

# SURROGATE MOTHERING – LEGAL IMPLICATIONS IN PERSONAL LAWS IN INDIA

## **I. Introduction**

Procreation of children is one of the main objects of marriage. It is a natural desire of every human being to leave behind his descendants for the continuity of lineage. Matrimonial happiness depends not only on satisfying biological need of sexual urge but also on begetting of a child. Attainment of Parenthood gives social recognition of the parties to the marriage. A situation of childlessness arises if the married couple is unable to procreate children due to infertility. The childless parents become depressed, desperate, helpless and feel cursed. It affects them not only psychologically and socially but also their lineage is discontinued.

Despite recent medical developments in the treatment of infertility, there are still very many couples who could not procreate a child of their own for various genetic reasons. For them adoption was the only alternative to have a child. Due to advancement of Medical Science of the last thirty years, modern reproduction techniques like artificial insemination (AIH and AID) and In vitro fertilization (IVF) are made available. When the wife is unable to conceive and carry the fetus in her womb due to various medical and genetic reasons, a new device of surrogate mothering is now used for the last few years. It is also felt that surrogate mothering is a better choice for childless couple than adoption as the baby is born as a genetic child of atleast one of the couple and sometimes both. In most of the advanced countries especially the USA, the U.K., France, Germany, Australia, this surrogacy method is increasingly used by the childless couples and regulated by law.

As the medical science and Public awareness of the technique of surrogate mothering advances more and more, medical practitioners and childless couples in India<sup>1</sup> will resort to his technique in the absence of any legal ban.<sup>2</sup> The concept of surrogate mothering has been engaging not only the attention of ethicists,

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psychologists, sociologists and medical scientists, but also jurists as well. This method has given rise to innumerable legal issues especially in the domain of personal laws. Among them the important issues in personal law are:

- (1) Is surrogate mothering arrangement legal?
- (2) Is the surrogate child legitimate? If legitimate, of whom?
- (3) Does surrogate mothering arrangement amount to consummation of marriage between childless intended couple? If not, what is the matrimonial remedy available?
- (4) Is the custodial rights over the Surrogate child vested with surrogate mother or intended parents?
- (5) Is the surrogate child entitled to succeed the property of the surrogate mother and her husband or intended parents?

Many of these legal issues are bound to arise in India sooner or later.

This paper aims to examine the legal implications of surrogate mothering with reference to the above issues in the field of personal laws in India and to suggest suitable reforms in the area.

## **II. Legal Status of Surrogate Mothering Arrangement**

“Surrogacy” is a constituent of Human Assisted Reproduction. “Surrogacy”<sup>3</sup> means any arrangement by which a surrogate woman agrees to be impregnated by non-coital means, using either intended father’s sperm or intended mothers’ egg or both, with the intent that the intended parents are to become the parents of the resulting child after the child’s birth.<sup>4</sup> Surrogacy is said to be of two types. 1. Gestational surrogacy or full surrogacy which means surrogate mother is not genetically related to the child. 2. Straight surrogacy or partial surrogacy which means surrogate mother is genetically related to the child.

One may be easily attracted with the fundamental legal issue manifest in the surrogacy arrangement. Is surrogate mothering arrangement legal? Surrogate mothering arrangement is essentially a contract for the service of a woman to carry a baby to term. It basically involves three promises:

1. The surrogate who offers her services carry the baby to terms either in the capacity of the gestational mother or genetic mother.
2. The surrogate and her husband agree to relinquish all parental rights at the birth of the child and
3. The intended parents agree to remunerate the surrogate for her service.

In legal parlance, an agreement is unlawful if it is forbidden by law or is immoral or opposed to public policy.

No law, at present, in India forbids Surrogate mothering contract. The concept "immorality" in law is generally confined to sexual immorality only.<sup>5</sup> Surrogate mothering contract which does not contemplate cohabitation is not to be construed as immoral. The concept "public policy" is a principle of judicial interpretation, found on the current needs of the society. It does not remain static, but varies from generation to generation and even in the same generation. "The twin touchstone of public policy are advancement of the public good and prevention of public mischief."<sup>6</sup> Surrogate mothering through AI or IVF techniques is an option now available to a childless couple for whom adoption is not legally made available. For them, surrogate mothering either commercial or non commercial is only a viable alternative to adoption. Commercial Surrogate mothering based on payment of consideration is a business- like transaction for the incubation service provided by the Surrogate mother treating the children as commodity. It also leads to exploitation of economically vulnerable women. Whereas non commercial Surrogate mothering based on payment of genuine expenses (some may call it Altruistic surrogacy) is usually an arrangement between childless couple and surrogate woman who is a close relative or friend, may agree to carry the baby for purely altruistic reasons.

One may also argue that altruistic surrogate mothering provides no protection to women who may be pressured in such arrangement by family members on economic reasons and in all probabilities, the childless couple may hardly arrange a surrogate woman who is just satisfied with the pleasure of carrying a child for others. Even in non-commercial surrogate mothering consideration may

be passed outside the purview of the agreement. This contention has no proof. It is pertinent to observe that commercial surrogacy is outlawed in the U. K and Australia as it involves ethical and moral issues.

It is submitted that in view of the above reasons non-commercial surrogate mothering may be preferred in a society like ours where ethical, moral and cultural values are highly respected. Therefore non-commercial surrogate mothering does not suffer from any legal infirmity. It neither leads to public mischief nor affects public good.

However, it is to be made clear that any surrogate mothering which contemplates impregnation through sexual intercourse is undoubtedly immoral and cohabitation outside the wedlock is opposed to public policy. This type of surrogate mothering agreement is prohibited everywhere.

### **III – Legitimacy of Surrogate Child**

Another issue in personal law manifests in the surrogate mothering arrangement is : Is the surrogate child legitimate? If so, of whom?

The legitimacy of children is the direct outcome of the concept of marriage. The settled rule is that the children born within the lawful wedlock are legitimate children of the man and his wife. As a corollary to this, children born outside the lawful wedlock are illegitimate.<sup>7</sup> Legal presumption as to the maternity of the child is assigned to its birth mother.<sup>8</sup> The child-mother relationship is conclusively determined at the point of birth regardless of whether the child is conceived through sexual intercourse or AI or IVF. The traditional laws do not presuppose mother's genetic tie to the child.

In the U.S.A., the concept of mother has undergone a radical change with the development of genetic engineering. Now, the concept of genetic mother is also considered in the Reproductive Biology. When surrogate is merely a gestational mother, the intended parents who provided the genetic imprint for the child are to be considered as natural and legal parents provided they have not relinquished or

waived their rights to assume the legal status of natural parents.<sup>9</sup> As a result, the surrogate child is the legitimate child of the intended parents.<sup>10</sup>

In the U.K., mother means “the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.”<sup>11</sup> Legally, the child’s mother is the woman who carries it i.e., the surrogate host, not the mother who provided the ova.

The Indian courts in this regard follow the English Common law. In effect, surrogate mother is admitted to be the mother of surrogate child. If the surrogate is a married woman, the legitimacy of a child during subsistence of a valid marriage is almost concluded under section 112 of the Indian Evidence Act 1872 and for all legal purposes, the child would be legitimate child of the surrogate and her husband unless he proves his non access with his wife at any time when the child could have been begotten and he has not consented for surrogate mothering by his wife. It is clear that the intended parents are not to become the legal parents of the surrogate child.

The position is still worse if the surrogate mother is unmarried. Of course, an unmarried woman resorting either to natural or artificial means of reproduction does not commit any offence as such. It is a different matter that the society does not approve such contact. A child of an unmarried surrogate woman is illegitimate only. Therefore, unmarried woman offering surrogacy service is to be discouraged. In both cases, the surrogate child may not become natural and legitimate child of the intended parents.

The only way out for the surrogate child to become the natural and legitimate child of the intended parents is adoption. However, in India, the law of adoption is not liberalized to overcome the situation. Under the personal laws in India, the institution of adoption is recognized only by Hindu law and not by Mohammedan law nor Parsee law. Christians in India are left with no legal sanction for a valid

adoption.<sup>12</sup> Even under Hindu law, an adoption is valid only when the adoptive parents and the child to be adopted are Hindus.<sup>13</sup> When either the surrogate woman or the intended parents are non-Hindus, adoption is invalid. It is indeed the law of adoption has not yet been able to extricate itself from the traditional philosophy. Complication is more added when the surrogate woman and her husband refuse to give the child in adoption to the intended parents who are genetically related to the child. Under this circumstance, adoption is not possible even if their personal law paves way for adoption.

It is submitted that this position of law may cause a grave injustice to the intended childless parents who desires to have their genetic child by surrogate mothering. This hardship may be removed by incorporating the concept of “constructive adoption” in the proposed comprehensive bill on adoption lying in Parliament for some years. However, it is the legislative wisdom to include or not the constructive adoption clause in the proposed bill. It is not certain. Instead, it is desirable that the intended parents can apply for a parental order which will give them full and permanent parental rights once the child is born. The present family courts may be vested with the jurisdiction to entertain such petition and pass necessary orders not withstanding the religion of the parties to the surrogate mothering arrangement.

#### **IV – Surrogate Mothering And Consummation of Marriage**

A more complicated problem may arise when the childless intended parents seek to avoid the marriage on the ground of non-consummation of marriage due to impotency of the party either during the pregnancy of the surrogate or after the delivery of the surrogate child. In this situation the question is : Can surrogate mothering arrangement with the consent of both the spouses approbate the marriage in the absence of consummation of marriage?

A marriage is consummated when parties have sexual intercourse after solemnization of marriage.<sup>14</sup> Under all personal laws, incapacity to consummate the marriage entitles the other party to a decree of nullity of marriage.<sup>15</sup>

The courts in England have taken the view that even when the wife resorted to AID with the consent of her husband who is psychologically impotent, a marriage cannot be said to be consummated. To have a child by AID is no approbation of marriage.<sup>16</sup>

Probably it was in this background, the Royal Commission on Marriage and Divorce 1956 recommended that when parties had resorted to AI, either parties should not be allowed to seek a declaration that their marriage is void on the ground of impotency.<sup>17</sup> Though the recommendation contains merit, it has not been acted upon by the British Parliament so far.

In India, under the Hindu Marriages Act, 1955, The Special Marriage Act 1954, The Parsi Marriage Act 1936 and The Dissolution of Muslim Marriage Act 1939, nonconsummation of marriage makes the marriage a nullity. However, in Muslim law, consummation of marriage is presumed in the presence of a valid retirement.<sup>18</sup>

The present position of law seems to be more favourable to the petitioner spouse who seeks to nullify the marriage on the ground of non-consummation of marriage notwithstanding that surrogate mothering arrangement is made with consent of both the spouses.

It is submitted that the right to matrimonial remedy is to be exercised as soon as the impotency of the other party comes to light. If the party without seeking the remedy gives consent for the surrogate mothering arrangement with the knowledge that the other spouse suffers from impotency, it is understood that the party has waived the right to seek matrimonial remedy. Thereafter the spouse is estopped from seeking such remedy on consideration of surrogate child's welfare. In the light of the above reason, it is desirable that consummation of marriage may be presumed between the intended parents who resort to surrogate mothering arrangement with their consent for getting a child. This presumption may operate from moment the Surrogate woman is conceived through AI or in case of IVF, placing of the embryo in the womb of the Surrogate woman.

## V – Custodial rights over Surrogate Child

Surrogate mothering may also present a problem on surrogates' refusal to hand over the custody of the child to the intended parents. A surrogate mothers' claim for custody of the child may be strengthened when she is the genetic mother.

The judicial approach in foreign countries to this problem is in favour of the intended parents only. In Britain under a magistrates' order surrogate mother Kim Cotton was restrained from removing the baby from the hospital where it was born. The High Court eventually awarded the baby to the couple who commissioned it with Kim Cotton received substantial fee for letting her womb.<sup>19</sup> No surrogate has ever gotten custody of her baby in American Courts. In the U.S.A., the uniform Parentage Act 1973 has recognized both genetic test and birth test as a means of establishing a mother-child relationship. When a child is delivered by a gestational surrogate, the genetic parents of the child are the natural and legal parents.<sup>20</sup>

In India, Hindu law lays down that the custody of a child upto the age of 5 years should ordinarily be with the mother.<sup>21</sup> Under other personal laws, though there is no statutory provision, the Indian Courts have consistently taken this view.<sup>22</sup> The Indian Courts are very often influenced by the principle of "Paramount welfare of the child" in deciding the custodial right of the father and mother in matrimonial litigations. It is not known whether the courts would extend the principle of "paramount welfare of the child" to dispute relating to custody of the child between surrogate and intended parents. The law as it stands now is in favour of the surrogate, as she cannot be denied the title of natural mother.

In the light of the above, it is desirable that the object and intention of the parties to the Surrogate mothering arrangement and the paramount welfare of the child are the guiding principles to award the custody of the child. Awarding custody to the intended parents is the general rule and the contra is an exception.

## VI – Inheritance Rights of Surrogate Child

The last but not the least legal issue relating to surrogate mothering in personal law is inheritance rights of the parties to the Surrogate mothering arrangement. This issue may raise innumerable questions. Firstly, Is the surrogate child entitled to succeed the property of the surrogate mother dying intestate either at delivery or thereafter? Secondly, Can the surrogate child inherit the property of the surrogates' husband who dies intestate during surrogate's pregnancy? Thirdly, Can the surrogate mother claim inheritance rights against the properties of her surrogate child who dies intestate after some years? Fourthly, Is the surrogate child entitled to inherit the properties of both or either of the intended parents died intestate as a child born at the time of their death or as a child begotten in the surrogates' womb at the time of death of intended parents but born after their death? And Fifthly, Can the surrogate child acquire coparcenary interest in the ancestral property of the intended parents or surrogate mother's husband, in case they are Hindus?

The simple question "whose legal heir the surrogate child is?" may answer all these questions. The general principle of inheritance is that inheritance is closely linked with legitimacy of heirs. Under all personal laws, legitimacy of a child is entirely based on lawfulness of the wedlock between the child's parents. However, a child and its mother are always entitled to inherit their properties mutually as the question of legitimacy between the child and its mother is not relevant for the purpose of inheritance.

As has been discussed in the earlier part, under the existing laws in India, the surrogate mother and her husband are the natural and the legal parents of the surrogate child and the child is therefore the legal heir of the surrogate mother and her husband provided the surrogate's husband has consented for such surrogate mothering arrangement.

As a result, the answer is affirmative in respect of the first three questions only. The surrogate child has no inheritance right in the properties of the intended

parents. A complication may also arise when the surrogate mother after delivery, as the natural guardian of the surrogate child, claims the property of the intended father or mother dying intestate during her pregnancy by which time the child could not have been given in adoption. Her claim would fail even when intended parents have any genetic linkage with the child as the child is not adopted by the intended parents.

This position may prejudicially affect the interest of the child. Surrogate mothering should protect not only the rights of the parties to the agreement but also the rights of the product i.e., the surrogate child. It is therefore desirable that the surrogate child is deemed to be the child of the intended parents from the moment the child is begotten for the purpose of testamentary and intestate succession.

## **VII – Law Relating to Surrogate Mothering Abroad**

In many foreign countries, the matter is regulated by legislation enacted during recent years. In the U.S.A., surrogacy (including commercial, fee-for service surrogacy) is legal in about half the states. Some states have enacted a legislation on surrogacy. Some other states recognize surrogacy though not expressly enacted. Few states have declared surrogacy contracts void and unenforceable.<sup>23</sup> Florida State has two excellent statutes that specifically regulate surrogacy. This law provides that a childless couple wishing to enter into such an arrangement must sign an agreement with a surrogate for her to carry the biological child of the intended father. The surrogate agrees that upon birth, the intended couple will obtain custody and later adopt the child. Since surrogacy is well protected in Florida, Florida has become a frequent location for surrogacies all over the world.<sup>24</sup> In California and Ohio, the intended parents are considered to be the legal parents in cases where there is no genetic parental relationship between surrogate and child.<sup>25</sup> Arkansas recognise the intended parents as the legal parents whether or not the surrogate has a genetic parental relationship to the child.<sup>26</sup>

In Australia, commercial surrogacy is prohibited. The Artificial Conception Act 1985 (ACT) provides that where a married woman gives birth to a child as a result of AI or IVF with the consent of her spouse, she and the spouse are presumed at law to be the parents and the donor of the gametes have no legal relationship at all with the child. It is not rebuttable, that is, it is conclusive for all purposes. No claim at all can be made to the child by a genetic parent. However, this hardship in surrogacy agreements can be removed only by adoption. The surrogate child on adoption by the intended parents will become their child.

In the U.K., the Surrogacy Arrangement Act, 1985 prohibits not only commercial surrogacy but also commercial agencies from assisting in the creation of surrogacy arrangements. The said Act permits surrogacy arrangement on payment of reasonable expenses to surrogate with an order of Court. However, surrogacy arrangement is not enforceable by or against any of the parties making it. Therefore, once the child is born, a parent responsibility agreement can be entered into by the intended parents and the surrogate mother. This gives them equal rights over the child. After 6 weeks the intended parents can apply for a parental order, which will give them full and permanent parental right over the child.<sup>27</sup> A executive committee recently constituted by the Government to review both the legislations has recommended to repeal The Surrogacy Arrangement Act, 1985 and Sec.30 of the Human Fertilisation and Embryology Act, 1990 and their replacement by a new Surrogacy Act.

France and Germany have all forbidden commercial surrogacy only. Surrogacy is legal in Israel.<sup>28</sup>

With the enactment of law to regulate surrogacy arrangement, surrogate mothering in western countries, is fast gaining ground.

## VIII – Conclusions And Suggestions

21<sup>st</sup> century has been recognized the Bio-Tech century. India as a developing country along with the western world is actively engaged with Genetic Engineering which has posed many challenges including Medico-legal problems. Medical advancement has revolutionised family building through AI, IVF in surrogate mothering which is gradually becoming popular in India. The infertile couples have started resorting to this technique to overcome childlessness. This method is likely to be more in demand with the changing role of women, who now hold important positions in commerce, industry, science and politics and would naturally find it inconvenient to bear a child.

With the legal vacuum, these Medico-legal issues remain unsettled leading to various complications especially in personal laws. It is therefore imperative that suitable law must be enacted on surrogate mothering. In this process, due consideration should necessarily be given on all the social, ethical and legal issues inherent in Surrogate mothering by engaging an Expert Committee representing Scientists, Medical Practitioner, Lawyers, Legal Academicians, Sociologists and Psychologists. So that procreative liberty and social welfare may be balanced.

It is submitted with due respect that adequate measures to regulate surrogate mothering may be made in India in the proposed legislation on surrogate mothering taking into consideration the following suggestions:

- (1) Non-commercial surrogate mothering arrangement in which the intended parents have genetic linkage with the child should be made lawful and enforceable. Attempts may be made to define non-commercial surrogate mothering arrangement. Commercial surrogate mothering should be prohibited.
- (2) A formal agreement between the necessary parties, namely infertile couple Surrogate woman and her husband, infertility physician & Surrogates, obstetrician may be required to be made so as to avoid any future litigations among them.

- (3) Reforms in the matters relating to personal law should also be considered.
- (A) Consummation of marriage between the intended parents shall be presumed on surrogate mothering arrangement from the moment the Surrogate woman is conceived through AI or in case of IVF, placing of the embryo in the womb of the Surrogate woman.
  - (B) The surrogate child should be considered to be the legitimate child of the intended parents on their genetic linkage with the child by securing a parental order from the court vested with the jurisdiction under the provisions of the proposed legislation.
  - (C) The custodial rights of the child may also be vested with the intended parents. However, the custody of the child may be permitted with the Surrogate during lactation period.
  - (D) The surrogate child may be vested with succession rights against the properties of the intended parents who have now become the natural and the legal parents of the child.
  - (E) The surrogate child is said to belong to the religion of the intended parents irrespective of the religion of the Surrogate and personal law is to be applied according.
- (4) Married woman having a medical history of at least one uncomplicated pregnancy and delivery of child alone may be considered for surrogate mothering. Surrogate mothering by unmarried woman may be prohibited.
- (5) Prejudicial Authorisation of Surrogate mothering arrangement by the court of law is desirable. Fairness of the terms of the agreement may be ensured and counseling of the parties may also be made. It is to be made prior to AI or IVF of the Surrogate. Any Surrogate mothering arrangement without prejudicial authorisation may be declared unenforceable in the proposed legislation.
- (6) Monitoring agency may be established. The infertility clinics in India are required to register with the Agency which will monitor the working of such clinics towards the childless couple. The Surrogate mothering arrangement should be made only with the registered infertility clinics.

(7) Supplementary matters like, health and Life Insurance of the surrogate when she sustains any injury, inability or dies during pregnancy or child birth, code of conduct for the surrogate, medical emergencies, medical and legal expenses for the gestation period, etc, may be worked out by the expert committee in consultation with the social and Family Welfare Department.

This endeavour to bring about legislation on surrogate mothering will be a boon to the childless couples, not only solving their problems but also the legal issues arising out of Surrogate mothering.

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