

Maternal surrogacy and reproductive tourism in Thailand: a call for legal enforcement

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บทคัดย่อ

เนื่องจากประเทศไทยยังไม่มีกฎหมายเกี่ยวกับการตั้งครรภ์แทนอย่างชัดเจนส่งผลให้ธุรกิจการท่องเที่ยวเชิงการแพทย์เพื่อการสืบพันธุ์ในประเทศไทยเติบโตในอัตราค่อนข้างสูงชาวต่างชาติหลาย ครอบครัวเลือกประเทศไทยเป็นจุดหมายปลายทาง ซึ่งแนวทางปฏิบัติที่ใช้อยู่ในปัจจุบันคือข้อบังคับ ของแพทยสภาในมาตรฐานการให้บริการเทคโนโลยีช่วยการเจริญพันธุ์ (ART) ในปี 1997 และ 2001(ประกาศ 1/2540 และ 21/2545) ข้อตกลงส่วนใหญ่นำไปสู่ผลประโยชน์ที่ดีสอดคล้องกับทุกฝ่ายที่เกี่ยวข้อง: ผู้ที่ขอให้มีการตั้งครรภ์แทน, ผู้ตั้งครรภ์แทน, สถานประกอบการและหน่วยงานที่เกี่ยวข้องในบางกรณีการตั้งครรภ์แทนอาจก่อให้เกิดปัญหาทางกฎหมายและสร้างการถกเถียงกันในเรื่องของการคุ้มครองเด็ก, บิดามารดาที่ต้องปฏิบัติตามกฎหมายและวิธีการบังคับใช้เพื่อที่จะลดผลที่ไม่พึงประสงค์เหล่านี้ประเทศไทยควรกำหนดข้อกฎหมายใหม่เพื่อ ควบคุมปัญหาโดยอาจจะใช้สหราชอาณาจักรหรือประเทศอิสราเอลเป็นแนวทางในการร่างข้อกฎหมายเพื่อผลประโยชน์ของทุกฝ่ายและที่สำคัญเพื่อคุ้มครองเด็กที่เกิดจากการรับตั้งครรภ์แทน

คำสำคัญ : การท่องเที่ยวเชิงการแพทย์เพื่อการสืบพันธุ์, การตั้งครรภ์แทน, ผู้ที่ขอให้มีการตั้งครรภ์แทน, ประเทศไทย

ABSTRACT

Legal constraints and high costs on access to technologies have led an increasing number of patients to cross international borders to have children. This phenomenon has rapidly increased in the past few years and Thailand has become one of the major international commercial surrogacy destinations providing assisted reproductive services to individuals from all over the world at affordable costs. Most of the time, reproductive agreements have lead to a positive outcome satisfying all parties involved: intended parents, gestational carriers, private clinics and agencies. In some cases, however, reproductive arrangements have given rise to legal issues and generated controversies in terms of protection of intended children, legal parenthood and enforceability. In order to minimize some of these undesired outcomes, Thai authorities should enforce new legislations to cope

with this issue, potentially using United Kingdom or Israel as model. The new legal framework should balance all parties' interests and guarantee a regulated way of engaging in surrogacy in the child's interest.

Keywords : Reproductive tourism, Surrogate mother's protection, Intended parents, Gestational carrier, Surrogacy contracts, Child's interest and welfare, Thailand.

1. Introduction

In August 2014, Thai authorities found out that a 24-year-old son of a Japanese magnate procreated more than ten children by hiring gestational carriers through private clinics during several weeks. In a different case that raised apprehension over surrogacy earlier in 2014, an Australian couple paid a gestational carrier for carrying twins but decided to bring back home only one of the children. The second child, nicknamed Gammy, was diagnosed with down-syndrome at an advanced stage and therefore abandoned at birth. Unfortunately, this occurs often in Thailand.

These cases are just an example of all the issues related to surrogacy and illustrate all the complications that may arise from such arrangements. Surrogacy contracts are very complex and risky for a number of reasons. They involve various parties including gestational carrier, sperm/egg donors, biological parents and intended parents. These parties often enter into agreements without being aware of all potentials risks they have to face in case of complications (Ber, 2000). Thus, many questions remain unanswered such as what is the fate of the 'imperfect' child? Should the child be merely treated as the object of a commercial transaction? The traditional characteristics of consumer dealings such as prices, marketing, and the extension of credit seem inappropriate in the context of reproductive services (McEwen, 1999). Besides, what happen in cases of infectious diseases transmitted from the biological mother to the child? Other unsolved problems arise in case of pregnancy complications, failed pregnancies or wrongful death of the gestational carrier (Deonandan, Green and van Beinum, 2012). Who bears the financial burden in such cases? Since these issues are not usually taken into account by private clinics animated only by the commercial logic, private parties to the agreement must attentively consider the risks related to surrogacy before engaging in similar arrangements. Other issues to be examined are related to the legal status of a child born to gestational carrier in cross-border commercial surrogacy arrangements. Legal impediments at the intended parents' country after the birth of a baby

could seriously threaten the welfare of the child. As a consequence, intended children may be stateless in cross-border commercial surrogacy arrangements and the parental rights of intended parents not be protected (Trimmings, Beaumont, 2011). Furthermore, The idea of an international market in surrogacy services where poor women could easily be exploited and hired at a lower rate than the current market price is naturally troublesome (Lee and Morgan, 2001). Some have also compared such practice to prostitution (Dworkin, 1983) or even slavery (Shanley, 1995).

As of November 2014, nevertheless, several clinics are willing to work with families that use gestational carriers and such practices have not been legislated yet. Apart from two notifications issued by the Medical Council of Thailand on service standards of Assisted Reproductive Technologies (ART) in 1997 and 2001 (Announcement 1/2540 and 21/2545), no legal framework exists for regulating surrogacy in Thailand.

It is difficult to estimate the number of children born from gestational carriers per year, as data are not accessible. However, recent researches have reported a growth of surrogacy practices, to include arrangements that cross national borders. It seems that more than half of worldwide births occur in nations with permissive regulation i.e. India, Thailand and the USA (Ferraretti, Pennings, Gianaroli, Natali and Magli, 2010).

In Thailand, surrogacy is facilitated by several private agencies which help contact the parties involved for profit.

In order to regulate this constantly expanding market and avoid parenthood and nationality problems, this article suggests that Thailand should set up a legal framework or guidelines and enforcing system regulating surrogacy. Part two will analyze the main terms relating to surrogacy in Thailand and summarize the history of such medical technique while part three will discuss the legal issues involved in international surrogacy agreements. Part four will analyze other models that can be used to regulate surrogacy and propose to follow the United Kingdom legislation to legalize surrogacy in Thailand. Finally, Part five summarizes the previous analysis and recommendations.

2. Surrogacy in Thailand

Regulation of surrogacy agreements significantly differs from nation to nation. In the majority of countries, the law prohibits gestational surrogacy in order to avoid that the surrogate child is treated as a commodity and considered as the object of a commercial transaction between gestational carriers and infertile couples. The prohibition is usually

based on ethical and moral considerations related to the safeguard of the surrogate baby who is psychologically at risk in this kind of arrangements (Hatzis, 2003). In countries where surrogacy is allowed, it is often heavily regulated as non-commercial surrogacy and agreements between gestational carriers and intended parents are, in most cases, unenforceable. Before discussing in detail the legal issues related to surrogacy in Thailand, it is necessary to define the meaning of surrogacy and its recent history.

2.1 Meaning of surrogacy

Surrogacy allows couples to become parents of a baby who in most cases is biologically related to one of them. It is a technique that is used when a woman is not able to provide eggs or gestate a child. The surrogate process involves a woman (gestational carrier) carrying the fetus for another person or couple (intended parents). Thus the gestational carrier is the woman who carries and gives birth to the child while the intended parent is the person who intends to raise the child.

Surrogacy arrangements are usually divided into two main types: genetic and gestational. In *genetic surrogacy* (also described as 'traditional', 'complete', 'straight' or 'genetic gestational' surrogacy), the pregnancy is usually achieved by artificial insemination from the intended father or a sperm donor and the gestational carrier's eggs (Kindregan and McBrien, 2006). If the gestational carrier becomes pregnant by artificial insemination, she is both the gestational and the biological mother of the future child (Deech and Smajdor, 2007). On the other hand, in *gestational surrogacy* (also described as 'host', 'carrier' or 'IVF' surrogacy) the embryo is conceived by IVF with the gametes of the couple or of one or more donors. Unlike genetic surrogacy, this type of surrogacy always involves medical intervention. The gestational carrier's eggs are not used and a third party is the biological mother of the resulting child. It involves the in vitro fertilization of sperm using either the intended mother's eggs or an anonymous donor's eggs, which are then implanted in the gestational carrier's womb (Kindregan and McBrien, 2006). Gestational surrogacy creates the new situation in which a child has not one, but two biological mothers--one genetic and the other gestational. In the past, a child might have had multiple social mothers--adoptive, foster, step. What is new with surrogacy is having multiple biological mothers (McLachlan and Swales, 2009).

It is also important to distinguish between the so-called altruistic surrogate motherhood and commercial surrogate motherhood (Shapo, 2006). The former indicates an arrangement in which the gestational carrier does not receive any financial compensation or

receives a payment that covers only expenses; the latter refers to an arrangement in which the gestational carrier receives payment from the intended parents over and above expenses.

Genetic surrogacy is not very common in Thailand and is generally disfavoured because of the genetic relationship between the gestational carrier and the embryo. Instead, most people go through gestational surrogacy specifically to avoid any genetic link between the gestational carrier and the child that may weaken the commissioning party's position in the event of a legal dispute. As this type of surrogacy becomes more widespread, this article will exclusively discuss the legal issues related to gestational commercial surrogacy agreements.

2.2 The Thai experience of the regulation of surrogacy

“Gestational surrogacy catches society unprepared to deal with the ramifications of its own advancing technology. The genetic link between mother and child assumes a new role in birth, existing not as a characteristic shared by birth mother and child, but instead serving as an economic incentive to choose one gestational carrier over another” (Munson, 1992).

In recent years Thailand has become a very common destination for intended parents seeking to start or grow their family. Data on the number of ‘procreative tourists’ seeking reproductive services in Thailand is uncertain but it has been forecasted that the surrogacy industry will significantly increase by 2020 (Smith, Chanda and Tangcharoensathien, 2009). Couples from overseas choose Thailand as procreative destination for several reasons. First, the competitive prices. It has been estimated (Smith, Chanda and Tangcharoensathien, 2009) that surrogacy arrangements in Thailand cost a mere few hundred thousand dollars while in other countries prices are much higher. Moreover, doctors are mostly trained in Western countries and their English proficiency is very high.

This practice, however, remains highly unregulated within the country. In 1997, the Medical Council of Thailand drafted the Notification No. 1/2540 as amended by the regulation No. 21/2544, aimed at regulating Service Standards of Assisted Reproductive Technologies. More precisely, the purpose of this notification is to ensure that the services on Assisted Reproductive Technologies by medical practitioners meet the standards and protect the service receivers in compliance with the nation's economic and social conditions. Section 4/2 provides that in case a couple wants to have a child through surrogacy, the medical practitioner may provide the service only in the case of embryo from that couple's

gametes. Besides, the woman who gets pregnant for the couple shall be a relative by blood of either party of the couple and financial compensation in return to the woman who gets pregnant instead of the couple is not allowed. However, these notifications are not legally binding.

In order to formally legalize surrogate motherhood agreements, Thai government has proposed in May 2010 a bill related to Assisted Reproductive Technology (ART) as part of Bill No. 167/2553, but it has not become law yet. Some of the changes in the proposed bill indicate that only married heterosexual couples can commission surrogacy by using their sperm and eggs or those of other donors, not the gestational carrier's ones. Section 22 of the draft Act states that: *"Surrogacy under this act can be performed through two methods and in particular:*

(1) Creation of an embryo using eggs and sperm of the intended parents implanted in the gestational carrier's womb;

(2) Creation of an embryo using either donated eggs fertilised with husband sperm or wife eggs fertilised with donated sperm implanted in the gestational carrier's womb;

It is prohibited to use the gestational carrier's eggs in any case.

The Assisted Reproductive Technology Bill also provides that surrogacy procedures must meet specific requirements. In particular, Section 21 states that *"Surrogacy must be performed according to these following conditions:*

(1) The intended legal parents must be unable to procreate and desire to have a child by using another woman as gestational carrier. The potential intended parents must be physically and mentally healthy enough to become parents.

(2) The gestational carrier is not a parent or a child of one or both of the intended parents

(3) The gestational carrier must have a child of her own before the surrogacy procedure and, if she is married, her husband must consent.

This last condition is important in order to avoid that the gestational carrier decides to keep the baby after delivery or her family claims any rights over the surrogate baby. In other words, the gestational carrier must have an understanding of what pregnancy is and what to expect from childbirth.

Furthermore, the draft law provides that the gestational carrier does not receive any financial compensation since the intended parents will only pay for physical and financial needs relating to the surrogacy.

The bill prohibits commercial surrogacy but does not specify this term; Section 23 only states that *“It is prohibited to perform a surrogacy for commercial purposes”*. The reason that is used to justify the ban of commercial surrogacy lies on the protection of the gestational carrier’s interests and in particular to avoid exploitation of women from lower economic classes (Damelio and Sorensen, 2008). In fact, after delivery the surrogate child, gestational carriers have to relinquish all emotional ties and surrender all parental rights towards their gestational child (Ife, 2012). According to the statistics, there is a clear social division in surrogacy practices (Ragone, 1994). This is confirmed by the fact that the majority of gestational carriers enter into surrogacy agreements because of the financial compensation they receive. Only few women would accept to carry someone else’s baby without any form of recompense.

It is not clear, however, how this prohibition will affect surrogacy arrangements given the provision of Section 24 which allows reimbursement of “medical expenses and other expenses associated with pregnancy, childbirth and after birth”. The commercial brokering of surrogacy agreements is criminalized, as is accepting financial compensation or other benefits related to the engagement or management of surrogacy (Section 25).

In an attempt to reduce legal parenthood uncertainties, the Assisted Reproductive Technology Bill also proposes a major change to family law: a child born through assisted reproductive technologies is deemed to be the legitimate child of the intended parents (Section 27). This is to say that the child born of a gestational carrier will be considered as the legitimate child of the commissioning parents and not of the biological parents or gestational carrier.

However, in the past years a high number of private agencies and clinics in Thailand have used websites to appeal intended parents from many countries around the world such as Australia, Japan, and United States. These commercials are very well designed, helping to relieve the fear that intended mothers may experience during assisted reproductive technology: prices, the mental and physical state of gestational carriers, the degree of professionalism of hospitals. Though these online marketing commercials persuade intended parents by emphasizing the advantages of assisted reproductive technologies in Thailand and promising personalized services to each couple, the websites often hide several issues arising

from international surrogacy. For example, they omit to explain the citizenship issues that may arise from surrogacy, legal issues in case of dispute, medical complications that may occur during pregnancy as well as the health conditions of gestational carriers. Further, doctors at clinics and private hospitals in Thailand are disposed to consider reproductive technologies used to achieve pregnancy by artificial or partially artificial means. This reason, in addition to the other reasons considered above, has made Thailand a major destination for procreative tourists coming from developed countries and has pressured Thailand's legislature to pass a law that bans commercial surrogacy putting a halt on foreign couples seeking to have children through Thai surrogate mothers.

3. Surrogacy-related legal issues

Several disputes may arise in case of surrogacy reproductive technology used to conceive children. One category is related to the validity of surrogacy agreements. The other is litigation involving legal parenthood.

3.1 Validity of surrogacy agreements

Surrogacy agreements involve a minimum of two parties: the gestational carrier who agrees to carry and give the child to the intended parents after delivery and the intended parent(s) who initiates the surrogacy arrangement and intends to be the legal father or mother of the baby. Sometimes, surrogacy contracts involve other parties such as the sperm donor or the egg donor. Besides, if the gestational carrier is married, the husband is recognized as the presumed father of the baby.

There are several legal issues that may be encountered when participating in surrogacy agreements. The main issue that gestational surrogacy agreements usually raise concerns the legal parenthood of the child. Apart from this main point, there are several other obstacles and circumstances that might lead to litigation between the parties involved in a surrogacy agreement. For example, if some circumstances change during the surrogacy process, serious complications with the surrogacy agreement might arise. In case disability or other condition of the foetus is diagnosed, intended parents may consider options such as abortion, while the gestational carrier might decide to keep the child (Tieu, 2009). As reproductive technologies are involved in surrogacy practices, there are higher risks of pregnancy-related complication, prematurity, disability, death of the child or multiple births. This might create legal problems, as often the intended parents desire to have only one child. Furthermore, as in any contractual agreement, contractual parties to the surrogacy

agreement are not always aware of their best interests. Information uncertainty might contribute to this and can lead to wrong decisions. This may happen when there is asymmetric information between the gestational carrier and the intended parents, with one party being privy to more information than the other (Galbraith, McLachlan and Swales, 2005). A further problem occurs in case of opportunistic behaviour by gestational carrier or the intended parents. All these types of disputes represent a risk that must be considered since they might impact the future wellbeing of the child.

In Thailand surrogacy agreements are very common. Usually two parties agree in writing to the surrogacy arrangement: the gestational carrier and intended parents. The terms and conditions of such contracts generally include requirements that the couple intending to be parents will be the legal parents of the child and that the gestational carrier (and her husband if she is married) renounce to any claims to legal parenthood. The agreement also provides for compensation for the gestational carrier.

In the absence of a specific law governing ART, however, such agreement are deemed void because contrary to the principles of public order. Under Section 150 of Thai Civil and Commercial Code: *“An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals”*. Void means that the contract has no legal effect because it is contrary to the public interest. It is as if no contract had been created at all; it is merely an act having no legal effect.

In spite of well-written contracts and the best intentions, parties cannot contract outside the law and against the principle of public order. Performance of an illegal contract can potentially lead to both civil and criminal liabilities of physicians, health clinics, surrogacy agencies, intended parents and gestational carriers.

If the contract is void, what happens then to the surrogate child?

3.2 Legal parenthood

Assisted reproductive technologies and, in particular, surrogacy techniques create a situation where as many as five individuals may claim parental rights over the baby: the gestational carrier, the intended parents, the genetic father and mother. This problem illustrates the difficulties that may arise from gestational surrogacy agreements (Blyth, 1993). In fact, such practice has different consequences: “First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship” (van den Akker, 2000).

Hence, a major problem in the surrogacy cases is related to the custody dispute that might arise in case of surrogacy agreements between the intended parents and the gestational carrier. If a gestational carrier changes her mind and wants to keep the child with her, the surrogacy contract cannot be used. Therefore it is very important to determine who in the legal system is recognized as the legal parents of the child. As there is no regulation for children born through the use of ART, it is hard to establish the parentage of the surrogate child.

Determining surrogate child's legal parents will directly impact the child's wellbeing, particularly in case of gestational surrogacy arrangements. Recognizing parental rights to a fit parent is probably more important in a gestational surrogacy maternity dispute because of the potential effect that the confusing circumstances surrounding a child's birth can have on a child (van den Akker, 2007). Parents of children resulting from surrogacy agreements should have the mental and emotional stability to support the child through any confusion and isolation the child may experience as a result of his or her unconventional birth (Hisano, 2011). These complications cannot be prevented by legal agreements.

In case of litigation to establish legal parenthood of the child, the rules to determine legal parentage follow the traditional adage *mater semper certa est*. In other words, the legal mother of the child is the gestational carrier, even though there is not any biological relationship between the gestational carrier and the child.

Within the Thai Civil and Commercial Code, a child born of a woman who is not married to a man is deemed to be the legitimate child of such woman (Section 1546). The father of a child who is not married to the mother at time of birth has no rights over his baby even if his name is recorded on the birth certificate and has a DNA test showing that he is indeed the biological father. Section 1547 of the Civil and commercial code, however, provides that: *"A child born of the parents who are not married to each other is legitimate by the subsequent marriage of the parents, or by the registration made on application by the father, or by a judgment of the Court"*.

According to the most convincing interpretation of the Section 1546, the woman who gives birth to a child is the child's mother. If the gestational carrier is married, the surrogate child will be registered as the child of the gestational carrier and her husband. Thus, under the Civil and commercial code, the intended parents have no automatic legal rights. Thus, in case of dispute, the gestational carrier will prevail under the common presumption that by mother it must be intended the birth mother. The Council of State has confirmed, in

his opinion No. 100/2543 that the name of the gestational carrier shall be registered as the legal parent of the child. Consequently even if the intended parents have contracted with the gestational carrier to be the baby's legal parents and the gestational carrier has agreed, they will not be recognized as legal parents in case of litigation. The result is that even if both intended parents are the biological parents of the child and have obtained the gestational carrier's consent, they will not acquire legal parenthood and will not be listed as parents on the birth certificate of the child.

Under Thai law, thus, it is necessary to engage an adoption procedure in order to create a legal parentage relationship between the intended parents and the child. The Child Adoption Center of the Thai Department of Social Development & Welfare (DSDW) is the government agency in charge of overseeing all Thai adoptions and its activity is approved and supervised by the Child Adoption Board of Thailand. Thailand authorises the adoption of a child born to gestational carrier after the child is declared available for adoption. Once such declaration has been made, the child may be assigned to be the prospective adoptee of the intended parents. Under Thai law, however, if the intended parents decide to adopt the child, the case becomes more difficult. In fact, the adopter cannot choose the adoptee. Thus, the intended parents may have difficulties in choosing the surrogate child as their adoptee.

To avoid all these difficulties and limitations, surrogacy clinics and agencies give a different interpretation to this provision and register the intended parents' names in the child's birth certificate. It is an easy procedure. The private clinic registers the baby's birth automatically by sending all the related documents to the local district office and the process is completed by the clinic's staff. The intended parents then only need to collect a copy of the birth certificate from the district office and provide a certified English translation of the birth certificate to their embassy in order to require the child's passport. There is no need to undergo a complex legal adoption.

On the basis of these observations, it emerges that it is relatively easy for intended parent to have a child in Thailand in the current legal framework. Most of the time, it's an agreement that conciliate all parties' interests: intended parents, gestational carriers, private clinics and agencies. Probably, it is time now for the legislator to assure that the most important piece of the puzzle is protected: the child.

An apparently simple solution to define parental rights and protect the surrogate child's interests involves enacting a comprehensive legislation, which can pre-determine

rights of the intended parents. However, in the absence of regulation expressly designed to address the unique problems of gestational surrogacy, it is not easy to determine what the legal rights and duties of parents in such situations are with any degree of certainty. This legislative inaction indicates that a majority of maternal rights disputes that arise in the near future will be left to the determination of the courts (Hisano, 2011).

4. Surrogacy models for Thailand

The purpose of this article is to analyse several different perspectives on surrogacy and suggest new approaches toward the legal debate regarding the practice of surrogacy. As it is to be expected that conflicts and litigation will increase significantly over the coming decades, it would be preferable for Thailand to setup an enforcement system for the safeguard of the surrogate mother and the resulting child. New disputes are sure to arise following a likely growth in the number of private agreements of heterosexual and homosexual couples who desire to become parents, gestational carriers and donors. On the basis of the observations described above, it emerges that it is relatively easy for intended parent to have a child in Thailand in the current legal framework. Most of the time, it's an agreement that conciliate all parties' interests: intended parents, surrogates, private clinics and agencies. Probably, it should be time now for the legislator to assure effective protection to the most important piece of the puzzle: the child. Before enacting ministerial regulations and guidelines regulating surrogacy, the legislator should consider the following issues:

1. Several disputes may arise in case of surrogacy reproductive technology used to conceive children. The main problem that gestational surrogacy agreements usually raise concerns the validity of surrogacy agreements. It would be beneficial for Thailand to enact a regulation in order to settle down potential disputes which may frequently occur during commercial transactions. In particular, Thai authorities should regulate in more detail the pre-birth surrogacy agreements.
2. A second major problem in the surrogacy cases is related to the legal parenthood of the child. If a gestational carrier changes her mind and wants to keep the child with her, the surrogacy contract cannot be used. Therefore it is very important to determine who in the legal system is recognized as the legal parents of the child. As there the enforcement of the legislation related to children born through the use of

ART is too new, it would be beneficial to regulate this point in more detail through ministerial regulations.

3. Apart from these main points, there are several other obstacles and circumstances that might lead to litigation between the parties involved in a surrogacy agreement. For example, if some circumstances change during the surrogacy process, serious complications with the surrogacy agreement might arise. In case disability or other condition of the foetus is diagnosed, intended parents may consider options such as abortion, while the gestational carrier might decide to keep the child (Tieu, 2009). As reproductive technologies are involved in surrogacy practices, there are higher risks of pregnancy-related complication, prematurity, disability, death of the child or multiple births. This might create legal problems, as often the intended parents desire to have only one child. Furthermore, as in any contractual agreement, contractual parties to the surrogacy agreement are not always aware of their best interests. Information uncertainty might contribute to this and can lead to wrong decisions. This may happen when there is asymmetric information between the gestational carrier and the intended parents, with one party being privy to more information than the other (Galbraith, McLachlan and Swales, 2005).

Worldwide, a variety of laws and regulations relevant to surrogacy have been established. The United Kingdom has developed a particular logical model that could be used to regulate surrogacy and offer the uniformity that is necessary to protect the interest of the child. Israel legislation also could be used for guidance by Thai government. The adoption of ministerial regulation and guidelines in this field would guarantee parental rights to intended parents and provide clear rules to decide who the parents of the future child are. Moreover, surrogacy enforcement would also reduce the legal uncertainty and eliminate the confusion surrounding the enforcements of surrogacy agreements (Caster, 2011).

4.1 The UK Model

In the United Kingdom (UK), surrogacy arrangements are regulated by the Surrogacy Arrangements Act 1985 (SAA) as modified by the Human Fertilisation and Embryology Act (HFEA) 1990 and 2008 (Horsey and Sheldon, 2012). Surrogate motherhood is legal in the United Kingdom but it is restricted by various legal rules (Morgan, 2003). More precisely, surrogacy is allowed as long as it is on a voluntary basis and the court protects the free consent of the woman who gives birth. Third parties commercial involvement is considered a

criminal offence as well as advertising that a gestational carrier is willing to act as surrogate or that intended parents are looking for a gestational carrier.

Surrogacy contracts are not enforced by the law: the gestational carrier has the right to keep the surrogate baby and is always treated as the legal mother - even though she is not biologically related to the baby. In case the gestational carrier is married and conceives the child through artificial insemination, the surrogate's husband will be considered as the legal father of the child, irrespective of the genetic link. Consequently, the intended father has no automatic right to legal parenthood except if it can be proved that the surrogate's husband did not consent to the surrogacy agreement.

In case a contract has been signed between the gestational carrier and the intended parents, it is not possible to force the former to renounce to the child should she change her mind. Under Section 1A of the Surrogacy Arrangements Act, as amended by the Human Fertilisation and Embryology Act 1990 "No surrogacy arrangement is enforceable by or against any of the persons making it".

The birth of the surrogate baby must be registered by the gestational carrier who is recorded as the baby's legal parent. Besides, the gestational carrier's husband is recorded as the legal father of the baby on the birth certificate. The intended father can be registered as legal parent only if the gestational carrier is single. In case of civil partnership between the gestational carrier and her same sex partner, the latter can be named as the child's second 'parent' on the birth certificate.

In order to obtain legal parenthood of the child and modify the birth certificate, Section 54 of the Human Fertilisation and Embryology Act 2008 provides that intended parents who wish to have children through surrogacy can apply for a parental order. In order to obtain a parental order, it is necessary to fulfill several requirements. In particular, the intended parents must live with the surrogate baby at the time of the application. The law also provides that at least one intended parent must be the genetic parent of the surrogate baby and must be domiciled in UK. Parental orders are used to reassign the parental status of the child, by assigning legal parenthood to both intended parents and extinguishing legal parenthood of the surrogate parents. Like adoption orders, they regulate parenthood and protect the rights of children born through surrogacy procedures whether the surrogate is married or unmarried. The intended parents must submit their application no later than six months after the baby's birth. After issuance of the parental order, a new birth certificate is

prepared upon request of the intended parents. Such certificate substitutes the previous one.

With regard to compensation, it is a criminal offence to broker a surrogacy agreement on a commercial basis. UK legislation tries to avoid children from becoming a commodity and allows payment only for minimal expenses. The Human Fertilisation and Embryology Act 2008 modifies Section 2 of the Surrogacy Arrangements Act 1985 but does not suppress the ban on commercial surrogacy. Section 56, in particular, allows for “reasonable payment,” meaning “a payment not exceeding the body’s costs reasonably attributable to the doing of the act,” to be paid to a gestational carrier. In practice, however, it is difficult to determine what constitutes reasonable expenses and to distinguish between commercial and non-commercial agreement.

Ultimately, UK model appears to be logical and coherent, which would probably make it an ideal legal framework to regulate surrogacy in Thailand. Furthermore, such system would allow intended parents to procreate their own children by using egg and sperm donors.

4.2 Israel Model

Surrogacy is strictly regulated in Israel. Under the Surrogate Motherhood Agreements Law of 1996 and the Surrogate Motherhood Regulations of 1998 all parties to the surrogacy contract receive some degree of protection (Teman, 2010). As is the case in UK, provisions of law in Israel are laid out in a coherent way that allow for the gestational carrier, the child and the intended parents to receive solid legal protection. The law provides that individuals can enter into gestational surrogacy contracts only if they are infertile heterosexual couples and they meet specific requirements (Teman, 2010). As general rule, surrogacy contracts cannot be entered between people of the same family, neither such practice can be done for personal convenience or career considerations. With regard to the intended parents, intended mother must provide the eggs and the intended father must provide the sperm. In case the intended mother’s eggs are not viable, the law allows the possibility to create an embryo from a donated egg and the intended father’s sperm. Such embryo is subsequently implanted into the gestational carrier’s uterus. In Israel, genetic surrogacy is banned and the gestational carrier’s eggs cannot be used. The law also provides age limits for the intended parents: intended mothers cannot be more than forty-eight while intended fathers cannot be more than fifty-nine. With regard to the gestational carrier, she must be unmarried i.e. single, divorced or widowed, who already has a child of her own. The law provides several other

limitations with regard to the modalities a gestational carrier can serve as a gestational carrier. In particular, the law prescribes that a gestational carrier cannot serve as a gestational carrier more than two times, she cannot be biologically related to the intended parents and cannot withdraw from the surrogacy agreement if a parentage order is issued. Under the Act, a gestational carrier may withdraw only at specific conditions and the withdrawal can never harm the child. Israel legislation also provides that gestational carrier is always free to decide which medical treatment she prefers to choose (including abortion) and the surrogacy agreement cannot limit this right.

A number of other regulations are part of the Israeli surrogacy law. In order to protect the gestational carriers from exploitation and guarantee suitability for the surrogacy process, the Surrogate Motherhood Agreements Law requires that all parties involved in the surrogacy agreement undergo a psychological and medical screening.

Subsequently, a special committee formed by seven members (i.e. one social worker, one lawyer, one internist, two gynecologists, one psychologist and one clergyman) is appointed by the Minister of Justice with the duty to analyze the main issues in the surrogacy agreement.

After birth, a welfare officer witnesses the transfer of the child to the intended parents. Unless the welfare officer reports that the intended parents are unable to take care of the child, the intended parents automatically receive a parentage order. Only after reaching the age of majority, children are allowed to know that they have been conceived through surrogacy technologies. Such provisions regulate surrogacy in a definite and certain way that drastically reduce the chances of exploitation (Kahn, 2000).

It must be noted, however, that surrogacy in Israel will probably change in the near future. In the proposed bill presented by the Israeli Government on 30 January 2014, singles and homosexual couples will have the possibility to access surrogacy services. The bill also allows married women may act as gestational carriers and the age limits of parties to a surrogacy agreement will be increased. Under these changed regulations, the intended parents will be recognized as legal parents of the child and the gestational carrier will not.

This model is very efficient and may be applied to Thailand with certain modifications. In particular, Thai legislation should not include the requirement that the sperm must be from the intended father because this would mean to exclude single mothers, heterosexual couples where both man and woman struggle with fertility and homosexual couples from having access to ART techniques.

If the legislator allows commercial surrogacy in Thailand, this would benefit both the gestational carrier and the intended parents: the gestational carrier, in fact, would receive more protection while the intended parents would act in a more responsible manner.

5. Conclusion

For long time no actual set laws governing surrogacy has been passed in Thailand. It has been broadly performed and tolerated by the government but no regulation was adopted. Without a specific legislation, surrogacy was available and accessible in Thailand for a high number of foreign families wishing to travel to Thailand to perform surrogacy agreements. Inconsistent announcements of the Medical Council of Thailand on service standards of Assisted Reproductive Technologies (ART) in 1997 and 2001, associated with the absence of a national policy addressing the challenges posed by the global cross border surrogacy market, places gestational carriers in economic jeopardy. For these reasons, Thailand a major destination for procreative tourists coming from developed countries and has pressured Thailand's legislature to pass a law that bans commercial surrogacy putting a halt on foreign couples seeking to have children through Thai surrogate mothers.

In summary, Thai legislator should enforce regulations to guarantee that surrogacy practices are performed only on voluntary basis and the free consent of the surrogate mother should be protected. Penalties should strictly sanction third parties commercial involvement as a criminal offence as well as advertising that a gestational carrier is willing to act as surrogate or that intended parents are looking for a gestational carrier. Reference to the solutions already adopted in UK as well as analogy to Israel model can help Thailand select the most suitable legal framework applicable to surrogacy arrangements. Furthermore, regulations should guarantee that in practice the gestational carrier has the right to keep the surrogate baby and is treated as the legal mother - even though she is not biologically related to the baby. With regard to compensation, it should be strictly enforced as a criminal offence to broker a surrogacy agreement on a commercial basis. Finally, law enforcement in Thailand should avoid children from becoming a commodity and there should be a ban on commercial surrogacy contracts. Without these regulations, surrogacy practices in Thailand would lead to psychological, physical and economic exploitation of weak parties with the threat that a market for intended children would be left to develop without control.

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