PARENTHOOD BY CONTRACT

Sarah Abramowicz[1]

[*Dear Readers - This draft is in its early stages, and incomplete. I am grateful for any thoughts you might have on the piece, and look forward to your feedback on how to shape the project going forward.*]

INTRODUCTION

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 or limiting 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. Despite recent trends toward increased acceptance of private

[1] Associate Professor of Law, Wayne State University Law School.

ordering in family life, this acceptance often stops short when it comes to private ordering of parent-child relationships.

This Article examines the continued reluctance to countenance parenthood by contract. The Article begins, in Part I, by surveying current scholarly and judicial approaches to parenthood contracts in the areas of co-parenting agreements, gamete donation agreements, and surrogacy agreements. It shows that even courts that do consider parenthood contracts in assessing parental status are often resistant to enforcing such contracts outright. Courts that determine parental status with reference to a parenthood contract 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 proceeds, in Part II, to trace 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 often 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.

In Part III, the Article considers 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 or adopted children.

I. CURRENT ATTITUDES TOWARD PARENTHOOD BY CONTRACT

A. Scholarly Attitudes Toward Parenthood Contracts

Over the past several decades, a number of scholars have embraced the contractualization of family life. The private ordering of marriage and of other adult relationships is heralded as promoting pluralism and respect for a diversity of family forms. Some voice concerns about protecting vulnerable adults from unequal bargaining power or cognitive bias, such as the optimism bias often present at the outset of a long-term relationship. But many advocate extending private ordering into the family nonetheless, with protections as necessary to address such concerns. Contract, many contend, promotes autonomy in family form, family dynamics, and division of labor within the family. Premarital or postmarital contracts enable spouses to determine the economic consequences of their marital union, and to renegotiate those consequences as needed. For those who cannot marry or prefer not to marry, contract provides an alternative mechanism for formalizing and protecting adult relationships that do not conform to the state-imposed ideal of marriage.

A number of scholars have expressed concern at the effect of private ordering on the more vulnerable partner in an adult relationship.[2] And many note the inequality of bargaining power and cognitive bias that often render such agreements less than truly

[2] *See, e.g.*, Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994) (arguing that enforcing such agreements exacerbates gender inequality); Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 518 (1998) ("[W]e should question how choice is produced within heterosexual unions, where power relationships are complicated and often unequal."); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1549 ("[L]egal rules that grant unfettered discretion to private individuals to structure the process of marital dissolution . . . may end up empowering economically stronger family members at the cost of economically weaker ones.").

voluntary and informed.[3] But a significant scholarly contingent advocates extending private ordering into the family nonetheless, with protections as necessary to address such concerns.[4]

Even scholars otherwise in favor of enforcing family contracts, however, often argue that parent-child relationships should prove the exception to any contractualized family law regime.[5] Thus, for instance, the scholarly consensus is largely opposed to enforcing spousal contracts concerning children's custody. Most accept that courts should retain the discretion to determine children's custody in the event of disputes between two legal parents regardless of any parental contracts allocating custody. Many argue that enforcement of custody contracts risks commodifying children by enabling trade-offs between custody and property or spousal support. Another argument is that parents may agree to custody contracts that are not in their children's interests. This is a concern particularly with respect to children not yet born. As Katharine Silbaugh put it, "there is little reason to privilege the parties' understanding of what is best for not-yet-living children" over the ex-post determination of "even a fallible court."[6] This is the prevailing view despite the widespread criticism of the best interests of the child standard that courts employ to determine children's custody, which many have argued leads to unpredictable outcomes and is often influenced by judicial bias.[7]

There is good reason for excepting children from a contractual approach to family law—as Henry Maine pointed out in 1861 when he famously observed a "movement from Status to Contract," children pose a necessary exception to the trend toward freedom of contract, because they lack the rational capacity that is "the first essential of an engagement by Contract."[8] When freedom of contract first became dominant in nineteenth-century Anglo-American law, not just children, but family law more generally, were excepted from contractual freedom, a trend that Janet Halley has termed

---

[3] *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUMAN. BEHAV. 439, 445 (1993) (finding that even law students well-informed about the high rate of divorce tend to believe that their own marriage will endure); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract Law*, 47 STAN. L. REV. 211, 254-58 (1995) (discussing the difficulty for spouses-to-be of predicting the various events that might occur over the course of a long-term marriage).

[4] *See, e.g.*, Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 328-34 (1982) (arguing that extension of the contractual ordering of marriage will best facilitate "private values and choices," despite the risk that some of these choices will be the product of a disparity in bargaining power); Stake at 415-29 (recommending that premarital agreements be both enforceable and mandatory); Sean Williams at 827 (advocating enforcement of postmarital agreements).

[5] *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1554-56 (proposing greater limits on privatization in families with children); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 830 (advocating greater enforcement of postnuptial contracts, with the exception of provisions related to child custody or support); *see also* Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (arguing that because custody contracts should not be enforced, but custody is central to the marital economy, no marital contracts should be enforced).

[6] Silbaugh at 140.

[7] *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975).

[8] HENRY MAINE, ANCIENT LAW 162 (1861)

"family law exceptionalism."[9] While family law exceptionalism has declined with the recent embrace of family contracts, it continues with respect to contracts determining parent-child ties. And this does make some sense. Contracts linking parents to children differ from those between spouses and other adults in that children are deeply affected by such contracts, but—by definition as long as they are subject to parental care—cannot be parties to them.

But the inability of children to consent to parenthood contracts cannot fully explain the resistance to enforcing such contracts. Children have never been able to choose their parents. Nor do children have the opportunity to consent to (or reject) the contract that has long defined parent-child ties—the marriage contract, which has traditionally conferred presumptive parental status on the husband of a woman who bears a child.

And, indeed, in recognition of this, there is somewhat greater acceptance of private ordering of parent-child ties with respect to the parentage of children born through assisted reproductive technology. As Marjorie Schultz argued in her groundbreaking 1990 article on intent-based parenthood, a default rule making bargained-for intent determinative of parental status for such children has a number of advantages. It reduces uncertainty for prospective parents; gives parental status to those who have carefully planned to raise children (and thus will presumptively be good parents); and provides a gender-neutral basis for determining parenthood.[10] Today, an increasing number of scholars agree. Both Nancy Polikoff[11] and Courtney Joslin[12] advocate looking to parental consent to determine parental status in the context of children born through assisted reproductive technology. And while it is important to distinguish the sale of parental status from the contractualization of parental status—not all parenthood contracts entail the exchange of money—those who defend a market in parenthood, such as Martha Ertman, support enforcement of private agreements allocating parental status.[13]

Even in the context of assisted reproductive technology, however, there is considerable scholarly opposition to contractualizing parenthood. This opposition is strongest with respect to contracts for surrogacy, especially compensated surrogacy, both traditional (where the carrier provides the ovum) and gestational (where she does not). During the early years of surrogacy, Margaret Radin argued that the practice of paying women to bear children for others harms personhood by treating both children and

---

[9] Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 753 (2010).
[10] Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood*: *An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.
[11] *See* Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009); *see also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 38-61 (2004) (arguing for contractual approach to parental status).
[12] *See* Courtney G. Joslin, *Protecting Children (?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222 (2010).
[13] Martha M. Ertman, *What's Wrong With A Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 22-26 (2003).

gestational labor as mere commodities.[14] Another objection is that surrogacy exploits the women who serve as surrogates, and that their consent to surrogacy agreements cannot be considered truly free, since it is given under conditions of scarcity.[15] And there is an extensive scholarly debate about whether women can rationally consent ex ante to terminate rights to a child who has not yet been born. Some argue that women cannot rationally consent to such a contract, especially given the hormonal and related emotional changes that accompany gestation and birth. Others counter that it is paternalistic to assume that women cannot freely and rationally consent to such contracts, and reinforces the stereotypical notion that women are less capable than men of exercising rational choice.

There is considerably more support for parenthood by contract outside the fraught realm of surrogacy. Some scholars more generally resist looking to contract, or parental intent, to define parental status, on the basis that defining parentage with reference to intent is at odds with children's welfare.[16] But many advocate enforcing co-parenting agreements, especially with respect to children born of assisted reproductive technology. And despite calls for greater regulation of gamete donation, there is relatively little objection to permitting the sale of gametes and enforcing related contracts as necessary.

However, even those scholars who would enforce parentage contracts tend to refrain from advocating parenthood by contract. There are strong arguments against making contract the sole determinant of parentage. As Courtney Joslin observes in her discussion of children born through assisted reproductive technology, not all intended parents have the resources to execute a formal legal agreement. Thus Joslin recommends looking more broadly to consent to parent, such that written contracts could serve as evidence of such intent, but are not required to establish it.

This Article agrees that the absence of contract should not be determinative—intended parents should not necessarily be deprived of their rights on the basis that they failed to execute a contract specifying those rights. But, as the next Part will demonstrate, would-be parents have been executing parenthood contracts for centuries. Contract has long served to formalize and protect parent-child ties when other mechanisms were either not available or less desirable. In the nineteenth century, parents routinely turned to contract to formalize and protect adoptive relationships, as well as to transfer custodial rights from a father to his separated wife. Today, parents continue to use contract to protect and formalize their parental status, and to lay out parental rights and obligations. Co-parents intending to create a child through assisted reproductive technology; intended parents, married or not, coupled or single, who create a child with the help of a surrogate; and those who employ a known gamete donor are among those who, again and again, execute formal agreements, or make oral promises, setting forth the parental status of the parties involved. It thus merits addressing: should parenthood contracts be enforced?

In her seminal article on the privatization of the family, Jana Singer wrote that "privatization may be particularly valuable as a sort of transition strategy—a way of moving from an unjust and outdated system of public ordering . . . . to a more just form

[14] Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987).
[15] Radin at 1909-11, 1917.
[16] *See* Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 HARV. L. REV. 835 (2000).

of public ordering."[17] One way to approach parenthood contracts, then, might be to consider them a useful transition strategy at time when the law has not yet adapted to changing social practices. However, the history of parenthood contracts indicates that the need for a "transition strategy" is a continuing one. Courts repeatedly face contracts allocating parenthood in novel ways, and struggle to determine how to respond to this legal practice.

Moreover, it is also worth considering whether parenthood by contract is worth embracing, not just as a transition strategy, but as a method of determining parental status even when the law is relatively stable. Currently, contract works to fill the gap where marriage and statute together do not suffice to define parental status. However, marriage cannot always suffice to determine parental status—it does nothing to protect the parental status or single or multiple (more than three) parents, for instance, or to clarify who is the parent of a child born to a surrogate. And, as we will see, even where a statute addresses the matter at hand, in many instances would-be parents have used contract to alter the default statutory regime. One possibility, then, is that contract will always be a necessary gap-filler, one that parents will continue to turn to even when the law stabilizes.

Another possibility is that contract is a desirable mechanism for determining parental status—one that should be not just tolerated, but encouraged and embraced. This raises the related question of what it would mean, precisely, to enforce parenthood contracts. As the next section will demonstrate, in many situations, parenthood contracts are often "enforced," if at all, only insofar as they are consistent with a judicial assessment of children's best interests. But as long as parental status itself—carrying with it the rights that we extend, for instance, to divorced parents, who are rarely denied at least visitation of their children—is contingent in a judicial assessment of children's interests, families that employ such contracts will not enjoy the same rights and recognition that we extend to traditional intact families. As Nancy Polikoff has argued, under this two-tiered approach, which she terms "the new illegitimacy," children suffer as well.[18] If we are to afford families created through contract some semblance of the dignity, stability, and freedom from state intervention that we afford traditional families consisting of two married parents and their biological offspring, then parenthood contracts need to have greater binding force than they currently do, on the contracting parties and judges alike.

B. Judicial Attitudes Toward Parenthood Contracts

Over the past several decades, there has been greater judicial acceptance of private ordering of the family. With the advent of no-fault divorce, marital exit is now increasingly a matter of private choice, rather than dictated by the state. Prenuptial agreements are enforced with little scrutiny in half of the states and with moderate scrutiny in most others, enabling spouses to dictate the economic consequences of their

[17] Singer at 1565-66. Singer is especially opposed to contracts affecting children, and proposes the possibility of a two-tier regime of private ordering, such that families with children would face greater restrictions on private ordering. Id. at 1553.

[18] Nancy Polikoff, *The New "Illegitimacy",* 20 AM. U.J. GENDER SOC. POL'Y & L. 721, 723 (2012) ("[C]hildren should not suffer because their parents do not marry.").

marital union. Most jurisdictions enforce cohabitation agreements that provide protection to those who cannot or prefer not to marry.

More recently, some courts have embraced private ordering even when it comes to parent-child ties. But there continues to be significant resistance to parenthood contracts, that is, contracts that create, terminate, or limit parental rights and obligations. This Section will discuss the continued judicial resistance to parenthood by contract in three contexts: co-parenting agreements, surrogacy agreements, and gamete donation agreements.

A number of courts still reject parenthood contracts altogether. And even where such contracts are recognized and made the basis of an award of parental rights, courts may at the same time express significant resistance to the prospect of parenthood by contract. Thus, in both the surrogacy context and certain tests of de facto parentage, a court may take a parenthood contract into account as a relevant factor in awarding parental rights, while at the same time refusing to enforce the contract directly. Or, in the case of co-parenting agreements, a court may enforce a parenthood contract but only partially, for instance by awarding custody rights but not parental status. And even where parenthood contracts such as co-parenting agreements are fully enforced, courts often make enforcement contingent on a judicial finding that enforcement is in the best interests of the affected child.

1. Co-Parenting Agreements

In recent decades, a new body of case law has arisen regarding the enforceability of co-parenting agreements. Courts had been asked for over a century to enforce private agreements by which parents transferred rights over their children to third parties, with most refusing to do so, and a minority finding the agreements enforceable if in a child's interests.[19] While some jurisdictions have applied this earlier body of case law to co-parenting agreements,[20] the two types of agreements differ in important respects. The earlier agreements, which I will call adoption agreements, purported to transfer rights altogether from the parent to a third party, such as a grandparent or an adoptive parent. Co-parenting agreements, by contrast, do not purport to terminate the rights of the original legal parent. Their goal in most instances is instead to share parental rights between the legal parent and a second parent, thus creating a parent-child relationship analogous to that of a traditional nuclear family.

Much of recent case law on co-parenting agreements involves agreements between same-sex couples.[21] In many of these cases, the couple agrees to jointly share

[19] See *infra* Part II.A.

[20] *See, e.g*., A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. Ap. 1992) (citing cases upholding transfer of custody to third parties as basis for finding co-parenting agreements not per se unenforceable); In re Bonfield, 780 N.E.2d 241 (Ohio 2002) (citing cases upholding transfer of custody to third parties for proposition that co-parenting agreements are enforceable if in a child's best interests).

[21] *See, e.g.,* Frazier v. Goudschaal, 296 Kan. 730 (2013); In re T.P.S. and K.M.S., 2012 Il. App. 5th 120176; E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); Mason v. Dwinell, 660 S.E.2d 58 (N.C. Ct. App. 2008); In re Bonfield, 780 N.E.2d 241 (Ohio 2002).

rights and responsibilities toward a child that one of the partners intends to conceive, or already has conceived, through assisted reproductive technology. Co-parenting agreements are also entered into with increasing frequency by step-parents.[22] In both situations, the goal of the agreement is to extend parental rights and obligations to a functional or intended parent who might otherwise have no legal status as a child's parent. These co-parenting agreements, unlike third-party custody agreements, create parental status for a party without terminating the custodial rights of an existing parent.

The case law involves both oral agreements to co-parent and co-parenting agreements that have been put in writing, often formally drafted by legal counsel.[23] A co-parenting agreement may be executed before or after the birth of a child—often parents execute an agreement both before and after the child's birth[24]—and typically provides that both parents will share rights and responsibilities toward the child.[25] In a number of instances, the co-parenting agreements that have surfaced in the case law have features that resemble premarital custody agreements. Such agreements are perhaps best described as a hybrid of an agreement to parent a child together during the parents' relationship and an agreement that both parents will continue to have legal rights to the child in the event that the parents separate.[26] While some co-parenting agreements of this nature merely indicate that both intended parents will have continued legal ties to the child in the event of separation, others include provisions that specify the custody, visitation, and support arrangements that will apply should separation occur.[27]

A related category of co-parenting agreements consists of those that resemble custody agreements between divorcing or separating couples. These agreements are reached between co-parents at the time their relationship dissolves, or during a conflict that arises post dissolution.[28] Some such agreements may be the product of a consensus on the part of the co-parents that they should both have continued ties to a child going forward, and thus constitute an ex ante attempt of the legal parent to self-bind, and

---

[22] *See, e.g.*, In re Marriage of Garrity, 226 Cal. Rptr. 485 (Cal. Ct. App. 1986) (refusing to enforce premarital agreement providing that each party would act as parent to the other party's children); In re Marriage of Engelkens, 821 N.E.2d 790, 798 (Ill. App. 2004) (refusing to enforce parental agreement to share custody with step-parent).

[23] *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58, 60-61 (N.C. App. 2008) (involving "Parenting Agreement" prepared by an attorney when child was three years old, and providing, *inter alia*, that both parties had "jointly decided to conceive and bear a child, based upon their commitment to each other and their commitment to jointly parent a child," as well as that "[e]ach party acknowledges and agrees that all major decisions regarding their child, including, but not limited to, residence, support, education, religious upbringing and medical care shall be made jointly by the parties and that their child shall be involved in the decision-making to the extent he is able, by maturity, to do so").

[24] *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (involving co-parenting agreements executed both before and after child's birth).

[25]

[26] *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 889 (Mass. 1999) (expressing both intent to co-parent and intent for non-biological parent to retain her parental status should the parties separate).

[27] *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58, 61 (N.C. App. 2008) (noting that "Parenting Agreement" executed when child was three years old, and when co-parents' relationship was intact, "set forth provisions relating to . . . custody, visitation, and financial support should the women's relationship terminate").

[28] *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (involving right of de facto parent to enforce visitation agreement arrived at by the parties during post-dissolution litigation).

thereby to protect the expectations (and thus perhaps to encourage continued investment by) her co-parent. In other cases, the legal parent may have agreed to a custody arrangement in the face of a threat to litigate, such that the agreement may evidence not a collaborative decision about the child's interests going forward so much as a decision to avoid the costs and risks of litigation.

The states vary widely in their response to co-parenting agreements. Only a few jurisdictions have published case law declaring that courts will directly enforce such agreements.[29] One such jurisdiction is Ohio. When faced with claims to enforce co-parenting agreements, Ohio courts have applied the state's rule regarding parental transfers of custody to third parties, under which "[p]arents may . . . waive their right to custody of a child and are bound by an agreement to do so."[30] Under this approach, Ohio has found agreements to share custody with a same-sex co-parent enforceable as long as the agreed-to arrangement is in the child's best interests.[31]

Ohio places significant limits, however, on the enforceability of co-parenting agreements. It distinguishes between parentage and custody, holding that agreements can reallocate custody, but cannot create parental status.[32] Moreover, the cases recognizing such agreements have tended to involve parents who are not in conflict, as was the situation in *In re Bonfield*, where the Ohio Supreme Court affirmed the validity of a co-parenting agreement in the context of an intact co-parenting relationship in which the parents wanted judicial affirmation of their shared custodial arrangement. In a subsequent case where the co-parents were in conflict, the Ohio Supreme Court limited the practical significance of same-sex co-parenting agreements by finding that any agreements by the legal parent to share custody with her co-parent had been revoked, and finding it relevant in this assessment that the legal mother had permitted the donor father to play a role in the child's life.[33]

In just the past few years, courts in both Kansas and Illinois have joined Ohio and New Mexico in enforcing co-parenting agreements.[34] Cases in both states involved female couples who agreed to bring children into the world through assisted reproductive technology, and to raise them together, sharing parental rights and obligations. In the Kansas case, the mothers executed a formal pre-birth parenting agreement for each child, whereas the Illinois case involved an oral agreement to share parental rights. While

---

[29] *See* Frazier v. Goudschaal, 296 Kan. 730 (2013) (finding co-parenting agreement enforceable if in children's best interests); In re T.P.S. and K.M.S., 2012 Il. App. 5th 120176 (finding that enforcement of a co-parenting agreement would not violate public policy); In re Bonfield, 97 Ohio St.3d 387 (2002); A.C. v. C.B., 829 P.2d 660 (N.M. App. 1992).

[30] *In re Bonfield*, 97 Ohio St.3d at 395 (citing Masitto v. Masitto, 22 Ohio St.3d 63, 65 (1986) (concerning transfer of custody to grandparent)).

[31] *See id*. at 395 (remanding to trial court for determination of whether enforcement of co-parenting agreement between same-sex parents was in children's best interests). The *Bonfield* court, however, limited its recognition of the co-parenting agreement to enforcement of its custody provisions, and refused to deem the co-parent the full legal "parent" of the four children she had raised with her partner since birth. *See id*.

[32] *See id*.

[33] *See* In re Mullen, 953 N.E.2d 302 (Ohio 2011).

[34] *See* Frazier v. Goudschaal, 296 Kan. 730 (2013) (finding co-parenting agreement enforceable if in children's best interests); In re T.P.S. and K.M.S., 2012 Il. App. 5th 120176 (finding that enforcement of a co-parenting agreement would not violate public policy).

finding that enforcement of the agreements would not violate public policy, the courts in both states were careful to rest enforcement on a finding that the particular agreement in question would promote the child's welfare. The child welfare requirement plays a significant policing role in these cases, allowing courts to affirm those agreements that create a family structure resembling the traditional nuclear family. For instance, the Kansas court enforced the agreement in part on the basis that it would be preferable for a child to have two parents than to "leav[e] them as the fatherless children of an artificially inseminated mother,"[35] and found that "[d]enying the children an opportunity to have two parents, the same as children of a traditional marriage, impinges upon the children's constitutional rights."[36] It also noted, approvingly, that the second mother in the case would not displace a biological father[37]—thus implicitly suggesting that a co-parenting agreement might not be enforced where it would displace a more traditional alternative.

In most states to take co-parenting agreements into account in allocating parental rights, the courts do not enforce the agreements, but instead consider them as a factor relevant to assessing parental rights under a theory of de facto parentage. Under the de facto parentage test set forth by the Wisconsin Supreme Court in *Holtzman v. Knott* and adopted by a number of states, a co-parenting agreement is some evidence of consent to a functional parenting relationship, which, if established, in turn permits a court to award the functional parent visitation with a child, as long as the court finds visitation to be in the child's best interests.[38] Other states have subsequently extended full parental status on the basis of de facto parentage.[39]

Under the de facto parentage approach, a co-parenting agreement alone does not suffice to create parental status in the absence of functional parenting. The result is that intended parents cannot protect their expectations against the possibility that their relationship will dissolve before both parents have had the chance to develop a functional

---

[35] Frazier, 296 Kan. at [].
[36] Frazier, 296 Kan. at [].
[37] Frazier, 296 Kan. at [] ("There is not a biological father to displace.").
[38] *See* Holtzman v. Knott, 193 Wis.2d 649, 694-95 (1995) (providing that functional parent can claim right to visitation where (1) biological or adoptive parent consented to petitioner's formation of a parent-like relationship with child; (2) petitioner and child lived together in same household; (3) petitioner assumed obligations of parenthood, including contribution towards child's support; and (4) petitioner has been in a parental role for a sufficient length of time to have develop a parental bond with the child); *see also* Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999) (permitting court to award visitation to de facto co-parent); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (upholding award of visitation to de facto parent under best interests test, and finding it proper for trial court to consider co-parenting agreement as evidence of intent to co-parent, absence of financial compensation for parental relationship, and biological parent's ex ante assessment of child's interests, while noting that no co-parenting agreement is enforceable with respect to children's interests); *cf.* Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (holding that, under state paternity statute, nonbiological same-sex co-parent had standing, on basis of de facto relationship with child, to enforce visitation agreement).
[39] *See, e.g.*, In re Parentage of L.B., 155 Wash.2d 679, 688 (2005); In re E.L.M.C., 100 P.3d 546, 562 (Colo. Ct. App. 2004); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); *see also* Mason v. Dwinnell, 660 S.E.2d 58 (Ct. App. N.C. 2008) (upholding shared custody award to same-sex co-parent under third-party visitation statute, where the co-parent had acted as a functional parent and the birth mother had waived her constitutional rights to sole custody by executing co-parenting agreement).

relationship with the child.[40] For instance, where the non-legal parent decides to walk away from her intended child shortly after the child is born, she cannot be held to her agreement to help support that child, even if the child was conceived with the expectation of that support.[41] Nonetheless, the de facto parentage rules make a co-parenting agreement a significant factor in the determination of parental rights.

Other rules that are often at play in decisions involving co-parenting agreements are third-party visitation statutes or paternity statutes that take into account de facto relationships between children and functional parents.[42] Paternity statutes have long provided that a man can establish a relationship to a child by holding himself out as the child's father, a rule that a number of states have extended to mothers in same-sex partnerships. In *Rubano v. Dicenzo*, the Supreme Court of Rhode Island interpreted the state's paternity statute to permit a woman who had formed a de facto parental relationship to her partner's child, by agreeing to create a child together through artificial insemination and then raising the child together for the first four years of the child's life, to petition to enforce the visitation agreement she had reached with the biological mother

[40] Under the ALI provision on de facto parentage—which extend the rule of *Holtzman* beyond visitation, deeming de facto parents the legal equivalent of any parent—the agreement to co-parent is relevant in determining de facto parental status, but is neither sufficient nor necessary to establish such status. A de facto parent under the ALI must point to either an agreement to co-parent or a "complete failure or inability" of the legal parent to care for the child; must have taken on either the majority of caretaking functions, or the same amount as the biological or adoptive parent, for a period of at least two years; and must convince a court that establishing de facto parental status is in the child's best interests. Under this test, a parent who is the primary breadwinner is ineligible for de facto parentage status, because she has not performed an amount of caretaking equal to that provided by the stay-at-home parent.

The ALI also provides for parentage by estoppel, which rests more than does de facto parentage on the agreement to co-parent, and does not require the same degree of day-to-day caretaking. Like a de facto parent, a parent by estoppel has full parental rights under the ALI. Parenthood by estoppel requires "a co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities." Here, the biological or adoptive parent must be found to have intended to share full parental rights with the co-parent, instead of simply permitting the parent to form a relationship of some sort with the child. Even a would-be parent by estoppel who has established such an agreement, however, will not necessarily be accorded parental rights. The ALI further requires that the parent by estoppel have either "lived with the child since birth, holding out and accepting full responsibilities as a parent," or done so for a period of at least two years, as well as that a court finds an award of parental status to be in the child's best interests. This makes parentage by estoppel available to a primary breadwinner, but only if she has resided with the child for at least some period of time, and can convince a court that it is a child's interests to recognize her as the child's parent.

Thus, like the de facto parentage test set forth in *Holtzman* and adopted by a number of states, the ALI requires some sort of functional parenting to occur before a co-parenting agreement is enforced. And under either approach, the agreements to parent give rise to parental status only if a court finds such status to be in a child's best interests. Nonetheless, both versions of the de facto parentage rule make a co-parenting agreement a significant factor in the determination of parental rights.

[41] *See, e.g.*, T.F. v. B.L., 442 Mass. 522 (2006) (refusing to impose duty of support on woman who agreed to jointly raise and provide for a child with her partner but then changed her mind before spending significant time holding out the child as her own).

[42] In *Holtzman*, the court does not apply the third-party visitation statute to the petitioning co-parent, but reasons by analogy from that statute in reaching its decision.

after their relationship had dissolved.[43] Here, the original agreement to parent was a factor in establishing de facto parenthood, and the subsequent agreement by the biological parent to share visitation rights defined the scope of rights that the intended co-parent was able to exercise.

North Carolina, in *Mason v. Dwinell*, provided rights to a co-parent under the state's statutory regime permitting third parties to petition for custody of a child.[44] The case involved former domestic partners who had agreed to raise together the child that the birth mother conceived through an anonymous sperm donor, and to share legal custody in the event that they separated. Under the third-party custody statute the court applied to resolve the case, any third party could petition for custody, and a court could award custody if in a child's interests to do so. The *Mason* court agreed that the statute as written violated a parent's due process right to custody of her child, but found that the mother had acted in a manner inconsistent with her constitutionally protected interest in sole custody of her child by allowing another adult to develop a parental relationship with the child. Thus, on the basis of both the third-party custody statute and a de facto parentage analysis, in conjunction with the agreement to co-parent, a court could award not just visitation, but custody, to the de facto parent if it found that this would be in the child's best interests.

As in the de facto parentage cases, courts looking to an agreement as a basis of parental rights under paternity or third-party custody or visitation statutes are careful to insist that they are not enforcing the agreements. The *Rubano* court notes that "a mere private agreement" to share parental rights cannot confer jurisdiction on a court to enforce such an agreement, and rests its jurisdiction instead on the finding of de facto parental status. And the North Carolina court noted in *Mason* that it was "not enforcing any agreement, but rather relied upon the agreement as a manifestation of [the mother's] intent to create a permanent family unit involving two parents and a child that would continue even if the relationship between [the mother] and [her partner] did not."[45]

Some of the judicial rhetoric most insistently opposed to enforcement of co-parenting agreements has come from Massachusetts, which retrenched on an initially favorable attitude toward same-sex de facto parents after the 2003 *Goodridge* decision enabled same-sex parents to establish parental rights through marriage. Thus, in the 1999 case of *E.N.O. v. L.M.M.*, the Supreme Judicial Court of Massachusetts recognized de facto parenthood, and permitted consideration of a co-parenting contract as a factor in determining de facto parenthood.[46] In 2006, however, the Massachusetts court refused, in *T.F. v. B.L.*, to permit a claim of support against a co-parent who left the relationship while her partner was pregnant with the child that they had agreed to raise together, on

[43] Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (holding that, under state paternity statute, nonbiological same-sex co-parent had standing, on basis of de facto relationship with child, to enforce visitation agreement).

[44] Mason v. Dwinnell, 660 S.E.2d 58 (Ct. App. N.C. 2008).

[45]

[46] E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (upholding award of visitation to de facto parent under best interests test, and finding it proper for trial court to consider co-parenting agreement as evidence of intent to co-parent, absence of financial compensation for parental relationship, and biological parent's ex ante assessment of child's interests, while noting that no co-parenting agreement is enforceable with respect to children's interests).

the basis that "parenthood by contract is not the law in Massachussets."[47] The Massachusetts court reiterated its resistance to parenthood contracts in the subsequent case of *A.H. v. M.P.*, where, again holding that "parenthood . . . cannot be conferred by private agreement," it refused to permit an award of visitation rights on the basis of a co-parenting agreement where the co-parent trying to enforce the agreement had lived with and cared for the child, but had not taken on a sufficient proportion of caretaking responsibilities to merit de facto parental status.[48] By refusing to enforce parenthood by contract,[49] Massachussetts left without recourse those intended co-parents who fall short of the requirements for de facto parentage.

Several jurisdictions have refused to recognize co-parenting agreements altogether, often along with a refusal to recognize de facto parentage.[50] In these jurisdictions, then, functional co-parents alleging an agreement to co-parent are left without any basis for asserting parental rights or enforcing parental obligations. Other states to deny rights to de facto parents, however, have noted in so doing that the petitioners did not rest their arguments on an agreement to co-parent, thus suggesting that such an agreement might provide a viable basis for extending parental rights and obligations.[51]

2. Gamete Donation Agreements

There is a widespread consensus that an agreement by an anonymous donor of gametes—whether in the form of sperm or ova—to relinquish parental status is binding and enforceable. In most states, largely as a matter of statutory law, anonymous donors terminate their parental status by agreeing to donate their gametes to intermediaries who then provide them to intended parents. While such laws were originally drafted to address anonymous sperm donation, many states have since updated their statutes to include ova donation as well, and others have achieved the same result through case law.[52]

---

[47] T.F. v. B.L., 442 Mass. 522 (2006).
[48] A.H. v. M.P., 447 Mass. 828, 844 (2006).
[49] [The court in A.H. v. M.P. also refused to adopt parenthood by estoppel, a possible basis for awarding parental rights to a functional parent who does not meet the requirements for de facto parentage. While the adoption of parenthood by estoppel would have protected the parent in A.H. v. M.P., it would not protect parents who had not yet established a functional relationship with the child, as was the case in T.F. v. B.L.]
[50] *See, e.g.*, Thompson v. Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (refusing to enforce co-parenting agreement or to adopt theory of de facto parentage); Wakeman v. Dixon, 921 So.2d 669 (D. Ct. Fla. 2006) (finding, in case involving co-parents who jointly decided to raise child born through ART, that "[a]greements providing for visitation by a non-parent are unenforceable").
[51] *See* White v. White, 293 S.W.3d 1, 15, 22 (2009) (declining to adopt theory of de facto parentage, and noting, in denying mother's petition for child support, that she had not preserved for appeal her argument that the co-parents had entered into an enforceable contract to share parental rights and responsibilities); Stadter v. Siperko, 52 Va. App. 81, 86 (2008) (declining to adopt theory of de facto parenthood, but noting without comment that "there was no written pre-separation agreement concerning appellant's parental rights").
[52] *See* NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 83-93 (2009).

Because of the consensus on anonymous gamete donation—as well as the infrequency of attempts by anonymous donors to contest their waiver of parental status—most of the case law on gamete donation involves parentage disputes between mothers and known sperm donors. Many states apply the same rules to sperm donors regardless of whether they are known or anonymous. Under a typical statutory provision, donation of sperm for the purpose of artificially inseminating a married woman other than the donor's wife through a physician-directed procedure terminates the donor's parental status.[53] Some states either extend this rule to the donation of sperm to an unmarried woman[54] or make no reference to the recipient's marital status.[55] A few further provide that a donor to a recipient other than his wife can retain parental status where the donor and recipient enter into a written contract to this effect, but that in the absence of such a contract the donor is has no parental rights or obligations.[56]

A number of cases have arisen in which mothers and known sperm donors have reached parentage agreements in derogation of a state's default rules on the subject. Some of these agreements provide that a donor of sperm to an unmarried woman will retain his parental status even where the state statutory regime provides otherwise. In some of the cases, the donor was an acquaintance of the woman, and they had agreed to raise a child together, sometimes in conjunction with the woman's female partner; in others, the donor and recipient were in an intimate, but unmarried, relationship. In both situations, courts have largely, but not uniformly, decided to enforce the agreements providing the donor with parental status.[57]

---

[53] *See, e.g.*, ALA. CODE 1975 § 26-17-702 ("A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction.").

[54] *See, e.g.*, ARK. CODE ANN. § 9-10-201(c)(1).

[55] *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-775 (West Supp. 2009) ("An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D."); TEX. FAM. CODE ANN. § 160.702 ("A donor is not a parent of a child conceived by means of assisted reproduction.").

[56] *See, e.g.*, N.J. STAT. ANN. § 9:17-44(b) ("Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.").

[57] *See* L.F. v. Breit, 2013 WL 119669 (Va. Jan. 10, 2013) (finding that despite the statutory termination of sperm donor's rights where he is not married to the mother, "[d]ue process requires that unmarried parents . . . be allowed to enter into voluntary agreements regarding the custody and care of their children"); Browne v. D'Alleva, 2007 WL 4636692 (Conn. Super. Dec. 07, 2007) (holding with respect to dispute between known sperm donor and female couple that "if there is an agreement between the parties about the donor's parental rights and that he would have them, it would be a violation of his due process right to apply the statute [terminating the donor's rights] to him"); In Interest of R.C., 775 P.2d 27 (Colo. 1989) (en banc) (finding in dispute between known sperm donor and unmarried biological mother that "agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute" terminating them); McIntyre v. Crouch, 98 Or. App. 462, 780 P.2d 239 (1989) (finding that application of statute terminating donor's parental rights would violate due process where donor and mother had entered into pre-conception agreement that he would retain paternal rights); *see also* In re Sullivan, 157 S.W.3d 911 (Tex. App. Ct. 2005) (finding that donor had standing to adjudicate paternity despite statute terminating his parental rights, but declining to address relevance of pre-birth co-parenting agreement to this determination); *but see* In re K.M.H., 285 Kan. 53, 74 (2007) (refusing to recognize parental status of donor who claimed oral agreement to retain parental status, where statute required such an agreement to be in writing); In re H.C.S., 219 S.W.3d 33 (Tex. App. Ct. 2006) (refusing to recognize donor's parental status

The judicial response to agreements purporting terminate or limit a known sperm donor's rights in the absence of statutes providing for such termination has been more mixed.[58] In the early case of *Thomas S. v. Robin Y.*, an appellate court in New York recognized the donor as the full legal father—granting his petition for an order of filiation—despite an agreement prior to conception that he "would not assume a parental role" toward the child.[59] Almost a decade later, another New York court reached a similar conclusion in *Tripp v. Hinckley*, holding that a sperm donor could not be limited to the terms of a preconception agreement making the mother and her partner the custodial parents of the child, with visitation to the father and his partner, but instead must be treated as a full legal parent with the right to whatever custodial arrangement a Family Court determined to be in the child's best interests.[60]

Other states, by contrast, have enforced agreements by which known donors have terminated their parental rights and obligations. In *Leckie v. Voorhies*, decided the same year as *Thomas R.*, an Oregon court enforced a written pre-conception agreement by which the donor relinquished his rights to paternity and custody, and agreed to retain only "limited visitation rights" at "the convenience of" the mother and her partner.[61] More recently, in *Ferguson v. McKiernon*, the Supreme Court of Pennsylvania enforced an oral agreement by which a known donor terminated his parental rights and obligations, where the mother decided five years after her twins' birth to bring an action for child support.[62] The court emphasized the value of enabling a woman to conceive a child using "sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child."[63]

The court in *Ferguson* not only enforced the agreement relinquishing the father's paternal status, rejecting the lower court's decision that it violated public policy, but held that enforcement should not hinge on any analysis of the children's best interests. The court acknowledged that the children in this case would be disadvantaged by enforcement of the agreement, which would deprive them of financial support. But it found that the agreement should be enforced nonetheless, without reference to the children's interests.[64]

This privileging of a contractual agreement over children's interests represents a significant departure from much of the case law on co-parenting agreements. As we have seen, to the extent that courts will enforce co-parenting agreements or consider them in

---

on basis of alleged pre-birth agreement that he would play a role in the child's life, where statute provided for termination of donor's parental status and donor had not executed an acknowledgment of paternity) [add - TX law abrogated by statute].

[58] In jurisdictions with statutes terminating paternal rights where the insemination is performed by a licensed physician, a number of courts have refused to enforce contracts purporting to terminate parental rights when insemination did not follow the statutorily mandated procedure. *See, e.g.*, E.E. v. O.M.G.R., 420 N.J. Super. 283 (2011) (refusing to enforce agreement to terminate donor's parental status with respect to child born of self-administered ART, where donor and mother joined to request such termination).

[59] Matter of Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 361 (App. Div. 1994).

[60] 736 N.Y.S.2d 506 (2002).

[61] 128 Or. App. 289, 291 (1994).

[62] 596 Pa. 78 (2007).

[63] *Id*. at 96.

[64] *See id.* at 97-98.

determining parental status under a theory of de facto parenthood, any award of custody or visitation on this basis requires a finding that such an award is in the child's best interests. The *Ferguson* court was willing to overlook children's interests in the name of facilitating certainty, stability, and predictability in their parents' arrangements, under the theory that that in itself would be beneficial both to the children involved and to children generally. In much of the case law on custody and other parentage agreements, however, there is no escaping the possibility of a best interests assessment that will undermine parents' and children's expectations about their future.

3. Surrogacy Agreements

Surrogacy, in which a woman agrees to carry a pregnancy for the intended parent or parents, falls into two categories. In traditional surrogacy, the surrogate's own ovum is fertilized through artificial insemination, and she then carries the resulting pregnancy to term. In gestational surrogacy, the surrogate is impregnated with fertilized ova from another woman, either an intended mother or a donor. Because gestational surrogacy requires in vitro fertilization, the procedures involved are both more complex and more expensive than those required for traditional surrogacy.

In the absence of any legislation addressing surrogacy, courts have uniformly refused to enforce traditional surrogacy agreements that purport to terminate parental rights prior to conception or birth.[65] Courts have generally been willing to approve a surrogate's post-birth consent to adoption by the intended parents.[66] But where the surrogate has instead changed her mind about relinquishing her biological child, courts have consistently declined to enforce the surrogate's pre-conception agreement to terminate her parental rights. In the highly publicized 1980s surrogacy dispute known as the Baby M case, in which the surrogate refused to relinquish her rights to her child as she had contracted to do, the New Jersey Supreme Court proclaimed that even if the mother was capable of knowingly consenting to terminate her parental rights to her unborn child in exchange for financial compensation, "[t]here are, in a civilized society, some things that money cannot buy."[67] The Baby M court declined to enforce the agreement on a number of grounds, among them that parents cannot by contract circumvent the jurisdiction of the judiciary to ensure that any custody arrangement agreed to by parents is in the best interests of the child.[68]

Courts have been more receptive toward gestational surrogacy agreements, both where the ovum was provided by the intended mother[69] and where it was obtained from a

[65] *See, e.g.*, A.L.S. v E.A.G., 2010 WL 4181449 (Min. App. 2010); R.R. v. M.H., 426 Mass. 501 (1998); In re Moschetta, 25 Cal. App. 4th 1218 (1994).
[66] *See, e.g.*, Matter of Adoption of Baby Girl, L.J., 505 N.Y.S.2d 813 (Surr. 1986).
[67] Matter of Baby M, 109 N.J. 396, 440 (1988).
[68] *Id.* at 437 ("Worst of all, however, is the contract's total disregard of the best interests of the child.").
[69] *See, e.g.*, Johnson v. Calvert, 5 Cal.4th 84 (1993); Belsito v. Clark, 644 N.E.2d 760 (Ct. Comm. Pleas Ohio 1994); Culliton v. Beth Israel Deaconess Medical Center, 435 Mass. 285 (2001).

donor.[70] Not all states have found such agreements enforceable, however, and some that have refused to enforce such agreements have awarded parental status to the surrogate, particularly when there was no intended mother with a genetic tie to the child.[71] In New Jersey, for example, a court following the lead of Baby M refused to enforce a woman's preconception agreement to relinquish her rights to the child she carried to term, where the child was conceived through a donated ovum and the sperm of her brother's partner. The contract was deemed unenforceable, and the surrogate was found to be the legal mother of the child to whom she had given birth.[72]

A growing minority of jurisdictions, including Virginia,[73] Florida,[74] Illinois,[75] and Arkansas,[76] have enacted legislation rendering certain gestational surrogacy agreements enforceable. In a number of these jurisdictions, the agreement is enforceable only if the intended parents meet a number of statutory requirements, including establishing a medical need for surrogacy[77] and, in some states, obtaining judicial pre-conception approval of the agreement.[78] Some permit compensation to the surrogate,[79] but others prohibit it.[80] Two states—Virginia and Arkansas—also permit the enforcement of traditional surrogacy agreements.[81] Virginia, however, in addition to requiring judicial pre-approval of the agreement,[82] allows the surrogate to revoke her consent for up to 180 days after the final attempt at conception,[83] thus negating much of the protection and certainty that such an agreement provides to the child and intended parents.

Other states, by contrast, have enacted statues prohibiting surrogacy of any variety, such that surrogacy agreements are void[84] and, in some states, subject to criminal penalties.[85] Moreover, despite a general trend toward enforcement of gestational surrogacy agreements, there has been resistance toward embracing a regime in which parentage is truly a matter of private contract. Thus, even in California, one of the most prominent jurisdictions to facilitate gestational surrogacy, courts have been careful to insist that they are not "enforcing" gestational agreements when they award custody to the commissioning parents so much as looking to such agreements as evidence of intent

---

[70] *See, e.g.*, Raftapol v. Ramey, 299 Conn. 681 (2011); In re Buzzanca, 61 Cal. App. 4th 1410 (1998); J.F. v. D.B., 116 Ohio St.3d 363 (2007).
[71] *See, e.g.*, A.G.R. v. D.R.H. & S.H., Sup. Ct. N.J. Dec. 23, 2009 (awarding maternal status to gestational surrogate who agreed to carry the biological child of her brother's partner).
[72] *See id*.
[73] *See* VA. CODE ANN. § 20–160.
[74] *See* FLA. STAT. ANN. § 742.15.
[75] *See* 750 ILL. COMP. STAT. §§ 47.1-47.75.
[76] *See* ARK. CODE ANN. § 9-10-201.
[77] *See, e.g.*, FLA. STAT. ANN. § 742.15(2); VA. CODE ANN. § 20–160(B)(8).
[78] *See, e.g.*, VA. CODE ANN. § 20–160(A).
[79] *See, e.g.*, 750 ILL. COMP. STAT. 47.25 (d)(3).
[80] *See, e.g.*, VA. CODE ANN. § 20–160(B)(4); FLA. STAT. ANN. § 742.15(4).
[81] *See* VA. CODE ANN. § 20–160; ARK. CODE ANN. § 9-10-201.
[82] *See* VA. CODE ANN. § 20–160(A).
[83] *See id*. § 20–161(B).
[84] *See, e.g.*, IND. CODE §§ 31–20–1–1 & 31–20–1–2; MICH. COMP. LAWS § 722.855; N.Y. DOM. REL. LAW § 122; N.D. CENT. CODE § 14–18–05; D.C. CODE ANN. § 16–402.
[85] *See, e.g.*, MICH. COMP. LAWS § 722.859 (criminalizing entry into or arrangement of a compensated surrogacy agreement); N.Y. DOM. REL. LAW § 123(1) (same).

to parent, which in turn is relevant under state parentage laws.[86] California has rejected making the parental status of children born through surrogacy hinge on an assessment of the children's interests, asserting that this "[r]aises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."[87] California in this sense favors private ordering in creating parental status. But the California courts have nonetheless resisted a regime of parenthood by contract, making clear that surrogacy contracts are not enforceable per se, but are only considered insofar as they have bearing on parental intent or other factors relevant to parental status under the state's parentage legislation.[88]

Thus, courts are conflicted on the enforcement of agreements allocating parental status, whether in the form of surrogacy agreements, gamete donation agreements, or co-parenting agreements. While on the one hand there is a trend toward recognizing certain forms of such agreements, this trend is far from uniform. And even courts that afford some recognition to parentage agreements may express antipathy toward the notion of "parenthood by contract."[89] Courts convey significant discomfort about the prospect of contractualizing parenthood.

II. NINETEENTH-CENTURY ATTITUDES TOWARD PARENTHOOD BY CONTRACT

While the details of some modern parentage disputes may be new, the legal dynamic at play in these disputes is not. As early as the eighteenth century, and with increasing prominence in the nineteenth century, parents and would-be parents in both England and the United States used contracts and other similar devices to transfer parental rights. The judicial response to these contracts was in many ways similar to the response to parentage contracts today. When faced with attempts to enforce parentage contracts, Anglo-American courts, like courts today, were frequently reluctant to enforce the contracts outright, and produced a conflicted and at times inconsistent body of law about the rights of parents to enforce such agreements. But, then as now, courts would

---

[86] *See* In re Buzzanca, 61 Cal. App. 4th 1410, 1424 (1998) ("There is a difference between a court's enforcing a surrogacy agreement and making a legal determination based on the intent expressed in a surrogacy agreement."); Johnson v. Calvert, 5 Cal.4th 84, 95 (1993) (looking to surrogacy agreement to determine intent to parent, and finding agreement sufficiently consistent with public policy to take it into consideration in assessing intent to parent, while refraining from directly enforcing the agreement).

[87] *Johnson*, 5 Cal.4th at 93 n. 10; *see also Buzzanca*, 61 Cal. App. 4th at 1423 (rejecting proposition that parents who employ assisted reproductive technology should be screened in the same way as are adoptive parents).

[88] *See Buzzanca*, 61 Cal. App. 4th at 1423 ("In the case before us, we are not concerned, as [the intended father] would have us believe, with a question of the enforceability of the oral and written surrogacy contracts into which he entered with [the gestational surrogate]. This case is not about 'transferring' parenthood pursuant to those agreements. We are, rather, concerned with the consequences of those agreements as acts which caused the birth of a child.").

[89] T.F. v. B.L., 442 Mass. 522, 523 (2006) (refusing to extend earlier decision permitting award of visitation to a de facto parent who was a party to such an agreement); *see also Buzzanca*, 61 Cal. App. 4th at 1423 (insisting that the court is not "enforcing" the surrogacy contract that it relies on to determine parentage).

often award custody to the parent attempting contractual enforcement nonetheless, on the basis that to do so was in the child's interests.

To fully understand the American legal response to these earliest parentage agreements, it is important to understand the English case law as well. This is so for two somewhat conflicting reasons. First, the English case law involving transfers of parental rights was a source of authority for American case law: American decisions on parentage agreements cited English case law for support throughout the nineteenth century, and even into the twentieth century. Second, American courts, especially in the latter half of the nineteenth century, often framed their child custody jurisprudence as a progressive alternative to what they characterized (often, as we will see, inaccurately) as the more patriarchal English approach to child welfare. Thus, this Part will analyze both the English and the American judicial response to parentage agreements.

The practice of using contracts to redefine parental rights emerges in two types of English and American cases: cases involving what I will call adoption agreements, that is, transfers of parental rights from parents to third parties, often a relative such as a grandparent, aunt or uncle; and those involving separation agreements by which husbands, who had a legal right to their children's custody, agreed to transfer custody to wives in the event of separation or divorce (which became more readily available in the later part of the nineteenth century). There were significant differences between adoption agreements and separation agreements, as well as in the courts' responses to such agreements. Most prominently, separation agreements were more likely than adoption agreements to pit husband against wife, and thus the judicial response to separation agreements was more likely to explicitly hinge on issues of marital dynamics and marital hierarchy. But courts framed both types of contracts as an attempted transfer of the parent's right—often cast, especially initially, as the father's right—to his children's custody. And the case law on both types of agreements was closely intertwined; nineteenth-century Anglo-American courts often cited the two types of cases interchangeably.[90] The early judicial response to adoption agreements cannot be understood in isolation from the early judicial response to separation agreements regarding custody, and both have bearing on the continued resistance to parentage contracts today. This Part will thus discuss both types of agreements, beginning with adoption agreements, and then turning to separation agreements regarding custody.

A. Adoption Contracts

1. English Judicial Responses to Adoption Contracts

Throughout the nineteenth century, a number of custody disputes between legal and adoptive parents appeared in English courts indicating that adoptive parents believed they had a legally enforceable claim to a child, a claim that derived from a private legal arrangement that purported to transfer parental rights. What surfaces in these cases is that throughout the nineteenth century, people were regularly turning to law to stabilize their

[90] [add cites]

relationships with adoptive children, asking their lawyers to draw up wills,[91] contracts, and deeds[92] that would prevent the original legal parent from later trying to reclaim control over the child,[93] or from blackmailing the adoptive parent with the threat of such interference, as sometimes occurred.[94]

The eighteenth-century English courts that first encountered these legal transfers of parentage spoke of parenthood in contractualized terms: A parent could "consent" to "waive" his "parental rights."[95] By the 1820s, however, judges, when they paid any attention at all to these private legal rearrangements of parenthood, rejected them as invalid, while nonetheless awarding custody to adoptive parents on the basis of the child's best interests, which courts determined by assessing a child's emotional ties to her adoptive parents. An adoptive parent who had drawn up a will legally transferring custody to herself had "attempt[ed] to do that which she could not lawfully do." If the court awarded custody to the adoptive parent, this was because it was too late to wrench the child away from an already-established "course of development," and not because the adoptive parent had, as she believed, created through legal instrument an enforceable legal right to the child.[96] The parent's consent to a legal arrangement did not validate it,

---

[91] Testators making children their adopted heirs often used conditional bequests to the children's parents to secure the parents' promise not to reclaim their children. See, for example, *Colston v. Morris*, 37 Eng. Rep. 849 (Ch. 1820), in which a testator drew up a will making his granddaughter his heir, and committing to his trustees her "guardianship, custody, care, tuition, management, and education" until she should reach the age of twenty-one. This will granted a legacy to the girl's father, making the legacy revocable "if the father or his wife should ever interfere with the management and direction of the trustees respecting the education of his granddaughter . . . as it was his wish that he should not have any controul over her."

[92] Contracts and deeds (courts used the terms interchangeably) that transferred parental rights began in the nineteenth century to replace legal wills as the most commonly used adoption device. Cases involving adoption contracts include *Hill v. Gomme*, 48 Eng. Rep. 1050 (Ch. 1839), *In re Boreham*, 94 R.R. 857 (Q.B. 1853), and *In re McGrath*, 1 Ch. 143 (1893). These contracts usually secured a promise of noninterference from the legal parent, in exchange for an agreement on the part of the adoptive parent to bring up and care for the child. Some also contained provisions in which the legal parent agreed to pay the adoptive parent as consideration for adopting the child. (In *Hill v. Gomme*, a witness testifies that the solicitor added such a provision only because he was unsure how to make the contract binding.) For a typical example of an adoption contract, see *In re Boreham*, in which a father

> did solemnly promise and agree with Smith that he would permit and suffer the said E.S. Boreham [his daughter] to reside and live with the said Smith until she should be grown up and able to provide for herself, and that he would not in any way interfere with the said Smith in the bringing up and education of his daughter, nor remove nor seek to remove her from the care of the said Smith, but would at all times permit her to remain with him as his adopted child; and further, that he would pay to Smith 14*s.* per month for the support and education of the said E.S. Boreham.

In re Boreham, 94 R.R. at 857.

[93] George Behlmer describes the predicament of adoptive parents who became attached to a child only to be forced to give the child up to legal parents who had changed their minds. Behlmer 285-99.

[94] Lawyers for adoptive parents would often intimate that a legal parent who brought a case to court did so only in the hope of financial gain. See, for instance, *Lyons v. Blenkin*, 37 Eng. Rep. 842, 843 (Ch. 1821), in which lawyers argue that the father "is only stimulated to come forward by the hope of procuring some allowance from [his daughters'] estates." According to Behlmer, in early twentieth-century England, blackmail by a child's legal parents was a common fear of middle-class parents who adopted children from orphanages and workhouses. Behlmer 299-315.

[95] *See, e.g., Blake v. Leigh*, 27 Eng. Rep. 207 (Ch. 1756).

[96] Lyons v. Blenkin, 37 Eng. Rep. 842, 846 (Ch. 1821).

because a contract giving up his rights to his children "is not a contract that a father has any legal power to make."[97] In cases where a legal and an adoptive father had executed a contract transferring parental rights and duties, the adopter had no enforceable legal right to the child if the father changed his mind "at a very early period." However, the court would refuse to allow the father to take the child back if the adoptive parent had "taken the boy home and brought him up" for an amount of time sufficient to "alter[] the condition in life of the boy."[98] A parent-child tie could not be created by legal contract. But courts would recognize the bond between parent and child that developed over time.

Lawyers in these cases sometimes argued that enforcing adoption contracts would open up the possibility of downward social mobility:

> [T]his was a contract contrary to the policy of the law, for thereby a parent was contracting for the relinquishment of his child, the father thus depriving his son of that parental care which by the law of nature he was entitled to, and relieving himself from those moral duties and obligations which a parent owed to his child. If such a contract were held valid, then, where a father in good circumstances contracted to abandon his child to a man of the lowest and meanest estate and condition, the Court might be obliged to enforce the contract.[99]

This specter of a wealthy legal father who loses custody to a poor adoptive father, which had no correlation to actual adoption cases, appeared alongside a judicial concern with the opposite scenario. Judges feared that by awarding custody to adoptive parents who were wealthier than their legal counterparts (as they tended to be), they might open the door to a legal regime in which children could be wrested from their parents at the "wanton" will of any stranger with a superior fortune.[100] The recurrence of these scenarios connecting adoption contracts to a new fluidity of class suggests that behind the resistance to legal adoption was an anxiety that the increased availability of private lawyering made it disconcertingly easy to rewrite existing social and family structures.

Underlying the nineteenth-century courts' turn away from formal legal definitions of parenthood was a judicial reluctance to countenance attempts by adoptive parents to restructure parent-child relationships through legal arrangements. The turn from legal parental status to the child's best interests as the basis of assessing parent-child ties allowed courts to award custody to adoptive parents without condoning these legal transfers of parentage.

---

[97] In re McGrath, 2 Ch. 496, 508 (1892). Courts made this point even more insistently in cases involving husbands who signed separation deeds giving custodial rights to their wives, refusing to enforce such contracts on the basis that the father's "custody and controul of his children [was] thrown upon him by law, not for his gratification, but on account of his duties." St. John v. St. John, 32 Eng. Rep. 1192, 1194 (Ch. 1805).

[98] Hill v. Gomme, 48 Eng. Rep. 1050, 1054-55 (Ch. 1839).

[99] *Hill v. Gomme*, 48 Eng. Rep. at 1053.

[100] Powel v. Cleaver, 29 Eng. Rep. 274, 274 (Ch. 1789) ("It is no where laid down that the guardianship of a child can be wantonly disposed of by a third person.").

2. American Judicial Responses to Adoption Contracts

Nineteenth-century American law departed from its English counterpart by providing for legal adoption. In both countries, adoption was common practice even before the nineteenth century. Families used a number of mechanisms to formalize such adoption, including, in the early American states, adoption through private acts. But modern legal adoption is generally seen to have originated with the 1851 enactment in Massachusetts,[101] and then in other states, of a statutory mechanism by which original and adoptive parents could go before a judge and legally transfer parental status. England would not create a similar mechanism for adoption until 1926.

Nonetheless, throughout the nineteenth century, in the United States just as in England, parents and would-be adoptive parents used private legal instruments, such as contracts and deeds, to transfer parental rights. This practice began in the late eighteenth and early nineteenth centuries, before the mid-century enactment by a number of American states of statutory mechanisms for formal adoption. However, the practice of adopting out through private agreement continued in the latter half of the nineteenth century, even once legal adoption became available. It is not clear why parents continued to turn to private agreement when a statutory option was available. Perhaps middle-class families were reluctant to employ statutory adoption because they preferred to avoid a process that was often forced upon poor families, and involved state control over private decisions. Many of these private agreements involved the transfer of a child to a relative of the original parent. Perhaps the parents in these cases—many of whom were mothers or fathers whose spouses had died—wished to retain some sort of continued tie to their children, which would not have been possible with a statutory adoption, and to have control over who would adopt them. Rather than rely entirely on an informal arrangement, however, many families sought to formalize the adoptive transfer through legal instrument.

With the exception of a small handful of cases,[102] the advent of statutory adoption had little effect on American courts' attitudes towards adoption through private contract. Many courts to address the enforceability of such agreements after statutory adoption had become available made no mention of the fact. Others mentioned statutory adoption only in passing, to note simply that the statutory method of adoption had not been followed. For the most part, the nineteenth-century judicial response to attempts to enforce adoption by private agreement made no mention of statutory adoption, and instead

[101] As Naomi Cahn has pointed out, the standard account often presents the 1851 Massachusetts statute as a more radical change than it in fact was. As Cahn discusses, adoption was practiced long before 1851, and could be formalized through apprenticeships as well as by private legislative act.

[102] One court found the private agreement equivalent to a statutory adoption, and enforced the agreement on that ground, albeit in circumstances that more closely resembled those involved in statutory adoptions than those that typically arose with private agreements. *See* Dumain v. Gwynne, 92 Mass. 270 (1865). The mother in Gwynne was impoverished and her husband incarcerated when she contracted to allow a benevolent institution to place her child for adoption. In another case involving more prosperous parents, the court came to the opposite conclusion, finding that the state-sanctioned adoption process was exclusive, such that the enactment of a statutory mechanism for adoption precluded enforcement of a private adoption agreement. *See* Johnson v. Terry, 34 Conn. 259 (1867) ("The statute . . . which provides a mode by which a parent may give away a child in adoption, implies that it can be legally done in no other mode)."

focused on whether these agreements could be enforced, and, if not, whether custody must be returned to the original legal parent.

The nineteenth-century American judicial response to adoption contracts was highly conflicted, and often inconsistent. As Joel Prentiss Bishop, in his 1891 treatise on family law, summed up the state of the law regarding what he termed "Bargaining for Custody," "It is difficult to state exactly what is the doctrine as to this."[103] As this section will show, courts took widely different approaches to characterizing adoption agreements, as well as in assessing their enforceability. However, the general consensus was that adoption agreements could not be enforced, but that such agreements gave courts discretion to assess the interests of the affected child in determining whether to return custody to the legal parent.

i. From Apprenticeship to Contract: 1800-1850

Some of the earliest American adoption agreements to appear in the case law were structured similarly to apprenticeship agreements. By state statute, voluntary apprenticeships needed to be in writing to be enforceable, and required the consent both of the parent and of the children. (Involuntary apprenticeships, which are not at issue here, were imposed by the poor law authorities.) A typical apprenticeship agreement bound a child to provide services in exchange for the master's promise to teach the child a trade and to provide the child with food and lodging. Many apprenticeships functioned, even early on, as a form of adoption, in that the child would become a member of the master's household, and sometimes formed emotional attachments akin to those formed by family members.

Over the course of the nineteenth century, as children were increasingly valued for sentimental reasons rather than for their potential as laborers, apprenticeships declined in popularity, especially for middle-class children. During this same period, purely familial adoptive arrangements appear with increasing frequency in custody disputes. (In many of these, one clue to the familial nature of the arrangement is that the child was "adopted" by a relative, such as an aunt, uncle, or grandparent.) In some of the earliest such cases, it can be difficult to distinguish an apprenticeship agreement from an adoption agreement. By the later part of the century, agreements to transfer custody to third parties were increasingly recognized as contracts for adoption. But even through the end of the century, even as reference to "contracts of adoption" increased, the apprenticeship paradigm lingered, perhaps because there was no alternative model for transferring parental status through private agreement. Courts and litigants continued to use the framework of apprenticeship indentures to analyze what were clearly adoption agreements, in that they no longer referred to services to be provided by the child, and that the new set of custodians agreed to act, not as master, but as mother or father, and to "bring the child up" as "their own."[104]

One of the earliest cases to feature an arrangement that arguably started to cross the line between an apprenticeship and an adoption was *M'Dowle*, decided in New York

[103] *See* JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE AND SEPARATION 1891, at § 1169.
[104] Mayne v. Baldwin, 5 N.J. Eq. 454 (1846).

in 1811. *M'Dowle* was one of many nineteenth-century custody disputes between a parent and a member of the Society of Shakers. The Shaker religion forbade procreating, and the Shakers frequently took in children to raise and educate. Often, as in *M'Dowle*, the parent who placed the child with a member of the Shakers did so under a formal agreement renouncing parental rights to a child in exchange for an agreement by the member of the Shaker society to raise and educate the child. When a parent changed her mind and sought to reclaim the child, courts were required to determine whether the agreement transferring the child's custody was enforceable.[105]

The agreements at issue in *M'Dowle* were framed as apprenticeship indentures. In the indentures, the widower father bound his two sons, ages six and eight, to two male members of the Shaker society. The younger boy was bound to one Nathan Spier, "to be by him, or under his care, fed, clothed, taught to read and write, and in the carpenter's and joiner's trade, permitted circumstances would admit, and the boy inclined, and to instruct him in other matters, according to his faith." A similar agreement bound the older boy to one Nathan Slosson, of the same town, to learn the trade of blacksmith. Two years after signing the agreements, the father had changed his mind, and had forcibly seized the children and taken them home. In response, the masters had brought a habeas petition seeking the children's return. (A habeas petition was the standard nineteenth-century procedure for a parent or guardian seeking to recover a child's custody from one who did not have the right to custody. The *M'Dowle* case is somewhat atypical in that it is the third party who brings the writ of habeas to recover custody from the father, rather than the other way around.)

While the agreements in *M'Dowle* resembled apprenticeship indentures in that they promised to teach each child a trade, they deviated from apprenticeship indentures in a number of ways. As counsel for the father pointed out, neither agreement used the word "apprentice." Moreover, neither of the children had executed the agreement, as required by statute. The notes to the case indicate that the boys' mother had been a member of the Society of Shakers, suggesting that perhaps the men who took the boys in had some connection to the mother. This fact, along with the anomalies in the agreement and the children's indication of a strong desire to stay with their "masters," indicate that perhaps the arrangement was intended less as an apprenticeship, where an adult promised training and support in exchange for services, than what we would now think of as an adoption—an agreement by an adult to stand as a parent to a child.

The New York court's response to the *M'Dowle* agreement made two moves that would be characteristic of later American case law on transfers of custody to third parties—what I am calling adoption agreements—in two ways. First, the court treated the agreement as a flawed indenture of apprenticeship, which as such did not bind the child, but did waive the parent's custodial right. Then, after thus dispensing with the father's rights, the *M'Dowle* court addressed how to respond to the habeas petition seeking

[105] For another early case involving a void apprenticeship indenture—in this instance, the apprenticeship was void under American law, but valid under Canadian law—*see* Commonwealth v. Hamilton, 6 Mass. 283 (1810). The apprenticeship in Hamilton, like that in MDowle, resembled what we would now think of as an adoption in that the child in the case (a girl who, according to the case report, appeared to be fourteen years old) was said to be "treated with great kindness and tenderness" by the family in which she had been placed, and was "warmly attached" to them. *See id.*

custody. It did so by following the rule of eighteenth-century English courts addressing habeas corpus petitions by parents who had allowed their children to live with third parties and then changed their minds.[106] Under the English eighteenth-century case law[107] (which was repudiated by English courts in the early nineteenth century[108]), a court faced with a habeas petition seeking a child's custody was not required to return the child to the father or legal guardian. Instead, under the rubric of "set[ting] the infants free from any improper restraint,"[109] the court could exercise its discretion on whether to return the children, including by consulting the wishes of children old enough to form their own opinion. Applying this approach, the *M'Dowle* court examined the wishes of the children in the case (then ages eight and eleven), and, upon determining that the children "expressed a decided and unequivocal desire to return to their masters," ordered the boys protected in their return.[110]

Thus, the agreement in *M'Dowle* both was and was not enforceable. The agreement could justify the court's refusal to award custody to the parent. But it did not give the third party, or adoptive parent, any right of enforcement. The agreement simply gave the court the power to exercise discretion in awarding custody in disputes between parents and third parties.

Throughout the nineteenth century, a number of American courts followed the *M'Dowle* approach of characterizing parents' agreements to transfer custody as faulty apprenticeship indentures that bound the parents but not the children. Such faulty indentures vitiated the parent's legal rights to custody, with the result that courts could exercise discretion in determining whether to return the children to their parents. Courts in these cases determined custody by looking to the children's interests and, where older children were concerned, consulting the children's own wishes as to their custody.

---

[106] *See M'Dowle*, 8 Johns. at 331 ("[I]n cases if writs of *habeas corpus* directed to private persons to bring up infants, the court is bound . . . to set the infants free from any improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their *discretion*, according to the circumstances of the particular case.") (quoting *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763)).

[107] In a series of eighteenth-century English cases in which fathers sought to recover custody from third parties, the English Court of King's Bench developed the doctrine that a court faced with a writ of habeas seeking a child's custody could exercise discretion in determining whether to order custody delivered to the father or legal guardian who had requested it. See *Rex v. Smith*, 93 Eng. Rep. 983 (K.B. 1734) (holding that a court presented with a writ of habeas could do no more than set a person of liberty, and on this ground ordering 14-year-old boy released from custody of his aunt, but refusing to order custody delivered to father); *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763) (Lord Mansfield) (holding that a court presented with a father's habeas petition for a child's custody could exercise discretion in determining whether to grant the petition, and on this ground refusing to deliver child into father's custody).

[108] The rule of *Delaval* and *Smith* was repudiated in a series of nineteenth-century English cases in which mothers, rather than third parties, sought to claim their children's custody through a writ of habeas, or refused to deliver custody to a father who had brought a writ of habeas. In these cases, the Court of King's Bench held that it lacked jurisdiction to interfere with the father's legal right to custody. *See* Rex v. de Manneville, 102 Eng. Rep. 1054 (K.B. 1804); Ex Parte Skinner, 27 Rev. Rep. 710 (C.P. 1824) (refusing mother's petition for writ of habeas, where father had placed child with his mistress); Ex parte McClellan, 1 Dowl. P.C. 81 (K.B. 1830) (refusing mother's petition for custody, where father had placed child in boarding school).

[109] M'Dowle, 8 Johns. at 331 (quoting *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763).

[110] Id.

A smaller number of courts, by contrast, used this same apprenticeship model to characterize adoption agreements, but reached the contrary conclusion that, since the agreements had not been executed in accordance with the statutory requirements for apprenticeship indentures, they were not enforceable, and the children must be returned to the parents. Thus, for instance, in the 1846 case of *Mayne v. Baldwin*, a New Jersey court confronted an arrangement that had no resemblance to an apprenticeship.[111] The father in *Mayne* brought a habeas petition seeking the return of his 5-year-old daughter Anna from a man named Baldwin. The court found that, sixteen months earlier, Mayne had given his "verbal consent" that his child would be "adopted by Baldwin and brought up as his own child." Since "no deed or writing of any kind" had been executed on the matter, the "verbal agreement" was "void as a contract for the apprenticeship of the child, by our act respecting apprentices and servants." Since there was no binding apprenticeship agreement, and outside of an apprenticeship agreement, the father "has no general power to dispose of [his children] to another," the child was ordered returned to her father.[112]

The more prevalent approach in the early nineteenth century cases involving adoption agreements, however, was to follow *M'Dowle* in allocating custody by assessing the interests of the affected child. Another set of adoption agreement cases during this period reached the same result as *M'Dowle* by altogether ignoring the agreements by which the parents had consented to transfer the right to raise their children. These courts made no mention of whether such agreements were enforceable, but followed *M'Dowle* in applying the eighteenth-century English rule that a court faced with a parent's habeas petition would look to the child's interests and wishes in determining whether to order the child returned to the parent. Thus, in the 1830 case of *Commonwealth v. Hammond*, the Supreme Judicial Court of Massachussets was faced with a mother who, like the father in *M'Dowle*, had "by verbal contract" committed her daughter to the care of "a member of the society of Shakers" who agreed to provide "support and education" until the child should reach the age of twenty one. While the *Hammond* contract resembled an apprenticeship in that it specified that the girl would provide her caretaker with "reasonable services," it was not in writing, as apprenticeship indentures were required to be. Instead of resting its determination on the mother's "verbal contract" and its effect on her rights, the *Hammond* court framed its task as that of exercising "discretion" in awarding custody, on the theory that, upon a writ of habeas, "the Court will not interfere where the liberty of the party is not injuriously or unwarrantably infringed." The Court exercised its discretion by determining that the child should remain where she had been placed, as she wished to do.

In a variation on this, other courts faced with attempted transfers of parental rights reached the same result by drawing on, not habeas jurisprudence, but English Parens Patriae jurisprudence, under which courts exercised the power to override the rights even of fathers where their children's interests so required. The courts to rest on Parens Patriae doctrine similarly overlooked the contracts purporting to transfer parental rights to a third party, and awarded custody instead on the basis of the children's interests. This was the

[111] Mayne v. Baldwin, 5 N.J. Eq. 454 (1846).
[112] Id.

approach taken by Justice Story in the 1824 case of *State v. Green*, where a grandfather who resisted returning his granddaughter to her father claimed that his now-deceased daughter and her husband had agreed that the grandfather could "bring up the said infant as his own." Like the court in *Hammond*, Story ignored the alleged transfer of parental rights that the grandfather argued gave him a right to continued custody. He addressed the custody dispute by applying the rule that courts awarding custody must "look[] into all the circumstances," and determine what "will be for the real, permanent interests of the infant." Story makes no reference here to the father's consent to part with custody, or to the alleged agreement that the grandfather would bring up the child as his own. He grounds the court's discretionary power on the authority of the judge, "as parens patriae, [to] remove[] children from the custody of their father, when he thought such custody unsuitable."[113]

Under each of these early nineteenth-century approaches to third-party custody transfer agreements—those that treated the custody transfer as a faulty apprenticeship binding on the parent but not on the child; those that overlooked the agreement altogether and applied the rule from habeas jurisprudence that a court would exercise discretion in ordering custody returned to a parent; and those that overlooked the agreement and asserted the court's discretion under the Parens Patriae doctrine to order custody in accordance with the child's interests—the result was the same: custody was determined, not on the basis of the agreement to transfer it, but in accordance with the court's assessment of the child's interests. In the first category of cases, the agreement to transfer custody was treated as relevant, in that it gave the court power to refuse custody to the legal parent. But the agreement was not determinative of the custody outcome. In the latter category of cases, the court dispensed of custody—often in accordance with the agreement—without addressing whether the agreement transferring custody had any binding force. Thus, even in the large number of cases in the 1800-1850 period that ultimately sanction the adoptive transfer, there is considerable ambivalence about the enforceability of the legal instrument at stake in each of these cases.

ii. Judicial Resistance to Enforcement: 1850-1870

During the 1850s and 1860s, the cases addressing agreements transferring custody from parents to third parties shift toward characterizing the agreement at stake as an adoption contract, rather than an apprenticeship. This could have been the result of the sanctioning of adoption during this period by the statutory creation of a judicial procedure for legally transferring parental rights. But the judicial response to private agreements that sidestepped the legal adoption process—or that were made before it was instituted—does not hinge on this new statutory mechanism of adoption; in fact, most of the cases to address the enforceability of adoption contracts in the latter half of the nineteenth century make no mention of the availability of statutory legal adoption.

[113] The court cited the English case of de Manneville v. De Manneville, 10 Ves. 52 (Ch. 1804), which asserted the power of the court of equity, acting as parens patriae, to interfere in the father's right of custody where necessary to protect children's interests. The *State v. Green* court resolved the custody dispute before it by reconvening to examine the child's interests, which ended with the parties reaching an undisclosed custody agreement that was sanctioned by the court.

As the terminology in the case law shifts away from the apprenticeship model and toward the language of "adoption" and of "contract," the judicial ambivalence toward these agreements becomes more pronounced. This ambivalence is often coupled with an incipient anti-commodification rhetoric, an insistence that what is at stake here is not mere property, but instead something more meaningful—a child's future—and as such, perhaps not amenable to contractual transfer. Thus, in the 1855 case of *Curtis v. Curtis*, Chief Justice Shaw of the Massachusetts Supreme Judicial Court begins his opinion on the enforceability of such an agreement by asserting that "this is not a question of mere property," but instead of a child's custody, such that "the interest of the minor is the principle thing to be considered."[114] *Curtis* involved an out-of-state "indenture" by which a widowed mother had placed her three daughters (ages four, six, and eleven) with Joseph Fairbank, a member of the Society of Shakers, with whom the mother "did thereby covenant" that the children were "to be by him brought up, educated and instructed according to the usages, principles, and rules of the society [of Shakers]". Five years later, when the mother forcibly "seized" her oldest daughter, Fairbank, who in the interim had also had himself appointed the child's guardian, brought a habeas petition seeking her return.

Like the earlier judges faced with flawed apprenticeship indentures, Chief Justice Shaw at once resists and relies on the mother's covenant in finding that the child should be ordered delivered to her guardian. Instead of simply assessing the child's interests, as he asserts at the outset that he has the power to do, Shaw first addresses the enforceability of the mother's agreement to transfer her children's custody. He finds that it is not necessary to determine "how far the indenture is valid and binding upon the minor," because "so far as the rights of the mother are concerned, she has relinquished them by this instrument, which operates either as a contract or as an estoppel—and it is immaterial which—to prevent her from now setting up her rights." The legal instrument at stake here is both unworthy of serious discussion—Shaw does not investigate whether it is enforceable as an indenture, and finds it irrelevant whether it operates "as a contract" or not—and at the same time the foundation of the court's power to deny the mother's claim to custody, and to look instead to the child's interests. Having interrogated the child and determined that she preferred to return to the Shakers, and that she was capable of forming a judgment about her own welfare, Shaw permits her to do so.

A similar ambivalence toward the enforceability of such legal transfers of parenthood, along with an increasing tendency to characterize these transfers as a contract of sorts, is evident in the 1856 New York case of *In re Murphy*, in which a father and mother by verbal agreement placed their eleven-week-old son with his aunt and uncle, who raised him for the next nine years.[115] The facts in *Murphy* are difficult to characterize as even a quasi-apprenticeship, and the court, while it cites the *M'Dowle* case, uses the language of contract, property law, and adoption instead of that of apprenticeship law to characterize the adoptive arrangement. *Murphy* also manifests a judicial shift toward assessing the ties of affection that children had formed with the parent-figures who raised them, and to take this into account in awarding custody. The

[114] Emily Curtis v. Jane Curtis, 71 Mass. 535 (1855).
[115] In re Murphy, 12 How. Pr. 513 (S. Ct. NY 1856).

Murphy court refers to the uncle and aunt several times as the child's "adopted parents," and characterizes them as having established through their nine years of solicitous care for the child that they are equivalent to biological parents, "anxious to rear and to provide for this child, in all respects as if he had sprung from their own loins." The court is quick to accept that an adoptive relationship can be as healthy for a child as a legal or biological one, and, in a move that we see in other mid-nineteenth-century cases as well, describes the child as having formed an emotional bond with his adoptive parents. Because "the lad himself now clings with more than filial affection" to his aunt and uncle, his interests demand that he continue in their care; to return him to his biological parents would render this adoptive family "rudely torn asunder," to the child's detriment.[116]

The *Murphy* court has more difficulty determining how to legally characterize the transaction by which the parents transferred custody to the adoptive parents. The court initially uses the language of property and of gift-giving to characterize the custody transfer, but indicates its discomfort by placing quotes around all property-related terms. The father "and, what is perhaps more important, the mother," the court writes, "freely . . . 'gave'" their newborn child to his aunt and uncle, which in turn created

> something nearly approaching a right on the part of the adopted parents. The child was 'given' to them; it was given by those who, or one of whom, had by law the right to make the gift.[117]

Citing a law giving the father a right to appoint a guardian to his children by will or deed, both of which require a writing, the court then shifts into the language of contract law:

> [D]o not nine years of undisturbed possession, on the one part, and of uninterrupted acquiescence, on the other, constitute as good evidence of the understanding of the parties as a written instrument? In ordinary contracts related to property, where the statute of frauds requires them to be in writing, it is still a principle of equity jurisprudence that part performance creates an exception to the general rule.[118]

The transfer of parental rights here is set up as defying legal categorization. It resembles, but falls short of, an appointment of guardianship, a contract related to property, and a gift. This failed legal instrument at the same time gives the court the power to exercise its equitable discretion. Consulting the child's interests—and considering, as well, the not-quite-"rights" earned by the adoptive parents through their nine-year "possession" of the child who had been "'given'" to them his parents —the court awards custody to the adoptive parents.[119]

---

[116] Id. at 514.
[117] Id. at 515.
[118] Id.
[119] For another case in which the court struggles to characterize an agreement that does not fit the traditional mold of apprenticeship, see *State v. Barrett and Wife,* 45 N.H. 15 (1863), one of the few cases to directly enforce an adoption agreement on the basis of the father's written relinquishment of custody, and to do so without assessing the child's interests. The father in *Barrett* was, like many of the fathers in these

In many of these cases, the court's ambivalent attitude toward adoption contracts resembles that of courts today that are at pains to distinguish enforcing a parenthood agreement, on the one hand, from, on the other, taking such an agreement into account in awarding custody or determining parental status. In the 1862 case of *State v. Libbey*, for instance, the Supreme Judicial Court of New Hampshire goes to great lengths to distinguish a contract to transfer custody, which would not be enforced, from consent to such a transfer, which empowered courts to leave a child in an agreed-upon arrangement if consistent with the child's welfare:

> [W]hile we should be disposed to consider the consent of the father that the respondent should have the custody and nurture of the child, as an important element in determining the exercise of judicial discretion . . . . we are of the opinion that, as a matter of law, the parental right can not be assigned or transferred by a parol contract.[120]

Reviewing the earlier case law, the *Libbey* court finds that while the judge might "very properly, in the exercise of his discretion, refuse to give up the child to the father" who had consented to a custodial arrangement and then changed his mind, this "decision is not based upon the ground that he had parted with his rights by verbal contract." Underscoring the confusion on the enforceability of such contracts, the court then concedes that "there are remarks which might seem to imply that it might be done."[121]

While in most of these cases, the adoption agreements seem to have little binding force, the contrary outcome in cases lacking any such agreement underscores their importance. Thus, in 1860, a New Hampshire court found in *State v. Richardson* that the father in the dispute had never agreed to yield his daughter's custody to her maternal grandparents, despite having allowed her to live with them for most of her ten years.[122] Citing evidence that the father had made clear to the grandfather "that he must not consider the child to be his,"[123] the court, while noting that case law was unclear about whether a father was bound by a verbal agreement to transfer his rights, found that, at any

---

cases, a widower, his wife, a mill worker, having died in the Pemberton Mills collapse in Massachusetts, one of the worst industrial accidents in American history. The child had been placed in the care of her aunt as a newborn - even before the mother's death - to allow her mother to work in the mill. Following the mother's death a few months later, the adoptive aunt and uncle and the child's father drew up a formal agreement transferring custody, agreeing in writing and under seal that the father would relinquish "all control and custody which I have as a parent and father", and that the aunt and uncle would "be a father and mother to her." When, three years later, the father tried to reclaim his daughter, the court refused, relying on the agreement. This agreement was clearly not an apprenticeship. While the court concedes this, it rests its power to deny the father custody on the doctrine that a nonconforming apprenticeship can bind the father:

> It is quite clear . . . that this agreement is not in conformity with the requisitions of our statute in respect to the binding out of apprentices or servants; therefore, the infant itself is not bound. But we are of the opinion that the father may bind *himself* by such an agreement.

In this rare case to enforce outright the adoptive transfer, the court relies on the category of apprenticeships to do so even while conceding that it is inapplicable to the agreement at hand.

[120] State v. Libbey, 44 N.H. 321 *2 (1862).
[121] *Id.*
[122] State v. Richardson, 40 N.H. 272 (1860).
[123] *Id.* at 279.

rate, no such agreement had been made. It then framed the task before it as assessing the child's interests, but under a strong presumption that the child's interest was to remain with her father, since he had the legal right of custody. The absence of an agreement was outcome-determinative: despite the child's preference to remain with her grandparents, her attachment to them, and their suitability, the court found that because the father was not "unsuitable" to raise his child, custody must be awarded to him.[124]

iii. Continued Ambivalence: 1870-1900

From the 1870s through the end of the nineteenth century, parents continued to privately transfer their children to adoptive parents—often relatives—and to formalize this transfer through contractual agreements, sometimes written, and sometimes verbal. We know this because adoptive parents continued to ask courts to enforce these private transfers of parental rights. During this time, one state supreme court after another was faced with attempts to enforce private adoption agreements. Like the earlier courts to have addressed the issue, the majority concluded that agreements transferring parental rights, while not enforceable, gave courts discretion to determine custody by consulting the interests of the affected child. A typical formulation was as follows, here voiced by the Supreme Court of Iowa in the 1883 case of *Bonnett v. Bonnett*:

> When a parent has, either by abandonment or contract, surrendered his present legal right to the custody of a child, in all controversies subsequently arising respecting its custody, the matter of primary importance is the interest and welfare of the child.[125]

Some courts framed the relevance of the agreement more strongly, such that it created a presumption that custody was to remain with the adoptive parents. Thus the Ohio Supreme Court in the much-cited 1877 case of *Clark v. Bayer*, which involved whether a grandfather had status to bring a kidnapping action—against defendants who, it was insinuated, had been hired by the children's parents—where those parents had "transferred the care and possession" of their children, and "wholly renounced and abandoned all right, as parents":

> It sometimes happens that parents have abandoned their minor children, or by act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training, and education of the infant, and the court is satisfied its social, moral, and educational interests will be

[124] *Id.* at 281-82. *See also* State v. Scott, 30 N.H. 274 (1855) (where mother did not agree to give child to Shakers permanently, but she lost her right to custody by remarriage, court determined custody by looking to child's welfare).

[125] Bonnett v. Bonnett, 61 Iowa 199 (1883) (finding that the mother "gave child to the [grandparents] to be theirs to raise," and that the grandparents, "under such agreement or understanding, took the child," and determining that the four-year-old child's interests would be better served by staying with the grandparents who had raised her since birth than by going to live with her mother and her new husband).

> best promoted by remaining in the custody of the person to whom it was transferred, . . . the new custody will be treated as lawful and exclusive.[126]

Despite the greater force given to the adoptive parents under this formulation, the court's assessment of the child's interests still prevailed.

In addressing the enforceability, or lack thereof, of the adoption agreements at stake in these cases, courts struggled to categorize them, and to articulate the ground for refusing enforcement. Where an agreement was not in writing, the lack of a writing might be made the reason for nonenforcement. Thus, a number of cases refused enforcement of adoptive transfers on the ground that they were merely verbal: "the parental right and authority can not be assigned or transferred by a parol contract," held the Supreme Judicial Court of New Hampshire in 1862. Or, as the Supreme Court of Iowa held in 1877, after finding that the father had made no "positive contract," but only an "understanding" that the grandparents "would have the child to raise," if there is to be "such a contract . . . certainly it should be clear, definite and certain."[127] But the lack of a writing was rarely determinative. In all of these cases, the court held that the unenforceable parol agreement empowered it to award custody by assessing the child's interests. As the Supreme Court of Kansas held in 1881 after finding that the father had "by parol agreement" relinquished his parental rights, "the want of a writing cuts no figure now," since the only relevant question before the court was "what will promote the welfare of the child."[128]

Moreover, even written and formalized agreements were often found unenforceable, because they didn't meet the requirements of any acceptable category of agreement. Thus, in the 1882 case of *In the Matter of Berenice Scarritt*, the Missouri Supreme Court, while doubtful that the evidence established that the father in the case had agreed in writing to relinquish custody to his daughter's grandparents, held that, even if his written discussion of the custody arrangement could be characterized as a contract, "public policy . . . incapacitate[s] the father from making a valid and irrevocable contract of this sort," and custody would still need to be determined, as the court did, by assessing the child's interests.[129]

---

[126] Clark v. Bayer, 32 Ohio St. 299, 305-06 (1877). *See also* Cunningham v. Barnes, 37 W. Va. 746 (1893) ("[W]hen a parent has transferred to another the custody of his infant child, by fair agreement, which has been acted on by such other person, to the manifest interest and welfare of the child, the parent will not be permitted to reclaim custody of the child, unless he can show that a change of custody will materially promote his child's welfare, moral or physical.").

[127] Drumb v. Keen, 47 Iowa 435 ("Conceding this offer and acceptance to have the force and effect of a contract, we are clearly of the opinion it does not import that the plaintiff thereby deprived himself of the right to the care and custody of his child for any length of time. It may be admitted such a contract may be made, but certainly it should be clear, definite, and certain.").

[128] Drumb v. Keen, 47 Iowa 435 (1877).

[129] 76 Mo. 565 (1882).

iv. Rationales for Nonenforcement

What is striking in the majority of cases is the length to which courts went to insist that they were not enforcing the agreements as contracts, even while referring to the agreement at issue as a "contract," [130] or sometimes as a "gift,"[131] and relying on it as a ground to assess the children's interests and, in many cases, deny custody to the original parents. Why were courts so uncomfortable with parenthood by contract, even as they often awarded custody in accordance with such contracts? Some courts simply asserted that custody belonged by law to the father, and could not be alienated. One explanation for this was that fatherhood is a "personal trust," which as such was not assignable.[132] The unpalatable nature of contracts transferring parental rights sometimes was argued as a basis for doing precisely that: in one early case, the attorney for an adoptive parent argued that "the making of the contract was an abuse of power by the guardian by nature," that is, the mother, and that, ironically, because of this breach of the maternal duty, the court should deny her custody.[133] Courts and litigants also noted that fathers could not transfer custody "even to their wives," thus suggesting that allowing fathers to transfer their rights to third parties might open up the possibility of inter-spousal transfers as well.

In the latter part of the century, one of the most frequently voiced rationales for rejecting the contract paradigm in these cases was akin to what today we would refer to as the non-commodification argument. Courts rejecting enforcement of adoption contracts frequently brought up, and dismissed, the notion of children as "chattel." Thus, in *Chapsky v. Wood*, which involved the enforceability of a mother and father's oral agreement to transfer custody of their child to her aunt, the Supreme Court of Kansas explained that

> a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived if the right to its custody. In this it differs from the gift of any article which is only property. If to-day Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and never can be reclaimed; but he cannot by simply giving away his child relieve himself of the obligation to support that child, nor deprive himself of the right to its custody.[134]

---

[130] *See, e.g.,* Clark v. Bayer (Ohio 1877) ("The father's right is not absolute . . . he may relinquish it by contract [or] forfeit it by abandonment").
[131] *See, e.g.,* Chapsky v. Wood, 26 Kan. 650 (1881) (referring to custody transfer as a "gift" as well as a "parol agreement" by which the father "relinquished . . . his parental rights").
[132] *See* Mayne v. Baldwin, 5 N.J. Eq. 454 (1846) ("The care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another.").
[133] *See* Commonwealth v. Hammond, 27 Mass. 274 (1830).
[134] *See also id.* ("[P]ublic policy is against the permanent transfer of the natural rights of a parent, and that such contracts are not to be specifically enforced."). The *Scarritt* and *Chapsky* courts both mention the new availability of legal adoption, but make little of it. The court in *Chapsky*, for instance, immediately following its assertion that contracts relinquishing parental rights cannot be enforced because they treat

In another case, the Supreme Court of Missouri elaborated on the anti-commodification rationale by explaining that both the law of nature and the good of society argue against permitting fathers to contract away their parental rights:

> As to any mere article of property, either personal or real, the law permits a man to dispose of it by gift or contract, as he chooses. Not so his children. The father owes a duty to nurture, support, educate and protect his child, and the child, and the child has the right to call on him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure.[135]

On a practical level, the argument here is that because the father's rights carried with them a reciprocal duty of support, allowing the father to alienate his rights would also allow him to "divest himself" of his paternal duties, leaving the children without a father to care for them. Rhetorically, however, this argument is framed in terms that play on the distinction between property and nature, and between money and love. The distinction between a contract that treats children as "chattel" and the parent's "natural" duty to "nurture" his children is central to the insistence that the law of contract, and of property, have no place in assessing parental status and children's custody. Understanding what is at play in this rhetoric can thus help us to understand both the continued resistance to parenthood contracts today, and, more broadly, the role of childhood—and of the law of parent-child relations—in driving what Janet Halley has called Family Law Exceptionalism, that is, the formation during the nineteenth century of family law as an exceptional field where the usual rules of contract and property law do not apply.[136]

The rhetoric in these adoption contract cases denying that children were "chattel"—and equating adoption contracts with treating them as such—worked on the one hand to convey the value of children in nineteenth-century American culture, and the new notion that children are, as Viviana Zelizer put it in her study of the nineteenth-century shift in attitudes toward children, "priceless."[137] The pejorative reference to treating children as chattel, a common trope in these cases, emphasized the law's newly protective attitude toward children. Such rhetoric at the same time painted a picture of American law as progressive and exceptional, and of American courts as more

---

children as chattel, notes, without further comment, that while "outside of the case" at hand, statute had made available an irrevocable relinquishment of parental rights through probate proceedings. *See id.*

[135] *Scarritt*, 76 Mo. 565 (1882).

[136] Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 753 (2010). In her genealogy of family law exceptionalism, Halley traces the "construction of the legal order to render family and its law special, other, exceptional," and sees this phenomenon as beginning with the emergence of the status/contract distinction in the period from 1765 to 1896, and the concomitant emergence of Domestic Relations as a distinct legal field that stood in opposition to the field of Contracts. Janey Halley, *What is Family Law? A Genealogy Part I*, 21 Yale J.L. & Human. 1, 3-6 (2011).

[137] VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 1994.

enlightened those of the past and of their English counterparts.[138] Thus, in a preface to his discussion of father's custody rights, Joel Prentiss Bishop, in his 1891 treatise *Commentaries on Marriage and Separation*, distinguishes the "modern" American approach to custody from the "old barbarity" whereby a father could "sell of kill" a child as a "kind of chattel." While the "old" law to which Bishop refers is that of ancient Rome, he used the opportunity to underscore not just the progress of modernity but American exceptionalism, adding that "the jurisprudence on this subject has travelled in most of our States more rapidly toward the light than in England."[139]

As Jill Hasday has discussed, there is considerable discomfort in American legal culture about associating intimacy with economic exchange, despite the fact that the law often countenances economic exchange between intimates.[140] None of the American adoption contract cases, however, involved the sale of a child—the parents in these cases were not compensated for relinquishing custody. Absent from these cases, then, is the element of monetary commodification—the exchange of children for money—that concerns some today in the contexts of surrogacy, compensated adoption, and the sale of gametes.[141]

It is also possible that the anxiety in these cases about treating children as "chattel" stemmed in part from discomfort with the connection between parental status and social class. The American cases did not tend to involve parents who had been financially pressured to part with their children. (While some of the earlier English cases involved parents who had given up their rights to their children in exchange for a legacy, and some later English cases involved impoverished mothers who could not afford to care for their children, a number of the English adoption cases involved transfers of custody between parents of the same class.) But in the courts' application of the best-interests analysis, there was, throughout the nineteenth century, significant evidence of concern about a legal regime that would enable a wealthier adoptive parent to prevail over a poor biological parent simply on the basis of superior wealth. At stake here was both the (priceless) value of parental nurture and the stability of parent-child ties. As the

---

[138] *See also, e.g.,* JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC 5TH ED. 1895 at § 251 (noting in a discussion of English and American approaches to "Contracts Transferring Parental Rights" that, while "such contracts are not to be specifically enforced, . . . American courts hold fast, nevertheless, to the true interests and welfare of the child").

[139] JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE AND SEPARATION 1891, at § 1163.

[140] Jill Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV 491 (2005).

[141] Another factor at play in the rhetoric of children as "chattel" was likely the paradigm of slavery. In the latter part of the nineteenth century, activists in both labor law and women's rights would use the paradigm of slavery—and the contrast (or, as some workers argued, the overlap) between slavery and contractual freedom—to argue for worker's and women's rights, respectively. *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN TEH AGE OF SLAVE EMANCIPATION (1998). Children, of course, posed a problem to the paradigm of the shift "from Status to Contract," being unable to form contracts themselves. This problem was particularly visible in the family, where not-yet-"emancipated" children were relegated to the care and control of parental adults. The shift to contractual "freedom" was withheld from children until they reached the age of capacity. But the eradication of slavery reinforced the relatively new notion that children were not, even during the age of incapacity, the mere "property" of their fathers. By rejecting the enforcement of contracts transferring parental rights, and characterizing such contracts as treating children as chattel, courts were able to proclaim their new solicitude for children's wellbeing and personhood.

court put it in 1732, in the one of the earliest English cases to address the enforceability of an alleged transfer of custody from a father to a wealthier grandparent, "it cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian."[142]

Courts assessing children's interests in these cases demonstrate anxiety about any appearance of allocating custody on the basis of superior wealth. When rejecting the claim of the wealthier party—as in *Chapsky*, where the court refused to allow the wealthier father to retrieve his child from the adoptive relatives with whom she had bonded—courts were quick to assert the primacy of love and affection over mere "pecuniary advantages."[143] But even in cases where courts dissected the relative financial standing of prospective parents and awarded custody accordingly, they disavowed the relevance of material wealth in assessing children's interests. Thus, in the 1893 West Virginia case *Cunningham v. Barnes*, the court rejected a father's petition for custody, and awarded custody to the grandparents to whom the father had agreed to transfer it, on the basis, in part, of the grandparents' superior wealth.[144] While explicitly resting its refusal to allow the father to reclaim his child (as the court noted, "in direct opposition to the terms of his agreement") on the grandparents' relative prosperity, finding it better for the child to stay in a home "where peace, plenty, and harmony prevail," the *Cunningham* court was quick to insist that

> [i]t is not intended to assert or hold in this case that every man who is thriftless, or has been unsuccessful in gathering around him the good things of this world, is to be deprived of the care, custody, and control of his children . . . .

This move to reassure parents that custody would not be reallocated to those with superior wealth conveys the suspicion that courts awarding custody to adoptive parents could do precisely that, undermining the security of parental rights generally by grounding parental status in material prosperity.[145]

Despite the concern throughout the case law about resting parental status on financial wellbeing, the adoption contract cases do not typically involve a transfer of a child to a markedly wealthier set of parents. Strikingly, one of the few nineteenth-century cases to speak favorably about a private adoption contract, *Dumain v Gwynne*, was also one of the few prominent American cases to involve an adoption of a child from a poor

---

[142] Ex Parte Hopkins, 24 Eng. Rep. 1009, 1009 (Ch. 1732).

[143] Chapsky at 656. See also id. (finding that "while there is more wealth on the side of the father," a more important factor was the "deep, strong, patient love" which the grandparents had formed through years of nurturing the child "during years of helpless babyhood").

[144] *Cunningham v.* Barnes, 37 W. Va. 746 (1893). The court noted that while the father's custody petition claimed that he was "worth some $1,200 of real estate," he admitted on cross-examination "that he own no real state, and had no personal estate."

[145] *See also* Drumb v. Keen, 47 Iowa 435, 437-38 (1877) (refusing to return child to father working as a telegraph operator in Indian Territory where "the character and condition of his home" were unsuitable for the child and he had "no opportunities or means to take adequate care of the child," whereas the grandparents to whom the father had given the child to raise "have ample means to raise him").

background by wealthier strangers.[146] The mother in *Dumain* had placed her child in the "Temporary Home for Destitute Children" while her husband was incarcerated, and contractually agreed to relinquish her daughter's custody for placement with an adoptive family. This case involving non-middle-class parents is one of the few where the court, while exercising its discretion to ensure that the adoption was in the child's interests (and finding that it was, because the adoptive parents could give her "an education much better than their parents could give"), shows little hesitation about condoning what it blithely refers to as an adoption "contract," finding it "a suitable contract for the wife to make," and that it was freely made.[147]

Most of the American adoption contract cases, by contrast—especially the majority of cases that express distaste for adoption by "contract," and resist specifically enforcing an adoption contract—involve sufficiently prosperous parents on both sides that they are difficult to characterize as involving a transfer from an impoverished parent to a significantly wealthier adoptive one. Nonetheless, it was in disputes between parties who were all more or less middle class that courts were most likely to express concern about treating children as chattel. The discomfort with adoption contracts thus may have been driven less by a solicitude for the rights of the poor than by a reflexive assumption that contract tainted, and potentially destabilized, the parent-child bond by suggesting that parenthood could be bought and sold.

Another issue at play in the rhetoric of children as "chattel" or "property" is the superior power of the courts—and of the law generally—to dictate parental status. Michael Grossberg has detailed the extent to which the nineteenth American custody law replaced traditional paternal rights with "a judicial patriarchy," that is, an expanded judicial discretion to police families in the name of children's welfare.[148] In denying that the father has the power to divest himself of his children at his "mere will," courts asserted their own power either to enforce the father's status as such, or to refuse to do so. Part of what was at stake in the anti-commodification rhetoric of these cases, then, was not simply whether children are an inappropriate subject of contract law or property law, but whether parents should be permitted to determine and redefine parental status. The resounding answer was no—parental status was not something that it was in a parent's power to relinquish by private agreement. Parenthood contracts were unenforceable, not just because they commodified children, or because they commodified parental status, but because—in treating children as property—the parents and adoptive parents who agreed to such contracts asserted the same power to define parental status with that they could exert over their private property. The refusal to enforce such contracts asserts the superior power of the states, and of the courts, to determine who is, and is not, a parent.

---

[146] Dumain v. Gwynne, 92 Mass 270 (1865).

[147] Id. The *Dumain* case, and the lack of ambivalence in this instance about the contractual transfer of a child, underscores the bifurcated nature of family law, which, as Jill Hasday has discussed, applies an entirely different set of rules applied to poor families than to better-off families, denying poorer families the relative decisional autonomy that was granted, at least nominally, to families that did not require public assistance. *See* Jill Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

[148] GOVERNING THE HEARTH 247.

Both aspects of this children-are-not-chattel argument—the anti-commodification argument and the insistence on the superior power of the state to define the family—are at play not just in the judicial refusal to enforce parenthood contracts, but in the simultaneous insistence that such contracts give courts the power to exercise discretion in determining custody. The *Chapsky* court, after refusing, because children are not chattel, to enforce the father's contractual transfer of custody, gives the same reason for refusing to automatically return custody to the father: "[A] parent's right to custody is not like the right of property, an absolute and uncontrollable right." Thus,

> though the gift of the child be revocable, yet when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question of whether such custody will promote the welfare and interest of such child.

The anticommodification paradigm thus helps to drive the contradictory judicial response to contracts transferring parental rights, rendering such agreements at once unenforceable and potentially determinative in disputes between parents and third parties. On the ground that a child is not chattel, and the right to a child is not like a right to property, courts faced with a contract transferring custody would at once refuse to enforce the agreement, while at the same time leaving custody with the adoptive parents upon finding that to do so would promote the child's interests.

B. Separation Agreements Allocating Custody

Most scholars today to discuss contracts establishing parental status—such as surrogacy agreements, co-parenting agreements, and gamete donation agreements—do not address custody agreements at any length. Scholarly treatment of parenthood contracts may well address how custody should be allocated between parents. But the literature on parentage contracts pays relatively little attention to the enforceability of custody agreements, especially traditional custody agreements made between spouses anticipating separation or divorce.

When the issue of contractual transfers of parental rights first arose in the nineteenth century, however, interspousal custody agreements were typically discussed alongside agreements transferring custody to third parties. Both legal treatise writers and courts addressing the enforceability of what one American treatise writer termed "bargaining for custody,"[149] and another "Contracts transferring Parental Rights,"[150] treated interspousal custody agreements and adoption agreements as closely related, and would cite cases involving the two types of agreements interchangeably.[151] At a time

[149] JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE AND SEPARATION 1891, at § 1169.
[150] JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC 1895, at § 251.
[151] *See* Bishop at § 1169; Schouler at §251; *State ex rel Jewett v. Barrett*, 45 N.H. 15 (1863) (citing both *Mayne v. Baldwin*, a case involving an adoption contract, and *People v. Mercein*, which involved a

when divorce was uncommon and the father's right to custody of his legitimate children was paramount, an interspousal custody agreement took the form of a separation deed by which the husband agreed to allocate custody to his wife. Throughout much of the nineteenth century, separation deeds and adoption agreements were framed as raising the same issue—namely, whether a father was bound by a contract in which he transferred and relinquished his parental rights and duties. (Mothers typically came into the equation either as recipients of the right transferred by the father, or when the father was no longer alive and the mother herself had made the custody transfer.)

Understanding the origins of our current attitudes toward parenthood contracts thus requires that we attend not only to the case law addressing the early use of contract and other legal instruments to transfer custody to third parties, but also to the initial judicial response to custody provisions in separation agreements. In both instances, we see parents turning to contract, and to other forms of private agreement, to allocate parental status at a time when there was no other viable or readily available mechanism for achieving the same result. And even when courts struck down such agreements as unenforceable—which, as we will see, they often did—parents continued to turn to them nonetheless.

The history of separation deeds is especially instructive in that it entails the use of private agreement to create a family form not recognized by law: marital separation without official sanction.[152] In England, while divorce was difficult to obtain prior to the Divorce Act of 1857, which provided for judicial divorce, the wealthiest spouses could attempt to obtain separation from bed and board through the Ecclesiastical Courts (divorce without permission to remarry), or divorce through Act of Parliament. But as early as the seventeenth century, and with increasing frequency in the nineteenth, English case law shows spouses using private agreements to structure the end of their marital unions, without pursuing a legal separation or divorce. Divorce was more readily available in the United States, which had provided for both judicial divorce and judicial separation since the colonial era. But at a time when divorce required fault, and was seen as a public method of shaming and punishing the guilty spouse, a number of American couples preferred to separate through private agreement.[153]

By the mid-nineteenth century, a number of English and American courts would enforce the maintenance and property provisions of separation agreements, albeit at times

---

separation agreement regarding custody, as holding that contracts relinquishing paternal rights were unenforceable).

[152] For a discussion of the relation in nineteenth-century America between the lived experience of marital separation, on the one hand, and the formal law of marriage and divorce, on the other, and of how spouses' understandings of and beliefs about the law shaped their experience of both marriage and separation, see HENDRIK HARTOG, MAN & WIFE IN AMERICA (2002).

[153] See HENDRIK HARTOG, MAN & WIFE IN AMERICA (2002). Hartog notes that while divorce and legal separation were available in every nineteenth-century American state except South Carolina, couples often preferred to separate privately, and without the involvement of the courts. In fact, he argues, "[e]nough people separated so that separation became the crucial practice through which the legal culture of marriage in American developed." Id. at 32. Hartog cautions against conceptualizing this trend as driven by the difficulties of obtaining a divorce, and observes that "divorce as a public closure" to marriage was not even an imagined or desired option in most instances. *See id.* at 84.

with significant reluctance.[154] One doctrinal reason for this reluctance was that the wife, under coverture, could not contract with her husband.[155] However, spouses would often circumvent this rule by arranging for a separation deed to be contracted between the husband and a trustee acting for the wife. While this solved the doctrinal problems created by coverture, courts resisted these separation agreements as well. The marriage contract, courts argued, could not be dissolved at will by husband and wife, since the public welfare was at stake in upholding the marital union.[156] Another oft-voiced judicial complaint was that separation agreements enabled husbands and wives to live in an "anomalous" state that was neither married nor divorced:

> If . . . the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interest to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character.[157]

Despite these objections, a number of courts enforced separation agreements regarding property, and later courts often felt bound to follow their predecessors.[158] In England, the House of Lords resolved the issue in 1848 by holding that articles of separation could be

---

[154] As the English Court of Chancery put it in 1858, "Separation deeds are contract of a very peculiar kind, which are rather tolerated than sanctioned by law." Vansittart v. Vansittart, 44 Eng. Rep. 984, 986 (Ch. 1858).

[155] *See, e.g.,* Marshall v. Button, 101 Eng. Rep. 1538 (K.B. 1800) ("[T]he agreement to live separate . . . is a contract supposed to be made between two parties, who . . . being in law but one person, are on that account unable to contract with each other.") The issue in Marshall was whether a married woman living separate from her husband under articles of separation could sue and be sued as a feme sole. The court held that she could not, because "a man and his wife can[not] by agreement between themselves change their legal capacities and characters." Id. at 1539.

[156] Thus, for instance, Lord Chancellor Eldon of the English Court of Chancery often lamented the precedent that bound him to allow actions to enforce provisions in separation agreements allowing maintenance to the wife through an arrangement between the husband and the wife's trustee. Eldon's complaint was that marriage was not an ordinary private contract that spouses could alter at their pleasure, but instead a special sort of contract in which the public had an interest:

> If the question, whether the Courts would or would not act upon articles of this sort, were not prejudiced by any decisions, I should say, that I think no Court ought to act on them; for whether the contract of marriage be, as it is represented by some, a civil contract only, or whether it be both civil and religious, it is one of a very peculiar nature; it is one which the parties cannot dissolve: one by which they impose duties on themselves, and by which they engage to perform duties with respect to their offspring; duties which are impose as much for the sake of public policy as of private happiness.

Westmeath v. Westmeath, 37 Eng. Rep. 797, 801 (Ch. 1821).

[157] Marshall v. Rutton, 101 Eng. Rep. at 1539.

[158] *See* Westmeath, 37 Eng. Rep. at 801 (lamenting precedents that bound court to enforce separation agreements allocating maintenance to wife).

enforced, so far as they concerned an agreement regarding property.[159] The legal picture in the United States was more conflicted. Some nineteenth-century American courts would enforce separation agreements regarding property, especially those between husbands and trustees. Others continued to find such agreements void and unenforceable.[160]

In both countries, even as courts moved toward allowing enforcement of separation agreements concerning property, there was considerably greater resistance to enforcing separation agreements that attempted to transfer children's custody from husband to wife. The refusal to sanction contracts concerning parental rights even as marital contracts regarding property were increasingly enforced resembles attitudes toward the private ordering of marriage today: even jurisdictions that favor private ordering in the form of prenuptial agreements, cohabitation agreements, and other contracts regarding property often draw the line at enforcing contracts related to children's custody.

1. English Judicial Responses to Separation Agreements Allocating Custody

Thus, in nineteenth-century England, courts consistently refused to enforce separation agreements allocating custody to the mother, even as they increasingly tolerated separation agreements concerning property.[161] As Lord Chancellor Eldon explained in a much-cited case from 1805 involving a separation agreement permitting the wife, with the assent of her trustee, to leave her husband's home and take the children with her, such a provisions were problematic for two reasons. The first was that such agreements made it too easy for the wife to leave her husband's home, which, in turn, would undermine the husband's power over the wife during the intact marriage as well:

> If such a contract as is contained in the second of these instruments, an engagement under the hand of the husband, that his wife and children shall be free from all controul by him, that she shall dwell in his house, as long as she pleases, and take herself away, when she pleases . . . .The consequence would be constant misery.

The second problem with custody agreements, Eldon continued, was that they allowed the father to abdicate his duties toward his children:

---

[159] Wilson v. Wilson, 1 H.L.C, 538 (1848).
[160] *See* Hartog, supra note , at 80-82. Courts of equity were more likely to enforce such agreements. *See id*.
[161] *See, e.g.,* St. John v. St. John, 32 Eng. Rep. 1192, 1194 (1805) (questioning "whether such an agreement as this is to be permitted; placing the wife in such a situation, that she may withdraw herself from her husband; and also taking her children from his roof and care"). In Westmeath v. Westmeath, which involved two separation deeds, the first containing a custody provision, and the second addressing property matters only, Lord Eldon of the Court of Chancery asserted without elaboration that "the first deed cannot stand for a moment," while lamenting that earlier decisions bound him to allow the suit on the property-related deed to go forward. Westmeath v. Westmeath, 37 Eng. Rep. 797 (Ch. 1821).

> Then, how is it as to the children? The father has controul over them by the law; as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration, before a Court of Law, should by *Habeas Corpus* upon a *Unilateral Covenant*, . . . take from him the custody and controul of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them in the hands of his wife.[162]

In expressing concern that separation deeds allocating custody could liberate the wife from the husband's control, Eldon was responding to a particular type of separation deed—one that was executed after a reconciliation, in anticipation of a future separation. Thus, the deed at issue in *St. John* provided that ""Lady St. John might at any future time, at the assent of the trustees . . . separate from her husband, and take away her children."[163] Many separation deeds that appear in both the English and American case law were of this nature, allocating custody of children to the wife in the event of a future separation.[164] The goal of such agreements was to effect a reconciliation when the marriage foundered and the wife left her husband's home, often because she had been mistreated. As a condition of returning to her husband, the wife wanted to be assured that if her husband should revive the behavior that had initially driven her away, she could leave, and take her children with her. These agreements indeed, as Eldon feared, created a marital union in which a wife was empowered to leave her husband's home at will (or, at least, with the consent of her male trustees).

Thus, in the 1819 English case of *Durant v. Titley*, a woman left her husband after 10 years of marriage upon learning that he had fathered four children with two of her children's nursery maids.[165] She was convinced to return to him by a "deed of separation" by which her husband "covenanted" that, in addition to paying maintenance if she should leave, "it should be lawful for her, whenever she should live apart from her husband, to take any one of her children by her husband which she should fix upon, to reside and live with her, except the eldest." When the wife, after another eight years, was asked by her husband to leave his home—at a time when there were 12 children of the marriage, and the husband had formed at least three additional "adulterous connection[s]"— she attempted to enforce her rights under the separation deed, asking for custody of a daughter named, appropriately, "Anguish." The husband refused. When the wife then

---

[162] St. John v. St. John, 32 Eng. Rep. 1192, 1194 (1805).
[163] St. John v. St,. John, 32 Eng. Rep. 1192, 1193 (1805).
[164] *See, e.g.,* St. John v. St,. John, 32 Eng. Rep. 1192, 1194 (1805); Durant v. Titley, 7 Price 577 (Exch. 1819); Westmeath v. Westmeath, 37 Eng. Rep. 797 (Ch. 1821); State v. Smith, 6 Me. 462 (1830) (involving agreement between trustee and husband providing that "if, in consequence of any ill treatment by him, his wife should be rendered unhappy and unwilling to cohabit with him, . . . then she may live separately from him at her own pleasure, and shall be at liberty to take the children under her own control and custody, and keep them so long as they, the petitioner and his wife, should live apart").
[165] Durant v. Titley, 7 Price 577 (Exch. 1819).

attempted to enforce the maintenance provision of the separation agreement, the court rejected her claim.[166] Numerous other cases followed a similar pattern.[167]

Courts were especially reluctant to enforce agreements that allocated custody to the wife in anticipation of future separation. But they were resistant, as well, to enforcing custody-related separation agreements that were negotiated at the time of separation, sometimes in lieu of an action for divorce. In England, this resistance to custody agreements persisted even after the House of Lords clarified in 1848 that courts were required to enforce articles of separation related to property. The courts quickly determined, not only that this had no bearing on separation agreements regarding custody, but that any such custody provision rendered a separation agreement unenforceable in its entirety.[168] As the Court of Chancery explained in the 1858 case of *Vansittart v. Vansittart*, such agreements posed the issue of whether "it was competent to the father to fetter and abandon his parental power" through contractual agreement with his wife. The court in *Vansittart* was especially concerned with a provision under which the parents agreed that none of their children would be sent away to schools, other than those specified in advance, without the written consent of both parents. While unremarkable today, the Court viewed such a provision as "qualifying and fettering the parental power"[169] by preventing the father from exercising his unilateral judgment about his children's education:

> Whatever, therefore, may be the father's judgment under any altered circumstances of these children, as to the mode in which they ought to be educated, according to the provisions of this agreement he is bound not to act upon that judgment for the benefit of the children, unless his wife consents. That is a provision which, in my opinion, is repugnant entirely to his parental duty.[170]

Because the separation agreement in Vansittart included a custody provision by which, in the eyes of the court, a father had "contracted" away his power, the entire agreement was void and unenforceable.

---

[166] *See id.* Mrs. Durant subsequently succeeded in obtaining an ecclesiastical divorce. The Ecclesiastical court commended Mrs. Durant for first seeking to enforce the deed of separation, finding that "it was natural and not improper that she should try that method rather than proclaim the misconduct of the father of her children by a detailed disclosure of it in such a proceeding as the present." Durant v. Durant, All Eng. Rep. 459 (Court of Arches 1825).

[167] *See, e.g.,* Westmeath v. Westmeath, 37 Eng. Rep. 797 (Ch. 1821) (involving legal instrument providing that the wife had agreed to live with the husband "upon the express condition, that in case it should unfortunately happen, that by a renewal of such disputes and differences as had nearly caused [a] separation, the [wife] should find herself compelled to cease to cohabit with [her husband,]" the husband "covenanted to permit their daughter and such other child or children as they might have between them, to be and reside with their mother the defendant"); State v. Smith, 6 Me. 462 (1830).

[168] *See* Vansittart v. Vansittart, 44 Eng. Rep. 984 (Ch. 1858) (finding that in assessing whether the separation deed violated public policy, "for this purpose, it is quite unnecessary to go further than to that portion of the agreement which relates to the children.").

[169] Vansittart, 44 Eng. Rep. at 988.

[170] Id.

2. American Judicial Responses to Separation Agreements Allocating Custody

The American nineteenth-century case law on separation deeds transferring custody to the wife is sparser and more conflicted, perhaps because couples in the United States could more easily obtain a divorce, in which event the court would address the issue of custody as part of the divorce proceedings. One of the earliest American cases to address the matter of custody provisions in separation deeds, *State v. Smith*, seems more tolerant of such an agreement than both the English courts and later American courts. In *Smith*, the Supreme Court of Maine was asked to enforce precisely the sort of agreement that courts were typically most resistant to - an agreement providing ex ante that a wife could exit her marriage, and retain her children's custody, if her husband should mistreat her.[171] It was this sort of agreement, as Lord Eldon had pointed out in England, that undermined marital hierarchy by empowering wives to exit from marriage at will. The *Smith* court departed from Eldon's approach in such cases by refusing to order the children's custody delivered to their father. In so doing, the court went so far as to note that "the decision of the cause might, perhaps, be placed on the voluntary transfer by the father of all his authority over these children to the wife."[172] However, the court in *Smith* ultimately declined to rest its decision on the custody agreement. It preferred, instead, to assert the right of the court faced with a writ of habeas corpus seeking return of an infant to determine whether returning to the father would be "for the real, permanent interests of the infant."[173] Thus, even the one case that is more favorable toward separation agreements regarding custody than any other decision of the era did not, in the end, enforce the contract.

The leading American case on separation deeds allocating custody—and on child custody more generally—was the *Mercein* case, which was heard in a number of New York courts from 1839 to 1844, and eventually made its way to the United States Supreme Court. *Mercein* involved a series of writs of habeas corpus by John Barry, who sought for years to reclaim custody of his daughter from his separated wife, who had moved in with her father. Barry initially lost in the New York Court of Common Pleas, which decided to leave custody with the mother; won on appeal in the New York Supreme Court; and then, in 1840, was reversed again by the Court for the Correction of Errors, with the result that the child stayed with her mother. Barry then brought another series of cases in 1842, where he again won in the New York Supreme Court in 1842, but was again reversed, and, in 1847, his appeal to the United States Supreme Court denied for lack of jurisdiction. The case involved so many reversals that it could be, and was, cited for just about any proposition related to child custody and fathers' rights, and as a

[171] *See* State v. Smith, 6 Me. 462 (1830) (involving agreement between husband and trustee providing that, if the wife should, "in consequence of any ill treatment" by her husband, "be rendered unhappy and unwilling to cohabit with him," then "she may live separately at her own pleasure, and shall be at liberty to take the children under her own control and custody.").
[172] Id. at 466.
[173] Id. at 468 (citing United States v. Green, 3 Mason 482 (Justice Story) (finding that court asked to order custody of 10-year-old girl delivered from grandfather to father should exercise its discretion in determining whether such a return was in the child's interests)).

result was the most heavily cited child custody dispute in nineteenth-century American case law.[174]

One proposition for which *Mercein* was cited repeatedly, in both the literature on separation deeds and the literature on adoption agreements,[175] was that contracts allocating parental rights were void and unenforceable. Even those courts that decided *Mercein* in favor of the mother, such as the Court for the Correction of Errors, did not specifically enforce the separation agreement giving her custody. Instead, citing the case law on contractual transfers of custody to third parties, the court found that the husband's agreement to relinquish custody to his wife "authorize[d] the court upon habeas corpus, to refuse to take the child from her."[176] According to every court to decide the matter, the court had discretion to refuse custody to the father in the name of the child's welfare. But no court involved in *Mercein* enforced the contract by which the father agreed to relinquish custody to his wife.

It was the New York Supreme Court's opinions in *Mercein*, however, in its (twice overturned) decisions awarding custody to the father, that most resoundingly rejected the enforcement of a separation deed by which a father relinquished his custodial rights. The New York court's rejection of separation deeds allocating custody was closely linked to the court's insistence on the paramount right of fathers to their children's custody. When the case first came up to the New York Supreme Court, Justice Bronson, writing for the court, agreed with all other courts involved in *Mercein* that judges could exercise discretion in responding to a writ of habeas corpus calling for delivery of a child: When a father tries to assert his right to his child by habeas corpus, "the court exercises a discretion, having regard to the welfare of the children, and may leave them in the custody of the mother or some other person, in preference to the claims of the father."[177] But Bronson differed from the other New York courts to address the matter by emphasizing that, in exercising its discretion, a court must start with the premise that "the father has a paramount right to . . . custody, which no court is at liberty to disregard."[178] The lower courts, in leaving custody with the separated mother, had, in Bronson's view, insufficiently respected the father's paramount right.

When Bronson, in the first iteration of *Mercein*, addressed the contract by which the father agreed to relinquish, and to transfer to his wife, his paramount right to custody, he found the agreement void on several grounds. These included that this was "a covenant between husband and wife, who are not competent to contract with each other," as well as an agreement for a future separation, which courts had thus far refused to

---

[174] Hartog at 210-12.

[175] *See, e.g.,* State ex rel. Jewett v. Barrett and Wife (N.H. Sup. Ct. 1863) (rejecting the rule of *Mercein* in case involving written agreement by which father gave custody to aunt and uncle).

[176] Mercein v. The People ex relatione Barry, 25 Wend. 64, 97 (NY Court for the Correction of Errors 1840) (Chancellor). See also id. at 94 (asserting that, even apart from the agreement, the court was "authorized to exercise a discretion, and that the father was not entitled to demand a delivery ofthe child to him, upon habeas corpus, as an absolute right"); id. at 101 (finding that agreement "was in equity a cession by him to her of custody," but that, at any rate, "laying this agreement out of the question," the court was empowered to assess the child's welfare in determining whether to order the child delivered to her father upon a writ of habeas corpus) (Senator Paige).

[177] The People ex relatione Barry, 25 Wend. 64, 73 (NY S Ct 1839) (Justice Bronson).

[178] Id.

enforce. Bronson further explained his rejection of the custody agreement by expressing his distaste for separation deeds more generally: "It is well worthy of consideration, whether all agreements based on the voluntary separation of husband and wife, are not contrary to law and absolutely void."[179]

When the case came up before the Supreme Court of New York for a second time, the lower courts had determined that the custody agreement was not part of an agreement for future separation, forcing the court to address the enforceability of a custody provision in an agreement for a present separation. Justice Bronson, in a terse concurring opinion, reiterated his holding that "the claims of the father are superior to those of the mother,"[180] using sarcasm to convey the extent to which enforcement of a contract transferring custody to the mother would improperly reverse the marital hierarchy:

> It is possible that our laws relating to the rights and duties of husband and wife have not kept pace with the progress of civilization. It may be best that the wife should be declared head of the family, and that she should be at liberty to desert her husband at pleasure and take the children of the marriage with her. But I will not inquire what the law ought to be.[181]

Writing for the court, Justice Cowen agreed with Bronson that the precedent enforcing separation deeds regarding property did not mandate enforcement of separation deeds regarding custody, and elaborated at length on why this was so. He began by expressing disapproval of the trend toward enforcing separation deeds, noting that "[t]he courts do not seem to have foreseen that, in doing so much, they empowered the parties to be their own judges in a matter which may, in the end, vitally affect the interests of society." But Cowen then firmly distinguished agreements concerning maintenance, which could be enforced, from those concerning children's custody, which could not.[182]

Cowen's opinion in *Mercein* gives several reasons for distinguishing separation deeds allocating property from those allocating custody. He opens with an anti-commodification rationale:

> If the husband has a right to transfer the marriage bed to his wife, I deny that he has, therefore, the right still farther to violate his duty by selling his children, with or without it. These he holds under the duty of a personal trust, inalienable to another who is *suijuris; a fortiori* to his wife, with whom he can make to contract whatever.[183]

[179] Id. at 76.
[180] The People ex re. Barry v. Mercein, 3 Hill 399 (1842).
[181] The People ex re. Barry v. Mercein, 3 Hill 399 (1842).
[182] Id. ("[T]he doctrine of separate maintenance cannot be made to bear on the agreement in question.").
[183] 3 Hill 399 (Justice Cowan).

While the child in question was not exchanged for property, Cowen, like others to make this argument, characterizes the prospect that "a husband may contract away the custody of his children" as akin to permitting him to "sell" them.[184]

In explaining why a separation deed regarding custody should be distinguished from case law permitting fathers to transfer custody to third parties under the law of apprenticeship, Cowen frames precedent such as *M'Dowle* as involving "a narrow exception, the principle of which should never be extended to any other case." To support this assertion, Cowen makes the familiar rhetorical move of distinguishing the enlightened modern law that forbids "contract[ing] away" one's children from the barbaric ancient law under which children could, in fact, be bought and sold by their fathers: "Those countries in which the father has a general power to dispose of his children, have always been considered barbarous."[185] Thus, in an ironic twist, Cowen holds up the barbarism of the father's absolute authority in ancient times to argue for respecting the father's continued paramount right to custody even where the father had agreed by contract to relinquish that right.

When Cowen then moves on to assess the child's interests, he manifests a further ground for his resistance to separation agreements regarding custody: the need to shore up marriage and the marital hierarchy. After dispensing of the "alleged bargain" between Barry and his wife, Cowen addresses "the single point" on which the case was to be resolved, namely, whether, "assuming that the wife resolves to continue in her state of separation, a due regard to the welfare of the child will warrant an order for its delivery" to the father.[186] Under this framing, the case came down to whether it was ever in a child's interests to live with a mother who has separated from her husband without judicial sanction.

The court's answer here was no—that a court assessing a child's interests could not, absent egregious circumstances, award custody to a separated wife—because to do so would undermine both marriage and the marital hierarchy. Echoing Lord Eldon in *St. John v. St. John*, Justice Cowen notes that this was "a mother who had withdrawn from her husband and bade him defiance," rejecting his repeated entreaties that she return. The hope is that, if custody of her child is awarded to her husband, the wife will follow: "if his wife's better feelings should revive and she were to follow after him and his child, he would no doubt joyfully receive her at any time."[187]

Should mothers be awarded custody after leaving their husband's homes, this would make it too easy for wives to leave their husbands' control: "The general allegation

---

[184] The distinction between children and property was affirmed by the United States Supreme Court, although the Court did not address the enforceability of a contract transferring custody. According to Justice Taney, the Supreme Court lacked jurisdiction over the case because it could not be characterized as a controversy involving a sum of money:

> In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute. And it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

Barry v. Mercein, 46 U.S. 103, 120 (U.S. 1847).

[185] Id.

[186] Id.

[187] Id.

that a daughter may be well in the hands of a mother who chooses to leave her husband, would, if allowed, work an entire subversion of his right."[188] This was in part because the father must be allowed to train up his daughter to serve and obey him: "it is by no means unimportant that he has a right to train up this child as he has his other daughters, with dispositions to serve him affectionately in the business of his household."[189] But at stake here is not just this father's control over this child, but the father's control, more generally, over the marital family. Should a court allow a wife with "a morbid excuse for desertion"[190] to raise her child after leaving her husband's roof, the marital hierarchy would dissolve:

> The claim of the husband has throughout been allowed to be paramount by every body except the wife. It has not been denied that he is the legal head of the whole family, wife and children inclusive; and I have heard it urged from no quarter that he should be brought under subjection to a household democracy. All will agree, I apprehend, that such a measure would extend the right of suffrage quite too far. Yet I do not see how this defence can be sustained unless we are prepared to go that length.
>
> . . . . Marriage is indeed regarded by our law as a mere civil contract; but not such a one as is capable of repudiation by a majority of the family, or even the assent of the whole. Bating some slight amelioration, its obligations should be maintained in all their ancient rigor.[191]

In the face of a reality in which spouses separated without legal sanction, courts could not force wives to stay in their husbands' homes. But by refusing to enforce contracts transferring custody to the mother, courts could pressure them to stay in the marital relationship, and to respect the marital hierarchy.[192]

3. Separation Agreements, The Best Interests Assessment, and Upholding the Marital Family

The early judicial resistance toward enforcing separation deeds allocating custody to the mother thus seems to have been driven in part by a desire to keep families within a traditional marital paradigm, even as that paradigm was beginning to change. Courts

---

[188] Id.
[189] Id.
[190] Id.
[191] Id.
[192] The judicial desire to police the marital family in these cases was not directed only at women. Thus, in the 1846 case of Cook v. Cook, the New York Court of Chancery, in refusing to enforce a custody agreement made by divorcing spouses, held that enforcement of such agreements would enable collusion in furnishing causes for divorce. Cook v. Cook, 1 Barb. Ch. 639 (NY Ct. Ch. 1846) ("[I]t would be a dangerous practice to allow parties to agree between themselves as to the custody of their children, in such a case, previous to a divorce. It would lead to collusion, in furnishing causes for divorce, if bargains of this kind could be made beforehand which the court was bound absolutely to sanction and carry into effect.").

sought to keep wives in the marital household, and worried about the effect on marriage if wives believed that they could raise children outside of the marital home. The concern about keeping mothers in the marital home was also driven by a desire to ensure that the next generation would be raised in an environment that taught respect for the marital union and marital hierarchy. The judicial concern about raising children to respect marital norms, as well as gender norms more generally, was especially keen when it came to girls.

The judicial concern with maintaining the marital paradigm is visible in a landmark English case about separation deeds allocating custody, *In re Besant*.[193] Besant was the first major decision to address the enforceability of a separation agreement concerning custody in the wake of the 1873 Custody of Infants Act, which—to counter the refusal of English courts to enforce separation deeds allocating custody—specifically provided that such agreements could be enforced, if a court found the agreement consistent with the child's best interests.[194] The Besant case vividly demonstrates the extent to which such agreements are unable to provide stability or autonomy for families when their enforceability hinges on a judicial assessment of children's interests. When feminist activist Annie Besant decided to separate from her clergyman husband after determining that she was an atheist and could not comply with his requirement that she take the sacraments, she took advantage of the 1873 statute to draw up a separation agreement giving her custody of their then three-year-old daughter Mabel. Five years later, after Annie was arrested for distributing a pamphlet on methods of birth control, her husband took the opportunity to seek the return of his daughter.

The court's reaction to this mother who had dared to teach other women how to control their child-bearing manifests the extent to which courts used the power of assessing children's interests to promote a traditional model of marital behavior and marital hierarchy.[195] (A further reason for returning Mabel to her father was that Annie Besant was an atheist, which the court found similarly damaging to her child, even as it professed to have no opinion on "the religious convictions of others, or even as to their non-religious convictions".)[196] Despite the statute empowering courts to enforce agreements giving custody to separated wives, the Besant court expresses resistance to this "very great alteration in the previous law," and opens its assessment of the child's interests by noting with disapproval that this wife has decided to live separately from her respectable husband:

> [L]et us consider the relative position of the parties. On the one hand we have an English clergyman, the vicar of a parish in Lincolnshire; and on the other hand, we have his wife living separate from him.

---

[193] 11 Eng. Rep. 508 (Ch. 1879).
[194] *See* Custody of Infants Act, 1873, 36 & 37 Vict., c. 12 (Eng.).
[195] Danaya Wright sees the *Besant* case as indicating a trend toward greater deference toward fathers' rights in England of the 1870s and 1880s. As Wright notes, courts during this period sought to ensure that custody was awarded only to "'deserving' mothers . . . those who had fully adopted traditional norms and values. "See Danaya C. Wright, *The Crisis of Child Custody*: *A History of the Birth of Family Law*, 11 COLUM. J. GENDER & L. 175, 257 (2002).
[196] Besant, 11 Eng. Rep. at 513.

The *Besant* court found that it could not be in Mabel's interests to be raised by a mother who had violated gender norms to the extent of advocating birth control, because she would be shunned by any proper member of her own sex:

> [The] effect on a woman's position of this course of conduct must . . . cut her off, practically, not merely from the sympathy of, but from social intercourse with, the great majority of her sex.[197]

In refusing to enforce the separation deed giving custody to the mother, the Besant court was explicit about its concern that Mabel, a member of the next generation of women, be raised to respect the marital norms that Besant had violated. As one of the justices put it, the distribution of birth-control pamphlets "is so repugnant, so abhorrent to the feelings of the great majority of decent Englishmen and Englishwomen" that the court could not allow this "young girl" to "run the risk of being brought up, or growing up, in opposition to the views of mankind as to what is moral, what is decent, and what is womanly or proper." And if the child were allowed to remain with her mother, she might herself "grow up to be the writer and publisher of such works as those now before us."[198]

Besant demonstrates the extent to which the court's power to assess children's interests when enforcing a parenthood contract undermines the potential of such agreements to provide families with certainty, stability, and freedom from state intervention. The case also demonstrates the extent to which the judicial refusal to enforce parenthood contracts works to police families and family form.

As long as the best interests analysis is at play, courts can reject a parenthood contract when they disapprove of the approach to family life that the contract was intended to protect. Annie Besant lost custody of the daughter she had raised for eight years, despite a contract protecting her custodial right, because the English courts disapproved of Besant's then-idiosyncratic views about family life. Besant not only lived as a separated woman, but encouraged other women to exercise similar independence in forming their families by teaching them to take control over how many children they bore. The *Besant* court's refusal to enforce the custody contract protecting Besant's right to raise her daughter meant that Besant would not be able to raise her daughter to have similarly independent views. Given the prominence of the case, *In re Besant* would also ensure that other mothers would think twice before leaving their husbands, and before advocating or exemplifying unorthodox approaches to child-bearing or to family life.

III. IMPLICATIONS/PROPOSAL

IV. CONCLUSION

[197] Id.
[198] Id. at [].