



The Obligations of the Parties in Surrogacy Contract

KEYWORDS

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Introduction

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 rapidly. The growth in the ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. A woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. Some authors put it as follows: **"The parents construct the child biologically, while the child constructs the parents socially"**. The problem however arises when the parents are unable to construct the child through the conventional biological means. Infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein Surrogacy comes as a supreme saviour.

The very word Surrogate means 'Substitute'. That means a Surrogate Mother is the substitute for the genetic-biological mother. In common language, a Surrogate Mother is the person who is hired to bear a child, which she hands over to her employer at birth¹.

The Surrogate will be the legal mother of the child unless or until parenthood is transferred to the intended mother through a parental order or adoption after the birth of the child. This is because, in law, the woman who gives birth is always treated as the mother.

However, Surrogacy is an arrangement between a woman and a couple or individual to carry and deliver a baby. It is a controversial process that is not legal in all states. The Surrogate Mother is also known as a *gestational carrier*. In many cases, the process is an expensive, time consuming, and emotional one. Women or couples who choose this path often do so because they are unable to conceive due to a missing or abnormal uterus, have experienced multiple pregnancy losses, or have had multiple in vitro fertilization attempts that have failed. In summary Surrogacy is used when a woman is incapable of holding and growing an embryo in her uterus. The advantage of the gestational method to the parents is that the embryo is created from the woman's egg and the man's sperm, so it is biologically theirs. In common terms the woman who rents the uterus is called "Surrogate Mother" and the infertile couple that demands a child is called "legal parents"².

Defining the Surrogacy Contract

It is necessary to know that the contract that forms the

agreement to use another woman's uterus for gestation is called "Surrogacy Contract". Although it is not possible to give a general and common definition for this kind of contract and it has different types and forms based on the agreements of the parties, generally it is defined as "an agreement based on which a woman (Surrogate Mother) accepts to become pregnant through artificial reproduction methods and using the sperm and egg of the intended parents or third parties in laboratory environment, though not having genetic relation with the child, carries the child resulted from the inseminated egg or the embryo and after birth, delivers it for the couple (intended or legal parents)"

Do Surrogacy Contracts amount to baby selling ' is the most crucial question while determining the validity of such contracts in relation to the argument of autonomy of women while rendering her services in terms of child bearing. This question can be answered from two angles, firstly, Surrogacy arrangements that do amount to baby selling and which can be termed as commercial Surrogacy ; secondly, Surrogacy arrangements that do not amount to baby selling, known as Altruistic Surrogacy .

SURROGACY CONTRACT IS DIVIDED INTO TWO GROUPS:

1. Commercial Surrogacy

In these contracts, the intended parents (legal parents) undertake to pay an amount of money to the Surrogate Mother for her service. The money paid to the Surrogate Mother is treated as the satisfaction of her obligations, the amount of which is determined through the agreement of the parties involved.

2. Non Commercial Surrogacy

In these contracts the Surrogate Mother does not receive any money for her services; rather she does that merely for ethical, sentimental and altruistic motives. In this type of Surrogacy usually one of the relatives of the infertile couple is determined as the Surrogate Mother. In this type of contract the legal parents accept to pay some of the necessary costs to the Surrogate Mother that can be considered as the quid pro quo ("something for something") in the contract.

One of the most important and most basic of them is the question about the rights and obligations of each of the parties in this contract. Questions such as:

1. What are the dos and don'ts for the woman who is growing the embryo of others in her uterus?
2. What are her rights towards the infertile couple for her labor?
3. What are the obligations of the infertile couple concern-

ing the Surrogate Mother?

And other questions that need ample legal consideration and discussion.³

First it is essential to know that the answer to the above questions depends on the parties of the contract and their choice of the contract. In other words the rights and obligations of the parties of the contract using Surrogacy depends on the type and nature of the legal form that the parties choose for the agreement.

Based on the above in the case the nature of the contract of using Surrogacy matched personal lease contract then the activity of the Surrogate Mother can be interpreted in two ways:

One that the Surrogate Mother with this contract, gives possession of a certain benefit of herself, concerning her uterus (growing embryo to the infancy), for a certain satisfaction to legal parents.

The other concerns that the Surrogate Mother undertakes that for a certain amount of money give birth to an embryo through an artificial gestation method that belong to legal parents and grow it in her uterus and deliver it for the legal parents.⁴

The legal issues related with Surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which Surrogacy can serve would be irrational.

Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of Surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic Surrogacy arrangements and prohibit commercial ones. Most important points in regard to the rights and obligations of the parties to a Surrogacy and rights of the Surrogate child the proposed legislation have been given in this research papers.

Obligations of the parties in the Surrogacy contract

Considering the above introduction we can enter the main discussion which is discussed in two parts. The first part, the obligations imposed by the contract using the Surrogate uterus of the legal parents towards the Surrogate Mother and in the second part the obligations of the Surrogate Mother towards the legal parents.⁵

The obligations of the legal parents under the Surrogacy Contract

- Paying wage (satisfaction) to the Surrogate Mother
- Paying necessary costs to the Surrogate Mother.
- Take delivery of the born baby in the appointed time
- Legal parents or an individual shall not have the service of more than one Surrogate at any given time.

a) Paying wage (satisfaction) to the Surrogate Mother

This obligation is formed only when the Surrogacy Contract is concluded in a reciprocal form (not friendly). As was mentioned if the Surrogacy Contract is formed in com-

mercial (reciprocal) then the intended parents undertake to pay a sum for the services provided by the Surrogate Mother and the paid sum of money is considered as the satisfaction of the obligations of the Surrogate Mother in the contract. ⁶

b) Paying necessary costs to the Surrogate Mother. Whether a commercial or a friendly contract, this obligation stands for the legal parents. These costs include;

the costs related to Surrogacy (taking the embryo to the uterus of the Surrogate Mother in the laboratory and medical centers),

the costs related to holding and growing the embryo in the uterus of the Surrogate Mother (the cost of feeding the embryo in the gestation period),

the costs related to the necessary costs for medical treatments, drug and treatment care during the gestation,

the costs related to child laboring and other related costs.

It should be noted that the obligation of the legal parents to pay such costs in the friendly type of Surrogacy Contract.

c) Take delivery of the born baby in the appointed time

In the lease contract as the hired worker is obligated to do the subject of obligation and give the subject of work (for example goods produced according to the order of the tenant) to the tenant, the tenant should accept the product that has been ordered and accept the work done for him.

In the contract of using the Surrogate uterus as the Surrogate Mother is obliged to deliver the baby at the appointed time to the legal parents, the legal parents are also obliged to take delivery of the child or in other case should compensate their delay. Determining a date in which the legal parents are obliged to take delivery of the child depends on the agreement with the Surrogate Mother and can be just after childbirth, a few days after that or after the breastfeeding period. ⁷

In any case the legal parents delay in taking delivery of the child are obliged to pay the inflicted costs and the damages to the Surrogate Mother in the time period between childbirth and handing over the baby. According to the law of tort and its rules concerning the responsibility of people in case of causing a loss to others, it seems that these costs include different cases such as:

All of the costs related to taking care of the child in the appointed time that includes eating, dressing, and treatment.

Fair equivalent remuneration (remuneration) of holding the child in this period

Remuneration of breastfeeding the baby in case the Surrogate Mother has breastfed the baby.

The damages resulted from disability of Surrogate Mother in this period because of her engagement for taking care of the child.

d) Legal parents or an individual shall not have the service of more than one Surrogate at any given time.

B) The Obligations of the Surrogate Mother under the Contract of Surrogacy

In effect of the conclusion of the Surrogacy Contract, the woman owning the uterus has also obligations for the Legal Parents or Infertile Couple:

Accepting the embryo of the infertile couple in her uterus, holding and nurturing her during gestation period and finally giving birth to the child.

Under this contract the Surrogate Mother is obliged to take care of the embryo and deliver the baby under the terms of the contract, the common practice in gestation and medical principles.

The obligation of the Surrogate Mother to take care of the embryo in her uterus includes other obligations impliedly. Because through accepting taking care of the embryo in her uterus in fact she is obliged to do things that are commonly necessary for the healthiness of the embryo (such as regular appointments with gynecologist during the gestation period, proper feeding, and taking proper drugs under the prescription of the physician.

Also she is obliged to abstain from doing things that endanger the healthiness of the embryo according to the common standards (such as smoking, drinking alcoholic beverages, using dangerous drugs for the embryo, taking drugs without the permission of the physician, doing heavy physical activities and.

Delivering the baby to the legal parents at the appointed time.

One of the other obligations in the lease contract is to "give the subject of work" to the tenant. The hired should deliver the product that has been produced or repaired under the order of the tenant to him within the appointed time. In the same way, the Surrogate Mother is obliged to deliver the baby after giving birth to her at the appointed time to the legal parents.⁸

Taking care of the baby within the time period of giving birth till delivering her to her legal parents.⁹

A Surrogate Mother shall relinquish all parental rights over the child.

No Surrogate Mother shall act as a Surrogate for more than five successful live births in her life, including her own children.

Surrogate Mother seeking or agreeing to act as a Surrogate Mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

In the Surrogate Mother contract based on the type of the agreement there is the possibility a time gap exists between childbirth to the delivery of the child to the legal parents. One of the other obligations of the Surrogate Mother is that, in this time gap takes care of the child without any extremities. In this respect the Surrogate Mother plays the role of a trustworthy person that should act under the common standards of taking care of the baby. So her obligation in this respect does not depend

on the result, rather she is only obliged to do all of the standard procedures for taking care of the baby. Only this prove makes her innocent. Thus if the Surrogate Mother does fail to take care of the baby, she has no responsibility in case the baby gets any harm or her physical health is damaged¹⁰.

Conclusion

There will be an agreement between Intended Parent and The Surrogate, which clearly signifies the meeting of the mind of both parties, their intention, their thoughts and action. As such there is no law with regard to Surrogacy In India, so it's only the agreement which is the legal consideration and foundation of the interests of both the parties to Surrogacy. So Surrogacy Agreement is the only consideration and will not be held voidable in the Indian Court Of Law. Surrogacy Agreement is a very sensitive and important in medical issue,

However, the Surrogacy contract, like any other contract, includes rights and obligations for each of the parties. Because the subject of this contract is related to a sensitive issue such as human breeding. It is clear that the parties of this contract depending on their agreement can have different rights and obligations. So it is not possible to determine exactly the responsibilities of the parties towards each other in a general form, since the scope of these obligations, under the agreement of the parties, is different in different contracts. Surrogacy Contracts which involve payment amount to baby selling and there is a need for a formal legal mechanism to protect such women from being exploited on economic necessity grounds. This also applies to Surrogacy Contracts which do not amount to baby selling but involve social factors compelling women to act as Surrogate Mothers. However altruistic arrangements deductive of social and economic compulsions can be justified on basis of social good and thus such arrangements need to be given certain amount of formality in order to regulate the relations between the parties and to ensure that Surrogate women are not exploited, which is the major concern of feminist ideology.