Contracts to Bear a Child

Wife is looking for a healthy, blue-eyed woman who is willing to carry my husband’s child. All expenses paid plus $4,000.1

A married couple is ready to have a child but the woman learns that she is sterile. The couple learns from an adoption agency that if the two meet the agency’s criteria for adoptive parents, they may be able to adopt an infant after a three to seven year wait.2 The possibility of a private adoption is no more encouraging: current law makes this method of adoption increasingly difficult.3 As a last resort the couple places an advertisement in a local newspaper for a “carrier”—a healthy woman willing to be artificially inseminated with the husband’s semen and to carry and bear a child for them. The advertisement is answered and the parties meet to negotiate a contract. A salary is agreed upon and the contract is signed. Within a year the couple has a child—a child that is biologically the husband’s.

When the couple contracts with the carrier, the couple bargains for two promises. First, the carrier agrees to be inseminated with the husband’s semen and to carry the child to full term. Second, the carrier contracts to surrender all parental rights in the child as of the date of birth. In years past the idea that such promises should be permissible and legally enforceable would probably have been rejected as immoral and impractical. Not surprisingly, therefore, California’s adoption and parentage laws effectively forbid such transactions.4 Despite these prohibitions, the practice is increasing.5 Changing standards of personal morality, rapid increase in the demand for adoptable infants, and

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1. Daily Californian, Nov. 19, 1976, at 19, col. 5.
2. Adoption and Foster Care 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare. 94th Cong., 1st Sess. 6 (April 28-29, 1975) [hereinafter cited as Baby Selling].
4. See text accompanying notes 8-27 infra.
recent legislation permitting, in certain limited circumstances, the parallel practice of artificial insemination of a married woman with semen from an anonymous donor, all indicate that the responses of the past should be carefully reexamined.

This Comment presents the case for legalizing such agreements. Part I describes the legal and policy barriers to enforcement of baby contracts. Part II explores the practical problems of contracting to obtain a child, and contrasts them with those inherent in private adoptions, a widely permitted form of child transfer that closely resembles the baby contract.

On the basis of this analysis, Part III proposes a system of state regulation adequate to protect the interests of the contract parents, the carrier, and the child, and outlines the statutory changes necessary to achieve that end.

I

LEGAL OBSTACLES TO CONTRACTS TO OBTAIN A CHILD

A couple entering into a baby contract risks criminal sanctions. Section 273(a) of the Penal Code makes it a misdemeanor to pay money or anything of value to a parent for the consent or cooperation of the parent to a subsequent adoption of the child. The statute also forbids payment of the living and maternity-related expenses of the mother contingent upon the placement of the child for adoption. Similarly, the presence of consideration might bring the contract within the scope of section 181 of the Penal Code which makes it a felony punishable by two to four years imprisonment to pay "money or deliver . . . anything of value to another, in consideration of having a person placed in his custody." Violations of these laws are seldom prose-


7. This Comment argues only that the right to enter such contracts should be extended to married couples. While strong arguments can be made that the right to enter into such contracts should be available to unmarried persons as well, such an extension would raise problems that are beyond the scope of this Comment.

8. It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his child. This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption. (West 1970).

9. Id.

contrived, but the threat of prosecution nonetheless remains a serious deterrent to baby contracts.

Even if a court were to hold that the baby contract fell outside of express criminal prohibitions, it might well rely on the underlying policies of the statutes to strike down the contract. Although there are no California cases on point, several other jurisdictions have held that contracts for the adoption of children in return for valuable consideration or for release from support obligations are void as contrary to public policy. While these cases deal with children already in existence, it is likely that courts would consider a contract to conceive, bear, and give up a child in exchange for valuable consideration as posing the same dangers to the welfare of the mother and child. The reasons for prohibiting the sale of children are obvious. Public policy and private morality both argue that the treatment of human infants as chattels is abhorrent. Moral distaste is compounded with the fear that financial incentives in the transfer will lead to a decision that is not in the best interest of the natural parents or the child.

A contract to bear a child is less subject to these objections. Because the purchaser is the natural father of the child, the risk that hard "commercial" considerations will prevail over the interests of the child or the mother is slight. Correspondingly, the likelihood that the ultimate adoption will be a success is increased. In addition, the contract to carry a child involves a social benefit not available by any other means—the contract parents can obtain a child that is biologically the husband's. A parallel benefit is now available to couples where the hus-


12. See, e.g., Willey v. Lawton, 9 Ill. App. 2d 344, 132 N.E.2d 34 (1956) where a natural mother with custody and her spouse agreed to adopt the children and thereby relieve defendant father of his support obligations if defendant paid $5000 for the release. The court held that the contract was void and against public policy, finding support in cases which held that allowing parents to be free to transfer a child for money would "tend to the destruction of one of the finest relations of human life." Id. at 345, 132 N.E.2d at 35. But see Reimche v. First Nat. Bank of Nevada, 512 F.2d 187 (9th Cir. 1975) where the court upheld under Nevada law an agreement whereby the natural mother of the child consented to its adoption by the father in return for his promise to provide for her and the child in his will. However, the court confined its holding to the situation before it—an agreement between parents or close family members where adoption was in the best interest of the child and pecuniary gain was not the motivating factor on the mother's part. Id. at 189.

13. Infants are a scarce commodity. A black market flourishes with healthy infants bringing up to $10,000. Bodenheimer, supra note 3, at 14-16. The arrangement is characterized by a middleman, who for a specified sum of money provides the couple desiring the child with the child of a "donor"—usually an unwed mother. The couple and the mother usually have no contact with each other. All too often the profit motive of this middleman dominates any considerations for the welfare of the baby, the mother, or the adoptive parents. The literature is replete with horror stories surrounding black-market transactions. See, e.g., Grove, Independent Adoptions: The Case for the Grey Market, 13 Vill. L.R. 116, 118-120 (1967). See generally Baby Selling, supra note 2.
band is sterile and the wife wishes to be artificially inseminated.\textsuperscript{14}

It may be argued that the arrangement exploits the woman carrier. Insofar as it is possible that carriers will be drawn from lower income groups,\textsuperscript{15} this claim is superficially appealing. It is equally arguable, however, that an adult woman, in good health, should not be denied the right to weigh for herself the risks and benefits of such an arrangement provided that she has full knowledge of those risks and that her choice is uncoerced.\textsuperscript{16} Part II of the Comment argues that state regulation is adequate to assure these conditions.

Of the variety of civil laws that hamper the implementation \textsuperscript{17} and enforcement of baby contracts, some of the most problematic are those governing proof of paternity. All contract childbirths relying on artificial insemination will fall under the shadow of section 7005(b) of the Uniform Parentage Act which provides that "[T]he donor of semen provided . . . for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."\textsuperscript{18} Although the purpose of this section is clearly to protect anonymous donors from legal responsibility for any children fathered by the use of their semen, the statutory language may make it difficult for the father in the contract situation to prove paternity or assert other parental rights.

Proof of paternity may be further hampered by a complex set of evidentiary presumptions. If the carrier was married and cohabiting with her husband at the time of conception, section 621 of the Evidence Code establishes a conclusive presumption that her issue is a child of the marriage.\textsuperscript{19} This presumption is a substantive rule of law. \textsuperscript{20} Courts have refused to admit blood tests as evidence of non-paternity, so it is unlikely that a contract to establish paternity would be admissible.\textsuperscript{21} If

\begin{itemize}
\item \textsuperscript{14} \textit{CAL. CIV. CODE} § 7005(a) (West Supp. 1977).
\item \textsuperscript{15} \textit{See} \textit{Baby Selling, supra} note 2, at 11.
\item \textsuperscript{16} Nor can a ban on contract childbearing be supported by analogy to victimless crimes like prostitution and gambling. The element of immorality that characterizes such crimes is not present in the bearing of a child. Similarly, the concern for health and safety of the individual and the preservation of social resources exemplified by mandatory motorcycle helmet laws, \textit{see generally} Kaplan, \textit{The Role of the Law in Drug Control}, 1971 DUKE L.J. 1065, 1066, can be met in this case by requiring a health examination prior to the contract. See text following note 44 \textit{supra}.
\item \textsuperscript{17} \textit{E.g.}, \textit{CAL. CIV. CODE} § 224p (West Supp. 1977) (prohibiting advertising or soliciting a child for adoption).
\item \textsuperscript{18} \textit{CAL. CIV. CODE} § 7005(b) (West Supp. 1977).
\item \textsuperscript{19} \textit{CAL. EVID. CODE} § 621 (West Supp. 1977).
\item \textsuperscript{20} \textit{See, e.g.}, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960). "A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such power of the legislature." \textit{Id.} at 619, 354 P.2d at 668, 7 Cal. Rptr. at 140.
\item \textsuperscript{21} \textit{See, e.g.}, Jackson v. Jackson, 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967); Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960); Keaton v. Keaton, 7 Cal. App. 3d 214, 86 Cal. Rptr. 562 (1st Dist. 1970); Note, \textit{California's Tangled Web: Blood Tests and}
the carrier's marriage has recently concluded, or is invalid, section 7004(a) of the Uniform Parentage Act establishes a presumption rebuttable by clear and convincing evidence that her former husband is the natural father of the child. While the contract would presumably provide such evidence, under section 7006 of the same act, the "biological" father may have no standing to bring an action to rebut the presumption unless it was established under section 7004(a)(4).

The Carriage of Children Act: What It Will Mean for the Putative Father in California, 28 Hastings L.J. 191 (1976). In Jackson v. Jackson, 67 Cal.2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967), the California Supreme Court permitted the admission of a blood test to establish that the conception could not have occurred during the four day period the husband and wife cohabited. This took the case out of the conclusive presumption of § 621 and put it under the rebuttable presumption of § 661. Hence, the blood test was not admissible for the purpose of establishing paternity. The court emphasized that the blood test could be used only to establish whether the wife conceived during the period of cohabitation and not to establish paternity. Id. at 247, 430 P.2d at 291, 60 Cal. Rptr. at 651.

22. A man is presumed to be the natural father of a child if he meets the conditions as set forth in § 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

23. Except as provided in § 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

24. Only the child, the natural mother, or a man presumed to be the father by reason of marriage can challenge the existence or nonexis-
The impact of these provisions is not absolute. When the carrier is not married or cohabiting, the contract father may establish his paternity by acknowledgement.\textsuperscript{25} But while an acknowledgement will establish his liability for support obligations,\textsuperscript{26} it does not give him any priorities for custody of the child.\textsuperscript{27}

\section{II}

\textbf{Problems of Contracting to Obtain a Child}

The contract to carry a child can be considered an alternate form of a childbearing or adoption decision. As such, it can be assessed in terms of its unique potential and problems. Analysis of the problems can then determine the scope of state regulation needed to protect the interests of the child, the carrier, the parents, and the state.

tence of a father-child relationship. It is only when the child has no presumed father, or the father-child relationship has been established by receiving the child into his home that the man alleging himself to be the father can bring an action. In In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975), cert. denied sub nom. Porzuczek v. Towner, 412 U.S. 1014 (1975), the California Supreme Court held that to apply the presumption in Evidence Code § 661 (repealed by Law of October 1, 1975, ch. 1244, § 14, 1975 Cal. Stats. 3202) to the alleged biological father when both the natural mother and the presumed father were dead, was "unreasonable, arbitrary and capricious, and a denial of due process," \textit{Id.} at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485. Although it remains unclear whether this holding will extend to cases where the mother and presumed father are alive and claim custody, one court of appeal recently refused to extend the \textit{Lisa R.} rationale in a case where the natural mother retained custody and control of the child. Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (3rd Dist. 1977). For further discussion of the problems arising out of the presumptions under § 7004, see Note, \textit{The Uniform Parentage Act: What It Will Mean for the Putative Father in California}, 28 Hastings L.J. 191 (1976).

25. \textsc{Cal. Civ. Code} § 7004(a)(4) (West Supp. 1977). It may be difficult for the contract father to become a "presumed" father by acknowledgement if the carrier retains control of the child and prevents him from even physically receiving the child into his home. Although the mother's consent is not a necessary prerequisite for the father's acknowledgement, In re Richard M., 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975), "constructive receipt" will not be inferred by public acknowledgement alone, even where the father was unable physically to receive the child. In re Reyna, 55 Cal. App. 3d 297, 126 Cal. Rptr. 138 (5th Dist. 1976). However, § 7006 provides that a man alleging himself to be the father of a child may bring an action to determine the existence of the father and child relationship. In Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (3rd Dist. 1977), the court construed this section as an avenue for the alleged father to become the presumed father:

The resulting judgment or order of court may make provision for any matter in the best interests of the child including support, custody, guardianship and visitation privileges (§ 7010, subd. (d)). Thus the judgment may provide the opportunity for the alleged natural father to qualify as the presumed father under section 7004, subdivision (a)(4).

\textit{Id.} at 198 n.4, 137 Cal. Rptr. at 103 n.4.

26. \textsc{Cal. Civ. Code} § 4700 (a)(West Supp. 1977) provides that the court may order either or both parents of a minor child to pay "any amount necessary for the support, maintenance and education of the child."

27. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. . . . Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child.


The attitude of the state to the private, childbearing decision is deferential. Although not all persons are equally equipped to be parents, only in extreme cases will the state interfere with a couple’s decision to have a child.\(^2\) The state’s reluctance to intervene is founded in part on recognition that the childbearing decision is intensely personal, protected in many of its aspects from state intrusion by the constitutional right of privacy.\(^2\) Equally important, in many childbearing decisions the government’s intervention is presumptively unnecessary, both because the parents genuinely desire to have a child, and because the “blood-tie” between the natural parents and the child tends to insure that the interests of the child will be protected.\(^3\)

In contrast, the state plays a more substantial role in the adoption process. Since there is no “blood-tie” between the adoptive parents and the child, and the adoptive mother has not experienced the physical and psychological effects of pregnancy and childbirth, it cannot be assumed that the adoptive parents will feel the same degree of attachment to and responsibility for the child as would natural parents. The higher risk for the child also implicates the interests of the state: as the parent of last resort, it bears the financial burden resulting from a failed adoption. By intervening, the state protects the interests of all the parties.

In California, the degree of state regulation in the adoption process is determined by whether the adoption is private or performed through a state-licensed agency.\(^3\) Agency adoptions offer numerous safeguards not ordinarily found in private placements.\(^3\) These include

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28. Drastic intervention by the state into the parent-child relationship typically occurs only when the child is being removed from the home because of a court determination of neglect or parental unfitness. **Cal. Welf. & Inst. Code** § 300 (West Supp. 1977). With the exception of the blood tests required as a precondition to legal marriage, **Cal. Civ. Code** § 4300 (West Supp. 1977), and the automatic assignment of a child to his biological parents by birth certificate, **Cal. Health and Safety Code** § 10100 (West Supp. 1977), the government has not attempted to regulate the experience of conception and birth.

29. “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). The right to privacy in the marriage relationship is “older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” Griswold v. Connecticut, 381 U.S. 479, 486 (1965). See also Roe v. Wade, 410 U.S. 113 (1973) (abortion); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Prince v. Massachusetts, 321 U.S. 158 (1944).

30. “Normally, the physical facts of having begotten a child or given birth to it have far-reaching psychological meaning for the parents.” J. Goldstein, A. Freud, & A. Solnit, **Beyond the Best Interest of the Child** 16 (1973).

31. The California adoption law is contained in chapter 2 of the Civil Code. Four types of adoptions are permitted: 1) adoption of an adult by an adult, **Cal. Civ. Code** § 227p (West Supp. 1977); 2) adoption by stepparent of a child in the custody of his spouse, id. § 226.9 (West Supp. 1977); 3) private adoptions; and 4) agency adoptions.

investigation of the maternal and paternal history of the child; a physical, mental, and psychological examination of the child; an evaluation of the health, financial situation, and motivation for adoption of the adoptive parents; and a probationary period during which the integration of the child into the adoptive family can be evaluated.33

In private adoptions the parties are brought together by an intermediary—usually a doctor, lawyer, or friend of the family. Opponents of private adoptions contend that the use of intermediaries produces an excessive emphasis on financial aspects of the transaction and encourages black market activity.34 The absence of an agency decisionmaker may allow the natural parents, who are often under severe financial or social pressure to relinquish the child, to make an ill-considered decision that increases the risk that they will fail to go through with the adoption, or will subsequently harass the adoptive parents.35 Lack of effective preadoption counseling may leave the adoptive parents feeling confused and unprepared.36 Most serious is the possibility that the adoptive home may not be suited to the needs of the child.37 And if the adoption fails, funds or personnel to care for the child are not readily available.38

California addresses these problems with regulations that include a mandatory investigation of the adoptive parents by state officials and a full report to the court.39 The natural parent’s relinquishment of the child must be signed in the presence of a state official, and the adoptive parents must appear before the court.40 In order to prevent abuse by the middleman, all legal fees and remuneration for the mother’s expenses must be reported to the court,41 and criminal penalties are imposed for payment or receipt of money in conjunction with the placement.42 There is substantial evidence that within this statutory framework, the private adoption has become a desirable institution in California.43

35. Id., at 639. See tenBroek, supra note 11, at 292, 343; Grove, supra note 13, at 123.
36. See tenBroek, supra note 11, at 295; Grove, supra note 13, at 123.
37. See H. Clark, Jr., supra note 34, at 639; tenBroek, supra note 11, at 343; Grove, supra note 13, at 123.
38. See Grove, supra note 13, at 123.
40. Id. § 226.1 (West Supp. 1977), and id. § 227 (West Supp. 1977).
41. Id. § 224r (West Supp. 1977).
43. Bodenheimer, supra note 3, at 108.
Insofar as the contract to carry a child involves the transfer of an infant from the natural mother to an adoptive family, it is similar to the private adoption. In two respects, however, the contract appears to be a better risk than the private adoption. First, since one of the adoptive parents is the natural father, the chance for success of the adoption is probably higher. Second, the agreement to carry the child is entered into prior to conception, free from the financial and emotional pressure of an unwanted pregnancy. Thus, a decision to contract for a child is likely to be better considered than a corresponding private adoption decision.

Several concerns arise in the case of baby contracts that are not present to the same degree in a private adoption. Most can, however, be met by regulation. First, because the pregnancy has not yet occurred, there is necessarily some uncertainty about the effect of pregnancy and childbirth on the health of the prospective carrier and of the child. The obvious goals are to assure a healthy mother and child and to guard against exploitation of the carrier. Although the contract parents have a strong incentive to seek out a healthy carrier and to see that she receives adequate medical treatment, the couple may not be fully aware of the need for full investigation or for insurance planning. Given the risk to mother and child from inadequate health provisions, this area would appear to be too sensitive to leave to the workings of the market.

Second, while the possibility that the adoptive parents will reject the child or that the natural mother will recant is a risk in all private adoptions, in the contract setting, the risk of breach is accentuated by the length of time between the agreement and the date of the placement and by the uncertainties of pregnancy. Breach by the contract parents seems to pose a greater threat to the welfare of the child and the state than does a breach by the carrier. Such a breach could leave the child unwanted by either parent. But the degree of risk involved, even in the absence of state regulation, may not actually be great. The circumstances of the baby contract make a breach by the parents unlikely. The couple's willingness to conduct the search for a suitable parent and to negotiate the contract suggests a special eagerness to have a child. Indeed, the decision to seek a contract carrier frequently comes only after a long series of attempts to obtain an infant by more conventional means. And, of course, the infant is the natural child of the husband. In any event, the impact of a breach is uncertain, since it may often be

44. The contract arrangement has serious consequences for the spouse of the natural father. Her willing participation must be assured in order for the family relationship to succeed. This concern, however, can be addressed by conditioning official approval of the contract upon obtaining her written consent to the arrangement. This method has been adopted under § 7005 of the Uniform Parentage Act, which provides for artificial insemination of the wife. CAL. CIV. CODE § 7005a (West Supp. 1977).
possible to place the infant for adoption. Moreover, if breach does oc-
cur, and the infant is otherwise unadoptable, the father will remain lia-
ble for support obligations.\(^4\)

Breach by the mother does not pose as severe a threat to the inter-
ests of the child and state. In the event of a breach during pregnancy by
way of an abortion, neither interest is threatened. A remedy in damages
should adequately protect the contract parents. If the mother breaches
after birth by refusing to surrender the child, the state at least has an
assurance that both sets of parents want the child in their own home.
Here, however, an appropriate contract remedy is more difficult to
fashion. Damages will not be satisfactory, since as a general rule con-
tract damages are not awarded for emotional harm,\(^4\) and economic
injury will be difficult to show. Specific performance also meets with
serious objections. Equity courts have shown a reluctance to intervene
in domestic relationships.\(^4\) More important, specific performance may
conflict with the policy that custody disputes between natural parents
should be resolved in the best interests of the child.\(^4\) The child was not
represented in the contracting process, and its interests may differ sig-
nificantly from those of the parties.

Use of the best interests of the child standard, however, will often
be compatible with specific enforcement of the contract. This becomes
clear if the process of determining custody is analyzed in terms of its
dual functions: child protection and dispute resolution.\(^4\) In performing
the first of these functions, the court will necessarily and appropriately
place the physical welfare of the child first. Thus, when an award to
either natural parent would pose a serious threat to the child’s health,
that fact should be determinative.\(^5\) In the absence of such a threat,
however, the determination of which parent will best serve the interests

\(^4\) If the child has no presumed father under § 7004 of the Uniform Parentage Act, the
carrier can bring an action to determine the existence of the father-child relationship under
§ 7006(c). If the child has a presumed father, the carrier can bring an action to declare the nonex-
istence of the father-child relationship and in the same action determine the paternity of the con-
tract father. Once the contract father’s paternity is established, the court can order him to pay for
the support, maintenance, and education of the child. CAL. CIV. CODE § 4700 (West Supp. 1977).

\(^4\) E.g., Westwater v. Grace Church, 140 Cal. 339, 73 P.1055 (1903); O’Neil v. Spillane, 45
Cal. App. 3d 147, 119 Cal. Rptr. 245 (1st Dist. 1975).

\(^4\) See, e.g., Simpson, Fifty Years of American Equity, 50 Harv. L. Rev. 171, 221-22
(1936). But see Dandini v. Dandini, 86 Cal. App. 2d 748, 195 P.2d 871 (1st Dist. 1948), criticized in
Comment, 1 Stan. L. Rev. 358 (1949).

\(^4\) See, e.g., CAL. CIV. CODE § 4600 (West Supp. 1977). In In re B.G., 11 Cal. 3d 679, 523
P.2d 244, 114 Cal. Rptr. 444 (1974), the supreme court held that the best interest of the child
standard established in § 4600 should be applied in all custody proceedings. This broad judgment
that the best interest standard should prevail suggests a strong public policy against unthinking
enforcement of the contract.

\(^4\) Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,
39 Law & Contemp. Prob. no. 3, 226, 229 (1976). Much of the argument that follows is indebted
to Professor Mnookin’s analysis.

\(^5\) Id. at 282.
of the child is speculative. In most cases the information necessary to predict the impact of alternative custody arrangements on the welfare of the child will be unavailable. Even if such prediction were possible, determining which of two futures is "actually" the best will often require a choice between values about which there is no consensus. In the baby contract dispute the advantages of alternate arrangements for the child may be especially difficult to predict, since immediately after birth the strong psychological bond between parent and child may not have developed.

On the level of dispute resolution, the contract case appears equally balanced, since both disputants are natural parents, ready and able to take care of the child. Current theories of psychological prediction provide no basis for a principled choice between the parents. Since the central concerns of custody law would be equally well served by an award to either parent, reference to a non-child-centered criterion for decision is appropriate. Fairness suggests that the existence of the contract, freely entered into by both parties, should shift the custody decision in favor of the natural father rather than the carrier.

III

A PROPOSAL FOR LEGALIZATION

The preceding analysis suggests that contracts to bear a child, if properly regulated, pose no serious threat to social interests and should be permitted. Appropriate regulation should aim, first, to assure that essential terms are included in the contract, and second, to assure that the contract is entered into advisedly and without duress.

As a condition of legality and enforceability, all contracts should be required to provide for adequate life and health insurance. A copy of the contract, a doctor's report on the physical condition of the carrier, and the results of a blood test, should then be presented for review to an official of the State Department of Health. This official should witness the signing of the contract and file it with the court.

Once the agreement is signed, the consent of the mother to the ultimate place-

51. Id. at 257-60.
52. Id. at 260-61.
53. Cf. id. at 282 & n.231 ("psychological" parent should be preferred over all strangers, including natural parents).
54. Id. at 282-83.
55. The legislature may consider requiring the adoptive parents to present an affidavit of financial responsibility. This would insure that the infant would be placed in a home financially able to provide for it, or in the case of breach, that the contract parents would be able to provide support payment. The benefits of this requirement are, however, arguably outweighed by the political problems it raises. A statutorily specified income floor would not be responsive to particular situations, but discretion in the reviewing official would easily lend itself to abuse. And either approach would probably discriminate against low-income couples.
ment of the child according to the contract terms could not be withdrawn except by court approval or by mutual consent.57

After the baby's birth, the court could order a finding of the parent-child relationship between the contract couple and the child. A copy of the order would be sent to the State Registrar, who, upon application of the contracting couple or the carrier, would issue a new birth certificate.58

The proposed system would not require extensive statutory modifications. If the contract was provided for in an independent enabling section, that section could also provide that the contract conforming to the statutory requirements would be valid and enforceable, notwithstanding conflicting provisions of law. In order to facilitate proof of parentage, the conclusive presumption of section 621 of the Evidence Code should be modified to except the baby contract situation, and section 7005 of the Parentage Act should be modified to exclude situations where the donor provides semen specifically to father the child.

The proposed modifications could also be implemented with minimum expense by using the existing procedures and personnel of the State Department of Health to supervise the contracting process.

CONCLUSION

Current law forbids the use of contractual arrangements to obtain a carrier for the natural child of a married man. This Comment has attempted to demonstrate that the policies that justify criminal law regulation of trading in children are inapplicable in the case of such contracts. The problems of such arrangements do not differ significantly from those of private adoptions and seem likely to respond to judicious regulation of the terms of the agreement and supervision of the contracting process. The minor modifications of existing law required to make such contracts possible would provide a small, but significant alternative to the traditional means of obtaining a child for those couples who truly desire one.

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57. Cf. id. § 224m (West Supp. 1977) (relinquishment to agencies rescinded only by mutual consent).

58. CAL. HEALTH & SAFETY CODE § 10450 (West Supp. 1977). The manner for establishing a new birth certificate is set forth at id. §§ 10430-10439.5. Under current adoption law the parent-child relationship arises after the court enters a decree of adoption. CAL. CIV. CODE § 227 (West Supp. 1977). In the contract situation the corresponding analogy would be the birth of the child.

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