Surrogacy and Adoption: A Case of Incompatibility

by Barbara L. Atwell*

So the woman who has the baby is the surrogate mother. She is the substitute. But for what? For the real mother? No, she is the real mother. So, for what is she a surrogate? She is the surrogate, according to logic (if that is not too strong a word to use in relation to what lies behind this Bill or Act) for somebody who cannot have a baby. But that does not make her a surrogate mother, it makes her a mother. The woman who gets the baby is the substitute for that original mother who hands the baby over by a process of adoption.[1]

INTRODUCTION

Since the highly publicized case of *Baby M*,[2] surrogate parenting agreements have become a popular issue for public comment. While the events leading to the *Baby M* case began in 1985, there has been a resurgence of surrogate parenting[3] since the

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1. 173 PARL. DEB., H.L. (5th ser.) 174 (1986), *quoted in* Means, *Surrogacy v. The Thirteenth Amendment*, IV N.Y.L. SCH. HUM. RTS. ANN. 445, 445 n.1 (1987).

2. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

3. The woman who agrees to bear a child in a surrogate parenting arrangement is normally referred to as the "surrogate mother." As indicated above, this term is misleading. In fact, the surrogate is not a surrogate mother at all, but is the natural or biological mother of the child. It is perhaps more appropriate to describe the surrogate as a "surrogate wife" since she substitutes for the wife by bearing a child for the biological father. *See* Means, *supra* note 1, at 445 n.1. *See also* THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 1 (1988) [hereinafter TASK FORCE REPORT] ("'[S]urrogate mother' is a misnomer because the woman is actually a 'surrogate wife' for the purposes of procreation.").

mid-1970's.[4] A "surrogate parenting agreement" is an agreement in which a surrogate agrees for a fee to be impregnated through artificial insemination, to carry the child to term, and, after birth, to deliver the newborn baby to the biological father and to surrender all the parental rights she would otherwise have.[5] It is then contemplated that the wife of the biological father will adopt the child.[6] Legal scholars[7]

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4. The practice of surrogate parenting dates back to Biblical times. *See Genesis* 16:2 ("Sarai said unto [her husband] Abraham, Behold, now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her."); *Genesis* 30:3 (When Rachel was unable to bear children for Jacob she told Jacob to "go in unto . . . [Bilhah] and she shall bear upon my knees, that I may also have children by her."). *See also* Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986).

5. *See* Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982). Typically, the parties to a surrogate parenting agreement are the surrogate, the biological father, and (where appropriate) the surrogate's husband. In an effort to circumvent baby-selling statutes, the wife of the biological father is generally not a party to the contract. Surrogate Parenting Associates, Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 210 (Ky. 1986). The biological father and his wife will generally be referred to herein as the adopting couple.

Under this form of surrogate parenting agreement, the surrogate is both a "genetic" and "gestational" surrogate. She is a genetic surrogate because it is her egg that is fertilized and she therefore has a genetic link to the child. She is a gestational surrogate because she carries the child to term. There are other types of surrogate arrangements. For example, the surrogate could be a gestational surrogate only, that is a surrogate with no genetic relation to the child. This type of surrogacy occurs when another woman's already fertilized egg is implanted into the surrogate. This Article discusses women who are both genetic and gestational surrogates.

In addition to surrogate parenting, there are several other relatively recent advances in reproductive technology. For example, with artificial insemination by donor (AID) a woman may become impregnated without intercourse. In fact, it is through artificial insemination that a surrogate is impregnated. In the more typical non-surrogate AID situation, though, a woman who has been impregnated would keep the child upon birth. Another of the modern reproductive technologies is in vitro fertilization (IVF). This form of reproduction involves fertilizing a woman's egg in a laboratory and subsequently re-implanting the egg in her body. Surrogate arrangements differ from AID and IVF in that they require the rental of the woman's body over a prolonged period of time. *See* TASK FORCE REPORT, *supra* note 3, at 82.

6. Katz, *supra* note 4, at 2; *see infra* notes 69-70 and accompanying text.

7. *See, e.g.*, Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281 (1987); Note,

and other professionals[8] have debated the advantages and disadvantages, the legality or illegality[9] of this form of procreation.

Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 HARV. L. REV. 1936 (1986); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147; Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71 (1982); Note, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 231 (1985) [hereinafter Note, *An Incomplete Picture*].

8. *See, e.g.*, Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. AM. ACAD. PSYCHIATRY L. 21 (1984) [hereinafter Parker, *Surrogate Motherhood*] (psychiatrist); Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140:1 AM. J. OF PSYCHIATRY 117 (1983) [hereinafter Parker, *Motivation*] (same).

9. There are many legal issues surrounding the validity of surrogate parenting agreements. There are contract issues, for example, regarding both the enforceability of the agreements and the appropriate remedy, if any, for their breach. *See, e.g.*, Field, *Surrogate Motherhood — The Legal Issues*, IV N.Y.L. SCH. HUM. RTS. ANN. 481 (1987); Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble With Specific Performance*, IV N.Y.L. SCH. HUM. RTS. ANN. 375 (1987). There is also the constitutional issue of one's privacy right of procreation. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983). Some commentators have suggested that surrogate parenting agreements must be enforced in order to avoid violating the parties' constitutional privacy right of procreation. Coleman, *supra* note 7; Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373 (1981). A better approach is to recognize that while there is a privacy right of procreation, the refusal to enforce a surrogate parenting agreement does not impair that right. *See* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983). If surrogate parenting agreements are not enforced, only one method of procreation is prohibited — not procreation generally.

Another legal issue that arises in the context of surrogate parenting agreements is the presumption of paternity that the law imposes on the spouse of a woman who has been artificially inseminated with her spouse's consent. *See, e.g.*, COLO. REV. STAT. § 19-4-106 (Supp. 1987) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."). Obviously, in a surrogate parenting arrangement, paternity is intended to rest with the biological father rather than with the spouse of the surrogate. In an effort to circumvent a similar provision in Michigan, the spouse of the surrogate signed a statement of "nonconsent" to the insemination of his wife. Syrkowski v. Appleyard, 122 Mich. App. 506, 506, 333 N.W.2d 90, 92 (1983), *rev'd on other grounds*, 420 Mich. 367,

This Article adds to the ongoing debate and suggests that, as currently practiced, surrogate parenting is an attempt to create a new form of independent adoption and that such agreements should not be enforced to the extent that they are incompatible with legitimate and well thought-out public policies expressed in state adoption statutes. Adoption is the method by which the state attempts to provide a suitable home for children whose biological parents are unable or unwilling to care for them.[10] Because it results in a permanent severing of the legal ties between a child and his or her biological parents, adoption is strictly regulated by each state.[11]

In an effort to ensure that the interests of all parties — the child, the biological parents, and the adoptive parents — are protected, several policies are reflected in state adoption statutes. One such policy is to ensure that the consent of the biological parents to surrender the child for adoption is voluntary and informed.[12] Another is to prevent children from being treated as chattel. Thus, states prohibit "baby-selling" or "baby-brokering" — a practice that tends to subordinate the suitability of the home to the financial interest of the baby-broker.[13] Finally, states seek to protect the child by ensuring that the adoptive parents are fit before they are granted an adoption decree.[14] Since surrogate parenting agreements are a form of adoption, they must conform to these policies.

This Article explores the public policy doctrine relating to contracts generally and examines specific public policies set forth in state adoption statutes. The Article concludes that surrogate parenting agreements are 1) incompatible with consent provisions of state adoption statutes, 2) inconsistent with state laws prohibiting baby-selling, and 3) inconsistent with state adoption provisions that provide for a thorough investigation of the adoptive parents in order to ensure that the adoption serves the child's best interests. Accordingly, this Article suggests that as state legislatures debate the

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362 N.W.2d 211 (1985). In *Baby M*, the surrogate's husband also refused to consent to the insemination. *See* Surrogate Parenting Agreement between Mary Beth Whitehead, Richard Whitehead, and William Stern (Feb. 6, 1985), Exhibit G [hereinafter MBW Contract]. *See infra* note 145 and accompanying text.

10. *See infra* notes 48-67 and accompanying text.
11. *See infra* notes 69-73 and accompanying text.
12. *See infra* notes 73-108 and accompanying text.
13. *See infra* notes 109-119 and accompanying text.
14. *See infra* notes 120-128 and accompanying text.

best means of addressing the issue of surrogate parenting,[15] they should recognize that surrogate parenting agreements must be restructured to avoid violation of adoption statutes. Surrogate parenting agreements that comply with adoption requirements in all respects except for failure to comply with adoption consent provisions should be voidable. Surrogate parenting agreements that violate baby-selling prohibitions or provisions requiring an investigation of the adoptive parents, however, should be void.

Part I of this Article examines the public policy doctrine as it applies to traditional contract law. Part II explores the adoption process and the public policies underlying it. Part III examines the incompatibilities between surrogate parenting agreements and the adoption statutes. Part IV describes the modifications required in the surrogate process in order to make surrogate parenting agreements enforceable and concludes by looking at surrogacy in the context of society at large.

I. THE PUBLIC POLICY DOCTRINE

Traditional contract law[16] permits private parties to contract freely without undue government interference.[17] In fact, private contractual agreements are encouraged and considered an important part of our free enterprise system.[18] Individuals would be hesitant to rely on each others' promises without the assurance that those promises would generally be enforced. Without enforcement of promises, it would be almost impossible to conduct private business in an orderly fashion. Accordingly, society has an interest in protecting

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15. Many states have recently proposed bills on the issue of surrogate parenting. Michigan is the first state that has actually enacted legislation. *See infra* notes 202-203 and accompanying text.

16. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

17. E. FARNSWORTH, CONTRACTS § 5.1 (1982) ("The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements.").

18. *See, e.g.*, Wallihan v. Hughes, 196 Va. 117, 117, 82 S.E.2d 553, 558 (1954) ("The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes."); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 744 (1982) ("A modern free enterprise system depends heavily on exchanges over time and on private planning.").

the expectations of contracting parties by binding them to the contracts they make.[19] In an effort to further this societal interest, courts normally enforce the promises of competent parties[20] that are supported by consideration.[21]

Not all promises, however, are enforceable.[22] For example, a promise may be unenforceable due to the absence of consideration[23] or a failure to comply with the statute of frauds.[24] An agreement that appears valid on its face may be unenforceable if duress,[25] undue

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19. Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-30 (1943).

> [The freedom to contract] became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way. Rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law. . . . [F]reedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system.

Id. (footnote omitted). *See also* Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985).

20. If one of the parties lacks capacity due to infancy or mental illness, the contract will be voidable by the party who lacks capacity. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (1979). *See also* First State Bank of Sinai v. Hyland, 399 N.W.2d 894 (S.D. 1987); Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969); Keser v. Chagnon, 159 Colo. 209, 410 P.2d 637 (1966).

21. E. FARNSWORTH, *supra* note 17, at § 5.1.

22. Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969) ("'No legal system devised by man has ever been reckless enough to make all promises enforceable.'"); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933) ("'It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient.'"); Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 500 (Alaska 1962) ("'We recognize that 'freedom of contract' is a qualified and not an absolute right.'").

23. *See, e.g.*, State v. Bryant, 237 Kan. 47, 697 P.2d 858 (1985); Sanders v. Arkansas-Missouri Power Co., 267 Ark. 1009, 593 S.W.2d 56 (Ct. App. 1980); Zamore v. Whitter, 395 A.2d 435 (Me. 1978); Kirksey v. Kirksey, 8 Ala. 131 (1845). *See also* A. CORBIN, CORBIN ON CONTRACTS 167 (1963).

24. RESTATEMENT (SECOND) OF CONTRACTS §§ 110-50 (1979). *See also* Farmer's State Bank v. Conrardy, 215 Kan. 334, 524 P.2d 690 (1974); Harry Rubin & Sons v. Consolidated Pipe Co., 396 Pa. 506, 153 A.2d 472 (1959).

25. RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (1979). *See also* Standard

influence,[26] or mistake[27] induced one party to enter into it. A court may deem unenforceable a contract that is procedurally and substantively unconscionable.[28] A court may also excuse performance under a contract if there is a subsequent unforeseen event amounting to impracticability of performance or frustration of purpose.[29] Finally, and most importantly for purposes of this discussion, a court may refuse to assist in the enforcement of a contract if it concludes that the contract violates public policy.[30]

The proposition that a contract may be void as against public policy is easily articulated. The definition of public policy, however, is much more elusive.[31] In the past, contracts that violated public policy were referred to as "illegal" bargains.[32] The current term, "public policy," is broader because contracts may violate public policy although they are not illegal.[33] "Public policy" encompasses those principles designed to protect the welfare of the people.[34] Thus, when a party challenges the validity of an agreement based on public policy, the underlying question faced by the court is whether the

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Finance Co. v. Ellis, 3 Haw. App. 614, 657 P.2d 1056 (1983); Marriage of Hitchcock, 265 N.W.2d 599 (Iowa 1978); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

26. RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979). *See also* Dobbins v. Hupp, 562 S.W.2d 736 (Mo. Ct. App. 1978); Agner v. Bourn, 281 Minn. 385, 161 N.W.2d 813 (1968).

27. RESTATEMENT (SECOND) OF CONTRACTS §§ 151-58 (1979). *See also* Anderson Brothers Corp. v. O'Meara, 306 F.2d 672 (5th Cir. 1962); Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982); Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887).

28. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). *See also* U.C.C. § 2-302(l) (1964).

29. RESTATEMENT (SECOND) OF CONTRACTS §§ 261-72 (1979).

30. *See* Trist v. Child, 88 U.S. (21 Wall.) 441, 448 (1874) ("[A] contract may be illegal and void because it is . . . inconsistent with sound policy and good morals.").

31. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403, 161 A.2d 69, 94 (1960) ("Public policy is a term not easily defined."). *See also* J. CALAMARI & J. PERILLO, CONTRACTS § 22-1 (3d ed. 1987) (public policy is "an amorphous but ubiquitous concept").

32. *See* RESTATEMENT (FIRST) OF CONTRACTS § 512 (1932).

33. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 8 introductory note (1979).

34. BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) (public policy refers to "[t]hat principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good"). Public policy may "for the good of the community" restrict the freedom to contract. *Id.*

contract is consistent with the public interest.[35] The perception of what is or is not in the public interest, namely public policy, changes with time.[36]

There are two basic reasons why a court will not enforce a contract or a portion thereof which offends public policy. First, by refusing to enforce the contract, the court hopes to deter others from making similar agreements. Second, the court does not want to assist the promisee by permitting him or her to use the judicial system to enforce a contract that violates public policy.[37] There is a greater reluctance to aid the promisee in these cases than there is a desire to help the promisor.[38]

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35. Anaconda Fed. Credit Union v. West, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971) ("[T]he courts can refuse to enforce any contract which they deem to be contrary to the best interests of citizens as a matter of public policy."). See also Prince, *supra* note 19, at 170, who explains:

> The phrasing of the public policy doctrine as applied to contracts has been fairly consistent across time and jurisdictions. The Anglo-American courts have stated repeatedly that they will not enforce contracts that are contrary to public policy in that they injure the public welfare or interests, or are contrary to public decency, sound policy, and good morals.

36. Wilson v. Carnley, 1 K.B. 729, 738 (1908) ("The determination of what is contrary to the so-called 'policy of the law' . . . necessarily varies from time to time. . . . The rule remains, but its application varies with the principles which for the time being guide public opinion."); Weeks v. New York Life Insurance Co., 128 S.C. 223, 228, 122 S.E. 586, 587 (1924) ("Public policy [is] a 'wide domain of shifting sands.' The term in itself imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of a people.") (*quoting* MacKendree v. S. States Life Ins. Co., 112 S.C. 335, 335, 99 S.E. 806, 807 (1919)). *See also* A. CORBIN, *supra* note 23, § 1375, at 12 ("It must ever be borne in mind that times change, and that with them public policy must likewise change. A decision or a rule that is believed to be in accord with the general welfare today may not accord with it tomorrow.").

37. RESTATEMENT (SECOND) OF CONTRACTS ch. 8 introductory note (1979).

38. *Id.* In a breach of contract case, the plaintiff is generally the promisee — the party who alleges that the defendant/promisor failed to comply with the terms of the contract. Assume a typical breach of contract case involving a contract for the sale of cotton. If the buyer breaches the contract by failing to pay the contract price, the court, in an action by the seller/promisee, will protect the seller's expectation interest by requiring the buyer to compensate the seller for his loss. This is in keeping with the societal interest in protecting the expectations of contracting parties which in turn furthers our free enterprise system. In a contract

Public policy is reflected in constitutions and statutes,[39] judicial decisions,[40] and rulings of administrative agencies.[41] There has been greater concern, however, over judicial pronouncements of public policy than over public policy set forth by legislatures. There is an apprehension that judicial pronouncements of public policy will simply reflect each judge's personal biases and opinions.[42] Therefore it has been suggested that judicially created public policies would lead to too much unpredictability — like an "unruly horse."[43] Moreover,

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which violates public policy, though, the defendant/promisor's promise may not be enforced. This is not primarily to relieve the promisor of his contractual responsibility since he agreed to the improper transaction, but to deny the promisee the benefit of the bargain. E. FARNSWORTH, *supra* note 17, at § 5.1.

39. "Constitutions and statutes are declarations of public policy by bodies of men authorized to legislate." A. CORBIN, *supra* note 21, § 1375, at 15. *See also* Pittsburgh, C., C. & St. L. Ry. v. Kinney, 95 Ohio St. 64, 67, 115 N.E. 505, 507 (1916) ("It has frequently been said that . . . public policy is a composite of constitutional provisions, statutes, and judicial decisions."). *See also* Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988).

An example of a public policy created by the federal Constitution is the Thirteenth Amendment which prohibits slavery. U.S. CONST. amend. XIII. *See infra* note 110 and accompanying text.

40. The public policy against the impairment of family relationships is a judicial creation. E. FARNSWORTH, *supra* note 17, at § 5.2. *See* Prince, *supra* note 19. For example, there is a public policy which favors the relationship of marriage. E. FARNSWORTH, *supra* note 17, at § 5.4. Thus, one court has condemned a cohabitation agreement as being inconsistent with the institution of marriage. Hewitt v. Hewitt, 77 Ill. 2d 49, 58-59, 394 N.E.2d 1204, 1208 (1979) (an agreement for which consideration consists in whole or in part of illicit sex is void). *But see* Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 113, 134 Cal. Rptr. 815, 831 (1976) (contract between nonmarital partners is unenforceable only to extent that consideration is explicitly illicit).

41. *Zamboni*, 847 F.2d at 82. *See also* Belenke v. SEC, 606 F.2d 193 (7th Cir. 1979).

42. *See* Anaconda Fed. Credit Union v. West, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971) ("[W]hether there is a prior expression or not the courts can refuse to enforce any contract which they deem to be contrary to . . . public policy."). Prince, *supra* note 19, at 172, explains:

> When the courts are without relevant legislative direction . . . they must focus on the specific policy standards accepted by society. Courts rely on their subjective perceptions to determine these societal standards. These perceptions will almost certainly vary depending on how judges view their social environment, where the environment is located and what the current societal morals are.

43. Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.)

if the opinions of each judge reflect his or her own personal view of what the public interest is, that view may or may not accurately reflect the public interest.

When public policy is declared by a constitution or legislative enactment, the concern over unpredictability is reduced.[44] First, it is easier for the court to determine what the public policy is. The judge is not basing the decision on his or her personal views, but on the policy established by a duly elected legislative body. Second, because the public policy is more defined, it is easier for a court to determine whether a contract is compatible with the public policy.[45]

("I, for one, protest as my Lord has done against arguing too strongly upon public policy; — it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.").

44. Prince, *supra* note 19, at 171 ("[The] identification of public goals and interest can be made with more certainty when legislative enactments exist. . . . The basis for the statutory public policy rule is that a duly constituted, public representative body has established law that reflects some public interest. The courts are then bound to act in accordance with this statutory public policy.").

45. Legislative declarations of public policy have increased over the years. Legislatures are often faster than courts in responding to matters of interest to their constituencies and have greater resources than a court with which to respond to a changing society. E. FARNSWORTH, *supra* note 17, at § 5.5. If legislation explicitly provides that contracts incompatible with it are unenforceable, a court's function is relatively simple, and it will conclude that the contract should not be enforced. But when the legislature enacts a statute, it often omits any reference to the intended treatment of contracts which are incompatible with it. Then a court must consider the violation of public policy on one hand, while on the other weigh the policy favoring the enforcement of promises. *Id.* In Sirkin v. Fourteenth St. Store, 124 A.D. 384, 108 N.Y.S. 830 (1908), for example, the buyer of goods challenged the enforceability of a contract on public policy grounds although the statute which set forth the public policy did not specify that contracts inconsistent with it were unenforceable. In that case the plaintiff, a seller of hosiery, sued for the purchase price of goods it delivered to buyer. The buyer defended on the ground that the contract had been procured through commercial bribery in violation of a New York statute and therefore was not enforceable. The seller had bribed the buyer's purchasing agent in order to obtain the contract. The court noted that while the statute did not specify how contracts procured through commercial bribery should be treated, the statute did, nonetheless, indicate "the public policy of the state." *Id.* at 389, 108 N.Y.S. at 833. Thus, the court held the contract unenforceable in an effort to further the public policy and deter commercial bribery. The dissent, however, argued that the express penalties imposed by the statute should not have been supplemented by the court. *Id.* at 395, 108 N.Y.S. at 838 (Scott, J., dissenting).

When a court concludes that a contract violates public policy, it need not declare the entire contract void; instead it may refuse to enforce only a portion of the contract. It may also allow one party to enforce the contract although the other party would not be permitted to enforce it.[46] The court thus retains some flexibility in determining the degree to which the contract should be enforced.[47] Keeping in mind the general contract rules of public policy, an examination must be made of specific public policies that affect both adoption and surrogate parenting agreements.

II. The Adoption Process and Its Underlying Public Policies

A. The Adoption Process

Adoption did not exist at common law; it is entirely a creation of the state and is governed by state statutes.[48] In general, the state prefers to keep children with their biological parents.[49] Adoption is the state's response to the needs of children whose parents are unable or unwilling to care for them. It is the procedure by which the state attempts to find a permanent home for those children who are without one. In general, adoption permanently severs the legal ties between a child and his or her biological parents.[50] Since adoption is a state

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46. As Professor Farnsworth explains:

> [A] court will not necessarily condemn the entire agreement as unenforceable by both parties merely because it offends public policy. A court may hold instead that the agreement can be enforced by one of the parties though it cannot be enforced by the other. Or it may hold that part of the agreement is enforceable, though another part of it is not. It is therefore more accurate to say that the agreement or some part of it is unenforceable by one or both parties than to say that it is 'void'.

E. Farnsworth, *supra* note 17, at § 5.1.

47. In the surrogate parenting context, a court could declare that the agreement could be enforced by the biological mother but not by the biological father, for example, in a case involving a birth defect where the biological father attempted to renege on his promise.

48. *In re* Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923).

49. B. Joe, Public Policies Toward Adoption 11-12 (1979).

50. In some instances, the adopter is the stepparent or some other relative of the biological parent(s) — so that the child is able to maintain contact with one or both of the biological parents.

creation that permanently removes children from their biological parents, several states strictly construe their adoption statutes.[51]

A couple that wants to adopt a child may generally follow one of two procedures. The first and often preferred[52] procedure is for the couple to use an agency licensed by the state.[53] The license signifies that the state deems the agency to be an acceptable organization for child placement.[54] When a couple interested in adopting contacts an agency, the agency will normally investigate the couple's fitness as parents.[55] A child will be placed with the couple should the agency conclude that they are fit. The couple then petitions a court to approve the adoption.

The second option open to couples in most states is the independent adoption, which is also known as private placement or gray market adoption.[56] No state-licensed agency is involved in an independent adoption. Instead, the adoption is arranged by a private, unlicensed intermediary such as an attorney, doctor, or member of

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51. *See, e.g.*, Scott v. Pulley 705 S.W.2d 666, 670 (Tenn. Ct. App. 1985); Anonymous v. Anonymous, 108 Misc. 2d 1098, 1102, 439 N.Y.S.2d 255, 255 (Sup. Ct. 1981); Matter of Doe's Adoption, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976). *But see* Wright v. Wysowatcky, 147 Colo. 317, 363 P.2d 1046 (1961) (adoption statutes should be liberally construed because of the humanitarian purpose they serve). *See also* N.J. STAT. ANN. § 9:3-37 (West Supp. 1988) ("This act shall be liberally construed to the end that the best interests of children be promoted.").

52. *See infra* notes 61-66 and accompanying text.

53. *See, e.g.*, MINN. STAT. ANN. § 259.22 (West Supp. 1988) ("No petition for adoption shall be filed unless the child sought to be adopted has been placed by the commissioner of human services, the commissioner's agent, or a licensed child-placing agency.").

54. *See, e.g.*, IDAHO CODE § 16-1602 (1979) ("'Authorized agency' means the department of health and welfare or a local agency, or a person, organization, corporation, benevolent society or association licensed or approved by the department or the court to receive children for control, care, maintenance or placement."). *See also* ARK. STAT. ANN. § 9-9-202 (1977); MINN. STAT. ANN. § 259.21 (West Supp. 1988).

55. *See* Note, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629, 633 (1980).

56. *See, e.g.*, KY. REV. STAT. ANN. § 199.473 (Baldwin 1984) (persons other than licensed child-placing agencies may seek permission to place a child for adoption); N.Y. DOMESTIC RELATIONS LAW § 115-b (McKinney 1986). *See also* Note, *Black-Market Adoptions*, 22 CATH. LAW. 48, 54 (1976) ("In contrast to the sinister sound of the term, gray-market adoptions, consisting of nonagency placement with nonrelatives, are legal in most states.").

the clergy.[57] These intermediaries are not necessarily in the business of child placement, but may be asked to arrange an adoption as an incident to their professions. Normally, the intermediary places the child in the prospective adoptive home. The state subsequently investigates the fitness of the couple, and a hearing is held in which the adoption is granted or denied.[58] In addition to the fact that in an independent adoption the intermediary is not licensed by the state, another major difference between an agency and an independent adoption is that in an independent adoption the investigation of the prospective adoptive parents often takes place subsequent to the placement of the child.[59] With an agency adoption, a determination of the prospective adoptive couple's fitness as parents is generally made prior to placing a child with them.[60]

Several commentators have criticized independent adoptions because more abuses tend to occur through independent adoptions than through agency adoptions.[61] For example, a child placed for adoption through an independent procedure is more likely to become a victim of the black market.[62] Moreover, some studies conclude that there

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57. See Note, *supra* note 55, at 629-30:

> When a person or couple decides to adopt a child in the United States, there are several vehicles through which a child can be obtained. The most extensively used is the adoption agency, which can be either a public agency — an arm of the government — or a private agency — a nonprofit entity. Both types of agencies are heavily controlled through various state laws, rules, and regulations. In contrast to placement through controlled agencies is placement through unlicensed groups and individuals. This unlicensed placement activity [is] known alternately as the gray market, private placement, or independent adoption.

58. *Id.* at 633.

59. Note, *supra* note 56, at 52-53 (1976) ("In an independent adoption, there is seldom any requirement that adoptive parents be evaluated before placement.").

60. Note, *supra* note 55, at 633-34 ("When an agency places the child, the . . . significant change in the sequence of events is that the agency will investigate the prospective parents *before* they can receive a child." There is an "absence of this preplacement evaluation of the adoptive parents and their home" with an independent adoption.). Because of this difference in the sequence of events, the child's best interests are arguably not sufficiently considered in the independent adoption. *Id.*

61. *See, e.g.*, Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975); L. MCTAGGART, THE BABY BROKERS: THE MARKETING OF WHITE BABIES IN AMERICA (1980).

62. A black market adoption differs from a legal private placement or gray

is a greater risk that the biological parents will not receive proper counseling regarding the decision to place the child for adoption.[63] There also appears to be a greater risk that the placement will not be permanent due to some intervening problem.[64] Because of the potential problems associated with independent adoptions,[65] at least one state prohibits independent adoptions completely, and many others severely restrict them.[66] On the other hand, some commentators

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market adoption only in that the intermediary receives a disallowable fee. Since it is so easy to cross the line between a permitted private placement and an illegal black market sale of a child, the threat of a black market adoption is greater with independent adoptions. *See* Note, *supra* note 56, at 54.

63. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 47-48 (1985) [hereinafter ADOPTION FACTBOOK]. Of the risks associated with independent adoptions, the National Committee for Adoption concludes that perhaps "most important of all, [is the risk that] the biological parents [will] . . . receive little if any adequate counseling regarding the plan that is best for them and for the child." *Id.* at 48.

64. For example, the adopting couple may specify that they want a healthy child and may discover, after placement, that the child is not healthy. As a result, they may attempt to return the child to the biological parents. *See id.* at 12.

65. *See* Amatruda & Baldwin, *Current Adoption Practices*, 38 J. OF PEDIATRICS 208, 209-11 (1951); H. WITMER, E. HERZOG, E. WEINSTEIN & M. SULLIVAN, INDEPENDENT ADOPTIONS 337-62 (1963).

66. Massachusetts prohibits independent adoptions completely. MASS. GEN. LAWS ANN. ch. 210, § 11A (West Supp. 1986) (No person other than a "duly authorized agent or employee of the department of social services or a child care or [licensed] placement agency" shall "in any way offer . . . to place, locate or dispose of children for adoption.").

Some states prohibit independent placement unless the placement is by the biological parents. *See, e.g.*, CAL. CIV. CODE § 224p (West Supp. 1988) ("Any person other than a parent who, or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Services, places any child for adoption is guilty of a misdemeanor."). *See also* COLO. REV. STAT. § 19-5-206 (Supp. 1987); GA. CODE ANN. § 19-8-3 (1977); MONT. CODE ANN. § 40-8-108 (1981); NEB. REV. STAT. § 43-701 (1961); NEV. REV. STAT. § 127.240 (1979); R.I. GEN. LAWS § 15-7-1 (1970).

Another group of states generally prohibits independent adoptions, but provides for limited exceptions. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-69d (West 1987); D.C. CODE ANN. § 32-1005 (1988); IND. CODE ANN. § 31-3-1-3 (Burns 1987); MD. FAM. LAW CODE ANN. § 5-507 (1984); MINN. STAT. ANN. § 259.22 (West Supp. 1988); N.J. REV. STAT. § 9:3-39 (Supp. 1988); N.M. STAT. ANN. § 40-7-34 (1985). For a discussion of state regulation of independent adoptions, see Note, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U.L.Q. 753, 755-56 (1985).

argue that despite the foregoing risks, independent adoptions pose no greater threat to a child's welfare than agency adoptions.[67] There are certain requirements, such as the investigation of the adoptive parents, that state laws impose before the adoption takes place irrespective of whether that adoption takes place through an agency or through private placement.

B. Surrogate Parenting as a Form of Adoption

A surrogate parenting agreement is not in itself an adoption agreement. It is an agreement pursuant to which the biological mother agrees for a fee to terminate her parental rights upon the birth of the child and to surrender the child to the biological father.[68] A threshold question may be why surrogate parenting agreements must conform to existing adoption statutes. The parties to the surrogate parenting agreement contemplate that the biological father's wife, the stepmother, will adopt the child.[69] Surrogate parenting agreements are, in effect, a form of independent adoption.[70] Their ultimate goal is to make the contracting couple the legal parents of the child through adoption.[71] Since surrogate parenting agreements

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67. *See* Note, *supra* note 55, at 629. *See also* W. MEEZAN, S. KATZ & E. RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 232-33 (1978).

68. *See supra* note 5 and accompanying text.

69. "In the typical case, the surrogate . . . conceives, carries the child for nine months, gives birth, and . . . releases her parental rights, giving up the child to the [contracting] couple for *adoption*." Katz, *supra* note 4, at 2 (emphasis added).

70. The trial court in *Baby M*, for example, upon declaring the surrogate parenting agreement valid, immediately issued a decree of adoption to Elizabeth Stern, the wife of the biological father. *See* 109 N.J. 396, 417, 537 A.2d 1227, 1237 (1988). Although the Supreme Court of New Jersey reversed the trial court, holding that the surrogate parenting agreement was not enforceable, it acknowledged that the agreement was a form of adoption. "It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money." *Id.* at 424-25, 537 A.2d at 1241. *See also* Field, *supra* note 9, at 510 ("Surrogacy arrangements are sufficiently similar to other adoption arrangements that the same rule[s] should apply."). For a description of independent adoptions, see *infra* notes 56-67 and accompanying text.

71. There are several reasons why the adopting couple may prefer to use a surrogate arrangement rather than proceeding through a traditional adoption.