

Surrogacy in India

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Abstract: *Surrogacy refers to a contract in which a woman carries a pregnancy for another couple. It is a scientific boon using burrowed eggs, sperms or wombs for child bearing for some unblessed couples. Numbers of Infertile couples approach India from all over the world where commercial surrogacy is legal. Actually the debate is between the uses of this scientific method on pure humanitarian ground to misuse of this method for commercialization. It is a need based temporary relationship between burrower looking for cheaper resource for the genetic makeup of the baby of their own and the lender for financial gains compromising with her social, physical and emotional health while nourishing the dream child which may come at the cost of her own family. Although this temporary arrangement appears to be beneficial for both the parties but there are certain delicate issues which need to be addressed through carefully framed laws in order to protect the rights of surrogate mothers and the intended parents.*

Keywords: Surrogate mother, Gestational surrogacy, Traditional Surrogacy, Commercial or Altruistic surrogacy, Intended Parents

1. Introduction

The prevalence of infertility world over is on rise which has resulted into the innovation and advancement of various Assisted Reproductive Techniques [ART]. For an infertile woman or a couple surrogacy is an alternative arrangement where surrogate mother bears and delivers a baby for another couple. Surrogacy is of two types Gestational and Traditional. In Gestational surrogacy an embryo which is in vitro fertilized is implanted into the uterus of the surrogate mother. In traditional surrogacy the surrogate mother is impregnated with the sperm of the intended father by artificial means thus making her gestational as well genetic mother. If the surrogate mother receives some financial help from the intended parents then the surrogacy may be called Commercial or Altruistic.

Commercial surrogacy is illegal in England, many states of United States and Australia but it is taken as legal in India, Ukraine and California. Countries like Germany Sweden, Norway and Italy do not recognize any surrogacy agreements. Many couples from India and abroad are attracted to such infertility centers through surrogacy agencies because the cost of the whole procedure is far less as compare to the other countries. For the reason India has come up as a favorite destination of Fertility Tourism.

2. Literature Survey

Infertility affects about 1 out of every 6 couples and it includes who are unable to conceive as well as those who cannot carry a pregnancy to terms. Since 1970 the No of infertile couples has increased. Over the years the social attitude towards medical interventions like IVF [In vitro fertilization] has changed and as a result infertile couples are less reluctant to seek help of these techniques which is proved in the percentage of infertile couples registered in these clinics. Medical experts strongly believe that nowadays child bearing is postponed due to career prospects and contraceptives. Consequently couples are older when they start trying to conceive a baby; older women are less fertile because of age related biological factors. There are several other reasons such as changes sexual practices, the use of intrauterine devices more and more women are

suffering from pelvic inflammatory disease which is studied to be the main reason of female infertility. Infertility is regarded as a major health problem and influences one's personal identity that is why people who cannot have children the natural way look for other ways in order to become a parent.

In the past couples unable to conceive were expected to turn to adoption to achieve their parenthood dreams. Nowadays there are many options for infertile couples, singles and homosexuals who want children. Advances in medical sciences and Technology particularly in Assisted Reproductive Technology with techniques like donor insemination and embryo transfer methods which have revolutionized the reproductive environment have led to awareness in popularity of surrogacy. With the introduction of financial agreement in exchange for the surrogate child, the child has become a saleable commodity. As a result of this complications arise and question must be raised regarding the rights of the surrogate mothers, the child and the commissioning agents.

3. Problem Definition

Those who advocate surrogacy argue that the surrogacy agreements are beneficial for all the parties involved as the needs of two desperate women are met. It is commonly said in surrogacy arrangement "the barren get the baby the broke get the bonus." The surrogate mothers often really utilize the money they earn by surrogacy. As long as one does not harm other one has a wide sphere for doing what one wants, this relates to intended parents as well as surrogate mothers.

An Economist argues that the efficiency will improve with free trade. This will happen when there are parents who are eager for children and women anxious to be surrogate. However once this trade of parental right is prohibited black market will come into existence. Due to complicated adoption regulations in many countries people go to other countries to evade the regulations creating a vast black money. As a result it is better to acknowledge the existence of such market in order to better control it and make it more efficient.

Another problem is that the practice of surrogacy exploits women economically, emotionally and physically. Most of the women who get involved as surrogates do so because they are in desperate need of money to maintain their family. In addition agents are often involved and arrange contracts of questionable legality, these contracts require the women to undergo all the rigors of child bearing and eventually they have to give away the child. The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of attorneys. Once the surrogate mothers sign the contract it is difficult to escape. It is even said that practice of surrogacy is a new and unique form of slavery of women and if surrogacy continued like this poor women may be transformed into a special caste of hired pregnancy carriers.

4. Methodology/ Approach

Initial consultation:- The intended parents start with initial consultation, it is a free consultation and last for about 2-3 hours in this consultation intended parents learn about the programme and options available, the detail process of matching with a surrogate, the legal process, insurance process and issues related to it, financial implications and the basic medic information. Prior to this consultation a basic questionnaire and photograph of the intended parents is required which help the team in tailoring the information to meet the need of the intended parents.

Officially becoming an intended Parent:- After the initial consultation the intended parents are requested to sign a contract called Agreement for Services. After this the intended parents are asked to transmit a portion of the Fee, and are introduced to the Programme coordinator team that will guide the intended parents through every phase of your surrogacy journey.

Screening and selection process for an egg donor:- Egg donors are young healthy women between 21 and 29 and they have their medical records reviewed by a licensed reproductive endocrinologist. The intended parents can browse the egg donor database or can take the help of programme coordinator team to complete the egg donor request form. Once the egg donor is chosen she undergoes psychological testing. Some intended parents choose to bring their own egg donors who might be family friend or family member.

Screening or selection process for a surrogate:- Surrogates are generally 21 to 41 years old and have undergone a mental health screening prior to being matched with intended parents. A typical screening process involves an extensive medical and psychological assessment as well as through criminal and financial background checks.

Medical Screening:- Prior to engaging in actual process of IVF all parties [Intended parents, egg donor and your surrogate] will complete medical screening as directed by the Reproductive Endocrinologist facilitating the process.

Legal Agreement:- To ensure clarity and legal appropriateness the egg donor and surrogate are assigned a n

independent attorney for representation. The intended parents are represented by attorney who drafts agreement.

Medical Process:- The process of In vitro fertilization and embryo transfer is managed and is completely at IVF clinic under the leadership of licensed reproductive endocrinologist.

Pregnancy:- When the joy of pregnancy is achieved your programme coordinator team remains your primary support as you prepare for the birth of the child. They ensure that you and your surrogate are prepared to welcome your child home.

Legal Representations:- They vary from country to country and state to state.

Birth:- Prior to the birth of the child the programme coordinator let the Hospital authorities know about you and why you are there and it is the glorious moment to leave the Hospital with your baby in your arms.

5. Result and Discussion

At a glance surrogacy seems like attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long desired biologically related baby and the country earns foreign currency but the real picture reveals the bitter truth. Due to the lack of proper legislation both the surrogate mother and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system and the chance of getting involved in the legal problem is there due to unpredictable regulations governing surrogacy in India.

Although ICMR issued guidelines in 2005 for accreditation, supervision and regulation of ART clinics in India but these guidelines are repeatedly violated. Frustration of cross-border childless couples is easily understandable who not only have to cope up with the language problem but sometimes have to fight long legal battle to get their child. Even if everything goes well they have to stay for at least 2-3 months for the completion of formalities after the birth of the child. The cross-border surrogacy leads to problems in citizenship, nationality, motherhood, parentage and rights of a child. There are occasions where children are denied the nationality of the country of their intended parents and this results in either long legal battle like in case of German couple with their twin surrogate children or Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in the orphanage for the child. These are the incidences where the child given to a couple after surrogacy is not genetically related to them in turn is disowned by the intended parents and has to spend life in orphanage.

The problems of surrogate mothers are still worse and unethical. The poor illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India there is

no provision of psychological screening or legal counseling which is mandatory in USA. After recruitment by commercial agents these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking Antenatal care. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visit and are allowed to meet their family on Sunday.

The worst part is that in case of unfavorable outcome of pregnancy they are unlikely to be paid and there is no provision of insurance or post pregnancy medical and psychiatric support for them. Rich career women who don't want to take the trouble of carrying their own pregnancy are restoring to hiring surrogate mothers. There are lots of moral and ethical issues regarding surrogacy which have become more of a commercial thing and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

6. Assisted Reproductive Technology Legislation

The Indian Govt. drafted legislation as ART regulations Bill in 2008 and then in 2010. The bill is still pending with Govt and has not been presented in the Parliament.

The proposed law has taken consideration of various aspects including interests of intended parents and surrogate mothers but the proposed draft has to be discussed properly and its moral and ethical aspects have to be debated.

The surrogacy agreements are treated at par with other contracts under the Indian Contract Act 1872 and other laws applicable to these kinds of agreements. Both the couple/single parent and surrogate mothers need to enter into this surrogacy agreement covering all issues which would be legally enforceable. Some of the features of the proposed bill are that an authority at National and State level should be constituted to register and regulate IVF clinics and ART Centers and a form should be created to file complaints for grievances against clinics and ART Centers.

The age of surrogate mother should be 21 to 35 years and should not have delivered more than 5 times including her own children. Surrogate mothers should not be allowed to undergo embryo transfer more than 3 times for the same couple. If the surrogate is a married woman the consent of her spouse would be required before she may act as surrogate mother to prevent any legal or marital dispute. A surrogate should be screened for STD, communicable diseases and should not have received blood transfusion in last 6 months as these may have adverse bearing on the pregnancy outcome. All these expenses including insurance of surrogate, medical bill and other reasonable expenses related to pregnancy and child birth should be borne by the intended parents. A surrogacy contract should include life insurance cover for surrogate mother. The surrogate mother may also receive monetary compensation from the couple or individual as the case may be for agreeing to act as surrogate. It is also felt that in order to save the poor

surrogate mothers from exploitation banks should directly deal with surrogate mother and minimal remuneration to be paid to the surrogate mother should be fixed by law.

The surrogacy arrangement should also provide for financial support for the surrogate child in case the commissioning couple dies before the delivery of the child or divorce between the intended couple and subsequent unwillingness of none to take delivery of the child so as to avoid having injustice to the child. Surrogate mothers should not have any parental right over the child and birth certificate of the baby should bear the names of the intended parents to avoid any complications. The guidelines dealing with legitimacy of the child born through ART state that the child shall be presumed to be the legitimate child of the married / unmarried couple / single parent with all attendant rights of parentage, support and inheritance.

The ART clinics should not be allowed to advertise for surrogacy for its clients and couple should directly seek facilities of ART bank. The intended parents should be legally bound to accept the custody of child / children irrespective of any abnormality in the child / children. Confidentiality should always be maintained and rights to privacy of the donor as well as surrogate mother should be protected. If a foreigner or NRI seeking surrogacy they should enter an agreement with written guarantee of citizenship for the child from their Govt and they also appoint a local guardian who would be legally responsible for taking care of surrogate during and after pregnancy till the child is delivered to the foreigner couple or reaches their country.

7. Conclusion

12 million Indian children are orphans and in spite of this huge no of needy children people are engaged in the practice of surrogacy, it is only because the adoption of child in India is lengthy and complicated procedure for those who want to give home to these children.

Even 60 years of independence has not given a comprehensive adoption law applicable to all citizens irrespective of religion or the country they live in as NRI, persons of Indian origin [POI] or overseas citizen of India [OCI]. As a result they prefer choosing the option of IVF or surrogacy. The guardian and ward act 1890 permits guardianship and not adoption. The Hindu adoption and maintenance Act 1956 does not permit non Hindu to adopt a Hindu child and immigration after adoption.

There is an urgent need to make adoption procedure simple for all and this will bring down the rate of surrogacy. Altruistic and non commercial surrogacy should be prevented, laws should be framed and implemented to cover the grey areas and to protect the rights of women and children.

8. Future Scope

After IT services, now the babies are outsourced from India. In this period of globalization and market driven economics there is a considerable demand for this service. This

consented arrangement outside wedlock is beyond our traditional outlook of our family norms and society apart from other legal, social emotional and health aspects. Economists have compared the cost effectiveness of surrogacy in India and abroad to be much cheaper in India. With International demand, overenthusiastic professionals, India a proud provider of cheap international labour, as a economic source for the individual, professionals and nation. Legal aspects are being taken care of for associated implications. Indian council of Medical Research [ICMR] established the guidelines for ART centers to ensure some bare ethics, health facilities and legalities. Encouraged debate by ICMR has led to objections and suggestions by professionals. Lagging behind is the conscious voice of the resource, the surrogate mother who is either unaware or unconcerned of the short and long term impacts of the whole issue. Even if she will have the voice, there may be no better option for earning the money in offering which may be a dream amount for her family. The decision makers for her would be her husband or in-laws? A nation still struggling with problems like dowry, burning, domestic violence separation and above all gender imbalance because of female foeticide at receiving end. . It is very rightly concluded "If surrogacy becomes an avenue by which women in richer countries choose poorer women in our country to bear their babies, then it is economic exploitation, a kind of biological colonization".

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