

THE RIGHTS OF AN UNKNOWN MOTHER TO A KNOWN CHILD – A CRITICAL ANALYSIS OF SURROGACY LAWS

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Abstract: The legal aspects surrounding Surrogacy are complex, diverse and mostly unsettled. In most of the countries world over, the woman giving birth to a child is considered as the Child's legal mother. However, in very few countries, the Intended Parents are recognized as the legal parents from birth by the virtue of the fact that the Surrogate has contracted to give the birth of the Child for the commissioned Parents. India is one country amongst the few, which recognize the Intended/ Commissioning Parent/s as the legal parents. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others the possibility of Surrogacy is either not recognized (all contracts specifying different legal parents are void), or is prohibited.

This paper observes the legal aspects of Surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- Are Surrogacy agreements enforceable, void or prohibited? Does it make a difference whether the surrogate mother is paid (commercial) or simply reimbursed for expenses (altruistic)?
- What, if any, difference does it make whether the Surrogacy is traditional or gestational?
- Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents, either before or after the birth?

Keywords: Surrogacy, laws in India, rights of Surrogate mother, Status of Surrogate

Introduction: A surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents. Intended parents may seek a surrogacy arrangement when either pregnancy is medically Impossible, pregnancy risks present an unacceptable danger to the mother's health or is a same sex couple's preferred method of having children. Monetary compensation may or may not be involved in these arrangements. If the surrogate receives money for the surrogacy the arrangement is considered commercial surrogacy, if she receives no compensation beyond reimbursement of medical and other reasonable expenses it is referred to as altruistic. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements. A surrogacy, which is considered to be boon for the parents who intends to have a children artificially but whether the rights of the women who gives her womb to carry pregnancy through an agreement is considered or not is a question. Where as in India a women is believed to be belong to one family, but do these kind of customs violates the base of the Indian cultures and tradition. But depending on their family situations and their needs the women are given their womb for this sort of arrangement.

Surrogacy Under The Framework Of The Indian Constitution: Under the Indian Constitution, a surrogacy transaction can be recognized indirectly by interpreting certain constitutional provisions. One of the vital interpretations is with respect to Article 21 which is understood to be wider than mere animal existence, and includes all aspects of life which make

it worth living as opposed to the right of freedom from state of interference. It is again, a matter of right of those women who are striving to meet their livelihood concerns and hence, an obligation on the state to recognize or provide a legal validity to surrogacy so that surrogates can legally opt for it to meet their financial and economic concerns.

In India, 'the right to have reproductive choices' has been declared as a part of Article 21 of the Constitution The Supreme Court in the case of R. Rajgopal v. State of Tamil Nadu,¹³ held that the right to life includes the 'right to privacy'. A citizen has a right to safeguard not only his own privacy but also of his family, marriage, procreation, motherhood, child bearing and education among other matters. The Andhra Pradesh High Court in B.K. Parthasarthi v. Government of Andhra Pradesh recognized reproductive rights as a fundamental right and upheld 'the right to reproductive autonomy' of an individual as a facet of his right to privacy. When the concept of privacy is extended to matters of procreation, state's interference or restrictions on procreation amount to a direct encroachment on one's privacy. Hence, even though the Supreme Court in *Javed v. State of Haryana* upheld 'the two living children' norm to debar a person from contesting a Panchayati raj election, it refrained from stating that the right to procreation is not a basic human right.

Surrogacy And Adoption- A Ray Of Hope For The Unblessed: Adoption law provides an opportunity to not only the child (destitute or abandoned) to have a family but also to the couple to fulfill their desire of having a child. Following the same rationale,

it can be argued that the state must recognize surrogacy transactions or techniques through which surrogacy transaction may be carried out.

The Supreme Court in the landmark decision of *Baby Manji Yamada v. Union of India and Anr.*, legalized commercial surrogacy with a direction to the legislature to pass an appropriate law governing surrogacy in India. At present, a surrogacy contract between the parties and Assisted Reproductive Technique (ART) Clinics Guidelines are the only two guiding forces for governing this transaction

In another recent case, *Jan Balaz v. Anand Municipality*, a German couple entered into a contract with a surrogate mother in India and consequently, twin children were born. The question that arose was whether the children would be entitled to Indian citizenship by birth as they were born in India to an Indian national. The passport authorities had withheld the children's passports on account of the pending litigation. In its final decision, the Supreme Court granted an exit permit to the children, thus evidencing again, a pro-surrogacy contract stance of the judiciary.

Contractual Aspect Of Surrogacy Transaction: Surrogacy, considering the fact that it affects almost all the disciplines of learning is being studied, researched and discussed upon all across the world.. The need for the, deliberation and adoption of surrogacy as a part of society in general and legal system in particular is felt by the legal fraternity.

Legally, a surrogacy arrangement has been defined by the Indian Supreme Court as an agreement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise, but hand over to a contracted party. Often it is done with intention of entering into a contract, at times the intention of the parties can be inferred from the transaction. In common parlance, the term refers to arrangement made between the two parties under which a woman (surrogate mother) agrees to (i) to donate the egg and by artificial insemination, carry a fetus in the embryo of her own and give birth; (ii) to carry the term of pregnancy with the help of fertilized egg. In the case of surrogacy, a woman undertakes to bear a child for a childless couple and agrees to relinquish all parental rights at the birth of the child for a payment or other consideration which becomes void for its contravention of statutory enactments, since the contract involves bartering of human lives and also, infringes public policy.

As per the provisions of Indian Contract Act, 1872 legal contracts can be, either General contract or Special Contracts, or specific contracts. Thus, contracts can be classified into different heads depending upon the subject matter or purpose of the contract. With respect to surrogacy, it is difficult to

decide under which type or under which head it falls. If surrogacy transactions were to be considered legal, then it must fall in the category of either specific or special contract. However, for them to be legal, it must satisfy all the requirements of a contract as laid down under the Indian Contract Act, 1872. However, in the absence of a statute governing surrogacy, several issues arise:

- 1) Surrogacy is neither protected by law, nor prohibited by law. There is no separate statute dealing with surrogacy and nor does the current legal system support it.
- 2) Despite absence of any statutes or position in the legal system, surrogacy transactions are being extensively entered into in some parts of India.
- 3) Subject matter of surrogacy contract i.e. surrogate child is a human being and as such cannot be the subject matter or object of contract.

As per the provisions of Indian Contract Act, 1872, a valid contract should have both, lawful consideration and object. At the same time, an agreement is considered to be immoral or opposed.

Rights And Status Of Surrogate Mother:

What claims does a surrogate have over the child? : In India the surrogate is not considered as the legal mother. As per ICMR Guidelines 2005, a surrogate mother cannot be genetically related to the child. She is legally and psychologically counseled that she will not be having any rights over the child. Her rights and obligations towards the intended parents as well the child are formulated in the gestational surrogacy agreement. As per the Indian Council of Medical Research (ICMR Guidelines) the surrogate mother should not be biologically connected to the child (Guideline 1.2.33). The Indian Law recognises the Intended mother only as the legal mother in surrogacy arrangements. Also Guidelines 3.10.1 and 3.16.1 make it very much clear that the intended parents only would be the legal parents of the child with all the attendance rights, parental responsibility etc. Also Guideline 3.5.4 states that the surrogate mother shall not be the legal mother and the birth certificate shall be in the name of the genetic parents. 3.5.5 Provides that the surrogate mother shall relinquish in writing all the parental rights over the child. India is very soon going to enact its legislation on the field of Assisted Reproductive Technology. The Proposed act also has the same favorable provisions.

What would be the legal position under Indian law if the surrogate mother changed her mind upon birth and refused to hand over the child to intended parents? : However such instances have not been witnessed in the Indian scenario but still if a situation like this arises then the surrogacy contract can be the saviour. The contract must clearly state that the child /children born out of surrogacy shall be

the legal children of the intended parents and that the surrogate shall have no rights over the child/children. The said contract can then become the basis of legal action against the surrogate mother also the law pertaining to surrogacy i.e. ICMR Guidelines also support the intended parents only as the legal parents.

Does the child have the right to know the identity of the surrogate mother? : As per the prevalent ICMR guidelines, a child born through ART has a right to seek information about his genetic parent/surrogate mother on reaching 18 years of age. But information relating to the name and address (the personal identity of the gamete donor or the surrogate) is excluded from it .Parents are not obliged to provide the information on their own when the child turns 18 years but no attempt must be made to hide it from the child should an occasion arise when this issue becomes important for the child.

What would happen if the intended parents refused to take responsibility for the child after the birth? The Indian Law makes it mandatory for the intended parents to take the responsibility of the child thus born, and till now there have been no cases witnessed where the intended parents have refused to take their child & this status necessarily emanates from the view that why would a couple not accept the child for whom they have borne so much of pain. Even if in case the Intended Parents refuse to take the responsibility of child then their refusal can be challenged in the court on the basis of the surrogacy contract signed by them.

Conclusion: To become a mother is what any women who has born in the society of India will think of and to lead a happy life .For that the science and technology has shown many ways by which they are getting chance of becoming mother ,whereas if we consider the rights of a surrogate it is debatable .

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