Volume : 1 | Issue : 5 | Oct 2012 • ISSN No 2277 - 8160

Research Paper | Law

Birth Orders, Baby Farms, and Surrogate Motherhood- A Womb for Rent

Dr G A Solanki Associate Professor, Faculty of Law, M S University of Baroda, Vadodara

ABSTRACT

Medical advancements in surrogacy and legal standings have brought the traditional concept of motherhood under debate. Apart from legal standings, there are social, moral and ethical issues which cannot be thrown away. The aim of this article is to establish whether there is anything intrinsically immoral about surrogacy arrangements. Though medical science is advancing rapidly and awareness towards surrogacy is growing fast among the people, it is believed that some regulation is necessary in the form of licensing and authoritative inspection for the benefit of society.

KEYWORDS: : Surrogacy, Surrogate Motherhood, Assisted Reproductive Techniques, Legal aspects of surrogacy

Introduction

Marriage as an institution is the social order through which a married couple wish to beget a child. But for an infertile couple, this desire remains unfulfilled. Over a couple of centuries, this desire of having a child by an infertile couple was being satisfied by adopting a child. In western countries the adoption law is universal. The corresponding law in India is not universal but applies to the Hindus only. The Hindu Adoptions and Maintenance Act 1956 provide some relief in this regard.

Modern science and technology has provided new opportunities for infertile couples. This new concept is known as 'surrogacy'. Now, a woman can bear a child for a couple and ever for a single person.

The word 'surrogate' literally means 'substitute' or 'replacement'. The word 'surrogate' literally means 'substitute' or 'replacement'. A 'surrogate mother' is therefore a 'substitute mother': she is a woman who, for financial and/or compassionate reasons, agrees to bear a child for another woman who is incapable or, less often, unwilling to do so herself. In other words, she is a substitute or 'tentative' mother in that she conceives, gestates and delivers a baby on behalf of another woman who is subsequently to be seen as the 'real' (social and legal) mother of the child. [2]

The roots of surrogacy can be traced long back in Indian history. The world's second and India's first IVF (In Vitro Fertilization) baby Kanupriya alias Durga was born in Kolkata on Oct. 3, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly. But legally the laws related to surrogacy are still in the nascent stage. At present the agreement between the parties based on the ART Guidelines are the guiding force. The codified law is yet to be adopted and implemented. With the recent growth in the Intended parents opting for surrogacy here, India has become the much sought after surrogacy destination. With the acceptance of same sex marriages/union and the recognition of the basic human right to have family and children has given rise to surrogacy manifold. However, at the same time nations all across the globe are condemning commercial surrogacy as it results in commercialization of human reproductive system and co modification of children.[3]

Far Reaching Impact

Amongst many other techniques of reproduction such as artificial insemination by donor, in vitro fertilization, embryo transfer, and embryo freezing, surrogate motherhood has such far-reaching consequences. It has a greatest tendency to raise ethical and legal issues. The issue is very contemporary and has always been hotly debated in courts and has gained merited considerations. As compared to other reproductive techniques, surrogacy is different not due to different technology but the circumstances of its application. Surrogacy reflects the incongruity of womanhood, that is, an arrangement whereby one woman bears a child for another, with the idea that she would relinquish the infant at birth.

The surrogate arrangement is often between the initiating couple or the person known as commissioning couple or person. The agreed woman may be medically inseminated with the sperm of the commissioning man or a donor. She may be, under different situations, implanted with the embryo produced in-verito. The woman then becomes pregnant, bears the baby for the full term of pregnancy and delivers. She releases her paternal rights and hands over the new born baby to the commissioning couple for their adoption. A surrogate mother is the obvious choice of a couple when they face problems like infertility of the wife, the wife habitually miscarries, pregnancy is dangerous for the health of the wife or the couple wants to reverse a hereditary disorder.[4]

Most of the surrogate arrangements are commercial in nature. Although surrogacy contracts vary, they always include the commissioning couple to pay certain amounts in exchange of surrogate mother's incubation service. [5] The contract always includes a provision concerning the rights and liabilities of all parties, before, during and after pregnancy. The geist of the arrangement is the promise by the surrogate to give-up the custody of the child and the promise of the other party to accept the child. [6]

While surrogacy is a boon for childless couples, there are many legal factors around it that must be kept in mind.

Motivations for Surrogate Motherhood

There are several reasons why couple might choose to have a child through surrogate. Some of them are listed here:

1. Childlessness
2. A distinctive opening to have a child biologically related to husband 'only'
3. To evade passing on a hereditary disorder
4. Heterosexual couples who are unable to have children due to medical issues suffered by either partner
5. Apart from the above, one of the reason that motivates surrogate arrangements is in cases of single men, women and gay or lesbian couple who are ready and willing to take on the responsibility of parenthood.

Not only for the infertile couple, surrogacy also comes to the rescue of the Indian women who are poor such as daily wage earners or who have no employment and husband do not contribute sufficiently to family. Thought Indian women are considered traditionalist there are many cases of women becoming surrogates and the assisted reproductive technology has progressed in India. India is becoming the only country where commercial surrogacy is legal.

It must be understood that Surrogacy may not always be the first choice in creating families; however, it is an option for many in starting a family and being able to experience the joy of pregnancy through the gift of your surrogate mother.[7]

Kinds of Surrogacy[8]

There are two types of surrogacy

- IVF/ Gestational surrogacy
- Traditional/ Natural surrogacy

IVF/ Gestational surrogacy

Gestational surrogacy is one in which a woman has her uterus removed but still has ovaries. She can provide the egg to make a baby, but has no womb to carry it. The egg of the wife is fertilized in vitro of the husband's sperms by IVF/ICSI procedure, and then the embryo is transferred into the uterus of surrogate mother which she carries it for nine months.

Traditional/ Natural surrogacy
In Natural surrogacy the surrogate is inseminated with the sperm of male partner of an infertile couple. The child thus produced is genetically related to the surrogate and the male but not to the commissioning female partner.

Ethical issues
Commercial surrogacy is an area which is fraught with social, ethical and moral questions and dilemmas of far-reaching importance. It is a subject which has crucial social implications and it may give rise to intractable dilemmas for the Indian society and its social fabric. The ease with which relatively rich foreigners are able to 'rent' the wombs of poor Indian women creates the potential for exploitation.[9]

In a country like India where families are dying due to poverty, commercial surrogacy cannot be regulated. There are reports that where young vulnerable girls from orphanages were 'hired out' for surrogacy and the surrogate mothers themselves never got any money; and even if they got any money, the poor women had little choice.[10] The combination of poverty, illiteracy and the lack of power that women have over their own lives in India in general are a deadly combination. There are instances of desperately poor women in India selling their own (biological) babies because they can't feed the rest of their family For the woman, even though she knows that she is undergoing a transaction, parting with or handing over the baby could be an event causing her terrible emotional conflict which at times may be quite devastating for her.

Surrogacy is not like donating a kidney; bearing a child is an emotional issue. Driven by the circumstances, a woman, in a way, forces on herself a nine-month-pregnancy which could prove to be a woefully agonizing event in her life. That once or twice upon a time, their mother went through motherhood purely for money or commercial reasons could severely dent the self-esteem of the children when they grow up and come to know about it.[11]

The negative aspects of surrogate motherhood need to be seriously considered. Surrogate motherhood is likely to give rise to a new class of agents/intermediates whose business would be to offer monetary inducement to the poor women for surrogacy with the connivance of some medical practioners and exploit their vulnerability in the way the notorious kidney racketeers in India have done. The unhealthy practice could lead to the creation of what can euphemistically be described as the springing up of 'baby 'factories'. There should be control so that it does not become an open market. [12]

Ethical issues that have been raised with regards to surrogacy include:[13]
- To what extent should we be concerned about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates?
- To what extent is it right for society to permit women to make contracts about the use of their bodies? To what extent is it a woman's human right to make contracts regarding the use of her body? Is contracting for surrogacy more like contracting for employment/labor, or more like contracting for prostitution, or more like contracting for slavery? Which, if any, of these kinds of contracts should be enforceable? Should the state be able to force a woman to carry out "specific performance" of her contract if that requires her to give birth to an embryo she would like to abort, or to abort an embryo she would like to carry to term?
- What does motherhood mean? What is the relationship between genetic motherhood, gestational motherhood, and social motherhood? Is it possible to socially or legally conceive of multiple modes of motherhood and/or the recognition of multiple mothers?
- Should a child born via surrogacy have the right to know the identity of any/all of the people involved in that child's conception and delivery?

Legal Issues
The legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. In most of the countries[14] 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 be 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.[15]

Surrogacy in India is relatively low cost and the legal environment is favorable. In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year.[16] Further, the Indian Council for Medical Research Guidelines in 2005 laid down a set of guiding principles, which comprise:[17]

- Surrogacy should be managed by way of a contract between the surrogate and the intended parents. This should cover reimbursement of all costs, including medical treatment, and the requirement of the surrogate to hand over the child post-delivery.
- The surrogacy arrangements should take into consideration the financial costs if the intended parents are unable to take charge of their baby. The intended parents should also cover the life insurance costs of the surrogate while pregnant.
- If possible, one of the intended parents should have a genetic affiliation with the child due to the bond created by a biological relationship.
- The birth certificate of the child should contain only the name of the intended parents.
- The donor and the surrogate have the right to privacy.

The main problem with these guidelines is that there is nothing to say that they should be followed or, indeed, what will happen if any contract you might have is breached. Since surrogacy can be legally complex, it is advisable to have a lawyer on your side to make sure you understand the legal rules and regulations, and do not go wrong in such an important step. [18]

Things to Mull Over
- Since different countries are having different laws pertaining to surrogacy it is always advisable to hire a local lawyer who shall take care of documentation. Surrogate must be made aware about the rights of the surrogate child, especially citizenship rights and the procedure for taking the newborn baby to new country.
- Method selected for surrogate is also important since legal consideration may differ from country to country.
- The clinic that offers assistance in surrogacy should be properly scrutinized.
- Also testimonials of those parents who've previously used a surrogacy service in India can be checked as this shall provide important information regarding the standing of the clinic and doctors.

Surrogacy is a fast growing trade in India but rigorous legislation is the need of the hour to avoid exploitation and misuse. There is conflict of laws with respect to surrogacy in different countries which raises problems regarding nationality, citizenship, parentage and the rights of intending parents and a child born by surrogacy. Surrogacy brings happiness to the intending parents and hence in order that whole process of surrogacy to go on efficiently without any legal hassles there should be a law which will help to solve problems faced due to different legal aspects in different countries.

Motherhood is precious thing in the world. Becoming a mother is a great creative moment. It's a second birth of a woman. Becoming a mother as a surrogate is creating life for others, and it's a great sacrifice.

REFERENCES

Dr. G A Solanki, Associate Professor, Faculty of Law, The M S University of Baroda | A van Niekerk and L van Zyl, The Ethics of Surrogacy: Women's reproductive Labour, available at, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1376831/, accessed on 8/10/12 | Surrogacy: Defines, available at http://www.surrogacylawsindia.com/index_inner.php, accessed on 8/10/12 | Nandita A, Surrogate Motherhood, Law and Medicine, Central Law Agency, p.155 | Ibid 3s | Surrogate Motherhood: Ethical and Legal issues, by Sue AMeinke, available at http://bioethics.georgetown.edu/publications/scopenotes/sn6.pdf, accessed on 9/10/12 | Why Choosing Surrogacy, available at http://www.northamericansurrogacycenter.com/faq.php, accessed on 8/10/12 | Saxena A., Surrogacy and Laws in India, available at, http://www.mightylaws.in/548/surrogacy-laws-india | Namita J., Surrogacy in India: A Thorny Issue, available at http://www.mainstreamweekly.net/article2040.html, accessed on 9/10/12 | Ibid 8 | Ibid 8 | Jamawal N S , Mainstream, available at http://www.mainstreamweekly.net/article2040.html, accessed on 9/10/12 | Surrogacy, available at, http://en.wikipedia.org/w/index.php?title=Surrogacy&action=edit&section=3, access on 8/10/12 | In Australia, the surrogate mother is regarded as legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the courts of Law. In addition commercial surrogacy is a criminal offence. In Canada, commercial surrogacy is prohibited under the Assisted Human Reproduction Act, 2004. But, altruistic surrogacy remains legal. In the province of Quebec, contracts that involve surrogacy are unenforceable. In France, any surrogacy arrangement whether it is commercial or altruistic is illegal, unlawful and prohibited by the law. Commercial surrogacy is illegal in Hungary aslo. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements. Surrogacy arrangements have been legal in the United Kingdom since 2009. It is illegal in the UK to pay more than expenses for a surrogacy. Many states have their own state laws written regarding the legality of surrogate parenting. It is most common for surrogates to reside in Florida and California due to the surrogacy-accommodating laws in these states. | Surrogacy Laws India, Legality, available at http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71, accessed on 9/10/12 | Ibid 14 | India Surrogacy Laws, available at http://www.surrogacyclinics.com/tag/surrogacy-laws-in-india/, accessed on 7/10/12 | Ibid 15 |