

Parenthood by Contract

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Intended parents often turn to contract to formalize their ties to their intended children. Would-be parents draw up co-parenting agreements, surrogacy agreements, and agreements terminating the parental status of gamete donors. Yet courts are typically reluctant to permit parties to determine parental status through contracts other than the marriage contract. Even courts that do consider parenthood contracts in assessing parental status will often insist that they are not enforcing the contract at issue, but rather, looking to the agreement to determine an element of parentage such as parental intent (in the context of surrogacy or other assisted reproductive technology) or consent to share parental status (in the context of co-parenting agreements). And in the minority of cases to permit outright enforcement of parenthood contracts, enforcement is often conditioned on a judicial finding that the contractual arrangement is consistent with the best interests of the affected child.

To better understand why courts resist parenthood contracts, even in the face of the private turn to such contracts, this Article traces the early history of such resistance. It examines a similar dynamic between legal practice and judicial response in nineteenth-century Anglo-American case law, when courts were first confronted with attempted contractual transfers of parental rights in the form of both adoption agreements between parents and third parties and separation agreements allocating custody from husband to wife. In the nineteenth century, as today, courts displayed considerable resistance to parenthood by contract. Parents repeatedly turned to contract to formalize their ties to their children, only to learn, upon attempting to enforce such agreements, that they had no legal force. The result, then as now, was to produce a conflicted and largely inconsistent body of law under which intended parents had no certainty about whether their contractual rights would be enforced.

The Article finds that the early judicial resistance to parenthood by contract was driven by two, often overlapping concerns: a commodification concern and a family-regulation concern. The commodification concern was that enforcing parenthood contracts treated children as chattel that parents could buy and sell, which, in turn, destabilized parental status, overlooked children's welfare, and improperly suggested that money rather than love is the foundation of a healthy parent-child tie. The family-regulation concern was that enforcement of contracts transferring parental rights would undermine marriage by making it easier for mothers to raise children outside of the marital home, and would undermine the patriarchal hierarchy within marriage by making marital exit more viable for women. Intertwined with both the commodification concern and the family-regulation concern was a judicial reluctance to cede the traditional judicial power to police

how and by whom children were raised, especially when the traditional family had broken down.

The Article explores the extent to which the commodification and family-regulation concerns still animate the continued resistance to parenthood by contract today, and brings this inquiry to bear on whether parenthood contracts should be enforced. It argues that to the extent that the commodification concern is compelling, this concern can be addressed and mitigated. The family-regulation concern, by contrast - the desire of the state to promote some family forms over others, and, in particular, to promote marital over other forms of relationships - is not a persuasive reason for refusing to enforce parenthood contracts, and often produces results at odds with child welfare. By deeming only state-sanctioned families worthy of recognition and protection, we create a two-tier system in which non-sanctioned families are denied the relationship security and freedom from state intervention that state-sanctioned families enjoy, to the detriment of children and parents alike.

The Article concludes by questioning the continued reluctance to countenance parenthood by contract. In an age of serial divorce, unmarried parentage, and assisted reproductive technology, contract should be permitted to work alongside marriage to determine parental status. Rather than force parent-child relationships into a marital paradigm that is increasingly out of touch with current realities, we should permit all potential parents to use contract to create a status that would confer the same degree of certainty, stability, and autonomy that we grant to traditional families consisting of two married parents and their biological children.