

# Jurisprudence-Legal Investigation of the Relationship between the Child Born by Gestational Surrogacy with the Egg and Womb Donator

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## ABSTRACT

Sterility is one of the great problems of some of the couples. One of the new methods is using gestational surrogacy and one of the ambiguities is the relationship between the children born with the egg and womb donator. According to Iran rights, there is no definite legal and Islamic rule in this regard. The present study at first determined the relational mother of the child and then the relationship between the children and other woman is determined. Based on the views and the evaluation of their coordination, it seems the egg donator is relation mother and the womb donator is foster mother.

**KEYWORDS:** Gestational surrogacy; Child; Egg donator; Womb donator; Relation; Foster

## INTRODUCTION

One of the greatest problems of some couples depriving them of having child is sterility. Today, by new methods in sterility treatment, this problem is less emphasized and the sterile couples can have child by these methods and they help the couples to have child. Gestational surrogacy is one of the methods by which a woman has another one child in her womb and in a contract, after delivery gives the child to the mentioned people (MacCallum1 et al., Surrogacy: The experience of commissioning couple, 1955) (MacCallum1, Lycett, Murray, Jadva and Golombok, Surrogacy: The experience of commissioning couple, 1334).

This method can be used first: The woman has mollerin duct dysfunction or without womb but with natural eggs).

(Beski, gorgy, venkat, l. craft and Edmonds, gestational surrogacy: a feasible option for patients with Rokitansky syndrome, 2326).

Second, the woman has no womb due to hysterectomy or other womb problems (Meniru and L.Craft, Experience with gestational surrogacy as a treatment for sterility resulting from hysterectomy, 51).

Third, the woman is suffering from chronic diseases as heart and cancer and pregnancy threatens the patient health (Raziel, Eight years' experience with an IVF surrogate gestational pregnancy program, 254).

Fourth, the woman is suffering from recurrent miscarriages and he womb cannot keep the child to the end of delivery (Carp, M.Dirnfeld, J.Dor and G.Grudzinskas, ART in recurrent miscarriage: preimplantation genetic diagnosis/screening or surrogacy?, 1503).

Fifth, the woman is suffering from genetic diseases and shouldn't be pregnant due to disease transfer (Nayebzade, legal investigation of new methods of artificial fertility, 88). Besides the above items as medical reasons, we can refer to the social reasons as the employment of woman and life style and appearance but this reason has no follower (ibid, 90).

In this method, at first the barren couples and womb donator is evaluated by medical and consulting investigations from various dimensions to be sure of their mental and physical health and avoid spread of infectious diseases as AIDS. It is recommended to freeze the embryo and then test the infertile couples in terms of AIDS (Ibn Sina research center, surrogacy, 19) and then by In Vitro Fertilization (IVF), active egg and sperm are obtained of woman and man in in vitro environment and they are beside each other for 48 hours and then the embryo is kept to achieve stage 4-8 in incubator and then it is put inside womb to continue growth (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 17).

Using gestational surrogacy dates back to the past and it is referred in Bible: Sara said to his husband Ibrahim to marry Hajar, her maid due to her sterility and Ismail was born (\* R.Brinsden , Gestational surrogacy, 483). The first case of gestational surrogacy is developed by Utian et al., (1985)( M.Goldfarb, Austin, Peskin, Lisbona, Desai and Loret de Mola, Fifteen years experience with an in-vitro fertilization surrogate gestational pregnancy programme, 1075). In 1986, the reports showed the birth of 500 infants by this method (Ibn Sina research center,

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surrogacy, 190. Surrogacy was raised for the first time in Iran in 2001 by some fertility and sterility clinics (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 16) and it has developed considerably.

Surrogacy created some challenges in jurisprudence, legal, morality, psychological and sociological aspects and the most important items are the ambiguity of the relationship between egg and womb donator with the born child. As there is no definite legal or Islamic order in Iran law, and embryo donation law to infertile couples (approved 2003) didn't refer to this issue and there is no alternative except referring to the general rules and following article 167 of constitution and article 3 of civil legal procedure regarding referring to the valid jurisprudence resources and verdicts and the relationship between such child and egg and womb donator can be determined.

The present study explained different types of surrogacy and determined the relational mother of child and after determining the relational relationship of one these two women and child, the relationship of the other woman and child is investigated.

## DISCUSSION

### Different types of surrogacy

Various types of surrogacy are divided in terms of genetic relationship between womb donator and infertile couples with child are divided into three groups (Nayebzade, the legal investigation of new artificial fertility methods, 79).

**Gestational surrogacy:** In this method, infertile egg and sperm are fertilized in lab environment and the embryo is transferred to the donator womb and she carries the embryo until delivery and this child has no genetic relationship with her (Goldfarb et al., Fifteen years experience with an in-vitro fertilization surrogate gestational pregnancy programme, 1075). This method is called Full surrogacy or host surrogacy (R.Brinsden , Gestational surrogacy, 484).

**Artificial Insemination surrogacy:** This method is called Traditional surrogacy and is based on the agreement between the infertile couple with womb donator and sperm of the infertile man is combined in vitro with the egg of surrogate mother and then the embryo is transferred to her womb and surrogate mother gives the child to the infertile couple after delivery (Goldfarb et al., Fifteen years experience with an in-vitro fertilization surrogate gestational pregnancy programme, 1075). This method is called Straight surrogacy and Partial surrogacy and there is a biological relationship between the surrogate mother and the child as she carries the embryo of her egg with the sperm of infertile man (R. Brinsden, Gestational surrogacy, 483).

**Surrogacy by donated embryo or egg:** In this method, a infertile couple uses donation egg or embryo for artificial insemination and pregnancy of surrogate mother. This is divided into two cases in terms of the genetic relationship of the child with the couples trying to have child:

**Egg donation surrogacy:** In this case, the woman has no egg and uses the donated egg from the third woman and the embryo of the infertile man and donated egg is put into the donated womb. In this method, surrogate mother and infertile woman have no genetic relationship with the child (Nayebzade, legal investigation of new methods of artificial fertility, 80).

**Embryo donation surrogacy:** In this case, the donated embryo or the embryo of donated sperm and egg is put into the womb of surrogate mother. It means the embryo combined from the sperm and egg of other couples or men and third women in lab is transferred to the surrogate womb and after delivery, the child is given to the infertile couple. In this method, the infertile couple and surrogate mother has no genetic relation with the child (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 35).

### Relational mother

To determine the relational mother of the child, at first the relation concept should be determined. In the rules, there is no definition of relation and it means nature, race, relation (Moein, Persian dictionary, 1295, Dehkhoda, dictionary 2986). In French, Filiation is equal to relation term and it means generation, family and continuity (Emami, comparative study of relation in Iran and France law, 6).

In legal terminology, relation is the interest between two people as a child is born of one of them or their birth of third party (Brojerdi Abde, Islamic law generalities, 280). Some of the law makers distinguished between relation and relational closeness and according to the m, the above definition is about relational closeness and it is called general relation. Relation (called specific relation) includes only blood and biological relation between the children and parents (Emami, civil law, 4, 262, Safayi and Emami, Family rights, 2, 41, Katuzian, civil rights of family, 2, 1).

Thus, relation is a definition of specific relation and in the past relation is combining sub principles to the main principles (Marashi Najafi, Relation study, 27).

By determining the source of attributing the child to parents, attributing the child to father is based on the presence of child of his embryo and the man owning the sperm is called the father of child. Thus, there is no problem in father child relationship. Thus, in attributing the child to mother as biologically (via egg) and

physiological (keeping in womb) is associated with child and it is ambiguous which relation is valid and the jurists presented various theories in attributing the child to mother.

### **Determining the jurists theories regarding the source of attributing the child to mother**

First theory: Birth the criterion of attributing the child to mother.

These jurists stated in proving their theory as: During the revelation of verses and traditions, people had no information of new medical information that child is the result of sperm and egg combination and woman womb is used for embryo growth and the considered the womb donator as the mother. It seems that their judgment is based on child born, the mother was the one bearing the child and this was also accepted by custom law (Mohaghegh Damad, jurisprudence and legal issues of transferring embryo, cited in Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 168).

The most important reason of this group is verse 2 of Al-Mojadele «... » they are not their mothers, their mothers are those who bear the child). They believe that this verse only consider the one who bear the child and it rejects those who were considered their wives as their mother but it is proved in principles science and it is not specific and philosophy is valid (Rezania moalem, Medical beliefs from the view of jurisprudence and law, 318). Rohany in some issues in Lesan Shar is based on custom concepts and if the jurist is on contrary, there is no defined rule about mother egg donation and the main focus is developing in womb (Merghati, children rights in gomet donation, 351).

Other verses in this group are including:

1-Verse 15 of Ahghaf: « » we advised men to his parents, his mother got pregnant by suffering)

2-Verse 14 of Loghman verse:” « » we advised men about his parents, his mother got pregnant as she was weak).

These verses are referred as God considers the mother who gets pregnant and tolerate pregnancy suffering and if a woman is not pregnant and doesn't tolerate pregnancy suffering, she is not the mother (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 169).

Saheb Javaher also followed this view and consider the criterion of attributing the child to woman as bearing the child in case of infertility of man with his wife and pregnancy of the maid, it is said:” the child is not belonging to the wife as it is not born of her (Najafi, Javaher Al-kalam Fi Sharh Sharae Al-Islam, 41, 398).

3-Verse 6 of Zomar: «... »

(created you in the womb of mothers a creation after another creation in the three darkness)

4-Verse 8 of Raad: « ...» God knows of what is in womb, what is reduced and increased in womb).

They believe the role of womb role and according to medical knowledge, womb has important role than container for embryo and we can not ignore the dependency of child to a person carrying him in womb and consider the verses as a reason of this issue.

Ayatollah Araki supported this view and said: the embryo of egg donator is dependent upon the womb donator and this is the second component of full reason of bearing child. Thus, the child is belonging to the second, womb donator (Araki, Toziholmasael, 598, cited in Nayeبزade, legal investigation of new artificial fertility methods, 278).

Other supporters of this group are Ayatollah Tabrizi, Ayatollah Khuyi and many jurists of Sunna (Rezania Moalem, medical fertility from the view of jurist and law, 318).

Second theory: Birth and growing, the criterion of attributing the child to mother.

This group believes both egg and womb donator are legal mothers of child and the child has two mothers. They believe that the child is not arising from egg and it is passing 9 months waiting in womb and these two roles can not be separated in child creation and it can not be compared with foster mother. Reproduction is impossible in case of dysfunction in each of the roles. Thus, the role of egg and womb donator is developing issue and can play important role in attributing child to both of them and attributing mother to them has real meaning. Despite attributing the term mother to foster mother as its virtual meaning (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 171).

Dr. Merghati proved this theory and said today from medical aspects, this is possible egg nucleus is separated of cytoplasm around the nucleus in egg and the nucleus of another woman egg is replaced and they are common from biological aspects. In this case, both women are effective in completion of human embryo. Thus, by assumption that an egg is belonging to a woman and womb to another woman, both are biological mothers of the child (Merghati, children rights in donating Gomet, 352).

There are no verses and traditions about this theory and some jurists believe to belong the child to embryo owner by gathering cited reasons and cited reasons belonging the child to egg donator consider these two women as the mother of child but Dr. Merghati believed that we can not prove this theory via the above theory and we can prove two mothers of the child (ibid).

Ayatollah Ardebili is one of the jurists who accepted this theory and considered motherhood for the womb

donator (Research on Embryo institution of Ayatoolah Ardebil cited in Rezanian Moalem, medical fertility from the view of jurisprudence and law, 465).

Third theory: Development, the criterion of attributing the child to mother.

This group considers the egg donator the mother of child and refers to literal term of "Om" as "Om" means" « » and attributing it to the women bearing the child is that the embryo belongs to him (Merghati, Children rights in donating Gomet, 352) and motherhood criterion is like father criterion and as the first stage of child creation is based on mother water, thus, egg donator is the mother of child as she has important share in the first stage of embryo formation (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 172) and believed that establishment of embryo in womb is not attributing the child to womb donator. Dr. Shahidi believed that:" there is no legal relation between the womb donator and the child, as the egg of this woman is not important in formation of child and developing in womb doesn't fulfill relation and the child is only dedicated to the embryo owners (Shahidi, legal condition of lab child, 184).

Other followers of this theory referred to the jurisprudence and legal rules regarding the plant and in accordance to article .33 of civil law, the owner of seed is the owner of plant and as this seed is grown in another land. If we liken the plant to human being, based on this theory, egg donator is the legal mother of child and surrogate mother has no relation with child (Mehrpour, an attitude to legal and Islamic condition of artificial fertility, 184).

One of the followers of this theory is Imam Khomeini, Ayatollah Sanei, Ayatollah Momen Qomi (Rezanian Moalem, medical beliefs from the view of jurisprudence and law, 321).

### Evaluation of theories

Evaluation of first theory; It seems that referring to verse 2 of Mojadele can not indicate their aim as first the verse can not be considered and only rejects those only considering their wives as their mothers. The verse doesn't consider "Om"(ibid). Second the main meaning of Valad is as: «

»

The main meaning is taking something out of another thing. This principle (formation of one thing from another) in all different interpretations of Valed (Mostafavi, Al-Tahghigh Fi Kalamat Al-Quran Al-Karim, 199, cited in Rezanian Moalem, medical beliefs of jurisprudence and law view, 322).

Thus, the verse considered that your mothers are those creating you and your women are not mother as they didn't created your and according to this meaning, the verse is not referring to bearing and the source of child is egg donator and it shows the true meaning and various verses referred to father as "Waled" as verse 3 Balad and «

» as the father doesn't bear and he creates.

They also referred to verse « » and « ». The child is formed in mother womb and the mother is responsible for pregnancy. Any person with these two descriptions is mother and this issue can not be proved by these verses. These verses don't show the mother is the one who carries or tolerate the suffering and advise the human being as when you were embryo; mother carried you and is good to them. Second, the above verses have no meaning and reminding pregnancy in these verses is based on this issue and this was not such and it is possible he is a mother who doesn't carry and it is possible a woman carries a child but is not his mother like the woman who is illegally pregnant and she is not considered mother (Gheble Khubi, the rules of children as donating Gomet regarding inheritance, 370).

The evaluation of second theory: This group believes that if the egg is by one woman and womb belongs to another woman, the child has two mothers but binding to this theory is not problematic. It is opposite to Quran verses as in verses 12-14, of Momenun verse it said: «

...»

It can be said the verse considered the human origin as embryo and introduced womb as a place keeping the embryo and embryo means combining sperm and egg in Holy Quran. Like verse 2 of Insan: «

» Some interpreters believe « » is an attribute of embryo and it is single

and combined embryo is man and

woman water (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 180).

Second, this theory requires the establishment of new jurisprudence as in Quran inheritance share of parents is case of the lack of child is 1/3 of mother and the result is for father. If the womb donator is mother, regarding the gathering of heirs of assumed one, at first the owners have their share of the inheritance and the rest is given to the relations. Thus, we should give 1/3 of inheritance and the money is dedicated to the father and it is on contrary to the Quran or if 1/3 is given to both mothers and they can divide the share and the above problem is raised as another form (ibid). Thus, such is not correct. According to the Holy Quran in deceased polygamy and in accordance to verse 12 of Al-Nisa verse « » the female plural pronoun and "L" is used and one-eights or one-fourth is dedicated to all the wives (Ghebe Khubi, the

investigation of children rules of donating Gomet regarding inheritance, 370).

The evaluation of third theory: According to the author, this is correct and womb is beyond the container and feed for embryo but this awareness of womb roles has no positive effect for embryo. And judgment doesn't change custom in abstracting child of woman and man embryo) (Nayebzade, the legal investigation of new artificial fertility methods, 275). In the past, common custom of mother was pregnancy and child formation is bearing and there is no way. Pregnancy is custom criterion for this issue that woman womb interferes in embryo womb. By medical knowledge progress, the scientific reality of embryo formation is proved and pregnancy is not absolute and proving the contrary to view is possible legally (Rezania Moalem, medical fertilities from the view of jurisprudence and law, 322). There are Quran verses supporting this theory as:

a. Verse 54 of Forghan: « ...» he is the one being created of human water and put him based on relation on blood and marriage....). In this verse, relation is the result of formation of embryo. This meaning is used of interpretation of “ ” to “ ” and subtract the “ ” on “ ” (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 175).

b. Verse 2 of Insan: « ...» (we created man of embryo...) combining means mixture and it is the embryo of combining sperm and egg and it is combined embryo in legal and jurisprudence and based on the meaning, the verse refers to the source of woman egg in child birth (Rezania Moalem, medical beliefs according to jurisprudence and law view, 323).

### **The evaluation of views**

As it was said, the source of attributing child to is developing child of its embryo. Thus, relation mother of child in various types surrogate womb:

- a. In case of gestational surrogacy: wife of infertile couple is the relation mother of child.
- b. In traditional surrogacy: Surrogate mother as she is egg and womb donator is relation mother of child.
- c. In embryo and egg surrogacy: The egg donator woman is the relation mother of the child as she is unknown and donate embryo only for benevolence.

### **The relationship between womb donator and child**

Determining egg donator as relation mother of child doesn't mean womb donator woman has no relation with child. Ignoring the second case of surrogacy in which the womb donator is the relation mother of child and it is outside of the issue, the main discussion is that whether we can attribute motherhood to womb donator and in terms of marriage prohibition, foster mother can be considered for her and there is marriage prohibition as it is in foster closeness? (Mehrpour, attitude to legal and Islamic condition of artificial fertility, 189). To do this, at first we refer to foster closeness.

### **Foster closeness**

Foster means breastfeeding. Breastfeeding of a child of the mother as is not her biological and relation mother and based on the conditions stipulated by law, it creates a kind of relative relation and this is called foster closeness and it is specific for Islam law (Safayi and Emami, family law, 274) and it is relative between two people for milk of one of another or breastfeeding two children of a person (Emami, civil law, 266, 4).

According to article 1046 of civil law, foster closeness by the conditions is in terms of marriage prohibition in relation closeness. It can be said fostering only causes prohibition and in other cases as custody, guardianship, marriage money and inheritance, there is no binding. About the reason of this prohibition or philosophy of this order, various jurisprudence and legal justifications are presented as creating blood relation between child and foster mother, creating biological relation as relation closeness and etc (Safayi and Emami, family law, 275).

According to article 1046 of civil law, it forms foster closeness and it is based on Emamieh jurisprudence as: First, the milk is based on legal delivery, second the milk is directly from the breast, third, the child is breastfed for one day or continual 15 days, without eating another food or the milk of another woman, Fourth: Breastfeeding before the end of two years of child birth, fifth the breastfeeding is of the same wife and husband.

### **The comparison of the relationship between surrogacy and foster relation**

Based on the role of womb from medical aspects as accepting embryo and controlling its aggressive growth and controlling defensive system of body, to avoid child excretion and food and breathing transfer and embryo excretion (Nayebzade, the legal study of new artificial fertility methods, 276) and it should be investigated whether by criterion unity or foster closeness priority, the relationship between child and womb donator can be attributed or not? The major reason regarding the foster closeness, it can be said physical growth of breastfeeding child is based on his nutrition of a matter made of breastfeed woman (Najafi, Javaheralkalam Fi Sharh Sharae Al-Eslam, 274, 29). This physical growth is determine by three methods of (growing flesh and stability of child bone), duration (a full day) and frequency (full 15 times)( Ameli, Legal issues of Lame Dameshghie, 141). Growing flesh and bone in

jurist traditions is mentioned as the regulation of prohibition but their expression is as we can not consider the mentioned regulation to jurist term as defined reason (Shahidi, legal condition of lab child, 185).

This criterion, the physical growth of child is based on the body of woman and it is mostly about womb donator. Embryo growth stages in Holy Quran is embryo, Alghe, Mazghe, Ezam, Lahm (flesh) † and these are passed in surrogate mother womb. After the formation of placenta, womb transfers food between surrogate mother and embryo and the embryo grows. It can be said if the criterion is spreading prohibition in fostering as the physical growth of child is due to feeding by a matter made by produced breastfeeding woman body, the same is true in surrogate womb and development and formation of child in womb and feeding from the womb donator can be marriage prohibition.

Other points can be presented as social relations and ethical and emotional values as people were considering the breastfeeding child in the arm of a woman as his mother and social support of the family of the child in the body of woman is one of the reasons of fulfilling relative fostering closeness (Emami, civil law, 292, 4) and this shows the second condition of article 1046 of civil law. This criterion is also considered in surrogate womb and family support of the person in womb of woman and social attitude of people about the child in womb is higher than the closeness of breastfeeding.

Regarding the second point (ethical and emotional values), some people believe there is an emotional relation between woman and child and breastfeeding causes that the child is mentally affected by the woman (Safayi and Emami, family law, 275). It can be said the emotional relation between child and surrogate mother is higher than the woman taking in her arms the child for breastfeeding and medical science proved that most of the features of child is arising from the type of feeding and mental stages of mother in pregnancy. From morality aspects, it is not accepted the child of surrogate womb can marry the women developing the child in her womb (Mahdi Shahidi, legal condition of lab child, 185).

The jurist policy in obligation of breastfeeding is based on the legal carriage in support of marriage and family and this policy is consistent with the surrogate womb as this improves the foundation of families that are dissolved due to infertility.

Some people believe the growth origin in jurisprudence leads to prohibition spread is milk not other internal materials used by child in embryo stages for growth (ibid, 186). It can be said the important point is being arising from another that both in relative closeness and in fostering closeness leads to prohibition and first one is via blood and second via milk. Thus, milk has no feature in this regard and these materials are inside the woman body and this leads to relation and milk has special consideration (Hamdolahi and Roshan, comparative jurisprudence and legal investigation of the contract of using surrogacy, 201).

As it was said, by criterion unity or priority, fostering closeness can be generalized to using surrogate womb and it can be said prohibition criterion in fostering is the same or with high intensity in surrogate womb and when fostering with gathering the conditions leads to prohibition, the formation of child in womb can be prohibited to marriage. Ayatollah Makarem Shirazi:

“Womb donator woman is fostering mother as a little flesh and skin and bone of a child is developed by milk of a woman, she is Mahram. The embryo, all its flesh and bone are developed and is Mahram with her”.

(Searching of author of Ayatollah Makarem Shirazi in 2013/10/15). Ayatollah Fazel Lankarani had the same belief (Mohammadi Hamedani, Asghar, 10 theses of jurisprudence in new issues, 190).

## CONCLUSION

† Verse 13 of Momenun <

...>

The child born of surrogate womb has real and developing relation with each of two women owning egg and womb. The relation that is proved from rational and medical aspect, among these two relations, the relationship between child and egg donator is the criterion of mother and child relation and the child relation mother is the woman donating egg. Regarding the relationship between the womb donator and child ignoring the second type of surrogate womb in which the surrogate mother owns the egg, it is the relation mother of child. According to rationalities, morality and social aspects, we consider her as fostering mother by comparison and there will be relation between her and child and this causes marriage prohibition arising from fostering closeness.

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