



# Contracts Concerning Children Are Not Legally Binding

by Jodi L. Wyman

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Normally a contract is a legally binding document, but not when it relates to children. In those cases, the contract is often not worth the paper it is written on.

Family law lawyers have been warning their clients for years that they can draft a Separation Agreement setting out the terms of custody, visitation and child support but Judges feel free to disregard the terms of the contract in favour of their own ideas.

The courts have what is called *parens patriae* jurisdiction. It allows a Judge to make decisions for those who cannot care for themselves, such as children or other vulnerable individuals. Judges do not always agree with the decisions made by a child's parents, even if in a contract signed with lawyers, and so can overrule them. This powerful jurisdiction of the court is only to be exercised if it is seen to be in the child's best interests.

One common example is when separated parents agree to waive the payment of child support. Unless there is a good reason, a Judge can refuse to go along with the parents decision. The reasoning is that no one has the right to waive a child's right to financial support and to improve their

standard of living. Support is to be for the benefit of the child and it is not the parent's money to refuse.

If Judges can overrule a contract made by the parents of the child, what about a contract signed before the child even exists?

This is a relatively new area of law that is developing in the context of expanding developments in reproductive technology. Individuals are entering into agreements to create children in various unconventional ways. Courts and governments are struggling with the ethics of surrogate parents, artificial insemination, same-sex couples, planned single parents and complicated adoption situations.

So far, those hoping these contracts are binding have not been encouraged by recent court decisions.

In one recent case, a woman with a live-in male partner wanted to become pregnant using artificial insemination and an anonymous donor. She and her partner signed a contract confirming that the partner would have no parental rights over the child at any time. He would not be able to apply for custody or access of the child nor would he ever be called upon to pay child support. The court

however decided that such a contract is unenforceable. The mother does not have the right to make these important decisions for her child.

Another recent case involved two friends who have a child by creating embryos through *in vitro* fertilization. A number of embryos were created and frozen. The friends entered into a contract that no use would be made of the remaining embryos without the consent of both parents.

A custody fight then began over the frozen embryos. The court decided that the contract between the couple was not binding. The embryos belonged to the mother and she could do with them what she wanted. Essentially, the male friend then had no say into how many more times he became a father, in spite of a signed contract to the contrary.

Parents in any situation who are trying to make binding agreements over children, even if the child does not yet exist, need to be aware of the chance the contract could be thrown out by the courts.