

Review and explanation of the financial rights of children born via Surrogacy

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Abstract

With the development of medicine, using assisted reproductive techniques for overcoming infertility problem of infertile couples is increasing. One of these modern assisted reproduction methods is surrogacy through which surrogate mother (womb owner) carries the fetus of infertile couple in her womb and it is required to give the child, after childbirth, to the owners of sperm and ovum. The child that is born in this way has certain rights like any other child. These rights include financial and non-financial rights; in this paper the researchers tried to study financial rights of these children including inheritance, will, alimony, devotion and the civil liability suing right of doctor. The results showed that children who are born through surrogacy inherit from sperm and ovum owners, because these children have relative relations with sperm and ovum owners. Therefore their alimony in the first place is upon sperm owner and after that the father of sperm owner and after that it is upon ovum owner, also alimony of these children at the time of fetus which is developing in the womb of surrogate mother is upon sperm owner. At the time of sperm coagulation these children have the right of fruition; therefore devotion and will are correct for these children during gestation and after that.

Key words: surrogacy, surrogate mother, intended parents, fetus, financial rights

Introduction

Every human being has a desire to reproduce and being parent is one of the most important stages of human development. However, this wish sometimes does not come true easily. Therefore, regarding an increase in infertility among couples, many methods have recently been developed including surrogacy. In this method, in addition to infertile couples, the woman who brings up the fetus in her womb to give it to the infertile couples after childbirth has a special and important role. This method is used when the couple cannot carry and bring up their child. Using surrogacy in the frame of one of legal contracts is a suitable method for infertile couples. Although it has been a long time since the agreements have been reached for the use of surrogacy and its religious orders and legal rights have been discussed in legal circles, and religious and legal scholars have presented their comments, the issue of surrogacy is still a new topic that needs a lot of reflection and research to study all the aspects of this issue with a deep and profound look.

In fact, even though this healing method has had brilliant advances in medical domains, this issue is a new issue in law and it has raised many important questions which have not yet been answered and needs comprehensive and thorough studies. As it is known, the children that are born in this way like other children, born in natural fertilization, have civil rights. Therefore if the rights of these children are not precisely defined, some problems may rise. If studies in this area are not organized and a certain framework is not drawn, it can have some irreparable consequences. Thus with regard to the daily increase in the use of this medical method and the existence of the countless number of applicants as well as the existence of vague and abundant points in this area create a huge obstacle for the use of this important medical achievement. Nowadays surrogacy is used for curing infertility, but the continuation of this method with regard to a lack of law and the silence of lawmaker is a move against diversion policy and judicial health. So it is required that the lawmaker regarding the consequences of this new method of human reproduction takes some actions to legislate its various stages from signing the surrogacy contract to childbirth and even after that so in the case of possible problems, a clear legal answer could be found.

In this paper the researchers study and explain the most important legal rights of these children including inheritance, will, alimony, the civil liability suing right of doctor.

Surrogacy

Surrogacy is one of IVF procedures. In IVF procedure when a woman gets pregnant for another couple's fetus, surrogacy is used. Among various stages of surrogacy, the most common, the most prominent and the most perfect stage of surrogacy is surrogacy in pregnancy. This method which is also called complete surrogate mother, the surrogate mother gets pregnant using assistant methods of reproduction and the fetus coming from the sperm and ovum of the parents. Surrogate mother has no genetic relationship with the child and carries the fetus consisting of sperm and ovum of the real parents (Nayebzade, 2001. p. 79). Thus in this method the real parents have active sperm and ovum, but they cannot, for a variety of reasons such as disturbance and uterine diseases, carry and bring up the fetus. As a

result IVF occurs between sperm and ovum of real parents in lab environment and then the fetus is put in the womb of surrogate mother. In this method surrogate mother carries the fetus until the final stage of growth and genetically speaking has no relationship with the child. This stage in comparison with other stages has a lot more prevalence and the main discussions in justice and legal bodies in using surrogacy is based on this stage. Therefore in this paper the researchers want to discuss the financial rights of children born through this procedure.

1) Inheritance

Inheritance is without doubt one of the most important financial rights of children born through surrogacy. It seems the issue of inheritance of these children to be of importance in two cases, one is the inheritance of these children after birth and the other is the inheritance of the child born from fertilization after death of the couple, so to clarify the obscurities, the researchers tackle these two issues in this section.

1-1 the issue of inheritance in surrogacy

Since regarding the civil law of article 861, one of the causes of inheritance has been known. The issue of inheritance of the children born through IVF is dependent on the relationship of the child, sperm and ovum owners as well as womb owner. When the relationship among a child, sperm owner, ovum owner and womb owner is officially recognized, the inheritance among them becomes active and when the relationship among a child and genetic parents is not recognized, the issue of inheritance among them becomes negative by the absence of subject and the inheritance among them does not become active. Therefore at first before entering into the issue of inheritance, some explanations about the relation of these children would be presented.

Regarding the issue of who the father of the child born through surrogacy is, there exists a lot of controversies and most jurists (Fighs) and lawyers believe that sperm owner is the righteous father of the child. So they pay attention to the genetic relation of the child and consider the true father of the child to be the person whose sperm plays a role in the formation of fetus. Medically speaking, it is the material which forms fetus and comes from the father, i.e. the sperm in his semen (Dehghani, 2009). In commonsense, though, attribution to the father is based on coming out of child from fetus. Therefore, the child born through surrogacy is literally, biologically, genetically and traditionally related to the sperm owner (Gorji et al. 2008). This issue could also be deduced from many Quranic verses which show that only the owner of the sperm in the semen has a paternal relationship with the child. Some of them would be presented in the following:

- 1- Does the human think to have been released purposelessly? Wasn't he a droplet of semen poured into the womb? Then it becomes a coagulated blood, and God created and made it harmonious, and created from it a couple of man and woman (Resurrection chapter (sura), verses. 36-39).
- 3- Humans should think of what they have been created! They have been created from springy water, the water that comes from the back and chests (Tareq chapter (sura), verses. 5-7).

Inducing from these Quranic verses is so clear and the child in all of them has been related to the water and the person who owns the water has the right; while we know that this verdict is only because the water or semen of man contains the sperm. Therefore the father of the child is the one who owns the semen and sperm, not anybody else (Yazdi, 2010. p. 79). Most jurists (Fighs) have accepted the third perspective, including Grand Ayatollah Naser Makarem Shirazi (2004), Ayatollah Mousavi Ardebili (1998) and Ayatollah Rouhani (2003).

Therefore from a medical viewpoint and jurisprudential and with regard to the verses and narratives, the source of the formation of fetus is sperm coming from father. In fact, a child is born through the combination of sperm and ovum. Traditionally speaking, the criterion and standard for ancestry is the creation of one from another and this developmental process is called "ancestry," in fact, ancestry to father is the result of the fusion between one sperm and one ovum, and the man who owns the sperm becomes the father of the child. Thus thanks to this issue, the relationship between this child and sperm owner is officially recognized and the inheritance among sperm owner and the child becomes active and they inherit from one another. The issue of inheritance among a child and the woman who owns the ovum or womb is based on the proof of maternal ancestry, and the verdict according to various jurisdictions in recognizing the real and legal mother of the child is different. In relation to maternal ancestry, three theories exist:

- A) Ovum owner (real mother) is the legal mother of the child.
- B) Womb owner (surrogate mother) is the legal mother of the child.
- C) Womb owner (surrogate mother) and ovum owner (real mother) are both legal mothers of the child.

From these three theories, the first theory has stronger reasoning. According to this view, the real (genetic) mother is the legal mother of the child. Those who support this view believe that the woman who plays a role in the first stage of creation and the formation of fetus is the legal or real mother. That woman is no one but the ovum owner; because her ovum plays a role in the first stage of fetus formation. (Nazari, 2010; Shahidi, 2012). This view is also accepted based on religious tradition. There are several verses in Quran that express this view, such as verse 54 of Forghaan chapter (sura), God says in this verse that:

He is One who created human being from water; then put some ancestors and causes for human being (and expanded his generation through this process); and your God has always been mighty (Forghaan chapter (sura), verse 54).

In this verse, ancestry which is the result of the formation of fetus, the traditional view that the source of the child is other than carriage and childbirth has been accepted. This meaning could be used both from the interpretation of forgery to ancestry and from enhancement of ancestral forgery on the creation from mother (Roshan and Hamdollahi, 2008).

It has also from a medical perspective been proven that the source and producing cells of fetus, from mother, is ovum and there is no doubt about this. It has also from the same perspective been proven that womb has certain roles such as preparing for the acceptance of fetus and its aggressive growth control.... Nevertheless it cannot be overlooked to attribute the child naturally, genetically, ethically, traditionally and habitually to the owners of sperm and ovum. Since the roles of the womb is more than a container and feeding, this amount of

knowledge from womb roles has not formation aspect for the fetus (Roshan and Hamdollahi, 2008).

Most jurists and religious scholars have accepted the abovementioned view including Ayatollah Khomeini, Ayatollah Khamenei (1996), Ayatollah Saanei (1998), Ayatollah Makarem Shirazi (2002), Ayatollah Hakim (2003) and Ayatollah Fazel Lankarani (2001). Thus without doubt and based on the medical findings, fetus and the emergence of child always result from two components of sperm and ovum, and since it is always the sperm owner who is considered as the father of the child, it is the ovum owner who is naturally considered to be the mother of the child. Although it is true that the child has some relationships with the woman who owns the ovum and the woman who carries and gives birth to the child, the fetus of the child is the beginning of the creation process which results from the fusion of sperm and ovum, and this fetus is the first stage of existence of the child. So it is the ovum owner who is legally the mother of the child.

Now that maternal ancestry has been recognized, we would like to discuss the issue of inheritance in all three cases:

- 1- If the ovum owner is considered to be the legal mother of the child: in this case, the inheritance relationship becomes active only between the child and the woman who owns the ovum and there is no inheritance relationship between the child and the woman who owns the ovum.
- 2- If the womb owner is considered the legal mother of the child: in this case, the inheritance relationship becomes active between the child and the real father as well as between the child and the surrogate mother and there is no reason for a true matrimony to be active between father and mother as a condition for ancestry inheritance. Thus if the condition for being mother is to be the womb owner, the inheritance relationship becomes active in this case.
- 3- If the womb owner and ovum owner are both considered legal mother of the child:

In this case the issue should be studied whether it is possible for one person to inherit from two mothers or for two mothers to inherit from one person? If the answer is positive, how much their share of inheritance would be?

Some lawyers mention that there is no doubt that two people could inherit from one person such as the deceased having two daughters, or several sons, in this case they all can inherit from their father. So with regard to this issue, two mothers can also inherit from their child, especially regarding the civil law of article 891: mother has no obstacle and inherits. So both mothers can inherit from their child (Saai and Barzegari, 2012).

In this case, this question occurs that if from the property of the deceased should be put aside the share for one mother or shares for two mothers?

Some experts utter since the issue is updated and the silence of law, there is no certainty. Because it is not possible to express anything with certainty and expedite the issue. However, it could be concluded that: the share of inheritance of mother has a clear and certain limit which cannot be changed, so the two mothers should reconcilably split the share of

inheritance into half¹. Because we should consider the dominant issue and our topic is one of the rare ones, it is worthy to conform the issue to the dominant criterion and to express our opinion according to this topic. Thus it is possible for two mothers to inherit from one child and their share of inheritance to be divided equally.

The other issue is that if it is possible for one person to inherit from two mothers? Is it, in other words, possible for one person to have inheritance relationship with two families?

Some writers, pointing to the civil law of article 865, have expressed that if a person can inherit from different aspects from the deceased and there is no obstacle for that, there is no problem and the person can inherit (Saai and Barzegari, 2012. Saaedi; 2008).

Some have criticized the above-mentioned reasoning and expressed that: basically the purpose of lawmaker for collecting numerous causes of inheritance is that an heir can socially inherit from different perspectives, such as in the case that the heir is the deceased's wife and also the cousin, so the above-mentioned case cannot be considered as one of the numerous causes of inheritance (Alavi Ghazvini and Safai, 2006). It has been expressed in response to this criticism that: although the purpose of numerous causes of inheritance in this article is the collection of ancestral multi-kinship or the collection of ancestral or causal kinship, its use covers our topic because based on this view, the numerous causes of inheritance (inheritance from two mothers) has been gathered in one person who is the child born from surrogate mother. In civil law the kinship between a child and a mother causes inheritance. Therefore numerous causes of inheritance, i.e. inheritance from two mothers, have been gathered in the child which based on the article 865 of civil law, a child born from surrogate mother can inherit from both mothers (Nayebzade, 2001). Thus based on the above-mentioned reasoning and based on the article 865 of civil law in the premise of having two mothers, the child can inherit from surrogate mother and from the real mother.

Note: After studying and discussing different premises, it should be mentioned that the kinship between the child and ovum owner should be officially recognized and the ovum owner is recognized as the official mother of the child, so the inheritance relationship between the ovum owner and the child becomes active and they inherit from each other.

2-1- legal status (inheritance) of child caused by fertilization after death of couple or couples

Another question which occurs in relation to inheritance in surrogacy is that when fertilization and formation of fetus is done after the death of couple or couples if this fetus is considered as an heir and if this heir is considered to have a share like other heirs or not? In other words, whether this inheritance relationship exists among them or not?

There are two conditions mentioned in Islamic Jurisprudence (Figh) and civil law for inheritance, and these two conditions are mentioned in article 875. Article 875 of civil law says that in addition to the general conditions of inheritance, two fundamental conditions exist for the fetal enjoyment of inheritance which are:

¹ Ayatollah Bahjat answered to this question: to whom mother does the inheritance belong, the ovum owner or the womb owner and if it belongs to both, how much is the share of each? Split into half or not? He answer: reconcilably split into half (Saai and Barzegari, 2012).

- 1) Fetal coagulation at the time of heir's death (existence of fetus)
- 2) The viability of the fetus during birth

Therefore the first condition is the existence of heir at the time of testator's death, because the inheritance causes the forcible transfer of testator's property to heir and the transferee should be available for potential acquisitions. Therefore with regard to article 875 of civil law, the condition for carriage inheritance is fetal coagulation at the time of testator's death and viability of the child. Since inheritance is one of the conditions of civil law, it could be mentioned that carriage enjoyment of civil law starts at the time of fetal coagulation, and this, of course, is conditioned by the viability of the child. Thus in surrogacy, if by the use of medical tools, sperm of father and ovum of mother are adopted to be transferred to a surrogate mother and before the fertilization of sperm and ovum in lab environments or in the womb of surrogate mother, one or both of the parents are dead and the fertilization is done after their death, the above-mentioned carriage from sperm owner or ovum owner whom would die during fertilization would not inherit, because the share of inheritance to the testator's death is transferred to the heir at the time of death and the fetus as a fertilized ovum at the time of death was not available, so the whole share of inheritance goes to the heir available at the time of testator's death (Nayebzade, 2001). This theory corresponds to the idea of some contemporary jurists of Imamieh including Ayatollah Sistani.

Therefore according to article 875 of civil law, the fetus of the child that is fertilized after the testator's death would not inherit from his/her property, because the fetus of the child at the time of the testator's death was not fertilized. In other words, article 875 of civil law says that the child that its fetus is fertilized after the death of sperm owner and ovum owner does not inherit from sperm and ovum owners.

2- Possessory will

Article 851 of civil law mentions that: "will is valid for carriage, so the child's ownership is subject to being alive after childbirth." The verdict of this article in the case of the child born of surrogacy is valid at the time of out of womb. A lab child enjoys civil rights with regard to fetus fertilization, and it does not matter if this carriage is in or out of womb. Therefore regarding this issue and with regard to the case that will is also one of the civil rights of human beings, will for the child born of surrogacy is valid, of course if they remain alive.

Studying some of the provisions of civil law in the case of will and their conformity with the mode of using surrogacy:

Article 852 of civil law provides that: If the carriage is aborted as a result of a crime, legacies would still go to the heir; unless the crime prohibits the inheritance. This article was drafted based on the right of carriage enjoyment of civil law. In this article it has been assumed that if the crime does not kill the fetus and a child is born alive, the child would be the owner of legacies. This assumption is based on the normal mode in which if nothing special happens, carriage is usually done through its natural stages and the child is born alive. So the law considers the child alive and conditioned to have the legacies. In this case, like a perfect human being, if he or she dies, the legacies would be transferred to his or her heir. Unless the crime prohibits the inheritance, like the heir of fetus commits a crime that leads to the abortion (Shahidi, 2012).

Article 880 of civil law also mentions that: murder is one of the obstacles of inheritance. If someone kills his or her heir intentionally, he or she would be banned from his or her legacies; and it is not important how the killing is done. So based on this article, the intentional killing of testator prohibits the heir from inheritance. It could also be concluded that based on the article 880 of civil law, if the testator's killing is not intentional, this would not be valid. Because the lawmaker's point and the verdict is fighting against the intention of killing due to property ownership (Kaatoozian, 2008).

Therefore based on article 852 of civil law, an intentional act which causes abortion is a crime and prohibits the inheritance, and as we know abortion is accomplished when the carriage is aborted in the womb through a material practice, is separated and gets out of it.

Regarding the above-mentioned materials, the issue which could be mentioned here is that whether article 852 of civil law could become active in the case of a lab child during the time of out of womb? And it is believed that if the fetus which is fertilized in test tube is considered as legatee and it is intentionally perished and wasted by someone, "legacies" would be transferred to his or her heir? The answer to this question is based on whether the killing of the fetus is done out of womb or not?

If we consider it as a crime, it is not unlikely to expedite the verdict of article 852 of civil law in the case of abortion by using unity of criterion to wastage of fertilized fetus and say the main criterion in fetus abortion is perishing something that could habitually become a human being, and this criterion exists in this case (Shahidi, 2012).

However regarding the ban on the use of analogy in minor affairs and the necessity of observing the principle of legality of crimes and punishments as well as perishing the fetus out of womb (lab environment) in Iran's criminal laws (neither in the previous law nor in the current law), it is not considered as a crime and no punishment has been considered for this title and thanks to the principle of narrow interpretation of criminal laws in favor of defendant, the perishing of the fetus out of womb (in lab environment) cannot be compared to the fetus abortion and consider it as a crime and then to expedite the punishment provided for the fetus abortion with the unity of criterion to this case.

3- Dedication to lab fetus and transfer to surrogacy

With regard to article 957 of civil law that mentions: carriage enjoys civil laws if it is born alive. Therefore the fetus and carriage from the time of fetus coagulation, i.e. from the time of fusion between sperm and ovum have the capacity to enjoy and legal personality, including fusion and formation of fetus is done in or out of the womb. Because traditionally the word "carriage" can also be used for the fetus out of womb (in lab environment). Therefore as dedication is among civil rights, fetus and carriage have the right of dedication, especially when the lawmaker in cases 45 and 69 of civil law have considered dedication and the right of utilization for those who are born later. One of the lawyers have uttered in explaining article 45 of civil law that: the right would not become self-destructed. The right of utilization can also become valid for a person or several people (article 45 of civil law). It should also be mentioned that there is a carriage before childbirth and if the child is born alive, he or she would own the right of utilization (retrieved from article 851 of civil law). Therefore it should not be concluded from this rule that the right of utilization would never become valid for non-existent; the owner of utilization right is neither the owner of the property nor the owner of its

profits and interests, his or her only right to use the profits and interests of the property. So this privilege could be created in favor of the existent and it could be decreed that after him or her another person becomes the surrogate. In this case, it would be enough for the second person to be existent at the time of receiving the privilege, even though he or she might not exist at the time of contract. Because at this time the privilege goes in favor of the existent. In fact being created as nonexistent is a condition for the right and he or she is never the rightful owner when in nonexistent. For these reasons, article 45 of civil law, after expressing that the beneficiary has to be existent, has added that: it is possible for those who are not existent at the time of contract to have utilization right. So long as the owners of the utilization rights are existent, the above-mentioned right remains and after their extinction would become obsolete (Kaatoozian, 2006). So regarding that the carriage is existent before childbirth and if the child is born alive, he or she would enjoy civil rights, therefore the utilization right that has been created on her or his behalf would be correct and could possess it.

Article 69 of civil law also mentions that: devotion is not correct on extinct unless in favor of existent. So beneficiaries of the endowment should become valid when the utilization right goes in his or her favor. If in special devotion beneficiaries of the endowment are located on the second floor, their existent at the time of creating the right in favor of this floor is a condition and it is not necessary to be existent at the time of dictation. Civil law also considers these devotions to be true by accepting the devotion on the extinct (article 69) (Kaatoozian, 2013).

Therefore with regard to article 957 of civil law which mentions that: carriage enjoys the civil rights if and only if the child is born alive. This verdict is general and it could not be dedicated to a special right like will or inheritance. So, cases in which the ownership of a property is transferred to the carriage freely, in particular in cases like devotion that its foundation is benefactor's will and beneficiaries of the endowment is only joined to that, carriage should have quality and being born alive should be considered as the discoverer of the true devotion (Kaatoozian, 2013). So devotion on carriage concerning the above-mentioned rights and rules is valid from the time of fetus coagulation.

Not having a vindication quality for the fetus is not an obstacle for the validity of devotion. Because unlike benefactor who is the main founder and composer of devotion, the role of beneficiaries of the endowment would be limited to joining the charter. Stewardship in accepting the devotion is not a condition: concerning lunatic and moral infant; incapable can accept devotion, because devotion creates a right freely and its ownership is not permissible for these incapables (article 212 of civil law). However, concerning lunatic and amoral infant, guardian and trustee can accept the devotion. As it is mentioned in article 56: devotion is on benefactor's requirement and accepting the first floor of beneficiaries of the endowment or their legal successor, and the purpose of legal successor is incapable successor (Kaatoozian, 2013). So an absent of a vindication quality for the fetus cannot be regarded as an obstacle for the correctness of devotion, because bill in devotion in this mode by the legal successor occurs like the guardian.

So regarding the above-mentioned explanations, lab fetus, from the time of fetus coagulation whether in or out of womb, application of article 957 of civil law works for him. Therefore devotion on lab fetus and the carriage in surrogate womb with regard to articles 957, 45 and 69 of civil law is correct. Since the guardian's beneficiaries of the endowment is not a

condition for accepting devotion, acceptance and bill is done by the legal successor. Thus, a fortiori, devotion for those children that are born from surrogacy is true.

4-Alimony

Alimony of the children born from surrogacy is studied in two ways, one is the alimony of these children after childbirth and another is the alimony of these children at the embryonic time of surrogacy.

4-1 Alimony of the child born from surrogacy

Regarding article 1199 of civil law, the alimony givers to descendants are divided into four levels and alimony is on father, parental grandparents, mother and maternal grandparents. And with regard to this article, the requirements of each level are subject to the idea that no one from the previous group is alive or capable of spending alimony.

Considering that the patrilineal in using surrogacy, the real father, is considered to be the legal father of the child, so, in the case of alimony of the child from father and parental grandparents there would be no problem. Since the kinship requirements of each level in alimony is upon the idea that no one from the previous group is alive and incapable of spending alimony. Therefore if the first and second levels do not exist and there is an incapability for spending the alimony, mother who is of the third level, requires alimony to the child.

Regarding the three theories that are mentioned in determining the legal mother of the child born from surrogacy, whether surrogate mother or real mother can be regarded as the legal mother of the child in the case of a lack of first or second level or their incapability for paying charity, she is required to spend the charity. Considering that the patrilineal in surrogacy, real mother is considered to be the legal mother, so after father and parental grandparents or their incapability for alimony, alimony would be on the legal mother.

However, one of the theories that are mentioned in matronymic is based on the idea that the child has two mothers, in this case two people from one level would be able to spend charity. Now, we should study that in the case of existence of this situation, how the implementation of this common task is?

In this mode, the two people (surrogate mother and real mother) who are required to spend charity on their descendants would be put in one level and in terms of the degree of kinship with the child no one precedes the other. This mode is achievable about the fourth level that the civil law determines the limitation of the tasks of these people in the recent section of article 1199 and expresses that: if some people from great grandparents in terms of the degree of kinship are equal, alimony should be paid equally. The application of this verdict in cases which both mothers are equal in terms of financial ability and are able to provide a good life for their child, there would be no problem concerning administration regulations to kinship alimony, however the application of this rule in cases that these two are not financially different, law is incompatible with fairness and justice and it is a little unfair and unjust (Nayebzade, 2001).

However, disregarding fairness and justice, it should be seen that the application of the rule of equity requirement to the payment of charity, in cases that exist a big financial difference

among charity people (mother and surrogate mother), how it is in terms of civil law regulations?

Article 1198 of civil law in this case mentions that: someone who is required to pay alimony is well off. It means he or she could pay alimony without being squeezed in his or her livelihood. Regarding this article, if for the sake of a lack of property and income, alimony to kinship, the person is troubled and squeezed on livelihood, would not be obliged to spend and only the obligation of paying alimony is activated when the person is well off and has something redundant of his or her and his or her partner's spending (Safai and Emami, 2007). Therefore if some of the kinship has some equal degree of kinship which is insolvent, others should make up their share. Because the recent clause of article 1199 in case of equality in part is conditioned for the kinship of requirements to alimony. Insolvent kinship gets out of the number of requirements of alimony (Kaatoozian, 2013).

So the verdict to equality should refer to the case that all alimony givers can provide a suitable and normal life, or there is no big difference among them in terms of affordability; but in cases that one is richer than the other, the court should consider the need of the worthy and divide it equally, in this case, when the poorer alimony giver cannot pay all that is determined, his or her obligation would reduce in terms of his or her abilities (Kaatoozian, 1993)

As a result, if they both are financially at the same level, and no big difference exists among them, the alimony should be divided equally, but in the case when one of them such as the real mother is better off, the real mother would make up the incapability of the surrogate mother and nothing would be reduced from the child's alimony.

4-2- Alimony of the fetus transferred to surrogacy

The important question which rises in this section is that whether the carriage that exist in surrogate mother is worthy of alimony or not? For answering to this question at first civil law and the verdict of jurists and judges would be studied and discussed concerning the alimony of the guardian to the pregnant woman after dissolution of marriage.

Basically, alimony is for the time of being couple and after dissolution of marriage and removing couple relationship, the woman is not worthy of alimony (Safai and Emami, 1993). For this reason article 1109 of civil law, alimony right at the time of dissolution of marriage or irrevocable divorce has not been recognized, because in the case that the marriage is dissolved from the man or woman and in the case that divorce is irrevocable, the couple relationship is certainly liquidated and as a result, there is no longer any demanding right for the woman, so the husband is not required to pay the alimony (Nayebzade, 2001). In other words as a result of causal relationship, the couple is required to pay the alimony, but when the cause of alimony is removed, this requirement would be canceled; as a result of divorce, since the relationship between the couple is dissolved, the requirement of the couple for alimony of divorced wife also as a result of marriage is denied. The above-mentioned principle has been conditioned in two cases. Civil law in article 1109 in two exceptional cases, after dissolving marriage, considers the woman worthy of receiving alimony:

1-Alimony of the divorced reacted in couple time

According to line one of 1109 of civil law: Alimony of the divorced reacted during the couple time is on the husband, unless divorce is placed in disobedience.... The reason for claiming the alimony in this case is that after a reacted divorce, couple relationship would not be completely disrupted and during couple time the effects of marriage would remain to some extent and the woman is considered wife in the verdict (Safai and Emami, 2007). And for this reason in the case of referral of man, the previous marriage relationship with all its effects would continue and there is no need for a remarriage.

2- Alimony of the pregnant woman in the dissolving the marriage or irrevocable divorce:

According to the second line of article 1109 of civil law: if it is for the sake of dissolving marriage or irrevocable divorce, the woman has no right for alimony, unless in the case of carriage from her husband that in this case she would have alimony right until the time of childbirth. Therefore in irrevocable divorce, since the couple relationship is completely cut off, the requirement to alimony would not be active during the couple time; in article 1109 of civil law, legislator following the ideas of the famous jurists of Emamieh, the irrevocably divorced wife, in the case of pregnancy, is worthy of alimony until the childbirth. This verdict is valid for the reacted divorced and this is according to the famous jurists of Emamieh.

For example, Muhaqqiq al-Hilli, with respect to the fall of irrevocably divorced alimony, only considers the irrevocably divorced woman worthy of alimony when she is pregnant of her husband, but concerning the essence of this alimony and who the underwriter of this would be, has not mentioned any clear comment (Muhaqqiq al-Hilli).

Therefore, the jurists have unanimous agreement on the worthiness of the pregnant irrevocably divorced concerning alimony, but some of them have disagreement on its essence. The source of disagreement would emerge when as a result of irrevocable divorce, the couple relationship is dissolved, so the husband has no responsibility regarding alimony of the wife, but in the case of irrevocably divorced, being pregnant makes her worthy of receiving alimony. So it has been disagreed that obligee of alimony, irrevocably divorced is pregnant or fetus?

This disagreement has also been observed among lawyers, since they have presented different comments concerning the recent section of article 1109 of civil law and the silence of lawmaker in determining obligee of this alimony have added on the disagreement domain.

Regarding the above-mentioned comments, this question occurs that why the man is responsible to pay alimony to his ex-wife to whom he has no relationship due to irrevocable divorce until the childbirth?

Is this requirement due to the child that the woman is carrying from the man's race, or is it due to the fact that the woman cannot function well in this period, so her living cost is upon the child's father? (Kaatoozian, 1993).

There are disagreements in response to this question. Some have considered alimony for the fetus and in other words the fetus is the obligee of the alimony and others consider the alimony for the woman and in other words the woman is the obligee of the alimony:

1- Attachment of alimony to carrier:

Among the great jurists who consider the alimony to belong to the carrier is Saaheb Javaher who mentions that: alimony is not for the irrevocably divorced wife who is not pregnant, due to the principle and texts that exist in this domain and Sheikh Tusi who has mentioned in detail that for the irrevocably divorced alimony is not considered, the weakness of this speech is clear with a lot of reasons (Najafi, 1987).

Therefore those jurists who consider alimony for the carrier, only when the irrevocably divorced is pregnant, consider her worthy of alimony and otherwise she is deprived of alimony.

Among lawyers, Dr. Kaatoozian considers the above-mentioned alimony in article 1109 of civil law to belong to irrevocably divorced and reasoned that since the fetus has no independent existence and before the childbirth is part of the mother's body, so father has no responsibility concerning alimony. The special status of the woman has caused that her alimony to be upon the man, thus the criterion for the worthiness of the woman is her special status and alimony is considered not as the main criterion for the provider of the child, but as the former wife (Kaatoozian, 1993).

Therefore based on this theory (belonging alimony for carrying), alimony is for the divorced mother who is carrying and the husband pays alimony to her divorced ex-wife with respect to being the ex-spouse. This alimony is subject to couple alimony.

2- Alimony attachment to fetus

Causes of alimony exclusive to the couple are kinship and ownership (Muhacqiq al-Hilli, 1409). Since there is no couple status and ownership is not reasonable, so kinship is the cause of alimony. Therefore the father pays alimony to his child who is being carried, and since the fetus cannot directly feed from the mouth, the alimony goes to the mother so that the food can reach his child through her blood (Emami, 1991). In fact the lawmaker for observing the child's situation considers the woman worthy of alimony, even though marriage relationship is canceled (Safai and Emami, 2007). Book and tradition are used in jurisprudence that alimony is the open circuit of carriage: either for carriage or due to carriage. True marriage, divorce either reversionary or irrevocable and termination is not relevant, thus the focus of alimony is on the carriage. As some jurists have mentioned that this alimony is the alimony for carriage that goes to the child through the carrier (Gheblei, 1999). Sheikh Tusi is among the jurists who agree with this idea and mentions that: as it was mentioned, alimony is not for the carrier, but it is apparently for the carrier (Tusi, 2008).

Regarding this issue, Shahid Saani also mentions that: there is no doubt that alimony is due to carriage, but there are two promises in which alimony is for carriage and their most famous one is that alimony is for carriage (Shahid Saani, 2006).

Some of the jurists refer to verse 6 of divorce chapter (sura) and claim that: the interpretation of this verse implies that the cause of incumbency of alimony is the existence of carriage and by childbirth, since there is no carriage, incumbency of alimony is also removed, because according to the verse by the childbirth, irrevocable divorce would not be worthy of alimony, so it becomes clear that alimony has been due to carriage and not carrier and the husband pays the alimony of the carrier woman because he is father of carriage (Tusi, 1964).

Therefore it could be concluded from the above-mentioned contents that alimony is for carriage and is of cases of alimony to kinship and the husband pays the alimony of the carrier woman because he is the father of carriage.

Also most lawyers who consider alimony for carrier, in fact have not assumed carriage as an independent entity to consider him or her worthy of alimony. However, regarding article 957 of civil law and the contents presented in this case in the previous discussions, the child enjoys civil rights from the time of fetus coagulation. In other words lawmaker has not consider any more condition for the fetus enjoying civil rights except being born alive and fetus coagulation at the time of the person's existence. In this case one of the lawyers expresses that: there is a rule that says verdict suspension on the description is emblematic of causality, and when they say give alimony to the carrier, i.e. give alimony due to carriage, carriage that is independent of mother biologically and legally (Jafari Langeroodi, 1988).

As a result of article 1109 of civil law that considers the woman worthy of alimony at the time of irrevocable divorce due to carriage, it could be concluded that alimony to a divorced woman at the time of marriage termination is for the carriage (Emami, 1991). Since there is no effective relationship between the divorced woman and the husband which could be the cause of alimony, because termination of marriage and dissolving of couple relation, no cause exists for the alimony of the woman, and this is in the case when between fetus and father in terms of the existence of a relative relationship, alimony becomes compulsory due to the existence of kinship.

Thus father according to article 1109 of civil law is responsible to pay the alimony of his child and there is no difference between the child and the fetus. Now we can answer to the question which was mentioned at the beginning of our discussion on how being worthy of alimony for the carriage existing in the womb of surrogate mother can be presented.

According to the reasoning presented for this case, it could be concluded that alimony of carriage time is for the fetus. Thus real father is required to pay alimony to his child who is being carried in the womb of the surrogate mother according to article 1199 of civil law, since the carriage cannot feed directly from the mouth, and use this alimony, alimony goes to the carrier, so that through her blood the fetus can feed.

5. Right of the child born of surrogacy in civil responsibility of doctor's lawsuit

The question which occurs here is that when the sperm or ovum or fetus are damaged as a result of infertility specialist's actions, and the fetus is inoculated and born incomplete, if the child born of this incomplete fetus or his or her legal representative can claim the damages?

In response to this question, it has been mentioned that in Iran law, it seems that according to a general rule cited in article 957 of civil law which mentions: carriage enjoys civil rights conditioned to be born alive, the legal character of the fetus can be recognized for claiming the damage, of course if the fetus is born alive, because the right of compensation is of civil rights; thus the legal representative of the child can claim the compensation for the damage during fetus life on the child's behalf and if not compensated the child can claim his or her compensation right after reaching the legal age for the damage to the fetus (Safai and Ghasemizade, 2006). Therefore regardless of the existence and nonexistence of doctor's actions which is dependent of criminal law and according to the contents of Islamic criminal

law, after proof of negligence, imprudence, non-compliance with government regulations and so on from the doctor, the person would be punished; the legal representative of the incomplete child born of surrogacy can claim for the manipulation and fault of the doctor who is responsible for the defect in the fetus and if the legal representative does not claim, the child can claim for the compensation of the damage after reaching the legal age.

Conclusion

Regarding the previous contents, the following conclusions can be drawn:

- 1- Regarding article 861 of civil law, kinship is one of the causes of inheritance; therefore the inheritance issue of children who are born of artificial insemination is dependent upon the proof of kinship between the child and sperm and ovum owners. Therefore with regard to the issue that the child who is born of surrogacy has kinship with the sperm and ovum owners, inheritance relationship among them sperm and ovum owners and the child would be valid.
- 2- The child whose fetus is coagulated after the death of testator would not inherit from his or her property. Therefore if the child's fetus is coagulated after the death of one or both of the parents, he or she would not inherit from the one who is dead at the time of fetus coagulation, because based on the article 875 of civil law one of the conditions for the realization of inheritance for the carriage is the coagulation of fetus at the time of testator.
- 3- With regard to article 957 of civil law, fetus and carriage at the time of fetus coagulation, i.e. at the time of the fusion between sperm and ovum possess enjoyment quality and legal character, whether combination and formation of fetus is done in or out of womb. Because traditionally carriage could also be applied to the fetus out of the womb (in lab environments). Since alimony is of civil rights, carriage and fetus also have the right for alimony, especially the lawmaker in cases 45 and 69 of civil law have considered alimony and utilization right for those who are born later. Also according to articles 957 and 851 of civil law, will is true for carriage and fetus, of course if the child is born alive.
- 4- The alimony of the child born of surrogacy with regard to article 1199 of civil law is on the real father (sperm owner) and after death or his incapability for charity is upon parental grandparents and in the case of nonexistence of father or parental grandparents or their incapability, alimony is on mother (ovum owner) or maternal grandparents.
- 5- The above-mentioned alimony in article 1109 of civil law is for the fetus (carriage). Because between divorced woman and the husband no relationship exist; because by the absolute termination of marriage and the loss of couple relationship no cause exists for the alimony of the woman and this is due to the fact that between fetus and father in terms of kinship relationship, alimony becomes compulsory because of the existence of kinship. Father according to article 1199 of civil law is responsible to pay his child's alimony and there is no difference in this regard between the child and the fetus. So in using surrogacy, surrogate mother due to carrying the fetus is worthy of receiving alimony.
- 6- Based on the article 957 of civil law, the child born of incomplete fetus has the right to claim for damages caused by the fault of the doctor. Because claim of damage

compensation also includes civil rights. Therefore, the legal representative of the incomplete child in this method of assisted reproduction can claim compensation for the manipulation and fault of doctor who is caused damage and defect in the fetus and if the legal representative does not claim, the child can claim compensation after reaching the legal age.

References

Quran

Emami, S.H. (1991). *Civil law*. Vol.4. 8th edition. Tehran: Eslamieh Publication.

Jafari Langeroodi, M.J. (1988). *Family rights*. Tehran: Ganj Danesh Publication.

Khomeini, R. (no date) *Tahrir al-Vasileh*. Vol.2. Qom: Esmailian Publication.

Dehghani, J. (2009). *Medical genetics*. 1st edition. Tehran: Rafi Publication.

Rouhani, M.S. (2003). *Questions and answers of religious issues (questionnaire)*. Tehran: Hadis Del Publication.

Roshan, M. and Hamdollahi, A. (2008). *Kinship of the child born of surrogacy*. Islamic Rights Quarterly. No. 28.

Saaedi, S. (2008). *Statutory provisions of surrogacy, surrogate womb (essay collection)*. 2nd edition. Tehran: Samt Publication and Avicenna institute.

Saaedi, M.H. and Bozorgi, A. (2012). *Study of kinship and children inheritance born of surrogate womb*. Legal thoughts Quarterly. No.1.

Sistani, S.A. (1995). *Righteous Approach*. Vol.1. Qom. Ayatollah Seyed Ali Sistani School.

Shahidi, M. (2012). *Legal Thoughts 5 (essay collection)*, 3rd edition. Tehran: Majd Publication.

Saanei, Y. (1998). *Medical issues*. 1st edition. Qom: Meysam Tamaar Publication.

Safai, S.H. and Emami, A. (1993). *Family rights*. Vol.1. 3rd edition. Tehran: Tehran University Publication.

Safai, S.H. and Emami, A. (2007). *A Brief of Family Rights*. 14th edition. Tehran: Meezan Publication.

Safai, S.H. and Ghasemzade, S.M. (2006). *Legal Rights. People and individuals*. 12th edition. Tehran. Samt Publication.

Samadi Ahari, M.H. (2003). *Kinship from Artificial Insemination in Iran and Islam Rights*. Tehran: Ganj Publication.

Tusi, E. J. M. A. (2008). *Expansion*. Vol.6. Tehran: Mortazavieh School.

Tusi, E. J. M. A. (1964). *End*. Translated by Mohammad Taghi Daneshpajoh. Tehran: Tehran University Publication.

Aameli Jabei (Shahid Saani). Z. A. A. (2006). *Gorgeous Kindergarten in explaining shiny Damascus*. With efforts of Alireza Amini and Mohammadreza Ayati. Vol.2. 9th edition. Tehran: Samt Publication and Taha cultural institute.

Alavi Ghazvini, S.A. and Safai, S.H. (2006). *Lab child inheritance*. Legal Rights Quarterly. No. 11.

- Faazel Lankarani, M. (2001). *Comprehensive Issues*. Vol.1. 10th edition. Qom. Amir Al-Alam Publication.
- Gheblei, Kh. (1999). *Study of Jurisprudence and legal issues of illegitimate children*. Quarterly of legal approaches. No. 13 and 14.
- Kaatoozian, N. (1993). *Civil Rights: Family*. Vol.2. 3rd edition. Tehran: Enteshar Co. in corporation with Bahman Borna.
- Kaatoozian, N. (2013) *of certain contracts*. Vol.3. 8th edition. Tehran: Ganj Danesh Publication.
- Kaatoozian, N. (2006) *Preliminary Period of Civil Law: property and ownership*. 14th edition. Tehran: Meezan Publication.
- Kaatoozian, N. (2008) *Preliminary Period of civil law: survivorship lessons, will, inheritance*. 10th edition. Tehran: Meezan Publication.
- Kaatoozian, N. (2013) *Civil law in current legal order*. 34th edition. 4th version. Tehran: Meezan Publication.
- Gorji, A. et al. (2008) *Comparative Study of Family Rights*. 2nd edition. Tehran: Tehran University Publication.
- Muhaqqiq al-Hilli, A. N. J. H. (1988) *Laws of Islam*. Vol.2. 2nd edition. Tehran: Esteghlal Publication.
- Makarem Shirazi, N. (2002). *New Issues*. Vol.2. Qom: Schools of Emam Ali Ibn Abi Taaleb Publication.
- Makarem Shirazi, N. (2004). *Religious Tricks and Correct Resourcefulnesses in Islamic Jurisprudence*. Qom: Schools of Emam Ali Ibn Abi Taaleb Publication.
- Mousavi Ardabili, S. A. (1998) *Issues*. Vol.1. 1st edition. Qom: Nejaat Publication.
- Mousavi Khamenei, S.A. (1996) *Medicine on the Mirror of Reasoning*. Vol.1. 1st edition. Tehran: Ansarian Publication.
- Nayebzade, A. (2001). *Legal Study of New Methods of Artificial Reproduction (Surrogate Mother)*. Tehran: Majd Publication.
- Najafi (Saheb Javaher), M.H. (2008). *Jewel Speech*. Vol.31. Beirut: Daar Ahya Al-Taras Al-Arabi.
- Nazari, A. (2010). *Jurisprudence study of the kinship of the child born of Artificial Reproduction*. Special Quarterly of Jurisprudence and History of Civilization. No. 23.
- Yazdi, M. (2010). *Artificial Inseminations and their jurisprudence verdict*. New Methods of Reproduction in the view of Jurisprudence and Law (Essay Collection). 3rd edition. Tehran: Samt Publication and Avicenna Institute.