

민법상 대리모계약에 관한 입법방향

박 종 렬*

The Legislative Directions about Surrogacy Contract on Civil law

Jong-Ryeol Park

요 약

현재 우리나라는 대리모출산을 둘러싼 가족법이나 모성추정의 법안이 없고, 사회적으로도 대리모 관련 문제들이 언론에서 보도는 된 적이 있지만 이러한 논의를 지속적으로 행해지지 못했다. 생명윤리 및 안전에 관한 법률의 제정과정에서 초기에 논의는 있었지만 이를 법안으로 수용하지 못하여 법적으로나 윤리적으로도 매우 곤란한 문제가 제기되고 있는 실정이다. 그동안 법적인 해석의 어려움과 윤리상의 문제에도 불구하고, 대리모 출산은 음성적으로 공공연히 행해지고 있고, 이에 대하여 최근까지 우리의 법률은 공서양속에 반한다는 이유로 그 법률행위의 무효를 선언하고 있는데 불과하다. 따라서 대리모계약의 문제는 공서양속에 반한다고 무효화하여 방지하기엔 대리모권리와 그 계약에 의해 출생한 자의 복리의 문제가 심각한 사회문제를 일으킬 수 있다고 본다.

이제는 대리모계약의 문제에 대한 법적, 의학적인 대책이 강구되어야 할 때라고 본다. 따라서 이와 관련하여 본 논문에서는 대리모계약에 따른 여러 문제를 해결하기 위하여, 먼저 대리모계약의 문제점을 고찰함과 동시에, 대리모계약에 대한 각국의 입법례를 이를 바탕으로 우리나라의 대리모에 대한 입법론을 제시하고자 한다.

▶ Keywords : 대리모계약, 대리모, 대리출산, 인공수정, 체외수정.

Abstract

Currently, there is no bill about Maternal Inference and the Family Law about surrogate birth in Korea. Also, Problems of surrogate mother were reported by media socially, but these discussions did not discuss continuously.

Early in the course that establishing process of Bioethics and Safety Act, there was a discussion. But it cannot acceptance as Act, it issued legally and ethically.

Despite the difficult of legal interpretation and ethical problem, the surrogate birth practiced

•제1저자 : 박종렬

•투고일 : 2013. 2. 27, 심사일 : 2013. 3. 14, 게재확정일 : 2013. 4. 11.

* 광주여자대학교 경찰법학과(Dept. of Police & Law, Gwang Ju Women's University)

covertly and frequently. And about this, our law just declared its invalidity because it is contrary to public order and good moral until recently.

Therefore, if it leaves as invalidation, the problem about right of surrogate mother and the baby from her it may occur a serious social problem.

From now, about the issue of surrogacy contracts the legal and medical countermeasures to be taken.

Therefore, to solve many problems about surrogacy contract, consider the problem of surrogacy contract, also suggest legislative study about Korean surrogate mother based on legislative cases of foreign countries.

▶ Keywords : Surrogacy Contract, Surrogate Mother, Surrogate Birth, Artificial Insemination, Outer Artificial Insemination.

I . Introduction

☞Infertile patient is getting increasing because of various causes that age to marriage increased, environmental hormones, stress, smoking and obesity due to dietary changes, etc. November 26, 2012, an infertile couple in Korea reached 13.5% of all couple according to statistics of Korea Institute for Health and Social Affairs. The one couple per 8 couples is suffered from infertile.

So the infertile couple have been used various method artificial insemination, outer artificial insemination and etc. But, above all, by choosing the surrogate mother it gives new hope to infertile couple who could not get the baby[1].

But the childbirth ways through surrogate mother that standard of legal and ethical justification are still unclearness. As time goes by, it makes chaotic situation.

There is no applicable Act about surrogate mother yet in Korea, also the regulatory system that can control is defective. So surrogate contract is practiced silently.

On the other hand, most countries are considered the surrogate contract as illegal and controlled strictly because it can destroy the dignity of man

and public order. But, the regulation is exist to meet social, ethical, and religious condition by the increase of infertile couple and the changed family relationship.

In case of Korea, surrogate contract is invalid so there are no related laws, in reality the birth characters are increasing by surrogate contract.

Currently, the cases of the birth by surrogate mother in Korea, at least 3~4 cases in one year, as many as 10 cases and about 100 cases nationally by infertility specialist hospitals. Also, the case that some young college student and Chinese women are used to surrogate mother has been reported[2].

Also, the Internet services that provide various services about surrogate birth were appeared, and it reported to much country like China and etc. as the social problem. Like this, the surrogate birth is getting a big social problem.

In this paper, to solve that problems about surrogacy contract, first, find the problem of surrogacy contract also, propose the legislation about Korean surrogate mother based on the foreign legislations.

II. The Meaning and Problem of Surrogacy Contract

1. The Meaning of Surrogacy Contract

The surrogacy contract is for that among the couple if one is infertile, let third party's women pregnancy[3]. The most common way about surrogacy is the artificial fertilization from the husband's semen of infertile women to third women. And the pregnant women should give up her parental right instead of scheduled remuneration. This childbirth by surrogacy is typically performed after the signing contract that including both the egg and the uterine. And the childbirth which is called the childbirth by surrogacy, that has the both couples' genetic relationship. In this case, sperm of father and the egg of mother were vitro fertilization and this ovum is given to other women and makes implantation and childbirth. So it occurred the separation between genetic mother and birth mother. And who is the legal mother is the complex problem.

When finding the legal of each countries about the problem that the surrogacy contract is invalid or valid. In the past, most was negative stance but the current suggesting that allow limited is gaining force. Like this, the problem that the Invalidity or validity of surrogacy contracts, as well as the most contents of contract is hard to force its implementation and to claim damages for violations of the contract is too hard.

2. The Problem of Surrogacy Contract

2.1 The Ethical Problem

The most monetary transactions incidental to the surrogacy contract is blocked by the legislative regulatory, but the trend in the UK, they allow a reasonable cost. But, it is hard to regulate that

where is the reasonable cost can be a problem, and if the surrogacy doesn't satisfied about the cost. Then, she will be able to refuse the give her baby. Currently, the brokering works that deal the surrogacy on the internet or offline have an epidemic. This brokering work can be invalid by the interpretation of the current law. But, when the women had a baby by surrogacy already, make invalid is not reasonable[4].

And, even though they didn't expect the money receive but it can be the human trafficking resultingly. After the child were grown up, when they know that their mother who gave birth give up them, then their psychological conflict will inhibit the growth. Moreover, the fact that their surrogacy mother give herself up by receive the money will be the huge impact to them.

Also, it can expect that the surrogacy have breached the Agreement causing a change of heart. In other words, a change of heart can occur these situations like termination of pregnancy or endanger the health of the fetus and suddenly disappearance after birth etc. Therefore, it leaves the question that the ethical binding of surrogacy contracts how much affects to these problems.

2.2 The Problem of Artificial Fertilization

The fetus which conceived by surrogacy can get the same emotional state, so in the case of artificial insemination the relationship with fetus must be considered. In case of the surrogacy by artificial fertilization, the surrogacy can think there is no connection of their relationship with the fetus and she and she can carelessness about many regulations for pregnancy. In most cases, the affection is getting deepens during the pregnancy and these risks can be reduced, but fundamentally, this part of risks cannot separate[5].

The other hand, unlike the agreement that the surrogacy will brings the baby in accordance with the passage of time, when the couple don't want the baby, then the dispute arises and then, this validity

and claims of surrogacy contracts can be the problem. Otherwise, when the baby birth with the physical, mental impairment, the couple who request to surrogacy and the surrogacy are avoid accept the baby. In that case, serious adverse effects will be caused to baby.

2.3 Release of the Contract and Problems of Compensation for Damages

When admit the surrogacy contract is valid, the surrogacy contract can be cancel freely before pregnancy, because the contents of surrogacy contract contain the high personal nature connection.

The problem is that does the surrogate mom can cancel its contract freely after conceived. about this, Allow law about surrogacy article 7 in the United States, it allow the cancel of contract to the surrogacy who provide the her ovum within the 180 days from the first artificial insemination, and in this case the surrogacy not assume the responsibilities about cancellation of a contract[6].

The Mother and Child Health Law in Korea acknowledge attributively. So, if the surrogacy contract valid, cancellation of a contract must be allowed.

2.4 The Legal Problem about Claim for Performance

The Article 103 of the Civil code not acknowledges the surrogacy contract. So a claim for a fee cannot allow. Also, the fee that already paid cannot made the right of a claim for a return by Civil code Article 746. But when seen as a valid, several matters that regulated in surrogacy contract are effect and the party can claim for performance according to their contents. But if disobey to this, it can claim for performance to court and the party can cancel the contract by nonfulfillment of a contract[7].

Also, regardless of the cancellation of a contract it can claim for damages by default. This allows the damages, such as reliance interest, claim for

damages from the contract were established effectively. So, the claim for damages of surrogacy contracts allowed by when see the valid the surrogacy contracts. And then, the principles of freedom of contract also applied and can set the type and contents of contract freely, also can set the condition of contract widely.

III. Comparative Legal Consideration of Surrogacy Contracts

1. United States of America

The attitude of the United States court or state was showed strongly not allowed, but recently, they has been show gradually positive reaction.

On the other hand, in August 1988, the national conference of commissioners on uniform state laws plan "Uniform Status of Children of Assisted Conception Act" - 'USCACA', and was approved by the American Bar Association in February 1989. This Act make choice the one agenda between A that surrogacy contract valid and B that surrogacy contract invalid. As a result, many states have no statutes about surrogacy in the United States, but some states have the statutes about the judicially effect on surrogacy contracts. And in the states that have the Act for surrogacy were divided as the two states which valid the surrogacy contract and invalid. And in some states that valid the surrogacy contract, invalidate the surrogacy contract which need the reward.

In 2000, the national conference of commissioners on uniform state laws in USA write a new "unified Parenthood (Uniform Parentage Act 2000, amended 2002)". As a model bill on Parenthood. The regulation about surrogate mother in Chapter 7 of this Act said that the sperm and the egg provider cannot be the parents of birth baby. In chapter 8, the gestational mother is used instead of surrogacy. For effective requirement of surrogacy contract, it is possible to make the pregnant contract by written

and it is regulated[8].

2. Germany

First time, the German define the surrogacy in the laws pertaining to adoption which revised in November 1989, "The surrogacy is artificially and natural pregnancy by the agreement or get the transplantation of embryos that are not derived from himself or in any other way. And does something to adapt to a third party or other immortal accept after the baby is born." and place the prohibit regulations about placement of a surrogate mother in same Act Article No. 13c and 13d. After that the Embryo Protection Act was enacted in December 1990. After this legislation surrogacy contract was prohibited in principle. That is, the surrogacy contract is legal violations and it became invalid by Article 138 of the German Civil Code[9]. But the Embryo Protection Act prohibited the artificial insemination or embryo transfer by surrogacy, it is just the punishment regulations to operator of artificial fertilization or embryo transfer and it does not punishment surrogacy she or couple who foster that. Even if the deed that Uterus rental for business purposes was done, the surrogacy does not punish. Germany determined that the women who gave birth can be a mother by establishment of the German Civil Code Section 1591, and through the amendments of parent-child relationship act in 1998[10].

3. England

July 16, 1985 the Surrogacy Arrangement Act was created in England, and it is the first country that makes the legislation in the world. There are five provisions, the person who uses a surrogacy privately excluded from the scope of punishment, the couples who commissioned and encourage the surrogacy are exempt from punishment. However, the person and institutions which procedures the surrogacy for commercial can get the criminal penalties and it should not force by the surrogacy and the couple who request the surrogacy.

In 1990, they enacted the "Human Fertilization and Embryology Act" and they discipline the baby's legal status explicitly. This Act was able to get the command that be the parents who want to be the parents they can apply to the court within six months after the who were born. But until then, the surrogacy is the mother.

In this case, the examination of court is not based on the baby's best benefit. It based on the voluntariness and free of conclusion of a contract and confirm the baby is already growing up by the client who married couples[11].

4. Japan

The surrogacy should be prohibited is prevailing view in Japan. But they think that regulate the right to give birth the children is undesirable. Because of this, they are not regulating Act about surrogacy.

The other hand in October 1977, the House of Representatives Justice Committee was trying to promote the legislation under the recognition that genetic and real relationship can get the self-separation by the development of assisted reproductive technology. But they adopt the civilly attention, so the new legislation was not accepted. Also, October in 1998, the Professional Committee about Assisted Reproductive Technology that consisting of experts from all walks of life under the leading edge medical technology assessment committee of Welfare Science Council was installed and the report about assisted reproductive medical policy by providing the sperm and ovum was written, but they make the conclusion that the surrogacy should be banned. Subsequently, in June 2001, to review the maintenance of the regulation about the conducting condition of assisted reproductive medical, Welfare Science Council of assisted reproductive medical committee was installed. And there were some opinion that the surrogate mother must admit, but they said the surrogacy must be prohibited. The reason are don't treat the person only for the means of reproduction and considerate

its safety sufficiently, and it contrary to the welfare of the child who born the first. In February 2001, The Justice Department also installed the paternity legal committee with assisted reproductive health-related of Legal Science Council. But, it premise prohibit of surrogacy and there are no regulation about surrogacy and now it has been suspended. Ministry of Health, Labor and Welfare in 2004, tried to submit a bill that related the report of the assisted reproductive technology committee. But the ruling party has the viewpoint that "The countries have no right to give birth to children and it is not desirable" and they dissuade[12].

5. France

In case of France, they prohibit the surrogacy at "The Standard on Bioethics" in 1992. Also the court precedents said the surrogacy contract was void. And it was reconfirmed by the 'protection of the human body Act' and 'The Act for providing and using of part of the human body and production or artificial reproduction of human body' which regulated in 1994[13]. Some of them were inserted in the Civil Law, the contract which raise the effect that granting a property value to the deliverables and components of the human body is invalid(Article 16-5 in Civil Law), The agreement for someone who want childbirth or pregnancy is invalid(Article 16-7 in Civil Law)[14].

6. Israel

In Israel, they allow the surrogacy contracts under certain conditions by regulation of "The Management of Sperm Donor Bank and Artificial Insemination Act" in 1996 which legitimizing the surrogacy. According to this law, it regulate that the person who can make surrogacy contract by the approval of 7 persons in committee. The approval requirements are free agreement of the parties, no danger to the health of the mother or child, the request men's sperm must be used, pregnant made by vitro fertilization, and surrogacy unmarried and

the people have to be the Israeli people, etc. The nominal fee can be compensated to surrogacy, but more fees cannot be paid. Surrogacy can be bringing their kids by change the determination. And if she wants, abortion can be possible[15].

IV. Legislative Policy Review of Surrogacy Contract

1. The Termination Possibility of Surrogacy Contracts

The surrogacy contract has the highly personal nature. So, even though the contract came validly, it must consider the termination possibility, and for this specific requirements and effects are need to be considered. First, in the face of the requirements, these will be the subject of the discussion such as the termination can be allowed after pregnancy and according to this, the abortion can be allowed. And in the face of the effect, the recognition of the liability for damages due to the one-sided termination, etc.

2. Whether the Surrogacy Agreement Acknowledge

In the legislation on surrogacy, the most important thing is allow of surrogacy contract. The surrogacy contract is invalid by Article 103 of Korean Civil law that is opposed to "Good morals and Social order" and it was the majority opinion. But recently, available opinion and limited opinion are becoming more. Realistically the childbirth by surrogacy is made openly. So, allow the surrogacy contract and birth within a reasonable constant range rather than prohibit them uniformly[16].

3. The Exceptional Acknowledge of Surrogacy Contract

Validity of surrogacy contracts which has the

certain conditions for the validity eclectic way would be possible. Consider the reality that already the childbirth by surrogacy is done, the need of foster is very high. And in case of the surrogacy system, if it premised as the means of overcoming infertility, admit it as in terms of protection of reproductive right is desirable. But in other cases, to induce the surrogacy to sound direction is necessary by allowing criminal penalties from no juridical effect.

4. The Qualification of Parties about Surrogacy Contract

In case of surrogacy, the limit of it's arrange to single woman or married woman or limit to who experienced the childbirth or get rid that limitation from first are should be examined. On the other hand, also it needs to think if there is a kinship between the client and the surrogate mother. In case of client couple, as allowing the surrogacy contract only sterility case and prevent as a means of leasing the uterus. Furthermore, more fine-grained review is required to common-law marriage or homosexual cases.

5. The Legal Status of Birth by Surrogacy Contracts

When legislation on surrogacy contract, regulate the legal status of birth is advisable. In this case, as seeing the model legislation in the United States and Israel, in case of surrogacy contract which took from the court's permission, it can be considered that recognize the birth child by surrogacy to couple of client. Also, like legislation cases in UK, it can be considered that register as the surrogacy couple's baby first, and through the simple steps to register the adoption[17].

6. Limit the Ways of Surrogacy Contract

The access to the system of surrogacy will be possible to deny the total surrogacy system. Also, recognize the criminal responsibility that surrounded

the prohibition and limitation of surrogacy can be considered. Especially, some ways can useful such as in Germany and some states in the United States. In this case, identify the range of surrogacy contract and the target of criminal penalties[18].

7. Considering the International Problems

Currently, the placement and brokerage of surrogacy birth are scrambling on the Internet cafes. Consider these contents, the problems of surrogacy is not just domestic, it related with China, Japan, and several Southeast Asian countries. Also, in some cases, the one side is foreigners and it may occur the international judicial problems. For example, the law applicable to the surrogacy contract with born baby and baby's legal status by International law which includes the nationality of those babies. Therefore, to this legislation on surrogacy, these international judicial issues will be considered.

8. The Legislative Direction of Surrogacy System in Korea

A result of examining the foreign related statutes can think the three kinds of ways to lawmaking about surrogacy. First, amend the Family Law. Second, amend the "Bioethics and Safety Act" or include widely, such as "Vitro fertilization Act" or "Medical Assisted Reproductive Act". Third, enact the special laws and make specific its name more like, "The Surrogacy contract law". In personal humble opinion, the third approach is probably best. And be based on the "The Family Law" or "The Bioethics and Safety Act" also governed their status as a special law with regulation of specific instructions on surrogacy.

V. Conclusion

As discussed above, caused by the development of the life sciences, the surrogacy problems is getting over the dimension the can be solved simply by

individual ethics. The selfishness that the infertile couples want to have children has appeared as a social phenomenon as the birth of the child by the surrogacy contract. But, even if it is instinctual, it cannot be achieved with hurting human dignity, and it should not deviate the restriction of legal ideology and moral responsibility for the society.

Meanwhile, there is no legislation on surrogacy in Korean situation. And cause of the infertile couples are increase, the surrogacy problem is very urgent. The solution to the problem found through a lot of social discussion, and many of the public change their recognition about surrogacy. These are certainly true.

And the last remaining hopes for infertile couples are on the birth of their child by surrogacy contract, and if it made realistically regardless of the regulations of the law. rather than blame and restricted or prohibited, make regulation about surrogacy and protect the client couples who had the surrogacy contract and have to explore how to regulate surrogacy contracts over the guidelines, while recognizing strongly.

References

- [1] The Statistics of Korea Institute for Health and Social Affairs, <http://nstkorea.tistory.com/613>
- [2] Press Releases by Sisa-Focus, <http://www.sisafocus.co.kr/news/articleView.html?idxno=60637>
- [3] Bong-lim Lee, "A Study on the Argument of Effectiveness and the legislation of Surrogate Mother Contract", Wonkwang University, Legal Research, Vol. 28, No. 4, p.154, 2012.
- [4] Min-Jeong Han, "An Ethical Review about Surrogacy", Dong-A University, Master's thesis, p.16, 2008.
- [5] Seung-heum Baek, "Ligalty and Problems on Surrogacy Arrangement", Dongguk University, Comparative Law Research, Vol. 6, No. 1, p.117, 2005.
- [6] Hye-ran Yoon, "A Propose of Legislative Bill on Surrogate Mother Agreements Acts", Soongsil University, Legal Research, Vol. 16, No. 8, p.355, 2006.
- [7] Jeong-sook Do, "Study of Surrogate Mother Contracts in Civil law", Yeungnam University, Master's thesis, p.48, 2001.
- [8] Jeong-il Kang, "Study of Surrogate Mother Contracts", Ewha Woman's University, Master's thesis, p.15, 1991.
- [9] Jang-su Yang, "The German Civil Code", Parkyeongsa, p.57, 2005.
- [10] Jong-hee Seo, "Study of Surrogate Mother Contracts", Korean Family Law Association, Family Law Studies, Vol 23, No. 3, p. 62, 2009.
- [11] Beong-hwa Lee, "A Legal Consideration of Surrogate Mother Contracts", Dongduk Women's University, Dongduk Women's Studies, No. 8, p.173, 2003
- [12] Dong-jin Park, "Birth and the Legal Issues by Surrogacy Contracts", Korean Medical Service Law Society, Medical Law, No. 3, No. 1, p.28, 2002.
- [13] Sang-chan Kim · Ji-heun Park, "Study on the Validity of Surrogacy Contracts", Cheju National University, The International law, Vol. 3, No. 2, p. 55, 2011.
- [14] Soon-gu Myeon, "The French Civil Code", Beopmoonsa, p.9, 2004.
- [15] Dong-sup Eom, "International Perspectives on Surrogacy Agreement", Korean Family Law Association, Family Law Studies, Vol 19, No. 2, p.45, 2005.
- [16] Cheol-ho Park, "Analysis of Legal Theory on the Surrogate Mother Contract and the Argument of Effectiveness", Hanyang University, Hanyang Law, Vol. 20, No. 4, p.258, 2009.
- [17] Ho-cheol Oh, "A study on the surrogate mother", Korean Law Association, Law Studies, Vol. 34, p.174. 2009.
- [18] Chang-sang Lee, "The Controversy and

Legal Issues of Surrogacy Contracts”,
Kyungsoong University, Kyungsoong Law,
Vol. 14, No. 2, p.21, 2005.

저 자 소 개



Jong-Ryeol Park
2001: Chosun University, Doctor of
Laws.(Mercantile law, Civil
law)
2009: National Communication
Ombudsman District
Prosecutors’ Office in
Gwang-ju.
2010: Metropolitan Police Agency
administrative disposition
of a driver’s license Review
committee members in
Gwang-ju.
2012: Policy Advisers in Gwangju
Jeonnam Regional Military
Manpower Administration.
Present: Professor in the Dept. of
Police & Law, Gwang