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TO SURROGATE OR NOT TO SURROGATE*

"But when I would see the surrogate, my first instinct, my first reaction would be jealousy, because she was doing what I wanted to do"

- Cheryl Tiegs¹

INTRODUCTION

While sterile couples unable of having their own child take surrogacy to be a boon, what still remains as a grey area in surrogacy contracts is the health and well-being of the surrogate mother. Simply put, Surrogacy is a process wherein a woman bears a child for another woman who is unable to conceive owing to various reasons like failure of embryo to implant, pelvic disorders, hysterectomy, repeated miscarriages, high blood pressure, heart and liver diseases². Therefore, going by the meaning of the word "surrogate", which has been derived from the Latin term '*surrogatus*' is "deputy or substitute", a surrogate mother is a substitute mother for a child³. Meaning that the surrogate mother bears the child in her womb for 9 months and after the child's birth, hands over the child to the contracting couple. This is the reason why surrogacy is better known as "wombs for rent". While some look at it as an unethical means of earning money, others including the sterile couple look at it as a blessing for them. Surrogacy in India has always been surrounded by a lot of controversy and debates. But what is ignored is the vital issue of the health of the surrogate mother.

WHY SURROGACY?

To start with, why surrogacy at all? For many women it is a matter of their situations and conditions, mostly financial, that pushes them into surrogacy. But there are women who do it

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¹ <http://www.brainyquote.com/quotes/quotes/c/cheryltieg357296.html>

² Pratibha Ganesh Chavan, "*Psychological and Legal aspects of Surrogate Motherhood*" AIR 2008 Journal 103 at 104.

³ Jaya Kumar F. DR. Yegudala, "*Socio-Legal aspects of surrogacy in India*" Available at <http://www.lawrights.asn.au/files/Jaya%20Kumar,%20full%20paper.pdf>

altruistically for family members, acquaintances and friends. Most people judge the surrogate mothers to be unethical and immoral humans who sell the child for money, this clearly is a myth. Women no doubt, do it for money, but, there is a driving force behind that. Some do it to educate their children, some do it to get a roof over their head and some do it to earn a square meal for the family. Traditionally this surrogacy arrangement was confined among the kith and kin, to help them. But owing to the advancement in the financial consideration extended to the surrogate mother, this surrogacy arrangement has crossed the boundaries of family, community and even countries!

Women, who undertake these surrogacy assignments in India, for the most part originate from lower class and lower working class foundations, are married, and are in frequent need of money for basic survival. Their requirement for money is acute to the extent that more often than not, childless couples can manage a good bargain and the women just agree at whatever price is being offered to them. The amount of money offered to a surrogate mother in India may seem exceptionally miniscule from any sensible point of view, in any case, the sum may serve as the financial soul for the families of the surrogate, and will be spent on the basic bare minimum needs of the family (a house, education of the kids). These are fundamental needs and may appear to be inconsequential from an outstandingly rich westerners' point of view, however they are considered to be luxuries needs in a nation like India, which needs social well being nets, and where the governance structure is adjusted as per the needs of the rich and influential individuals of the society.

This has given way to what is termed as "commercial surrogacy". A lot of couples from abroad come to India to get a baby while paying for it. India has become a destination for surrogacy because of cheap medical facilities, no laws regulating surrogacy (therefore, no legal issues) and easily available surrogates, owing to poor socio-economic conditions of women. All these couples need to do is pay for the treatments, look after the surrogate mother during the pregnancy and pay her some extra dollars and the baby is in their hands.

PRE - REQUISITES FOR A SURROGATE :

Before learning the kinds of surrogacy arrangements and the consequences of the same, it is important to understand the pre-requisites necessary for a woman to become a Surrogate Mother :

- The most important of all pre requisites is that the age of the woman must be between 21 and 45 years of age. A female below 21 years of age is not capable of carrying a foetus inside her. She has a delicate body which is not mature enough to rear an offspring.

Likewise, a female who is aged above 45 years of age cannot act as a surrogate mother her aging body cannot be burdened with child birth process.

- The woman must have given birth to at least one child before entering into surrogacy. This is to ensure that the woman already has an experience of child birth and is aware as to how it is to be managed and knows all the care to be taken.
- The woman must be in good health, physically and mentally. The health of the woman has a direct effect on the health of the child she rears. Therefore, it is very important that the woman should be mentally and physically fit, free from any diseases or ailments. Therefore, the biological and physiological health of the surrogate and the child ought to be considered when commissioning couples and potential surrogates are making an informed decision so as to enter into a contract⁴.
- She must be free from all and any sexually transmitted diseases. This factor counts as relevant because such a disease may affect the birth process and the health of the child adversely.
- She must be willing and mentally prepared to undergo psychological and physical evaluations and changes. She should be strong willed.
- She must have consent and full support from her husband and/or family so that the whole process can be completed successfully without any issues.
- She must have and be able to provide her previous delivery records and any other medical reports required for the surrogacy process.

These pre-requisites make sure that there are no complications in the whole process and the health of the surrogate mother and the child are not affected. It is necessary that all women who enter into surrogacy contracts make sure that they fit into the above criteria to be safe and have safe delivery. These conditions are just guidelines to ensure no body harms from surrogacy contracts.

TYPES OF SURROGACY :

To understand the process of surrogacy better, it is necessary to understand the types of surrogacy. The Surrogacy arrangement is of two kinds⁵ :

1. Traditional surrogacy

It is defined in Blacks' Law Dictionary as the "pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the foetus and gives birth to a child for another person."

⁴ M.M. Tieu, "*The necessary objectification of surrogate mothers*" Journal of Medical Ethics Vol. 35 No. 3

⁵ 228th report of the Law Commission of India

Therefore, a traditional surrogacy involves a woman who is artificially inseminated with the man's sperm. A traditional surrogate, accordingly is the child's biological mother. This is due to the fact that it was her own egg that was fertilized by the man's sperm⁶. Alternatively, a donor sperm may also be used for traditional surrogacy.

2. Gestational surrogacy

Blacks' Law Dictionary defines Gestational Surrogacy as when "an embryo created by the process of In vitro fertilization (IVF) is implanted into the surrogate mother". It means that the eggs are harvested from the mother, and are fertilized with the sperms of the father. And ultimately, the embryo is placed into the uterus of the gestational surrogate. A child born from gestational surrogacy has no genetic ties to the surrogate. This is because she is just a carrier of the embryo and her egg was not used in the process of child birth. A gestational surrogate is rightly called the "birth mother", since she just gives birth to the child. The woman whose egg was fertilized will be the biological mother of the child and the child will have her genes.

HEALTH RISKS AND COMPLICATIONS

For the most part, the same risks connected with traditional pregnancies will likewise be experienced in surrogate pregnancies. These incorporate morning affliction, gaining extra kilos of weight, and muscle strain. Be that as it may, but surrogate pregnancies do have their own arrangement of selective conditions, including conceivable contamination or bleeding amid implantation or insemination. It is also important to bear in mind that a woman who has had one or more uncomplicated births may not necessarily experience an easy, uncomplicated pregnancy in later births; placenta abruption, gestational diabetes, and hormonal imbalances can all play a role in health complications during the pregnancy and birth.⁷

Before even signing a surrogacy contract and beginning a surrogacy cycle, it is highly recommendable that the potential surrogates thoroughly discuss all potential risks, health issues and side effects with the fertility physician. This is required because most of such potential surrogates come from the low income strata of the society, and hence uneducated. It is therefore, a necessity that before undergoing this process, these women are made aware of all the risks and complications that may occur during the completion of the process or after it in some cases. There are various number of risks and side effects that are associated with being a surrogate. Some of them are as follows :

- **Bleeding** - The surrogate may experience mild discomfort and a little risk of developing a bruise in her private parts.

⁶ Katherine A. Harmon, *Navigating Adoption and Surrogacy Laws*, Aspatore 2014, Page 10

⁷ <http://www.surrogatesolutions.net/tag/risks-of-being-a-surrogate/>

- **Bodily Reactions :** The woman's body may react adversely to Fertility Medication . Such reactions include, hot flushes, feeling low or easily irritable. Other symptoms may be headaches and restlessness.
- **Risks Associated with Traditional Pregnancy** - Exhaustion, nausea, indigestion, constipation, bloating, backaches, difficulty sleeping, breast pain, higher blood pressure, hormonal mood changes, stretch marks, loose skin, abdominal and vaginal muscle weakness, gestational diabetes, anemia, future infertility etc.⁸
- **Psychological and Emotional Distress** - This does not directly relate to the physical well being of the surrogate but has a great impact on the same. It is very crucial to the safe birth of the child that the surrogate remains mentally and emotionally fit. The mind set and the thought process, the feelings of the surrogate mother has a direct effect on the child. A lot of times, the surrogate mother gets so attached to the child in her womb that she is unable to part from the child and finds it extremely painful to give away the child to the parents. The psychological and spiritual make up of the pregnant woman will influence the health of the newborn child.⁹ Therefore, a healthy mother gives birth to a healthy child.
- **Multiplicity of births** - When a surrogate gives birth to more number of children, she is at a higher risk. Multiple births by the same surrogate carry various risks to the health of both, the mother and the unborn children. Repeated child birth procedures and medications affect the body of the surrogate and can be dangerous to her life if not regulated.

DECISIONS WITH OR WITHOUT CONSIDERATION OF HEALTH CONCERNS?

All said and done, the most important consideration after discussing the health risks and complications is whether the surrogates refrain themselves from entering into surrogacy contracts after knowing the potential risks to their bodies with such arrangement. The sad truth is that not a lot of surrogates pay attention to these risks owing to the dire need of money. Some women in fact become so desperate for the payment they will receive in consideration of the child that they are ready to risk their own health and life for securing the future of their children and family.

The situation is so bad that the surrogates are blinded by the money over their own lives. Such bleak is their future that they are ready to take a risk for the sake of the families. An arrangement for counselling sessions, awareness camps for the surrogates is the need of the hour. It is very important that the potential risks and health concerns are explained in detail to these prospective

⁸ <https://www.surrogacyamerica.com/become-surrogate-mother/surrogate-risks-complications>

⁹ Eric Blyth and Ruth Landau , *Faith and Fertility*

surrogates who are willing to enter into such contracts. How their bodies will be affected, how they should be dealing with it and other relevant factors should be told to them in a way that they are able to make a better and unbiased decision. For example, the health risks associated with surrogate pregnancy include those inherent in all pregnancies, including but not limited to complications like gestational diabetes, or problems relating to preterm birth.¹⁰ They should be informed and aware of the repercussions of the surrogacy contracts.

GOVERNMENT INITIATIVES IN INDIA

To address the surrogacy issues and to regulate such surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of "National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India."¹¹

Despite of all these issues and the guidelines by the ICMR, there is till date no statutory provision on surrogacy, on rights and duties and protection of the surrogate, the commissioning parents and the child. The Assisted Reproductive Technique (ART) Regulation Bill, 2006¹² is a step towards the same. It lays down the rights and duties of both, the surrogate mother and the commissioning parents. Picking up extracts from the bill, that relate to the health measures, the following points can be highlighted¹³ :

1 No woman below 21 years of age and over 35 years of age shall be eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than 5 successful live births in her life, including her own children.

2. Any woman 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.

3. If the first embryo transfer has failed in a surrogate mother, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the

¹⁰ Kalindi Vora, *Potential, Risk and Return in Transnational Indian Gestational Surrogacy* : Current Anthropology, Vol. 54 No, S7

¹¹ Dr. R.S. Sharma, *National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy*

¹² ART (Regulation) Bill 2010

¹³ Ibid

same couple that had engaged her services in the first instance. No surrogate mother shall undergo embryo transfer more than three times for the same couple."

The important points highlighted in the draft are relating to the age of the surrogates owing to their body capacities, limit of the surrogate to number of births and medical tests. Although the above mentioned health concerns have been given attention in the bill, but it still remains a grey area as far as the surrogate's health is concerned. Issues like health insurance, health covers, and other safe guards for the surrogate do not find any mention in the bill. There is need of a greater focus on that with a legal implementation of the same.

In surrogacy contracts, in exchange for the promise of a fee for surrogacy, and the possible bright future that it presents, the surrogates undertake uncertainty and unknown risks in terms of their social status, their health and well being through the pregnancy process and after¹⁴. Even after going through so much and undertaking high health risks, there are chances that they will not receive the payment promised to them.

The lack of statutory regulations has led to a plethora of consequences. The rights of the children born via surrogacy are often misty and leave them open to various risks of great harm. The same holds true for the surrogate mothers as well, who hardly have any say in the whole process and are more often than not utterly left at the hands of the specialists at the fertility clinics. Surrogates are conventionally poor, coming from low income groups, generally uneducated and unaware. They end up signing contracts that they don't even understand, without understanding the terms and conditions of the same, in hopes of making money. The often live in unsafe and unsanitary living conditions, wait for long hours for routine tests at clinics lagging proper attention and health care.¹⁵

CONCLUSION :

Clinics regularly implant more number of embryos in the surrogate mother's uterus than is medically safe and prescribed, which in turn leads to complications and risks for the surrogate. Moreover, such clinics may also pay the surrogates lesser amount than that they charge the parents and follow various other unscrupulous practices leading to exploitation of the surrogate, financially, physically and emotionally. All of these factors point to the fact that while the surrogacy industry is flaunted as a flourishing market where women unable to conceive can still have a baby and other willing women can help and make money based on independent decisions

¹⁴ Supra at 8

¹⁵ <http://web.stanford.edu/group/womenscourage/Surrogacy/health.html>

about their bodies, this is rarely true in case of the Indian surrogates. As harsh it may sound, but the ugly truth is that surrogates in India are and will always continue to be exploited in money matters, physical health issues and otherwise¹⁶, as the surrogacy industry grows unregulated without any statute or legal position on the same.

It is significant to note that though the stigmas and stereotypes associated with the surrogacy process and surrogate mothers has lessened a great deal in India, the pregnancy and of the surrogate women till date has to be kept under covers from the society. Also, as already stated, there are substantial possibilities for potential legal, financial, psychological, emotional and health complications in a surrogacy arrangement, but still there exists no proper legislation in India. The surrogacy sector is scarcely governed by the Indian Council of Medical Research guidelines that are sadly not under the legal purview, hence not making any sort of non-compliance to these guidelines punishable. The ART Bill of 2010 is still in the draft form and lagging in the Parliament for passing. A proper legislation is very important to have control over this "surrogacy industry."¹⁷ But again, to protect the rights of the surrogate, the ethical considerations relating to surrogacy cannot be ignored completely. Making legislations in light of surrogacy will be indicative that surrogacy has been legalized in India which in turn will also make the surrogacy contracts enforceable. This leads to the conclusion that the unborn child is the "consideration" for the surrogacy contract. Is a human child capable of being termed as "consideration"? Another issue that might creep up, is that the surrogate might develop affection and attachment towards the child and refuse to enforce the contract and return all the money paid to her as consideration for the child. What will be the remedy available to the commissioning parents then? There are a lot of legal and social dilemmas surrounding surrogacy. Whether to let the status quo continue or to legalize the surrogacy arrangements is a very important question to be considered.

All said and done, whether surrogacy be legalized or not, a surrogate will always be at the centre of potential risks of health hazards, psychological risks and financial risks. Putting down legislations will legalize the surrogacy arrangement leading to a new set of complications for the society and the contracting parties and continuing the status quo will keep surrogates at the same risk, same vulnerability level as it is.

¹⁶ Dr. Krishna Pal Malik, *Women and Law*

¹⁷ *Mother's Market : An exploratory study on the surrogate industry in India*. Available at http://iussp.org/sites/default/files/event_call_for_papers/Mother.pdf