Whose Child is it Anyway?
Determining Parentage Claims in Surrogacy Contracts

Abstract
India is arguably the most approached destination for surrogacy arrangements in the world today. However, this large market exists in a legal vacuum. With no laws or regulations in place to govern surrogacy arrangements, several issues arise such as exploitation of the surrogate, commodification of women and children and most importantly, multiple claims of parentage. Uncertainty with regard to the legal parentage of the child works against the best interests of the child due to the lengthy litigation it triggers with regard to the legitimacy of the child. Every child has a fundamental right to legal parentage at birth in order to have his interests looked after. Since surrogacy arrangements create a situation of limbo with respect to parentage, urgent clarification is sought by way of a legislation governing all such arrangements in India. In this paper, the author has analysed decisions of Indian and English courts to understand the current position of law with regard to parentage claims arising out of surrogate arrangements. The author proceeds to analyse the draft Assisted Reproductive Technologies (Regulation) Bill, 2010 to understand if the proposed legislation would resolve these problems. Finally, the author offers recommendations which if incorporated into the Bill, would ensure that the rights of all parties are upheld.

Introduction

Various studies have projected that by 2015, one in every five newly married couples will be infertile. Infertility in marriage in India is considered to be a social stigma which adds to the psychological trauma faced by a childless couple. But, with advancement in technology, infertility no longer means childlessness. Couples seeking to have children now have surrogacy as a viable option before them to have a child they share a genetic link with.

Surrogacy is traditionally defined as the procedure whereby a couple contracts with a woman (known as the surrogate) to conceive a child for them, carry it to term, and then relinquish to the
couple all her parental rights.\textsuperscript{1} It can be of two types: traditional and gestational. Gestational surrogacy has developed with the advent of IVF where the surrogate supplies the uterus, but the intended mother supplies the egg and the husband of the intended mother provides the sperm. It can occur in several ways, some involving anonymous sperm or egg donors. This paper concerns itself only with contracts involving gestational surrogacy since the new draft Assisted Reproductive Technology (Regulation) Bill, 2010 to be placed before the Parliament of India has outlawed traditional surrogacy arrangements.\textsuperscript{2}

Surrogacy arrangements that go badly can have profound implications, especially for the child born out of such an arrangement. In some occasions, a gestational surrogacy arrangement can result in parentage claims from as many as five different parties- for instance, a gestational carrier may agree to gestate a child for two intended parents and the gametes used to conceive the child may be procured from sperm and egg donors. This could result in substantial uncertainty with regard to legal parentage and may lead to lengthy litigation. As a result there is a need for tighter regulation with respect to determination of legal parentage in cases involving surrogacy contracts. In this paper, the researcher has discussed the judicial assumptions regarding parenthood and their effect on determination of legal parentage in surrogacy contracts. This discussion is essential in light of a child’s fundamental right to legal parents at birth.\textsuperscript{3}

In Part I, the researcher analyzes and discusses the legal problems regarding parentage arising out of contracts involving gestational surrogacy. In Part II, the researcher analyzes and discusses the legal determination of paternity and maternity with respect to gestational surrogacy contracts. In Part III, the researcher has surveyed the situation in India with regard to surrogacy and studied the Assisted Reproductive Technology (Regulation) Bill of 2010 and analyzed it with respect to problems which might arise as a result of contracts involving gestational surrogacy.

\textsuperscript{1} C. Kerian, \textit{Surrogacy: A Last Resort Alternative for Infertile Women or Commodification of Women’s Bodies and Children?}, 12 WISCONSIN WOMEN’S LAW JOURNAL 113, 114 (1997).
\textsuperscript{2} S. 2(aa), The Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.
\textsuperscript{3} M. Byrn & J. Ives, \textit{Which Came First the Parent or the Child?}, 62 RUTGERS LAW REVIEW 305, 328 (2010).
I

In the context of assisted reproductive technology, especially surrogacy, it needs to be noted that technology is moving much faster than the law. As a result, the traditional categories of “mother” and “father” cannot be universally applied without reservations as to the meanings of the words. Today the law acknowledges specific categories such as the “commissioning parent” or the “donor parent” or the “genetic parent”. In light of new realities, the new legal categories of parentage have not only come into play but are also shifting and evolving with the march of law and technology. Any law that will be passed in order to regulate contracts involving gestational surrogacy needs to address the question of parentage not only to guarantee a child’s fundamental right to legal parents at birth but because parentage affects the child’s rights with respect to citizenship, inheritance and social benefits entitlement among others. The answer to this question will have profound ramifications on the social perception of a parent-child relationship in the future and the power of the state to regulate such a relationship.

II

Till the advent of reproductive technology, courts rarely had to address disputes regarding parentage. This is because, on one hand, motherhood was recognized as a natural fact considering the evidence of pregnancy and childbirth was irrefutable, while on the other hand fatherhood was presumed depending on the man’s relationship with the mother. The arrival of surrogacy contracts has given rise to the differentiation and subsequent comparison of various symbols of parenthood such as genetics, gestation, intention and care. This has caused an alteration in the meaning of parenthood which needs to be clarified to minimize disputes and lengthy post-conception litigation.

6 M. Byrn & J. Ives, supra note 3 at 340.
7 D. Moyal & C. Shelley, supra note 5 at 443.
PATERNITY AND THE MARITAL PRESUMPTION UNDER S. 112 OF THE INDIAN EVIDENCE ACT, 1872

It is essential to understand legal paternity to be able to contextualize the various approaches to the determination of maternity. The question of legal paternity pre-dates the development of assisted reproductive technology. In *Lehr v. Robertson*\(^\text{10}\) the Court explained that an unwed father did not have a constitutional right to the companionship of his child because he had not established a substantial social relationship with the child.\(^\text{11}\) Similarly, in *Michael H. v. Gerald D.*\(^\text{12}\), the Court established that although the petitioner had established such a relationship with the child he did not enjoy a constitutionally protected parental right. But, within a marriage, the mother’s husband and not the biological father would have paternity rights. The court ruled that the marital presumption, displayed in Section 112 of the Indian Evidence Act\(^\text{13}\), served the purpose of ensuring the legitimacy of the child, furthering the public interest of promoting parenting rights and responsibilities within a marriage\(^\text{14}\) as also protecting an established unit of a marital family\(^\text{15}\). This causes a limbo to be created often as is also seen in the facts of the *Michael H.* case where the child was left without a legal father for 8 years.

Section 112 of the Indian Evidence Act seems to act in contradiction to what is required by the Draft ART Bill. This provision causes the husband of the surrogate (who is required to be married) to be the legitimate father of the child. But, this man has no biological interest in the child. This presumption conflicts with the right of the commissioning father who shares genetic linkages with the child. It also causes what may be called “compelled paternity”.

In order to help interpret this provision, a Singapore Court has ruled in *WW v. WX*\(^\text{16}\) that the provision exists in order to confer legitimacy in cases where such legitimacy is disputed and not to invalidate evidence that a man is the biological father of the child. WX was asked to maintain

\(^{11}\) *Id.*, at 267.  
\(^{13}\) S. 112, Indian Evidence Act, 1872: *Birth during marriage, conclusive proof of legitimacy* - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.  
\(^{14}\) I. Russell, *supra* note 8 at 628.  
\(^{16}\) *WW v. WX*, 2009 SGHC 70.
the child. The logical conclusion is that by distinguishing legitimacy from actual paternity is that the child would now have two fathers: a legitimate father and a biological father. This creates a situation where WW can demand maintenance from both. Modern Hindu Law requires that none but the biological son of a man, begotten upon his wedded wife shall inherit his rank and property. The law needs to evolve and recognize that in today’s time, children maybe begotten without sexual intercourse and paternity can be ascertained beyond reasonable doubt with the help of technology. This prevents the bastardization of children, anyway. The appropriate course of action now would be to include a “notwithstanding S. 112 of the Indian Evidence Act” clause in the Draft ART Bill.

**Adjudicating Legal Maternity**

Before the advent of reproductive technology, biological maternity could be presumed with certainty. Reproductive technology adds a new dimension to motherhood by separating biological and social motherhood. Not only that, gestational surrogacy allows for the separation of various aspects of biological maternity as well, for instance one woman could gestate the child while another could share genetic links with the child. In order to adjudicate or define legal maternity in cases involving gestational surrogacy, courts and legislatures have relied on 4 theories-

**1. The Intent of Parties**

This theory essentially derives from the judgment in *Johnson v. Calvert*. In this case, the California Supreme Court held that the genetically related mother was the legal mother of the child because she intended to procreate and bring about the birth of the child who she intended to raise as her own. By this ruling the court established that intentions regarding parentage, as expressed in the surrogacy contract, determined maternity. This theory is often supported because it prioritizes the commissioning mother’s bid for legal maternity regardless of the genetic or gestational connection. Feminists support this theory on the rationale that

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17 J. Dolgin, *supra* note 9 at 673.
19 C. Archer, *supra* note 4 at 157.
“disallowing freedom of contract to surrogates degrades women by treating them as incompetent and furthers a gender stereotype that women are incapable of making decisions and keeping promises.”

This test can be criticized in two ways. One that in some cases existing laws may not sanction parties’ intent. Take for example cases involving commissioning parents being unmarried or homosexual. In such cases, a break from conventional reproduction is enough to override the parties’ intentions. Secondly, the intention test fails to protect in cases where the law compels maternity on the gestational surrogate.

2. The Genetic Contribution Test

The genetic contribution test determines maternity based on the genetic link shared by the child and the woman whose ovum contributed to the conception of the child. This test was put forth by an Ohio court of common pleas in Belisto v. Clark. The court, in this case, concluded that genetics, then gestation were the key elements to the determination of legal maternity. The opinion of the court in Lehr supported the preference of gestational mothers over genetic mothers but this judicial trend seems to not have continued in cases involving gestational surrogacy. In fact, courts in gestational surrogacy cases have readily negated or minimized the significance of the biological bases of the surrogate’s claims to legal maternity. This has conspicuously always been to bestow legal parenthood on the parties who reflected most nearly a middle class two-parent family. It remains a matter of speculation to determine if this is in best interests of the child or in the court’s interest in preserving the conventional unit of family. The Belsito test is criticized for allowing birth to nevertheless remain a determinant of maternity only second to genetics. As a result, situations of compelled maternity arise in the event of: (1) the death of the intended mother who was the egg provider; (2) the egg donor being unknown; (3) the intended mother waiving her rights after implantation but before birth. Also, in case of

23 E. Stark, supra note 20 at 295.
27 Lehr, supra note 10 at 260.
28 J. Dolgin, supra note 9 at 678.
29 E. Stark, supra note 20 at 300.
application of the right of the surrogate to rebut maternity as laid down in *In re Roberto d.B*\(^{30}\) the child may end up with no legal mother at all.

3. **Gestational Mother Preference Theory**

Before the advent of reproductive technology the common law rule that prevailed was that the woman giving birth to the child was the legal mother of the child.\(^{31}\) This rule is backed using a rationale that this can prevent exploitation of the surrogate at the hands of the commissioning parents who are at an economically better position.\(^{32}\) It is also argued that the gestational mother establishes a unique physical and emotional bond with the child during the 9 months which the commissioning parents cannot attain.\(^{33}\) However, there is no persuasive evidence of a general pattern of forced separation from the child being harmful to the surrogate’s mental health.\(^{34}\) Also, a gestator’s role is contractually pre-defined to exclude maternity.\(^{35}\) Constitutional protection of a gestator’s parental right in such circumstances would operate in derogation of the interests of genetic-intended parents whose relationship with the child is a “blood relationship” within the traditional meaning of the term.\(^{36}\) This approach might even defeat the purpose of surrogacy contracts in the first place. It would address the concerns of few surrogates who wish to keep the child as against the multitude who don’t. Additionally, there is no compelling need to perpetuate the relationship of the gestator if the intended parents are also the genetic parents and not unfit. In any case, the child welfare system presumes that children should remain with biological parents if possible since they are deemed to act in the best interests of the child.\(^{37}\)

4. **The Best Interests of the Child Theory**

The dissent in *Johnson v. Calvert* called for the application of the best interests of the child doctrine. Under this approach, the interests of the child are controlling and the court will ultimately award legal maternity to the party which can best care for the child.\(^{38}\) This theory is

\(^{31}\) M. Coleman, *supra* note 25 at 524.
\(^{32}\) A. Larkey, *supra* note 15 at 625.
\(^{33}\) A. Larkey, *supra* note 15 at 625.
\(^{35}\) J. Dolgin, *supra* note 9 at 686.
\(^{36}\) A. Hofheimer, *supra* note 34 at 592.
\(^{38}\) A. Larkey, *supra* note 15 at 626.
based on the notion that multiple theories to determine legal maternity should co-exist and decisions should be taken on a case-by-case basis.\textsuperscript{39} This theory has been criticized because it causes a lack of legal predictability as also it might turn out to be a bureaucratic nightmare to rank adults on the basis of their parenting ability. The best interests of the child lie with the parents which calls for clarification regarding parental status in surrogacy since a child’s best interests are assumed to lie with his biological parents. This question can only be resolved when it is confronted by the government as a public policy choice.\textsuperscript{40}

The Draft ART Bill calls for the commissioning parents to be given status as legal parents and the complete relinquishment of parental rights by the surrogate. It was essential that such clarity was legislatively established. In addition it requires that commissioning parents produce a certificate from their home country stating that the child born out of the surrogacy arrangement will not be denied citizenship. This is a welcome change and provides some clarity to the issues of parentage in proposed surrogacy transactions in India.

\section*{III}

India is currently a top destination for fertility tourism. But, the lack of regulation with respect to surrogacy is creating various unforeseen problems. The law needs to catch up with the advancement in technology. This calls for a national legislation to regulate surrogacy contracts. The previously existing ICMR guidelines being non-binding did not have an effect on gestational surrogacy arrangements. But now, the ICMR has prepared the Assisted Reproductive Technology (Regulation) Bill 2010.\textsuperscript{41}

The Bill is believed to be a well drafted piece of legislation but leaves several questions unanswered-

\subsection*{1. \textsc{Legitimacy}}

The questions of legitimacy and legal parentage intersect in this Bill. Section 35 discusses the aspects of legal parentage and legitimacy. Though this answers most questions that arise as to

\begin{footnotesize}
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\item I. Hurwitz, \textit{supra} note 21 at 167.
\item I. Russell, \textit{supra} note 8 at 671.
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legitimacy and legal parentage, there are two major gaps. Firstly, as discussed above in Part II, it
does not address the conflict of laws created with respect to Section 112 of the Indian Evidence
Act, 1872\(^{42}\) which provides that the husband of a married woman will be presumed to be the
legitimate father of the child. Secondly, it does not address situations wherein a married or
unmarried couple may revoke consent post conception but before the birth of the child. The first
issue can be addressed by including a “notwithstanding S. 112 of the Indian Evidence Act, 1872”
clause. The second issue can be addressed by calling for specific performance of surrogacy
contracts with no right to revoke consent post conception. The commissioning parents do not
have a right over the surrogate’s body and cannot demand an abortion.

2. Gay Couples and Single Individuals

The bill is completely gender neutral and provided married couples, unmarried couples,
homosexuals as well as single individuals with the right enter into a surrogacy contract. Section
32(1) of the Bill provides that assisted reproductive technology shall be available to all persons
including single persons, married persons and unmarried persons.\(^{43}\)

Although, the use of gender neutral terminology opens the use of ART to homosexual couples as
well. However, this right is only extended to homosexuals who are citizens of countries where
homosexuality has been legalized. This is because the definition of “married couple” under
section 2(v)\(^{44}\) requires the marriage of the two persons to be legal in their country of citizenship
and the definition of “unmarried couple” under section 2(dd)\(^{45}\) requires the relationship of two
persons of marriageable age living together with mutual consent to be legal in their country of
citizenship.

3. Maximum Age of Couples who can Avail of ART

We have discussed above about the applicability of the best interests of child doctrine to the
determination of parentage in cases involving gestational surrogacy. We also saw the courts’
inclination towards preferring the “traditional” unit of family to protect these interests.
Therefore, a factor which might cause problems is the age of parents who wish to enter into a
gestational surrogacy arrangement. If the commissioning couple is too old, it might not be in the

\(^{42}\) Section 112, Indian Evidence Act, 1872.
\(^{43}\) Section 32(1), The Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.
\(^{44}\) Section 2(v), The Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.
\(^{45}\) Section 2 (dd), The Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.
best interests of the child. The Bill, therefore, needs to clarify the maximum age limit for persons wishing to enter into such arrangements.\footnote{Sarojini N.B. & A. Sharma, \textit{The Draft ART Regulation Bill: In whose Interest?}, available at http://www.issuesinmedicalethics.org/171co36 (Last visited on November 25, 2010).}

4. HEALTH OF THE SURROGATE

The act provides that the commissioning parents will undertake all expenses related to the surrogacy until the child is handed over to the couple under Section 34(2). This does not take into account post partem disorders that may arise and harm the surrogate. Although section 34(24) requires the commissioning parents to appropriately insure the surrogate for all health issues arising out of surrogacy, there is no prescription as to what will be defined as “appropriate”. Furthermore, section 34(9) imposes a restriction on the number of embryo transfers. This provision may prove to be piecemeal as the restriction only applies to transfers per couple and not on the whole. Exceeding a certain number may prove harmful to the health of the surrogate.\footnote{Section 34, The Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.}

There is also an issue regarding the anonymity of the surrogate considering she is required to register at a medical facility in context of medical treatment with regard to the child in her own name as per section 34(8) of the Bill.

If all these issues are addressed, the Assisted Reproductive Technology (Amendment) Bill, 2010 seems considerably promising with respect to the regulation of gestational surrogacy in India.

CONCLUSION

Most surrogacy arrangements in India are gestational and commercial. In fact, the surrogacy business in India has been valued at Rs. 25,000 crore. The significant issue, therefore, is that Indian law does not address this industry as of yet. It is only guided by non-binding guidelines issued by the Indian Council of Medical Research. Surrogacy is an issue which has raised various ethical, medical, legal and philosophical concerns. Therefore, the debate regarding an appropriate legislation rages on.
All the issues which the phenomenon of surrogacy raises cannot be discussed in one place and so the researcher has limited this discussion to parentage in surrogacy arrangements. This issue needed to be addressed immediately to address concerns raised by children already born and to be born out of such arrangements. Every child has a fundamental right to legal parentage at birth in order to have his interests looked after. Since surrogacy arrangements create a situation of limbo with respect to parentage, urgent clarification is required.

In this paper, the researcher analyzed various methods adopted by the courts in other jurisdictions which can influence courts in India. India itself faces a dearth of case law on the issue in spite of the amount of such transactions being much higher. None among the 4 tests used by courts to determine maternity can single-handedly deal with the legal custodial issues which arise out of gestational surrogacy arrangements. India, as per the ART Bill has chosen to determine parentage by legislation to establish clarity. Such legislation will have a profound effect on public policy because it would stand for the encouragement of the practice in spite of the multiple ethical issues involved.

Law must be sensitive to the morality of society but it cannot remain outdated to appease regressive groups. Technological advancement calls for legislation which may alter conventional relationships and perceptions in society. It is time to catch up.
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MISCELLANEOUS