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Rights of Child in Surrogacy Arrangements

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ABSTRACT

Surrogacy arrangements give rise to a unique category of children who may have two to five parents, biological, gestational, and intentional, scattered across different jurisdictions. This article examines the rights of children born out of surrogacy transactions from a child-rights perspective. It analyses the best interests of the child principle as applied to surrogacy disputes, the risks of commodification, the psychological and developmental concerns documented in the Brazier Report, the rights recognised under the United Nations Convention on the Rights of the Child (UNCRC), and the judicial approach to custody and parentage. The article argues that while surrogacy may offer the opportunity of life to children who would otherwise not exist, the regulatory framework must place the welfare of the child at its centre, ensuring that the child's rights to identity, bonding, safe home, and non-discrimination are fully protected.

Keywords: *Rights of Child, Surrogacy, Best Interests of the Child, United Nations Convention on the Rights of the Child, Commodification, Parentage*

I. INTRODUCTION

Children are the most precious and vulnerable participants in any surrogacy arrangement. Most children have a single parental set. An adopted child will have two subsets, one biological and one adoptive. But a child born from a surrogacy arrangement has the unique possibility of having two to five parents anywhere in the world [1]. Advocates of surrogate parenting suggest that any risks to children are outweighed by the opportunity for life itself, pointing out that the children always benefit since they would not have been born without the practice. However, this argument assumes the very factor under deliberation, the child's conception and birth.

The assessment for public policy occurs prior to conception when the surrogate arrangements are made. The issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. The notion that children have an interest in being born prior to their conception and birth is not embraced in other public policies and should not be assumed in the debate on surrogate parenting [2].

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II. BEST INTERESTS OF THE CHILD IN SURROGACY

The interest of children born out of surrogacy transactions is the highlight of most debates over surrogacy. The best interests of the child principle has received predominant consideration in the surrogacy issue. In general, judges choose to ignore the surrogacy arrangements for public policy reasons and rule cases in the best interests of the child. Ethicists also agree in general that the child's best interest must trump any other considerations [3].

There is no dispute that the best interests of the child should be analysed in every surrogacy arrangement. However, in no case of surrogacy, whether commercial or altruistic, can there be a paramount consideration given exclusively to the child's interest. The only thing to claim is that many children were given the chance of having life who would otherwise not have been born [4]. In surrogacy arrangements, infertile couples want a baby, and the assumption is always their welfare, as commissioning parents have spent a huge amount of money for them. After birth, they are supposed to ensure the interests of the child. By clearly establishing the adult parties' rights, a stable environment for the child will be created, and the child's best interests will be protected [5].

Chances of exploitation are often raised by critics of the children born out of surrogacy transactions. Commercial surrogacy and making children a commodity are concerns certified by the Warnock Report. However, exploitation itself is not necessarily a crime, and it is not clear that commercial surrogate motherhood should be made illegal solely because of its supposed exploitative nature.

III. PSYCHOLOGICAL AND DEVELOPMENTAL CONCERNS: BRAZIER REPORT FINDINGS

The Brazier Report remarked that there exists no systematic information on the long-term psychological consequences for children born as a result of a surrogacy arrangement. To the extent that the experiences of adopted children are relevant, it is important to note that adopted children do tend to show a greater incidence of emotional and behavioural problems in comparison with their non-adopted counterparts. Not all adopted children experience difficulties, however. Psychological problems are most likely to occur in adoptive families where the quality of parenting is poor and where the parents do not communicate openly about the adoption to the child. It is also of relevance that the younger children are at the time of the adoption, the less they are at risk [6].

The report also states that there is a growing body of research on the psychological development

of children conceived by assisted reproduction, suggesting that the quality of parenting in such families is good and that the children themselves are functioning well, whether or not donated gametes had been used in the child's conception [7].

IV. CHILD RIGHTS IN SURROGACY: A DETAILED FRAMEWORK

Imrana Qader identifies that the vulnerability of the baby can be enhanced if the surrogacy process is not sensitive to the issues of child rights. These rights are [8]:

- The right to bonding, breastfeeding for a minimum period of 3 to 6 months, and early psychological and immunological development while prescribing the time of separation.
- The right to survival, any baby with a disability or born of a multiple pregnancy should not be undermined by the whims of the commissioning parents.
- The right to a safe home, the state that permits surrogacy bears an obligation in cases where both sets of parents refuse to accept the baby.
- The right to know his or her identity, early acceptance of their status helps their socialisation and acquisition of a sense of belonging. Discovering parentage late or accidentally is more damaging than knowing the truth in an open and frank environment. Secrecy and misinformation is born out of the notion of priority of biological associations over socio-psychological ones.

There is a responsibility on the state to ensure the welfare of the child because the risk to the welfare of the child is greater than in relation to natural birth, and because surrogacy involves the active assistance of the state both in the provision of medical services and in determining the status of the child [9]. The child's physical health at birth is dependent on the health of the three adults on whom his or her conception and gestation depend, as well as on the doctors who carried out the IVF and implantation [10].

The risks of the child born in pursuance of a surrogacy agreement being rejected at birth by intended parents are likely to be greater than those of a child born in the ordinary way, because the intended mother does not have the same physical bond with the child as a mother who has carried and given birth to her or him [11]. The identity of the birth mother should ordinarily be kept confidential; however, if a child wants to trace it, he or she must be given a chance. Failure to provide this may constitute an offence. For example, in Israel, Section 19(cc) of the Surrogacy Law makes the publication of anything that would enable the identification of the surrogate mother, intended parents, or child without the proper permission of a court a criminal offence carrying one year of imprisonment [12].

V. COMMODIFICATION OF CHILDREN AND THE QUESTION OF PARENTAL RIGHTS

Elizabeth S. Anderson criticises surrogacy as a form of contract pregnancy that amounts to the literal sale of parental and custody rights over children [13]. An irrational insistence on distinguishing altruistic from commercial surrogacy is not always necessary, because both are substantially the same process, the element of money involved is the same as medical and hospital expenses. The financial reward to the surrogate alone is absent, which may cause a couple difficulty in obtaining a parental order from a court where only altruistic surrogacy is permitted. Supporters of surrogacy claim that a particular service of the surrogate mother is procured by the intended parents, and the deal should not be considered as buying or selling a child.

Margaret Brazier observes that if an infertile couple can buy an egg and rent a womb, splitting the role of the mother between different women, egg donor, commissioning woman, and surrogate mother, and the role of the father between sperm donor and commissioning father, this violates the child's right to know his or her origin and identity as guaranteed in Articles 7 and 8 of the United Nations Convention on the Rights of the Child [14, 15].

Surrogacy is likely to remain very much a last resort for involuntarily childless people rather than an arrangement primarily made for convenience. Society should not discourage the opportunity of parenthood to people finding themselves in this position where another woman has offered to assist them by means of a surrogacy arrangement, so long as this does not result in the commodification of the child [16].

VI. JUDICIAL APPROACH TO CUSTODY AND PARENTAGE

It is also true that children do not get a chance to choose their biological mothers. They have no role in the preliminary surrogacy process, yet they are the most affected after the process. While evaluating maternity disputes, the best interests of the child is the prominent focus. When a custodial arrangement issue comes before a court, it considers the following factors:

- Parental fitness
- Stability
- Primary caretaker
- Harmful parental conduct
- Separation of siblings
- Substantial change in circumstances

The paramount consideration of the court is the wellbeing of the child. In a surrogacy arrangement, it must be clear who is responsible for the child from the moment he or she is born. It is presumed that the best interests lie with the child's legal parents, as they desired the child and intended to raise it after birth. In *Johnson v. Calvert* [17], custodial rights of the child were conferred on the woman who intended to bring about the birth of the child and intended to raise it.

If a market-like arrangement is initiated for surrogacy, there will always exist a demand for good-quality products. One may pay a huge amount of money for having a baby through surrogacy, and a child born with a disability may often be rejected. In *Weber v. Stony Brook Hospital* [18], the baby suffered from microcephaly and was rejected by the commissioning parents; the Michigan Department of Social Services fostered the child.

VII. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND SURROGACY

Articles 7 and 8 of the United Nations Convention on the Rights of the Child (UNCRC) make it clear that every child should have their right to life, survival, and development [19]. Respect for the views of the child is also incorporated under Article 12. The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy, and law makers [20]. Both surrogate mothers and intended mothers should think of the welfare of the child.

Advocates of surrogate parenting suggest that any risks to children are outweighed by the opportunity for life itself, and they point out that the children always benefit since they would not have been born without the practice. However, this argument assumes the very factor under deliberation, the child's conception and birth. The assessment for public policy occurs prior to conception when the surrogate arrangements are made. The issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. The notion that children have an interest in being born prior to their conception and birth is not embraced in other public policies and should not be assumed in the debate on surrogate parenting [21, 22].

VIII. CONCLUSION

In India, although there is now exclusive legislation on surrogacy, namely the Surrogacy (Regulation) Act, 2021, legislation alone cannot address all future unforeseen incidents. Priority

towards the best interests of the child should not be detrimental to the other parties' genuine interests either, which is the most crucial and difficult consideration to be dealt with. In a surrogacy arrangement, the most unpredictable thing that remains is the interest of the child born out of it. It can only be assumed that a child getting into the hands of those who desired it will be happy with those who needed it.

The state bears an inescapable responsibility to ensure the welfare of the child, not merely by permitting or prohibiting surrogacy, but by actively building a regulatory architecture that places the child's rights to identity, bonding, non-discrimination, and a safe home at its centre. Legislation must evolve alongside reproductive technology to fill the gaps that no contract or court order can fully anticipate.

Endnotes

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