



## The Rights of Alternative Mother against Real Mother (Rental Womb)

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### ABSTRACT

The story of human creation is a great and amazing and mysterious. Whatever is the creation way of first man and his mate, the creation of next men is by combination of two gametes from man's and woman's body. The cell from man's body is sperm and oocyte is the cell from woman's body. Many interested in having child, but there are problems in this regard including sterility in some persons. Nowadays fortunately some solutions are discovered for these problems by scientific methods even for those people who aren't able to produce sperm or in ovulation. Artificial insemination is one of these solutions. There are various reasons that lead people towards artificial insemination. This is sometimes because of a disease for example damaged sperms or oocytes, or sometimes other failures in sexual organs may prevent combination of gametes. In some cases womb can't keep zygote in itself so that it can't develop. There are various methods to cure these diseases. Using these methods some extremist feminists who interested in baby can release themselves from male partners. There are persons who used their sperm and oocytes or womb for monetary profits. People use artificial insemination for different aims, for example some prefer to have a child with specific features but their partner lacks such features genetically, some women have a heavy social role then prefer another woman undertakes pregnancy of their child. Until now Iranian legislators and other responsible officials didn't interested in such matter. Ahl-e-Beit fiqh association –Iranian representative in Organization of Islamic Conference's fiqh council- is the only entity that in this regard attempted to issue a publication in 1994 that included about fourteen fiqh views about artificial insemination which were related to happened problems. There are disagreements among these fatwas about usage or rejection of others' sperms and oocytes by infertile couples and legal-fiqh issues of such pregnancies.

**KEYWORDS:** Alternative mother; real mother; rental womb; child

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### INTRODUCTION

The story of human creation is a great and amazing and mysterious. The God created Adam the father of human from soil and inspired life into both of them.

Whatever is the creation way of first man and his mate, the creation of next men is by combination of two gametes from man's and woman's body. The cell from man's body is sperm and oocyte is the cell from woman's body.

A new being which is produced from combination of sperm and oocyte resides in woman's womb and develops during pregnancy period, after experiencing different states and stages it enters the world as a male or female one.

Many interested in having child, but there are problems in this regard including sterility in some persons. Nowadays fortunately some solutions are discovered for these problems by scientific methods even for those people who aren't able to produce sperm or in ovulation. Artificial insemination is one of these solutions.

There are various reasons that lead people towards artificial insemination. This is sometimes because of a disease for example damaged sperms or oocytes, or sometimes other failures in sexual organs may prevent combination of gametes. In some cases womb can't keep zygote in itself so that it can't develop. There are various methods to cure these diseases. Using these methods some extremist feminists who interested in baby can release themselves from male partners. There are persons who used their sperm and oocytes or womb for monetary profits. People use artificial insemination for different aims, for example some prefer to have a child with specific features but their partner lacks such features genetically, some women have a heavy social role then prefer another woman undertakes pregnancy of their child. Until now Iranian legislators and other responsible officials didn't interested in such matter. Ahl-e-Beit fiqh association –Iranian representative in Organization of Islamic Conference's fiqh council- is the only entity that in this regard attempted to issue a publication in 1994 that included about fourteen fiqh views about artificial insemination which were related to happened problems. There are disagreements among these fatwas about usage or rejection of others' sperms and oocytes by infertile couples and legal-fiqh issues of such

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pregnancies. Also it must be said that even before opening of first infertility treatment center (1988) many Iranian faqihs and physicians showed their interest to this matter. Gradually Iran becomes a treatment center for this issue in Middle East. The subject matter of reproduction is discussed in fifth parliament in 1998. Primary bill was prepared after consultation by judicial commission and 110 representatives signed it. After final enactment in second course, hence this bill finalized in 2003. This law has five articles and one provision but yet there are many unanswered problems.

### **Who is Mother?**

Mother in Persian is defined in Dehkhoda dictionary as follows: “a woman who gives birth to child or children.” Mother in English is defined as “a woman who gives birth to a child.”

Previously the mother word was so clear and obvious that there was no need to be defined, but after medical developments and emergence of surrogate mother we encountered some difficulty to define it and to answer the question of who is mother. Different legal systems tried to answer this question, for example in Jewish legal system a child is Jewish only if his/her mother is Jewish. And it is important to know that who is the owner of oocyte.

### **Mother's Rights**

Forbiddenness of Marriage, article 105 family law

1- Marriage to father and ancestors and to mother and female ancestors, whatever upward, is forbidden.

Alimony

Article 1196- In relations among genealogical relatives along vertical line, upward or downward, they are obligated to supply alimony to each other.

Article 1199- The alimony of children is upon father, after he died or if he is unable it is upon paternal ancestors -according to closest ancestor rule- and if there is no paternal ancestor or they are unable to do their duty, then it is upon mother.

Article 1223-A woman without consent of her husband can't accept the role of guardian.

Article 862- According to lineage of father and mother and children, the offspring of children inherit.

Article 875- The condition for inheritance is that inheritor to be alive after the death of bequeathed one. And if there is a pregnancy, this child only can inherit if its conceiving was occurred before death of bequeathed one and if to be alive after birth even died immediately.

Who is surrogate mother?

Different kinds of surrogate mother,

According to the method of genetic relation between surrogate mother and mandatory or demander parents with embryo there are three kinds of surrogate mother.

### **Total Gestational Surrogacy**

In this method the surrogate mother is conceived by reproductive auxiliary techniques and by embryo produced from parents' sperm and oocyte. This kind of surrogate mother has no genetic relation with child and she bears the embryo that belongs to mandatory parents.

### **Artificial Insemination Surrogacy**

In this case that called as partial mother also, the surrogate mother bears an embryo which is produced from her oocyte and mandatory father's sperm. The surrogate mother has a genetic relation with child and the embryo is produced from mandatory father's sperm and her oocyte.

### **Ovule/Embryo Donation Surrogacy**

Infertile mandatory parents in this method used donated ovule or embryo for artificial insemination and fertilization of surrogate mother. This method in terms of genetic relation between child and demander parents divided into two states:

A: the embryo produced from mandatory father's sperm and donated ovule will be implanted in the surrogate mother's womb. Surrogate mother has no genetic relation with child, but mandatory father is related to it.

B: The donated embryo produced from donated sperm and ovule will be implanted in the womb of surrogate mother. The surrogate mother and demander parents have no genetic relation with child.

### **Legislations about the Way of Embryo Donation to Infertile Couples**

Enactment of embryo donation method to infertile couples in Islamic Counsel Assembly:

(This law included 5 articles that is enacted on 20th July 2003 and then confirmed by guard counsel on 30th July 2003).

Article 1: Hereby all professional infertile clinics are allowed, observing all conditions stated in this law, to attempt after written agreement to transfer the embryo produced from out-womb insemination belongs to legal couples to a woman's womb that her infertility is proved by medical tests and after marriage (one or both).

Article 2: The demand for donation of embryo must be applied by both of wife and husband and to be submitted to the court, then court will issue the permit for embryo reception according to following conditions:

A: The couple must be unable to pregnancy and must be prone to receive the embryo.

B: The couple must have moral qualification.

C: None of them to be insane and under guardianship.

D: None of them to be afflicted with incurable diseases.

E: None of them to be addicted.

F: And the couple must have Iranian nationality.

Article 3: The duties of receiver couple –nurture, upbringing, alimony, respect and so on- are same as regular parents.

Article 4: determination of demander couple's qualification is upon family court and its legal procedure will be processed without queue, and non-qualification rule is revisable.

Article 5: Executive instruction for this slaw must be prepared by health ministry with justice ministry within three months and then it must be enacted by administration.

### **The Contract of Surrogate Mother**

#### **The Necessity of Contract**

This contract undoubtedly is one of the most private and at same time the most complex contract in the life of its parties, and it is necessary for harmonization of parties' obligations during artificial insemination and pregnancy and delivery, and for regulation of involved persons' activities. This contract has an essential role in elimination of parties' worries and preventing possible claims.

Woman conceiving and childbirth for another one in a family that the child isn't belong to them can lead to doubt of adultery in the mind of others. Therefore the surrogacy contract can be a justification for surrogate mother's pregnancy.

The Contract's Parties:

A: Infertile couple (mandatory parents) that is demander of embryo and is obligated to upbringing of child.

B: Surrogate mother who pregnancy and delivery of child is upon her and agrees to cut her relation with child immediately after birth.

#### **The Contract's Secondary Persons**

A: The husband of surrogate mother must agree to avoid sexual intercourse with her wife during certain times and also she to be under medical tests aiming to prevent any contagious disease.

B: Infertility professional physician who as a real and legal person must be confirmed by mandatory parents and surrogate mother.

C: Midwife or obstetrician. There are some advantages from services by midwife or obstetrician for surrogate mother during pregnancy and delivery, also about issuance of birth certificate.

D: Psychological consultants for resolving any possible worries after child delivery to infertile parents.

E: Maternity or hospital that child will be delivered in it. It is upon this place to register information such as parents' name during delivery process and also information for child's identification certificate.

F: Official agent. The government must be sure that mandatory parents will pursuit their duties about child for example child birth and his/her identification issuance and also affairs about nurturing and education.

Obligations of Surrogate and Mandatory parents in the Contract:

A: Surrogate mother directly causes a financial commitment for mandatory parents.

B: The commitment of surrogate mother to submit the child to the mandatory parents is a legal obligation and it can be said that they produced this commitment by their agreement.

C: Mandatory parents are obligated to pay an amount to surrogate mother.

#### **Legal Effects of Mother Surrogacy**

Forbiddenness of marriage, child custody, alimony commitment, inheritance.

Forbiddenness of Marriage

Marriage among relatives-in-law and genealogical relatives according to civil law is forbidden to certain extent.

Mandatory father is legal father and surrogate mother is legal mother in artificial insemination surrogacy and genealogic relation is established among these two and the child. Mandatory mother has no relation with child and a relation between these will no occurred.

There are three theories about legal mother which according to them the legal mother of child is biological mother or womb owner, or both of them is the legal mother. Using foster relation in article 1044 and 1047 of civil law it is stated that foster relation in terms of marriage forbiddenness is similar to relative-in-law and is regarded as kin but about other things including guardianship, custody, alimony, and inheritance no duty and commitment will be established. We can discuss about this matter according to material, social, emotional, psychical, and moral reasons.

#### **Material Reason**

Child growth from breastfeeding a child by foster mother is more than growth of child by surrogate mother because embryo in her womb is developed and takes soul.

#### **Social Reason**

A child who is feeding in a woman's embrace is considered as her child, and according to convention a woman who borne embryo and finally gives birth to it is considered as child's mother.

#### **Moral or Emotional or Psychical Reason**

Emotional relation between surrogate mother and a child who was nine months in her womb is proved medically and this leads to high effect emotionally and psychically.

Consequently surrogate mother is equal with foster mother in terms of marriage forbiddenness.

#### **Custody**

##### **Custody Meaning**

This verbally means keeping, nursing, upbringing, and caring of child and according to Imamiyah faqihs' definition custody is guardianship and sovereignty over child upbringing and related affairs including keeping, putting in clean bed, washing clothes and so on. Fiqh defines this as follows: there is a sovereignty over child that its effect is upbringing and nurturing of child and doing best for child from keeping to putting in bed and cleaning.

##### **Base of Custody Relations**

- 1- Family consistency
- 2- Child protection

According to article 12 of family law the child custody is a right and a duty for parents, and they must help each other to strengthen family foundations and child education. Then according to laws there is no right of custody for surrogate mother in surrogacy contract and with attention to child prudence.

##### **Alimony Obligation**

Alimony verbally means expenditure and financial support and monetary amounts that are needed for family. Its fiqh meaning is close to its verbal meaning, or what is needed for subsistence. The alimony of for the child from surrogate mother is same as alimony for relatives, which is one of legal relation's effects. The relatives are included relatives-in-law, genealogical and foster relatives. But here from relatives we mean genealogical relatives. Because there is no commitment for relative-in-law and this is so among foster relatives also. And about genealogical relatives this commitment is only for those that have a direct (vertical) relation of kinship. This is emphasized in article 1169 of civil law.

According to these results now we can answer to the question that how the child during pregnancy of surrogate mother deserves alimony. This alimony is considered for the embryo during pregnancy period, therefore mandatory father provides alimony for his child who is in the surrogate's womb, and because this embryo can't feed by its mouth, this alimony will be used by embryo through surrogate mother's blood.

It must be mentioned that this alimony will be received by surrogate mother and it has no relation with her right to receive alimony from her husband, because according to article 1107 of civil law the woman's alimony isn't conditioned to poverty or richness of husband and even if wife is rich she can demand her alimony from husband, and on the other hand these two rights have no interference with each other, because mother's alimony (according to wife-husband relation) is upon the husband of surrogate mother which in this relation it doesn't matter one of them

be rich or poor, and the alimony of pregnancy (according to kinship) is upon mandatory father which will be received by surrogate mother.

### **Inheritance**

The Legacy of Child born from Rental Womb

This subject can be discussed into two parts.

The legacy between the owner of oocyte and child born from rental womb is established since there is a genealogical relation between oocyte owner and child. According to article 861 of civil law genealogical relatives can inherit from each other and there is no doubt that child is relative to oocyte owner.

Some faqihs maintained in this regard as following:

- 1- Ayat-Allah Mohammad Fazel Lanlari: "oocyte owner and womb owner make an agreement with each other."
- 2- Ayat-Allah Seyed Ali Sistani: "caution must be considered regarding legacy for both."
- 3- Ayat-Allah Mohammad Fazel Lanlari: "it inherits from owner of semen."

### **Inheritance between Child and Rental Womb Owner**

If we accept that there is a genetic relation between womb owner and child, and because during pregnancy the needed materials will be delivered to child through blood current, so this leads to a genealogical relation. A genealogical relation is a reason for inheritance according to article 861 and 862 of civil law. Therefore child and womb owner inherit from each other. But if we consider womb owner same as foster mother, then foster mother and child in terms of marriage forbiddenness foster are as mother and child and there is a forbiddenness between their children, but a genealogical relation isn't established which may lead to inheritance. So they don't inherit from each other.

### **Conclusion**

Regarding above discussions we can realize that there are disagreements about any subject, but parties can reach a compromise on the condition of inheritance and alimony and so on according to contract, and also some faqihs have agreement with this. Another important point is that identity of oocyte donator and embryo donator must remain secret and it isn't possible that their identities to be unveiled except by court rule. But now there are many questions and details that are discussable including deprivation and inheritor relation.

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