

REVIEW ARTICLE

AGREEMENT SURROGATE MOTHER AND THE EFFECT ON CHILDREN'S STATUS BORN

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ABSTRACT

Surrogate mother is one of the IVF techniques (*fertilization in vitro*), the seeds must come from the husband and wife pair and then put in the womb of another woman. After the child is born another woman is obliged to give the child to a married couple who ordered the agreed agreement. In this research, the author aims to find out how the validity of the agreement *surrogate mother* and what is the legal status of children born from agreements *surrogate mother*. Agreement is a something that someone or some people commit themselves to someone or some people who tie themselves to others, and while Legitimate children are children born in or due to a legal marriage. The theory used (statue approach) by examining all regulatory laws. Results of research on the validity of the agreement *surrogate mother*, the agreement is invalid because it is based on the fourth condition in terms of the validity of an agreement Article 1320 Indonesian Civil Code that is, due to "the existence of halal reasons" and as for the status of the child from the status of the child who was born that the child is the child of a surrogate who already conceived and gave birth to her.

Keywords: *Surrogate Mother, Agreement, Child Status*

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INTRODUCTION

Every person has the right to form a family and continue the lineage through a legal marriage. However, there are times when there are marriages there are various obstacles related to obtaining offspring (Yee, Goodman, & Librach, 2019). This can occur if one or both of them have abnormalities in their reproductive organs. But a married couple would want to have children who still have a genetic relationship or blood with them (Shenoy, Desai, Venkatasubramanian, & Chandra, 2019).

Becomes a cause of infertility *surrogate mother* is: the wife does not have a uterus from birth (Banerjee & Basu, 2009), the wife has never done the removal of the uterus or the wife does not want to give birth even though her uterus is good because he wants to maintain an athletic body considering she is a career woman (Irianto, 2014). Making a woman impossible to conceive naturally and can be replaced with another woman instead.

In a case often referred to as *surrogate mother*, Literally equated with the term surrogate mother or guardian mother who is freely defined as a woman who ties herself through a binding agreement with another party (usually husband and wife) to become pregnant after the incorporation of the male germ cell (sperm) and female germ cell (ovum) carried out fertilization outside the uterus (*In Vitro Fertilization*) until giving birth according to an agreement which then the baby is handed over to the husband and wife with a reward in the form of material that has been agreed upon (Zerr, Newton, Litrownik, McCabe, & Yeh, 2019).

Initially, *surrogate mother* happens because the party of the wife cannot conceive because of something that happens to her uterus so that the wife's role is transferred to another woman to replace her function as a mother to conceive and give birth, both

in material or voluntary rewards (although voluntary ones are very rare) (Teman, 2008).

That is the arrangement against surrogate mother many countries that prohibit this practice in the country (Kogan et al., 2019), such as Germany bans the transfer of the fetus, France does not allow commercial use of the human body, there are also banned by its constitution (Italy, Britain, and Libya), the United States only a few states that prohibit it, and Iceland has banned this practice since 1996 (Kristinsson, 2016).

In Indonesia's positive law there is no specific regulation regarding this *surrogate mother*, but if you use the way of thinking *argumentum a contrario*, then it can be applied in Article 1548 and Article 1320 of Indonesian Civil Code (Irianto, 2014). *Surrogate mother* this cannot be separated in relation to the agreement seen from Article 1313 Indonesian Civil Code: "*Something that someone or several people commit themselves to one or several other people*", then the practice of surrogate mother / rent the uterus can already be said as a form of agreement that is an event where someone promised (married couple) to another woman (surrogate) or where the two people promised each other to do something (*embryo transfer*). From this incident, arises a relationship between the two people called a treaty (Headd & Bradford, 2016).

Agreement *surrogate mother* it alone must fulfill several legal conditions of the agreement contained in Article 1320 Indonesian Civil Code. If it is reviewed at a glance that there is one reason that makes this agreement invalid. The reason is that the 'halal cause' *causa* made this agreement null and void by law which resulted in the agreement being returned to its original position where there was no agreement at all.

In the law of the agreement itself, there is the principle of freedom of contract (Byrne & Congdon, 1999). This is set in Article 1338 which states that "*All treaties made legally apply as a law for those who make them*". Means that the parties in an agreement are free to make or not make, can enter into an agreement with anyone, determine (content, implementation, and terms) of the agreement, and can determine the form of the agreement (Yilmaz, Vellanki, Ata, & Yildiz, 2018). However, in the freedom of contract, there are still restrictions in that article, these restrictions are contained in Indonesian Civil Code other.

METHOD

This type of research that can be used in this study is normative legal research which is also called doctrinal research (*law in books*). (Amiruddin & Asikin, 2006) Use a legal approach (*statue approach*) by examining all regulatory laws relating to legal issues that are legal issues being addressed (Marzuki, 2016). Sources of data in this type of research are normative legal research as the data source is only secondary data consisting of primary legal material, secondary legal and non-legal materials. The data collection technique uses the study of documentation or library materials is a data collection tool that is done through written data (Soekanto, 1986). The method used

to analyze data, here the author uses descriptive-analytical research methods, analytical data used is a qualitative approach to secondary data.

SURROGATE MOTHER

I. AGREEMENT SURROGATE MOTHER

According to Fred Amelen states that women who bind themselves through a binding agreement with other parties (husband and wife) to become pregnant after the inclusion of the unification of male seed cells and female seed cells, which are fertilized outside the womb until giving birth according to the agreement which then the baby is handed over to husband and wife to get rewards in the form of agreed-upon material (Poursafa et al., 2016)

Case *surrogate mother* the truth is if the egg must come from the biological mother, whereas if the egg comes from the donor it is not said to be a *surrogate mother*. Here the essence is the transfer of the rights of pregnancy and childbirth from a woman who is transferred to another woman with some compensation under any pretext, both medically and aesthetically (Dey, 2016).

Agreement *surrogate mother* is an IVF technique (in vitro fertilization), wherein the sperm and ovum of a married couple are processed in a tube, then put into someone else's uterus, not into the wife's womb. (Cranfield et al., 1992) Women who are willing to be entrusted with the embryo are called *surrogate mother*, generally with an agreement between *surrogate mother* with a married couple who want to use services *surrogate* that can be called by an *intended parent*. (Stöbel-Richter, Goldschmidt, Brähler, Weidner, & Beutel, 2009) A *surrogate mother* is provided for all the needs during the process of conceiving the child, during childbirth and after delivery. *Surrogate* after giving birth, the child must submit the child to the *intended parent*. (Morin, Tsang, Pugash, & Wilson, 1999)

The most important purpose of practice *surrogate mother* this is to help married couples who are not blessed with offspring. Surely all married couples after marriage must leave a descendant of a child in the family. There are several things that cause surrogate mother done as emphasized by Rulsan (2017), as follows:

1. A woman has no hope of conceiving naturally. This can be caused because the woman is afflicted with an illness or disability which then prevents her from wanting to conceive and give birth to a child.
2. A woman who wants to have children, but her womb has been removed because of surgery or because of other problems. This certainly does not allow her to get pregnant.
3. A woman who wants to maintain her beauty by avoiding pregnancy, childbirth, and breastfeeding. Because it is feared that pregnancy, childbirth, and

breastfeeding will negatively affect the beauty of his body shape. For example, obesity and so forth.

4. A woman who wants to have children but at the same time, she has broken her period (menopause).
5. The woman wants to have children but does not want to carry the pregnancy, give birth and breastfeed the child and wants to maintain the beauty of the body from the consequences of pregnancy.
6. A woman who wants to earn income by renting out her womb to others. This could be due to very pressing economic problems.

The practice of the agreement *surrogate mother* certainly will have an impact on the parties. However, the most visible effect is for women who rent out their wombs (surrogate) (Reame, 1991). The impact of practice *surrogate mother* for women who rent out their wombs are:

1. She has committed adultery because there is a mixture of other male sperm into her womb (surrogate).
2. Killing instincts to motherhood, because they have to give up the child they have conceived.
3. Eliminating dignity and glory for women, because the uterus is not traded goods.
4. There will be mistakes when one party violates the agreement that has been made, for example when a surrogate mother does not want to give the child to the couple who has the sperm and ovum.
5. There will be social upheaval if this news reaches the public. Because people are not familiar with the practice of uterine leasing.

LEGAL ASPECT OF SURROGATE MOTHER

I. THE VALIDITY OF THE AGREEMENT SURROGATE MOTHER

If reviewed from Article 1313 Indonesian Civil Code: "*Something that someone or some people commit themselves to someone or some people who tie themselves to others*", then from that the practice of surrogate mother can already be said as a form of agreement that is an event in which someone promises to be married to the husband and wife to surrogate or where the two people promised each other to carry out what had been promised (*transfer embryo*) (Bibler & Miller, 2019).

If you see the principle of freedom of contract contained in Article 1338 (1) Indonesian Civil Code which reads: "*All treaties made legally apply as a law for the parties who made them*". The principle of freedom of contract as also emphasized by Agorastos, Zafarakas, & Mastrominas (2009) has its own scope which gives freedom to the parties to: Make or not make an agreement, making an agreement is a necessity for the parties to be able to carry out the obligations that have been promised. In a *surrogate mother*, this is better to be promised because it can protect the parties if it occurs from

one of the parties not carrying out their obligations/default (Hickman, Daly, Clochesy, O'Brien, & Leuchtag, 2016).

1. Enter into an agreement with anyone, in this case, the object and subject of the agreement cannot be separated *surrogate mother*. Become the subject of the agreement *surrogate mother* are parties who make agreements between married couples with a *surrogate*. While the object is what has been agreed in the agreement *surrogate mother* is the womb women (Burrell & Edozien, 2014).
2. Determine the contents of the agreement, implementation, and terms
 - a. Determine the contents of the agreement *surrogate mother*

In determining the contents of an agreement *surrogate mother* the parties (married couple with a surrogate) can determine the contents of the agreement between themselves as long as it does not conflict with public order, decency, and law (Pizitz, McCullaugh, & Rabin, 2013).

Quoting the contents of the agreement *surrogate mother* according to Leenen; willingness surrogate to receive artificial insemination, willingness surrogate gives the name to the child (baby) obtained from genetic parents, willingness surrogate giving up the child or baby to genetic parents immediately after giving birth, willingness surrogate to assist fully in completing family law procedures relating to the desired legal status and changes in the child's family name, willingness of a surrogate mother to act well for the fetus, the availability of genetic parents to pay all costs during pregnancy and birth costs, and availability genetic parents to provide service fees to surrogate (HS, 2007).

The problem in determining the contents of an agreement is contrary to decency, public order, and law in Indonesia. Because the issue is whether the womb of a woman who is the object of this agreement can be rented to other people who rent it.

- b. Implementation of the agreement *surrogate mother*

When viewed from the object, it can be estimated at around ten months. That period includes the embryo transplantation time until the birth of the baby (HS, 2007). That the implementation of an agreement basically involves the matter of payment and delivery of goods. It can be concluded that the agreement *surrogate mother* This begins with an embryo transplant while payments are made at any time and of course, the author does not know yet. The termination of the agreement is in accordance with the deadline set in writing or when surrogate surrender the child to biological parents (Arieh et al., 2005).

- c. Requirements in the agreement *surrogate mother*

According to Sudikno Mertokusumo, the requirements in carrying out the agreement *surrogate mother* includes compensation for services, regarding the

status of their children, what if surrogate his life was not careful enough to cause the child conceived to die (Irianto, 2014).

If observed from the contents of the agreement, implementation, and terms in an agreement *surrogate mother* above, it appears that *surrogate* must surrender their child to a husband and wife who left the embryo. Besides that, *surrogate* assist in completing legal procedures relating to the desired legal status and changing the child's family name (Yee, Hemalal, & Librach, 2019).

3. Determine the form of agreement whether written or oral. In agreement *surrogate mother* can use verbally and in writing (but usually written) (Giacalone, Laffargue, Bénos, Dechaud, & Hédon, 2001).

The next discussion about Article 1320 Indonesian Civil Code which regulates the legal terms in an agreement if applied in the agreement *surrogate mother*. The first condition is a free agreement between the parties that entered into an agreement, in this case between a married couple with *surrogate* must have the same will in order for an agreement to occur (Judiasih, 2016). The agreement that has been agreed in *surrogate mother* usually regarding the object of the agreement, the contents of the agreement and the terms of the agreement described above (Ziaei, Ziaei, & Ghobadi, 2009).

The second requirement is to be able to make an agreement, in an agreement *surrogate mother* the parties must have the ability to do legal actions, in addition to meeting the age limit skills, and must also meet the requirements as *surrogate mother* that is the condition of being *surrogate* for those who are married: no more than 38 years, physically and mentally healthy, have a healthy and strong uterus, married social status, have at least one child and have the consent of her husband and as *intended parents* (wife) must meet the requirements *intended parents* (wife) as an egg cell grower must have a marriage bond (Carone, Baiocco, & Lingardi, 2017).

The parties who carried out the agreement *surrogate mother* this is a married couple with the *surrogate* as the subject of the agreement. A married couple is definitely said to be the subject of an agreement that is already capable of making agreements. While surrogate this itself can possibly be married or unmarried, if already married it can be said to be competent in making agreements and how for surrogate unmarried mothers who are not married *surrogate* This does not explain the minimum age limit as a surrogate mother/surrogate under these conditions only the appeal is not more than 38 years old. Citing Koes Irianto's opinion in his book *Biologi Reproduksi* that at the age of 24 years is the highest fertility for IVF (Irianto, 2014). It can be interpreted that the parties in the agreement *surrogate mother* already said to be capable of making an agreement.

Regarding the third condition is regarding a particular matter, in this case, cannot be separated about the object in the agreement. Related to the object, the woman's womb from the initial process of embedding an embryo from a married couple implanted in the womb of another woman who is not his wife, and finally has a child. Whereas in this particular matter contained in the agreement *surrogate mother* is the

womb of a woman who has been determined type as the object of this agreement (Blake et al., 2016).

Regarding the fourth condition is about a halal cause, namely an object that is not contrary to the law in terms of decency and public order. On agreement *surrogate mother* the object is the womb of a woman herself. According to the author, a woman's womb is a part of the human body that should not be traded or exhibited in matters of earning a living.

It can be concluded that the agreement *surrogate mother* for the three conditions in the legal condition of an agreement, "an agreement of the parties, the ability of the parties and a certain thing can be implemented". But in agreement *surrogate mother* there are conditions that cannot be fulfilled to become a valid agreement. The unmet requirement is the 'legal cause(halal)' which causes the agreement *surrogate mother* should null and void by law (*Nietig van Rechtswegs, Null and Void*).

According to the author that the agreement *surrogate mother* This is invalid because it is based on the fourth or final condition in terms of the validity of an agreement that is due to 'legal reasons(halal)' which made the agreement null and void. This legal nullification results in the agreement being deemed to have never existed or returned as before the agreement or before the existence of an agreement (Imrie, Jadv, & Golombok, 2012). Whereas the first, second and third conditions can be applied in the agreement, the conditions can be fulfilled because the parties, namely husband and wife, *surrogate* is a person who is capable of carrying out legal actions and in certain cases it has been determined that what is made as the object is the womb of a woman.

If seen Article 1338 Indonesian Civil Code that all parties are given the freedom to make their own agreements in this article. The opinion of the author that the principle of freedom of contract freedom in making agreements is not absolute because there are limitations given by the articles Indonesian Civil Code others that make this principle have the following limitations in responding to agreements *surrogate mother* as below:

1. Article 1320 Indonesian Civil Code these cannot be separated with Article 1338 Indonesian Civil Code this which reads "All agreements made legally ..." from the sound can be interpreted that all agreements made by the parties legally, the meaning of the word legally is the essence of a legal condition of an agreement contained in Article 1320 Indonesian Civil Code. It is known that all agreements still refer to Article 1320 Indonesian Civil Code, which is the legal condition of an agreement. It can be known that in the agreement *surrogate mother* this cannot be said to be valid because it cannot fulfill the fourth requirement of 'legal cause' which caused this agreement to be null and void (*Nietig van Rechtswegs, Null and Void*).
2. Article 1332 which reads "Only goods that can be traded can be the subject of an agreement" which is a traded item is an object in an agreement. Tradable items are any objects that can be traded, such as motor vehicles, household furniture, electronic devices, and other items that can be traded. It is known that the object

of the agreement *surrogate mother* this is a woman's womb is not an object or item that can be traded or rented.

3. Article 1337 reads "A cause is prohibited if prohibited by law, or contrary to good decency or public order". A cause is related to a lawful cause which must not be in conflict with the law, decency, and public order. In this case, the agreement *surrogate mother* not allowed in positive law in Indonesia.
4. Article 1339 reads "An agreement is not only binding for things that are expressly stated therein, but also for anything that according to the nature of the agreement, is required by propriety, custom or law". This article means that the parties are not only bound by an agreement that has been agreed but also bound by propriety, customs or laws.

It can be interpreted that the parties are given the freedom to make their own agreements, but there are also limits that must be obeyed by the parties who made them.

II. STATUS OF CHILDREN BORN FROM THE AGREEMENT SURROGATE MOTHER

Regarding the status of children born from agreements *surrogate mother*, This is possible having two possibilities due to being *surrogate* can be married women and girls or widows (Hanlon et al., 2005). Related to the status of this child, it can be connected with regulations regarding the understanding of legitimate children, the possibilities of the status of children born from the agreement *surrogate mother* as follows:

1. If that becomes *surrogate* is a girl or widow (not bound in a legal marriage),
If the status *surrogate* is a girl or widow, then the child born is a child outside the marriage of the woman. Often referred to as a child born due to adultery, which is the result of a husband or wife relationship with another man or woman (Yilmaz et al., 2018).
2. If that becomes *surrogate* is a married woman (still has a husband)
If a status *surrogate* is a married woman, the child born is a legitimate child of a married couple who rents out their wombs. Based on the regulations above Article 42 Law No. 1 of 1974 concerning Marriage (Indonesian Marriage Law) and Article 250 Indonesian Civil Code which if applied in this case surrogate who is married that the child is considered legitimate child together with the husband (*surrogate*) because in the sound of the article concerning legitimate children is a child born in a legal marriage.
That the husband (*surrogate*) can reject the presence of children born from *surrogate mother* because it's not his biological child. Then the husband can deny the child who is deep Article 251, 252, dan 253 Indonesian Civil Code by submitting to court for a blood draw (blood type or DNA test) and based on the inside Article 44 Indonesian Marriage Law "A husband can deny the legitimacy of

a child born to his wife, if he can prove that his wife has committed adultery and the child is the result of adultery" (Ratman, 2012).

If reviewed from Article 99 Islamic Law Compilation that agreement *surrogate mother*, then the child is a child outside of marriage. This article does not see the status of *surrogate* married or unmarried. If you see the status of *surrogate* who is married, indeed surrogate it still has a marital relationship with her husband but in the article there is a word 'husband and wife fertilization' and what you need to know is that the fertilization is done by a couple who ordered the child and the seeds belong to those who ordered it. Then put together in a tube and after becoming a new embryo transferred to the surrogate uterus. Therefore, the child is born *surrogate* is a child out of marriage based on Article 99 Islamic Law Compilation.

According to the author regarding the status of children born in the agreement *surrogate mother*: "The position of a child born through IVF using sperm and ovum which is owned by a married couple and then the embryo is transferred to the womb of another woman who does not have an ovum or is known as *surrogate mother* that the child is a child of *surrogate* who already conceived and gave birth to her. But according to the author, it is necessary to see the status of a surrogate if surrogate the girl or widow of the child is a child outside of marriage. Whereas if the surrogate mother is a woman who is still bound in a legal marriage, then the child is the legitimate child of the surrogate mother and her husband " .

Relationship of children born in agreement *surrogate mother* with the parties. So, when viewed from the side *surrogate* there are two possibilities if surrogate the girl or widow is said to be a child outside the marriage of the woman or often said to be an adultery child. The child only has a relationship with his mother and his mother's family. While *surrogate* is bound by a legal marriage with her husband, then the child is the legal child of the mother who gave birth to her husband.

Relationship between husband and wife with children born in the agreement *surrogate mother*. Genetically the child is their child, but in positive law, the husband and wife with the child do not have a relationship like parents with children. The verdict is issued Constitutional Court of Indonesia No.46/PUU-VII/2000 for children outside of marriage if applied the regulation try to be applied by agreement *surrogate mother*. Then it cannot be applied, and the only effort is to adopt a child.

CONCLUSION

This paper highlights and concludes that the validity of the agreement *surrogate mother* this must be seen through Article 1320 Indonesian Civil Code regarding the terms of validity of the agreement. If the article is applied, then this agreement is invalid

because there is one condition that is not fulfilled. The first, second, and third conditions can be fulfilled, but the fourth condition cannot be fulfilled. In these terms of agreement of the parties, competent to make agreements and certain conditions can be fulfilled these conditions. For the first condition, the parties can determine their own agreement in the agreement *surrogate mother* in order for the agreement to occur, the conditions of the two parties have been fulfilled the age limit to be able to be said to be capable of loading the agreement, and the third condition in terms of the object can be determined in the form of the womb of the woman who has been promised. As for the fourth condition for the existence of 'a lawful cause', it cannot be fulfilled because it contradicts existing laws, decency, public order and is contrary to the main points of the agreement. Not fulfilling these conditions resulted in an agreement *surrogate mother* resulting in the agreement being null and void. This legal nullification results in the agreement being deemed to have never existed or returned as before the agreement or before the existence of an agreement. Status of children from the status of children born in the agreement *surrogate mother* that the child is a child of a *surrogate* who already conceived and gave birth to her. Because in Indonesian law inside Indonesian Marriage Law, Indonesian Civil Code and Islamic Law Compilation of these regulations only see where the child was born. That surrogate can be said as parents biologically as well as legally, whereas for husband and wife couples who order the child are considered as parents genetically from the child. However, it is necessary to see the status of a surrogate if surrogate the girl or widow of the child is a child outside of marriage. Whereas if surrogate these are women who are still bound in a legal marriage, so the child is the legal child of surrogate with her husband and the regulations in Indonesia do not allow agreements *surrogate mother*.

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