

5-1-1976

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Recommended Citation

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Contracts—ADOPTION—A FLEXIBLE STANDARD FOR DETERMINING WHEN A CONTRACT TO MAKE A WILL, INCIDENTAL TO AN ADOPTION AGREEMENT, IS VOID AS AGAINST PUBLIC POLICY—*Reimche v. First National Bank*, 512 F.2d 187 (9th Cir. 1975).

Plaintiff, the mother of an illegitimate child, commenced this diversity action against the executor and legatees of the putative father's estate. She sought specific performance of an alleged oral contract by the decedent to make the plaintiff one of the beneficiaries of his will. This promise and other promises by the father to benefit the child were allegedly made in return for the mother's promises to consent to his adoption of the child, to never attempt to regain custody of the child, and to remain silent about the parentage of the child during the father's lifetime.¹

The Federal District Court for the District of Nevada dismissed the complaint for failure to state a claim upon which relief could be granted, finding that the contract was a sale of the child and void as against public policy.² The Ninth Circuit Court of Appeals reversed and remanded, holding that the contract was enforceable and did not violate public policy.

I. BACKGROUND

A. *Public Policy, Generally*

The concept that a contract violative of public policy is unenforceable is based on the principle that one cannot lawfully do that which tends to be injurious to the public welfare.³ Both because of the practical difficulties involved in identifying and defining public policy⁴ and because of the countervailing princi-

1. In addition, the plaintiff alleged that the contract was initiated by the decedent prior to the birth of the child after the decedent assured the plaintiff that his proposal was the best way to provide for the child and to insure that the benefits of enormous trusts created by decedent's forefathers inured at his death to the child. Plaintiff accepted decedent's offer and fully performed her promises. The decedent performed all his promises to benefit the child, but he failed to name the plaintiff as a beneficiary of his will. *Reimche v. First Nat'l Bank*, 512 F.2d 187, 187-88 (9th Cir. 1975).

2. *Reimche v. First Nat'l Bank*, Civil No. LV-1923 (D. Nev. Feb. 14, 1973) (unreported memorandum decision).

3. *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959). It is the general tendency of the contract and not the result in a particular case which determines its validity. *State ex rel. Spillman v. First Bank*, 114 Neb. 423, 430, 207 N.W. 674, 676-77 (1926); *Enders v. Enders*, 164 Pa. 266, 271, 30 A. 129, 130 (1894).

4. *Steele v. Drummond*, 275 U.S. 199, 205 (1927); *Pendleton v. Greever*, 80 Okla. 35, 193 P. 885 (1920); *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 226-27, 122 S.E. 586, 587 (1924).

Public Policy is in its nature so uncertain and fluctuating, varying with the

ple of freedom of contract,⁵ the courts have generally been reluctant to invalidate a contract on public policy grounds unless the policy is clearly inferable from the constitution, statutes, or judicial decisions of the jurisdiction,⁶ and the effects of the agreement are clearly within the intended scope of the policy.⁷ In the area of contracts involving surrender of child custody or consent to adoption, however, it is well settled that any transaction amounting in substance to the sale of a child violates public policy.⁸

At early common law, contracts for the transfer of child custody were void as against public policy,⁹ even where the consideration for the transfer was exclusively for the benefit of the child.¹⁰ This policy found expression in two broad rules: (1) children cannot be bought and sold,¹¹ and, (2) parents cannot permanently transfer the custody of their child to another by their own acts.¹²

habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud.

Pendleton, *supra*, at 37, 193 P. at 887.

5. *Baltimore and O.S.W.R. Co. v. Voight*, 176 U.S. 498, 505-06 (1900); *Tschirgi v. Merchants Nat'l Bank*, 253 Iowa 682, 690, 113 N.W.2d 226, 231 (1962) (the courts should not emasculate the liberty of contract unless imperatively required by the public welfare).

6. *Twin City Pipeline Co. v. Harding Glass Co.*, 283 U.S. 353, 356-57 (1931); *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 226-27, 122 S.E. 586, 587 (1924).

7. *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 44 (1941); *Twin City Pipeline Co. v. Harding Glass Co.*, 283 U.S. 353, 356-57 (1931).

8. *See, e.g., In re Estate of Shirk*, 186 Kan. 311, 323-24, 350 P.2d 1, 11 (1960) ("It is fundamental that parents may not barter or sell their children nor may they demand pecuniary gain as the price of consent to adoptions. This is so inherent in the fabric of American law that citation of authority is unnecessary."); *Enders v. Enders*, 164 Pa. 266, 272-73, 30 A. 129, 130 (1894); *RESTATEMENT OF CONTRACTS* § 583 (1931). *But see id.* which provides in subsection 2 that agreements between parents are not void if for the welfare of the child, and comment *a* which states that the entire section is inapplicable if an adoption is involved.

The sale of children is also forbidden by statute in many jurisdictions. *E.g., UTAH CODE ANN.* § 76-15-3 (1953). For a detailed discussion of the criminal provisions in the Michigan adoption statute prohibiting the sale of children see M. VIRTUE, *STUDY OF THE BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN* 182-83 (1953).

9. *See, e.g., Swift v. Swift*, 55 Eng. Rep. 637, 638 (Ch. 1865) *aff'd* 34 L.J. Ch. 394 (1865); *Hamilton v. Hector*, L.R. 6 Ch. App. 701, 704 (1871).

10. *See Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921) (following the early common law).

11. *See note 8 supra*.

12. *See Ford v. Ford*, 371 U.S. 187, 192-94 (1962) (agreements between parents for the custody of their children are not binding on the courts); *Kelsey v. Green*, 69 Conn. 291, 37 A. 679 (1897); *Weir v. Marley*, 99 Mo. 484, 12 S.W. 798 (1890). *But see Clark v. Clark*, 122 Md. 114, 118, 89 A. 405, 407 (Ct. App. 1913) (welfare of the child considered to be more important than strict application of the old common law rule prohibiting private contractual transfers of custody).

By discouraging parents from shifting their parental responsibilities to another who had only a contractual obligation to support the child, but no corresponding moral obligation, it seems that the courts intended to protect society from additional welfare costs for the care of abandoned children.¹³ Moreover, since parental custody rights were not considered property interests and children were not chattels, a child was not considered to be the proper subject of a contract.¹⁴

As statutes legalizing adoption became prevalent,¹⁵ and the best interests of the child became the paramount concern in cases involving the custody of children,¹⁶ courts began enforcing contracts to give or will property to the child.¹⁷ Even in cases where the custody of the child is the central issue, the modern trend is to enforce the contract if it promotes the child's welfare.¹⁸ Never-

These cases suggest that the rule was primarily invoked in cases where the custody of the child was the central issue. See *Anderson v. Anderson*, 75 Kan. 117, 128, 88 P. 743, 747 (1907) (enforcing a contract to leave property to the child even though the contract also provided for the transfer of child custody, where the action was not directly concerned with child custody).

13. See *Enders v. Enders*, 164 Pa. 266, 272-73, 30 A. 129, 130 (1894).

14. See *Hooks v. Bridgewater*, 111 Tex. 122, 131-32, 229 S.W. 1114, 1118 (1921); Sell, *Custody of Children after Divorce in Pennsylvania*, 10 U. PITT. L. REV. 1, 6 (1948).

15. Adoption was unknown at common law. The first adoption statutes in the United States were enacted in the middle of the nineteenth century. England did not provide for adoption in its statutes until 1926. See Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAMILY LAW 443 (1971).

Nevada's current adoption statute provides that "If the court finds the best interests of the child warrant the granting of the petition, an order or decree of adoption shall be made and filed . . ." NEV. REV. STAT. § 127.150 (1973).

16. See, e.g., *Ford v. Ford*, 371 U.S. 187, 193 (1962) ("Virginia law, like that of probably every state in the Union requires the court to put the child's interest first.").

For a discussion of the development of the best interest standard and custody generally see Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAMILY LAW 21 (1965) [hereinafter cited as Oster]; Sell, note 14 *supra* at 1; 17 N.Y.L.F. 875 (1971). The varied development of the law involved in the custody of illegitimate children is traced in H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

For a discussion of the effects of *Stanley v. Illinois*, 405 U.S. 645 (1972), on the rights of the unwed father in a custody hearing see Comment, *Adoption Consent Rights of the Unwed Father in Oregon*, 53 ORE. L. REV. 531 (1974).

17. *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940) (contract with third party held specifically enforceable); *Redmon v. Roberts*, 198 N.C. 161, 150 S.E. 881 (1929) (upholding contract between natural parents of illegitimate child); *Bassett v. American Baptist Publication Soc'y* 215 Mich. 126, 183 N.W. 747 (1921). *Contra*, *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921) (denying specific performance of contract with third party on grounds that enforcement would encourage widespread sale of children).

18. *Crocker v. Crocker*, 195 F.2d 236 (10th Cir. 1952).

For a critical analysis concerning the conclusionary application by the courts of the "best interest" or "child's welfare standard" see Foster & Freed, *Child Custody*, 39

theless, contracts involving surrender of custody to a third party without reference to the child's interests or primarily for the pecuniary benefit of the parent continue to be held void as against public policy.¹⁹ The rationale for this approach appears to be the strong public interest in promoting the welfare of children and in maintaining the natural parent-child relationship.²⁰ When, however, it is apparent that the welfare of the child has been promoted, some courts have permitted the parent to *incidentally* benefit from the agreement notwithstanding the general rule that parents may not profit from the transfer of child custody to another. This narrowly construed exception has been applied only where the contract involved a close family compact that generally promoted the child's welfare and the parent relinquishing custody was not motivated by prospects of pecuniary gain.²¹

B. Nevada Public Policy

Nothing in the Nevada constitution or statutes directly prohibits contracts for the surrender of a child to another or expressly makes it unlawful for the mother of an illegitimate child to inci-

N.Y.U.L. Rev. 423 (1964) [hereinafter cited as Foster & Freed]; Oster, *supra* note 16, at 22, 37-38.

Generalizations are developed to guide the courts. To decide a question of custody by mere reference to these generalities without searching the specifics and stating such findings in the opinion is unsatisfactory. To render an opinion that the mother should have custody because she is fit tells us . . . nothing about what made this mother fit. Nor does such an opinion serve as a guide for the future. . . .

Id. at 37.

19. See, e.g., Savannah Bank & Trust Co. v. Hanley, 208 Ga. 34, 65 S.E.2d 26 (1951) (denying specific performance of promise by sister-in-law to leave a legacy to the child's mother in return for consent to adoption); Downs v. Wortman 228 Ga. 315, 185 S.E.2d 387 (1971) (returning custody of child to natural parents because a payment to the mother was against public policy and invalidated the consent); cf. Bilderback v. Clark, 106 Kan. 737, 189 P. 977 (1920) (refusing to enforce an alleged promise to leave the estate to the natural heirs on the grounds that such a promise was detrimental to the welfare of the child and contrary to the adoption statutes).

20. Cases cited note 19 *supra*.

An additional rationale suggested by the district court in the present case is the fundamental "abjuration of agreements involving the barter or sale of human beings" provided in the anti-slavery provisions of the Thirteenth Amendment. Civil No. LV-1923, at 7.

21. See, e.g., *In re Estate of Shirk*, 186 Kan. 311, 350 P.2d 1 (1960) (contract initiated by maternal grandmother to leave legacy to mother in return for consent to adoption); Clark v. Clark, 122 Md. 114, 89 A. 405 (1922) (contract initiated by paternal grandfather to pay mother's boarding expenses in return for transfer of custody); Enders v. Enders, 164 Pa. 266, 30 A. 129 (1894) (contract initiated by paternal grandfather to give a certain sum of money to the mother and the child on a specified date).

dentally profit from a custody contract with the child's putative father. Nevertheless, the Nevada legislature has enacted a comprehensive adoption statute,²² prohibiting unlicensed persons from receiving or requesting any compensation for the placement of children²³ and providing criminal penalties for violations.²⁴ Natural parents, however, are exempted from the licensing requirements²⁵ and penalty provisions.²⁶ Also, no written notice of a proposed placement is required by the state's welfare division if the "child and one of the prospective adoptive parents are related within the third degree of consanguinity."²⁷

The validity of a contract incidental to adoption that provides a pecuniary benefit to the parent relinquishing custody has never been considered by the Nevada courts. The Nevada Supreme Court in *Las Vegas Sun v. Franklin*,²⁸ however, strongly suggested that any compensation in a black market setting which permitted the mother to profit from childbirth would be a sale of the child and against public policy.²⁹

II. THE NINTH CIRCUIT CONFRONTS THE CONTRACT FOR ADOPTION PROBLEM

In the instant case the federal district court was confronted with the problem of determining Nevada public policy without the aid of specific legislative pronouncement or prior judicial decisions. In concluding that there was a Nevada public policy against the receipt of any compensation for the placement of a child, the district court reasoned that the statutes prohibiting any unlicensed person from receiving compensation for the placement

22. NEV. REV. STAT. §§ 127.005 *et seq.* (1973).

23. *Id.* § 127.290.

24. *Id.* § 127.300.

25. *Id.* § 127.240.

26. *Id.* § 127.300.

27. *Id.* § 127.280.

28. 74 Nev. 282, 329 P.2d 867 (1958).

29. *Id.* at 291-92, 329 P.2d at 872. This was a libel action in which the Nevada Supreme Court held that an accusation that an attorney participated in the black market sale of a child was libel per se. Commenting on the asserted defense of truth because the mother had been paid for her hospital expenses and lost wages during confinement, the court said:

We shall not disturb their [the jury's] determination . . . that such compensation did not constitute the transaction a sale. There is nothing to indicate that the payment permitted the mother to profit from childbirth. To the contrary, it would seem to have been intended simply to prevent her confinement from resulting in pecuniary loss.

Id.

of a child literally applied to the plaintiff.³⁰ The Nevada Supreme Court's language in *Las Vegas Sun v. Franklin* provided a negative inference that the Nevada courts would consider any transaction which permitted the mother to profit from childbirth a sale of the child and void as against public policy.³¹ This conclusion accorded with the weight of authority in other jurisdictions.³² Admittedly, there existed a narrowly construed exception allowing a parent to receive incidental profits under special circumstances, but that exception did not properly apply in the instant case.³³

Since the promise to make a will for the mother's benefit was held by the district court to violate public policy, the dismissal of the complaint was further justified by the principle of divisibility of contract.³⁴ The agreement was a partially executed, unilateral contract containing a number of promises made by the father solely in consideration for the mother's consent to adoption.³⁵ Since the only unperformed promise was the unlawful promise to the mother, the district court reasoned that it should leave the parties where it found them.

On appeal, the Ninth Circuit Court of Appeals found that no Nevada public policy against adoption agreements between the natural parents could reasonably be inferred from the state con-

30. Civil No. LV-1923, at 4-5.

31. *Id.* at 5.

32. *Id.* (citing 59 AM. JUR. 2d *Parent & Child* § 34 (1971)). *But see* 59 AM. JUR. 2d *Parent & Child* § 37 (1971). Apparently the district court failed to distinguish between (1) cases in which a parent attempts to regain custody of his child after contracting for the child's transfer to a third party and (2) cases in which the parent attempts to enforce an incidental promise made by the other party to leave property or money to the parent or the child in return for the transfer of custody. The section relied on by the district court merely indicates that in the first category of cases, where custody of the child is the main issue, the courts do not hold themselves bound by private custody contracts. *See* notes 12 and 18 *supra*. On the other hand, section 37 seems to indicate that in the second category, where enforcement of an incidental promise is the central issue, the courts are more concerned with the rule that children cannot be bought and sold. Even though concerned with that rule, however, the courts do not always apply it automatically to invalidate a contract. Some contracts requiring the party acquiring custody to leave money or property to the child or to the parent surrendering custody have been judicially enforced. *See* note 21 and accompanying text *supra*.

33. Civil No. LV-1923, at 6.

34. *Id.* at 7.

35. *Id.* at 6-7. The plaintiff, however, alleged that the contract was bilateral, decedent's promises being made in return for her promises, and that more consideration was given than just the promise to consent to adoption. Plaintiff's Amended Complaint at 8. The court concluded that decedent could not have compelled the mother to perform in light of its finding that an indivisible part of the promised consideration was illegal. Civil No. LV-1923, at 7.

stitution, statutes, or case law. The clear distinction drawn by the statutes between adoption agreements involving the natural parents and those involving third parties supports this conclusion. *Las Vegas Sun* is inapposite in a "situation involving an adoption agreement between the natural parents of an illegitimate child."³⁶ Further, the facts of the instant case meet the requirements of the exception permitting parents to profit in limited circumstances. Indeed, this exception constitutes the majority rule where there exists a compact between natural parents. It was, therefore, error for the district court to conclude that Nevada would reject the majority rule.³⁷

The Ninth Circuit did not directly respond to the district court's discussion of divisibility. It did say, however, that more consideration was involved in the case than the mere consent for adoption.³⁸

III. ANALYSIS

The Ninth Circuit in the present case confronted one crucial, substantive issue: what standard or test should be applied to determine the validity of an adoption contract between natural parents? Before reaching that issue, however, the court was obligated to determine whether the law and public policy of the relevant state jurisdiction, Nevada, already provided clear guidelines for resolution of the issue which would preclude a relatively independent federal court consideration of precedents from other jurisdictions and relevant policy.

This case note will first evaluate the court's resolution of the second issue, the presence or absence of controlling Nevada law. It will then examine the precedents of other jurisdictions bearing on the substantive issue available to the court and the court's use of those precedents. Finally, this case note will describe, and analyze in some detail, the standard or approach adopted by the court for determining the validity of the adoption contract in the instant case.

A. Nevada Law and Public Policy

The circuit court correctly concluded that the Nevada adoption statute is not applicable to contracts between the adopted

36. 512 F.2d at 188.

37. *Id.* at 189-90.

38. *Id.* at 188.

child's natural parents. The legislative history of the act reveals that it was intended to eliminate the evils and abuses connected with the black market sale of children and especially the presence of middlemen or brokers in this baby market.³⁹ This purpose is also evident in the language of the act itself. The statute restricts the activities of attorneys to prevent them from acting as brokers,⁴⁰ requires persons placing children to be licensed,⁴¹ and provides criminal penalties for the placing of children without a license and for advertising that children are available for placement or will be accepted for that purpose.⁴² On the other hand, the exemption of natural parents from the licensing requirements,⁴³ and the waiver of the notification requirement if the proposed adoptive parent is related to the child by blood,⁴⁴ demonstrate that contracts between the natural parents or the parents and a close blood relative of the child are not within the intended scope of the statute.

Although agreements between the natural parents are not affected by the statute, the prohibition against the receipt of compensation by unlicensed persons could reasonably be applied to parents who contract with third parties for the transfer of their child's custody. Thus, it may be inferred that Nevada public policy prohibits any profit to the parent resulting from the surrender of custody of his child to a stranger. Such a situation is closely analogous to the black market situation which the adoption statutes were designed to prevent. The holding of the Nevada Supreme Court in *Las Vegas Sun v. Franklin*⁴⁵ is in accord with this

39. Mitler, *Child Welfare and Adoption in Nevada: A New Law and a New Approach*, NEVADA LEGISLATIVE COUNSEL BUREAU BULL. No. 58, at 31 (1963):

The real question is: was the selection of the adoptive home influenced or determined by the compensation being given an intermediary of the adoptive couple? If the sole reason for selecting an adoptive home was the ability of a couple to pay the intermediary one dollar, social damage has been inflicted.

40. NEV. REV. STAT. § 127.285 (1973).

41. *Id.* § 127.310.

42. *Id.*

This statute, read literally, could be applied to the natural parents, but such an application would be in conflict with § 127.240 which exempts the natural parents from the licensing requirements. This legislative oversight suggests that the licensing provisions of the statute were not intended to apply to agreements between natural parents and that the district court incorrectly applied the anti-compensation provisions of § 127.290. See note 26 and accompanying text *supra*.

43. See note 25 and accompanying text *supra*.

44. See note 27 and accompanying text *supra*.

45. 74 Nev. 282, 329 P.2d 867 (1958). The court defined a black market sale as follows:

Under any reasonable construction of the term, "black market sale" contemplates a sale contrary to regulations with a profit calculated either to compen-

principle and with the general rule that parents should not be permitted to profit from the surrender of their child to a third party without reference to the "child's best interests." Nevertheless, the circuit court properly refused to extend the holding of *Las Vegas Sun* to a situation far removed from the black market context, in which the allegations of the plaintiff indicated that the welfare of the child was considered by the natural parents and in fact promoted by the agreement.

By determining that neither Nevada's adoption statute nor the Nevada Supreme Court's decision in *Las Vegas Sun v. Franklin* controlled in the present case, the court left itself relatively free to determine the substantive issue concerning the proper standard to be applied to the alleged contract of adoption. In making that determination, the court turned both to precedents from other jurisdictions and to public policy.

B. *The Application of Precedent*

The unique factual setting in the present case made it difficult for both the district and the circuit courts to apply precedent. The contract involved was more complicated than a simple agreement between the natural parents for the custody and control of their child because the child was born out of wedlock at a time when the parents were both married to other persons.⁴⁶ Furthermore, the courts were unable to find any precedent for a situation involving an adoption agreement between the natural parents of an illegitimate child in which the parent relinquishing custody was monetarily benefited by the contract.

Although the present case is not precisely similar to any other known case, it is more closely analagous to those cases, relied on by the circuit court, which have established the narrow exception permitting parents to incidentally profit from the contract.⁴⁷ Like the contracts in those cases, the contract in the present case was a close family compact, which was found to promote the welfare of the child; additionally, pecuniary gain was not the primary motivation for creation of the contract and surrender of child custody. At the same time, the cases relied on by the district

sate for the risk of apprehension or to match the buyer demand which has created the market.

Id. at 291-92, 329 P.2d at 872.

46. Letter from Ralph M. Crow, Counsel for Plaintiff, to the Brigham Young University Law Review, October 2, 1975.

47. Cases cited note 21 *supra*.

court do not apply as well to the peculiar facts of the present case. Those cases involved contracts between the parents and third parties, which were either made without reference to the interests of the child or by their terms were detrimental to the child's welfare.⁴⁸

In conclusion, the circuit court neither disregarded nor misapplied precedent in formulating its standard for measuring the validity of adoption contracts. Rather, the flexible standard adopted by the court has some support in prior case law.

C. *The Flexible Standard Adopted by the Ninth Circuit*

While it is well settled that contracts for the sale of children are void as against public policy, the courts have disagreed on the number and importance of the factors to be considered in arriving at the conclusion that a sale has occurred. In attempting to arrive at a result consistent with the underlying rationale and fundamental assumptions of the general policy against sales of children, the circuit court was confronted in the present case with the mutually exclusive theories of the district court and the plaintiff.

The standard adopted by the district court was fairly rigid and based entirely on the presence of an economic benefit to the parent releasing custody. Under this approach the only relevant inquiries are whether there was compensation or a sale price, and whether the purpose and effect of the compensation resulted in profit to the parent. The existence of a special relationship between the parties to the contract and the overall effect of the contract on the welfare of the child had no bearing on the court's determination.⁴⁹ Nevertheless, application of this standard would not affect statutory adoptions requiring the consent of parents, or incidental contracts exclusively for the benefit of the child, be-

48. Cases cited note 19 *supra*.

Additionally, the circuit court implied that there was an alternative ground for enforcing the contract even if the promise to benefit the mother in return for her consent to the adoption was invalid as against public policy. This implication or inference arises from both the statement that there "was other consideration for the payment besides mere consent to the adoption by the mother" and the court's extended discussion of *consideration* concepts. Further discussion by the court of cases in which the mother was able to regain custody following a prior consent to adoption suggests that the plaintiff's forbearance to assert her right to reclaim custody of the child was a legal detriment to her which created sufficient independent consideration to support the father's promise to make a will. 512 F.2d at 188-89. Such an argument is difficult to support, however, because the promise not to regain custody was so closely associated with the consent to adoption as to be almost indistinguishable.

49. See Civil No. LV-1923, at 5, 7.

cause neither of these situations involves a monetary profit to the parent. The justification for this approach appears to be that by refusing to enforce promises beneficial to the parent the courts remove the temptation for parents to sacrifice the "best interests of their child" for their own pecuniary advantage.⁵⁰ Although this rationale is in harmony with the underlying purposes of the public policy, its inflexibility would appear to create a harsh and oppressive result in some cases.

The standard advanced by the plaintiff⁵¹ involved a broad balancing-of-facts test and lies at the opposite end of the spectrum from the profit test utilized by the district court. Under the balancing approach, the child's welfare is the ultimate concern, and the court is free to examine all the facts and circumstances surrounding the contract. If the court finds that the contract promotes the welfare of the child, it will conclude either that the contract is consistent with public policy or that no invalidating public policy exists in the particular case.⁵² The basis for this balancing-of-facts test is the paramount concern for the welfare of the child in any case involving child custody. Extrapolating this approach to its logical conclusion, if the parent intended to sell the child for profit and was solely motivated by this purpose, the contract would be enforced if found to promote the child's welfare.

The Ninth Circuit did not adopt either of these two standards; rather, it adopted an intermediate approach which it summarized in these terms:

It is not against public policy to enforce an agreement to provide for the mother of an illegitimate child in the putative father's will, incidental to an agreement to permit the adoption of the child by its father, where the adoption was in the best interests of the child and pecuniary gain was not the motivating factor on the mother's part.⁵³

This standard permits the court the flexibility necessary to evaluate all the factors relating to the child's welfare while providing important safeguards against abuse by limiting the applicability of the test to special fact situations. The contract will be enforced

50. 512 F.2d at 199 (Koelsch, J., dissenting). The argument is made that financial consideration to the mother may "buy a blind spot to qualities in the adoptive parent harmful to the child" which is contrary to the responsibility the statutes place on the mother to make a wise choice of adoptive parents for her child.

51. See Brief for Appellant at 18.

52. *Id.*

53. 512 F.2d at 189.

only where it involves a close family compact, actually promotes the child's welfare, and is not primarily motivated by the prospect of pecuniary gain.

The first condition, that the contract must be a close family compact, is not a dispositive factor, but a threshold requirement which must be satisfied before the court may look at the other facts and circumstances in the case. Thus, contracts between parents and third parties remain subject to the more rigid "profit test" adopted by the district court. There are sound reasons for such a distinction. First, common experience indicates that contracts between parents and strangers are more likely to be associated with the evils and abuses of the black market which the law attempts to prevent.⁵⁴ Second, the close relationship of the parties to one another and to the child creates a strong inference that the welfare of the child was not only considered but was the object of the contract. Third, close family members have a moral obligation to support the child. Moreover, and this is important in the present case, the Nevada statute imposes a corresponding legal obligation for support on both parents of an illegitimate child.⁵⁵ Fourth, in contracts between the natural parents, a special relationship is present that is consistent both with the public interest in maintaining the natural family relationship and with the public policy that favors the support of children by their natural fathers.⁵⁶ Adoption by the putative father also removes the stigma of illegitimacy.

The second condition in the test adopted by the Ninth Circuit is that the contract for adoption or transfer of custody must have actually promoted the child's welfare. In determining whether this condition has been satisfied, the court should follow the extensive fact-finding and balancing process employed in hearings for custody or adoption decrees.⁵⁷ This inquiry should

54. Three states do not permit a parent to privately place his child for adoption unless the prospective adoptive parent is a close blood relative of the child. CONN. GEN. STAT. REV. § 45:63 (1975); DEL. CODE ANN. tit. 13, § 904 (1974); MINN. STAT. ANN. § 259.22 (1974). Arguably, the purpose of these provisions is to control the black market sale of children. See also 1 FAMILY LAW REP. 2104 (Dec. 10, 1974).

55. NEV. REV. STAT. §§ 126.030 *et seq.* (1973).

56. See *Schumm v. Berg*, 37 Cal.2d 174, 231 P.2d 39 (1951); *Miller v. Miller*, 335 S.W.2d 884 (Ct. App. Ky. 1960); *Peterson v. Eritslund*, 69 Wash. 2d 588, 419 P.2d 332 (1966).

57. While this fact-finding process is the same as if the court were deciding who should receive custody of the child, the purpose is different. Since cases involving contracts incidental to adoption agreements usually arise long after the custody of the child has been transferred, the court does not actually protect the welfare of the child in the particular case, but rather, uses this as an indication of whether the relinquishing parent

include such factors as the financial and social status of the parties, but neither these nor any other individual factors should be given conclusive weight. The obvious weakness in relying *exclusively* on this test is the lack of specific guidelines concerning the meaning of "best interests." In the present case, however, the tremendous financial advantages and apparent social benefits accruing to the child by reason of the contract appeared sufficient to justify a remand for trial on the merits.⁵⁸

The third condition is that the parent relinquishing custody must not be primarily motivated by the prospect of pecuniary gain. This means that the welfare of the child must have been promoted as the result of a conscious effort on the part of the parent to that end, rather than as the by-product of chance or good fortune. The purpose of this requirement is to insure that the parent surrendering custody has placed the welfare of the child above all other considerations and that the prospect of a pecuniary advantage has not colored his judgement about the welfare of the child.⁵⁹ In the present case, the allegation that the contract was initiated by the father evidenced a lack of self-seeking on the part of the mother.⁶⁰

IV. CONCLUSION

Since public policy should not be applied to invalidate a contract unless the effects of the agreement are clearly within the intended scope of that policy, the circuit court correctly refused to adopt a rigid or blanket test for determining whether contracts incidental to adoption agreements between the natural parents are contrary to public policy. While profit to the parent should

sold the child, oblivious to its welfare, or actually entered into the transaction to promote the child's welfare.

58. Oster, *supra* note 16, at 22, has attempted to list some of the criteria which courts have developed to determine the child's best interests. The list includes: child preference; mental and physical health of the child; sex, age, and fitness of the parent including moral fitness; love and affection of the parent for the child; and the parent's ability to provide for the child physically, mentally, and financially. For a criticism of the court's use of these guidelines see note 18 *supra*.

Foster & Freed, *supra* note 18, at 438, concluded from a study of court decisions that the criteria used to determine best interests "are inadequate [because] they fail to force courts to consider essential factual, social, medical, and psychological information." For a well-written discussion illustrating proper and improper applications of the child's best interests standard see Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFFALO L. REV. 1 (1973). For a discussion of proposed criteria focusing on the child's economic and educational security and emotional stability see 34 LA. L. REV. 881 (1974).

59. See note 50 *supra*.

60. 512 F.2d at 189.

be considered as one factor in assessing the validity of such agreements, in cases where the contract promotes the welfare of the child, and the mother was not primarily motivated by pecuniary gain, courts should be allowed greater flexibility to determine whether the incidental profit to the parent falls within the intended scope of the public policy. This flexible approach is supported by sound precedent and, if accompanied by an extensive fact-finding process, will serve both to protect the public interest against the sale of children and to achieve justice by enforcing contracts which do not violate the public policy. In light of the increased likelihood, however, that the presence of profit in adoption contracts with third parties would affect the parent's assessment of the "best interests of the child," application of the flexible standard should be limited, as it was by the circuit court in the present case, to cases involving close family compacts.