

“Womb for Rent”
Gestational Surrogacy Contracts - A New Path for
Outsourcing Service Contracts

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ABSTRACT

Infertility affects approximately 2 to 3 million married couples in the United States and a larger cohort of unmarried men and women. For those not inclined to adopt, science has provided another option, one based on assisted reproduction through artificial insemination, commonly known as *In Vitro Fertilization* (IVF), or as “surrogacy.” Under this framework a woman, designated as a “surrogate”, bears a baby on behalf of a couple with the intention of relinquishing her rights as legal mother of the child after birth. This ‘surrogate’ can either be from the local community or living in another community or country. This transaction for the services of a ‘surrogate’ or more specifically for the use of her ‘womb’ can be viewed as a service contract or a service contract involving outsourcing. In either case a new dimension of international trade can be established involving the services of developing country women. The paper shows that applying strict contract law both the surrogate and the infertile couple can achieve a Pareto efficient solution. Moreover, wages of women, entering into these IVF contacts will increase as these surrogacy contracts become part of an outsourcing mechanism.

I. INTRODUCTION

Medically assisted procreation, which encompasses all medical techniques enabling infertile couples to reproduce, has developed considerably since the 1980s. It is estimated that on a global level some 10 to 15% of couples face infertility.¹ In the US Infertility affects approximately 2 to 3 million married couples. Scientific medical advances will enable around 60% of these couples to start a family, although this will often entail exhaustive and expensive medical treatment.² Adoption has historically been viewed as the cheaper alternative way of addressing this demand for children without exhaustive medical treatment. The adoption process, however, does not appear to be the first choice for many. Science has provided another option, one based on assisted reproduction through artificial insemination, commonly known as “surrogacy.” Under this framework a woman, designated as a “surrogate”, bears a baby on behalf of a couple with the intention of relinquishing her rights as legal mother of the child after birth. The practice of surrogacy, however, is deeply disconcerting for traditional conceptions of the family and women. It is seen by some as a beneficial development resulting from the tremendous progress made in the area of procreation and by others as an aberration of this revolution.

The intent of this paper is to argue that the debate over surrogacy is too focused on ‘morality’ issues while missing the crucial point that these arrangements are commercial

¹ The World Health Organization (WHO) defines infertility as a couple’s inability to conceive after at least one year of regular, unprotected *coitus*.

² Daniluck JC, *Infertility : intrapersonal and interpersonal impact*. Fertil. Steril. 1988. Vol 49 : 982-990.

contracts. Moreover, we show that these transactions are for the services of a ‘surrogate’ or more specifically for the use of her ‘womb’ and can best be described as a service contract or a service contract involving outsourcing. Such a contract, if upheld by the courts, can be shown to improve the welfare of the all the participants.

This paper focuses on the so-called gestational (full) surrogacy, i.e. the form of artificial insemination which applies the method of *In Vitro Fertilization* (IVF), whereby a doctor implants the fertilized eggs of a woman into the surrogate’s uterus. The surrogate has no genetic link to the biological parents and is assumed to contractually release the child after birth. The important factor is that the woman, who is designated as a “surrogate”, bears a baby on behalf of a couple with the intention of relinquishing her rights as legal mother of the child after birth. That is, the ‘surrogate’ provides a paid for service very much like the production of a sweater.

While it may appear that this is a straight forward market arrangement, the first reported IVF surrogacy in the United States was reported in 1985. With all the scientific innovations in this area the total cost to the client parents can range from \$20,000 to \$120,000, in the United States.

Apart from the high monetary cost of the procedure there is a physical cost to the surrogate in terms of a high probability of miscarriage. Furthermore, there is no uniform application of case law in support of “surrogacy” contracts across the states in the United States and far less across countries. In most countries other than Israel, the United Kingdom and Greece, IVF surrogacy is prohibited by law and even when it is permitted, in most cases the contracts between the genetic parents and the surrogate mother are not enforceable. In the European Union, most countries do not enforce surrogacy contracts. In developing countries the story is even more complicated.

In this paper, I will present the case why IVF surrogacy contracts should be enforceable under the law as is true of any other service contracts. The arguments are based

on elements of US contract law. The starting position is that IVF surrogacy contracts are not contracts to sell a baby (the final product), since the surrogate cannot sell something she does not have property rights to, namely the newborn. The surrogate is essentially selling her gestational services. These services are similar to other services offered by women in employment contracts including wet nurses, models, and more recently athletes and soldiers. The paper will show that applying strict contract law both parties can achieve a Pareto efficient solution. Moreover, wages of surrogate women, entering into these IVF contracts will increase as these surrogacy contracts become part of an outsourcing mechanism.

Section II of the paper presents a two stage production process which separates the womb from the sterilization stage. The history of surrogacy as contracts in US courts is presented in Section III. A model of surrogacy as outsourcing is presented in Section IV. Concluding remarks are presented in Section V.

II. THE PRODUCTION PROCESS

Science has made enormous progress in the field of reproductive technology thus redefining our standard paradigm of the husband-wife union with an internal process of producing children.³ In its simplest form, reproductive technology refers to various medical

³ Historically there is considerable discussion of paternity as a legal fiction. For example In James Joyce's *Ulysses*, the character of Stephen Daedalus declares that 'Fatherhood in the sense of conscious begetting is unknown to man. It is a mystical estate, an apostolic succession, from only begetter to only begotten. On that mystery and not on the Madonna which the cunning Italian intellect flung to the mob of Europe the Church is founded and founded irremovably because founded, like the world, macro- and microcosm, upon the void. Upon incertitude, upon unlikelihood. *Amor matris*, subjective and objective genitive, may be the only true thing in life. Paternity may be a legal fiction. Who is the father of any son that any son should love him or he any son?' The philosopher, Derrida comments on Joyce's 'paternity as legal fiction' in the following:

“The second thing I would select here has to do with what Joyce calls at some point the legal fiction of fatherhood. This is a very Christian moment - I am referring to this text; I cannot quote it here - but that's when Stephen says, well, 'Paternity is a legal fiction', and he refers to Christian texts, the Biblical text. Why is it so? Because one is supposed to know who the mother is; there is a possibility of bearing witness to who the mother is, whereas the father is only... only sort of reconstructed, inferred. The identification of the father is

procedures that are designed to alleviate infertility, or the inability of a couple to produce a child of their own. The current state of knowledge includes artificial insemination, in vitro fertilization, and various forms of surrogate motherhood. In the successful cases, science has provided couples with an alternative mechanism to conceive a child of their own. In providing these new advances, science has made it possible for economists and lawyers to consider the process of child bearing as a production function with the standard inputs, production environment and requisite output. In a global trading environment this has also introduced the possibility of outsourcing of certain elements of the child bearing production process.

Once one takes the childbearing process out of the traditional household production function, science provides many alternative technological processes, akin to differing technologies along an isoquant. If a man cannot produce sperm and his wife wants to have a child, science provides the opportunity whereby she is artificially inseminated with sperm from an anonymous donor, conceives, and bears a child. If a woman who cannot produce eggs and her husband want to have a child they simply hire a woman to be inseminated with the husband's sperm, and she bears the child for them. If a woman is able to produce eggs but is unable to carry a child to term, she and her husband can "rent the womb" of another

always resounding in a judgement - you cannot see the father. And I think that today we experience that not only is the father a legal fiction from which it draws and it has drawn its authority, and before I confirm this by saying, well, patriarchy has been a progress in the history of mankind because the father... to determine who the father is you need reason; for us to determine who the mother is, you only need sensible perception. I think he is wrong and he has always been wrong but we don't... there is not only this paternal prerogative because the mother is also a legal fiction from that moment, that is, the motherhood is something which is interpreted. The theme of a reconstruction of an experience - what one calls today surrogate mothers for instance, with all the enormous problems that, you know, attest to the fact that we do not know who is the mother - who is the mother in the case of surrogate mothers? And when we realize that the motherhood is not simply a matter of perception we realize that it has never been so, that the mother has always been a matter of interpretation, of social construction and so on and so forth, and this has enormous political consequences. We don't have time probably to deal with this but I would, if we had time I would try to show what the political consequences may be of this fact that the situation of the mother is the same as the one of the father in that respect." (Transcribed by J. Christian Guerrero; this interview is now in print in John D. Caputo, ed.(1997) *Deconstruction in a nutshell*, Fordham University Press.)

woman and she gestates an embryo that was formed by laboratory fertilization of the husband's sperm and his wife's egg. If a lesbian couple wants to have a child, one of the women partners provides an egg, and after it has been fertilized by donor sperm, the embryo is implanted in the uterus of her partner. If a couple desiring to have children cannot produce any of the sperm or eggs necessary for conception it is possible for the woman's sister to donate the egg and the man's brother donates sperm. Fertilization occurs in vitro, that is, outside the womb, and the embryo is transferred to the wife of the couple, who carries the child. These differing technologies redefine the family and turn traditional notions of reproduction upside down.

If one were to rank order the technological procedures in terms of least cost and with the least social counter pressure one would start with artificial insemination. This procedure is relatively simple whereby sperm, either from the woman's husband or a donor, is inserted into the woman's uterus directly rather than through sexual intercourse. Its ease of application makes this procedure the number one choice in infertility treatment. It is simple to accomplish, involves no pain for the woman, and is inexpensive compared to other reproductive technologies. It is most often employed when a woman's husband has a low sperm count, or his sperm has difficulty in reaching the woman's egg. Most people have no moral difficulty with such a procedure. It is simply viewed as medical technology providing assistance to what could not be accomplished by normal sexual intercourse. The genetic materials that are combined when conception occurs are the property of the woman and her husband, and they are the ones who plan to raise the child. Most people agree that there are no morally significant differences between artificial insemination and procreation by intercourse.

Likewise in cases where the husband is unable to produce sperm at all, artificial insemination occurs by sperm being provided by anonymous donor. While this process is technically very simple it alters the household production function in that it introduces a third party into the reproductive matrix, and someone who donates sperm is now contributing genetic material without the intent to parent the child that will be produced through the use of his genes.

Where the process becomes more costly and far more complicated both in terms of enforceability when an outside carrier is involved is in the procedure known as in vitro fertilization (IVF). This procedure simply means fertilization “in glass,” as in the glass container of a test tube or petri dish used in a laboratory. The procedure involves extraction of a number of eggs from the woman. To do this she is usually given a drug that enables her to “superovulate,” or to produce more eggs in one cycle than she normally does. The eggs are then surgically removed and fertilized outside the body in the laboratory, normally using the sperm of the woman's husband. Since the procedure is so expensive,⁴ all of the eggs are fertilized in the lab. In this way if none of the fertilized embryos are successfully implanted, re-implantation can occur without much additional cost or lost time, since to extract the eggs would involve waiting until at least the woman's next cycle. Normally, more than one embryo is implanted in the woman's uterus, since it is uncertain how many, if any at all, will be implanted successfully. The actual number implanted depends on various factors relating to the condition of the eggs and the health of the woman. It is not unusual to have some if not all of the embryos spontaneously miscarry. If more than one embryo *does* successfully implant, then the couple may end up with more children than they originally intended. Twins

⁴ It is not abnormal to see a price of \$10,000 as the cost of extraction of the eggs.

and even triplets are not uncommon for couples who use IVF. The average success rate is less than 10 percent of the fertilized embryos actually implanting and developing into a child.⁵

Where this procedure becomes complicated is when it involves a surrogacy agreement. The agreement involves an infertile couple on one side of the contract wishing to become parents who make an offer to the surrogate (the other party of the contract) who agrees to carry the foreign embryo in her uterus to full term and then give the baby to the genetic parents. With this gestational surrogacy, the embryo is genetically related to both of the parents and not the surrogate. In effect this procedure introduces the concept of outsourcing to what has usually been considered a household production.

In addition to the cost of extracting the eggs gestational surrogacy (via the IVF method) also involves the costs associated with the preparation of the surrogate mother and the period after the insemination which involves several injections of hormones, estrogen and progesterone, the taking of pills and a significant change in the surrogate's way of life. There is a significant miscarriage rate and the compensation to the surrogate mother in the United States begins at \$15,000 for a novice surrogate mother and can go up to \$25,000 for an experienced surrogate.⁶ Therefore, the total cost to the oferee parents can be quite high (ranging from \$20,000 to \$120,000).

⁵ On July 25, 1978, Louise Brown was born. She was the first child ever born through the use of in vitro fertilization; that is, she was the first "test-tube" baby. A British gynecologist, Dr. Patrick Steptoe, and a physiologist, Dr. Robert Edwards, successfully joined egg and sperm outside the body, then implanted the embryo in the mother. Nine months later, Louise Brown was born and was heralded as a miracle baby around the world.

⁶ Prices quoted by various fertility clinics.

III. SURROGACY AND CONTRACT LAW

The first documented use of artificial insemination resulting in pregnancy took place in 1799.⁷ As science progressed, the technology of taking birth outside of the household production function led to the first commercial surrogate motherhood arrangement reported in the United States in 1976.⁸ Gestational surrogacy was first reported in the United States in 1985.⁹ In most jurisdictions worldwide, gestational surrogacy is prohibited by law and even when it is permitted, in most cases the contracts between the genetic parents and the surrogate mother are not enforceable. In the United States few state high courts have ruled on surrogate motherhood arrangements.

The first and most widely recognized surrogacy case in US history is *In re Baby M*.¹⁰ In that case William Stern, "Baby M's" natural father, and his wife, Elizabeth Stern, brought suit seeking to: (1) enforce a surrogate parenting arrangement between themselves and a surrogate, Mary Beth Whitehead; (2) compel the surrender of the infant born to the surrogate mother; (3) restrain any interference with their custody of the infant; and (4) terminate the surrogate mother's parental rights, allowing Mrs. Stern to adopt the child.¹¹ The New Jersey Supreme Court awarded custody of the child to the Sterns, but invalidated the surrogacy contract.¹² The court determined it was in the child's best interests to live with

⁷ U.S. Cong. Office of Techn. Assessment, *Infertility: Medical and Social Choices* 36 (1988) [hereinafter OTA].

⁸ *Id.*, at 282-84.

⁹ *Id.*

¹⁰ *In re Baby M*, 537 A.2d 1227 (N.J. 1988)

¹¹ *Id.* at 1235-40.

¹² *Id.* at 1250-59.

her father and his wife.¹³ In fairness to the surrogate the court did, grant the surrogate mother visitation privileges.¹⁴

In 1986, in *Surrogate Parenting Associates, Inc. v. Armstrong*,¹⁵ the Supreme Court of Kentucky held that a surrogate mother who changed her mind before completing her contractual obligation stood in the same legal position as a woman who conceived without contractual obligations. In effect her breach of contract forfeited her rights to whatever fees the contract provided.¹⁶ However, the mother, child and biological father were given the statutory rights and obligations that exist in the absence of contract. Therefore, the surrogate motherhood contract was voidable by the surrogate mother.¹⁷

In the Court of Appeals of Virginia a gestational surrogacy case, *Doe v. Doe*, appeared in 1992.¹⁸ In this case the trial court found clear and convincing evidence that the man and woman whose sperm and ovum were fertilized and implanted in the surrogate were the child's "biological and genetic parents."¹⁹ Consequently the court concluded that they became the baby's true and lawful parents of record, while the surrogate mother's parental rights are terminated.²⁰

¹³ *Id. at 1256-61*. In this case the surrogate mother not only gave birth to the child but also supplied the genetic material necessary for its fertilization. *Id. at 1236*.

¹⁴ *Id. at 1261-64*.

¹⁵ *Surrogate Parenting Assoc., Inc. v. Armstrong*, 704 S.W.2d 209 (Ky. 1986).

¹⁶ *Id. at 213*.

¹⁷ *Id.* In making their decision the court highlighted an important distinction. First it stated that surrogate parenting agreements were neither illegal nor void under Kentucky law. Second, they found that there were fundamental differences between the surrogacy agreement in this case and the buying and selling of children which is prohibited by Kentucky law. *Id. at 211*.

¹⁸ *Doe v. Doe*, 421 S.E.2d 913 (Va. Ct. App. 1992).

¹⁹ *Id. at 915*.

²⁰ *Id.*

The appellate court in Doe held that under the statute, the parent-child relationship between a child and a woman may be established prima facie by proof that the woman gave birth to the child.²¹ However, this birth mother-child relationship may also be established by other means, and that relationship is not terminated even if another woman is determined to be a parent.²² Consequently the appellate court reversed the lower court's decision, and passed the issue of surrogacy contracts to the politicians.²³

The leading case opposing surrogacy contracts is Doe v. Attorney General.²⁴ This case, decided in June of 1992, involved several infertile couples and their prospective surrogate mothers. These parties brought an action for declaratory judgment against the Michigan State Attorney General regarding the constitutionality of the Surrogate Parenting Act.²⁵ The Michigan Court of Appeals held that the legislature's interests in preventing children from becoming mere commodities, in protecting the child's best interests, and in preventing the exploitation of women were compelling enough to justify an intrusion into the procreation rights of infertile couples and prospective surrogate mothers,²⁶ without violating the parties' due process.²⁷ Ultimately the court held that a "surrogate parentage

²¹ Id.

²² Id.

²³ *Id. at 916*. The Virginia General Assembly enacted code provisions directly addressing the status of children born as a result of surrogacy contracts. . *Va. Code Ann. sections 20-156 to 20-165*. This provision became ex-post with respect to this case since it became effective in July 1, 1993 (Michie 1992).

²⁴ Doe v. Attorney Gen., 487 N.W.2d 484 (Mich. Ct. App. 1992).

²⁵ Michigan's Surrogate Parenting Act provides the rules and procedures for surrogacy arrangements in Michigan.

²⁶ The court based its conclusion on the Surrogate Parenting Act. *Id. at 485, 486-87*.

²⁷ Id.

contract” which involves a voluntary relinquishment, after conception, of the surrogate’s parental rights to a child is void and unenforceable.²⁸

In *Johnson v. Calvert*²⁹ the California Supreme Court was confronted with two main issues: (1) whether the genetic mother or the birth mother was the child’s “natural mother” under California law; and (2) whether gestational surrogacy contracts violate the public policies and constitutional guarantees embodied in California’s statutes.³⁰ In answering the first question the California Supreme Court looked to the state’s Uniform Parentage Act [hereinafter “the Act”].³¹

According to the Act and particularly Civil Code § 7003 a parent and child relationship, between a child and the natural mother, “may be established by proof of her having given birth to the child”³² Despite the fact that under the Act this is the only way by which a mother and child relationship can be established, the Act also states that, insofar as practicable, provisions applicable to the father and child relationship may apply to determine the existence or nonexistence of a mother and child relationship.³³ Combining *California Civil Code* § 7004 and *California Evidence Code* § 721, paternity may be determined by a blood test.³⁴ Putting all of this together, the court found that when maternity is in dispute, genetic

²⁸ *Id.* at 488-89.

²⁹ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

³⁰ *Id.* at 777-78.

³¹ *Id.* at 778-85. See also The Uniform Parentage Act, *Cal. Civ. Code sections 7000-21* (West Supp. 1993) (repealed and replaced by sections 7600-7650 in the California Family Code, effective January 1, 1994).

³² *Cal. Civ. Code* § 7003(1).

³³ *Id.* § 7015.

³⁴ *Johnson*, 851 P.2d at 780-81; see *Cal. Civ. Code* § 7004 (West Supp. 1993) and *Cal. Evid. Code* § 892 (West Supp. 1993).

evidence derived from blood testing is admissible.³⁵ Consequently both Crispina Calvert and Anna Johnson had sufficient evidence that they were legally the child's natural mother -- Calvert by the genetic evidence and Johnson by giving birth to the child. Despite the existence of a surrogacy agreement, whereby Mark and Crispina Calvert were to supply the genetic material to Anna Johnson who would act as a surrogate and be compensated for the rental of her womb, the court found that she who intended to procreate the child - that is, she who intended to bring about the birth of a child that she intended to raise as her own - is the natural mother under California law.³⁶

Based on its determination that Anna was not the child's "natural mother" under California law,³⁷ the Johnson court found that any constitutional interests that Anna claimed, including her rights to substantive due process, privacy, and procreative freedom were less than those of a mother. The high court reiterated the trial court's analogy of Anna's relationship to the child resembling that of a foster mother in whose care the child was placed for a limited time.³⁸ Consequently, the court dismissed Anna's claims of public policy infringements and constitutional violations, leaving Anna with one final option: to petition the Supreme Court of the United States for a writ of certiorari, which she did on July 1, 1993.³⁹

³⁵ *Johnson*, 851 P.2d at 781.

³⁶ *Johnson*, 851 P.2d at 782.

³⁷ *Johnson*, 851 P.2d at 786.

³⁸ *Id.*

³⁹ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), petition for cert. filed, 61 U.S.L.W. 2721 (U.S. July 1, 1993) (No. 93-5065).

The different state courts that have dealt with surrogacy arrangements have most often looked to their state adoption statutes for guidance.⁴⁰ Since the decision in Baby M, sixteen states have adopted surrogacy laws.⁴¹ Twelve of these states have taken the position that surrogacy contracts will not be enforced (i.e., are voidable) against the birth mother if she wishes to keep the child.⁴² In only eight of the sixteen state surrogacy statutes specifically apply to gestational surrogacy.⁴³ Despite the controversies over surrogacy, only four states have outright bans: Arizona bans surrogacy contracts altogether; Kentucky, Michigan and Utah ban all payment to a surrogate. Florida, New Hampshire, New York, Virginia and Washington ban payment to surrogates, but allow payment of medical and other surrogate expenses.

The obvious question about surrogacy contracts is whether or not they should be viewed as contracts and if so should they be enforceable at law? According to the traditional bargain theory of contracts,⁴⁴ *a promise is legally enforceable if it is given as part of a bargain; otherwise, a promise is unenforceable*⁴⁵. In effect, three conditions: offer, acceptance, and

⁴⁰ See *Baby M*, 537 A.2d at 1242-46; *Doe*, 487 N.W.2d at 486-88. In cases where the surrogate performs both biological and birthing functions of motherhood - the spouse will adopt the baby upon birth. This is not the case in a gestational surrogacy arrangement where it is simply an outsourcing function and the surrogate has no genetic links to the child. In this case the biological mother need not adopt the baby if, according to state law, it is already considered her child.

⁴¹ The states that have adopted surrogacy laws include: Arizona, Arkansas, California, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New Hampshire, New York, North Dakota, Utah, Virginia and Washington.

⁴² The states making surrogacy contracts voidable include: Arizona, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Jersey, North Dakota, Utah and Washington.

⁴³ The states with gestational surrogacy statutes are: Arizona, Florida, Indiana, Michigan, New Hampshire, New York, Virginia and Washington.

⁴⁴ Eisenberg, *The Bargain Principal and its Limits*. 95 HVLR 741,

⁴⁵ The “promisor” refers to the person who gives a promise, and the “promisee” refers to the person who receives a promise.

consideration must be present in order to create a bargain. In a bargain, the promise, the expected parents, induces the promisor, surrogate, to give the promise. The inducement in these contracts is usually another promise, as when a surrogate promises to deliver the baby to the parents after full term, and the parents promise to pay a certain price upon delivery and cover all the costs associated with the birth.⁴⁶

Under this approach, and the assumption that the contract is not unconscionable, it should be enforced. If we add Pareto optimality conditions each of the parties becomes the best source of their utility maximizing preferences, not a paternalistic intervention by the legal system. When the parties to a surrogacy contract reach agreement on the terms of the contract, they have demonstrated their desire to have the contract enforceable; otherwise they would not have entered into it in the first place. The problem of breach occurs when the surrogate changes her mind.

This change of heart then begins an entire litany of legal arguments against surrogacy contracts. The most important argument against commercial surrogacy is the commodification argument.⁴⁷ According to this argument, a surrogacy agreement is unacceptable, since it commodifies a woman's body and permits her to exchange an inalienable right (i.e. her *quasi* parental right)⁴⁸ for money. Is this argument valid or have we started on a slippery slope down a morality play? In the context of the gestational surrogacy agreement, the embryo belongs to its parents. Consequently, the surrogate has no "parental

⁴⁶ Regardless of the specific form, each surrogacy bargain involves reciprocal inducement: the promisee gives something to induce the promisor to give the promise, and the promisor gives the promise as inducement to the promisee. Under common law the technical term consideration is used to describe what the promisee gives the promisor to induce the promise.

⁴⁷ See Radin (1996).

⁴⁸ See Johnson v. Calvert, *op. cit.*

rights” to sell. The surrogate is essentially selling her labor, and her gestational services. Even if one grants the argument that a surrogacy contract of this type commodifies the women’s womb why is it different from any other service contract?

Another way to interpret this objection to surrogacy contracts is to view the commodification argument essentially as an attempt to preclude women from contracting their services. The surrogate would be prevented from offering a unique service by using her uterus, but would not be prevented from using other parts of her body, her hands or her brain as well to obtain something that is more valuable to her. What is even more telling is the differentiated treatment of sperm donors and surrogate mothers. While the former is considered acceptable, the latter is viewed as morally unconscionable.⁴⁹

Another major criticism of these contracts is that they exploit women. The standard paradigm is that surrogate mothers, are presumed to be poor and unsophisticated, and will therefore have unequal bargaining power compared to the infertile couple who will be more educated and more financially powerful. This imbalance will lead to contracts that are unconscionable for poor women. Specifically, it is charged that the price for the service will be low and the nature of the service will be of such magnitude that the surrogate will turn into the couple’s slave for nine months.⁵⁰ There is no empirical evidence that these assertions are true. In fact, as we show in the next section it may be possible for the surrogate to increase her wages if we view the surrogacy contract as an outsourcing contract.

⁴⁹ See McLachlan & Swales, (2000).

⁵⁰ See Wertheimer (1997).

IV. SURROGACY AND OUTSOURCING

Being able to subdivide production into self contained stages of unique skill intensity is the traditional way of describing outsourcing industries.⁵¹ In the case of surrogacy contracts one can argue that infertile couples facing ever higher costs of conception turn to a less costly but outsourced service provider, the surrogate.

The production of a single child Y^C involves two complementary production stages. The first stage involves the creation of the fertilized eggs of a woman and the second stage involves the incubation in the surrogate's uterus for the full term. The substitutability between the services of the surrogate and the repeated attempts by the natural mother can be modeled by two separate production functions in a CES production environment.

The incubation (I) can be viewed as an intermediate stage in the production of a child either produced in a household using the mother (H) or in a womb of the surrogate (RW). The outsourced womb can be rented at the world price p_1 , whereas the household version requires domestic capital (K) and domestic labor (L) according to a Cobb-Douglas production function.

$$I = [\beta H^\rho + (1 - \beta)RW^\rho]^{1/\rho} = [\beta(M^\gamma K^{1-\gamma})^\rho + (1 - \beta)RW^\rho]^{1/\rho}$$

The initial stage of production, fertilization of the eggs is assumed to always take place at a local hospital, using capital and skilled medical labor according to the following production function:

$$F = S^\alpha K^{1-\alpha}$$

The final product, the baby is the finished product of these two stages:

$$Y^C = \min\{F, I\} = \min\{S^\alpha K^{1-\alpha}, [\beta(M^\gamma K^{1-\gamma})^\rho + (1 - \beta)RW^\rho]^{1/\rho}\}$$

⁵¹ See Feenstra and Hanson (1996).

The minimum cost of producing the child (Y^C) is given by:

$$C(w_s, w_m, p_1, r, Y^C) = \left\{ \left(\frac{w_s}{\alpha} \right)^\alpha \left(\frac{r}{1-\alpha} \right)^{1-\alpha} + \left[\beta^\sigma \left(\left(\frac{w_m}{\gamma} \right)^\gamma \left(\frac{r}{1-\gamma} \right)^{1-\gamma} \right)^{1-\sigma} + (1-\beta^\sigma) p_1^{1-\sigma} \right]^{\frac{1}{1-\sigma}} \right\} Y^C$$

where

$$\sigma = \frac{1}{1-\rho}$$

denotes the elasticity of substitution between the household and outsourced womb. Wages are w_s and w_m , the return to capital is r and the rental womb services set at world market is p_1 .

Using Shepard's lemma, the conditional demand for M labor is found by differentiating the cost function with respect to w_m :

$$M(w_m, p_1, r, Y^C) = Y^C \beta^\sigma \left(\frac{w_m}{\gamma} \right)^{\gamma(1-\sigma)-1} \left(\frac{r}{1-\gamma} \right)^{(1-\gamma)(1-\sigma)} \left[\beta^\sigma \left(\left(\frac{w_m}{\gamma} \right)^\gamma \left(\frac{r}{1-\gamma} \right)^{1-\gamma} \right)^{1-\sigma} + (1-\beta)^\sigma p_1^{1-\sigma} \right]^{\frac{\sigma}{1-\sigma}}$$

The conditional labor demand elasticity (holding baby output constant) for household labor can than be derived as:

$$\varepsilon_m = \frac{dM / M}{dw_m / w_m} = - \left[(1-\gamma) + \gamma \sigma s_{RW,I} \right]$$

This represents the responsiveness of demand for household labor to changes wages along a production isoquant. $S_{RW,I}$ is the share of outsourced womb services (RW) in the total cost of intermediate production I and is equal to:

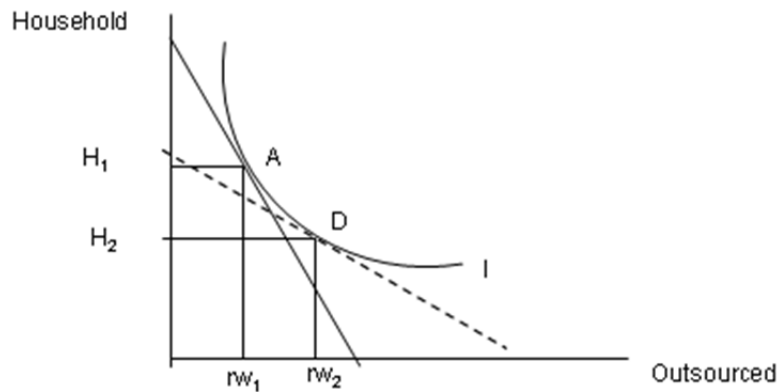
$$s_{RW,I} = \frac{p_1 RW}{C_I I} = \left[\left(\frac{\beta}{1-\beta} \right)^\sigma \left(\frac{C_H}{p_1} \right)^{1-\sigma} + 1 \right]^{-1} = \left[\left(\frac{\beta}{1-\beta} \frac{p_1}{C_H} \right)^\sigma \frac{C_H}{p_1} + 1 \right]^{-1}$$

where C_H is unit cost of producing the intermediate input in the household and is:

$$C_H = \left(\frac{w_m}{\gamma} \right)^\gamma \left(\frac{r}{1-\gamma} \right)^{1-\gamma}$$

To see the intuition behind the conditional labor demand elasticity one only needs to look at Figure 1, below where the cost minimization problem faced by a household becomes very crystal. Faced with a constant world price for outsourced rental of womb space – p_1 , and the alternative household cost of C_H .

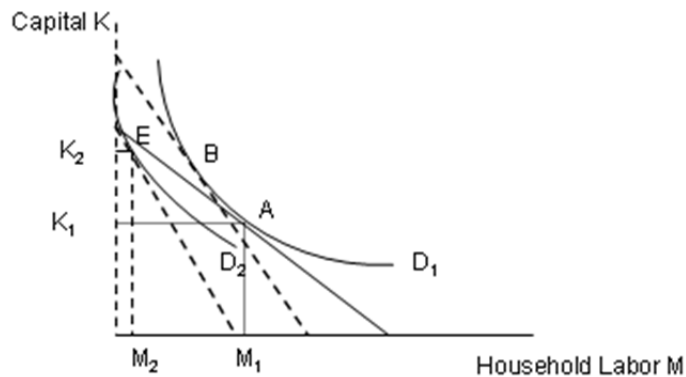
Figure 1



Faced with higher costs for w_m the household has only two choices, outsource or spend more funds on additional trials, that is higher capital costs. This is seen in Figure 2 below. The steeper isocost line implies substituting away from household labor and towards capital in the production of the baby in the womb. But because of the increase in labor cost

the unit cost of producing in the household will rise. This creates the incentive to outsource. In Figure 1 above, the increase in Household cost of the services of the womb is shown by the flattening of the isocost line. The new equilibrium would be D, where the household chooses to substitute away from household production towards outsourcing. This is reflected in Figure 2 by a downward shift in isoquant to equilibrium at point E. The assumption is the two shifts are proportional.

Figure 2



If the elasticity of substitution between the household and rental services of the womb (σ) is sufficiently large, the labor demand for surrogates increases as the price of foreign womb rental decreases.

$$\frac{\partial |\varepsilon_m|}{\partial p_1} = \sigma \gamma \frac{\partial s_{RW,I}}{\partial p_1} < 0 \text{ if } \sigma > 1$$

where

$$\frac{\partial s_{RW,I}}{\partial p_1} = \frac{1}{\left[\left(\frac{\beta}{1-\beta} \frac{p_1}{C_H} \right)^\sigma \frac{C_H}{p_1} + 1 \right]^2} \left(\left(\frac{\beta}{1-\beta} \right)^\sigma \frac{(1-\sigma)}{p_1} \left(\frac{C_H}{p_1} \right)^{1-\sigma} \right)$$

A decrease in legal barriers would thus provide not only a greater use of outsourced rental of womb space but would also increase the wages of surrogates.

V. CONCLUDING THOUGHTS

This paper focused on the so-called gestational (full) surrogacy, i.e. the form of artificial insemination which applies the method of *In Vitro Fertilization* (IVF), whereby a doctor implants the fertilized eggs of a woman into the surrogate's uterus. As we argue above, the surrogate has no genetic link to the biological parents and is assumed to contractually release the child after birth. The important factor is that the woman, who is designated as a "surrogate", bears a baby on behalf of a couple with the intention of relinquishing her rights as legal mother of the child after birth. That is, the 'surrogate' provides a paid for service very much like the production of a sweater.

The key element to keep in mind is that IVF surrogacy contracts are not contracts to sell a baby (the final product), since the surrogate cannot sell something she does not have property rights to, namely the newborn. The surrogate is essentially selling her gestational services. These services are similar to other services offered by women in employment contracts including wet nurses, models, and more recently athletes and soldiers. The paper will show that applying strict contract law both parties can achieve a Pareto efficient solution. Moreover, wages of surrogate women, entering into these IVF contacts will increase as these surrogacy contracts become part of an outsourcing mechanism.

The obvious question is whether or not surrogacy contracts should be viewed as contracts and if so should they be enforceable at law? According to the traditional bargain theory of contracts, *a promise is legally enforceable if it is given as part of a bargain; otherwise, a promise is unenforceable.* In effect, three conditions: offer, acceptance, and consideration must be present in order to create a bargain. In a bargain, the promise, the expected parents, induces the promisor, surrogate, to give the promise. The inducement in these contracts is usually another promise, as when a surrogate promises to deliver the baby to the parents after full term, and the parents promise to pay a certain price upon delivery and cover all the costs associated with the birth.

Under this approach, and the assumption that the contract is not unconscionable, it should be enforced. If we add Pareto optimality conditions each of the parties becomes the best source of their utility maximizing preferences, not a paternalistic intervention by the legal system. When the parties to a surrogacy contract reach agreement on the terms of the contract, they have demonstrated their desire to have the contract enforceable; otherwise they would not have entered into it in the first place. The problem of breach occurs when the surrogate changes her mind.

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