BARTERING FOR BABIES: ARE PRECONCEPTION AGREEMENTS IN THE BEST INTERESTS OF CHILDREN?

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There are, in a civilized society, some things that money cannot buy.1

I. INTRODUCTION

In recent years, many childless couples and individuals increasingly have turned to preconception agreements, most involving assisted reproductive technology (hereinafter “ART”), to have a child.2 A preconception agreement, more commonly known as a surrogate motherhood contract, is a contract in which a gestational woman agrees to become pregnant with the sole intent to bear a child, relinquish all legal rights to and obligations for the child, and deliver the child to an individual or couple for adoption.3 The Uniform Parentage Act of 2000, as amended in 2002, (UPA) rejects the term “surrogacy agreement” for “gestational agreement.”4 In discussing these arrangements, this article uses interchangeably the terms preconception, surrogacy, and gestational.

Even apart from the exchange of consideration that occurs in most preconception arrangements, where a permanent change of child custody or adoption occurs, states seek to determine whether such change in custody is in the best interest of the child.5 A proper best interest analysis, however, requires a

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4. UPA, art. 8, pref. cmt.

case-by-case determination based upon consideration of numerous factors specifically related to the particular child at issue. These individualized determinations require at a minimum, a child in order to consider his or her specific needs. A few states, by statute, require parties to obtain prior court approval of their preconception agreements, among other things, to protect the best interest of the child. Preconception agreements, by definition, are executed by the parties before a child is conceived. Thus, preconception agreements, even where court pre-approval is obtained, may protect the interest of the parties; however, these agreements are not and cannot be based upon a true best interest of the child analysis.

Part II of this article provides background on preconception agreements. Part III considers whether preconception agreements, even with court pre-approval, are in the best interest of the children born through such arrangements. Part IV discusses the validity and enforceability of preconception agreements in the United States and selected International communities. Part V argues that not only are preconception agreements incongruous with best interest of the child principles, but also these agreements constitute baby bartering that violates federal law, circumvents state law, exploits women and children, and devalues humans. Finally, the article concludes by arguing that preconception agreements uniformly should be declared void and unenforceable.

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6. See id. at 1248.