of Scarnecchia's judgment and skill.[14]

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[10] Just as as the federal government was poised to enforce the court’s integration order – with troops and loss of life as it turned out – Meredith wrote to Motley saying he wanted to drop his lawsuit. The students read excerpts from autobiographies by both the lawyer and the client -- Constance Baker Motley, *Equal Justice Under Law* (New York Farrar, Strauss and Giroux, 1997) and James Meredith, *Three Years in Mississippi* (Cincinnati, Meredith Publications, 1966) – and watch in class a part of the documentary about the Civil Rights Movement, *Eyes on the Prize,* that includes interviews with Motley and Meredith, dramatic footage of the rioting, arson and killings that accompanied Meredith’s enrollment at the university, and an historical assessment of the case as “the last battle of the Civil War.”

[11] This 15 minute video can be viewed as a webcast through the internet at http://law.gsu.edu/ccunningham/PR/Video/SESI(new).html (requires installation of Quicktime media software which can be downloaded at no charge at: http://www.apple.com/quicktime/download/standalone.html)

[12] Part of the paper is also an opportunity to revise the analysis of the first paper with the benefit of ensuing class discussion, instructor comments on the first paper, the sample papers posted on the web site, and the wisdom of hindsight from the second simulation.

[13] S08W-Ex2-2a, *supra* n. 47.

[14] *Ibid.* The student goes on to say: “Scarnecchia is not simply an agent carrying out the DeBoers' orders; she is also an advisor, bound to "exercise independent professional judgment and render candid advice," including non-legal factors that "may be relevant to the client's situation."

Scarnecchia, like Constance Baker Motley advising James Meredith, wanted to encourage and enable her clients to decide with wisdom and courage whether to proceed with a lawsuit of national import — but as professionals both faced the challenge of giving that advice free of influence from either their personal motives or the imperatives of the law reform organizations to which they had dedicated themselves.[15] The second simulation thus presents a complex moral dilemma *created* by the application of the conduct rules but not *resolved* by them. Students are thus not merely applying principles stated at a frustrating level of generality or their own personal preferences. They have the compass of professional values but still face a challenging moral landscape to navigate, and they are free to take different paths and even reach different destinations.

The student papers quoted in this article were written during the Spring 2008 semester when I taught two sections: one on Tuesday and the other on Wednesday. The two Tuesday simulations showed significantly different approaches to Scarnecchia's dilemma. For example, one student attorney, when asked by the client what the lawyer would do in his place, gave direct advice to end the case. The other student attorney, faced with the same question, declined to give such a direct answer. One student firmly supported the decision to give direct advice to end the litigation, but began with recognition of the complexity of the decision by analogizing the Baby Jessica situation to Motley's meeting with Meredith.

> When Meredith wanted to drop the case, [Motley] convinced him not to. However ... Meredith's reluctance to go forward was entirely justified – in addition to the factors he referenced in his letter, it was clear that dropping the case could save his life. I think in both [cases] Motley and Scarnecchia were able to reconcile [their] passion for the cause with [their] client's objectives, and thus meet [their] duty under MR 1.8(f)(2), because both clients also cared deeply about the cause. However, it is a dangerous situation to be in, and the lawyer should consider the possible conflicts of interest before going forward.[16]

Having concluded that Scarnecchia's advice about potential harm to Jessica and to the law relating to children's rights from proceeding was not improperly motivated by her personal interests and organizational obligations but consistent with client loyalty, this student then moved to the different and equally important issue of whether an ethical decision made in the abstract had been effectively implemented.

> The biggest difference between the approach taken by B1 and B2 Scarnecchia was their willingness to tell Jan whether they thought he should continue the fight. B2 Scarnecchia, when asked if she thought it

[15] Motley was a staff attorney at the famous Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) that successfully litigated *Brown v. Board of Education*.

[16] S08T-Ex2-2a, *supra* n. 50.

> was best to stop, said "not necessarily" ... B1 Scarnecchia, in contrast, gave her opinion: ... 'I'm inclined to say it's time to stop'." ... I believe the willingness of B1 Scarnecchia to give her opinion, in a caring and respectful way, was consistent with a client-centered counseling approach generally and with her duty to Jan and Robby in particular. If I were the client, and I asked for a straight opinion from my lawyer, I would be [angry] if I got an evasive answer. For me, part of a client-centered counseling approach is giving the client the information they want, even if that includes my personal opinion. ... I feel that Scarnecchia had a duty to the DeBoers to continue the candid approach that the DeBoers had valued in the past, and that this honesty was the best way to help her clients act consistently with their character and values. Robby notes in Losing Jessica that "I liked her (Scarnecchia's) straightforward approach. I wanted to hear the truth without any sugarcoating." p.27. In the article "A Client's Perspective" Daisy Floyd said that having a lawyer who "supported me in acting consistently with my character," was essential. Additionally, she said "that's what most clients really want from their lawyers- to move through the conflict without losing their integrity, their values, their identity." Scarnecchia had a duty to respect the relationship and try to advise them in the way they would find most helpful. She also was acting in accord with her own character and integrity. The real Scarnecchia, of course, also expressed her opinion to the DeBoers, and rather emphatically. "There was at that point in my representation of them such an integrated view of what their interests were that I was able to really push them on, this is what you've told me before that this is why you're doing this, that this is what your interests are, and I'm going to try to hold you to that."[17]

The author of the other exemplar student paper from the Tuesday section thought it more likely that advice that includes the "risk of making bad law" is tainted by conflict of interest and questioned the sincerity of both student lawyers in their delivery of advice:

> In Jan's case, the risk of making "bad law" is almost entirely a concern of third parties, although, as discussed earlier, moral considerations probably warrant some mention of it. Both the classroom and real-life Scarnecchias, however, came very near to the MR 1.8(f) line, if not crossing it, in introducing third-party considerations in counseling the DeBoers against further action in their legal battle over Jessica. Evidence for this assertion derives from the "persuasive" tone of both subgroup meetings; in neither case could it be honestly said that the attorney had not previously made up her mind that proceeding was a bad idea. I think it is perfectly sensible, and in fact sanctioned by the Model Rules, for an attorney to make up his or her mind as to the preferred means of pursuing

[17] *Ibid.*

> a representation objective prior to consultation with his or her client, but masquerading the reasons for this preference as "factors the client should consider" is insulting to the client and probably a violation of MR 1.4. Furthermore, it is bound to result in a client's feeling divested of control.[18]

The same student then went on to provide a very sophisticated critique of the issue of implementation:

> Scarnecchia was obliged to discuss the risk of Jessica's suffering "transfer trauma" as a result of a successful appeal because that consideration might make such an appeal a poor means of furthering the DeBoers' stated objective of seeking the child's best interest. Moreover, making the DeBoers aware of the bigger picture impact of their case on Supreme Court precedent raises both legal and moral considerations necessary for informed decision-making. Nonetheless, the discussion in both subgroups did not enable informed decision-making by the DeBoers because it gave them no sense of the seriousness of these risks, strategies that may be useful to minimize them, or corresponding benefits of proceeding with their legal battle. First, while both ... Scarnecchias discussed the risk of "transfer trauma," neither of them took seriously the notion Jan himself raised in both subgroups that the DeBoers might win at the Supreme Court level and then opt not to transfer Jessica from the Schmidts. ... The ... Scarnecchias also failed to adequately describe the risks of making "bad law" through pursuing an ultimate failure at the Supreme Court level. ... B1-Scarnecchia ... might have given Jan a more complete sense of the risk of making bad law if he explained to him that "bad" precedent would only extend from their case to disputes similarly turning on the standing of persons granted temporary custody in one state to modify custody orders in another state under the authority of the UCCJA. ... [I]t would have been possible to give him a clearer picture of the other parties whose options may have been affected by his and Robby's decision to proceed. Similarly, an explanation that a denial of certiorari would not have the same binding effect as a loss in the Supreme Court would also have furthered his informed decision. Finally, neither Scarnecchia revisited the idea that high-profile Supreme Court cases, no matter what the outcome, often bring about policy reform by state legislatures and/or Congress.[19]

When I asked the students who wrote the excellent papers quoted above, I invited them also to comment on the draft of this article. One student responded in detail, and I conclude with an excerpt: “By prepping for the Scarnecchia case, I had to wrestle with

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[18] Exercise Two (The Baby Jessica Case) Writing Assignment: Part Two (Spring 2008, Tuesday Section) – Sample Paper S08T-Ex2-2b.

[19] *Ibid.*

my own beliefs, values, and fears in the midst of a living scenario. I had to harmonize my own assumptions with the law, and in so doing, gained an understanding of the substance of the law as I would never have been able to do otherwise."