

The Cobweb of International Surrogacy Arrangement

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INTRODUCTION

Issues relating to family law, such as marriage and adoption, are subjects that constantly have import in private international law. Given the vast differences that exist in the structure of different societies, it is not surprising that the legal systems relating to these areas of the law are often completely divergent. Over the past few decades, surrogacy has become an extremely common phenomenon, where couples who are unable to have a child or opt not to rely on a third party to bear their child. The question of surrogacy is dealt with in different parts of the world – while some countries ban it completely, some allow only altruistic surrogacy, and yet others permit commercial surrogacy as well. Given this state of affairs, many couples increasingly opt for shifting to another jurisdiction in order to be able to legally bear a child. Needless to say, complex questions of jurisdiction arise in such a case, related to the citizenship and parentage of the child in question. It is also extremely important to keep in mind that international surrogacy arrangements can create exploitative relations where third world surrogate mothers are often put in a vulnerable position.

This paper focuses on international surrogacy and the conflict of laws. The issue that has been focused is legal parentage and the ways in which the question is resolved in different jurisdictions. The first part of this paper highlights the vast differences that exist in different states with respect to surrogacy, and aims at scrutinising the reasons why the issue is increasingly becoming relevant to the field of private international law. This has been followed by an analysis of the evolution of international law surrounding this issue. Finally, an examination has been made of the Indian position on this question, given the number of surrogacy arrangements that the nation has been hosting of late.

RISE OF COMMERCIAL SURROGACY

While the concept of surrogacy may be ancient, modern ethical and legal tensions were sparked by the advent of assisted reproductive technologies (ART) in the 1970s. Today there are two methods of surrogacy: traditional, where the surrogate woman's own egg is fertilized with the intended father's sperm, and gestational, where an embryo is created with in vitro fertilization (IVF) and implanted in the surrogate's womb. The embryo is created from the gametes of the intended parents or those of donors. Intended parents may prefer gestational surrogacy to traditional surrogacy due to the lack of genetic ties between the child and the surrogate woman, thereby reducing the likelihood of the surrogate changing her mind and exercising custodial claims over the child. If the surrogate has been compensated for carrying the child, the arrangement is known as a commercial surrogacy. If the surrogate is not paid, or receives no compensation beyond medical costs, it is known as an altruistic surrogacy.

The ethical concerns raised by surrogacy include the surrogate woman's rights over her body, the preservation of human dignity, the possible exploitation of indigent surrogates and gamete donors," and the commodification of children. Surrogacy proponents argue that surrogacy is a mutually beneficial arrangement: surrogates will realize a rare economic opportunity and the intended parents will have a child they otherwise could not have.

Proponents further argue that restricting or prohibiting surrogacy is an infringement upon reproductive and contractual freedom. These ethical questions over modern surrogate births have resulted in diverging opinions over its legality.

A nation's laws on surrogacy may fall into one of four categories:

- (1) the law is completely silent on surrogacy and its legality is undetermined, e.g., Belgium
- (2) all surrogacy contracts, commercial and altruistic, are prohibited, e.g., France

(3) surrogacy is permitted if it is for altruistic, noncommercial purposes, e.g., United Kingdom; and

(4) all forms of surrogacy are permitted, e.g., India, Ukraine and Israel.

In the United States there is no uniform federal law on surrogacy, and the matter is left to the States. California is particularly notable as a "surrogacy-friendly jurisdiction." Differing laws, coupled with the ease of modern day communications and travel, have encouraged commissioning parents to enter into surrogacy arrangements in foreign nations. The practice of travelling to a foreign country for the purpose of utilizing its medical reproductive services is commonly referred to as "medical tourism," and may be more specifically referred to as "surrogacy tourism," "fertility tourism," or "reproductive tourism."

International surrogacy has become a booming business in countries such as India and Ukraine due to their relatively low costs, lax regulations, and populations of willing surrogates. Although surrogacy is also legal in Israel, its strict regulations render medical tourism impractical.

In India, commercial surrogacy is legal and effectively unregulated. In 2005, the Ministry of Health and Family Welfare published nonbinding National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (the 2005 Guidelines). The 2005 Guidelines acknowledged the "mushrooming of infertility clinics in India" and that "[t]here are no guidelines for the practice of ART, accreditation of infertility clinics and supervision of their performance in India. This document aims to fill this lacuna." The 2005 Guidelines established medical criteria for infertility treatments, as well as a procedure for the government to regulate ART clinics. However, the 2005 Guidelines have been criticized for their vagueness, voluntary nature, and lack of guidance. Since 2008, there has been much speculation that the Indian Parliament will pass a bill legalizing and regulating surrogacy; however, it is unclear if and when that will happen. International surrogacy has become a profitable industry, one that shows no signs of abating. As gestational surrogacy arrangements become increasingly popular, nations are struggling to keep pace with modern technology.

INTERNATIONAL SURROGACY

ARRANGEMENTS

Surrogacy is the phenomenon whereby infertile couples are able to acquire a child, usually biologically related to only one spouse, and borne by a woman who is a party to the contract. Though adoption is not a requirement as per this definition, surrogacy is often inevitably accompanied by consensual adoption. Given the degree of controversy surrounding the question of surrogacy, governments across the world have tried to regulate, restrict, or completely ban this practice. There are four kinds of responses that have been made by states in this regard: firstly, where surrogacy is legal and enforceable; second, where it is allowed but strictly regulated; third, where it is illegal; and fourth, where domestic law makes no mention of it. The desire to have a child being a very strong and desperate one, it is but inevitable that there has been an increase in the instances of people moving to more hospitable jurisdictions in order to carry out surrogacy contracts. Moreover, it must be mentioned here that differing development levels influence legislation on the subject. In India, for example, there is very little restriction, to the extent that commercial surrogacy is permitted, while in the UK, only altruistic surrogacy is permitted. Therefore, the issue of surrogacy contracts often has strong multijurisdictional elements that courts must deal with. The main participants in a surrogacy contract are the surrogate mother, the intended parents, the egg donor (if necessary), the child, and other consenting parties (e.g. the surrogate's partner). The concerned legal systems connected to a surrogacy contract could include the state of origin of the surrogate mother, the receiving state, i.e. the residence of the intended parents, the locus of the procedure, and the place of birth of the child, which may or may not be the same as the state of origin. There exists a debate on whether surrogacy agreements are contractual matters, or matters related to family law and adoption.

A question pertaining to conflict of laws may arise if there is a negotiation of the terms of the contract between the surrogate mother and the intended parent, including non-performance of the contract from either

side, assessment of the eligibility of the participants to be a part of the surrogacy process, conferring parenthood to the intended parents for the child who is about to be born, and so on. In most jurisdictions, the parentage of the child is based on the parentage of the surrogate mother. Conflicts could potentially arise out of numerous situations relating to jurisdiction – at the time that the intended parents wish to take the child back to their country, at the time of registration of the foreign birth certificate or for recognising the foreign parentage, or even incidentally to determine custody, etc. This is significant because parentage affects citizenship, nationality, residence and the responsibility to protect the child.

One of the most recurring problems that come up in this context therefore is that of determining legal parenthood, given that different states have different policies with respect to bestowing citizenship. For instance, let it be assumed that the intended parents are from country A, which does not allow surrogacy, and they use a surrogate from country B, where it is permitted, based on the agreement that they will be the legal parents of the child. Country B will recognise the intended parents as being the legal parents, and will not grant citizenship to the child. However, since surrogacy is not recognised in country A, it is likely that they will recognise the biological mother as the parent, and will not confer citizenship on the child. This could lead to a situation where the child remains stateless, and with uncertain parentage. Similarly, concerns have also been raised about safeguarding the rights of the surrogate, especially from developing countries, where if surrogacy is not recognised or regulated, there may be severe exploitation of women from the lower income categories.

INDIA

In India, surrogacy is not prohibited, but is increasingly being sought to be regulated. Due to a number of cross border surrogacy transactions that take place in India, there are serious conflict of law issues related to the child's citizenship as well as parentage status. In India, the Assisted Reproductive Technologies Bill, 2010, continues to lie pending before the parliament. A woman cannot be sent abroad to be a surrogate under this Bill. Moreover, the

surrogacy agreement is granted the status of legal enforceability, and commercial surrogacy is proposed to be allowed under the law. For foreign couples with an Indian surrogate mother, there is a requirement for them to have a local guardian to take care of the surrogate. The proposed Indian law unequivocally states that the child will be the legitimate child of the couple in question.

There is very little reported case law on the matter. In 2008, there was the case of *Baby Manji Yamada*, where the Supreme Court took into consideration that an intended parent may be a single male; however, the private international law implications were not discussed. In 2009, the Gujarat High Court took a decision in the case of *Jan Balaz* that babies that are born in India to surrogates are Indian citizens entitled to Indian passports (this was stayed by the Supreme Court). The German citizens who were the intended parents in this case were allowed by the Supreme Court to adopt the children from the CARA as a special exception so that they could leave the country. However, outside these cases, the issue of nationality and parenthood vis-à-vis surrogacy remains untouched in courts, but has massive potential of becoming immensely complicated, given India's status as a 'reproductive tourism' destination.

CONCLUSION

International surrogacy arrangements are in urgent need of regulation, and there must be a move from the international community to try and standardise systems for bestowing legal parentage. The fate of the child's citizenship and guardianship being dependant on the recognition by the home state of the intended parent, it is important that even restrictive states allow at the very least for the child's best interests to be preserved, so that the outcome of cases like *In re X & Y* is not repeated.

Further, it is crucial for developing countries such as India to have tight legislation to regulate these arrangements, so that there is protection for vulnerable surrogates. As of now, there continues to be no regulation, leaving a huge loophole for exploitation of these vulnerable categories. The provisions of the draft bill discussed above seem to be broad enough to be able to fulfil that function, and therefore it is hoped that the bill is adopted into

legislation at the earliest, and that the same standard is also accepted at the global level to do away with the multiple conflict of law problems that arise from such arrangements.

REFERENCES

BOOKS:

- Trimmings and Beavar, INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL, (2013)

ARTICLES

- Anil Malhotra, *Rewriting Surrogacy Laws*, (June 2014), LAWYERS UPDATE, available at <http://lawyersupdate.co.in/LU/1/1629.asp> (Last visited on August 15, 2015).
- Anne Marie Hutchinson, *The Hague Convention on Surrogacy: Should we agree to disagree?*, paper presented at the Family Law 2012 Fall CLE Conference (Philadelphia, October 2012), available at http://www.dawsoncornwell.com/en/documents/AB_A_AMH.pdf (Last visited on August 15, 2015).
- Associated Press, India's surrogate mother business raises questions of global ethics, in DAILY NEWS (December 30, 2007), available at <http://www.nydailynews.com/news/world/india-surrogate-mother-business-raises-questions-global-ethics-article-1.276982> (Last visited on August 16, 2015).
- C. Jackson, Baby M and the Question of Parenthood, 76 GEO. L.J. 1811 (1988)
- Christine L. Kerian, Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?, 12 Wis. WOMEN'S L.J. 113, 116-17 (1997).
- European Parliament Directorate-General for Internal Policies, *A Comparative Study on the regime of surrogacy in EU Member States*, (May, 2013).
- Hague Conference on Private International Law, *Private International Law Issues Surrounding The Status Of Children, Including Issues Arising From International Surrogacy Arrangements* (March 2011), available at <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (Last visited on August 14, 2015).
- Hague Conference on Private International Law, *Private International Law Issues Surrounding The Status Of Children, Including Issues Arising From International Surrogacy Arrangements* (March

2011), available at <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (Last visited on August 14, 2015).

- Hutchinson and Khan, *International Surrogacy Arrangements: Time for a Multilateral Convention*, (November, 2011) available at http://www.dawsoncornwell.com/en/documents/International_surrogacy.pdf (Last visited on August 16, 2015).
- Katherine B. Lieber, Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?, 68 IND. L.J. 205, 211 (1992)
- Margaret Ryznar, International Commercial Surrogacy and Its Parties, 43 J. MARSHALL L. REV. 1009, 1015-16 (2010)
- Michael Nicholls QC, *Legal Problems With International Surrogacy Arrangements*, (October 2013) available at
- Rhona Schuz, Surrogacy in Israel: An Analysis of the Law in Practice, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 35 (Rachel Cook et. al. eds., 2003).
- See Lori B. Andrews, Surrogate Motherhood: The Challenge for Feminists, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 168 (Larry Gostin ed., 1990)
- Susan Appleton, *Surrogacy Arrangements And The Conflict Of Laws*, WISCONSIN LAW REVIEW 399, (1990)
- Tetiana Istervych, *International Surrogacy Arrangements: The Problem of Recognition of Legal Parenthood*, (November 29, 2013).
- The Hague Conference on Private International Law, *A Preliminary Report On The Issues Arising From International Surrogacy Arrangements*, (March, 2012), available at
- Usha Rengachary Smerdon, Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India, 39 CUMB. L. REV. 15, 16 (2009).
- Weldon E. Havins & James J. Dalessio, Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts, 31 McGEORGE L. REV. 673, 675, 681 (2000).