
A DETAILED STUDY ON AGREEMENTS OF SURROGACY

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ABSTRACT

“It may be that I may obtain children by her.” Surrogacy practice dates back to biblical times. Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. Surrogacy has, for many years, been rejected by society, where by many look at it as an immoral act and ethically wrong and thus should not be legally recognize. Surrogacy obtained more popularity in the mid- 1980's through the Baby M case in the United Kingdom. The Indian Council of Medical Research has introduced the Assisted Reproductive Technology(Regulation) Bill, 2020 to regularize and legitimate different forms of reproductive technologies, including commercial surrogacy. The Surrogacy (Regulation) Bill of 2019 was adopted to incorporate changes aimed at banning commercial surrogacy in India and allowing altruistic surrogacy for Indian couples. Surrogacy, has emerged as a new level of scientific advancement for reproduction with the usage of womb of a woman to reproduce children for another woman. One of the most efficient methods to overcome both biological and social infertility is surrogacy. The word Surrogate has been derived from latin word “Surrogatus” meaning a substitute, that is person appointed to act on behalf of another. Existing laws and regulations governing surrogacy agreements do not address all the issues relating to surrogacy. Surrogacy is a good alternative for commissioning parents and surrogates. Surrogacy contracts are formal agreements which provide the terms and conditions of a surrogacy arrangement between the surrogate and intended parents. A specific legislation can resolve all the uncertainties surrounding the surrogacy contracts and provide a proper regulatory framework for dealing with most of the difficulties faced by the parties.To analyze the legal framework governing agreements relating to surrogacy and identify key legal issues and challenges faced regarding surrogacy.

Keywords: Biological, Children, Commercial surrogacy, Infertility, Legislation, Woman.

1. Introduction:-

The surrogacy contract serves as a roadmap for the whole surrogacy process and lays out in detail each party's obligations prior to, during, and after the pregnancy. When the surrogacy contract is thorough and properly completed, it can assist prevent disagreements and misunderstandings while safeguarding all parties involved in the surrogacy process: The intended parents, the surrogate and the baby. A contract in which a woman carries a pregnancy "for" another couple is referred to as a surrogacy. Numerous infertile couples travel to India, where commercial surrogacy is permitted, from all over the world. Even if it looks that everyone involved will benefit from this arrangement, there are some sensitive problems that must be handled through carefully crafted laws in order to protect the surrogate mother's and the intended parents' rights.

The prevalence of infertility is rising globally, which has accelerated the development of Assisted Reproductive Technologies (ART). When an infertile woman or couple is unable to conceive, surrogacy is offered as a possible alternative. In a surrogacy agreement, a surrogate mother conceives and gives birth to a child on behalf of another couple or individual. In gestational surrogacy, an embryo that has undergone in vitro fertilisation is put into the surrogate mother's uterus and will carry the child to term. In a typical surrogacy, the intended father's sperm are artificially implanted into the surrogate mother, making her the genetic and gestational mother. Depending on whether the surrogate receives compensation for carrying the child, surrogacy can be either for profit or for charitable purposes.¹

While commercial surrogacy is illegal in England, many US states, and Australia, which only recognises altruistic surrogacy, it is legal in India, Ukraine, and California. Germany, Sweden, Norway, and Italy, in contrast, do not recognise any surrogacy agreements. India is now a popular location for fertility tourism. The cost of the entire procedure in India is as little as one third of what it is in the United States and the United Kingdom (10-20 lakhs), which draws couples from overseas to the country every year.

In 2002, India legalised commercial surrogacy and joined the small group of nations where the practise is permitted. However, due to a lack of regulations on the practise of surrogacy, fertility clinics began engaging in unethical behaviour. As a result, a bill to outlaw

¹ Surrogacy: Ethical and Legal Issues available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/> last seen on 06/05/2023.

commercial surrogacy and only permit altruistic surrogacy was introduced in the parliament in 2016, but it was never passed. The Surrogacy (Regulation) Bill, 2019, which had been amended, was reintroduced to Parliament in July 2019 and approved by Lok Sabha in August 2019. Further a new bill which was incorporated the recommendations of the Rajya Sabha Select committee was approved by the Union Cabinet i.e Surrogacy (Regulation) Bill, 2020. The Surrogacy (Regulation) Act was passed in 2021 and The Ministry of Health and Family Welfare on 10th October 2022, has published the *Surrogacy (Regulation) Amendment Rules, 2022*.

2. Definition, Meaning and Types of Surrogacy:-

According to Black's Law Dictionary, "Surrogacy means the process of carrying and delivering a child for another person."²

According to Oxford Learner's Dictionary, " Surrogacy means the practice of giving birth to a baby for another person or couple, usually because they are unable to have babies themselves."³

The Surrogacy (Regulation) Bill, 2019 defines 'Surrogacy as a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after birth.'⁴

A person who consents to carry and give birth to a child on behalf of another is said to be a surrogate. The intended parent or parents receive custody and guardianship of the child once it is born from the birth parent. There are intricate legal and medical requirements for surrogacy. It's critical to understand the procedure, seek professional guidance, and establish supportive networks. The term "surrogate" or "birth parent" refers to a person who consents to carry and deliver a child on behalf of another person. The intended or commissioning parent(s) are the person or people who will raise the child once it is born.

² <https://thelawdictionary.org/surrogacy/> last seen on 06/05/2023

³ <https://www.oxfordlearnersdictionaries.com/definition/english/surrogacy#:~:text=%2F%CB%88s%2F%CB%90r%2F%CB%99%2F%CB%A1%2F%CB%99si%2F,themselvesTopics%20Life%20stagesc2> last seen on 06/05/2023

⁴ Surrogacy Regulation Bill, 2019 last seen on 06/05/2023

Types of Surrogacy:**1. Natural/ Traditional/ Partial surrogacy:**

The commissioning parent's sperm is used to fertilise the surrogate's own egg, which is provided by the surrogate. Artificial insemination or In Vitro Fertilisation (IVF) can be used for this. The infant in this instance is a biological relative of the surrogate.⁵

2. Gestational/ Full surrogacy:

In a surrogate's uterus, an embryo is implanted during this kind of pregnancy. Using IVF, the embryo is created from the intended parents' or donors' sperm and eggs. The surrogate is not the source of the egg.

3. Commercial surrogacy:

This entails the intended parents covering pregnancy-related expenses as well as the surrogate receiving compensation or a material advantage for serving as a surrogate.

4. Altruistic Surrogacy:

In this type of surrogacy, the surrogate mother receives no financial compensation, and the commission parents only pay for her medical costs. Family and friends frequently use this kind of surrogacy.

3. History of Surrogacy in India:-

- A blessing for infertile couples is surrogacy. Surrogacy is the practise of a woman carrying a child in her womb for another person through the transfer of an embryo or gametes made with the help of the intended parents. It has been practised in India for a very long time and was previously referred to as Niyoya Dharma.⁶

⁵ Surrogacy available at <https://www.pregnancybirthbaby.org.au/surrogacy> last seen on 06/05/2023

⁶ An Understanding of Surrogacy: A Legal analysis in Indian Context available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726683 last seen on 06/05/2023

- The seventh child of Devki and Vasudev. Balram was transferred in womb of Rohini who was Vasudev's first wife while it was embryo. It was done to prevent the baby being killed by Kansa.
- In the Mahabharata, Gandhari gave birth to a large group after a two-year pregnancy. Rishi Agyasa discovered that the bulk had 101 cells. These cells were cultivated outside the womb in a feeding medium to produce 100 male babies known as Kaurans and a female body known as Dushala.
- Kartikey mostly known as god of fertility was also born out of Surrogacy through Shiva and Ganga (the surrogate mother).

4. Evolution of Surrogacy Law in India:-

i. Assisted Reproductive Technology Bill, 2013:-

The Assisted Reproductive Technology Bill of 2013 prohibited commercial surrogacy, which involves the exchange of money for anything other than covering the mother's and the child's medical costs. Additionally, the measure forbade couples who already had children, foreigners or holders of Overseas Citizenship of India (OCI), live-in partners, single individuals, homosexuals, and widows from choosing surrogacy.

ii. Surrogacy (Regulation) Bill, 2016 and 2019:-

In 2016, a Surrogacy (Regulation) Bill was introduced and passed in Lok Sabha, the lower house of the Indian parliament, proposing to limit access to altruistic or unpaid surrogacy to Indian heterosexual couples who have been married for at least five years and are experiencing infertility issues, outlawing commercial surrogacy in the process. Due to the parliament's session being adjourned, the 2016 bill expired. The Lok Sabha approved the bill after it was reintroduced in 2019.

iii. Surrogacy (Regulation) Act, 2021:-

According to this Act, a couple is qualified for the surrogacy process under certain conditions if they are unable to conceive a child of their own owing to infertility or another illness. Only those with noble intentions or couples who have a documented infertility or sickness are

allowed to use it. Other than covering the surrogate's medical expenses and providing safety while she is pregnant, altruistic surrogacy does not pay the surrogate any money. The most well-known and effective type of ART is in vitro fertilisation (IVF). By establishing the National Assisted Reproductive Technology and Surrogacy Board, the ART Regulation 2021 provides a framework for the implementation of the surrogacy statute.

iv. Surrogacy (Regulation) Rules, 2022:-

The Surrogacy (Regulation) Rules, 2022 were developed on June 21, 2022, by the Ministry of Health and Family Welfare, under the leadership of Mansukh Mandaviya. They elaborate on the requirements for the number of employees and the credentials they must have. Additionally, it specifies the format and manner in which registration will occur as well as the process for paying the surrogacy clinic's fees.

5. Circumstances for opting Surrogacy/ Who can use Surrogates:

- i. When a woman is born without a uterus, has one that is missing or malformed, or when her uterus has been surgically removed because of an illness.
- ii. Even after numerous IVF or intracytoplasmic sperm injection efforts, the couple was unable to conceive.
- iii. If there have been multiple miscarriages with no known medical cause.
- iv. If pregnancy is impossible due to some illness.
- v. Parenthood has also been made possible for those who would not be able to adopt a kid due to their age or marital status.⁷

6. Essentials of Surrogacy Contract:

Every surrogacy contract will be based on each party's individual needs and circumstances, however every surrogacy contract should include the following elements:

⁷ Using a Surrogate mother: What you need to know available at <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> last seen on 06/05/2023

- The surrogate's base compensation as well as any additional compensation she would get for undergoing invasive surgeries, carrying multiples, going on bedrest, etc.
- The risk and liability associated with the pregnancy
- Health of the surrogate and her obligations to look after herself and the foetus throughout her pregnancy.
- An agreement on sensitive issues such as selective reduction and termination, if that should become necessary
- Who will attend prenatal checkups and the delivery.

7. Commercial Surrogacy and Provisions in other countries:-

Section 2(f) of the Surrogacy (Regulation) Bill, 2019 defines commercial surrogacy as, commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying human embryo or trading in the sale or purchase of human embryo or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.”⁸

Since it has become more difficult and expensive to have a child through surrogacy in the West, many foreign couples have relocated to India, where there are less regulations and better medical facilities, making the process less expensive and complicated. The surrogacy industry earns 2.2 billion dollars annually, with some of the most well-known centres located in Bhopal, Surat, etc. In order to capitalise on India's expanding surrogacy market, commercial surrogacy was made legal in the year 2002. The Indian Council of Medical Research's Central Ethics Committee on Human Research published guidelines for assisted reproductive technologies. a proposal from a group of 15 people led by Baidya Nath Chakrabarty. The draughts include the regulations, monitoring, and certification standards for clinics that use assisted reproductive technologies in India.

⁸ Surrogacy (Regulation) Bill, 2019 last seen on 06/05/2023

Additionally, it discusses the creation of a body through legal means for the accreditation, control, and oversight of ART clinics in India. However, because they are not legally obligatory, these recommendations were useless. If we focus on the mathematics underlying the surrogacy procedure in India, an Indian surrogate mother gets paid in payments over a nine-month period, and if she is unable to bring the pregnancy to term, she may not receive any payment at all. From fertilisation through hospital birth, a whole package at an Indian reproductive clinic costs between 10,000 and 28,000 US dollars. At the same time, the Indian fertility clinics are upping their game in terms of surrogate retention as well as cost. A few of the locations from where many surrogate moms originate are Anand in Gujarat, Indore in Madhya Pradesh, Pune, Mumbai, Delhi, Kolkata, and Thiruvananthapuram.

Many renowned clinics in India have legitimately registered a sizable number of international surrogate moms. Since surrogate moms come from underprivileged backgrounds and lack legal representation, the rights of these women are rarely given the respect they deserve when surrogacy contracts are drafted. Due to the lack of a grace period for surrogate women to alter their minds and the absence of any provisions for compensation in the event that the surrogate mother is unable to carry a child, these contracts are exploitative in nature.

Regarding surrogacy practises, each nation has its own legal framework. With the legalisation of commercial surrogacy in 2002, India joined other nations like the Ukraine, Georgia, Russia, and a few US states in doing so. While nations like France and the United Kingdom have outright prohibited surrogacy. Nevertheless, nations like Belgium and the Netherlands only permit altruistic surrogacy. The agreement with a third person about gestation is absolutely void according to French Civil Code Article 17/6. In a groundbreaking decision, France's highest court, the Cour de Cassation, ruled that agreements relating to international surrogacy were unlawful. According to the German Civil Code, surrogacy agreements are void and in breach of Article 1 of the German Constitution.⁹ Similar regulations prohibiting commercial surrogacy exist in both Belgium and the Netherlands, and only altruistic surrogacy, which can only be carried out by a small number of hospitals in each nation, is permitted. The majority of intended couples choose international surrogacy because

⁹ Shabber Allh & Dr. Asha Sundaram, Commercialization of surrogacy in India & its legal context: a critical study with regard to Baby Manji Yamada's case, 120 International Journal of Pure and Applied Mathematics, 4137- 4154 2018 last seen on 06/05/2023

there are fewer hospitals available.¹⁰ Surrogacy is prohibited in the United Kingdom, as stated by the Surrogacy Arrangements Act of 1985. The agreements relating to surrogacy are not enforceable, and the surrogate mother continues to be the child's legal guardian until the intended parents adopt the child or a court issues a parental order. States like California in the United States of America permit commercial surrogacy and have some of the best surrogacy laws. While other states only permit altruistic surrogacy and some outright prohibit it.

8. Surrogacy a boon or bane during recent times?

Those who are against commercial surrogacy contend that legalising the practise will dispel the notion that mothers are merely "baby-making machines" and their offspring are "commodities" that can be bought and sold. The reduced compensation given to Indian surrogate mothers, according to critics, reflects their helplessness as a result of their low socioeconomic status and is therefore against public policy. But if we were to take this into account, it would imply that the issue could be remedied if surrogate mothers were compensated significantly in line with what was paid to international surrogate mothers. However, an issue like this could be solved so easily because it is more complex than it appears on the surface to be. Because surrogate mothers, who typically come from lower socioeconomic backgrounds, are paid less, proponents of surrogacy contend that the practise violates public policy. Second, the compensation that Indian surrogate mothers receive is lower than that earned by international surrogate mothers, despite the fact that the services they provide deserve much more than the sum that is paid to them.

The main defence offered by detractors of the surrogacy industry is that it allows such couples who were unable to conceive children a second shot. Although the financial side of surrogacy cannot be discounted, proponents contend that many surrogate moms who agree to such agreements are moved by the altruistic nature of the practise. Those who support surrogacy contend that because it involves a contract, it cannot be described as baby sale. Additionally, the purpose of a surrogacy agreement is to carry a kid, not to sell one. In the same way that fees are paid to lawyers and doctors for their services, the money paid to a surrogate mother should be viewed as compensation for the services she provided.

¹⁰ Ibid

Additionally, some detractors contend that nullifying a commercial surrogacy contract means denying a surrogate mother's constitutionally protected right to contract.

9. Judicial Response to Surroacy:-

- **Baby Manji Yamada vs. Union of India & Ors:-¹¹**

The problem in this case was that, in accordance with the terms of the surrogacy contract, none of the three women had any legal obligations to the kid. This was because Yumi refused to accept the child and the anonymous egg donor had no rights. Due to a terrorist assault in Ahmedabad, infant Yamada was transferred to Arya Hospital in Rajasthan the day after her delivery. The infant spent a long time there after developing viral infections and septicemia. When baby Manji's condition improved, it was uncertain who would get custody of her. The Anand Municipality referred the case to national level advice. The court held that commercial surrogacy contracts are legal in India. Grandparents of the baby who filed the case stated that Satya NGO lacked standing to petition the Rajasthan High Court for a writ of habeas corpus because the petition was filed as a Public Interest Litigation and there was no public interest at issue. The NGO's petition was denied on the grounds that the respondent lacked locus standi because the case was not in the public interest and only a child's relative with a grievance may submit a writ. Furthermore, while the subject was still being handled by the Central and State Governments, the court made no ruling regarding the granting of passports. The court ultimately decided that commercial surrogacy is permitted in India. This case gained significance since it served as a wake-up call to the problems with commercial surrogacy in India.

- **In re Baby M:-¹²**

Whether the defendant's parental rights have been legally terminated was the question on trial. The contract was declared legally unenforceable by the court because it violated public policy. The contract was completely unenforceable, because the law stipulates that children must be turned over to a government agency. According to the court, no one can

¹¹ Baby Manjhi Yamada v. Union of India and Ors, (2008) 13 SCC 521 last seen on 06/05/2023

¹² In Re Baby M 109 N.J. 396,537 A.2d 1227 (1988)

contractually renounce their parental rights, and because the termination was illegal, the adoption was also illegal.

10. Conclusion:-

Surrogacy has been used as a method of childbirth since the beginning of time. Yet with the advancement of science and technology, anyone who wants a child can become pregnant through this approach, not just infertile couples. An innovation made contraception more accessible and affordable; a market developed to meet this demand. As a result, there are now global legal, ethical, moral, and religious debates around the growing use of surrogacy. As there are usually more than two parties involved in surrogacy arrangements, each of whom is legally entitled to make the claim that they are the child's parents. Government should establish surrogacy facilities, and all surrogates should register with a government agency alone rather than with private companies, which frequently take advantage of these women.

Additionally, a background check should be done on a surrogate before she registers with the agency to make sure she is doing so voluntarily and not under duress. As a result, disagreements may emerge over who should take on the child's parental rights and obligations. This is a problem that is intrinsic to surrogacy, thus it is impossible to predict when it may occur. Surrogacy is a blessing for infertile couples on the one hand, but it has also led to the commercialization of this technique, which has created a number of issues. While commercial surrogacy safeguards infertile women's rights to reproduction, making it illegal goes against basic human rights. It is crucially important to maintain and monitor the anonymity of the surrogate mothers. The surrogate mother should not undergo more than 3 trials and it has to be monitored. The surrogate mother should be provided by the copy of the contract as she is a party in the agreement and her interests should be taken into account. It happens that very often decision is taken by the intended parents and clinic, while surrogate mother does not have any say in this matter. Similarly, while we should accept and encourage different family formations, commercial surrogacy should not be 'sold' as the preferred option to people seeking to form a family.

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