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ATTORNEY GENERAL OPINION NO. 82- 150

The Honorable Sam K. Bruner
Associate District Judge
Tenth Judicial District
Johnson County Courthouse
Olathe, Kansas 66061

Re: Domestic Relations -- Custody of Children -- Prohibited Contracts

Synopsis: A contract which determines the custody of a child is void as against public policy. Cited herein: K.S.A. 23-128, 23-129, 23-130.

* * *

Dear Judge Bruner:

You have requested that this office prepare an opinion concerning the legality of the proposed establishment and operation of a corporation to deal in surrogate motherhood and adoption. As we understand the proposal, a for profit Kansas corporation, doing business solely within the State of Kansas, would be organized to locate and thereafter contract with single women to serve as surrogate mothers on an independent contractor basis. Pursuant to contract, artificial insemination between the surrogate mother and father (sperm donor) would be clinically handled and the surrogate mother would thereafter carry the child to term under provisions of the contract. After delivery an adoption would be completed.

The subject contract would specify the expenses and compensation to be received by the surrogate and outline the responsibilities of the father. The adoption by the father's wife would complete the corporation's involvement with the parties. The corporation would not be a custodial agency for the child, but would be the paid intermediary between the individuals and a party to the contracts. The procedure presumes that

the child would be the natural child of the sperm donor and the adoption would be necessary by the wife of the sperm donor only.

The major legal impediment to the commercial practice outlined above is the long-standing legal principle and public policy that children are not chattel and therefore may not be the subject of a contract or gift. Hamm v. Hamm, 207 Kan. 431 at 435 (1971), In re Rhea, 207 Kan. 610 at 612 (1971), Wood v. Shaw, 92 Kan. 70 at 72 (1914), Tucker v. Finnigan, 139 Kan. 496 at 499 (1934), Wood v. Lee, 123 Kan. 669 at 670-671 (1927), Chapsky v. Wood, 26 Kan. 650 at 652 (1881).

This is a well-recognized principle which has been invoked in various factual situations where the custody of children has been at issue. For example, in In re Rhea, supra, the appellant brought a habeas corpus action to gain custody of her natural child. The trial court's summarization of the facts was reprinted in the appellate opinion as follows:

> "This is an unusual factual situation. Both parties agreed prior to the birth of this child that the custody of the child when born would be vested in the Respondent [appellee], and the agreement was consummated and was abided by until December 8, 1969, when this petition for writ of habeas corpus was filed, in which consent to custody was attempted to be changed by Petitioner [appellant] in this case." Id. at 611-612.

The trial court allowed the appellee to retain custody of the subject minor child and stated, inter alia:

> "At the time this case was filed there was no showing that this child was not being properly taken care of; that the child was not in the possession of one agreed to; and therefore I am going to order that this writ of habeas corpus be denied." Id.

In reversing the trial court's ruling the Supreme Court of Kansas opined:

> "Undoubtedly acting in good faith in its conception of the child's best interest, the trial court patently placed reliance on the fact the child was in the custody of its aunt agreeable to its mother's arrangement. However, such reliance was juridically misplaced. Our cases are legion that a minor child cannot be the

> subject of a valid gift and a parent cannot merely by giving away a child be deprived of the right to its custody. (See e.g., Wood v. Shaw, 92 Kan. 70, In re Jackson, 164 Kan. 391). Custody of a minor child is simply not a matter to be determined by contract. (Chapsky v. Wood, 26 Kan. 650)." (Emphasis added.) Id.

We are mindful of the fact that an adoption is contemplated by the proposed commercial activity and that such adoption would serve to sever all rights of the natural (here, surrogate) mother. However, the proposed commercial activity contemplates that the final determination of custody of the minor child is a matter of contract. This contractual custodial arrangement is prohibited by the mandate set out in Chapsky v. Wood, supra, and its progeny.

We realize that the decision to "bear or beget a child" is essentially a private one and, as such, has certain constitutional protections. See Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972) and Roe v. Wade, 410 U.S. 113 (1973). However, the contemplated commercial activity triggers a compelling state interest, i.e., custody of a minor child, and such compelling state interest cannot be mitigated by commercial contract. In re Rhea, supra and Chapsky v. Wood, supra. At 15 Williston, Contracts, §1744 A (3d ed 1957) it is stated:

> "The sovereign has an interest in a minor child held superior to that of the parent; hence, there is a public policy against the custody of a child becoming the subject of barter."

We recognize that the commercial activity contemplated here might be characterized as a "contract for services" rather than a contract to determine custody of a child. However, we cannot escape the fact that custody of the minor child is decided as a contractual matter between the parties thereto. It is our considered opinion that such contract is void as contrary to the public policy enunciated in the above-cited authorities.

Additionally, we are cognizant of the fact that K.S.A. 23-128 to 23-130 specifically authorize the "commercial" use of the male's reproductive system by artificial insemination. However, this artificial insemination process has been legitimated by the legislature as a matter of public policy. Such is not the case with the proposed commercialization of motherhood, and in the absence of a legislative declaration legitimating such practice, we are constrained to consider this matter in the light of existing public policy.

In summary, it is the considered opinion of this office that a contract which determines the custody of a child is void as against public policy.

Very truly yours,

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RTS:BJS:RVE:hle