Chapter - 6
Surrogacy and legal concerns

In our study, we have already seen that surrogacy is basically a kind of arrangement. The arrangement includes psychological counseling, various uses of modern technologies like artificial insemination or embryo transfer through IVF etc. In addition, this arrangement contains a contract. Surrogacy contract is a prenatal contract through which two contracting parties—the commissioning parents and the surrogate mother—are bound within a legal periphery. So, the successful completion of any surrogacy arrangement, to some extent, depends on the nature, formulation and conditions of the contract. A well-framed contract would enhance the success rate of its application.

Now, it is to be noted that, unlike any other contract, surrogacy contract has some unique characteristics:

✓ Surrogacy is a contract about woman’s reproductive labor. It is a quite novel type of contract. No other reproductive service like donation of sperm or ova or embryo—needs such a well-designed contract.

✓ It allocates the parenthood of a child in advance.

✓ This contract predetermines the future behaviour of one contracting part for full course of a woman’s pregnancy.

In this context, I would like to inquire how these unique features become problematic and contentious during this arrangement. Any pregnancy has two prominent phases: pre-childbirth and post-childbirth phase. So, any surrogacy contract should contain numerous clauses about conception, gestation, child-birth and surrender of the resulting child.

Very prominently, in the pre-childbirth phase of surrogate pregnancy, there are two prominent sub-phases.

1. Pre-implantation phase: In this phase, a surrogate undergoes various types of medical tests, diagnosis and therapy. Various pre-conception diagnosis and
tests, hormonal treatments for artificial insemination or IVF cycles, donation of ova (in case of traditional surrogacy) or embryo transfer (in case of gestational surrogacy) through IVF, PGD (Pre-implantation Genetic Disorder) test—all these procedures constitute the pre-implantation phase of the pregnancy. Since a well designed surrogacy contract always needs the valid consent of a surrogate for these tests and applications of these technologies, a contract would contain the clauses about confirmation of a surrogate’s consent for these medical tests and for applications of relevant technologies.

2. **Post-implantation phase:** This phase actually begins when the resulting fetus has been transplanted to the uterine wall of the surrogate. Like any normal pregnancy, it has been assumed that restricted life-pattern, routine medical check up, suggested counseling—all these behaviours of a surrogate mother may significantly affect the growing fetus. So, it is very natural to include clauses to a contract to regulate the behaviour of a surrogate during her pregnancy. But, unlike any normal pregnancy, the surrogacy contract requires two most contentious clauses of pregnancy: (i) a surrogate could not abort the fetus without the permission of commissioning couple and (ii) during pregnancy, a surrogate could never develop any emotional bond with her fetus.

Now, from these two issues in the post implantation phase of pregnancy two very crucial and controversial issues originate:

- **Surrogate motherhood is basically autonomous decisions of two individuals.** Is it consistent with a surrogate’s autonomy if other party makes decisions on her body and pregnancy? Does this contract lack self-determination of a woman? A surrogacy contract not only undermines the autonomy of a surrogate, it also challenges the right to abortion of a woman.

- **The second issue is:** surrogacy demands not to form any maternal bond with the growing fetus. But, pregnancy is not only a biological process. Numerous emotional involvements, social expectations are attached to it. So, to instruct a pregnant woman to be alienated from her emotional bond to her fetus is
deviant and unnatural. A maternal bond of a woman with fetus is quite unpredictable and unbreakable.

The **post-childbirth session**, mainly contains three types of issues: (i) when a surrogate would surrender the resulting baby to its genetic father or commissioning parents after relinquishing all her maternal rights and (ii) determination of legal parenthood, i.e., the genetic father or the commissioning couple would be the legal parent(s) of the child and (iii) no objection of birthmother for adoption.

Now, most of the litigated cases of surrogacy are related to the custody dispute of the resulting child. The dispute mainly arises when a surrogate fails to surrender the baby after its birth to its biological father or commissioning parents due to her enduring emotional bond. It is hardly possible for a woman to be alienated from her growing fetus and such evolved perspective of a birthing mother towards her child enables her to surrender the baby to its so-called parents. The first disputed case of surrogacy in USA is **Baby M case**, in which Mary Beth Whitehead, the surrogate could not relinquish her child to its biological father and fought an unsuccessful legal battle for the child, Baby Melissa.

In any commercial surrogacy, the contract states different amount of remunerations in case of abortion, miscarriage or stillbirth. The full amount of the agreed remuneration would only be given to a surrogate after handing over a live baby to the commissioning parents, relinquishing all her maternal right.

In short, we have noticed that a surrogate contract contains five major types of clauses: clauses regarding **determination of parenthood** (who is the biological parent of the child), clause about surrender of parental rights and **relinquishment of child**; clauses regarding **consent to medical as well as genetic tests** during pregnancy, clauses on **abortion** (when and who would decide to abort the fetus) and finally, clauses about the amount of **payment**.
Surrogacy is a novel application of modern technology. Since the moral assessment of this arrangement is divergent, we have seen numerous formulations of surrogacy regulatory laws all over the world. At the same time, in a larger part of the world, there is no specific law regarding this arrangement. In those countries where surrogacy is acknowledged as a legal arrangement, their formulations also differ from one another depending on various grounds. In our study, I have recognized four distinct categories of surrogacy law or regulation throughout the globe. These categories are:

1. Law or regulation that strictly prohibits surrogacy arrangement: Austria, China, Germany, Italy, Latvia, Norway, Poland, Singapore, Slovenia, Vietnam, Sweden, Switzerland, Finland, France, Taiwan, Tunisia, Turkey etc.

2. Laws that approve non-commercial, altruistic form of surrogacy, but, commercial surrogacy is strictly prohibited by law or policies: Australia, Canada, Denmark, Greece, Israel, United Kingdom, Netherlands, New Zealand etc.

3. Any type of surrogacy—commercial or altruistic, traditional or gestational—in, no manner, is allowed: India and Ukraine.

4. There is no policy or the practice is not recognized by national law: Afghanistan, Albania, Algeria, Bahrain, Bangladesh, Barbados, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, Columbia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Ethiopia, Fiji, Gambia, Georgia, Guatemala, Guinea, Guyana, Haiti, Honduras, Indonesia, Iran, Iraq, Ireland, Yemen, Zambia, Zimbabwe, Uruguay, Uzbekistan, Vanuatu, Venezuela, Tajikistan, Tanzania, Thailand, Solomon Islands, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Swaziland etc.

The following table shows the nature and provisions of different formulations of surrogacy law in some details.
### 6.1 A GLOBAL VIEW OF SURROGACY LAW (TABLE - 1) *

<table>
<thead>
<tr>
<th>COUNTRY / STATE</th>
<th>LAW THAT REGULATES SURROGACY ARRANGEMENT OR NO LAW REGARDING SURROGACY</th>
<th>NATURE OF LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRALIA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. QUEENSLAND</td>
<td>SURROGACY ACT, 2010</td>
<td>Altruistic surrogacy is permissible, but, commercial surrogacy is strictly prohibited in all states of Australia</td>
</tr>
<tr>
<td>2. SOUTH AUSTRALIA</td>
<td>FAMILY RELATIONSHIP ACT, 1975</td>
<td></td>
</tr>
<tr>
<td>3. TASMANIA</td>
<td>SURROGACY CONTRACT ACT, 1993</td>
<td></td>
</tr>
<tr>
<td>4. VICTORIA</td>
<td>ASSISTED REPRODUCTIVE TREATMENT ACT, 2005</td>
<td></td>
</tr>
<tr>
<td>CANADA</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
|                | ASSISTED HUMAN REPRODUCTION ACT (AHRA), 2004.                       | i) Altruistic surrogacy remains legal,  
|                |                                                                     | ii) Commercial surrogacy is still illegal, 
|                |                                                                     | iii) In the province of Quebec, any type of surrogacy contract is unenforceable. |
| UK            | SURROGACY ARRANGEMENT ACT, 1985                                     | Only Altruistic surrogacy is allowed |
| FRANCE        | ARTICLE 6, 16-7, 1128 OF CODE CIVIL                                 | Any form of surrogacy is strictly forbidden |
| GERMANY       | EMBRYO PROTECTION ACT, 1990 AND ADOPTION PLACEMENT ACT              | Any form of surrogacy is strictly forbidden |
| ISRAEL        | EMBRYO CARRYING AGREEMENTS LAW, 1996                                | i) Israel is the first country where surrogacy arrangement has been granted by a state-appointed committee. 
<p>|                |                                                                     | ii) Intrafamilial surrogacy is strictly prohibited |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Reference</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>ITALIAN LAW 40/2004 ON ART</td>
<td>Ban on commercial surrogacy and using donor sperm and egg.</td>
</tr>
<tr>
<td>Ukraine</td>
<td>FAMILY CODE OF UKRAINE, CLAUSE 123</td>
<td>Any form of surrogacy, even surrogacy using donor sperm or egg is legal under this code.</td>
</tr>
<tr>
<td>USA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming</td>
<td>No provision of surrogacy</td>
<td></td>
</tr>
<tr>
<td>District of Columbia, Michigan</td>
<td></td>
<td>Strictly Prohibits surrogacy arrangement</td>
</tr>
<tr>
<td>Indiana, New York</td>
<td></td>
<td>Surrogacy is not enforceable arrangement</td>
</tr>
<tr>
<td>Arizona, Maryland, Missouri, Ohio, Pennsylvania, South Carolina, Wisconsin</td>
<td></td>
<td>Unclear law on surrogacy</td>
</tr>
<tr>
<td>Florida, Nevada, New Hampshire, Tennessee, Virginia (gestational only)</td>
<td></td>
<td>Law permits surrogacy agreements for married couples only</td>
</tr>
<tr>
<td>Illinois, New Jersey, Texas, Utah</td>
<td></td>
<td>Law permits surrogacy agreements for gestational surrogacy, and unclear for traditional surrogacy</td>
</tr>
<tr>
<td>New Mexico, Oregon, Washington</td>
<td></td>
<td>Law prohibits commercial surrogacy contracts, but may uphold altruistic contracts.</td>
</tr>
<tr>
<td>North Dakota, Louisiana</td>
<td></td>
<td>Traditional surrogacy contracts are unenforceable, but, gestational surrogacy contracts are enforceable</td>
</tr>
<tr>
<td>China</td>
<td></td>
<td>Gestational surrogacy is strictly</td>
</tr>
<tr>
<td>Region</td>
<td>Legal Source</td>
<td>Prohibition/Permissibility</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>SINGAPORE</td>
<td>Private Hospitals and Medical Clinics Act, Section 4.11.2</td>
<td>Total ban on any type of surrogacy.</td>
</tr>
<tr>
<td>INDIA</td>
<td>National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, Indian Council of Medical Research and National Academy of Medical Sciences (India)</td>
<td>Any type of surrogacy arrangement—Traditional or gestational, commercial or altruistic—is permissible.</td>
</tr>
</tbody>
</table>

* Data collected from following sites: (Sites visited on 27/11/2010)

http://www.surrogacy.com/legals/map.html
http://www.surrogacy911.com/laws/
http://www.allaboutsurrogacy.com/surrogacylaws.htm
http://humupd.oxfordjournals.org/content/3/2/173.full.pdf
http://www.fertilitylaw.ca/surrogacy.shtml
http://blog.indiansurrogacvlaw.com/tag/nsw-surrogacy-law/

Reference of Articles:

1. **Surrogacy Agreements in French Law,** by Eva Steiner, Published in: *The International and Comparative Law Quarterly,* Vol. 41, No. 4. (Oct., 1992), pp. 866-875
Now, the legal controversies regarding surrogacy arrangements mainly involve two types of issues:

i). Issues regarding the law or policy that regulates surrogacy arrangement—whether the surrogacy arrangement is consistent with the traditional law about legal parenthood, whether all forms of surrogacy would be permissible or not, whether the contract is enforceable or not, whether the adoption that takes place through this arrangement is compatible with the existing law of adoption, what would be the legal status of a surrogate mother etc.

ii). Issues regarding specific surrogacy contract—disputed custody, violation of state law, withdrawal of consent regarding adoption etc.

In fact, the first set of issues, discussed above, would be considered mostly in connection with the second set of controversies. The nature of reproductive labor, determination of parenthood within a fragmented situation, surrender of parental claims—all these issues are not only atypical in nature, these issues have the immense potentialities to become contentious at point of time during pregnancy. And, this suspicion becomes true when highly publicized Baby M case enters into court-room for trial in New Jersey Supreme Court to resolve the custody dispute of the resulting child, Baby Melissa. In USA, the commercial application of surrogacy began in 1970’s. Within a decade, numerous lawsuits were filed. Very soon, in different parts of western countries like Britain (Baby Cotton, a popular disputed lawsuit of surrogacy in UK), legal battle concerning surrogate motherhood increasingly became an appalling issue. We have also noticed that each lawsuit originated from the custody dispute of the resulting child—no matter, whether the legal proceeding was initiated in European countries or in USA. Here, I would like to mention some of the popular lawsuits of surrogacy arrangements which show how custody disputes of children have been resolved variedly. These lawsuits are:

6.2 A.

In the matter of Baby M, 109N.J. 396, 537 A.2d 1227 (N.J. 1988)

Fact: On 6th February, 1985, Mary Beth Whitehead signed a contract with William Stern, a New Jersey citizen, to be artificially inseminated with Stern’s sperm and to act as a traditional surrogate mother till the birth of the child.
Whitehead also agreed to relinquish the baby to Stern couple for adoption. In return, the Stern couple would pay her $10,000. On March 27, 1986, a baby girl, Melissa, was born. Whitehead surrendered the custody of the child to Sterns, but, later on, due to her psychosomatic crisis, Stern couple handed over the child to her temporarily. Whitehead, then, refused to surrender the baby and threatened Sterns to kill the baby. William Stern filed an exparte application to superior court of New Jersey and the trial court had issued an order to surrender Melissa to William Stern. Whitehead fled to Florida with Melissa. Law enforcement officials in Florida recovered the baby.

**Court Verdict:** The trial court of New Jersey declared that surrogacy contract is **valid and enforceable** and awarded custody of Melissa to Sterns and terminated the parental rights of Whitehead, but, allowed her for limited visitation. New Jersey Supreme Court **reversed** the trial court ruling that surrogacy arrangement is valid and enforceable. Supreme Court declared surrogacy as **unlawful** on two grounds: (i) surrogacy contract is not compatible with existing statutes of New Jersey. According to New Jersey state law, no adoption would involve transaction of money. So, the adoption of child born through commercial surrogacy would not be considered as legal under the law of adoption. (ii) Secondly, surrogacy violates the public policy of New Jersey—both biological parents would possess the equal status of parenthood. In case of divorce or other disputed parentage, the custody of the child would be allocated only on the basis of the best interest of the child. Since the surrogacy contract does not allocate any parental right to child’s birthing mother and regards the biological father as the only legal parent of the child, the contract becomes null and void under the public policy of New Jersey. The custody of a child would be allocated only on the basis of **the best interest of the child**.

6.2 B.


This lawsuit is the first disputed parentage of surrogacy arrangement in California appellate court which was finally resolved in 1991. Charlotte and Timothy M., a childless couple, made a contract with Nancy B to be artificially inseminated with Timothy’s sperm and act as a surrogate mother till the birth of the child. On 1st September, 1986, Nancy gave birth of a baby boy, Matthew B. Almost eight months before Matthew’s birth, Nancy gave a consent letter to Charlotte for adoption. After Matthew’s birth, she handed over Matthew to its commissioning parents. When Charlotte petitioned for adoption with Nancy’s consent letter, Nancy appealed to the authority that she wanted to withdraw her consent for adoption.

**Court Verdict:** California trial court rejected her plea.

### 6.2 C.

**Anna Johnson vs Mark Calvert** (Supreme Court of California, No. S023721, 5Cal. 4th 84; 851 P.2d776; 19 Cal.Rptr.2d 494;1993).


**Fact:** On January 15, 1990, Mark and Crispina Calvert, a married couple contracted with Anna Johnson, a single woman, to act as a gestational surrogate mother. An embryo produced by Calvert couple was implanted to Anna on January, 1990. But, during Anna’s pregnancy, Calvert couple learned that Anna had undergone stillbirth and miscarriages for several times. Anna did not disclose these informations to Calvert couple. Gradually, the relationship between Anna and Calvert couple broke down. Both parties filed lawsuits seeking declaration of parental right of the unborn baby. Within this legal hazard, a baby was born on September 19, 1990.

**Court Verdict:** Trial court of California directed both parties to place documents in favour of their parental claim. Reports of the blood-test of all concerned parties were submitted to court. The test report of Anna confirmed that she was not genetically related to her fetus. Trail court ruled in favour of Calvert Couple and held them as ‘genetic,’ ‘natural’ and ‘biological’ parents of the child. Later on, the California Court of appeal also affirmed the decision.
6.2 D.
Belsito vs Clark, 644 N.E.2d 760 (Ohio Com. Pl.1994)

Fact: Anthony and Shelly Belsito employed Carol S. Clark to perform as a gestational surrogate mother. Carol and Shelly were siblings. An embryo of Belsito couple had been implanted to Carol and later on, she was admitted to Akron City Hospital at Ohio for delivery. Before the birth of the child, Belsito couple learned from the hospital authority that in the birth certificate of the child, according to Ohio Parentage Act, the birth-mother, Carol, would be entitled as the mother of the resulting child. Since the birth-mother and genetic father of child are not married couple, the resulting child would be treated as an illegal baby. Belsito couple moved to court and appealed to declare them as 'genetic,' 'natural' parent of the unborn child, so that they both could be recorded in the birth certificate as the natural parent of the child and the child would be treated as legitimate child of them.

Court Verdict: Both Anthony and Shelly were awarded natural parenthood.

Observation: Like Johnson vs Calvert Case, Belsito vs Clark is another case of disputed custody of the child. In Belsito case, Ohio Court, further, faced the same controversial question which also raised in Johnson case—who is the real mother of the child? Genetic mother or gestational mother of the baby? The traditional definition of legal parenthood states that the legal mother of a child would be one who is both genetic mother and the birth mother of the child. In both Johnson and Belsito cases, court concluded that the woman who has provided the genetic imprint for the child is the natural mother of the child, but, for different reasons. In Johnson, the court refused both birth test and genetic test to determining legal motherhood. The court introduced a novel formulation for allocating legal parenthood—the intent test of parents—a natural mother is one who intends to procreate and raises the child. While California court adopted the intent test—Ohio court, in Belsito case, did not employ the intent test. Ohio court relied on the genetic test of motherhood. Thus, the birth test becomes secondary to the genetic test in determining parentage.
Fact: This lawsuit involves an uncommon application of gestational surrogacy. In normal cases of gestational surrogacy, the ova produced by the female partner have been artificially inseminated by the sperm of her male partner. This procedure is popularly known as AIH (Artificial Insemination by Husband). But, in this lawsuit, we have seen, a rare application of surrogacy technology, where the commissioning couple uses both donor's ova and donor's sperm. Therefore, the child born through this arrangement would not be genetically related to none of its social parent. John and Luanne Buzzanca, a married couple, made a contract with Pamela, a surrogate, on August 25, 1994, to carry the embryo produced by using donor's sperm and egg. Approximately one month before the birth of the child, Buzzanca couple split up and on March 30, 1995, John filed a petition for dissolution of marriage alleging they have no minor children. Meanwhile, on April 26, 1995, Pamela gave birth of a baby girl, Jaycee. On that day, John filed a plea stating that he would neither accept the custody nor would provide support for Jaycee. Pamela, the surrogate, did not place any claim over the child. But, Luanne claimed that John and she were the legal parents of Jaycee.

Court Verdict: Orange County Court reached to an extraordinary conclusion: Jaycee is a legal orphan, she has no lawful parent. Later on, California Court of Appeal for the Fourth Appellate District assigned John and Luanne Buzzanca both as the legal parents of Jaycee.

Observation: In this lawsuit, we get two court verdicts: one from trail court and another from California Supreme Court. We have noticed that the decision of trail court strictly bounded within the Uniform Parentage Act (UPA), Section 7610 of family code, which states that legal motherhood could be determined both by giving birth and contributing genetic substances. Under this law, trial court found that neither John nor Luanne satisfied either of these requirements. Luanne neither contributes her ova nor gives the birth of Jaycee. John also is not genetically
connected with the baby. So, Jaycee is considered as a legal orphan. But, California Appeal Court ruled that a relationship would be considered as parental relationship when individual gives consent and took part in implementing medical procedures attached to the process of procreation.

6.2 F.


Fact: Judy Stiver, a Michigan house-wife, agreed to be artificially inseminated with Alexander Malahoff’s sperm and to act as a surrogate till the birth of the child in exchange of $10,000. A baby boy, Christopher, was born. But, he was found to have severe infection, called Cytomegalovirus (CMV), which caused serious health problems, including mental retardation, loss of hearing, neuromuscular disorders etc. Normally, such in-utero infection could only take place if birthing mother got infected during her pregnancy. But, neither Judy nor her husband was infected with CMV before artificial insemination. So, Judy logically concluded that the CMV comes from Malahoff’s sperm, which was untested at the time of artificial insemination. Malahoff refused to accept the baby and at the same time, directed the hospital to withdraw the treatment of Christopher. The hospital authority went to court and won permission to care for the child and the Michigan Department of Social Services fostered the child out. Meanwhile, Judy filed a lawsuit against Malahoff, related doctor, technicians and other professionals.

Court-Verdict: Finally, the U.S Court of Appeals for the Sixth Circuit decided that surrogacy is not an ordinary obstetrical practice. High degree of risks and injuries are involved in it. Such arrangement required some specific duties and responsibilities of child caring.

Observation: this court-case is much more popular as a case of negligence in collaborative procreation rather than a disputed case of surrogacy arrangement.
### 6.3 COMPARISON BETWEEN DIFFERENT LAWSUITS (TABLE - 2)

<table>
<thead>
<tr>
<th>LAWSUITS</th>
<th>NATURE OF SURROGACY</th>
<th>COURT</th>
<th>VERDICT</th>
<th>NATURE of VERDICT</th>
</tr>
</thead>
</table>
b). Awarded the custody of Baby M to her biological father. | Disputed parentage would be resolved on the basis of 'best interest of child.' |
| Adoption of Matthew B., Nancy B vs Charlotte M and Timothy M, (Court of Appeal of California, First Appellate District, 232 Cal. Approach. 3d 1239; 284 Cal. Rptr.18; 1991 No. A044280, A045711) | Traditional | California Supreme Court | a). Court avoided to decide whether surrogacy contract is valid or enforceable.  
b). Awarded the custody of Matthew to his biological father. | Court ruling mainly centres on: Matthew’s birth, his placement with Timothy M and execution of consent to adopt depending on ‘the best interest of the child.’ |
| Anna Johnson vs Mark Calvert (Supreme Court of California, No. S023721, 5Cal. 4th 84; 851 P.2d776; 19 Cal.Rptr.2d 494;1993 | Gestational (AIH) | California Supreme Court | a). Court also avoided to declare surrogacy contract as valid or enforceable.  
b). Awarded the custody of the baby to the intending parent. | Court decision has been formulated on the principle of ‘intent,’ to procreate and to raise the child rather than ‘the best interest of the child.’ |
<table>
<thead>
<tr>
<th>Case</th>
<th>Type</th>
<th>Court</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Belsito vs Clark</strong>, 644 N.E.2d 760 (Ohio Com. Pl. 1994)</td>
<td>Gestational (AIH)</td>
<td>Ohio Supreme Court</td>
<td>a). Avoided to declare surrogacy contract as valid or enforceable.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>b). Awarded the custody to its <strong>genetic parents</strong>.</td>
</tr>
<tr>
<td><strong>Jaycee Buzzanca vs The Superior Court of Orange County (No. G019080, Court of Appeal of California, 4th Appellate District, Division three), 42 Cal. Approach. 4th. 718; 49; Cal Rptr. 2d 694; 1996.</strong></td>
<td>Gestational (AID)</td>
<td>Superior Court of Orange County</td>
<td>a). Jaycee has no legal parent.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>This decision is exclusively depended on the <strong>Uniform Parentage Act</strong> (UPA), Section 7610: to be a legal parent, one must either genetically related or have <strong>given birth</strong> to the child.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>California Supreme Court</td>
<td>a). Neither court states that surrogacy should be treated as null and void.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>b). John Buzzanca and Luanne Buzzanca are the legal parent of Jaycee.</td>
</tr>
<tr>
<td><strong>Judy Stiver and Ray Stiver vs Philip J. Parker and others (975 F2d261, 61 USLW 2166, No. 90-1624)</strong></td>
<td>Traditional</td>
<td>United States Court of Appeals, Sixth Circuit.</td>
<td>a). No clear verdict on any types of surrogacy arrangement.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The lawsuit became popular mainly as 'negligence' of all concerned parties.</td>
</tr>
</tbody>
</table>
The above comparison shows that (i) All lawsuits were instituted in different states of America, (ii) Except Baby M case, no court ruling, discussed above, clearly states whether surrogacy arrangement is null and void or valid and enforceable, (iii) Not in a single case, the court granted the custody of child to a surrogate mother, (iv) Court decisions depend on various determining principles, sometimes on the best interest of the child, sometimes on genetic test. In few cases, the intent test is the only decisive principle of parenthood. Now, our query is: why do various US courts so diversely resolved the custody dispute of surrogacy arrangement? What are the roots of these disagreements?

Our study closely observes that all these divergences originate from two vital issues: application of surrogate motherhood is not compatible with two existing laws—the traditional parentage law and the existing law of adoption. Let us clear the position.

In Anglo-American thoughts, legal parenthood is defined by marriage. Until mid twentieth century, this definition of parenthood has been executed in the form of—Universal Parentage Act or in short, UPA. In most of the American or European countries, the mother of a child is one who is the genetic as well as the gestational mother of the child. So, legal motherhood includes both genetic and gestational motherhood. Legal fatherhood was determined by marital presumption. This means a father of a child is the husband of child’s mother. This UPA becomes problematic when application of surrogate motherhood fragments motherhood or different assisted reproductive technologies separate parenthood into several distinguishable parts. Uniform Parentage Act fails to resolve the problem of fragmented parenthood and allocate legal parenthood on the basis of novel formulations.

Secondly, a surrogacy arrangement ends with adoption. This means that the commissioning parents would adopt the resulting child after relinquishment by the surrogate. Now, no case of adoption would permit any transaction of money. So, commercial form of surrogacy would not be consistent with any law of adoption.

So, the inappropriateness of UPA, mismatches with the laws of adoption. This makes this arrangement problematic, legally non-manageable by any existing law. As a result, neither court of US succeeded to clearly state that whether surrogacy arrangement is valid or not, whether it is enforceable or not and finally adopted.
novel formulations for allocating legal parenthood. In fact, the advents of different assisted reproductive technologies, including the application of surrogate motherhood, express the need of formulating new definitions of parent-child relationship. Complexities of court decisions prove the inappropriateness of traditional law, regulation or policy.

6.4 Need for a new definition of parenthood

Now, to formulate a new definition of legal parenthood under this complex situation is not an easy task. Fragmented parenthood becomes severely problematic in allocating the legal parenthood in conventional ways. The most crucial issue of this controversy is: who is the ‘real’ parent of the child? Genetic, gestational or social? In an unusual application of surrogacy, five unrelated individuals can collaboratively procreate a child. These five are: sperm donor, ova donor, gestational surrogate, social father and social mother. Through IVF, the donor’s ova, fertilized by donor’s sperm, would be implanted on the uterus of the gestational surrogate, who would carry the fetus till the birth of the child and would relinquish the resulting child to its commissioning father and mother after birth. Therefore, the main difficulty is to find out: who is the ‘real’ parent of a child? Which aspect of parenthood—genetic, gestational or social—would be considered as the ‘real’ contribution of procreation?

Now, to resolve this complexity regarding the real motherhood of the child another vital issue comes in the forefront. In this collaborative process of procreation, gestational surrogate performs one of the most crucial roles of procreation. Whatever she would provide is unique in nature. Unlike any other productive labor, reproductive labor of a surrogate mother is deeply entangled with woman’s soul and involves profound emotional attachment to the growing fetus. The emotional bond of a mother with her child is natural and to some extent, inevitable. On this issue, both proponents and opponents of surrogacy arrangement offer their advocacy to defend their standpoints. Let us, elaborate the point.

Opponents of surrogacy arrangement think that since such emotional evolvement is natural and inevitable, so, when a surrogate refuses to relinquish the child, her behaviour is considered as natural and she should not be condemned. It would be immoral to force a surrogate to relinquish her child, if she felt unbreakable emotional attachment to the child. On the other hand, the proponent of surrogacy
arrangement believes that this emotional bond of a surrogate with her fetus is unjustified. So, when a surrogate declines to surrender the child to its commissioning parents, it becomes invalid and unjustified. As a result, while proponents of surrogacy arrangement prefer enforceability of the agreement, opponents always choose non-enforceability of surrogacy contract. To execute these standpoints, both the opposing camps have employed different legal frameworks to serve their purposes. To make an agreement enforceable, the proponents prefer a contractual framework, while, on the other hand, to make an agreement non-enforceable, the opponents often assume that surrogacy arrangement should be regulated in accordance with the adoption law of the country. Both these legal frameworks—contractual and adoption—would fulfil the ultimate goal of arrangement as preferred by these opposing camps.

Now, our next query is: how do these two legal frameworks—contract and adoption—serve their purposes?

✓ Those who think that surrogacy agreement should be non-enforceable and prefer to incorporate surrogacy law under adoption law, assume that if we treat surrogacy arrangement under a contractual framework, it would never work out properly. Their advocacy depends on some valid grounds: (i) surrogacy is a prenatal contract and always ends with adoption. Now, a pre-natal agreement can not validly incorporate adoption. Let us clear the point. Surrogacy is a pre-natal contract which has been signed at least ten months before the childbirth and a surrogacy contract always contains the consent of a surrogate mother for adopting the child by the commissioning parents. No law of adoption would permit a birth mother to give her consent at least ten months before childbirth. Therefore, any arrangement that ends with adoption can never be a pre-natal agreement. (ii) Commercial surrogacy always involves some monetary transaction, either to a surrogate or to brokers. No adoption could be allowed in exchange of money. (iii) Since it is a pre-natal agreement, the contract no way considers the best interest of the resulting child, and (iv) to enforce a birthing mother not to form an emotional bond with her fetus and child, is improper and illogical. It is hardly possible for a surrogate to anticipate the intensity of her feeling towards her fetus ten months before. So, to treat an arrangement which ends with adoption can never be incorporated with a contractual framework.
Then, our query is: what are the benefits to place surrogacy law under law of adoption?

- An agreement of adoption can be signed only after the birth of the adoptable child. If we treat surrogacy arrangement under law of adoption, then, until the child birth, she could properly estimate the real strength of her emotion and would decide whether she could relinquish the child for adoption or not. The decision taken only after childbirth would be considered as a valid consent. At this stage, a surrogate would get enormous time to assess her own mental constitution.

- No law of adoption permits any sort of monetary transaction between parties. Since commercial surrogacy involves exchange of money in the form of remuneration, it is also considered as invalid. So, woman who acts as a surrogate only for pecuniary urge ignoring her own welfare would feel least interested. Women with altruistic motivations may act as surrogates accurately. Till date, no altruistic surrogacy becomes contentious for custody dispute of the resulting child.

- Since adoption is a post-natal agreement, the welfare of the resulting child would occupy the central position. One of the most disadvantages of a pre-natal contract is that the two contracting parties concentrate exclusively on their own benefits. Neither party considers the welfare of the unborn child.

So, to consider a surrogacy law under adoption law has some additional advantages. Benefits of post-natal agreement, ban on commercial surrogacy, focus on welfare of child—all these advantages of adoption law recommend that surrogacy could be properly arranged only under adoption law. Legal feminists like Margaret Friedlander Brinig, Martha Field, A.M Capron and M.J Radin strongly support this standpoint.

On the other hand, few critics think that adoption law could never fulfil the purpose of surrogacy arrangement. The non-enforceability of surrogacy arrangement would never work out. Only the enforceability of surrogacy arrangement would serve the goal of the contracting parties. Since all contracts are, by nature, enforceable, this group of thinkers recommend to employ a contractual format to incorporate surrogacy arrangement. Now, what are the benefits to regulate surrogacy arrangement under a contract law?
Two autonomous individuals may enjoy their reproductive liberties through a surrogacy arrangement. If an autonomous individual feels that she should enjoy her reproductive liberty by serving her as a surrogate and if another individual assumes that he or she should employ her reproductive labor to fulfill their own reproductive goal, then, both parties would like to ensure about the enforceability of the consent or contract. Right to reproduce, right to make a contract and right to privacy—these fundamental as well as constitutional rights of different countries permit surrogacy arrangement. So, to make a contract on reproductive issue is legitimate and proper.

Except a contract, very few legal formats are enforceable. A contract, by nature, fulfills the demand of the contracting parties only in the way they prefer. So, to exercise the autonomy of two contracting parties and, at the same time, to make it enforceable to its concerned parties, the arrangement would be structured only under a legal format.

It may be asked: how could private or family matters like pregnancy, gestation, child birth or parentage be the subject of contract? In reply, we may say that there are numerous examples where family matters are resolved only under contractual agreements. A legal approach, called 'private ordering,' is a popular example where private or family matters are resolved through contractual agreement. This approach does not prefer the intervention of a third party like court. These advocates assume that the intervention of third party would definitely weaken the authority of self-determination or autonomy. Uncontested cases of divorce are the good example of private ordering. Therefore, to treat the arrangement of surrogate motherhood as another application of private ordering would be the only possible way out to protect the self-determination of both contracting parties. Legal feminists like Lori B. Andrews, John Lawrence Hill are the prominent advocates of this legal approach.

6.5 Our assessment

Now, our final query is: what are the roots of these legal divergences? Our study has noticed that all these divergences originate from the divergences in moral issues. We have already seen that, throughout the world, there are numerous varieties of surrogacy law. But, we may arrange all these laws under three broad categories:
i). Law that **strictly prohibits** any kind of surrogacy—no matter whether it is commercial or altruistic, gestational or traditional.

ii). Law that **allows specific form** of surrogacy,

iii). And, law that **allows any form** of surrogacy—no matter whether it is commercial or altruistic, gestational or traditional.

The legal standpoint clearly shows the nature of the moral assessment. Different formulations of law actually manifest the moral valuation towards the application of surrogate motherhood. (i) The first group of policy-makers, who **strictly prohibit** any kind of surrogacy arrangement, assume that surrogacy is an immoral practice. Since it is inherently wrong, the application of any kind of surrogacy would commit a moral harm. So, surrogacy should be strictly prohibited. (ii) The second group of law-makers think that not all applications of surrogacy are harmful. Few applications of surrogacy would be allowed, but, under strict supervision and state control. And, (iii) the third category of law-makers believe that applications of surrogate motherhood involve no intricate, immoral harm. So, any kind of surrogacy would be allowed.

Now, the legal stands of the first and the third group of law-makers are straightforward and comprehensible. The complexities mainly arise only in connection with the second approach. Since all the moral assessments of this second group of the policy makers are not the same, the complexities originate: how does surrogacy arrangement be regulated under law? Is conventional law regarding legal parenthood consistent with the application of surrogate motherhood? If not, then, which law is satisfactory to arrange the practice? In this connection, another complexity arises: whether surrogacy should be regulated under contract law or law of adoption? We have already seen that those who think that the practice of surrogate motherhood would be enforceable prefer to consider this arrangement as a contract, while those who recommend non-enforceability of agreement, always suggest that surrogacy should be regulated only under law of adoption.

It is hardly possible to formulate a standard, internationally recognized law. Since the moral assessments are divergent, the formulations of law can never be similar. Now, the divergences in legal approach create another type of legal controversy. In this connection, I would like to mention those cases in which couples coming from those countries where surrogacy is not allowed, but, commissioned a
surrogate in foreign countries and after birth, parents seek citizenship of their motherland of those newborn babies. In this context, I would like to refer two very recent lawsuits before the Supreme Court of India: one is the custody dispute of Baby Manji and the Jan Balaz vs Union of India.

6.5 (A)

**Baby Manji Yamada Vs. Union of India (UOI), in THE SUPREME COURT OF INDIA, (the apex Court of India (2008) 13 SCC 518) and Writ Petition (C) No. 369 of 2008.**

**Fact:** A Japanese-physician couple, Ikufumi and Yuki Yamada, visited India in late 2007 and arranged a surrogacy contract through a Gujrat-based fertility clinic with an Indian surrogate mother, named Pritiben Mehta to carry an embryo from Ikufumi’s sperm and an egg harvested from an anonymous Indian donor. An embryo was implanted to Mehta’s womb. On 25th July, 2008, a child, Baby Manji, was born. But, before the birth of baby Manji, Yamada couple legally separated and in June, 2008, got divorce. The genetic father of baby Manji, Dr. Ikufumi Yamada, an orthopaedic surgeon, wanted to raise the child, but, his ex-wife disowned the baby and refused to take the custody of the baby.

Japan embassy in New Delhi refused to issue a passport in favour of Manji, for two reasons: (i) the baby was born in India and (ii) in Japan, there is no legal provision for surrogacy. According to Japanese Civil Code, a woman who gives birth to a baby would be the mother of the child. So, Baby Manji required an Indian passport and a no-objection certificate to leave the country. But, under Indian law, only father is not entitled to claim the paternity of a child. The passport of an infant has always been issued mentioning both the name of child’s father and mother. Since neither Yuki nor the surrogate mother is ready to accept the custody of Manji, Dr. Ikufumi Yamada could not claim a passport in favour of Manji.

Manji’s grandmother, at last, Emiko Yamada, prayed for her custody in Rajasthan High court, but, a NGO, Satya, moved to court and objected that the custody claim of a grandmother is not legal or valid, because there is no such provision either in India or in Japan. At last, on 29.09.2008, a division bench of Justice Arijit Pasayat
and Justice S.H Kapadia, had passed an order of Manji’s legal custody in favour of Emiko Yamada, 74-years old grand-mother of Baby Manji.

6.5 (B)

In a similar case, Jan Balaz and Susan Lohle, a German couple gave the birth of two baby boys through an Indian surrogate, Marthaben Immanuel Khristi, on January 4, 2008 at Gujrat. Ministry of External Affairs, Regional Passport Office, Government of India, issued passports mentioning the name of the surrogate mother as their mother. But, German government refused to issue a passport in favour of these children for two reasons. Surrogacy is not legally recognized in Germany and secondly, under German law, German nationality should be determined by the nationality of the birth mother. Jan Balaz moved Gujrat High Court with a prayer to issue passport in favour of the twin, so that they can avail German citizenship subsequently. (See: Jan Balaz Vs Anand Municipality, Letters Patent Appeal No. 2151 of 2009 in the High Court of Gujrat). Gujrat High court issued a favourable order, but, central government of India placed an objection to Supreme Court of India against Gujrat High Court ruling. A baby born through an Indian surrogate mother, but, alien biological father, is not entitled to avail an Indian passport. A division bench of Justice G.S Singhvi and Justice A.K Ganguly, directed the Central Adoption Resource Agency (CARA) of Germany, to consider the adoption of twin as a special case and also as one-time plea. Finally, on 3rd May 2010, CARA agrees to grant a No-objection-certificate (NOC) to this german Couple to adopt their children born through an Indian surrogate.

Observation: The identity of the birthing mother plays a crucial role in resolving the custody disputes or in issuing passport to a newborn. So, who is the real mother of the child? Since adoption laws are not uniform across the globe and child born through surrogacy arrangement in foreign countries may face legal hassles to establish their nationality in those countries where surrogacy is not legally recognized, this question has to be addressed in proper manner to establish the identity of the child.

Throughout this chapter, we have seen that the legal approval of this practice exclusively depends on its moral assessment. I feel that the practice needs more scrutiny, in-depth discussions, re-evaluations and strict monitoring. As already noted Israel is the only country where a state appointed committee regulates this
arrangement. In my opinion, a state appointed committee or a legal guardian would ensure the benefit out of it. In most of the countries, like India, surrogacy is exclusively arranged by the ART clinic without any state supervision. In none of the countries, there are legal provisions to monitor the fact whether the arrangement executed in a clinic is in accordance with the state guidelines or not. Without a strict, proper supervision, third parties like fertility clinics or brokers may occupy the key control of this arrangement and would arrange the practice according to their own convenience.

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