



SURROGACY CONTRACTS AND PUBLIC POLICY*

INTRODUCTION

Surrogacy is an arrangement to get the child by the intended parents with the help of a woman called surrogate, who agrees to carry the child for full term and also relinquish her parental rights over the child after birth and hand it over to the intended parents. Generally these arrangements involve a contract between the surrogate mother and the intended parents. Intended parents who wish to beget the child must first find the female who is voluntarily ready to be a surrogate and if they get such women they enter in to a contract. Such contract may be a formal written document or mere understanding between the intended parents and the surrogate for the payment of money to the surrogate for her services. A surrogate contract involving payment to the surrogate is considered as commercial surrogacy contract, while a surrogacy contract in which no monetary compensation is given to the surrogate for her services is considered as an altruistic surrogacy contract. These surrogacy contracts are very important to determine the right and liabilities of the parties involved in the contracts. Surrogate Motherhood Agreement usually defines the rights and duties of the intended parents and surrogate mother. The Contracts may be long and detailed (as in Baby M Case¹) or may be very short and simple (as in Doe v Kelley²).

These Contract are usually provides that surrogate mother would be artificially inseminated³ carry the resulting foetus to the term, and then relinquish her parental rights to the intended parents. Many such contracts also require the surrogate to undergo physical and psychological testing before the artificial insemination takes place. Furthermore, contracts may require the surrogate to refrain from the use of alcohol, drugs or tobacco during pregnancy. In addition, some contracts may require an amniocentesis test; if this reveals some defect in the pregnancy, the natural father and adopting mother may have the contractual right to demand an abortion. Many contracts forbid the surrogate mother from aborting the foetus unless necessary for the surrogate's physical well-being. Finally, some surrogate contracts may require paternity testing after the child is born.⁴

In exchange for these services, the adoptive parents agree to pay all medical and health-related expenses associated with the surrogate's pregnancy. Contracts may also provide that the adoptive parents pay for the living expenses of the surrogate during the period of pregnancy. Furthermore, the adoptive parents may often pay travelling expenses and insurance premiums connected with the pregnancy.²⁰ Contracts usually indicate the amount and payment terms of the fee paid to the surrogate in consideration for her services.⁵

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¹ In Re Baby M 109 NJ 396, 470- 478,537 A.2d 1227,1265-1273(1988)

² 106 Mich. App. 169, 172, 307 N.W.2d 438, 440 (1981)

³ Artificial insemination is insertion of semen in to vagina or uterus by mechanical and instrumental means other than sexual intercourse.

⁴ Stephen G. York The contractual Analysis of Surrogate Motherhood and a Proposed Solution, Loyola of Los Angles Law Review Vol 24:395 Jan 1997, p 397

⁵Ibid.

A contract is a voluntarily, deliberate, and legally binding agreement between two or more competent parties. A contractual relationship is evidenced by an offer, acceptance of the offer, and a valid (legal and valuable consideration).⁶ As per Sir William Anson, a Contract is an agreement enforceable at Law made between two or more persons, by which rights are acquired by one or more to act or forbearances on the part of other or others. Each party to a contract acquires rights and duties relative to the rights and duties of the other parties. However, while all parties may expect a fair benefit for the contract (otherwise court may set aside it as inequitable), it is not necessary that each party will benefit to an equal extent.⁷ The main objections to surrogacy contracts are that it commodifies women's reproductive capacities and also make child as commodity and enforceability of such contracts are also questionable as it is against the public policy.

Surrogacy Contracts and public Policy

Surrogacy arrangements are subject to very controversial debates as they are challenge to the concept of family law and it alters the natural process of female reproduction. At one hand as it is only, accessible and suitable method for the infertile couples (both medical and social) and is boon for infertile couple, on the other hand it gives birth to serious legal controversies about the parenthood, custody of child, enforceability of surrogacy contracts, it's commercial use, safety and wellbeing of children born out of such arrangements. These conflicts have at times erupted in to fierce debate over the legality of surrogacy. Since the controversy over the legality of surrogacy has been brought to limelight by the leading surrogacy cases all over the world⁸ as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by legal systems in different countries.

Agreements that may harm the public welfare are condemned as contrary to public policy and are not binding. In 1966 Frumston divide such contract in to five classes, contract which are legal but whose enforcement is affected by consideration of public policy, contracts to do an improper act, contract for improper trafficking in action, contracts with an improper tendency and contract for supply of materials for impropriety. Recently the term public policy described in the sense of law and economics and divide the cases in to four distinct categories that cast by nature of the contract at issue ----whether the contract commit an act “definitely against public policy, to refrain from acts that are further public policy, to commit legal acts that themselves facilitate acts against public policy and to perform acts with uncertain public policy effects.”⁹

Both categories of surrogacy contract (altruistic and commercial) are mostly criticized on the ground of public policy. The term public policy refers to that principle of law which holds that no subject cannot lawfully do that which has a tendency to be injurious to the public or against the public good¹⁰. Public policy encompasses those principles designed to protect the welfare of the people. It is well recognised principle of contract law that court may not chose to enforce a contract if it violated public policy. There are two basic reasons why court will not enforce the surrogacy contract which offends public policy. First by refusing to enforce the contract, the court hopes to deter the others for making similar contracts. Secondly, the court does not want to assist the promise by permitting him or her to use the judicial system to

⁶ See Businessdictionary.com/definition/contract.html#ixzz1xPlk2cvC > visited 12\01\2016

⁷ Dr. Anees v. Pillai, ' Surrogate Motherhood and the Law, International and National perspective, Regal Publication, New Delhi, 2015 p 215-216

⁸ Baby M Case, Jhonson v Culvert, Baby manjhi Yamada Case, Jan Balaz Case, Baby Gammy Case, Shelly Shepheffered Case.

⁹ David Adams Friedman 'Bringing order to contracts against public policy' Florida State University Law review, Vol 39:563 available at <http://law-wss-01.law.fsu.edu/journals/lawreview/backissues/vol39/documents/friedman.pdf> visited on 7\3\2016

¹⁰ Bryan A. Garner, Black's Law Ditionary, Thomson Reuters, USA(5th Edition, 1979,)p 1071

enforce a contract that violates public policy.¹¹ Public Policy cannot be defined precisely but it loosely describes protection from that which tends to be injurious to the public or contrary to the public good and which violates any established interest of society. Contracts that may be unenforceable as contrary to public policy frequently relate to the protection of public welfare, health and safety to the protection of the person and to the protection of recognised social institutions.¹² Thus public policy is the principle of law, under which freedom of contract or private dealings are restricted by the law for the good of the public.

An Agreement is unlawful if the court regards it as opposed to public policy. The normal function of the Courts is to enforce contracts; but consideration of public interest may require the courts to depart from their primary function and to refuse to enforce the contract. The Doctrine of Public policy may be summarised thus “Public policy or the policy of the law is an elusive concept, it has been described as “untrustworthy guide”, “variable quality”, “unruly horse”, etc; the primary duty of court of law to enforce promise which the parties are made and to uphold the sanctity of contract which forms the basis of society; but in certain cases may relieve them from their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing; but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is a branch of Common law, and just like any other branch of common law, it is governed by precedents, the principles had been crystallised under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.”¹³

The surrogacy contract was held unenforceable as against the public policy in the first surrogacy case i.e. Baby M case¹⁴ in 1988 and later in 1998 the Massachusetts Court held that surrogacy contracts are unenforceable as against the public policy¹⁵. But after that a liberal approach was developed and it was held that surrogacy contracts are enforceable and not contrary to public policy. In a recent case (2015) *In re Baby S. Appeal of S.S.*¹⁶ (Shely Shepherd Case) the Pennsylvania Superior Court held that gestational surrogacy contract is a valid and enforceable contract. In the facts of the case the intended mother appealed the trial court arguing that the surrogacy contract is against the public policy. The Court held that “standard of deciding a case on strict public policy ground is unquestionably high”. “it is only when the given policy is so obviously for or against the public health, safety, morals, or welfare, that there is virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring that the contract is against the public policy”. Before that in 2013 the Wisconsin Supreme Court¹⁷ held with a majority that public policy supports the enforcement of surrogacy contracts. It was further held that “enforcement of surrogacy agreements promotes stability and permanence in the family relationship because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement and reduces contentious litigation that could drag on for the first several years of the child’s life”.

¹¹ Barbara L. Atwell, “Surrogacy and Adoption: A case of Incompatibility” 20 *Colu. Hum. Rts L. Review*, 774(2002-03)

¹² David P Twomey Marianne M Jennings, Stephanie M. Greene, *Business Law: Principles of today’s commercial environment*, p 275

¹³ Subba Rao J In *Gheru Lal Parakh Mahadeodas* AIR 1959 SC 781, Avtar Singh, *Contract and Specific Relief*, Eleventh Edition, EBC, Lucknow p264-265

¹⁴ [Citation of Baby M case](#)

¹⁵ *R.R v M.H.*, SJC-07551, available at <http://www.opt.com/HJGitlin.htm>, visited on 7/3/2016

¹⁶ *In re Baby S v Appeal of S.S* 2015 PA Super 244

¹⁷ *In re Paternity of F.T.R.* 2013 F.T.R. WI ss66

Such justifications to the enforcement of surrogacy contract is because that every individual has a right to contract freely with another and this right is recognised under the principle of freedom of contract which is directly related to personal autonomy of an individual. Freedom of contract is an important liberty that recognises the importance of allowing individuals to reliably order their own affairs.¹⁸

Though the Chief Justice Shirley Abrahamson in his Concurring opinion in Baby FTR case points out numerous public policy issues regarding the validity of surrogacy agreements including

“Must the agreement be in writing, should compensated agreement be allowed and what are limits on compensation, should the availability of surrogacy be limited to married couples or to infertile intended parents, should the age of any party be limited, should a spouse be required either to consent or to be made party to the contract, must each individual involved must be represented with the counsel; should State require that information about each individual’s legal rights provided, what provisions are valid regarding who make decisions about health care and termination of pregnancy; how and when may the agreement be terminated, and must any party to the agreement be given opportunity to change his or her mind before and after the birth of the child”.

Here important issue is that when Courts justifying surrogacy contracts as not opposed to public policy they are relying on the public policy of the ‘best interest of the child’. For example in Baby SS case intended mother refused (who was not the genetic mother) to comply the conditions of the surrogacy contract, even refused to support the surrogate mother to bear the financial burden of the child care and bearing on account of her divorce with the intended father Upon trial surrogacy contract was held valid and she was liable to bear the terms of the contract. Against that decision she appealed and contended in the Court that such contracts are against public policy. The Court held that only in clearest of clear cases court held any contract void against public policy. But in this case child is in this world because of the Shelly and Shepherded agreement (intended parents) and their clearly stated intention to become parents bind them with the terms of the contract they enter. Thus the Court protects the best interest of the child as a public policy. Similarly in the Baby FTR case Paternity Agreement was held valid, enforceable and is not against the public policy because its enforcement is in consistent with the other provisions of the state’s statutes concerning children and family, especially a statute providing “instability and impermanence in family relationship are contrary to the welfare of children”. Again Wisconsin Higher Court relied on the public policy of ‘best interest of child’.

About twenty five years before(1988) in the first surrogacy case the New Jersey Supreme Court¹⁹ held surrogacy contract void and unenforceable as contrary the public policy of best interest of child because there is public policy of keeping children with both of their natural parents.

Thus Courts either enforce or reject to enforce (though now only enforce) the surrogacy contracts relying on the one public policy that is ‘welfare and best interest of the child’. True and it is justified that the sole purpose of the surrogacy contracts is the “parenthood” and child has paramount interest in parenthood.

On the other side when we argue that surrogacy Contracts are against the public policy we are concerned with the public policy of ‘respect to the women dignity’ and ‘use of her reproductive capacity’. This issue arises in the case of commercial surrogacy. From the past decades commercial surrogacy motherhood has gained notoriety as a method for acquiring children. Commercial surrogacy substitutes market norms for some of the norms of parental love. Most importantly, it requires us to understand parental rights no longer as trusts but as things more like property rights----that is, right of use and disposal over the things owned. For example in this practice the

¹⁸ E.Allen Fansworth, Fansworth on contracts, Aspen Publishers, New York(2nd edition 2001)

¹⁹ Baby M Case

natural mother deliberately conceives a child with the intention of giving it up for material advantage. Her renunciation of parental responsibilities is not done for child's sake nor for the sake of fulfilling an interest she shares for the child, but typically for her own sake (and possibly if altruism for the sake of the intended parents). She and the couple who pay her to give up her parental rights over her child thus treat her rights as a kind of property rights.²⁰

Further from the Surrogate mothers perspective the application of economic norms to the sphere of women's labour violates women's claim to respect and consideration in following ways, First by requiring the surrogate mother to repress whatever parental love she feels for the child, these form convert women's labour in to alienated labour, second, by manipulating and denying legitimacy to the surrogate mothers evolving perspective on her own pregnancy, the norms of the market degrade her. Third by taking advantage of surrogate mothers non-commercial motivations without offering anything but what the norms of commerce demand in return, these norms leave her open to exploitation.²¹

Surrogacy contracts produce the surrogate women in the circumstances which may be exploitative because as when she enters in to contract she is not free to develop an autonomous perspective with her child. She is contractually bound to manipulate her emotions to agree with the interest of the intended parents. In reference to the freedom of women to enter in to contract in the case of surrogacy contract it compromises the autonomy of surrogate mother because it uses the norms of commerce and commands the surrogate mother to manipulate their emotions for others. Thus surrogacy industry actually undermines the external and external conditions required for the fully autonomous choice of women.²²

All such practice for the compliance of the surrogacy contracts are derogatory to the dignity of women, protection of which is the prior duty all systems.

As it is held that "public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you".²³ This is the rule of caution and as said by the Lord Halsbury that "in any court can invent new head of public policy".²⁴ In accordance to that justification surrogacy contracts are held to be void as contrary to the public policy of 'protection of dignity of women'.

For example The New York the Task Force Life and Law released a report entitled *Surrogate Parenting: Analysis and Recommendations for Public Policy* in 1988. The Task Force unanimously recommended that public policy should prohibit commercial surrogate parenting. The members concluded that the practice could not be distinguished from the sale of children and that it placed children at significant risk of harm. They also agreed that surrogacy undermines the dignity of women, children, and human reproduction. The Task Force rejected the notion that rights as fundamental as the right of a parent to a relationship with his or her child should be bought and sold or waived irrevocably in advance of the child's birth. Legislation based on the Task Force's proposal was enacted and named New York Domestic Relations Laws. The legislation embraces existing family law principles, rather than contract law, as the touchstone for public policy on surrogate parenting. As recommended by the Task Force, the law declares surrogacy contracts void in New York, and bans the payment of fees to women who serve as surrogates and to individuals who act as brokers for the arrangements. The law does not bar surrogate arrangements that are voluntary and non-commercial; consistent with existing New York adoption law, a woman can voluntarily relinquish her child after birth. Under the legislation, the intended parents can

²⁰ Elizabeth S. Aderson 'Is women's Labor a commodity? Phylosophy and public affairs, Vol.19, No.1, 1990, Down loaded from 128.239.99.140 on Tue, 10 Mar 2015, JSTOR

²¹ Ibid.

²² Elizabeth S. Aderson 'Is women's Labor a commodity? Phylosophy and public affairs, Vol.19, No.1, 1990, Down loaded from 128.239.99.140 on Tue, 10 Mar 2015, JSTOR

²³ Borrough J in Richardson v Mellish (1824-34) All Eng Rep 258

²⁴ Parke B In Egerton v Brownlow, 10 ER 359,408: (1853) 4HLC 1,123

reimburse the birth mother for reasonable medical expenses arising from pregnancy and childbirth, but cannot pay her for relinquishing the child.²⁵The New York law holds that commercial surrogacy contract contravene public policy and provide for civil liberties penalties for those who participate or facilitate in commercial surrogacy contract in New York.²⁶ Altruistic surrogacy contract are not penalized, but neither they are enforceable. Surrogacy parenting contracts are contrary to public policy of the state and are void and unenforceable.²⁷

Not only that Thailand Government also enacted a law to ban commercial surrogacy for foreigners,²⁸after shocking baby gammy case(Australian couple refused to take the child born through Thai Surrogate after disclosure that he suffering with Down syndrome) and a millionaire Japanese family(A Japanese male found the father of about sixteen children born through surrogates of Thailand). The policy of Thailand Government was to protect the physical and emotional torture of surrogate mothers of Thailand where services of surrogates was used as trade. India is also in the way to bring the policy for protection of dignity of women working as surrogates in the economic necessities in the country. The Surrogacy (Regulation) Bill 2014 is pending in the Parliament.

Conclusion

Hence, the protection of dignity of woman who is surrogate and welfare of the child born out of surrogacy are the public policies upon which surrogacy contracts can be declare unenforceable and if not, it must at least be regulated up to the extent that the protection of dignity of women and the welfare of children can be secured all over the world. When freedom to enter in to contract causing wrong or harmful effect in to life of the parties of the contracts and even on the future generation of the society(children), there must not any hesitation to declare to such contract void and unenforceable, or to regulate it in such manner as they must not be commercially exploited.

²⁵ https://www.health.ny.gov/regulations/task_force/reports_publications/#reproductive_tech 8\3\2016

²⁶ New York domestic Relations Laws article 8(sec 121-124)

²⁷ Sec 124 of the Article 8 of the Domestic relation Laws of Newyork

²⁸ The Protection of children born through Assisted Reproductive Technoligies Act 2015