

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOL-2, ISSUE-2
ISSN-2583-8725

LEX SCRIPTA MAGAZINE OF LAW AND POLICY
ISSN- 2583-8725

VOLUME-2 ISSUE-2
YEAR: 2023

EDITED BY:
LEX SCRIPTA MAGAZINE OF LAW AND
POLICY

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOLUME-2: ISSUE-2

[COPYRIGHT © 2023 LEX SCRIPTA MAGAZINE OF LAW AND POLICY]

All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (Lex Scripta Magazine of Law and Policy), an irrevocable, non-exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known.

No part of this publication may be reproduced, stored, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non- commercial uses permitted by copyright law.

The Editorial Team of Lex Scripta Magazine of Law and Policy Issues holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not necessarily reflect the views of the Editorial Team of Lex Scripta Magazine of Law and Policy.

[© Lex Scripta Magazine of Law and Policy. Any unauthorized use, circulation or reproduction shall attract suitable action under application law.]

SURROGACY ETHICAL AND LEGAL IMPLICATION IN INDIA

Author: Shruti Mistry

(Student, 4th Year, B.A. LLB (H) Amity Law School, Amity University Chhattisgarh)

ABSTRACT

A female surrogate is one who signs a contract to have a child for someone else couple in exchange for payment. Many infertile couples fly to India, where it is allowed to use commercial surrogates. Although It appears that each and every involved benefit In light of this arrangement, several careful attention must be given to delicate situations drafted legislation to be able to safeguard the rights of intending parents and surrogate moms. A surrogacy agreement is a contract that commits the surrogate to bear the intended parents' pregnancy. The two primary forms of surrogacy are gestational and traditional. Through the embryo's transfer produced through in vitro fertilisation, pregnancy is achieved in gestational surrogacy, yielding a kid whom the surrogate has no genetic relation to.

KEYWORDS: Couple, Surrogate, Surrogacy, Embryo, Gestational, Pregnancy, Fertilisation.

INTRODUCTION

Law and custom in Babylonia followed ancient customs. It is possible for a couple to arrange for the male partner to become pregnant by another woman. The couple intended to raise their newly born child. This procedure could be used by an infertile lady to avoid divorce. Numerous developments in social norms, legislation, and health have all helped shape the current state of commercial surrogacy. The pharmaceutical industry in America firms Schering-Kahlbaum and Parke-Davis started manufacturing oestrogen in large quantities in the 1930s. John Rock, a professor at Harvard Medical School, successfully fertilised human oocytes outside of the uterus in 1944. In 1953, sperm cryopreservation was successfully attempted for the first time. The initial business bank of sperm opened its doors in New York in 1971, and it expanded quickly to become a highly lucrative industry on a global scale. In 1978, Louise Brown—the first child born in a test tube and the product of in vitro fertilization— was English by birth. Michigan attorney Noel Keane drafted the first surrogacy agreement in 1980. The first gestational surrogacy pregnancy that was successfully completed on a woman occurred in 1985. Mary Beth Whitehead, the biological mother and surrogate, The US authorities refused to give the couple custody of Baby M in 1986, even though they had a surrogacy agreement. The biological father was given child custody by New Jersey courts, not the surrogate mother.

(Website-lexscriptamagazine.com) 3 (lexscriptamagazine@gmail.com)

1990 saw Californian surrogate mother Anna Johnson was adamant about giving the intended guardians possession of the child. The court upheld the couple's parental rights. This rule states that a woman who aspires to become pregnant and raise a child is the actual mother. Professionals involved in fertility from Chile was the meeting place for Latin America. in 1994 to discuss the morality and legality of assisted reproduction. The idea of surrogacy is not new; it has existed for millennia all throughout the world.

WHAT SURROGACY MEANS?

A crucial method of aided human reproduction for those who are unable or unable to have children normally is surrogacy. In a surrogacy arrangement, a woman consents to assisted conception, carries the resulting foetus to term, and then gives up her rights as a parent when the kid is born. It is among the most striking examples of contemporary reproductive technology. The Warnock Report defines surrogacy as "the practice of one woman carrying a child for another with the aim of the child being given over after delivery." A female friend might volunteer her services as a surrogate or family member, or strangers might reach a consensus that typically include the payment of fees.

As per the terms of an agreement made before to the woman becoming pregnant, The child will be given to the surrogate by the father's family following birth. This is known by some experts as "contractual parenting."

For ladies who can't conceive for a number of reasons, this ART treatment is a blessing. It's probable that not every woman will have the ability to carry her own genetic children. For instance, if a woman's womb and ovaries were destroyed due to cancer, or if she was not born with them, she could not be able to ovulate or bear a pregnancy. Because of how hazardously a lady who has severe skin diseases or high blood pressure perhaps capable of ovulating but not carrying an unborn child. By employing a surrogate, these ladies could continue to parent the biological child of their partner. In order to fulfil her wish to have a biological child, a woman who has a history of spontaneous abortions and is unable to keep the generated foetus may ask her spouse to take part in this arrangement. This surgery may also be beneficial for women who have multiple sclerosis or kidney illness, two diseases that can be fatal.

SUBSTITUTION OF DIVERSE FORMS

Surrogacy is a worldwide practice that takes many different forms. The various forms of surrogacy can be classified according to the kind of agreement entered into, the exchange of money and other relationships, as well as the application of genetic material. Formal or informal surrogacy can be described based on the specifics of the parties' agreement. Formal

surrogacy arrangements carefully define the terms and nature of the agreement amid the commissioning couple and the surrogate. Informal surrogacy agreements are usually ambiguous and vague because no terms and conditions are stated. The differences between commercial and charitable surrogacy can be made based on the surrogate mother's financial exchanges with the commissioning parental units.

Commercial replacement of parents involves giving the surrogate mother cash or other benefits, while selfless surrogacy is usually carried out between friends and family and involves no financial exchange. Partial or complete surrogacy can be distinguished based on the use of genetic material. In a partial surrogacy, in which the child receives genetic material from the surrogate mother that results. Total surrogacy is the practice of implanting DNA from outside sources into a lady who subsequently bears the kid on behalf of a different couple who are the biological parents.

The entire surrogacy procedure is therefore exceedingly challenging, expensive, and has important psychological ramifications. For most couples, surrogacy is their last choice. Numerous individuals have experimented with in vitro fertilisation, artificial insemination, or a combination of the two, as well as a range of additional technologies for assisted reproduction. The legality of surrogacy is also in question because some nations consider agreements with surrogates to be illegal and because it's unclear what the parties' rights and responsibilities are. In their journey to become parents, prospective parents face many significant obstacles time before the baby is delivered that is intended. Despite this, a lot of men and women still want to have children all the ethical, moral, legal, and religious barriers.

THE FREQUENCY OF INFERTILITY WORLDWIDE

Globally, the prevalence of infertility is rising, and assisted reproductive technology (ART) is developing. Infertility is the inability of a woman or couple to conceive. The possibility of surrogacy becomes feasible. The practice of surrogacy is wherein a child is carried by and born of a woman in support of another partner or person. A cultured fertilised embryo is placed within the gestational uterus of the surrogate mother, where she bears and gives birth to the kid arrangement. In a traditional Through artificial sperm implantation, the intended father becomes a genetic and gestational mother through surrogacy. Based on whether or not the surrogate gets paid for the pregnancy, commercial and charitable surrogacy are both possible. India, California, and the Ukraine are the only countries that allow commercial surrogacy; Australia, many US states, and England exclusively accept charitable surrogacy. Some

countries do not recognise surrogacy agreements, such as Sweden, Germany, Italy, Norway, etc. India has been a well-liked destination for fertility travellers couples from around the globe travel to India each year to use services for surrogacy because the total cost of the process is less than one-third of what it is in the US and the United Kingdom (ten to twenty lakhs).

GLOBAL SCALE SURROGACY ARRANGEMENTS

The process of surrogacy often involves fusing the sperm of the commissioning father holding the surrogate mother's egg. The commissioning father is the legal father of the child mother in the nations where both parents are from, and the mother of the kid would be the surrogate mother.

Conversely, the surrogate the legal father would be father. However, it is now challenging to confer parenthood to couples who use artificial fertilisation techniques. It took legislation to declare the father of the kid, the woman's husband, who is the donor for artificial insemination by law because Usually, the sperm donor is thought of as the child's father. Under this law, surrogacy agreements are discouraged.

For instance, gestational surrogacy is a medical breakthrough that enables a substitute mother to be utilised to bear a child created using sperm and donor eggs. The term "mother" needs to be defined legally in this situation. There might be legal differences between the native nations of the surrogacy and commissioning parents. There can be a heated court dispute that influences matters like as immigration and nationality. Regulations in countries that permit commissioning parents may benefit from commercial surrogacy, rather than the parental rights over the surrogate mother the child. Other nations, which might have different laws, might fail to acknowledge this.

A FINANCIALLY VIABLE OPTION FOR SURROGACY

At first glance, surrogacy seems to be a preferable choice because it can give a poor much-needed surrogate mother income. In a perfect world, an infertile pair can have their long-awaited biological child, and the nation can receive foreign currency earnings. However, the reality is somewhat different. The lack of regulation allows intended parents and surrogate mothers to be exploited and the money is generated by commercial organisations who act as my intermediaries. The whole enterprise lacks transparency, and the unpredictable stringent surrogacy rules in India may lead to legal entanglements. Even though the ICMR established guidelines for the accreditation, oversight, and management in 2005, of ART centres in India, these rules are frequently disregarded.

It's easy to sympathise with the suffering of without children's pairs on opposing sides of the conflict who must battle a drawn-out legal battle in addition to a linguistic barrier in order to obtain their kid. You'll need to spend an additional two to three months in India, even in the best of circumstances. The child is born to finish all the paperwork. Cross-border surrogacy affects nationality, citizenship, and motherhood, parenthood, and the rights of a child. A protracted court struggle may ensue when kids are refused nationality in the nation of the parents they were supposed to be (as was the case with the German and Israeli couples who had to raise their twin surrogacy children or the submit to DNA testing to prove parentage) or a miserable future in an institution (as in the cases of the Israeli homosexual couple who had to prove parenthood through DNA testing or the German couple who had twin surrogate children). In many instances, the prospective parent rejects the surrogate child, forcing him to live as an orphan, because their surrogate child is not genetically connected to them. The situation that surrogate moms are in is significantly more challenging and immoral. It is common for spouses or middlemen to lure poor, illiterate rural women into these kinds of deals with the assurance of quick money. These women are powerless over their own lives and bodies.

Legal counsel and mental health evaluation are not necessary in India, unlike in the US. These Hostels are where pregnant ladies stay when they are pregnant after being recruited by commercial agencies under the pretence of obtaining antenatal care. The main objective is to protect children from the social stigma associated with being an outsider in their neighbourhood. Throughout their pregnancies, many women worry about their houses and kids. They are only allowed to On Sundays, they visit their family, and their sole permission to visit a pregnant woman is to leave the house. The worst part is that if the pregnancy does not go well, they are unlikely to be reimbursed and there is no post-pregnancy medical or insurance coverage. Wealthy professional women who would rather not deal with the burden of bearing their own pregnancy employ surrogate mothers. Regulations for the surrogate mother as well as the parents must be developed and put into effect because surrogacy has become a business.

CAN ANYONE PROFIT FROM SURROGACY?

When you look behind the obvious benefits of surrogacy—a poor surrogate mother is provided with essential financial support, an infertile pair receives their eagerly anticipated biological child, and the country earns foreign currency—you find the harsh reality of the situation. Because there is a lack of appropriate legislation, intermediaries and businesses make money by taking advantage of intending parents as well as surrogate mothers. The entire system lacks

transparency, and the erratic laws that control surrogacy in India increase the likelihood of running afoul of the law.

Despite the fact that the ICMR published recommendations in 2005 for the regulation, oversight, and accreditation of ART clinics these standards are commonly used in India disregarded. It is easy to understand why cross-border childless couples grow frustrated when they must overcome more than simply a linguistic barrier but occasionally a protracted legal battle in order to obtain their child. Even if all goes according to plan, they will need to spend two to three months in India to finish the documentation that's required after the child arrives. Parenthood, citizenship, ethnicity, and parenthood, and children's rights are all impacted through international surrogacy. Sometimes, Like in the example of the gay couple from Israel who had to prove parenthood through DNA testing, or the German couple who had twin surrogate children, children are not allowed to have the nationality of their intended parents. This can lead to either a hopeless future or a protracted legal battle.

In many cases, the intended parent disowns the kid born via surrogacy because he is not genetically related to them, forcing the youngster to live in an orphanage for the rest of his life. When we consider the issue of surrogate moms, the situation becomes even more dire and immoral. Poor, illiterate women from rural backgrounds are sometimes persuaded to participate in such transactions by their spouses or middlemen in an attempt to gain quick money. These women are not entitled to make choices regarding their own lives or bodies. Legal counselling and psychiatric screening are not provided in India, whereas they are necessary in the United States. Under the pretence of obtaining services from commercial agencies, these women are recruited and remain in hostels for the duration of their pregnancies antenatal care.

The true intention is to protect them and shield them from the social disgrace of being shunned by their community. Throughout their whole pregnancy, many women worry about their children and home. They are only permitted to see their family are only allowed to go for prenatal appointments on Sundays. The worst part is that they are not guaranteed payment in the event of an unfavourable pregnancy outcome, and they are not eligible for coverage or treatment of mental and physical issues following pregnancy. Hiring surrogate mothers has become popular among wealthy business women who choose not to deal with the burden of a pregnancy on their own. Surrogacy raises several moral and ethical questions and has grown in popularity.

SURROGACY'S LEGAL IMPLICATIONS IN INDIA

The ART Regulation Draft Bill 2010, as it is currently known, was prepared by the Indian government and first suggested in 2008. The measure has not yet been introduced in Parliament, but the government is still working on it. The proposed draught should be thoroughly examined before any law is framed, and professionals in social, legal, and medical fields, additionally the broader public, should regularly discuss the ethical and moral implications of it. The bill recognises the enforceability of surrogacy agreements under the law. Agreements for surrogacy are subject to the same laws as regular contracts, including the Indian Contract Act of 1872 and other laws that were created in order to safeguard Native Americans.

The surrogate mother and the single person must execute a legally enforceable surrogacy agreement that addresses all issues or couple parent. Among other things, the proposed measure calls for the establishment of a federal and state government with the power to sign up and control IVF facilities and ART centres, as well as a platform to lodge complaints and objections against clinics and centres. It was not appropriate for the surrogate mother to have more than five children, including her own and should be between the ages of 21 and 35. The maximum number of times surrogate moms might transfer embryos for the same couple would be three. When a married woman serves as a surrogate, her husband's approval is necessary before she may perform in order to prevent any legal or marital complications.

Since these things can influence the outcome of the pregnancy, It is necessary to check a surrogate for communicable infections and sexually transmitted infections. She also shouldn't have received a blood transfusion during the preceding six months. All expenses, including The intended parents should pay for surrogate medical insurance as well as any other appropriate expenses associated with getting pregnant and giving delivery. The surrogacy agreement should contain a life insurance coverage for the surrogate mother. The couple or individual in issue may offer the surrogate mother financial remuneration in return for her consent to act as a surrogate.

It is suggested that banks work with surrogate parents directly moms in order to protect them from exploitation and that laws be put in place establishing the minimum compensation for surrogate mothers. In order to protect the kid from harm, the agreement for surrogacy requires incorporate the following clauses: financial support for the surrogate kid in the event that the divorce of the intended parents and nobody want to accept the child's delivery, or should the commissioning couple decide to pass away before the child is born. The parents who were meant to be should be named as parents a surrogate mother shouldn't be granted any parental

rights over the child on the birth certificate to avoid any legal issues. According to the standards, the newborn registered is recognised as the legal child of a married, single, unmarried, or pair of parents through ART, with all associated rights to parentage, inheritance, and support. Couples should contact ART Bank services directly rather than having ART clinics promote surrogacy to their clientele.

In spite of any irregularity, the intended parents of the kid or children should be legally required to agree to take custody of the child or children. The surrogate mothers and donor's right to privacy should also always be upheld, as should confidentiality. If an NRI or foreigner wishes to use a surrogate, they must first designate a local guardian who will act as the surrogate's legal guardian both during and after the pregnancy, up until the foreign couple receives the child or reaches their nation. They also need to formally guarantee the child's citizenship in a contract they sign with their government. Gender-based surrogacy ought to be prohibited, and the 1971 Act for the Medical Termination of Pregnancy ought to regulate abortions.

When pregnancy is deemed to be exceedingly risky for the mother's health or medically impossible, intended parents usually look into surrogacy arrangements. These contracts may or may not entail financial reimbursement. The configuration is characterised as commercial adoption as a surrogate receives payment above and above other than remuneration for medical costs and other acceptable expenses, this type of surrogacy is known as non-commercial or philanthropic is defined as surrogacy that is not done for financial gain. The costs and laws governing surrogacy differ greatly between nations.

CONCLUSION

Considering that almost 12 million Indian children are orphans, surrogacy seems like a strange practice. If childless couples in India choose to provide these children with a home, adopting a kid is a difficult and time-consuming process. India still lacks the most basic infrastructure. All citizens, whether they are Persons of Indian Origin (PIOs), Overseas Citizens of India (OCIs), or Non-Resident Indians (NRIs), should be covered by a comprehensive adoption law that is independent of religion and location of residence—was enacted 60 years after independence. They therefore consider surrogacy or IVF as options. The Guardian and Wards Act of 1890 allows for guardianship rather than adoption.

The Hindu Adoption and Maintenance Act of 1956 prohibits non-Hindus from adopting a Hindu child, and the rules for immigration following adoption create further difficulties. In India, When there are numerous orphaned children, surrogacy is practiced. Adopting these children requires a drawn-out process for couples without children. Not a single adoption

occurs statute that applies to all Indians living overseas or residents of all faiths. They are consequently forced to decide between surrogacy and IVF. Adoption is allowed but guardianship is not, according to the Guardian and Wards Act of 1890. The Hindu Adoption and Maintenance Act of 1956 prohibits non-Hindus from adopting Hindu children, and the immigration process following adoption is difficult.

The use of straightforward adoption procedures will lower the surrogacy rate. Conversely, commercial surrogacy ought to be promoted. Legislation that fills in all the gaps should be passed to safeguard the rights of women and children. Everyone feels strongly that the adoption process has to be streamlined and altered. It is anticipated that this would lead to an increase in surrogacy rates. Promoting surrogacy should be done so out of altruism rather than financial gain. Laws should be drafted and put into effect to cover the grey areas and safeguard women's and children's rights.

REFERENCES

- C. Surrogacy, LTD. (2016 Aug). Parents, available programs for intended parents.
- Peet, Jessica L. (2016). A womb that is (not always) one's own: Commercial surrogacy in a globalized world.
- Steiner, L. M. (2014). The baby chase: How surrogacy is transforming the American family. New York: St Martin's Press.
- Siva, N. (2017). Rise in assisted reproduction tourism in Asia threatens local medical services. British Medical Journal, 343, d5453.
- Amin & Rehman. (2019). Surrogacy in India and its legal and ethical implication. Journal of International Academic Research for Multidisciplinary, 2(4), 222-229.
- Steiner, L. M. (2014). The baby chase: How surrogacy is transforming the American family. New York: St Martin's Press.