

Surrogacy: Reproductive Rights of Surrogate Mother and Duties of Intending Parents

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Abstract: The ever-rising prevalence of infertility world over has led to advancement of assisted reproductive techniques. Surrogacy also comes as an alternative when the infertile women or couple is not able to reproduce. So, the future and to some extent the present situation relating to the birth of the child is in the form of test tube babies, surrogate motherhood and cloning technology will introduce undreamt opportunities in the pregnancy problems.

This paper aims to analyse the rights of a surrogate mother with regards to her health, her reproductive health and human rights which are to be protected during and after the surrogacy arrangement under Indian and International Laws which are for the protection of her health, reproductive health and human rights.

Key words: Reproductive Health, Surrogacy, Test Tube Babies, Infertility.

INTRODUCTION

The word “surrogate,” is derived from the Latin word “*surrogatus*” which means “appointed to act in place of”. A woman who bears a child on behalf of another woman, either from her own ovum or from the implantation in her womb of a fertilized egg from another woman is called a surrogate mother. Thus surrogacy is the practice whereby a woman carries a child for another with the intention that the child should be handed over after its birth either voluntarily or for a fee.

The Surrogacy (Regulation) Bill, 2016, section 2 (z b) “surrogacy” means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.

The Surrogacy (Regulation) Bill, 2016, section 2 (z e) “surrogate mother” means a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4.

Black’s Law Dictionary defines surrogacy as an “agreement wherein a woman agrees to be artificially inseminated with the semen of another woman’s husband. She agrees to conceive a child, carry the child to term and after the birth, and assigns her parental rights to the biological father and his wife”.

TYPES OF SURROGACY

Traditional Surrogacy or Partial Surrogacy

Under traditional surrogacy the husband of the infertile woman would have access to another woman and after the birth of the child; the woman would hand over the child to the husband and his wife. The modern science and technology has made it possible for procuring a biological child with the help of another woman without sexual intercourse. In this process the woman is artificially inseminated with the semen of the husband of the “genetic couple”.

Gestational Surrogacy or Total Surrogacy

When a surrogate becomes pregnant via an embryo transfer with a child of whom she is not the biological mother and such a mother is called gestational carrier.

Altruistic Surrogacy

Under this, surrogate mother does not receive anything except the medical expenses, maternity clothing etc. for acting as surrogate.

Commercial Surrogacy

Under this, surrogate mother receives full consideration treating her actions as surrogate in a manner akin to a commercial surrogacy.

Reasons for Surrogacy

There can be several reasons behind surrogacy pregnancy. For instance, intending parents may arrange a surrogate pregnancy because a woman who intends to be parent is either infertile or unable to carry a pregnancy to term, e.g. women with hysterectomy, uterine malformation or with a problem related to recurrent abortions or any medical illness making her pregnancy a risk to her own health or may be not having all these problems but at the same time may be unwilling to carry or undergo pregnancy.

Surrogacy and Its Legal Consequences

A surrogacy agreement is an arrangement to carry a pregnancy for intending parents. Various countries across the world allow only altruistic type of surrogacy, on the other part some of the countries of the world has put total ban over surrogacy arrangement. Some of the countries has allowed it but has regulated it by implication of some certain laws over it. Surrogacy Laws and Costs may differ significantly across jurisdictions in various nations and thus a situation of conflict of laws arises.

Surrogacy Arrangement at the International Level

Advancement in medical field and in gestational surrogacy enables an embryo to be created from a donor egg and sperm and then implanted into a surrogate mother. In this case, the “mother” has to be legally defined. Legal rules may differ in the home countries of the surrogate and the commissioning parents. Then there will be a situation of serious conflict of laws including the matter of nationality and immigration. Those countries that are in the favour of surrogacy may provide parental rights to the commissioning parents instead of surrogate mother but other countries may have an adverse opinion.

Surrogacy Around the World and Legal Issues

Ethical and legal implications have been a deterrent for worldwide acceptance of surrogacy. In France, Germany, Sweden and Spain, the people have voted against Surrogacy. In 1991 highest court of France announced that “the human body is not lent out, it is not rented out, and is not sold.” In the United States, rules and regulations on surrogacy differ among states. California has legalized commercial surrogacy, while it is illegal in some states and in some other, regulations are introduced. Surrogacy is totally banned in Sweden. Commercial surrogacy is also not supported in United Kingdom where legal hurdles exist. In Australia, all states except Tasmania (banes all surrogacy under surrogacy Act 1993) altruistic surrogacy has been recognized as legal. In Japan, the Science Council of Japan proposed a ban surrogacy and doctors, agents and clients will be punished for commercial surrogacy arrangement. In Saudi, Arabia religious authorities do not allow the use of surrogate mothers. In China, ministry of health banned surrogacy in 2001. Despite this regulation it is reported that illegal surrogacy is still flourishing in china. In Russia, commercial gestational surrogacy is legal and available for willing Adults. In Georgia surrogacy is legal but there surrogate mother cannot exercise any parental rights over the child. Legal parentage of such a child has not been recognized by any international conventions. In some countries, producing evidence (such as DNA test results) of at least one parent of the child having a genetic relationship with the child is mandatory, whereas in other countries, legal release of the child by the husband of any married surrogate is required. Obtaining citizenship and travel document is tough in most countries for such a child. In Belgium, altruistic surrogacy is legal, while commercial surrogacy is illegal. In France, Article 17/6 of the civil procedure code nullifies any agreement with a third party relating to procreation or gestation and disobeying the law may lead to judicial problems.

Indian Situation

Since many nations do not recognize surrogacy agreements, India has become a popular destination of fertile tourism. Infertile couples from all over the world travel to India where commercial surrogacy was made legal with the land mark Supreme Court judgment and later, the Indian council of medical research guidelines 2005 prescribed conduct and use of ART procedures or treatment by fertility clinics. It prescribed monetary compensation to the surrogate mother by the intending couple. Law commission

Report No. 228(2009) recommends legalization of altruistic or non-commercial surrogacy arrangements in India in order to protect the surrogate mother from exploitation.

Surrogacy Regulation bill 2016

- It prohibits foreigners including Overseas Indians from commissioning surrogacy.
- There will be a complete ban on commercial surrogacy.
- In Altruistic surrogacy, as proposed in the draft bill, it would be illegal for the commissioning parents to pay the surrogate except for paying of all the medical bills. In addition to this bill postulates a compulsory 'insurance cover' of the surrogates during the whole period of pregnancy, while extending the insurance cover for a stipulated time period of post pregnancy.
- All Assisted Reproductive Technology (ART) clinics will be registered. Clinics will be allowed to charge for the services rendered in the course of surrogacy, but the surrogate mother cannot be paid. All clinics will have to maintain records of surrogacy for 25 years.
- The Bill seeks to provide surrogacy only for heterosexually married Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility related issues. Further it prohibits homosexual couples from taking surrogacy services. This is because in December 2013, the honourable Apex Court decriminalised homosexual relationship by triggering article 377 of the Indian Penal Code, 1860. Perhaps, values of Indian culture not prepared to embrace homosexual and live-in relationship couples. The draft bill is also incongruous to chapter VIII, Clause no.57 of the Juvenile Justice (care and Protection of children) Act, 2015 that allows a single parent (or a divorced person on the fulfilment of certain criteria) to adopt a child.
- Only 'close relatives', not necessarily related by blood, will be able to offer altruistic surrogacy to the eligible couples.
- Surrogacy regulation board will be set-up at both Central and State-level
- The surrogate child will have the same rights of as that of a biological child
- The Bill is aimed at making parentage of such children legal and transparent
- The Bill seeks to safeguard the rights and interests of surrogate mothers
- In cases of Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling or import of human embryo have all are punishable by a jail term of at least 10 years and a fine of up to 10 lakh.

INTERNATIONAL PERSPECTIVE

Reproductive Rights:

Rights related to Re productivity are relatively new at international level. The basic concept first appeared in the final document approved by the Teheran conference which was held in 1968 and recognized the "rights to decide freely and responsibly about the children, their numbers, and spacing and to have the access to the information, education and different means which enable them to exercise these rights." It was not until the world conference on population in 1994 (Cairo conference) that reproductive rights were clearly articulated. Although convened to address population issues, the participants in the Cairo conference recognized that:

- Programmes related to Family planning should not involve any form of oppression;
- Governmentally sponsored economic incentives and disincentives were only marginally effective; and Governmental goals should be defined in terms of unmet needs for information and services rather than quotas or targets imposed on service providers.
- Couples and individuals should be assisted to achieve their reproductive goals and to have children by their own choice.
- The Cairo Conference recognized reproductive rights of all couples and individuals, their right for planning about children and to have the information and means to do so Reproductive rights are progressively accepted in international human rights law. These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to health. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit. Surrogacy was not on the agenda at Cairo; it was neither supported nor condemned. To the extent surrogacy enables those otherwise unable to "achieve their reproductive goals and have children by choice," Cairo

arguably supports surrogacy. Convention on the elimination of all kind of discrimination against women (CEDAW), assures the rights of pregnant women. Article 11.2, for example, sets out the measures to be taken by states to “prevent discrimination on the grounds of marriage or maternity and to ensure women’s effective right to work.”

- These measures include the prohibition of dismissal for pregnancy or maternity leave, maternity leave with pay or “comparable social benefits, and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment of childcare facilities.” Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.” Article 14 reiterates the right to family planning services for rural women in particular. Finally, Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.” In addition to these specific guarantees, Article 5 more broadly demands recognition of maternity as “a social function,” rather than a commercial function. To the extent CEDAW focuses on the health of the pregnant woman, it is not inconsistent with gestational surrogacy. Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To the extent CEDAW focuses on maternity as a “social function,” however, it is difficult to reconcile with commercial surrogacy, or at least those forms of commercial surrogacy in which the intending parents and the surrogate remain strangers.

Insinuation of Rights in the Process of Surrogacy

- It is seen that the rights of surrogate mother are paid no heed after she deliver the child to the intended parents. It is also to be scrutinized as to how the rights of surrogate mother are to be protected in the light of ICMR Guidelines, 2005 and the proposed legislation.
- The most important aspect of such rights is the proper and judicious implementation of the same.

Rights of the Surrogate Mother Vis-a-Vis Duties of the Intended Parents

- Surrogate mother has certain rights to be exercised by her against the intended parents; the intended parents correspondingly have certain duties against the surrogate mother:
- If it is a duty of the surrogate mother to carry a child for nine months then it is a right of intended parents to have such child. In other words, to assign a right to intended parents is to imply that surrogate mother is under a corresponding duty. The rights and duties of the parties can be permanent by entering into a ‘surrogacy agreement’, which would be legally enforceable in the courts of law. Here, the legal machinery has the power to compel the intended parents for the specific performance of their duties for procuring the legal rights of the surrogate mother.
- Legal rights of one set of parties to the surrogacy in strict sense constitute the correlative duties of other set of parties. So far as surrogacy arrangement is concerned, we will consider the legal rights in a wider sense. In this generic sense, a legal right may be defined as any advantage or benefit conferred upon a person by rule of law.

Legal rights embrace the following

- Rights (in the strict sense),
- Liberties
- Powers
- Immunities

Each of these has its correlative, namely,

- Duties
- No rights
- Liabilities
- Disabilities

Thus, right of surrogate mother to have proper medicines, vitamins and diet is the liability of intended parents in order to ensure the life of surrogate mother.

The rights and obligations of the parties to surrogacy can be classified as under:

Rights of the Surrogate Mother:

- Human Rights of the Surrogate

- Right of Surrogate to health
- Right of the husband of Surrogate Mother to give consent for Surrogacy
- Right to have legal advice for entering into Surrogacy Arrangement
- Right to resolve the disputes arising out of Surrogacy Arrangement at Pre-Litigation Stage
- Right to resolve the disputes arising out of Surrogacy Arrangement by Arbitration and Conciliation
- Right to companionship or visiting rights of surrogate mother to the child
- Right to have correct information about the parties to surrogacy arrangement
- Right to have careful and unemotional decision for entering into surrogacy arrangement
- Right of voluntariness for entering into surrogacy arrangement
- Right to be explained the content of surrogate agreement in the mother tongue or local language of the parties
- Right to have surrogacy agreement in effect during pregnancy
- Surrogate mother to retain part payment given to her on failure to conceive in spite of three IVF procedures
- Right of surrogate mother to be aware of the psychological and medical risks involved in the surrogacy arrangement
- Right of surrogate mother not to refund any funds paid by the intended parents in event of miscarriage or abortion at the instance of the intended parents or by the attending expert physician
- Right of surrogate mother to fair compensation

Corresponding Duties of the Intended Parents:

- Obligation of intended parents to bear all costs of surrogate mothers' medical examination
- Obligation of intended parents to undergo medical examination under the direction of the expert physician so as to determine their satisfactory health (HIV+ and AIDS etc.) prior to IVF procedure
- Duty of intended parents to bear the cost of any miscarriage or abortion
- Duty of intended parents to pay fair compensation to surrogate mother and to pay all expenses of surrogacy arrangement to the concerned doctor or pathological, laboratory etc.
- Duty of the intended parents to pay forthwith the obstetrical, nursing, hospital and maternity care, pharmaceuticals and paediatric care or other medical cost and charges
- Duty of intended parents to commensurate the lost wages of the surrogate mother, child care expenses, transportation expenses in accordance with the agreement
- Duty of intended parents to pay a fixed sum of money to surrogate mother as a support for the unborn child and consideration to compensate her for her pain, sufferings and inconveniences suffered by her and her family
- Duty of intended parents to pay the above mentioned compensation to the surrogate mother in time bound instalments beginning from the time of embryo transfer in her womb till the custody of child is given by the surrogate to the intended parents
- Duty of intended parents to confirm in writing their parentage after the pregnancy by signing a declaration or affidavit
- Duty of all the parties to facilitate and cooperate in a timely manner with the legal proceedings to establish the parental rights of the intended parents and to terminate any parental rights of the surrogate to the child
- Duty of each party to facilitate the obtaining of birth certificate, citizenship certificate or any other document requested by the government
- Duty of the parties not to intervene in each other's life after delivery of custody of the child
- Duty of the parties not to disclose child's conception and birth
- Duty of intending parents not to disclose the fact of surrogate parenting including surrogate's identity
- Duty of the parties not to disclose any information to the public, news media or any other individual regarding their involvement in surrogacy arrangement
- Duty of the parties not to violate any term of the agreement and perform it specifically
- Duty of the parties to amend the agreement only by a subsequent written agreement signed by all parties
- Duty of the parties to treat the agreement as ultimate between them, integrating all previous talks, agreements, covenants, representations (express, implied, written or oral)
- Duty of parties that their agreement shall be governed by all laws in force in India

- Duty of intended parents to get the life of the surrogate mother insured for a sum mentioned in the agreement

CONCLUSION

India has become a popular destination of fertile tourism. Infertile couples from all over the world travel to India where commercial surrogacy was made legal. But it raises so many issues like the health, maintenance of surrogate mother, etc. and at the international level conflicting state of different laws of different countries. As right now there is no having any particular law at the international level to regulate this condition still society is having various human rights, convention at the international level and at the national level for the protections of rights of the surrogate mother. In India, there is Surrogacy (regulation) Bill, 2016 which totally prohibit commercial surrogacy. It does not allow to the foreigners and NRIs for the same. But at the same time it provides various safeguards to the surrogate mother for her maintenance and health related issues. Thus, Surrogate women are having various rights for her safety which are widely covered under human rights of surrogacy. Surrogate mother must be made aware about their rights for the protection of their life and health. This paper focuses on showing much more attention on this type of conflicting situation and it also paved the way for making policies for solution at the national and at the international level.

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