

“Surrogacy: Family Law or Contract Law?”

Garima Bothra
GITAM School of Law

Abstract:

Surrogacy is one of the new takes on Motherhood. Commercial Surrogacy was first introduced to India in 2002 as a step forward to increase medical tourism. Soon enough, India became the hub of Surrogacy because of the low costs and absence of any strict laws. It is over a \$2.3 billion a year industry. With the increase in demand of surrogate mothers over the years, it has become essential to recognize the legal relationship between the surrogate mothers and the couples. While doing so, it is also necessary to understand these are not pure contractual relationships as it is a concept of reproduction and is, therefore, a sensitive subject matter. This article's primary focus will be on the paradigm which governs Surrogacy from a legal point of view, whether it will come under Family law like adoption or just a mere contract like the sale of a good or providing a service.

Keywords: Surrogacy, contract, family

Introduction:

Surrogacy has become an accepted practice in India as well as the whole world. Consequently, it also started debates and raised issues related to its ethical, social, and economic aspects. Before going further, it is to be understood that Surrogacy is of 2 types: Gestational and Traditional Surrogacy. The former allows the surrogate to donate her egg and have a genetic connection to the baby. In the latter, the intending parents use their egg and sperm, and it is implanted in the surrogate. It is safe to say that no other form of human reproduction raises as many issues in law and policy and sometimes even morality as Surrogacy.¹ The contentions are usually raised from either of these two views; First, the Family Law view. It upholds individual rights, in this case, the surrogate mother's rights, and therefore, protects and respects their nurturing talents. Second, a Contract Law view. Here it is viewed in a simple, "a deal's a deal" context.² So, next comes the question of which is the correct view.

The Contract Law Perspective:

This is the simplistic view while dealing with a problem related to Surrogacy. This view can also be accepted on the basis that family relatives can enter into agreements. This provides a purely contractual approach while dealing with a problem and, in this case, the surrogate agreement. Contracts generally provide principles that both parties consent to and help avoid a future misunderstanding or any glitch. The word "contract" is interpreted as a harsh term,

¹A. M. Capron & M. J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, JOURNAL OF LAW, MEDICINE & ETHICS (Sept 1, 1988).

²Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, VIRGINIA LAW REVIEW (November 1995).

which is a misunderstanding. A contract need not be severe on either one of the parties. It is to be understood that both the parties consent to the principles provided and only then agree. A contractual approach can also help understand the boundaries and limits that the parties intend to have before forming such relationships. Therefore, in a way, it aids in establishing the right relationship between the parties.

A surrogacy agreement is "a comprehensive document that lays the foundation for governing relationships between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose, and situation of both parties, the terms under which the surrogate has agreed, compensation, payment schedule, etc."³

This agreement is binding on both parties. It regulates the rights and obligations of both the parties on each other. As already mentioned before, it contains all the conditions based on which the situation will be handled. Moreover, in commercial Surrogacy, it most important deals with the monetary compensation part, and the parties have to abide by it strictly. In *Re The Matter Of TT (A Minor)*⁴, *Re P (Surrogacy: Residence)*⁵, the court held that "The surrogate child born is a result of a Surrogacy agreement." This implies how an agreement is necessary and obligatory.

A contractual approach provides answers to the plethora of problems that might arise after the baby's birth. Even in a general perspective, if we find anything important or of a dominant nature, we get it in writing. Then, why should Surrogacy be any different?

The contractual approach is essential. It helps in achieving practical reasonableness even before such a situation comes up.⁶

"Freedom of contract is important to flourishing because no one but the individual should make the choice to enter into the contract freely for his own benefit, which is an exercise of the requirements of practical reasonableness."⁷

Thus, it would be good for the parties to go through a contractual approach and enforce and find a solution.

The Family Law Perspective:

Family Law recognizes some core values related to adoption and reproduction, which is, more or less, what happens here. Doctors put together a child through IVF, and a contract is formed for it. But a contract reduces the child to a manufactured product. The family law model doesn't allow this. It doesn't look at surrogacy child as a manufactured product but as

³Mother & Baby, Womb in your heart, News.advisen, 09/03/2014, available at <http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY_NEWS_0012>

⁴[2011] EWHC 33 (Fam)

⁵[2008] 1 FLR 177.

⁶Adeline A. Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARVARD JOURNAL OF LAW & PUBLIC POLICY (May 26, 2018).

⁷Adam J. Macleod, *Property And Practical Reason* 13 (2015). at 24–25, 30, 107–110

an adoption of a child. When viewed through an adoption perspective, Surrogacy becomes easier to understand and protect the parties' rights. It gives importance to birth mothers as well. A birth mother is the one who mainly influences this process. Therefore, her rights are also fundamental and need to be protected.

The adoption laws of Modern India & all the recent judicial decisions on it are adequate. An adopted child is treated equally to a natural-born child. This is mostly because of the belief that a child is indispensable for the spiritual and material well-being.⁸ Once a child is adopted, he has duties and rights as a natural-born does.

What happens in adoption is that the biological parent has a more significant role before the process happens. This is needed in Surrogacy too. Because reproduction is involved, one really can't be sure about the future. A contract tries to do this. Let's take an example of a surrogate goes through a miscarriage in the seventh month of her pregnancy. A contract might or might not compensate her for all the effort and time. But it will not compensate her for the mental trauma she will go through.

Society is becoming more open-minded day by day. You don't have to be married anymore to adopt a child. Although there are restrictions on non-heterosexual couples in India, they will change in the coming years. Thus, family law allows them a private ordering without anybody's interference. Family law, as we all know, recognizes core values related to individual rights. Article 21 of the Indian Constitution upholds the Right to Life & Dignity. This has a close relation to family law and can be called the backbone of the same. Surrogate mothers are reduced to prostitutes because of their work. Article 21 will help them in preserving their dignity, which a contract definitely can't. It will help them in improving their status as individuals.

Which one is correct?

Both views have their own limitations. One can contend that Adoption laws also went through their battle. For example, under the Hindu Adoption Law, only a son could be adopted. But later, it went through an evolution as India started modernizing, and such gender biases were removed. That's why Surrogacy should be left alone to evolve with time as society becomes more open-minded. Family law also evolved over the years. Even spousal relationships fit better in contractual ordering due to some egoistic and personal traits in today's world.⁹ However, again, the issue of unequal power to the contracting parties.

There is no wrong perspective. The correct one, although, would be if both are to take in a combined view. Because surrogacy contracts deal with fundamental human rights, which are highly personal and of social importance, and rigid enforcement of such agreements or total

⁸Almas Shaikh, *Legal Framework Governing Adoption Laws in India*, Feb 4,2015 available <https://www.lawctopus.com/academike/legal-framework-governing-adoption-laws-india/>

⁹Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, WILLIAM & MARY JOURNAL OF RACE, GENDER, AND SOCIAL JUSTICE (Feb 2014).

withdrawal from them may damage either or both parties. Similarly, every other considered solution, such as monetary refund or compensation, is appropriate if taken in the commercial context through a contract.

Conclusion:

In conclusion, partial enforcement of Surrogacy agreements would be correct. The contract will not remain binding if an unpredictable situation comes up since the agreement's sole goal is the birth of a child and establishing that child's legal parenthood. We should not forget that the subject of such agreement is a child whose interests and rights could be badly damaged should the parties be unable to reach a just compromise. So laws made in whichever point of view, either contract law or family law, must be strict enough in the end to protect the child.