Spitz, Contracts, Section 3 (reading for August 20, 2019)

Dear students: welcome to UNM and to Contracts! Please read the edited case + underlying contract (both below) and bring a printed copy of the readings and your notes to class (ie, so you won't need your computers on the first day). Please note that we will be focused on the Contract Law issues only, and (hint) the assigned Casebook readings will help you identify them. Don't hesitate to email me with any questions: laura.spitz@law.unm.edu.

109 N.J. 396
Supreme Court of New Jersey.

In the Matter of BABY M, a pseudonym for an actual person. [***EDITED, footnotes omitted**]

Argued Sept. 14, 1987.

Decided Feb. 3, 1988.

****1234 *410** The opinion of the Court was delivered by

WILENTZ, C.J.

In this matter the Court is asked to determine the validity of a contract that purports to provide a new way of bringing children into a family. For a fee of $10,000, a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry it to term, and after its birth surrender it to the natural father and his wife. The intent of the contract is that the child's natural mother will thereafter be forever separated from her child. The wife is to adopt the child, and she and the natural father are to be ***411** regarded as its parents for all purposes. The contract providing for this is called a "surrogacy contract," the natural mother inappropriately called the "surrogate mother."

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child. We remand the issue ****1235** of the natural mother's visitation rights to the trial court, since that issue was not reached below and the record before us is not sufficient to permit us to decide it *de novo.*

We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child. Moreover, our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts. Under current law, however, the surrogacy agreement before us is illegal and invalid.

I.

FACTS

In February 1985, William Stern and Mary Beth Whitehead entered into a surrogacy contract. It recited that Stern's wife, Elizabeth, was infertile, that they wanted a child, and that Mrs. Whitehead was willing to provide that child as the mother with Mr. Stern as the father.

***412** The contract provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child. Mrs. Whitehead's husband, Richard,[1] was also a party to the contract; Mrs. Stern was not. Mr. Whitehead promised to do all acts necessary to rebut the presumption of paternity under the Parentage Act. *N.J.S.A.* 9:17–43a(1), –44a. Although Mrs. Stern was not a party to the surrogacy agreement, the contract gave her sole custody of the child in the event of Mr. Stern's death. Mrs. Stern's status as a nonparty to the surrogate parenting agreement presumably was to avoid the application of the baby-selling statute to this arrangement. *N.J.S.A.* 9:3–54.

Mr. Stern, on his part, agreed to attempt the

insemination and to pay Mrs. Whitehead $10,000 after the child's birth, on its delivery to him. In a separate contract, Mr. Stern agreed to pay $7,500 to the Infertility Center of New York ("ICNY"). The Center's advertising campaigns solicit surrogate mothers and encourage infertile couples to consider surrogacy. ICNY arranged for the surrogacy contract by bringing the parties together, explaining the process to them, furnishing the contractual form,[2] and providing legal counsel.

The history of the parties' involvement in this arrangement suggests their good faith. William and Elizabeth Stern were ***413** married in July 1974, having met at the University of Michigan, where both were Ph.D. candidates. Due to financial considerations and Mrs. Stern's pursuit of a medical degree and residency, they decided to defer starting a family until 1981. Before then, however, Mrs. Stern learned that she might have multiple sclerosis and that the disease in some cases renders pregnancy a serious health risk. Her anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal. Nonetheless that anxiety was evidently quite real, Mrs. Stern fearing that pregnancy might precipitate blindness, paraplegia, or other forms of debilitation. Based on the perceived risk, the Sterns decided to forego having their own children. The decision had special significance for Mr. Stern. Most of his family had been destroyed in the Holocaust. As the family's only survivor, he very much wanted to continue his bloodline.

****1236** Initially the Sterns considered adoption, but were discouraged by the substantial delay apparently involved and by the potential problem they saw arising from their age and their differing religious backgrounds. They were most eager for some other means to start a family.

The paths of Mrs. Whitehead and the Sterns to surrogacy were similar. Both responded to advertising by ICNY. The Sterns' response, following their inquiries into adoption, was the result of their long-standing decision to have a child. Mrs. Whitehead's response apparently resulted from her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the "gift of life"); she also wanted the $10,000 to help her family.

Both parties, undoubtedly because of their own self-interest, were less sensitive to the implications of the transaction than they might otherwise have been. Mrs. Whitehead, for instance, appears not to have been concerned about whether the Sterns would make good parents for her child; the Sterns, on their part, while conscious of the obvious possibility that surrendering ***414** the child might cause grief to Mrs. Whitehead, overcame their qualms because of their desire for a child. At any rate, both the Sterns and Mrs. Whitehead were committed to the arrangement; both thought it right and constructive.

Mrs. Whitehead had reached her decision concerning surrogacy before the Sterns, and had actually been involved as a potential surrogate mother with another couple. After numerous unsuccessful artificial inseminations, that effort was abandoned. Thereafter, the Sterns learned of the Infertility Center, the possibilities of surrogacy, and of Mary Beth Whitehead. The two couples met to discuss the surrogacy arrangement and decided to go forward. On February 6, 1985, Mr. Stern and Mr. and Mrs. Whitehead executed the surrogate parenting agreement. After several artificial inseminations over a period of months, Mrs. Whitehead became pregnant. The pregnancy was uneventful and on March 27, 1986, Baby M was born.

Not wishing anyone at the hospital to be aware of the surrogacy arrangement, Mr. and Mrs. Whitehead appeared to all as the proud parents of a healthy female child. Her birth certificate indicated her name to be Sara Elizabeth Whitehead and her father to be Richard Whitehead. In accordance with Mrs. Whitehead's request, the Sterns visited the hospital unobtrusively to see the newborn child.

Mrs. Whitehead realized, almost from the moment of birth, that she could not part with this child. She had felt a bond with it even during pregnancy. Some indication of the attachment was conveyed to the Sterns at the hospital when they told Mrs. Whitehead what they were going to name the baby. She apparently broke into tears and indicated that she did not know if she could give up the child. She talked about how the baby looked like her other daughter, and made it clear that she was experiencing great difficulty with the decision.

Nonetheless, Mrs. Whitehead was, for the moment, true to her word. Despite powerful inclinations to the contrary, she ***415** turned her child over to the Sterns on March 30 at the Whiteheads' home.

The Sterns were thrilled with their new child. They had planned extensively for its arrival, far beyond the practical furnishing of a room for her. It was a time of joyful celebration—not just for them but for their friends as well. The Sterns looked forward to raising their daughter, whom they named Melissa. While aware by then that Mrs. Whitehead was undergoing an emotional crisis, they were as yet not cognizant of the depth of that crisis and its implications for their newly-enlarged family.

Later in the evening of March 30, Mrs. Whitehead became deeply disturbed, disconsolate, stricken with unbearable sadness. She had to have her child. She could not eat, sleep, or concentrate on anything other than her need for her baby. The next day she went to the Sterns' home and told them how much she was suffering.

The depth of Mrs. Whitehead's despair surprised and frightened the Sterns. She told them that she could not live without ****1237** her baby, that she must have her, even if

only for one week, that thereafter she would surrender her child. The Sterns, concerned that Mrs. Whitehead might indeed commit suicide, not wanting under any circumstances to risk that, and in any event believing that Mrs. Whitehead would keep her word, turned the child over to her. It was not until four months later, after a series of attempts to regain possession of the child, that Melissa was returned to the Sterns, having been forcibly removed from the home where she was then living with Mr. and Mrs. Whitehead, the home in Florida owned by Mary Beth Whitehead's parents.

The struggle over Baby M began when it became apparent that Mrs. Whitehead could not return the child to Mr. Stern. Due to Mrs. Whitehead's refusal to relinquish the baby, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract. He alleged, accurately, that Mrs. Whitehead had not ***416** only refused to comply with the surrogacy contract but had threatened to flee from New Jersey with the child in order to avoid even the possibility of his obtaining custody. The court papers asserted that if Mrs. Whitehead were to be given notice of the application for an order requiring her to relinquish custody, she would, prior to the hearing, leave the state with the baby. And that is precisely what she did. After the order was entered, *ex parte*, the process server, aided by the police, in the presence of the Sterns, entered Mrs. Whitehead's home to execute the order. Mr. Whitehead fled with the child, who had been handed to him through a window while those who came to enforce the order were thrown off balance by a dispute over the child's current name.

The Whiteheads immediately fled to Florida with Baby M. They stayed initially with Mrs. Whitehead's parents, where one of Mrs. Whitehead's children had been living. For the next three months, the Whiteheads and Melissa lived at roughly twenty different hotels, motels, and homes in order to avoid apprehension. From time to time Mrs. Whitehead would call Mr. Stern to discuss the matter; the conversations, recorded by Mr. Stern on advice of counsel, show an escalating dispute about rights, morality, and power, accompanied by threats of Mrs. Whitehead to kill herself, to kill the child, and falsely to accuse Mr. Stern of sexually molesting Mrs. Whitehead's other daughter.

Eventually the Sterns discovered where the Whiteheads were staying, commenced supplementary proceedings in Florida, and obtained an order requiring the Whiteheads to turn over the child. Police in Florida enforced the order, forcibly removing the child from her grandparents' home. She was soon thereafter brought to New Jersey and turned over to the Sterns. The prior order of the court, issued *ex parte*, awarding custody of the child to the Sterns *pendente lite*, was reaffirmed by the trial court after consideration of the certified representations of the parties (both represented by counsel) concerning the unusual sequence of events that had unfolded. Pending final ***417** judgment, Mrs. Whitehead was awarded limited visitation with Baby M.

The Sterns' complaint, in addition to seeking possession and ultimately custody of the child, sought enforcement of the surrogacy contract. Pursuant to the contract, it asked that the child be permanently placed in their custody, that Mrs. Whitehead's parental rights be terminated, and that Mrs. Stern be allowed to adopt the child, *i.e.*, that, for all purposes, Melissa become the Sterns' child.

The trial took thirty-two days over a period of more than two months. It included numerous interlocutory appeals and attempted interlocutory appeals. There were twenty-three witnesses to the facts recited above and fifteen expert witnesses, eleven testifying on the issue of custody and four on the subject of Mrs. Stern's multiple sclerosis; the bulk of the testimony was devoted to determining the parenting arrangement most compatible with the child's best interests. Soon after the conclusion of the trial, the trial court announced its opinion from the bench. 217 *N.J.Super.* 313, 525 *A.*2d 1128 (1987). It held that the surrogacy contract was valid; ordered that Mrs. Whitehead's parental rights be terminated ****1238** and that sole custody of the child be granted to Mr. Stern; and, after hearing brief testimony from Mrs. Stern, immediately entered an order allowing the adoption of Melissa by Mrs. Stern, all in accordance with the surrogacy contract. Pending the outcome of the appeal, we granted a continuation of visitation to Mrs. Whitehead, although slightly more limited than the visitation allowed during the trial.

Although clearly expressing its view that the surrogacy contract was valid, the trial court devoted the major portion of its opinion to the question of the baby's best interests. The inconsistency is apparent. The surrogacy contract calls for the surrender of the child to the Sterns, permanent and sole custody in the Sterns, and termination of Mrs. Whitehead's parental rights, all without qualification, all regardless of any evaluation ***418** of the best interests of the child. As a matter of fact the contract recites (even before the child was conceived) that it is in the best interests of the child to be placed with Mr. Stern. In effect, the trial court awarded custody to Mr. Stern, the natural father, based on the same kind of evidence and analysis as might be expected had no surrogacy contract existed. Its rationalization, however, was that while the surrogacy contract was valid, specific performance would not be granted unless that remedy was in the best interests of the child. The factual issues confronted and decided by the trial court were the same as if Mr. Stern and Mrs. Whitehead had had the child out of wedlock, intended or unintended, and then disagreed about custody. The trial court's awareness of the irrelevance of the contract in the court's determination of custody is suggested by its remark that beyond the question of the child's best interests, "[a]ll other concerns raised by counsel constitute commentary." 217 *N.J.Super.* at 323, 525 *A.*2d 1128.

On the question of best interests—and we agree, but for

different reasons, that custody was the critical issue—the court's analysis of the testimony was perceptive, demonstrating both its understanding of the case and its considerable experience in these matters. We agree substantially with both its analysis and conclusions on the matter of custody.

The court's review and analysis of the surrogacy contract, however, is not at all in accord with ours. The trial court concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money in connection with adoptions, do not apply to surrogacy contracts. *Id.* at 372–73, 525 *A.*2d 1128. It reasoned that because the Legislature did not have surrogacy contracts in mind when it passed those laws, those laws were therefore irrelevant. *Ibid.* Thus, assuming it was writing on a clean slate, the trial court analyzed the interests involved and the power of the court to accommodate them. It then held that surrogacy contracts are valid and should be enforced, ***419** *id.* at 388, 525 *A.*2d 1128, and furthermore that Mr. Stern's rights under the surrogacy contract were constitutionally protected. *Id.* at 385–88, 525 *A.*2d 1128.

Mrs. Whitehead appealed. This Court granted direct certification. 107 *N.J.* 140, 526 *A.*2d 203 (1987). The briefs of the parties on appeal were joined by numerous briefs filed by *amici* expressing various interests and views on surrogacy and on this case. We have found many of them helpful in resolving the issues before us.

Mrs. Whitehead contends that the surrogacy contract, for a variety of reasons, is invalid. She contends that it conflicts with public policy since it guarantees that the child will not have the nurturing of both natural parents—presumably New Jersey's goal for families. She further argues that it deprives the mother of her constitutional right to the companionship of her child, and that it conflicts with statutes concerning termination of parental rights and adoption. With the contract thus void, Mrs. Whitehead claims primary custody (with visitation rights in Mr. Stern) both on a best interests basis (stressing the "tender years" doctrine) as well as on the policy basis of discouraging surrogacy contracts. She maintains that even if custody would ordinarily go to Mr. Stern, here it should be ****1239** awarded to Mrs. Whitehead to deter future surrogacy arrangements.

In a brief filed after oral argument, counsel for Mrs. Whitehead suggests that the standard for determining best interests where the infant resulted from a surrogacy contract is that the child should be placed with the mother absent a showing of unfitness. All parties agree that no expert testified that Mary Beth Whitehead was unfit as a mother; the trial court expressly found that she was *not* "unfit," that, on the contrary, "she is a good mother for and to her older children," 217 *N.J.Super.* at 397, 525 *A.*2d 1128; and no one now claims anything to the contrary.

One of the repeated themes put forth by Mrs. Whitehead is that the court's initial *ex parte* order granting custody to the Sterns during the trial was a substantial factor in the ultimate "best interests" determination. That initial order, claimed to be erroneous by Mrs. Whitehead, not only established Melissa as part of the Stern family, but brought enormous pressure on Mrs. Whitehead. The order brought the weight of the state behind the Sterns' attempt, ultimately successful, to gain possession of the child. The resulting pressure, Mrs. Whitehead contends, caused her to act in ways that were atypical of her ordinary behavior when not under stress, and to act in ways that were thought to be inimical to the child's best interests in that they demonstrated a failure of character, maturity, and consistency. She claims that any mother who truly loved her child might so respond and that it is doubly unfair to judge her on the basis of her reaction to an extreme situation rarely faced by any mother, where that situation was itself caused by an erroneous order of the court. Therefore, according to Mrs. Whitehead, the erroneous *ex parte* order precipitated a series of events that proved instrumental in the final result.[3]

The Sterns claim that the surrogacy contract is valid and should be enforced, largely for the reasons given by the trial court. They claim a constitutional right of privacy, which includes the right of procreation, and the right of consenting adults to deal with matters of reproduction as they see fit. As for the child's best interests, their position is factual: given all of the circumstances, the child is better off in their custody with no residual parental rights reserved for Mrs. Whitehead.

[1] Of considerable interest in this clash of views is the position of the child's guardian *ad litem*, wisely appointed by the court at the outset of the litigation. As the child's representative, her role in the litigation, as she viewed it, was solely to protect the child's best interests. She therefore took no position on the validity of the surrogacy contract, and instead ***421** devoted her energies to obtaining expert testimony uninfluenced by any interest other than the child's. We agree with the guardian's perception of her role in this litigation. She appropriately refrained from taking any position that might have appeared to compromise her role as the child's advocate. She first took the position, based on her experts' testimony, that the Sterns should have primary custody, and that while Mrs. Whitehead's parental rights should not be terminated, no visitation should be allowed for five years. As a result of subsequent developments, mentioned *infra*, her view has changed. She now recommends that no visitation be allowed at least until Baby M reaches maturity.

Although some of the experts' opinions touched on visitation, the major issue they addressed was whether custody should be reposed in the Sterns or in the Whiteheads. The trial court, consistent in this respect with

its view that the surrogacy contract was valid, did not deal at all with the question of visitation. Having concluded that the best interests of the child called for custody in the Sterns, the trial court enforced the operative provisions of the surrogacy contract, terminated Mrs. Whitehead's parental rights, and granted an adoption to Mrs. Stern. Explicit in the ****1240** ruling was the conclusion that the best interests determination removed whatever impediment might have existed in enforcing the surrogacy contract. This Court, therefore, is without guidance from the trial court on the visitation issue, an issue of considerable importance in any event, and especially important in view of our determination that the surrogacy contract is invalid.

II.

INVALIDITY AND UNENFORCEABILITY OF SURROGACY CONTRACT

We have concluded that this surrogacy contract is invalid. Our conclusion has two bases: direct conflict with existing ***422** statutes and conflict with the public policies of this State, as expressed in its statutory and decisional law.

[2] One of the surrogacy contract's basic purposes, to achieve the adoption of a child through private placement, though permitted in New Jersey "is very much disfavored." *Sees v. Baber*, 74 *N.J.* 201, 217, 377 *A.*2d 628 (1977). Its use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—is illegal and perhaps criminal. *N.J.S.A.* 9:3–54. In addition to the inducement of money, there is the coercion of contract: the natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple. Such an agreement is totally unenforceable in private placement adoption. *Sees*, 74 *N.J.* at 212–14, 377 *A.*2d 628. Even where the adoption is through an approved agency, the formal agreement to surrender occurs only *after* birth (as we read *N.J.S.A.* 9:2–16 and –17, and similar statutes), and then, by regulation, only after the birth mother has been offered counseling. *N.J.A.C.* 10:121A–5.4(c). Integral to these invalid provisions of the surrogacy contract is the related agreement, equally invalid, on the part of the natural mother to cooperate with, and not to contest, proceedings to terminate her parental rights, as well as her contractual concession, in aid of the adoption, that the child's best interests would be served by awarding custody to the natural father and his wife—all of this before she has even conceived, and, in some cases, before she has the slightest idea of what the natural father and adoptive mother are like.

The foregoing provisions not only directly conflict with New Jersey statutes, but also offend long-established State policies. These critical terms, which are at the heart of the contract, are invalid and unenforceable; the conclusion therefore follows, without more, that the entire contract is unenforceable.

***423 A. Conflict with Statutory Provisions**

The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

[3] (1) Our law prohibits paying or accepting money in connection with any placement of a child for adoption. *N.J.S.A.* 9:3–54a. Violation is a high misdemeanor. *N.J.S.A.* 9:3–54c. Excepted are fees of an approved agency (which must be a non-profit entity, *N.J.S.A.* 9:3–38a) and certain expenses in connection with childbirth. *N.J.S.A.* 9:3–54b.[4]

****1241** Considerable care was taken in this case to structure the surrogacy arrangement so as not to violate this prohibition. The arrangement was structured as follows: the adopting parent, Mrs. Stern, was not a party to the surrogacy contract; the money paid to Mrs. Whitehead was stated to be for her services—not for the adoption; the sole purpose of the contract was stated as being that "of giving a child to William Stern, its natural and biological father"; the money was purported to be "compensation for services and expenses and in no way ... a fee for termination of parental rights or a payment in exchange for consent to surrender a child for adoption"; the fee to the Infertility Center ($7,500) was stated to be for legal representation, advice, administrative work, and other "services." Nevertheless, it seems clear that the money was paid and accepted in connection with an adoption.

The Infertility Center's major role was first as a "finder" of the surrogate mother whose child was to be adopted, and second as the arranger of all proceedings that led to the adoption. Its role as adoption finder is demonstrated by the provision requiring Mr. Stern to pay another $7,500 if he uses Mary Beth Whitehead again as a surrogate, and by ICNY's agreement to "coordinate arrangements for the adoption of the child by the wife." The surrogacy agreement requires Mrs. Whitehead to surrender Baby M for the purposes of adoption. The agreement notes that Mr. *and Mrs.* Stern wanted to have a child, and provides that the child be "placed" with Mrs. Stern in the event Mr. Stern dies before the child is born. The payment of the $10,000 occurs only on surrender of custody of the child and "completion of the duties and obligations" of Mrs. Whitehead, including termination of her parental rights to facilitate adoption by Mrs. Stern. As for the contention that the Sterns are paying only for services and not for an adoption, we need note only that they would pay nothing in the event the child died before the fourth month of

pregnancy, and only $1,000 if the child were stillborn, even though the "services" had been fully rendered. Additionally, one of Mrs. Whitehead's estimated costs, to be assumed by Mr. Stern, was an "Adoption Fee," presumably for Mrs. Whitehead's incidental costs in connection with the adoption.

Mr. Stern knew he was paying for the adoption of a child; Mrs. Whitehead knew she was accepting money so that a child might be adopted; the Infertility Center knew that it was being paid for assisting in the adoption of a child. The actions of all three worked to frustrate the goals of the statute. It strains ***425** credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.

The prohibition of our statute is strong. Violation constitutes a high misdemeanor, *N.J.S.A.* 9:3–54c, a third-degree crime, *N.J.S.A.* 2C:43–1b, carrying a penalty of three to five years imprisonment. *N.J.S.A.* 2C:43–6a(3). The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. N. Baker, *Baby Selling: The Scandal of Black Market Adoption* 7 (1978). The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. *Id.* at 44. Furthermore, the adoptive parents[5] may not be fully informed of the natural parents' medical history.

****1242** Baby-selling potentially results in the exploitation of all parties involved. *Ibid.* Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child. H. Witmer, E. Herzog, E. Weinstein, & M. Sullivan, *Independent Adoptions: A Follow–Up Study* 32 (1967). The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.

[4] [5] (2) The termination of Mrs. Whitehead's parental rights, called for by the surrogacy contract and actually ordered by the court, 217 *N.J.Super.* at 399–400, 525 *A.*2d 1128, fails to comply ***426** with the stringent requirements of New Jersey law. Our law, recognizing the finality of any termination of parental rights, provides for such termination only where there has been a voluntary surrender of a child to an approved agency or to the Division of Youth and Family Services ("DYFS"), accompanied by a formal document acknowledging termination of parental rights, *N.J.S.A.* 9:2–16, –17; *N.J.S.A.* 9:3–41; *N.J.S.A.* 30:4C–23, or where there has been a showing of parental abandonment or unfitness. A termination may ordinarily take one of three forms: an action by an approved agency, an action by DYFS, or an action in connection with a private placement adoption. The three are governed by separate statutes, but the standards for termination are substantially the same, except that whereas a written surrender is effective when made to an approved agency or to DYFS, there is no provision for it in the private placement context. *See N.J.S.A.* 9:2–14; *N.J.S.A.* 30:4C–23.

N.J.S.A. 9:2–18 to –20 governs an action by an approved agency to terminate parental rights. Such an action, whether or not in conjunction with a pending adoption, may proceed on proof of written surrender, *N.J.S.A.* 9:2–16, –17, "forsaken parental obligation," or other specific grounds such as death or insanity, *N.J.S.A.* 9:2–19. Where the parent has not executed a formal consent, termination requires a showing of "forsaken parental obligation," *i.e.*, "willful and continuous neglect or failure to perform the natural and regular obligations of care and support of a child." *N.J.S.A.* 9:2–13(d). *See also N.J.S.A.* 9:3–46a, –47c.

Where DYFS is the agency seeking termination, the requirements are similarly stringent, although at first glance they do not appear to be so. DYFS can, as can any approved agency, accept a formal voluntary surrender or writing having the effect of termination and giving DYFS the right to place the child for adoption. *N.J.S.A.* 30:4C–23. Absent such formal written surrender and consent, similar to that given to approved agencies, DYFS can terminate parental rights in an ***427** action for guardianship by proving that "the best interests of such child require that he be placed under proper guardianship." *N.J.S.A.* 30:4C–20. Despite this "best interests" language, however, this Court has recently held in *New Jersey Div. of Youth & Family Servs. v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986), that in order for DYFS to terminate parental rights it must prove, by clear and convincing evidence, that "[t]he child's health and development have been or will be seriously impaired by the parental relationship," *id.* at 604, 512 *A.*2d 438, that "[t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm," *id.* at 605, 512 *A.*2d 438, that "[t]he court has considered alternatives to termination," *id.* at 608, 512 *A.*2d 438, and that "[t]he termination of parental rights will not do more harm than good," *id.* at 610, 512 *A.*2d 438. This interpretation of the statutory language requires a most substantial showing of harm to the child if the parental relationship were to continue, far exceeding anything that a "best interests" test connotes.

In order to terminate parental rights under the private placement adoption statute, there must be a finding of "intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future." *N.J.S.A.* 9:3–48c(1). This requirement is similar to that of the prior law (*i.e.*, "forsaken parental obligations," *L.*1953, *c.* 264, § 2(d)

(codified at **1243 *N.J.S.A.* 9:3–18(d) (repealed))), and to that of the law providing for termination through actions by approved agencies, *N.J.S.A.* 9:2–13(d). *See also In re Adoption by J.J.P.*, 175 *N.J.Super.* 420, 427, 419 *A.*2d 1135 (App.Div.1980) (noting that the language of the termination provision in the present statute, *N.J.S.A.* 9:3–48c(1), derives from this Court's construction of the prior statute in *In re Adoption of Children by D.*, 61 *N.J.* 89, 94–95, 293 *A.*2d 171 (1972)).

In *Sees v. Baber*, 74 *N.J.* 201, 377 *A.*2d 628 (1977) we distinguished the requirements for terminating parental rights in a private placement adoption from those required in an approved agency adoption. We stated that in an unregulated private placement, "neither consent nor voluntary surrender is singled out as a **428 statutory factor in terminating parental rights." *Id.* at 213, 377 *A.*2d 628. *Sees* established that without proof that parental obligations had been forsaken, there would be no termination in a private placement setting.

[6] As the trial court recognized, without a valid termination there can be no adoption. *In re Adoption of Children by D., supra*, 61 *N.J.* at 95, 293 *A.*2d 171. This requirement applies to all adoptions, whether they be private placements, *ibid.*, or agency adoptions, *N.J.S.A.* 9:3–46a, –47c.

[7] [8] [9] [10] Our statutes, and the cases interpreting them, leave no doubt that where there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect. *See, e.g., Sorentino v. Family & Children's Soc'y of Elizabeth*, 74 *N.J.* 313, 378 *A.*2d 18 (1977) (*Sorentino II*); *Sees v. Baber*, 74 *N.J.* 201, 377 *A.*2d 628 (1977); *Sorentino v. Family & Children's Soc'y of Elizabeth*, 72 *N.J.* 127, 367 *A.*2d 1168 (1976) (*Sorentino I*); *In re Adoption of Children by D., supra*, 61 *N.J.* 89, 293 *A.*2d 171. That showing is required in every context in which termination of parental rights is sought, be it an action by an approved agency, an action by DYFS, or a private placement adoption proceeding, even where the petitioning adoptive parent is, as here, a stepparent. While the statutes make certain procedural allowances when stepparents are involved, *N.J.S.A.* 9:3–48a(2), –48a(4), –48c(4), the substantive requirement for terminating the natural parents' rights is not relaxed one iota. *N.J.S.A.* 9:3–48c(1); *In re Adoption of Children by D., supra*, 61 *N.J.* at 94–95, 293 *A.*2d 171; *In re Adoption by J.J.P., supra*, 175 *N.J.Super.* at 426–28, 419 *A.*2d 1135; *In re N.*, 96 *N.J.Super.* 415, 423–27, 233 *A.*2d 188 (App.Div.1967). It is clear that a "best interests" determination is never sufficient to terminate parental rights; the statutory criteria must be **429 proved.[6]

[11] In this case a termination of parental rights was obtained not by proving the statutory prerequisites but by claiming the benefit of contractual provisions. From all that has been stated above, it is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental **1244 rights if it had intended to allow termination to be achieved by one short sentence in a contract.

Since the termination was invalid,[7] it follows, as noted above, that adoption of Melissa by Mrs. Stern could not properly be granted.

[12] (3) The provision in the surrogacy contract stating that Mary Beth Whitehead agrees to "surrender custody ... and terminate all parental rights" contains no clause giving her a right to rescind. It is intended to be an irrevocable consent to surrender the child for adoption—in other words, an irrevocable **430 commitment by Mrs. Whitehead to turn Baby M over to the Sterns and thereafter to allow termination of her parental rights. The trial court required a "best interests" showing as a condition to granting specific performance of the surrogacy contract. 217 *N.J.Super.* at 399–400, 525 *A.*2d 1128. Having decided the "best interests" issue in favor of the Sterns, that court's order included, among other things, specific performance of this agreement to surrender custody and terminate all parental rights.

Mrs. Whitehead, shortly after the child's birth, had attempted to revoke her consent and surrender by refusing, after the Sterns had allowed her to have the child "just for one week," to return Baby M to them. The trial court's award of specific performance therefore reflects its view that the consent to surrender the child was irrevocable. We accept the trial court's construction of the contract; indeed it appears quite clear that this was the parties' intent. Such a provision, however, making irrevocable the natural mother's consent to surrender custody of her child in a private placement adoption, clearly conflicts with New Jersey law.

Our analysis commences with the statute providing for surrender of custody to an approved agency and termination of parental rights on the suit of that agency. The two basic provisions of the statute are *N.J.S.A.* 9:2–14 and 9:2–16. The former provides explicitly that

> [e]xcept as otherwise provided by law or by order or judgment of a court of competent jurisdiction or by testamentary disposition, no surrender of the custody of a child shall be valid in this state unless made to an approved agency pursuant to the provisions of this act....

There is no exception "provided by law," and it is not clear that there could be any "order or judgment of a court of

competent jurisdiction" validating a surrender of custody as a basis for adoption when that surrender was not in conformance with the statute. Requirements for a voluntary surrender to an approved agency are set forth in *N.J.S.A.* 9:2–16. This section allows an approved agency to take a voluntary surrender of ***431** custody from the parent of a child but provides stringent requirements as a condition to its validity. The surrender must be in writing, must be in such form as is required for the recording of a deed, and, pursuant to *N.J.S.A.* 9:2–17, must

> be such as to declare that the person executing the same desires to relinquish the custody of the child, acknowledge the termination of parental rights as to such custody in favor of the approved agency, and acknowledge full understanding of the effect of such surrender as provided by this act.

If the foregoing requirements are met, the consent, the voluntary surrender of custody

> shall be valid whether or not the person giving same is a minor and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction, setting aside such surrender upon proof of fraud, duress, or misrepresentation. [*N.J.S.A.* 9:2–16.]

The importance of that irrevocability is that the surrender itself gives the agency ****1245** the power to obtain termination of parental rights—in other words, permanent separation of the parent from the child, leading in the ordinary case to an adoption. *N.J.S.A.* 9:2–18 to –20.

[13] This statutory pattern, providing for a surrender in writing and for termination of parental rights by an approved agency, is generally followed in connection with adoption proceedings and proceedings by DYFS to obtain permanent custody of a child. Our adoption statute repeats the requirements necessary to accomplish an irrevocable surrender to an approved agency in both form and substance. *N.J.S.A.* 9:3–41a. It provides that the surrender "shall be valid and binding without regard to the age of the person executing the surrender," *ibid.*; and although the word "irrevocable" is not used, that seems clearly to be the intent of the provision. The statute speaks of such surrender as constituting "relinquishment of such person's parental rights in or guardianship or custody of the child *named therein* and consent by such person to adoption of the child." *Ibid.* (emphasis supplied). We emphasize "named therein," for we construe the statute to allow a surrender only after the birth of the child. The formal consent ***432** to surrender enables the approved agency to terminate parental rights.

Similarly, DYFS is empowered to "take voluntary surrenders and releases of custody and consents to adoption[s]" from parents, which surrenders, releases, or consents "when properly acknowledged ... shall be valid and binding irrespective of the age of the person giving the same, and shall be irrevocable except at the discretion of the Bureau of Childrens Services [currently DYFS] or upon order of a court of competent jurisdiction." *N.J.S.A.* 30:4C–23. Such consent to surrender of the custody of the child would presumably lead to an adoption placement by DYFS. *See N.J.S.A.* 30:4C–20.

It is clear that the Legislature so carefully circumscribed all aspects of a consent to surrender custody—its form and substance, its manner of execution, and the agency or agencies to which it may be made—in order to provide the basis for irrevocability. It seems most unlikely that the Legislature intended that a consent not complying with these requirements would also be irrevocable, especially where, as here, that consent falls radically short of compliance. Not only do the form and substance of the consent in the surrogacy contract fail to meet statutory requirements, but the surrender of custody is made to a private party. It is not made, as the statute requires, either to an approved agency or to DYFS.

These strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child. *See Sees v. Baber*, *supra*, 74 *N.J.* at 217, 377 *A.*2d 628. Because of those consequences, the Legislature severely limited the circumstances under which such consent would be irrevocable. The legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully ***433** understand and appreciate the consequences of their acts. *N.J.A.C.* 10:121A–5.4(c).

Contractual surrender of parental rights is not provided for in our statutes as now written. Indeed, in the Parentage Act, *N.J.S.A.* 9:17–38 to –59, there is a specific provision invalidating any agreement "between an alleged or presumed father and the mother of the child" to bar an action brought for the purpose of determining paternity "[r]egardless of [the contract's] terms." *N.J.S.A.* 9:17–45. Even a settlement agreement concerning parentage reached in a judicially-mandated consent conference is not valid unless the proposed settlement is approved beforehand by the court. *N.J.S.A.* 9:17–48c and d. There is no doubt that a contractual provision purporting to constitute an irrevocable agreement ****1246** to surrender custody of a child for adoption is invalid.

In *Sees v. Baber, supra,* 74 *N.J.* 201, 377 *A.*2d 628, we noted that a natural mother's consent to surrender her child and to its subsequent adoption was no longer *required* by the statute in private placement adoptions. After tracing the statutory history from the time when such a consent had been an essential prerequisite to adoption, we concluded that such a consent was now neither necessary nor sufficient for the purpose of terminating parental rights. *Id.* at 213, 377 *A.*2d 628. The consent to surrender custody in that case was in writing, had been executed prior to physical surrender of the infant, and had been explained to the mother by an attorney. The trial court found that the consent to surrender of custody in that private placement adoption was knowing, voluntary, and deliberate. *Id.* at 216, 377 *A.*2d 628. The physical surrender of the child took place four days after its birth. Two days thereafter the natural mother changed her mind, and asked that the adoptive couple give her baby back to her. We held that she was entitled to the baby's return. The effect of our holding in that case necessarily encompassed our conclusion that "in an unsupervised private placement, since there is no statutory obligation to consent, there can be no legal barrier to its retraction." *Id.* at 215, 377 *A.*2d 628. The only possible relevance of ***434** consent in these matters, we noted, was that it *might* bear on whether there had been an abandonment of the child, or a forsaking of parental obligations. *Id.* at 216, 377 *A.*2d 628. Otherwise, consent in a private placement adoption is not only revocable but, when revoked early enough, irrelevant. *Id.* at 213–15, 377 *A.*2d 628.

[14] The provision in the surrogacy contract whereby the mother irrevocably agrees to surrender custody of her child and to terminate her parental rights conflicts with the settled interpretation of New Jersey statutory law.[8] There is only one irrevocable consent, and that is the one explicitly provided for by statute: a consent to surrender of custody and a placement with an approved agency or with DYFS. The provision in the surrogacy contract, agreed to before conception, requiring the natural mother to surrender custody of the child without any right of revocation is one more indication of the essential nature of this transaction: the creation of a contractual system of termination and adoption designed to circumvent our statutes.

B. Public Policy Considerations

[15] The surrogacy contract's invalidity, resulting from its direct conflict with the above statutory provisions, is further underlined when its goals and means are measured against New Jersey's public policy. The contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody. *See Fantony v. Fantony,* 21 *N.J.* 525, 536–37, 122 *A.*2d 593 (1956); *see also Sheehan v. Sheehan,* 38 *N.J.Super.* 120, 125, 118 *A.*2d 89 (App.Div.1955) ("WHATEVER THE AGREEMENT OF THE PARENTS, The Ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as *parens patriae.*"). The fact that the trial court remedied that aspect of the contract through the "best interests" phase does not make the contractual provision any less offensive to the public policy of this State.

The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, ****1247** children should remain with and be brought up by both of their natural parents. That was the first stated purpose of the previous adoption act, *L.*1953, *c.* 264, § 1, codified at *N.J.S.A.* 9:3–17 (repealed): "it is necessary and desirable (a) to protect the child from unnecessary separation from his natural parents...." While not so stated in the present adoption law, this purpose remains part of the public policy of this State. *See, e.g., Wilke v. Culp,* 196 *N.J.Super.* 487, 496, 483 *A.*2d 420 (App.Div.1984), certif. den., 99 *N.J.* 243, 491 *A.*2d 728 (1985); *In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 426, 419 *A.*2d 1135. This is not simply some theoretical ideal that in practice has no meaning. The impact of failure to follow that policy is nowhere better shown than in the results of this surrogacy contract. A child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father.[9]

The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father's right no greater than the mother's. "The parent ***436** and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *N.J.S.A.* 9:17–40. As the Assembly Judiciary Committee noted in its statement to the bill, this section establishes "the principle that regardless of the marital status of the parents, all children *and all parents* have equal rights with respect to each other." *Statement to Senate No. 888,* Assembly Judiciary, Law, Public Safety and Defense Committee (1983) (emphasis supplied). The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.

The policies expressed in our comprehensive laws governing consent to the surrender of a child, discussed *supra* at 1244–1246, stand in stark contrast to the surrogacy contract and what it implies. Here there is no counseling, independent or otherwise, of the natural mother, no evaluation, no warning.

The only legal advice Mary Beth Whitehead received regarding the surrogacy contract was provided in connection with the contract that she previously entered into with another couple. Mrs. Whitehead's lawyer was

referred to her by the Infertility Center, with which he had an agreement to act as counsel for surrogate candidates. His services consisted of spending one hour going through the contract with the Whiteheads, section by section, and answering their questions. Mrs. Whitehead received no further legal advice prior to signing the contract with the Sterns.

Mrs. Whitehead was examined and psychologically evaluated, but if it was for her benefit, the record does not disclose that fact. The Sterns regarded the evaluation as important, particularly in connection with the question of whether she would change her mind. Yet they never asked to see it, and were content with the assumption that the Infertility Center had made an evaluation and had concluded that there was no danger that the surrogate mother would change her mind. From Mrs. Whitehead's point of view, all that she learned from ***437** the evaluation was that "she had passed." It is apparent that the profit motive got the better of the Infertility Center. Although the evaluation was made, it was not put to any use, and understandably so, for the psychologist warned that Mrs. Whitehead demonstrated certain traits that might make surrender of the ****1248** child difficult and that there should be further inquiry into this issue in connection with her surrogacy. To inquire further, however, might have jeopardized the Infertility Center's fee. The record indicates that neither Mrs. Whitehead nor the Sterns were ever told of this fact, a fact that might have ended their surrogacy arrangement.

Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction.

Although the interest of the natural father and adoptive mother is certainly the predominant interest, realistically the *only* interest served, even they are left with less than what public policy requires. They know little about the natural mother, her genetic makeup, and her psychological and medical history. Moreover, not even a superficial attempt is made to determine their awareness of their responsibilities as parents.

Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.

This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being ***438** that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.

The differences between an adoption and a surrogacy contract should be noted, since it is asserted that the use of money in connection with surrogacy does not pose the risks found where money buys an adoption. Katz, "Surrogate Motherhood and the Baby–Selling Laws," 20 *Colum.J.L. & Soc.Probs.* 1 (1986).

First, and perhaps most important, all parties concede that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few. That conclusion contrasts with adoption; for obvious reasons, there remains a steady supply, albeit insufficient, despite the prohibitions against payment. The adoption itself, relieving the natural mother of the financial burden of supporting an infant, is in some sense the equivalent of payment.

Second, the use of money in adoptions does not *produce* the problem—conception occurs, and usually the birth itself, before illicit funds are offered. With surrogacy, the "problem," if one views it as such, consisting of the purchase of a woman's procreative capacity, at the risk of her life, is caused by and originates with the offer of money.

Third, with the law prohibiting the use of money in connection with adoptions, the built-in financial pressure of the unwanted pregnancy and the consequent support obligation do not lead the mother to the highest paying, ill-suited, adoptive parents. She is just as well-off surrendering the child to an approved agency. In surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted.

Fourth, the mother's consent to surrender her child in adoptions is revocable, even after surrender of the child, unless it be to an approved agency, where by regulation there are protections ***439** against an ill-advised surrender. In surrogacy, consent occurs so early that no amount of advice would satisfy the potential mother's need, yet the consent is irrevocable.

The main difference, that the unwanted pregnancy is unintended while the situation ****1249** of the surrogate mother is voluntary and intended, is really not significant. Initially, it produces stronger reactions of sympathy for the mother whose pregnancy was unwanted than for the surrogate mother, who "went into this with her eyes wide open." On reflection, however, it appears that the essential evil is the same, taking advantage of a woman's

circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree.

In the scheme contemplated by the surrogacy contract in this case, a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction. The demand for children is great and the supply small. The availability of contraception, abortion, and the greater willingness of single mothers to bring up their children has led to a shortage of babies offered for adoption. *See* N. Baker, *Baby Selling: The Scandal of Black Market Adoption, supra; Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. On Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong.1st Sess. 6 (1975) (Statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc.). The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money.

Intimated, but disputed, is the assertion that surrogacy will be used for the benefit of the rich at the expense of the poor. *See, e.g.*, Radin, "Market Inalienability," 100 *Harv.L.Rev.* 1849, 1930 (1987). In response it is noted that the Sterns are not rich and the Whiteheads not poor. Nevertheless, it is clear to us ***440** that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. *Ibid.* Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.

In any event, even in this case one should not pretend that disparate wealth does not play a part simply because the contrast is not the dramatic "rich versus poor." At the time of trial, the Whiteheads' net assets were probably negative—Mrs. Whitehead's own sister was foreclosing on a second mortgage. Their income derived from Mr. Whitehead's labors. Mrs. Whitehead is a homemaker, having previously held part-time jobs. The Sterns are both professionals, she a medical doctor, he a biochemist. Their combined income when both were working was about $89,500 a year and their assets sufficient to pay for the surrogacy contract arrangements.

[16] The point is made that Mrs. Whitehead *agreed* to the surrogacy arrangement, supposedly fully understanding the consequences. Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. *West Coast Hotel Co. v. Parrish*, 300 *U.S.* 379, 57 *S.Ct.* 578, 81 *L.Ed.* 703 (1937). Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," 29 *U.S.C.* § 206 (1982), or buy women's labor for less money than paid to men for the same job, 29 *U.S.C.* § 206(d), or purchase the agreement of children to perform oppressive labor, 29 *U.S.C.* § 212, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions, 29 *U.S.C.* §§ 651 to 678. (Occupational Safety and Health Act of 1970). There are, in short, ***441** values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life. Whether this principle ****1250** recommends prohibition of surrogacy, which presumably sometimes results in great satisfaction to all of the parties, is not for us to say. We note here only that, under existing law, the fact that Mrs. Whitehead "agreed" to the arrangement is not dispositive.

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct. Literature in related areas suggests these are substantial considerations, although, given the newness of surrogacy, there is little information. *See* N. Baker, *Baby Selling: The Scandal of Black Market Adoption, supra; Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong. 1st Sess. (1975).

[17] The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws.[10] It guarantees ***442** the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Beyond that is the potential degradation of some women that may result from this arrangement. In many cases, of course, surrogacy may bring satisfaction, not only to the infertile couple, but to the surrogate mother herself. The fact, however, that many women may not perceive surrogacy negatively but rather see it as an opportunity does not diminish its potential for devastation to other women.

In sum, the harmful consequences of this surrogacy arrangement appear to us all too palpable. In New Jersey the surrogate mother's agreement to sell her child is void.[11] Its irrevocability ***444** infects the entire contract, as does the money that purports to buy it.

****1251** III.

TERMINATION

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IV.

CONSTITUTIONAL ISSUES

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V.

CUSTODY

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VI.

VISITATION

. . .

CONCLUSION

This case affords some insight into a new reproductive arrangement: the artificial insemination of a surrogate mother. The unfortunate events that have unfolded illustrate that its unregulated use can bring suffering to all involved. Potential victims include the surrogate mother and her family, the natural father and his wife, and most importantly, the child. Although surrogacy has apparently provided positive results for some infertile couples, it can also, as this case demonstrates, cause suffering to participants, here essentially innocent and well-intended.

We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do ***469** we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.

If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms. We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—*in vitro* fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

For affirmance in part, reversal in part and remandment—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

****1265** APPENDIX A

SURROGATE PARENTING AGREEMENT

_____

THIS AGREEMENT is made this 6th day of February, 1985, by and between MARY BETH WHITEHEAD, a married woman (herein referred to as "Surrogate), RICHARD WHITEHEAD, her husband (herein referred to a "Husband"), and WILLIAM STERN, (herein referred to as "Natural Father").

RECITALS

THIS AGREEMENT is made with reference to the following facts:

(1) WILLIAM STERN, Natural Father, is an individual over the age of eighteen (18) years who is desirous of entering into this Agreement.

(2) The sole purpose of this Agreement is to enable WILLIAM STERN and his infertile wife to have a child which is biologically related to WILLIAM STERN.

(3) MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, are over the age

of eighteen (18) years and desirous of entering into this Agreement in consideration of the following:

NOW THEREFORE, in consideration of the mutual promises contained herein and the intentions of being legally bound hereby, the parties agree as follows:

1. MARY BETH WHITEHEAD, Surrogate, represents that she is capable of conceiving children. MARY BETH WHITEHEAD understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to WILLIAM STERN, Natural Father, immediately upon birth of the child; and terminate all parental rights to said child pursuant to this Agreement.

2. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, have been married since 12/2/73, and RICHARD WHITEHEAD is in agreement with the purposes, intents and provisions of this Agreement and acknowledges that his wife, MARY BETH WHITEHEAD, Surrogate, shall be artificially inseminated pursuant to the provisions of this Agreement. RICHARD WHITEHEAD agrees that in the best interest of the child, he will not form or attempt to form a parent-child relationship with any child or children MARY BETH WHITEHEAD, Surrogate, may conceive by artificial insemination as described herein, and agrees to freely and readily surrender immediate custody of the child to WILLIAM STERN, Natural Father; and terminate his parental rights; RICHARD WHITEHEAD further acknowledges he will do all acts necessary to rebut the presumption of paternity of any offspring conceived and born pursuant to aforementioned agreement as provided by law, including blood testing and/or HLA testing.

3. WILLIAM STERN, Natural Father, does hereby enter into this written contractual Agreement with MARY BETH WHITEHEAD, Surrogate, where MARY BETH WHITEHEAD shall be artificially inseminated with the semen of WILLIAM STERN by a physician. MARY BETH WHITEHEAD, Surrogate, upon becoming pregnant, acknowledges that she will carry said embryo/fetus(s) until delivery. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree that they will cooperate with any background investigation into the ****1266** Surrogate's medical, family and personal history and warrants the information to be accurate to the best of their knowledge. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree to surrender custody of the child to WILLIAM STERN, Natural Father, immediately upon birth, acknowledging that it is the intent of this Agreement in the best interests of the child to do so; as well as institute and cooperate in proceedings to terminate their respective parental rights to said child, and sign any and all necessary affidavits, documents, and the like, in order to further the intent and purposes of this Agreement. It is understood by MARY BETH WHITEHEAD, and RICHARD WHITEHEAD, that the child to be conceived is being done so for the sole purpose of giving said child to WILLIAM STERN, its natural and biological father. MARY BETH WHITEHEAD and RICHARD WHITEHEAD agree to sign all necessary affidavits prior to and after the birth of the child and voluntarily participate in any paternity proceedings necessary to have WILLIAM STERN'S name entered on said child's birth certificate as the natural or biological father.

4. That the consideration for this Agreement, which is compensation for services and expenses, and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for a consent to surrender the child for adoption, in addition to other provisions contained herein, shall be as follows:

(A) $10,000 shall be paid to MARY BETH WHITEHEAD, Surrogate, upon surrender of custody to WILLIAM STERN, the natural and biological father of the child born pursuant to the provisions of this Agreement for surrogate services and expenses in carrying out her obligations under this Agreement;

(B) The consideration to be paid to MARY BETH WHITEHEAD, Surrogate, shall be deposited with the Infertility Center of New York (hereinafter ICNY), the representative of WILLIAM STERN, at the time of the signing of this Agreement, and held in escrow until completion of the duties and obligation of MARY BETH WHITEHEAD, Surrogate, (see Exhibit "A" for a copy of the Escrow Agreement), as herein described.

(C) WILLIAM STERN, Natural Father, shall pay the expenses incurred by MARY BETH WHITEHEAD, Surrogate, pursuant to her pregnancy, more specifically defined as follows:

(1) All medical, hospitalization, and pharmaceutical, laboratory and therapy expenses incurred as a result of MARY BETH WHITEHEAD's pregnancy, not covered or allowed by her present health and major medical insurance, including all extraordinary medical expenses and all reasonable expenses for treatment of any emotional or mental conditions or problems related to said pregnancy, but in no case shall any such expenses be paid or reimbursed after a period of six (6) months have elapsed since the date of the termination of the pregnancy, and this Agreement specifically excludes any expenses for lost wages or other non-itemized incidentals (see Exhibit "B") related to said pregnancy.

(2) WILLIAM STERN, Natural Father, shall not be responsible for any latent medical expenses occurring six (6) weeks subsequent to the birth of the child, unless the

medical problem or abnormality incident thereto was known and treated by a physician prior to the expiration of said six (6) week period and in written notice of the same sent to ICNY, as representative of WILLIAM STERN by certified mail, return receipt requested, advising of this treatment.

(3) WILLIAM STERN, Natural Father, shall be responsible for the total costs of all paternity testing. Such paternity testing may, at the option of WILLIAM STERN, Natural Father, be required prior to release of the surrogate fee from escrow. In the event WILLIAM STERN, Natural Father, is conclusively determined not to be the biological father of the child as a result of an HLA test, this Agreement will be deemed breached and MARY BETH ****1267** WHITEHEAD, Surrogate, shall not be entitled to any fee. WILLIAM STERN, Natural Father, shall be entitled to reimbursement of all medical and related expenses from MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband.

(4) MARY BETH WHITEHEAD'S reasonable travel expenses incurred at the request of WILLIAM STERN, pursuant to this Agreement.

5. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, understand and agree to assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, including but not limited to, postpartum complications. A copy of said possible risks and/or complications is attached hereto and made a part hereof (see Exhibit "C").

6. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, hereby agree to undergo psychiatric evaluation by JOAN EINWOHNER, a psychiatrist as designated by WILLIAM STERN or an agent thereof. WILLIAM STERN shall pay for the cost of said psychiatric evaluation. MARY BETH WHITEHEAD and RICHARD WHITEHEAD shall sign, prior to their evaluations, a medical release permitting dissemination of the report prepared as a result of said psychiatric evaluations to ICNY or WILLIAM STERN and his wife.

7. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, hereby agree that it is the exclusive and sole right of WILLIAM STERN, Natural Father, to name said child.

8. "Child" as referred to in this Agreement shall include all children born simultaneously pursuant to the inseminations contemplated herein.

9. In the event of the death of WILLIAM STERN, prior or subsequent to the birth of said child, it is hereby understood and agreed by MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, that the child will be placed in the custody of WILLIAM STERN'S wife.

10. In the event that the child is miscarried prior to the fifth (5th) month of pregnancy, no compensation, as enumerated in paragraph 4(A), shall be paid to MARY BETH WHITEHEAD, Surrogate. However, the expenses enumerated in paragraph 4(C) shall be paid or reimbursed to MARY BETH WHITEHEAD, Surrogate. In the event the child is miscarried, dies or is stillborn subsequent to the fourth (4th) month of pregnancy and said child does not survive, the Surrogate shall receive $1,000.00 in lieu of the compensation enumerated in paragraph 4(A). In the event of a miscarriage or stillbirth as described above, this Agreement shall terminate and neither MARY BETH WHITEHEAD, Surrogate, nor WILLIAM STERN, Natural Father, shall be under any further obligation under this Agreement.

11. MARY BETH WHITEHEAD, Surrogate, and WILLIAM STERN, Natural Father, shall have undergone complete physical and genetic evaluation, under the direction and supervision of a licensed physician, to determine whether the physical health and will-being of each is satisfactory. Said physical examination shall include testing for venereal diseases, specifically including but not limited to, syphilis, herpes and gonorrhea. Said venereal disease testing shall be done prior to, but not limited to, each series of insemination.

12. In the event that pregnancy has not occurred within a reasonable time, in the opinion of WILLIAM STERN, Natural Father, this Agreement shall terminate by written notice to MARY BETH WHITEHEAD, Surrogate, at the residence provided to the ICNY by the Surrogate, form ICNY, as representative of WILLIAM STERN, Natural Father.

****1268** 13. MARY BETH WHITEHEAD, Surrogate, agrees that she will not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of MARY BETH WHITEHEAD or the child has been determined by said physician to be physiologically abnormal. MARY BETH WHITEHEAD further agrees, upon the request of said physician to undergo amniocentesis (see Exhibit "D") or similar tests to detect genetic and congenital defects. In the event said test reveals that the fetus is genetically or congenitally abnormal, MARY BETH WHITEHEAD, Surrogate, agrees to abort the fetus upon demand of WILLIAM STERN, Natural Father, in which event, the fee paid to the Surrogate will be in accordance to Paragraph 10. If MARY BETH WHITEHEAD refuses to abort the fetus upon demand of WILLIAM STERN, his obligations as stated in this Agreement shall cease forthwith, except as to obligations of paternity imposed by statute.

14. Despite the provisions of Paragraph 13, WILLIAM STERN, Natural Father, recognizes that some genetic and

congenital abnormalities may not be detected by amniocentesis or other tests, and therefore, if proven to be the biological father of the child, assumes the legal responsibility for any child who may possess genetic or congenital abnormalities. (See Exhibits "E" and "F").

15. MARY BETH WHITEHEAD, Surrogate, further agrees to adhere to all medical instructions given to her by the inseminating physician as well as her independent obstetrician. MARY BETH WHITEHEAD also agrees not to smoke cigarettes, drink alcoholic beverages, use illegal drugs, or take non-prescription medications or prescribed medications without written consent from her physician. MARY BETH WHITEHEAD agrees to follow a prenatal medical examination schedule to consist of no fewer visits than: one visit per month during the first seven (7) months of pregnancy, two visits (each to occur at two-week intervals) during the eighth and ninth month of pregnancy.

16. MARY BETH WHITEHEAD, Surrogate, agrees to cause RICHARD WHITEHEAD, her husband, to execute a refusal of consent form as annexed hereto as Exhibit "G".

[signatures and footnotes omitted]

17. Each party acknowledges that he or she fully understands this Agreement and its legal effect, and that they are signing the same freely and voluntarily and that neither party has any reason to believe that the other(s) did not freely and voluntarily execute said Agreement.

18. In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, then said provision shall be deemed valid to the extent of the scope or breadth permitted by law.

****1269** 19. The original of this Agreement, upon execution, shall be retained by the Infertility Center of New York, with photocopies being distributed to MARY BETH WHITEHEAD, Surrogate and WILLIAM STERN, Natural Father, having the same legal effect as the original.