



## Legal Consequences for Children Born from Surrogacy Contracts

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### Abstract

Technological advance in medical field, especially concerning non-natural pregnancy, such as surrogacy that is present as a solution for couples experiencing infertility as outlined in contract can certainly have legal consequences. This study addresses legal consequences of a child born from surrogacy contract. Research method used in this paper is doctrinal legal research. The legal consequences of children born from surrogate mothers' agreement lie in the legal standing for them and the right of inheritance they own. Reviewed from Indonesian legislation, a child born from surrogacy contract is a legal child of the surrogate mother and is not a legal child of his biological parents; in the case of inheritance rights, if a child is categorized as a legal child, he/she may inherit the full property of the surrogate mother and her husband, whereas if the child is classified as a child outside of marriage, she/he has only a cognate relationship with the mother who gave him/her birth.

**Keywords:** inheriting rights; legal consequences; legal status; surrogacy contract

### INTRODUCTION

Establishing a family in a marriage bond is a goal for most people. A marriage will usually be complete if the couple can have offspring. However, in reality not all couple can have offspring for some causes. People who cannot have this offspring are most often referred to as infertility, a condition where a couple is not able to have children despite having had sexual intercourse for 2-3 times a week throughout the year without using any kind of contraception<sup>1</sup>. Infertility in women is generally caused by early menopause: damage in the ovary (tube), polycystic ovary syndrome (PCOS), endometriosis, scarring ovaries, pelvic adhesions, and thyroid problems. In addition, lifestyle can also affect fertility for both men and women<sup>2</sup>. Meanwhile, infertility in men is of well-known causes of *varicocele*, low hormones, congenital abnormalities such as testes do not descend the tumor, blockage of sperm channels and other diseases<sup>3</sup>.

Reproduction is a form of human effort to create its offspring as a natural inherent right, which is one of the three original rights given by God Almighty: the right to freedom, the right to life and property as long as it does not interfere with moral norms, religious

1. Tono Djuantono, et.al., *Panduan Medis Tepat dan Terpercaya untuk Mengatasi Kemandulan Hanya 7 Hari, Memahami Infertilitas*, (Refika Aditama 2008). [1]
2. Pevi Revina dan Enok Tjitjih, '10 Penyebab Umum Perempuan Sulit Hamil' (Bidanku, 2016), <<https://bidanku.com/10-penyebab-umum-perempuan-sulit-hamil>>, accessed on 3-01-2018.
3. Dian Maharani, 'Ini Penyebab Infertilitas pada Pria' (Kompas, 2014), <<http://health.kompas.com/read/2014/12/11/1754023/Ini.Penyebab.Infertilitas.pada.Pria>>, accessed on 3-01-2018.

norms, and the rule of law<sup>4</sup>. Thus, instinctively every living creature is eager to obtain offspring even though there are certain limitations that normally and naturally do not enable them to have offspring. Therefore, in the end science and technology can provide answers to the problems of individuals who experience problems in obtaining offspring<sup>5</sup>. From legal science, efforts have been put on seeking for strategic ways through sciences to help disadvantaged spouses bear their offspring. Approximately by integrated collaboration of medical science and legal science at least a few operational solutions were found. The development in medical science today has made it able to answer and provide solutions for spouses who experience infertility. In cooperation with notary field, solutions are through the process of test-tube baby and surrogacy.

In some countries, such as India, Pakistan, Bangladesh, China, Thailand, and the United States, surrogacy has often been done for various factors, and especially because of a difficult economy. Meanwhile, the basic reason for the tenants of surrogate mother (the source of seeds), who on average are from community in developed countries, is aesthetic (fear of having a bad physical appearance after giving birth)<sup>6</sup>.

There are many state courts in the United States that officially define the body as a factory and allowing surrogacy to use their biological uterus to produce babies, but others are stipulating that making the surrogacy contract is a serious offense<sup>7</sup>. In the United States and Britain, since there were legal provisions prescribed, surrogacy contract is officially applicable. The question is, is it simply because by rewarding in the form of some material, an action that affects the decline of human values is allowed? Such actions need to be further questioned, particularly concerning the extent to which the principle of benefit can be used for the condition of married couples who undergo difficulties in having offspring, which then utilize technological skills because it is known that the fertility rate in Indonesia is still quite high, i.e. between 7-15% of married couples<sup>8</sup>.

Forced and arranged marriages are not made exclusively for economic reasons but often to restore family honor ([Pastor, Almansa, & Jiménez, 2014](#)). Historically, long-term single women were more economically advantaged than their counterparts; this has changed as more married women remain less dependent on their spouses, which in turn has ramifications for less economic disadvantages with marital dissolution ([Newton, Ryan, King, & Smith, 2014](#)). Preferences for height and family relationship are believed to change if socioeconomic conditions change ([Yamamura & Tsutsui, 2017](#)). Marriage unions are central in establishing and positioning a person within a society ([Agha, 2016](#)). Regardless of how and why daughters' marriage persists, the practice of child marriage has adverse social, economic and health consequences for girls ([Pandey, 2017](#)). International marriage migrant women are expected to become pregnant and give birth early on in their marriage ([Korea, Sun, Park, & Kim, 2017](#)). Ecofeminism sees the global development paradigm as destroying diversity, both cultural and biological and women are as the main victims of this process by severing their bond with the land and destroying their subsistence economy ([Development, 2017](#)).

The issue of surrogacy has been a heated topic of debate in relation to women's ethical, legal, and social existence. In India the implementation of surrogacy is a strategy to save individuals from poverty and thus moral problems are ruled out. Until now India is a dominant destination for mothers to conduct commercial surrogacy. India is the first country to develop a commercially viable national and international industrial surrogacy<sup>9</sup>.

The surrogacy was initially applied in countries where the legal system permits gamete cell donation, sperm cells, and ovum cells so that surrogacy contracts are possible in these countries, as Schenker and Frenkel suggest in *Medico-Legal Aspects of IVT-ET Practice*, USA, UK, Austria, Australia, Germany, Denmark, Finland, France, Israel, Japan,

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5. Ibid. P.3.

6. Muhammad Djumhana, *Hukum dalam Perkembangan Bioteknologi*, (Citra Aditya Bakti 1995). [163]

7. Ibid.

8. Amrita Pande, *Wombs in Labor Transnational Commercial Surrogacy in India*, (Columbia University Press 2014). [12]

9. Fred Ameln, *Kapita Selektta Hukum Kedokteran*, (Grafikatama Jaya 1991). [124]

Norway, Singapore (sperm donation) and USA, England, Austria, Australia, Israel (donation ovum)<sup>10</sup>.

Surrogacy is literally equated with the term "surrogate mother" or "gestational carrier" which is defined freely as a woman binding herself through an agreement with another party (husband and wife) to become pregnant against the conception of the spouses, sperm cells and ovum cells implanted into her uterus and after childbirth, she is required to surrender the baby to the husband and wife based on the contract made<sup>11</sup>.

There are several forms of surrogacy<sup>12</sup>:

- Gestational Surrogate (there is medical abnormalities, there are rewards);
- Intrafamilie Surrogate (there are medical disorders without rewards);
- Commercial Surrogate (there is no medical disorder, there is a reward).

Gestational surrogacy can be done in the following forms<sup>13</sup>:

- Seeds of a wife's ovum cells are compounded with sperm seeds, and then it is inserted into another woman's womb. This rule is used in the circumstances of the wife having a good seed, but the uterus is removed because of continuous surgery or disability due to chronic illness or other causes.
- It is the same as the first form, except the seed which has been compounded when frozen and inserted into the mother's womb<sup>14</sup> overlap after the death of the couple.
- The wife's ovum is compounded with the sperm of another man (not her husband) and inserted into another woman's womb. This situation when the husband is barren and the wife there is a hitch or disability in the womb but the wife's wife in good condition.
- The husband's sperm is compounded with another woman's ovum, and then inserted into another woman's uterus. This state of affairs applies when the wife is overwritten by the disease in the ovary and her uterus is unable to bear the task of pregnancy, or the wife has reached the menopause stage.
- Sperm of husband and wife ovum compounded, then inserted into the womb of another wife of the same husband. In this state the other wife could conceive the child of her husband from the wife who should not be pregnant.

Surrogacy is a test-tube baby technique (in vitro fertilization), in which sperm and ovum of a married couple are processed in a tube, and then it is inserted into another person's uterus, not into the wife's womb. A woman who is willing to keep the embryo in her uterus is referred to as surrogate mother. Generally in the agreement between surrogate mother and married couple who want to make a surrogacy contract, the tenant is usually called intended parents. Surrogate mother is given the cost for all needs during the process of containing the child, during childbirth and after delivery. After Surrogate Mother gave birth, the child born must submitted to intended parent<sup>15</sup>.

Requirements to become a surrogate mother are as follows<sup>16</sup>:

- a women aged 40 and under;
- physically and mentally healthy;
- having a healthy and strong uterus;
- married;

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10. Fred Ameln, *Kapita Selektu Hukum Kedokteran*, (Grafikatama Jaya 1991). [124]

11. *Ibid.*

12. Desriza Ratman, *Op.Cit.* [135]

13. Sonny Dewi Judiasih, Susilowati Suparto Dajaan, dan Deviana Yuanitasari, *Aspek Hukum Sewa Rahim dalam Perspektif Hukum Indonesia*, (Refika Aditama, 2016). [12]

14. *Ibid.*, [13]

15. *Ibid.*

16. *Ibid.* [5]

- having at least one child, and
- there is approval from her husband.

Surrogacy can answer the problem of infertile couples who want to have children with genetics associated with one of the couples in question. Surrogacy is the only answer to certain forms of female infertility. A woman may not be able to fulfill her desire to get pregnant and give birth to a child, so one solution is through surrogacy<sup>17</sup>.

The presence of a way of pregnancy outside the natural way such as surrogacy is certainly the answer for infertile patients who really eager to have a child. In Indonesian law, the ways to get pregnant are regulated in Law Number 36 of 2009 on Health (Health Act) which divides there are two ways to get pregnancy; through natural pregnancy and through pregnancy out of the natural way. Pregnancy beyond the natural way in question is referred to pregnancy by the process of IVF, while pregnancy through surrogacy process is not explicitly regulated in the Health Act of the Republic of Indonesia. The absence of strict regulation on pregnancy outside the natural way especially creates legal uncertainty, one of which is on the legal status of the child born from surrogacy contract.

## **METHOD**

The type of research used in this paper is Doctrinal Research<sup>18</sup>, which was started by collecting legal norms from sources, analyzing relationships between legal norms, explaining difficult areas, and predicting future developments about the legal norms as a part of the writing conclusion. These legal norms were found in legislation especially in matters relating to the Politics of Law, Licensing, Legal Protection and the science of legislation.

## **DISCUSSION**

### **Legal Status for Children Born from Surrogacy Contract**

In Indonesia, the position of the child shall be governed by the provisions of Chapter IX of Law Number 1 Year 1974 on Marriage (Marriage Law), where in the provision of Article 42 of the Marriage Law, a legal child is a child born in or as a result of a legitimate marriage. When viewed from the formulation of Article 42 of the Marriage Law, it can be interpreted that if a child is born not as a result of legitimate marriage, he is classified as a child born outside marriage.

According to the provisions contained in Burgerlijk Wetboek (BW), by marriage a husband and wife obtain heredity. What is meant by "heredity" here is the relationship of blood between father, mother, and children. So, between father, mother and child there is a biological relationship. Children born from biological relationship and grown throughout the marriage are legitimate children (*wettige of echte kinderen*)<sup>19</sup>. In Article 250 BW, it is stated that every child born or grown throughout the marriage acquires the husband as his father, so that a child is a legitimate child when it is considered to be born of a legal marriage between his biological father and mother. Article 251 BW determines that a child born before one hundred and eighty days since a marriage of a husband and a wife can be denied by the husband, but the denial shall not be done in the following way;

- when a husband has known that his candidate wife would get pregnant before the marriage;
- when it has been present when the birth certificate is made and the deed has been signed or contains a statement that he cannot sign it;
- when the child is alive when born.

Meanwhile, other children, whose mothers and fathers are not bound by marriage,

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17. Myriam Hunter-Henin, *Surrogacy: Is There Room for a New Library Between the French Prohibitive Position and the English Ambivalence, Law and Bioethic, Volume 11*, (Oxford University Press 2008).[332]

18. Peter Mahmud Marzuki, *Penelitian Hukum*, (Kencana, 2016). [32-33]

19. Martiman Prodjohamijojo, *Hukum Perkawinan Indonesia*, (Indonesia Legal Centre Publishing 2007). [53]

are called illegitimate children, or children outside of marriage (they are also often called natural children or onwettige onechte of natuurlijke kinderen. Hence, against a child born out of wedlock, there is a biological relationship only with his mother but not with his father<sup>20</sup>. Under the provisions of Article 272 BW, the meaning of the child outside of marriage is divided into two: in a broad sense and in a narrow sense. A child outside marriage in broad sense includes the adulterous child, the child of the offspring, and the other outside child, while a child outside the marriage in narrow sense does not include the child of adultery and the offspring, the outsider in this narrow sense can be acknowledged<sup>21</sup>.

The child born on surrogacy contract will certainly cause some confusion in determining their parents. There are several parent combinations that can occur, namely<sup>22</sup>:

- 2 parents: the egg giver and the natural mother are the same and the real father without the marriage bond;
- 3 parents: the egg giver and the biological mother are the same, the real father, and the wife of the biological father;
- 4 parents: the egg giver, biological mother, biological father, and wife of the biological father; or
- 5 parents: the egg giver, sperm giver, biological mother, adoptive father, and foster mother

If we refer to Indonesia current legislation to find out legal status of a child born surrogacy agreement we must see the provisions of Law No. 1 of 1974 on Marriage (Marriage Law), especially those in Article 42 stipulating that a lawful child is a child born in or as a result of a legitimate marriage. In relation to a child born on a surrogacy agreement and in connection with rule in question the following status will occur<sup>23</sup>:

- If a child is born of a surrogate mother who is bound to a marriage (having a husband), the child will be a legal child of the woman and her husband.
- If a child is born of a surrogate mother who is not bound in marriage, the child will be a child outside the marriage of the woman.

To see the class of a child born from surrogacy contract, whether legitimate or illegitimate, we must first look at the marital status of the surrogate women, namely<sup>24</sup>:

- A child outside of an unrecognized marriage, if the surrogate woman's status is a girl or a widow, the born child is a "child outside of unrecognized marriage", a child born of fornication, the result of a husband or wife relationship with a male, other men or women.
- Legitimate child, if her surrogate woman status is bound in legitimate marriage (with her husband), the child born is a legitimate son of wife whose womb was hired, and her husband, until the husband declares "no" under Article 251, 252, and 253 Burgerlijk Wetboek by blood or DNA examination and permanent decision by court and also based on Article 44 paragraph (1) of Marriage Law.

Viewed from the above description and in relation to Marriage Act, if a child born of a surrogate bound in marriage the child is domiciled as the legitimate child of the woman and her husband, but if the child is born of a surrogate mother who is not bound in marriage, the child shall be domiciled as the offspring of that woman. By Indonesia positive law specifically related to a child born on surrogacy contract, when examined from the Marriage Law, a child born on surrogacy contract is the legitimate child of the surrogate mother and

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20. *Ibid.*

21. Rr. Murdiningsih Hayu Perwitasari, Tinjauan Umum tentang Anak Luar Kawin Berdasarkan Hukum Keluarga di Indonesia, (FH UI 2009), <<https://tinyurl.com/yar4chyg>>, accessed on 22-03-2018.

22. Sonny Dewi Judiasih, *Op.Cit.*[17]

23. *Ibid.* [18]

24. Desriza Ratman, *Op.Cit.* [120]

not the child of the intended parents who entrusted the seed in the surrogates' womb<sup>25</sup>.

### **Inheritance Rights of Children Born on a Surrogacy Contract**

In Indonesia inheritance law is part of family law that is closely related to human life. There has been a good deal of talk made on interpreting the law of inheritance. Jurists have different opinions in defining it. Wirjono Prodjodikoro<sup>26</sup> uses the term "inheritance"; he thinks inheritance is a matter of whether and how various rights and duties about one's wealth at the time of his death will turn to the living. According to R. Abdul Djamali<sup>27</sup>, inheritance law is the rules of how, from century to century, the continuation and acquisition of the rights of tangible and intangible assets from generation to generation. Meanwhile, H. M. Idris Ramulyo defines inheritance law as a set of legal rules governing who the heirs or legal entities are entitled to inherit the estate; how each of the heirs is positioned and how much each acquired fairly and perfectly.

In the law of inheritance of BW, there is a valid principle. It is that only the rights and obligation in the field of property law can be inherited. Therefore, rights and obligation in the field of family law in general are the right of individual, for example the rights and duties as a husband or as a father cannot be inherited, as well as the rights and obligations of a person as a member of a society.

There are three conditions of inheritance, namely<sup>30</sup>:

- a person who passed away (inheritors);
- there are those who are still alive as heirs who will inherit the heirs when the inheritor passed away (the heirs);
- there are some assets left by the inheritor (inheritance).

The inheritance in the BW is set forth in Book II of Material in the Chapter 12 on Inheritance due to death. This provision starts from Article 830 BW to Article 1130 BW. According to Article 830 BW, inheritance only takes place on death. According to the law or inheritance of abintestato and based on blood relation, a heir is classified into four groups, namely:

- Group I, the family in a straight line down, including children and their offspring, regardless of gender, time of birth from first or second marriage, as provided for in Article 852 BW.
- Group II, the second heirs of the family in a straight line upward, covering parents, brothers and sisters and descendants; if there is no husband or wife and his descendants, the inheritance falls into this second-blooded family.
- Group III, the third-class heirs of the blood family in the upright line if the heir does not leave the offspring or husband or wife, parents, brothers or descendants of brothers, the party who gets the turn is the next blood family in straight line to the so-called third group.
- Group IV, fourth class heirs of other families in a lateral line that is limited to the sixth degree, either from the father or from the mother.

Inheritance rights of a child born as a result of a surrogacy must be determined by looking at the legal status of the child based on the status of the surrogate<sup>31</sup>. The right of inheritance will be determined by the child's group based on the surrogate's marital status

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25. Sony Dewi Judiasih, *Op.Cit.* [ 30]

26. Maman Suparman, *Hukum Waris Perdata*, (Sinar Grafika 2017), h.7, yang dikutip dari Wirjono Prodjodikoro, *Hukum Warisan di Indonesia*, (IS Gravenage Vorkink van Hove 1962). [8]

27. R. Abdul Djamali, *Hukum Islam*, (Mandar Madju 2002). [112]

28. H.M. Idris Ramulyo, *Perbandingan Hukum Kewarisan Islam dengan Kewarisan KUH Perdata, Edisi Revisi*, (Sinar Grafika 2004). [28]

29. Subekti, *Pokok-Pokok Hukum Perdata*, Cetakan XXXII, (Intermasa 2005). [95-96]

30. H. Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, (Sinar Grafika 2008). [81]

31. Mutia Az Zahra, Rosa Agustina, dan Endah Hartati, 'Tinjauan Yuridis Terhadap Perjanjian Sewa Rahim (Surrogate Mother) Berdasarkan Terminologi Hukum Perdata', (Fakultas Hukum Universitas Indonesia, 2015), <<https://tinyurl.com/y7p3cqdy>>, accessed on 5-03-2018. [14]

or substitute mother as follows<sup>32</sup>:

Children outside of unrecognized marriage (when the surrogate woman is a girl or widow), meaning that the mother who gave birth, is not bound in legitimate marriage;

Article 43 of the Marriage Law: children born outside of a marriage only have a relationship with their mother and mother's family.

Article 288 BW: The child can investigate who the mother is.

Article 287 BW: For his biological father (due to his status as an adulterous child), the child is forbidden to investigate.

Thus, the right of inheritance of a child born on surrogacy contract is only related to the mother or mother's family; while for his biological father, the child has no right to demand it (vide Article 869 BW) as long as the father must provide sufficient living in accordance with his ability, (vide Article 867 jo 868 BW).

A child is legitimate (if the surrogate woman is bound in a legal marriage);

Article 42 of the Marriage Law: A legal child is a child born in or as a result of a legal marriage.

Article 250 BW: A child born or raised during marriage and acquires the husband as his father, the child is the legal child of the couple and she/he is entitled to full inheritance rights in accordance with the inherited law of surrogate's husband. However, if the husband does not admit the child as his child, the child's status becomes a child of adultery and her/his inheritance is the same as the above point, that is, he is denied through the provisions of Article 251, 252, 253 BW by filing to the Court for DNA testing and under Article 44 of the Marriage Law.

## **CONCLUSION**

Based on the discussion described above, the legal status of a child born on a surrogacy contract is not independent of the provisions of Law No. 1 of 1974 on Marriage, where a child born as a result of a surrogacy agreement is a legal child of a substitute mother and is not a valid child of his biological parents. In addition, the right of inheritance, in its arrangement in Indonesia, can be seen in the provisions of *Burgerlijk Wetboek*, that is, it has to do with the inheritance rights of a child born of surrogate mother as described in the previous chapter, i.e. if a person is classified as a legitimate child, she/he can inherit the full treasure of a successor mother with her husband. In contrast, if a child is classified as an out-of-breeder, he or she has only a civic relationship with the mother who gives him birth, or in this case, with surrogate mother.

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32. *Ibid.* [121]

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