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CONTRACTS - ILLEGALITY - CONTRACT TO RELINQUISH CUSTODY OF CHILD

CONTRACTS — ILLEGALITY — CONTRACT TO RELINQUISH CUSTODY OF CHILD. — The plaintiff declared on a contract between her father, Thomas Smith, and J. F. and A. T. Mulkey, in which the parent contracted to relinquish all control over the plaintiff, a minor, in consideration for which J. F. and A. T. Mulkey agreed to adopt the child and leave their property to her upon the death of the survivor. The contract was fully performed by the child's parent, but J. F. and A. T. Mulkey failed to adopt the child, and made no provision for her in the distribution of their property. In a suit by the plaintiff at the death of J. F. Mulkey it was *held* that the contract was illegal and void. *Mulkey v. Allen*, 36 S.W. (2d) 198 (1931).

It is not remarkable that there is a dearth of authority to support this decision. The case of *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921), lends support to it by the bald statement that such a contract is opposed to public policy. Other jurisdictions do not carry the doctrine to such an extreme, but hold that a contract whereby the parent agrees to relinquish all control over the child is revocable at the will of the parent. *Smith v. Young*, 136 Mo. App. 65, 117 S.W. 628 (1909); *In re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768 (1882); *State v. Bollinger*, 88 Fla. 123, 101 So. 282 (1924). These latter decisions appear to be subject to the objection that there is no mutuality. In the principal case, however, there had been complete performance by the party against whom the contract could not be specifically enforced; consequently, lack of mutuality should no longer be an objection.

Oles v. Wilson, 57 Colo. 246, 141 Pac. 489 (1914). The great majority of jurisdictions adopt a more sensible rule. Some make the statement, in the abstract, that a contract to relinquish custody of a child is opposed to public policy since it tends to encourage the sale of children as chattels. But, almost universally, they regard the welfare of the child as of paramount interest, and where the contract is for the best interests of the infant they will hold it valid. *Clark v. Clark*, 122 Md. 114, 89 Atl. 405 (1913); *Eaves v. Fears*, 131 Ga. 820, 64 S.E. 269 (1909); *Bedford v. Hamilton*, 153 Ky. 429, 155 S.W. 1128 (1913); *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907); *Bassett v. American Baptist Publication Society*, 215 Mich. 126, 183 N.W. 747 (1921); *Parks v. Burney*, 103 Neb. 572, 173 N.W. 478 (1919); *Winne v. Winne*, 166 N. Y. 263, 59 N.E. 832 (1901); *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489 (1914). The contract is likely to be held valid especially if the contemplated transfer of the child is to some relative who would have a moral duty to rear the child with the greatest educational, moral, and spiritual advantages. *Wilkinson v. Lee*, 138 Ga. 360, 75 S.E. 477 (1912); *Enders v. Enders*, 164 Pa. 266, 30 Atl. 129 (1894). The result in the principal case is regrettable. The foster parents have accepted all of the benefits of the contract and, when called upon to perform, they have said: "This contract is opposed to public policy." This is most inequitable and savors almost of fraud. There is no universal public policy which can be applied to such cases. Each case rests upon its individual facts, and the welfare of the child should be the determinative factor. Where the child's interests, as in the principal case, are best subserved by the performance of the contract, specific performance should be granted.