Selected Legal Issues Concerning Surrogacy in Malaysia*

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Abstract

Surrogacy, which originates from the Latin term "*surrogatus*" (substitute), generally refers to an arrangement where a woman bears a child for another woman. The Oxford dictionary defines surrogacy as the process of giving birth as a surrogate mother or of arranging such a birth. Surrogacy can be used for two purposes, i.e. commercial or altruistic. Generally, there are two types of surrogacy, i.e., first IVF or Gestational surrogacy and secondly, traditional or natural surrogacy. The former refers to a situation where a woman, whose uterus has been removed but still has her ovaries, provides her eggs to be in vitro with her husband's sperms by the IVF or ICSI procedure. The embryo is then transferred into the uterus of a surrogate mother. On the other hand, the latter refers to a situation where the surrogate is inseminated with the sperm of the male partner of an infertile couple. Surrogacy cases in Malaysia are on the rise. However, it is disheartening to note that the Malaysian legislature has not passed any specific law to govern the issue of surrogacy. Many couples who are unable to conceive a child enter into a surrogacy arrangement without realizing the consequences of this arrangement. Hence, the purpose of this paper is to look at certain legal issues that may arise as a result of a surrogacy arrangement. Basically, four legal issues would be discussed in this paper: first, the legitimate status of the child concerned, the right to guardianship and custody of the child, the child's right to maintenance and the child's right to inheritance. The writer would then make an attempt to suggest reforms to the issues above and also examine the possibility of enacting a law concerning surrogacy. In discussing the abovementioned issues, reference would be made to surrogacy laws in other jurisdictions, such as Queensland (Australia) and India.

I. INTRODUCTION

Science and technology has advanced rapidly in the last century. Medical science has advanced in such a manner that it could be said to take over the role of God as the Creator. The writer states this in the context of medical science assisting childless couples conceive a child through the assisted reproduction process. This is done by adopting the following methods: Intra-Uterine Insemination (IUI), In Vitro Fertilization (IVF) and Intra-Cytoplasmic Sperm Injection (ICSI).

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* This paper was presented at the 10th Asian Law Institutes Conference held in India on 23.5.2013 and 24.5.2013.

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These methods could be performed on the childless couples themselves or in the alternative, via a surrogate mother. For the purposes of this paper, the writer would focus on surrogacy arrangements where the childless couple (referred to as "intended parents" in this paper) would seek the assistance of a surrogate mother to carry the embryo throughout the pregnancy.

The number of childless couples in Malaysia unfortunately is on the rise. As such, these couples tend to resort to surrogacy arrangements with the hope of getting a child. However, they do not think of the legal consequences that would arise. Thus, the purpose of this paper is to examine the legal issues that may arise as a result of a surrogacy arrangement. The writer would specifically focus on four legal issues, i.e., the legitimate status of the child concerned, the right to guardianship and custody of the child, the child's right to maintenance and the child's right to inheritance. Finally, the writer would refer to the position in other jurisdictions such as Queensland (Australia) and India and make an attempt to suggest reforms to overcome the problems that may arise as a result of a surrogacy arrangement.

II. FERTILITY RATE IN MALAYSIA

Malaysia, a multiracial nation, consists of the following races i.e. the Malays (who are considered the natives or "Bumiputeras"), other Bumiputeras or natives, Chinese, Indians and others. The total fertility rate in Malaysia reached the replacement level i.e. 2.1 which started from the year 2010 and remained in the following year, 2011. The fertility rate for each race could be seen as follows:

Fertility rate according to race - ethnicity

Race	**2010**	**2011**
Total	2.1	2.1
Malays	2.7	2.7
Other Bumiputeras	2.4	2.3
Chinese	1.5	1.5
Indians	1.7	1.6
Others	1.1	1.1

Source: Vital Statistic, Malaysia 2011, Department of Statistics, Malaysia.[1]

The analysis above shows that the fertility rate for the Malays and the other Bumiputeras still recorded above the replacement level at 2.7 and 2.3 respectively for every woman aged 15-49 years. However the rates for the Chinese, Indians and Others remained below the replacement level at 1.5, 1.6 and 1.0 respectively in the year 2011.

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[1] Vital Statistics Malaysia 2011, Department of Statistic, Malaysia, Nov.2012: http://statistics.gov.my/portal/images/stories/files/LatestReleases/vital/Vital_Statistic_Malaysia_2011.pdf. Site accessed on 28.2.2013.

III. MEANING OF SURROGACY

Before examining the four legal issues, it is pertinent to know the meaning of surrogacy. "Surrogacy" originates from the Latin word "*surrogatus*" (substitute). The Oxford dictionary defines surrogacy as the process of giving birth as a surrogate mother or of arranging such a birth. The Merriam-Webster encyclopaedia defines surrogacy as the practice of serving as a surrogate mother.[2]

Surrogacy has also been described as "a gift of modern science which has given infertile couples the opportunity to enjoy the fundamental right of parenting a child.[3] It is also a "term used when a woman agrees to become pregnant and deliver a child for a contracted party. This gives infertile couples the opportunity to enjoy the fundamental right of parenting children".[4]

There are generally two types of surrogacy options: traditional and gestational. A traditional surrogate is a woman who donates her own egg and then carries the pregnancy. The surrogate's egg is fertilized through artificial insemination with the husband's sperm or a donor's sperm. On the other hand, a gestational surrogate is in no way related to the child she carries, either biologically or genetically. She becomes pregnant through the process of IVF, where the embryo or embryos created from the eggs and sperms from the intended parents or donors are implanted in her uterus for the gestational period of forty weeks.

There are two types of surrogacy arrangements between the intended parents and the surrogate: altruistic, where the surrogate does not receive any financial reward and secondly, commercial, where she (the surrogate) is financially compensated.[5]

Usually, surrogates are relatives or friends of the intended parents. She (the surrogate) must be in good health. It is not an easy task being a surrogate as it is an emotionally and physically demanding task. It is pertinent that the surrogate has emotional support and practical help throughout and after the pregnancy.[6] Surrogacy has been legally accepted in most of the developed nations, while it is still not allowed in certain developing countries.

In Malaysia, there is no law passed on surrogacy. However, where Muslims are concerned (note that 60% of the population of 27 million in Malaysia are Muslims), the National Council of Islamic Religious Affairs issued a *fatw*a (binding ruling) barring surrogacy in 2008. This is because in Islam, it is not permissible for a married male's sperm to be implanted into the egg of another woman as he is not married to this woman. The child would then be considered as his child born out of wedlock.[7] However, where

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2 Meriam-Webster, *An Encyclopaedia Britannica Company*: www. merriam-webster.com/medical/surrogacy. Site accessed on 1.3.2013.

3 James Johnson, September 16, 2009, *Surrogacy- A Gift of Modern Science*, Health, general community, http://www.thefreelibrary.com/Surrogacy+-A+Gift+of+Modern+Science-aO10735986532">Surrogacy-AGift ofModernScience. Site accessed on 1.3.2013.

4 *Ibid.*

5 *Ibid*.

6 *Ibid.*

7 1st March 2011, *Surrogacy banned under Malaysian fatwa,* Free Malaysia Today: www.freemalaysiatoday.com/category/nation/2011/03/01/surrogacy-banned-under-Malaysian-fatwa/ . Site accessed on 1.3. 2013.

non-Muslims are concerned, legal issues arise once the surrogate delivers the child and surrenders the child to the intended parents.

IV. LEGAL ISSUES

A. Legitimate status of the child

The first legal issue that arises concern the legitimate status of the child born as a result of a surrogacy arrangement. Is the child considered legitimate or illegitimate under the law? As far as a traditional surrogacy is concerned, there is no issue as to the legitimate status of the child as the wife's egg is fertilised through artificial insemination with the husband's sperm. There is no involvement of any third party. Hence the child is considered a legitimate child of the intended parents. However, the problem arises in the case of a gestational surrogacy where the sperm of the intended parent is fertilised with the egg of a surrogate and the embryo is implanted in the uterus of the latter. As mentioned earlier, under Islamic law such a child would be considered as a child born out of wedlock.

So far as non-Muslims are concerned, there are no legislation defining the meaning of a "legitimate child". The closest legislation that could be referred to is the Evidence Act 1950.[8] Section 112 of the Evidence Act, which follows the common law position, provides for the presumption of legitimacy as follows:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The above presumption is rebuttable. Before looking at how the presumption could be rebutted, it is pertinent to first look at who is presumed to be a legitimate person under this Act. Upon reading the above provision, two presumptions arise as to the legitimacy of a person:

> a. the person was born during the continuance of a valid marriage between his mother and any man; or
> b. the person was born two hundred and eighty days after the dissolution of his parents' marriage on condition the mother remains unmarried.

The above presumptions could be rebutted if it could be proven that the parties to the marriage did not have access to each other at the time the child could have been begotten. The question that arises at this juncture is what is meant by "non-access"? This has been explained by Mimi Kamariah Majid in her book *Family Law in Malaysia*[9] as follows:

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[8] Act 56.

[9] Mimi Kamariah Majid, *Family Law in Malaysia*, Malayan Law Journal, Kuala Lumpur 1999.

> Non-access may be proved if the parties are physically separated, as in the case when the husband or wife has to leave for abroad or stays apart from the other spouse because of employment or other reasons. Non-access may also be proved if the husband is proved to be impotent or incapacitated at the relevant point of time.[10]

An interesting case on this issue was decided in New Zealand in 1931, i.e. the case of *Ah Chuck and Needham*.[11] In this case, both the husband and wife, Mr and Mrs Hedges, were Caucasians. In 1928, the wife gave birth to a child with Mongoloid features. Ah Chuck was a market gardener who worked near their house and frequently visited the Hedges. Thus, the issue arose as to the legitimacy of the child and whether the child's father was Ah Chuck. The court having looked at the evidence, stated as follows:[12]

> There is no evidence of any kind which would justify me in concluding that the normal and natural human relations which exist between husband and wife did not subsist in the case of Hedges and his wife when the child was conceived.
>
> It is open to the appellant to prove that it was a natural impossibility for the husband to be the father of the child. Proof might be given that intercourse between husband and wife was impossible that husband and wife were so separated by distance that access could never have taken place. Again, proof might be given that Hedges was impotent, and proof of impotence would suffice to bastardize the child. No such proof was given in the present case.

Thus, the presumption of legitimacy in the above case could not be rebutted.

Applying the two presumptions stated in section 112 of the Evidence Act to the status of a child born out of a surrogacy arrangement, specifically in a gestational surrogacy, where the sperm of the intended parent is fertilised with the surrogate's egg, it could be noted that neither of the above presumptions apply. This is due to the fact that in the first presumption, it must be shown that the child was born during the continuance of a valid marriage between his mother and any man. In this case, both his biological father and mother are not married. In fact, they may be total strangers. The same reason applies to the second presumption as well. The second presumption states that if the parents' marriage has been dissolved, the child should be born within two hundred and eighty days from the date of dissolution of the marriage on condition that the mother remains unmarried. In the case of a gestational surrogacy, the child's "parents" were never married in the first place.

Having observed that both the presumptions of legitimacy do not arise in the case of a gestational surrogacy, the child concerned is prima facie deemed to be an illegitimate child in the eyes of the law. It is disheartening to note that the child would be considered as a child born out of wedlock through no fault of his or her. In such a case, he or she would not enjoy the rights enjoyed by a legitimate child pertaining to certain legal matters, such

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10 *Ibid* at p. 204.
11 [1931] NZLR 559.
12 *Ibid*, per Hardman J. at p. 564.

as the right to inheritance of his or her parents' property. Hence, it is submitted that the intended parents fail to realize this issue when they enter into a surrogacy arrangement with a surrogate.

On the other hand, the position of a child born in a traditional surrogacy is different. In this method the child's biological parents are married and thus the first presumption under section 112 of the Evidence Act would apply.

> In conclusion on the issue of the legitimate status of a child, a child born in a traditional surrogacy is deemed to be legitimate under the Evidence Act, whereas a child born in a gestational surrogacy is deemed to be illegitimate.

B. Guardianship and Custody of the Child

The second legal issue that arises is pertaining to the right to guardianship and custody of the child concerned. In a gestational surrogacy, generally, the surrogacy arrangement ends with the surrogate handing the baby over to the intended parents. However, there are situations when the surrogate, after giving birth to the child, refuses to hand the child over. The issue, then, of who has the right to guardianship and custody over the child arises.

Before discussing the above issue in depth, it is first important to know the meaning of "guardianship and custody". To a lay person, guardianship and custody mean the same. However, in law, it is not so. A "guardian" has been defined by Mimi Kamariah Majid, in her book *Family Law in Malaysia*, to mean as a person "who has powers over a child's upbringing, care, discipline and religion" and "custody" refers to "the state of having certain rights over a child which rights may include care and control of the child".[13]

Generally, a person who is given the custody of a child has the child physically living with him or her. However, when it comes to whether the person who has custody also has the right to decide the children's education and other important matters, it is not necessarily so. In the case of *Dipper v Dipper*,[14] Ormrod LJ stated as follows:[15]

> In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.

Thus, if there is an issue as to the upbringing of the child concerned, it has to be decided by the court.

Guardianship and custody issues in Malaysia are governed by two statutes, i.e. the Guardianship of Infants Act 1961[16] ("GIA") and the Law Reform (Marriage and Divorce) Act 1976 ("LRA").[17] Reverting to the issue in hand, i.e. in a gestational surrogacy,

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13 *Supra* n 9 at p.252.
14 [1980] 2 All ER 722.
15 *Ibid* at p.731.
16 Act 351.
17 Act 164.

can the surrogate claim that she is the guardian and has the right to the custody of the child? The provision in the Guardianship of Infants Act pertaining to who has the right to guardianship and custody of a child would be referred to. The relevant provision is section 5 of the GIA which provides as follows:

> **Equality of parental rights**
> 5.(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

Section 5 of the GIA gives both the biological parents of a child equal right in relation to the custody and upbringing of the child. However, this would generally be applicable to a situation where the biological parents of the child are legally married to one another. Therefore, would this also apply to a child born by way of a gestational surrogacy? In order to answer this question, two issues have to be addressed.

First, as discussed under Part IV (A) of this article, a child born by way of a gestational surrogacy would be deemed to be illegitimate under section 112 of the Evidence Act as his or her parents are not legally married to one another. This leads us to the second issue, i.e. whether the GIA applies to illegitimate children? Section 2 of the GIA, which is the Interpretation provision defines "infant" as a "person who has not attained his majority". There is no mention at all whether "infant" under this Act includes an illegitimate child.

As the GIA is silent on the issue of guardianship and custody of an illegitimate child, reference would have to be made to the common law position. The landmark case on this issue is *Barnado v McHugh.*[18] In this case, the court had to decide who was the rightful guardian of an illegitimate child, who was left by the mother in the Home for Destitute Children for twelve years. Halsbury LC at the House of Lords decided as follows:[19]

> It is clear ... that the law has placed upon the mother of an illegitimate child obligations which ought to, and in my opinion, do, bring with them corresponding rights. Whether the right is ... a *prima facie* right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of the opinion that no misconduct is established against this mother which disentitles her to exercise rights to be considered in respect of the custody of this child.

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18 [1891] AC 388.
19 *Ibid* at pp. 395-396.

In the case of *In re CT (An Infant)*,[20] the court held that the titles "father" and "mother" of a child refer to those who are married to one another and the marriage is a valid one under the law. Roxborough J stated as follows:[21]

> ... *prima facie,* the titles "father" and "mother" belong only to those who have become so in the manner known to and approved by the law.

Therefore, following the above decision, in order for a father and mother to get custody of a child, they must be legally married to each other. In other words, the case goes to show that a putative father and a de facto mother of an illegitimate child have no right to guardianship and custody of their child.

The first local case to decide on the issue whether the GIA applies to illegitimate children is *Re Balasingam and Paravathy.*[22] This was an application by a de facto mother to get custody of her two infant children. Raja Azlan Shah J in holding that the GIA does not apply to illegitimate children stated as follows:[23]

> The Guardianship of Infants Act does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate other than in ... section 1(2)(a) would seem to favour the provision that Parliament intended the Act not to apply to illegitimate children.
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> Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v Galloway,*[24] it is safe to say that "infant" means a legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father ", "mother" or "infant" can be construed to mean an illegitimate or de facto parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Hence, in an application for the guardianship and custody of illegitimate children, the above decision makes it clear that the GIA is not applicable, which means that section 5 of the GIA providing for the equality of parental rights over a child is not applicable. In such a case, the next pertinent question that arises is who has the right to guardianship and custody of the child concerned?

In the case of *T v O*[25] which was decided after *Re Balasingam and Paravathy,* the court agreed with the decision in that case that "the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order." The natural father has no right over the infant if there is no court order.

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20 [1957] Ch 48.
21 *Ibid* at p.56.
22 [1970] 2 MLJ 74.
23 *Ibid* at p.75.
24 [1955] 3 All ER 429.
25 [1993] 1 MLJ 168.

On the contrary, there are two cases decided after the above cases which have decided otherwise. The High Court in *Tam Ley Chian v Seah Heng Lye*[26] held that by virtue of section 24 of the Courts of Judicature Act 1964, the High Court has jurisdiction to appoint and control guardians of infants, which must include illegitimate infants. The High Court did not refer to the decision in *Re Balasingam and Paravathy*. In the case of *Low Pek Nai v Koh Chye Guan @ Koh Chai Guan*,[27] the High Court held that the GIA applied to illegitimate children, the reason being that since section 3 of the GIA in relation to Muslim infants contemplates legitimate and illegitimate infants, the GIA should apply to illegitimate children as well for non-Muslim children.

However, in the following year, the High Court in *Khoo Liang Keow v Tee Ming Kook*[28] did not agree with the decision in *Low Pek Nai*. The High Court agreed with the decision in *Re Balasingam and Paravathy* and stated that in the absence of any express provisions in the GIA on non-Muslim illegitimate children, the Parliament must have intended that the Act does not apply to illegitimate children. In *Low Pak Houng v Tan Kok Keong*,[29] the court held that section 5 of the GIA is intended to apply to a lawful father. Therefore, the putative father of an illegitimate child cannot claim guardianship under this Act. In the case of an illegitimate child, the mother has rights over and obligations towards her illegitimate child.

Therefore, having looked at the cases above, the current position in Malaysia is that the putative father of an illegitimate child does not have any rights or obligations on the child. The mother has all such rights. Reverting to the issue of whether a surrogate could claim the right to guardianship and custody of her child, the answer is yes as the child is deemed to be an illegitimate child and the majority of the cases as discussed above have held in favour of the mother.

C. Right to Maintenance

The third legal issue which would be discussed here is regarding the right to maintenance of a child born as a result of a surrogacy arrangement. There are two questions that arise here, i.e. first, whether the child does have a right to claim maintenance and if the answer is yes, the second question is from whom does he or she claim maintenance? The maintenance laws in Malaysia concerning non-Muslims are:

a) The Married Women and Children (Maintenance) Act 1950[30]
b) The LRA

Before discussing the right to maintenance under the abovementioned statutes, it is to be noted that in so far as a child born in a traditional surrogacy is concerned, his or her right to claim for maintenance from his or her biological parents is not an issue, as he or she is deemed a legitimate child and his or her rights are enshrined in the

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26 [1993] 3 MLJ 696.
27 [1995] 2 CLJ 110.
28 [1996] 2 CLJ 631.
29 [1998]2 MLJ 322.
30 Act 263.

abovementioned statutes. The problem, however, arises in a gestational surrogacy, as the child born is deemed to be an illegitimate child and as such does he or she have a right to claim maintenance under the abovementioned statutes? As an illegitimate child is not allowed to claim maintenance under the LRA unless he or she is adopted, the writer will focus on the Married Women and Children (Maintenance) Act 1950.[31]

Section 3(2) of the Married Women and Children (Maintenance) Act 1950 ("the 1950 Act") provides as follows:

> If any person refuses or neglects to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable.

The above provision confers the right to claim maintenance on an illegitimate child from his putative father. Generally, when an illegitimate child is claiming maintenance from his putative father, he or she has the onus of proving his or her paternity. This could be done by adducing his or her birth certificate if it has the name of the putative father stated or entered as the father of the child. In the alternative, a DNA test would have to be carried out.[32] Unfortunately, the child would face a problem when the putative father refuses to undergo a DNA test. The court too cannot compel him (the father) to do so as there is no law in Malaysia which gives the court the power to compel a person to take such a test for the purpose of proving paternity. However, such a problem would not arise in a surrogacy arrangement as the male intended parent would not dispute the child's paternity as in the first instance, he willingly gave his sperm to be fertilized with the surrogate's egg with the hope of getting a child.

The second issue that arises is who has the duty to pay maintenance to the child or in other words from whom can the child claim maintenance? Upon reading section 3(2) of the 1950 Act, there is no doubt that the putative father of the child has the duty to maintain the child. However, the issue that arises is whether the mother of the child too has a duty to maintain the child. "Mother" here could refer to the surrogate mother as well as the female intended parent. It is submitted that once the surrogate hands over the baby to the intended parents, she generally would have nothing to do with the child anymore and thus the child should not be able to claim maintenance from her. On the other hand, the female intended parent, once she receives the baby from the surrogate, "steps into the shoes of the surrogate". Therefore, the issue is whether the child could also claim maintenance from the female intended parent under the 1950 Act. Unfortunately there is no authority on this issue and authors have submitted that this issue is arguable.[33]

D. Right to Inheritance

The final legal issue that would be examined in this paper is concerning the right of the child concerned to inherit his or her parents' property upon the death of the latter.

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31 See section 2 of the LRA for the definition of the term "*child of marriage*".

32 *Supra* n 9 at p.314.

33 *Supra* n 9.

Generally, when a person dies, it is said that he has either died testate (leaving a will) or died intestate (without leaving a will). Basically, when a person dies testate thus naming his beneficiaries in his will, the position is more or less settled. However, parties who were not named in the will, or even those named in the will as beneficiaries but are not satisfied with the distribution of the deceased's estate, may want to contest the said will under the Inheritance (Family Provision) Act 1971.[34] Section 3(1) of this Act provides that:

> Where a person dies domiciled in Malaysia leaving -
> (a) a wife or husband;
> (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
> (c) an infant son; or
> (d) a son, who is, by reason of some mental or physical disability, incapable of maintaining himself;
> then, if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a "dependent" of the deceased) is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, the combination of his will and that law, is not such as to make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate for the maintenance of that dependant.

The next issue is whether "son" and "daughter" stated in section 3(1) above refer only to legitimate children or do they include illegitimate children as well. Section 2 of the Act defines "son" and "daughter" as follows:

> "son" and "daughter" respectively include a male or female child adopted by the deceased under the provisions of any written law relating to adoption of children for the time being in force and also the son or daughter of the deceased *en ventre sa mere* at the date of the deceased.

The above definition refers to legitimate children, adopted children and even an unborn foetus, thus leaving out illegitimate children. The issue then is if it includes "an unborn foetus", would it then include an unborn illegitimate child of the deceased? There is no authority on this issue yet.

When the deceased dies intestate, the Distribution Act 1958[35] would come in to decide the distribution of the deceased's property. Section 6 lists down the categories of persons who are entitled to his or her property. Basically, there are three categories of persons:

a) spouse
b) issues
c) parents.

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[34] Act 39.
[35] Act 300.

For our purposes, the question is whether "issue" here refers to only legitimate issues or does it include illegitimate issues (for example, children born by way of a gestational surrogacy)? Section 3 of the Act defines "issue" as follows:

> "issue" includes children and the descendants of the deceased children.

Section 3 goes on to define who a "child" is as follows:

> "child" means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952.[36]

The above definition clearly excludes illegitimate children. Hence, a child born by way of a gestational surrogacy, unfortunately, would not be able to inherit his intended parents' property upon their demise. It is submitted that in order to protect the interest of such a child, it is best for the intended parents to write a will naming the child concerned therein as a beneficiary.

V. COMPARISON WITH THE LAW IN OTHER JURISDICTIONS

Having discussed the four legal issues that may arise as a result of a surrogacy arrangement, it is observed that the child concerned, specifically a child born by way of a gestational surrogacy, would be deemed illegitimate in the eyes of the law and therefore would be deprived of his basic rights. There are no laws on surrogacy yet in Malaysia in order to resolve the above issues. Hence, the writer would next examine surrogacy laws which are already in force or have been drafted in other jurisdictions such as Queensland, Australia and India respectively in order to see if these laws adequately protect the rights of children born as a result of a surrogacy arrangement.

A. Queensland, Australia

The Parliament in the state of Queensland, Australia passed the Surrogacy Act 2010.[37] The preamble to the Act provides as follows:

> An Act about surrogacy, to provide for the court-sanctioned transfer of parentage of children born as a result of particular surrogacy arrangements, to prohibit commercial surrogacy arrangements, to make particular related amendments of the Adoption Act 2009, the Births, Deaths and Marriages Registration Act 2003, and the regulation under that Act, the Criminal Code, the Domicile Act 1981, the Evidence Act 1977, the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998, to amend the Status of Children Act 1978 for particular purposes and to make minor and consequential amendments of the Acts as stated in schedule 1.

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[36] Act 257.
[37] Act No.2 of 2010.

It is clear from the preamble that the Act prohibits commercial surrogacy, thereby only permitting altruistic surrogacies in Queensland. The Act was also passed, mainly to provide for transfer of parentage of children born as a result of surrogacy arrangements, which is sanctioned by the courts. The issue that arises here is whether it was passed to protect the welfare and best interests of the children concerned.

Reference could be made to section 5 of the Act in order to answer the question above. Section 5 in providing the main object of this Act, states, *inter alia,* in paragraph (b) as follows:

> The main objects of this Act are -
> (a) ...
> (b) in the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result -
> (i) to establish procedures to ensure parties to the arrangement understand its nature and implications; and
> (ii) to safeguard the child's wellbeing and best interests.

The objectives stated above are two-fold and actually answers the intention of the writer in writing this paper. First, it states that the Act intends to establish procedures so that the parties to a surrogacy arrangement *understand its nature and implications* of such an arrangement. This is very important as was stated in the beginning of this paper. Intended parents who enter into a surrogacy arrangement without understanding the nature and implications of this arrangement could be in for a shock later when legal issues as have been discussed above arise. Secondly, the Act states that it also aims *to safeguard the child's wellbeing and best interests*. This actually, in the writer's opinion, is the most important factor which should be considered by the legislation.

The above concern is in fact stated in section 6 of the Act which states the "*Guiding principles*" as follows:

> **6. Guiding principles**
>
> (1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

The above principle places importance on the wellbeing, and best interests of the child, not only through his or her childhood period, but also for "the rest of his life". Section 5 further explains the principles which would be administered in safeguarding the wellbeing and best interests of the child concerned as follows:

> (2) Subject to subsection (1), this Act is to be administered according to the following principles -
> (a) a child born as a result of a surrogacy arrangement should be cared for in a way that -
> (i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's birth parentage; and
(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;
(b) the same status, protection and support shall be available to a child born as a result of a surrogacy arrangement regardless of -
(i) how the child was conceived under the arrangement; or
(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or
(iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;
(c) the long-term health and well being of parents to a surrogacy arrangement and their families should be promoted;
(d) the autonomy of consenting adults in their private lives should be respected.

This Act ensures that the child concerned is provided with a safe, stable and nurturing family and home life and the development of the child's emotional, mental, physical and social wellbeing. Upon perusing the above section, the writer is of the opinion that the most important part is paragraph (b) which expressly states, *inter alia,* that regardless of how the child was conceived under the surrogacy arrangement or whether there was a genetic relationship between the child and any of the parties to the arrangement, the same status, protection and support should be available to the child. This means that no matter whether the child was conceived by way of a traditional surrogacy or a gestational surrogacy, he or she should be given the same status, protection and support. It is submitted that "status" here, though not defined in the Act, could be presumed to refer to the legitimate status of the child. If this presumption is accepted, this would resolve the problem of the illegitimate status of a child born by way of a gestational surrogacy and the legal issues that arise thereafter.

Apart from resolving the issue of the legitimate status of the child, this Act also resolves the problem of the surrogate mother refusing to hand over the child to the intended parents. Reference could be made to section 39 of the Act which provides on the "Effect of a parentage order". In order for this section to be applicable, the intended parents have to obtain a parentage order from the court provided for under sections 21 to 38.[38] The effect of a parentage order is provided for under section 39(2) as follows:

(2) On the making of the parentage order -
(a) the child becomes a child of the intended parent, or intended parents, and the intended parent or intended parents, become the parent, or parents of the child; and
(b) the child stops being a child of a birth parent and a birth parent stops being a parent of the child.

Therefore, once a parentage order is issued by the court, the birth mother or the surrogate ceases to be the parent of the child concerned and the intended parents step into

[38] Part 2 of the Act.

the shoes of the surrogate, thereby answering the question of who is the lawful guardian entitled to have custody of the child.

B. India

India could be described as a leader in international surrogacy. Many infertile couples seek Indian females as surrogate due to the relatively low cost. Commercial surrogacy has been legal since 2002. The issue of commercial surrogacy arose in the landmark case of baby Manji or "Baby M" (Japanese Baby), where a Japanese man's sperm and an egg from an unknown donor were fertilised through IVF in Gujarat in July 2008. The Supreme Court held that commercial surrogacy is permissible in India and directed the legislature to pass a law to govern surrogacy arrangements in India.[39]

As a result of the above case, the Law Commission of India submitted its 228th Report on "*Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties To A Surrogacy"*. The Commission has strongly recommended against commercial surrogacy.[40]

The Assisted Reproductive Technology Bill 2010 aiming to regulate the surrogacy business in India was passed to provide for a national framework for accreditations, regulation and supervision of assisted technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.[41]

Chapter VII of the Bill spells out the Rights and Duties of Patients, Donors, Surrogates and Children. Section 34(1) states that both the intended parents and the surrogate shall enter into a surrogacy arrangement and this agreement shall be legally enforceable. Subsection (2) goes on to state that all expenses until the child is ready to be delivered to the intended parents shall be borne by them.

Section 34(3) is a pertinent provision in this Bill as it expressly permits the surrogate to receive monetary compensation from the intended parents. When comparing this statute to the Surrogacy Act of Queensland, it could be noted that this proposed law allows commercial surrogacy whereas the Australian law expressly prohibits it.

Section 34(4) provides that a surrogate mother shall relinquish all parental rights over the child. This is an extremely important provision as it prohibits the surrogate from claiming parental rights over the child either after the child is born or at a later date. This is also to protect the welfare of the child in order to avoid any confusion in the future as to the identity of his or her biological mother.

Section 34(1) of the Bill provides that the intended parents are legally bound to accept the custody of the child irrespective of any abnormality that the child may have. This provision is to ensure that the intended parents do not breach the agreement on the

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39 S*urrogacy Laws India,* Legally Yours: http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71. Site accessed on 1.3.2013.

40 *Ibid*.

41 Statement of Objects and Reasons.

ground that the child was born abnormal. If the intended parents refuse to accept the custody of the child, it would constitute an offence under this Bill.

Section 35 constitutes a very important provision as it determines the status of the child. Subsection (1) provides that a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock, and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through traditional surrogacy. There is no mention of the status of a child born from a gestational surrogacy. Nevertheless, subsection (7) would come in handy to help solve this problem. Subsection (7) states that the birth certificate of a child born through the use of assisted reproductive technology shall contain the name of the parents who sought such use. Therefore, it is possible to assume that the status of a child born using the gestational surrogacy method would be deemed to be a legitimate child under this Act.

However, this Bill is yet to become law in India. It would in fact solve many legal issues once it is enforced.

VI. RECOMMENDATIONS

Having looked at the serious legal issues that may arise in Malaysia as a result of surrogacy arrangements (especially gestational surrogacies), the writer would next attempt to recommend certain measures to resolve the abovementioned issues. The main issue that needs to be addressed here is concerning the legitimate status of a child born by way of a gestational surrogacy. As stated earlier, such child would be deemed illegitimate in the eyes of the law.

In order to overcome this problem, it is submitted that the child should be legitimated. One way of legitimating an illegitimate child is through adoption. The intended parents would have to apply to the court under the Adoption Act 1952[42] for an adoption order, having complied with the conditions stated in the said Act. Upon the adoption order being made by the court, they would become the legal parents of the child. Section 9 of the Adoption Act 1952 states the effect of an adoption order as follows:

> 9(1). Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock:
>
> Provided that, in any case where two spouses are the adopters such spouses shall in respect of matters provided in this subsection and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the

[42] Act 257.

> adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother, respectively.

Hence, once the adoption order is made by the court, all the right, duties and obligation of the biological parents are relinquished and are transferred to the adoptive parents.

At this juncture, a very pertinent issue needs to be highlighted. Section 6 of the Adoption Act states the matters the court has to consider before issuing an adoption order. One of the matters stated in section 6(c) is that neither the applicant nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction. Therefore, if the surrogacy arrangement between the intended parents and the surrogate is a commercial surrogacy, it would not be possible for the intended parents to adopt the said child as the Adoption Act prohibits altogether any monetary payment in exchange for the child. The reason behind this prohibition is that a child should not be treated as a chattel.

As an alternative to the above recommendation to adopt the child concerned, with the rising number of infertile couples resorting to surrogacy as a way for them to have a child and the increasing popularity of surrogacy, the writer would recommend that a law be passed to regulate surrogacy arrangements in Malaysia, as has been done in other jurisdictions. It is also pertinent for the legislature to come up with such laws quickly. This is due to the fact that there is no surrogacy law, the children born as a result of surrogacy arrangements would be deprived of their basic rights, as has been discussed earlier.

In addition to the above measures, it is also pertinent for the medico-legal institutions in the country such as the Malaysian Medical Association and the Bar Council to conduct legal clinics to educate the intended parents and surrogates on the legal issues that would arise as a result of surrogacy arrangements. The position concerning the Muslims wanting to resort to surrogacy is resolved as a result of the *fatwa* issued in 2008. The problem therefore is concerning non-Muslims wanting to enter into surrogacy arrangements.

VII. CONCLUSION

In conclusion, it is submitted that it is disheartening to note that the development of Malaysian law is not on par with the development of medical science in the nation. Medical science has made it easy for childless couples to resort to surrogacy methods to have a child. All they have to do is to seek medical advice from a medical practitioner who is a specialist in infertility.

On the other hand, the legislature is left far behind in enacting laws to regulate surrogacy arrangements in order to ensure that the rights of all the parties concerned, especially the child, are protected. This is a serious issue that the country has to grapple in the coming years if the legislature does not make any attempt to enact a law to regulate surrogacy in Malaysia for the non-Muslims.