



SURROGATE MOTHERHOOD: A RAY OF HOPE

KEYWORDS

surrogacy, assisted reproductive technology (ART), commercial surrogacy

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ABSTRACT *This article is an attempt to reflect the concept of surrogacy and surrogacy laws India. In India commercial surrogacy is legal. So many childless parents approach India for their desire to become parents. Although both the parties get benefit through this process but there are certain legal issues which are very complex and need to be addressed and resolved subsequently by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society.*

INTRODUCTION

The term 'Surrogacy' is derived from the Latin word 'surrogatus', which means 'to substitute'. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. Surrogacy is not a new concept in India. History has already witnessed surrogacy with the birth of Lord Balaram where Rohini gave birth to a child for Basudev and Devki. Every woman has the desire to become mother of a child, whom she can nourish and blend according to her desire and format, but unfortunately every woman is not blessed with this, due to certain scientific reasons, many are unable to give birth to a child. Adoption is always considered to be the last step in this process of owing a child therefore the other way out is surrogacy which helps a couple to have a child who would at least have some similarities with the father since the process requires the sperm of the father desiring the baby.

Surrogacy is said to be an arrangement or an agreement in which the carrying of a pregnancy is done by a woman other than the mother for the intended parents. In other words it is said to be the act of a woman altruistic by nature to gestate a child for another individual or couple with the intent to give the child back to his/her parents at birth. The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly¹.

CLASSIFICATION OF SURROGACY

There are mainly two types of surrogacy, (1) Gestational and (2) Traditional surrogacy. Again Gestational surrogacy classified into four types namely: gestational surrogacy, gestational surrogacy and egg donation, gestational surrogacy and donor sperm, gestational surrogacy and donor embryo. Similarly Traditional surrogacy is of two kinds, traditional surrogacy and traditional surrogacy and donor sperm.

Gestational surrogacy (GS) implies a surrogate is implanted with an embryo created by IVF, using the egg and sperm of the intended parents. The resulting child is genetically related to the intended parents, and genetically unrelated to the surrogate.

Gestational surrogacy and egg donation (GS/ED) means a surrogate is implanted with an embryo created by IVF, using intended father's sperm and a donor egg. The resulting child is genetically related to intended father and genetically unrelated to the surrogate.

Gestational surrogacy and donor sperm (GS/DS) means a surrogate is implanted with an embryo created by IVF, using intended mother's egg and donor sperm. The resulting child is genetically related to intended mother and genetically unrelated to the surrogate.

Gestational surrogacy and donor embryo (GS/DE) means a donor embryo is implanted in a surrogate; such embryos may be available when others undergoing IVF have embryos left over, which they opt to donate to others. The resulting child is genetically unrelated to the intended parent(s) and genetically unrelated to the surrogate.

Traditional surrogacy (TS) involves naturally or artificially inseminating a surrogate with intended father's sperm via IUI, IVF or home insemination. With this method, the resulting child is genetically related to intended father and genetically related to the surrogate.

Traditional surrogacy and donor sperm (TS/DS) implies surrogate is artificially inseminated with donor sperm via IUI, IVF or home insemination. The resulting child is genetically unrelated to the intended parent(s) and genetically related to the surrogate.

METHOD

There are two methods of surrogacy, partial surrogacy which involves the surrogate mother inseminating her with the commissioning father's sperm and in case of full surrogacy an embryo is created in vitro, using the commissioning couple's egg and sperm and is transferred to the surrogate mother's uterus.

STATUS OF PARTIES INVOLVED

In India the surrogate mother is not considered as the legal mother. As per ICMR Guidelines 2005², a surrogate mother cannot be genetically related to the baby. She is having no legal rights over the child. Her rights and obligations towards the intended parents as well as the child are elaborated in the gestational surrogacy agreement. However, a child born through the process of surrogacy shall

be deemed to be the legitimate child of the intended parents/s and shall have all the legal rights acquired from parents, inheritance and all other privileges which a child born naturally to the intended parents/s would have had.

SURROGACY LAWS IN INDIA

Indian Council for Medical Research issued guidelines in the year 2005 for Surrogate Motherhood. In 2008, the Supreme Court of India in the Manji's case^v (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. The Ministry of Health and Family Welfare, Government of India has drafted The Assisted Reproductive Technologies (Regulation) Bill in 2010(ART). This is an act to provide for a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto^{vi}. The bill enumerates that the surrogate should be of 21 to 35 years of age and she should not have had more than five successful live births in her life, including her own children^{vii}. The surrogate mother will have to enter into a legally enforceable surrogacy agreement as per the proposed legislation. The present bill also mentions that consent of the husband of the surrogate must be taken before undergoing any agreement with the intended parents^{viii}. Section 34(3) of The Assisted Reproductive Technologies (Regulation) Bill in 2010 says that, the surrogate mother will be involved in deciding the compensation amount to be paid for her surrogacy. Foreign couples including NRIs seeking surrogacy in India will have under the proposed law to submit certificates that their country recognizes surrogacy as legal and also that the surrogate child after birth would get their country's citizenship. The Law Commission of India in its 228th Report on "Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy," has by and large supported surrogacy in India, but is not favourable towards commercial surrogacy. The Commission said, "It seems that wombs in India are on rent, which translates into babies for foreigners and dollars for Indian surrogate mothers."^{ix}

ISSUES IN SURROGACY

The Indian Judiciary has recognized the reproductive right of humans as a basic right. In *B. K. Parthasarthi v. Government of Andhra Pradesh*^x, the Andhra Pradesh High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*^{xi}, which characterised the right to reproduce as "one of the basic civil rights of man". In India, The Assisted Reproductive Technology (Regulation) Bill – 2010 includes surrogacy contracts within the ambit of the Contract Act, 1872 to make it enforceable. The Act on the other hand, prohibits contracts against public policy which includes public morality and conscience. Section 23 of the Contract Act states deals with the provisions where the object or consideration is immoral in nature, such agreement or contract is void. Many people argue that commercial surrogacy arrangements are considered immoral as they involve giving up the material rights and the selling of babies for money, therefore, surrogacy must be banned. Lord Patrick Devlin observed: "No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation; It is not the duty of law to concern itself with immorality as such; it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious^{xii}." In this context legalising commercial surrogacy should be welcomed because this decision finally catches up without time and in no way it is offensive and injurious. Public morality must not be accepted as a shield against any act of human development and social change.

CONCLUSION

Surrogacy is a new era to the medical science which can fulfil the dream of many a childless couple to have children. It is a welcome approach of becoming parent of a child. But however there are near about 12 million children are orphans. Adoption is the means in which such orphan children can at least get their status and value in the society. So laws relating to adoption should be simplified for the desirous adoptive parents to adopt children.

REFERENCE

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