

PIN # _____

LEGAL ANALYSIS PROFESSOR _____

WRITING COMPETENCY EXAM

Note to the Student:

This test was designed to evaluate your ability to use standard written English. You are not being tested on your ability to use specialized features of legal writing. The test is formatted as a legal memorandum, but for simplicity, we have omitted the full reference when citing cases.

DIRECTIONS:

Read the following legal memorandum and note the parts that are underlined. Decide whether each underlined part is correct or incorrect in formal writing. If the underlined part is correct, fill in the box under the first column (marked "C") on the answer sheet; if the underlined part is incorrect, fill in the box under the second column (marked "I") on the answer sheet. When a blank space is underlined, decide whether an error of omission has been made. Incorrect underlined parts may include errors in spelling, punctuation, capitalization, grammar, word placement, usage, word choice, manuscript format, or omission.

SAMPLE:

Under Frankleton law of adverse possession _____^a may a landowner establish title to a part of a neighbor's property when, knowing the boundarys,^b the landowner builds a permanent structure that extends onto that property and openly used^c it and the surrounding land for thirteen years without objection from the neighbor whom^d the landowner knows to be the true owner?

EXPLANATION:

Question a would be marked incorrect ("I") on the answer sheet because the comma is omitted after a long introductory prepositional phrase. Question b would be marked incorrect ("I") because "boundaries" is misspelled. Question c would be marked incorrect ("I") because the past tense verb "used" is inconsistent with the earlier present tense verb "builds" in that clause. "Uses" is the correct verb form. Question d should be marked correct ("C") because the objective case of the pronoun is required in this position.

Use this format, "I" for incorrect and "C" for correct, for the following facts, analysis, and conclusion sections of the same memorandum.

--TEST BEGINS HERE--

III. FACTS

Our clients, Pamela and Guillermo De Leon, postponed having children while they established their professional careers. When they decided to start a family, they discovered that Pamela De Leon was infertile. After registering with adoption agencys, the De Leon's decided to advertise for a surrogate mother to carry a child biologically related to Guillermo De Leon. Cathy Matsuda answered the ad. She and the De Leons agreed to the following terms:

1. Matsuda would be artificially inseminated with Guillermo De Leon's sperm and bare a child for the couple;
2. The De Leons would pay all Matsuda's insemination and maternity-related expenses;
3. Upon Matsuda's surrender of the child to them, the De Leons would pay Matsuda \$20,000; and
4. Matsuda would relinquish all custodial interests in the child to the De Leons.

Ms. Matsuda was a divorced mother with two children, and her ex-husband had stopped paying child support. She therefore needed the \$20,000 offered in the contract. However, after giving birth to the baby, Ms. Matsuda changed her mind and decide to keep it. The De Leons want to sue for specific performance, compensatory damages, and restitution. They have withheld the \$20,000 fee.

IV. DISCUSSION

A. Enforceability of Surrogate Mother Contract

1. Violation of Law or Public Policy

Generally, competent parties are free to enter into contracts and be bound by them. ⁹ (Cite.) However, a contract will not be enforced if it clearly countervenes a law or public policy. (Cite.)

¹⁰
a. "Baby-Selling" Statute

The surrogacy contract in the present case is illegal and unenforceable if it violates Deseret's "baby-selling" statute. (Cite.) This statute makes it a crime for anyone to "pay or offer to pay a parent to adopt his or her child". (Cite.) The De Leons arguably ¹¹ violated this statute by agreeing to pay Matsuda \$20,000 upon her surrender of the child to them.

"Adoption" normally refers to termination of the natural parents' ¹² relationship with his or her child ¹³ and substitution of other persons into that relationship." (Cites.) Therefore, an agreement to transfer custody from Ms. Matsuda to Mr. De Leon, the biological father, presumably wouldn't ¹⁴ constitute an "adoption" within the meaning of section 690, being that ¹⁵ this involves only the substitution between natural parents of responsibility for the parent-child relationship.

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On the other hand, transfer of custody from the biological mother to the wife of the biological father to constitute a prohibited adoption. ¹⁷ Partly on this basis, several courts have held that surrogate mother contracts that involve the exchange of money for the adoption of a baby violate the "baby-selling" laws of their respective states. (Cites.)

In Baby M, the parties attempted to avoid the prohibitions of New Jersey's baby-selling statute by ensuring ¹⁸ that the wife of the biological father was not a formal party to the written contract. The court nonetheless found that the husband and wife plainly paid for the

opportunity to both of them adopt the baby. (Cite.) In the present case ¹⁹ Pamela De Leon was a party to the contract, making the potential ²⁰ conflict with the Deseret baby-selling statute even more apparent.

The De Leons may have success arguing that the serious constitutional questions raised by application of section 690 to their circumstances suggest that the legislature must of intended the statute to have the narrowest possible application. (Cite.) The Armstrong court noted that Kentuckys' "baby-selling" statute did not explicitly prohibit a medical technique ²¹ that helps a childless couple have a child, ²² and the court was not inclined to infer a per se prohibition in an area ²³ of such fundamental importance. (Cite.) ²⁴ ²⁵

As in Armstrong, Deseret's "baby-selling" law does not specifically prohibit surrogate mother contracts. Moreover, legislative history suggests that the legislature was concerned with other, more ²⁶ blatant forms of baby-selling when it enacted the law:

This bill is aimed at stopping the exploitation of economically distressed mothers who are pressured into selling their babies to help alleviate their desperate financial woes. The people of this great state cannot tolerate this black market in babies which preys on destitute, often unwed mothers who out of desperation sell their babies to total ²⁷ strangers. (Cite.)

The legislature's concern about desperate mothers selling their babies to "strangers" probably did not extend to a mother's promise to relinquish custody to the natural father & his wife. Moreover, the legislature appears to have been concerned primarily with bargains ²⁸ struck after a baby's birth, rather than before conception like in this case ²⁹

If the Deseret court trying our case follows Armstrong rather than Baby M, the De Leons should be able to establish that Deseret's baby-selling statute does not directly prohibit the De Leons' surrogacy contract with Matsuda. Provided Pamela De Leon was a party to the contract. ³⁰

Courts and commentators have suggested that surrogacy contracts might violate other laws, such as constitutional protections of a mother's right to companionship to her child. (Cites.) These laws, ³¹ however, provide a less direct, less compelling argument for illegality ³² than does Deseret's baby-selling statutes.

b. Public Policy

Even if the parties' contract does not violate the precise terms of the "baby-selling" statute, it still may be unenforceable if the contract is generally contrary to the boader public policies reflected in statutes, constitutional provisions, or common law. (Cites.) In Vasquez, using a surrogate mother to give birth to their child, a married couple entered into a contract similar to the De Leon contract. ³³ The court found that even though the surrogacy contract did not violate the specific terms of a baby-selling statute, the contract was still voidable at the option of the surrogate mother if she changed her mind about relinquishing custody of the child. (Cite.)

On the other hand, courts give great weight to competent parties' ³⁴ freedom to enter contracts and will not lightly invalidate a contract for violating public policy. (Cites.) A contract violates public policy if it is injurious to public interests, affronts an established interest of society or tends to interfere with public welfare or safety. ³⁵ (Cite.)

In general, our society recognizes the fundamental public policy meaning that people are not property to be sold. (Cite.) This policy obviously forms part of the basis for Deseret's baby-selling statute; a binding law. That statute also reflects a concern that financially desperate woman may be driven to make promises who are not in their best interests. (See attached statute.) Relying upon the Deseret statute courts in this state have been cautious in taking a child away from their natural mother. In this case, the parties are not treating the child like property, because Matsuda truly wished to help the De Leons start a family. However, Matsuda also needed money for her own children, circumstances arguably encompassed by the legislative concern with the exploitation of financially needy women.

Another basic assumption in our society: children belong with their biological parents. (Cite.) Whether or not a surrogacy contract is enforced, it contemplates that the child will be separated from one of its natural parents. Moreover, enforcing a surrogacy contract might infringe upon the natural mother's constitutional interest in the companionship of her child. (Cite.)

Conversely, however, surrogate mother agreements may promote the family by allowing childless couples otherwise to have children. The De Leons have a federal constitutional right to procreate. (Cite.) The De Leons can argue that, in their circumstances, the right to procreate is meaningless if they are barred from attracting a surrogate with an offer of compensation. Moreover, the Deseret legislature has appropriated 12 million dollars, this money is for research in reproductive technology. Such action reflects a legislative policy favoring creative techniques of reproduction and family planning. (Cite.)

On balance, the public policies against exchanging money for custody and against separating a child from it's mother probably outweigh the policies supporting creative means of family planning. 52

Nonenforcement of the De Leons' contract would not absolutely prevent 53 Guillermo from procreating through a surrogate mother; it simply would prevent him from using compensation as a basis for compelling the 54 transfer of custody of the resulting child. (Cites.) Nor would lack of enforcement hamper the state's efforts to promote research in reproductive technologies. 55 Parties are still free to use inovative 56 methods of reproduction--artificial insemination, for example-- so long as they do not exchange money for parental rights. 57

Thus, even if the Deseret baby-selling statute can not directly prohibit the De Leons' contract with Matsuda, the contract may be unenforceable as a violation of public policy. 58

2. Severability

If any part of the surrogate mother contract is found to be illegal, the De Leons can still request the court to sever the illegal portion of the contract and asking that the remainder be enforced. * 59

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Under the traditional approach, "[a] court generally will not void an essential part of a contract, because the court cannot be sure that the parties would have agreed at all in the provision's absence." 61

(Cite.)

In the present case, the illegal portion of the contract is the exchange of money, and the adoption of a child. The De Leons can argue that the \$20,000 is related only to Ms. Matsuda's "services" (carrying and bearing the child), and that the court should uphold the remainder 62

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of the contract: the adoption in exchange for Ms. Matsuda's emotional gratification in helping a childless couple. The Baby M court implicitly rejected this argument when it held that the parties clearly associated the payment of the money with the adoption--despite contract language to the contrary.

In our case, the \$20,000 is an essential part of the consideration, because Ms. Matsuda entered into the contract to help alleviate her financial difficulties partly. Ms. Matsuda almost certainly would not have agreed to the contract in the absence of this payment. Accordingly, the court would not void the De Leon's promise to pay \$20,000 from the rest of the contract. The entire contract, therefore, is probably void and unenforceable.

B. Remedies

1. Enforceable Contract

a. Specific Performance

A court can decree the specific performance of a contract if the remedy at law is inadequate and if the particular equities of the case demand it. (Cites.) * * * *

The De Leons should argue that the legal remedy of an award of damages is not an adequate substitute for performance of the contract, which would have given them a child. However, if a court simply equated performance with the \$20,000, it could easily fix the damages. The De Leons were the only ones which were named in the contract as responsible for such damages. Further, specific performance would result in great hardship to Matsuda because she wants to keep her baby. Also, even if the contract is enforceable. Questions of illegality or public policy are still raised; thus, discretionary relief would not clearly be in the

public interest. Lastly, although the baby is certainly unique, it would be degrading to equate it with a object of trade. (Cites.) For these reasons, the court will probably not grant specific performance.

b. Damages

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In addition to their direct loss the De Leons specifically seek consequential damages for emotional distress. Damages for emotional distress are usually not awarded for breach of contract because the harm is viewed as to remote to have been contemplated by the parties when they entered into the contract. (Cite.) The De Leons can argue that Ms. Matsuda's breach quite foreseeably resulted in their emotional distress for reasons other than pecuniary loss. Their case is roughly analagous to several cases involving the mishandeling of corpses. (Cites.) In both situations the potential for emotional distress being obvious.

The mortician cases can be distinguished, however, because they involve commercial transactions the public expects a high standard of professional care from. (Cite.) Although Ms. Matsuda was to be paid for her "services," she is a private person; and not running a surrogate mother business.

Nonetheless, because emotional distress is such a clearly foreseeable consequence of a surrogate mother's breach of her promise to transfer custody of a baby, if the contract is enforceable the De Leons have a good chance of carving out new exception to the rule against damages for emotional distress in this most novel case.

2. Unenforceable Contract: Restitution

Even if the contract is unenforceable, the De Leons may be entitled to restitution of the benefits that they have already transferred to Matsuda. Specifically, Matsuda may be unjustly enriched if she both keeps the baby and being reimbursed by the De Leons for her ⁸³ medical expenses. ⁸⁴

Generally, however, a party to an illegal contract is not entitled to restitution. (Cites.) Instead, the law leaves the parties as it finds them. (Cites.) Any injustice that results between ⁸⁵ the parties to an illegal contract is ⁸⁶ "by the importance of deterring illegal conduct." (Cite.)

Courts may recognize an exception to the general rule disallowing ⁸⁷ restitution in an illegal contract if (1) the public no longer needs to be protected because the transaction has already been completed; (2) "no serious moral turpitude is involved;" (3) the defendant is more morally ⁸⁸ at fault than the plaintiff; and (4) unjust enrichment. (Cites.)

Courts do not always require the presence of every element of the exception to the general rule before granting restitution. (Cite.) However, the only element that applies to the De Leons clearly is ⁹⁰ Matsuda's unjust enrichment, which is no more than would be ⁹¹ present in any restitution claim. The absence, presumably, of serious moral turpitude would be greatly in doubt if the court has already found the contract to be unenforceable on the grounds of illegality, or violation ⁹² of public policy. Moreover, Matsuda is no more culpable for the contract than the De Leons; in fact, ⁹³ the De Leons initiated contract negotiations by placing the advertisement for a surrogate mother. Also, the state would have a continued interest in protecting society from such transcendence; granting restitution could encourage further

surrogacy contracts. Consequently, only the unjust enrichment element of the exception has been met.

Thus, if a court is inclined to deny enforcement of the contract, it will deny restitution likely.

V. CONCLUSION ⁹⁵

The surrogacy contract may not directly violate Deseret's "baby-selling" statute, but it probably contravenes Deseret's public policy against selling babies and taking advantage of some womens' unfortunate economic circumstances. The court probably will not find the payment portion of the contract severable, because of Matsudas significant motivation for money. Even if the contract is enforced the court probably will not grant specific performance. However, it may grant the De Leons damages for emotional distress if it finds that breaching a surrogacy contract would foreseeably result in such harm for reasons other than pecuniary loss.