The Role of Contracts in ART

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Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 **U. Rich. L. Rev.** 419 (2017).

Every fall, the second day of my Contracts course is spent discussing the *Baby M* case concerning the enforceability of a surrogacy contract. The students engage in a moot court exercise for which they assume the roles of legal counsel for the Sterns, the biological father and adoptive mother, and Mrs. Whitehead, the surrogate. Students also serve as state supreme court justices with yours truly presiding as Chief Justice. Over the years, I have found this exercise to be a fun, interactive, and collaborative way to ease nervous angst-filled law students into the study and practice of law. It also affords the class the opportunity to consider and discuss important fundamental principles of contract law including freedom of contract and public policy concerns. During the three decades that have passed since the *Baby M* case, there has been enormous growth in the number of individuals using contractual agreements to help them meet their reproductive goals. This growth has necessitated a closer examination of the enforceability of such agreements, which Professor Deborah Zalesne undertakes in her thought-provoking article, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*.

Professor Zalesne's article begins with a very thorough discussion of the controversial ethical issues surrounding alternative reproductive technologies (ART). Although she acknowledges critics' concerns about commodification, exploitation, consent, and access as they relate to reproductive practices such as surrogacy and gamete donation, Professor Zalesne argues that "these concerns are overstated, often rooted in traditional and untested beliefs about the sacredness of motherhood and family, and should give way to the paramount concern of reproductive autonomy." (P. 427.)

Throughout her discussion of the tension between individual choice and moral values, Professor Zalesne explains the role of contracts in the reproductive arena and argues for their enforceability when freely entered into by the parties. For instance, in the context of surrogacy, she argues that courts' unwillingness to enforce such agreements incentivizes exploitation not only by surrogate mothers who may "threaten to renege in order to get more money," but also by intended parents who may "refuse to pay medical costs unless the surrogate acquiesces to unreasonable demands," thereby "result[ing] in greater cost to both parties." When discussing critics' concerns regarding exploitation of surrogates and their perceived lack of voluntary consent, Professor Zalesne cautions against imposing impermissible limitations on women's autonomy to freely contract. She also reminds us that contract law defenses such as unconscionability, undue influence, and economic duress protect against unfair and exploitative contract terms by helping to determine whether surrogates knowingly and voluntarily entered into their agreements. Professor Zalesne thoughtfully suggests that "[c]onsent must include extensive counseling about the inherent medical and emotional benefits and risks associated with most forms of ART, and participants must participate voluntarily and without coercion or undue influence." (P. 442.)

When Professor Zalesne turns her attention to the reproductive technology of pre-implantation genetic testing, she confronts the many ethical issues that accompany such technology, particularly as it relates to trait selection. Whether contracting parties select for gender, race, height, complexion, or hair and eye color, Professor Zalesne generally advocates for protecting individual reproductive choices provided that they are "private choices for private purposes" rather than "centralized choices for the state's purposes."

Respecting private choices, as long as they are not against public policy, is a core tenet of contract law and one that is

central to Professor Zalesne's discussion regarding the importance of judicially enforced reproductive agreements. According to Professor Zalesne, such enforceability protects parties' intentions and ensures that their wishes at the time of contracting are honored, particularly in cases concerning embryo disposal when one party's desires may change some time after executing the agreement. Enforceability of reproductive contracts also avoids "unintended, and sometimes absurd, consequences" that can be life altering for parties involved and their families.

Because legislation can be slow to keep pace with evolving social values and technology in the context of ART, Professor Zalesne makes a compelling case that "[p]eople should be their own lawmakers when it comes to reproduction and their personal relationships," (P. 486) and that contract law serves as an efficient and effective mechanism through which to govern these arrangements. Although we've "come a long way" since the *Baby M* case (to quote the decades old Virginia Slims ad), there continues to be much disagreement surrounding alternative reproduction. As the debate continues, as it undoubtedly will, I am confident that Professor Zalesne's well-written article will inform it, particularly as it relates to the enforceability of ART agreements, for years to come.

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