

## Legal Power in the Mother Surrogate Agreement in the Notary Deed

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### Abstract

*Implementation of uterine rental agreement or surrogate mother is an agreement between a woman who binds herself through an agreement with another party (husband and wife) to become pregnant with the result of the fertilization of the husband and wife which is implanted into her womb, and after giving birth is required to hand over the baby to the husband and wife based on agreement made. The research method used is normative legal research, namely legal research conducted by researching library materials or secondary legal materials, while the problem approach is carried out using a legal approach and a conceptual approach. The results of the study indicate that the mother surrogate does not fulfill one of the conditions of the agreement. Then the Notary Deed is declared null and void if the deed does not meet the objective elements of the deed, namely a lawful cause. In such a case, legally without any request from the parties, thus the agreement is considered to have never existed and is not binding on anyone.*

### Keywords

notary deed; agreement;  
surrogate mother



## I. Introduction

Article 127 of Law Number 36 of 2009 concerning Health (Health Law) stipulates that attempts at pregnancy outside the natural way can only be carried out by a legal husband and wife with the following provisions:

- a. The results of fertilization of sperm and ovum from the husband and wife concerned are implanted in wife's uterus where the ovum comes from;
- b. It is carried out by health workers who have the expertise and authority to do so;
- c. In certain health care facilities.

From the explanation of the article, it means that the method or pregnancy outside the natural way can only be done through IVF only. In addition, it is re-explained in the Regulation of the Minister of Health Number 039/Menkes/SK/2010 concerning the Implementation of Artificial Reproductive Technology Services, in Article 2 paragraph (3) it is stated that artificial reproductive technology services can only be provided to married couples related to a legal marriage and as a final effort to obtain offspring and based on a medical indication. Based on these two regulations, it can be said that the method of pregnancy outside the natural method can only be carried out through the IVF method and to legal married couples.

Surrogate Mother occurs because the woman is unable to conceive due to abnormalities in the uterus, so that the role of the wife is replaced by another woman to replace her function as a mother who undergoes the womb and gives birth either given rewards or voluntarily<sup>2</sup>. However, along with the times, there has been a shift in the meaning of the initial substance as a medical alternative, towards being social and

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exploiting the value of a womb or often called a new business field/tool to earn a living for the sake of a higher society's lifestyle.

This happens in society among the middle class and above, because of problems with fertilization (reproductive fertility), so they cannot get pregnant. This problem is also supported by advances in medical technology related to reproductive problems, namely the way of birth outside the scientific method or called Assisted Reproductive Technology (ART). Assisted Reproductive Technology (ART) is a way to have children that is carried out by a third party (husband and wife) through renting a uterus to have children. The family is a basic family unit consisting of a husband, wife and children (Batubara, 2019).

The implementation of uterine borrowing in Indonesia has experienced obstacles due to a legal vacuum in this case there is no legal umbrella (laws and regulations) that regulates uterine borrowing and ethical considerations based on the norms that apply in Indonesia, uterine leasing in practice is closely related to contract law. or engagement. According to Article 1313 of the Civil Code, an agreement is defined as an act in which a person or several persons bind themselves to another person or persons. In other words, each person who enters into an agreement has an attachment, binds himself to an agreement. Then in Article 1233 of the Civil Code, the engagement is affirmed as something that is born because of an agreement or law. Therefore, based on the two articles, everything listed or agreed upon is law for them and is included in the element of the agreement. In addition, find out the validity of an agreement, the requirements of an agreement must be fulfilled by the parties. In article 1320 the conditions for the validity of an agreement include several things, including: 1. The agreement of those who bind themselves, 2. The ability to make an engagement, 3. A certain subject matter, 4. A cause that is not forbidden.

Problems arise in the surrogate mother, because the child born in the case of a surrogate mother has no clear lineage. The process is almost the same as IVF, but the process of pregnancy is carried out in the womb of another woman. Considering that the eggs and sperm come from a husband and wife, the child is raised and born from the womb of another woman. The process of pregnancy in the womb of another woman is the problem. This is because in the womb of another woman, phases of fetal development occur, and the growth of the fetus is more perfect when the spirit is blown into it. This is corroborated by the hadith of the Prophet which reads, "Every one of you is collected in your mother's womb for 40 days, then becomes a lump of flesh in 40 days. After that, Allah sends angels to complete 4 things, namely charity, reason, sustenance, suffering and happiness. It was only after that the spirit was breathed into it."

A notary as referred to in article 1 point 1 UUJN is a public official who is authorized to make an authentic deed and has other authorities as referred to in this law or based on other laws, which means that a notary is one of the public officials who exercises the authority based on laws and regulations to make evidence for interested parties, therefore a notary as a public official has a very large authority in carrying out his office.

As a public official, a notary must obey the principles in carrying out his position so that every notary must comply with the applicable laws and regulations, in this case the UUJN, is an effort from the legislators to carry out legal reforms including in the notary world by replacing the Notary Position Regulations which are the legacy of the colonial government. The Netherlands, which was deemed no longer in accordance with the situation, could not keep up with developments and legal demands in society and the ideals of an independent Indonesia.

In contract law adheres to the principle of freedom of contract. This is also regulated in Article 1338 of the Civil Code which states that all agreements made legally apply as law for the markers that make them. This means that the parties to an agreement are free to determine the content of the agreement. Then, if it is related to the legal terms of the agreement 1320 of the Civil Code, does it have legal force in the uterine rental agreement in the notarial deed made in this case the two parties, namely the husband and wife pair and the prospective mother surrogate are both willing and have agreed to enter into a uterine rental agreement? The Notaries as officials are given by laws and regulations the authority to make all agreements and deeds as well as those desired by those concerned. This is in accordance with the provisions in Article 15 of the Law on Notary Positions. As an official making authentic deeds, a Notary in his duties also attaches obligations that must be obeyed, because these obligations are something that must be carried out. This is in accordance with the provisions in Article 16 paragraph (1) to paragraph (13) of the UUJN.

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### **Problem Formulation**

Based on the description above, the legal problem can be formulated as follows:

1. Legal power in the uterine rental agreement (Mother Surrogate) in the Notary Deed
2. Proof of the uterine rental agreement (Mother Surrogate) in the Notary Deed

## **II. Research Method**

The type of research used by the author in this study is a type of normative research. "Normative legal research is also known as doctrinal legal research. According to Peter Mahmud Marzuki, normative legal research is a process to find a rule of law, legal principles, and legal doctrines in order to answer the legal issues at hand.

In legal research there are several types of approaches. The author focuses his research on: 1) Statute Approach, an approach by examining all laws and regulations related to the problems (legal issues) being faced. 2) Conceptual Approach, which is an approach that departs from the views and doctrines that develop in the science of law.

## **III. Results and Discussion**

### **3.1 The Power of Law in the Surrogate Mother**

Surrogate mother (surrogate mother) still sounds very foreign, especially if it is related to the existing law in Indonesia. Until now, there are still no clear rules regarding this surrogate mother, although it is possible that this could or has already happened in Indonesia. The problem of renting a uterus is indeed a dilemma, on the one hand the community needs it, but on the legal side there are no rules that regulate renting a uterus so that it can cause problems in the future which are very difficult to solve.

A womb rental agreement made by a husband and wife who want to have children but cannot get pregnant by natural means which then decides to use a surrogate mother pregnancy, according to the ideals of Immanuel Kant's moral law. Science and technology

Humans become individual, egoistic and exploitative, both towards themselves, society, the natural environment, and even towards God the creator himself. That's why the philosophy of science is presented in the midst of the diversity of science and technology to straighten the path and place its function for human life. The surrogate mother agreement from Dutch is a barring contract, while in English it is called a surrogacy contract. Surrogate mother is a woman who bears children for the sake of others and also gives children for the sake of others and also gives her rights as parents to other people or a woman who bears children whose seeds come from other partners and then after the woman gives birth will grants the right to custody of the child born to the spouse from whom the seed originates.

According to Desriza Ratman's opinion, uterine rental is the fertilization of a male seed against a female seed in a petri dish, which after the union will be implanted or implanted in the womb of another woman who has no relationship at all with the source of the seed with a lease agreement (surrogacy) known as the surrogate mother. Meanwhile, Fred Amelen's opinion states that a woman who binds herself through an agreement with another party (husband and wife) to become pregnant after the inclusion of male germ cells and female germ cells, whose fertilization is carried out outside of the uterus is delivered according to the agreement, then the baby is handed over to the husband and wife in exchange for the agreed material.

Surrogate mothering is a test tube baby technique (in vitro fertilization), which is where the sperm and ovum of a husband and wife are processed in a tube, then inserted into another person's womb, not into the wife's womb. The woman who is willing to have her embryo deposited is called a surrogate mother and a husband and wife who want to use the services of a surrogate mother, commonly referred to as intended parent. This surrogate mother is given a fee for all needs during the process of carrying the child, during the delivery process and after giving birth. The surrogate mother after giving birth to the child must hand the child over to the intended parent. So the provisions on the union of male (husband) and female (wife) seeds which are then replanted in the womb of the surrogate mother are bound through an agreement made with the husband and wife with certain rewards for the woman who rents the womb. After giving birth, the surrogate mother is required to give the baby she is carrying to the parents who have rented out the womb based on the agreement that has been made.

Article 1313 of the Civil Code states that an agreement is an act by which one or more people bind themselves to one or more other people. From the contents of the provisions of Article 1313 of the Civil Code, the elements of the agreement can be drawn, namely

- a. Elements of action
- b. Elements of one or more people binding themselves to one or more people

Then in the law of agreement, it is known Article 1320 of the Civil Code which is a condition for the validity of an agreement, namely:

1. Agree those who bind themselves;
2. The ability to make an engagement;
3. A certain thing;
4. A lawful cause.

If the first and second (subjective) conditions are not met, then the agreement can be canceled (vernietigbaar), while if the third and fourth conditions are not met, the agreement is null and void.

If the first and second conditions are applied in the womb rental agreement, then the agreement can be fulfilled because here the people involved or the parties entering into the agreement, namely the parents who entrusted the embryos and the surrogate mother, are people who are capable and agree to perform the procedure legal action. While the third problem, a certain subject matter, namely the contents of the agreement in the form of achievements that will be given by the surrogate woman in the form of being willing to conceive, give birth, and deliver her baby to biological parents and material rewards given by biological parents. And fourth, a cause that is not prohibited, namely the object of the agreement must not conflict with the applicable law (law), decency, and public order.

In the case of a surrogate mother, the subjective requirements have met the requirements, namely that there are parties who agree and are capable of carrying out the contents of the agreement, but for the objective conditions, the practice of the surrogate mother is hampered by the 4th condition, namely "there is a lawful cause" because there are several reasons which state that the agreement made in the surrogate mother case must be automatically canceled by law (Nietig van Rechtswegw, Null and Void) after obtaining a court decision and the situation is returned to its original position where it is considered that there is no agreement. Regarding the non-fulfillment of the conditions for the existence of a lawful cause in the practice of surrogate mothers in Indonesia, which is caused by violating existing laws and regulations (positive law), namely first, Article 127 paragraph (1) of the Law of the Republic of Indonesia Number 36 of 2009 concerning Health, which states that "attempts to get pregnant outside the natural way can only be carried out by a legal husband and wife. Second, the Regulation of the Minister of Health of the Republic of Indonesia Number 73/Menkes/PER/II/1999 concerning the Implementation of Artificial Reproductive Technology Services. Third, the Decree of the Director General of Medical Services of the Ministry of Health of the Republic of Indonesia in 2000 concerning Guidelines for IVF Services in Hospitals.

The practice of a surrogate mother agreement can be classified as an act that is contrary to existing laws and regulations and is contrary to public order and morality, this is what a Notary must pay attention to in providing legal services in the form of making an authentic deed if there is an appearance or client. who wants to make a Notary deed against the surrogate mother agreement that he/she does. An agreement that does not meet the objective requirements, namely the object is not certain and the cause is prohibited, then the agreement is null and void.

Article 1333 BW stipulates that an agreement must have a certain object, which means that an agreement must have as its principal an item of at least a specified type, which in the future the amount (goods) can be determined or calculated. Article 1335 BW confirms that an agreement without cause or which has been made for a false or forbidden cause, then the agreement has no force. This proves that every agreement must have a lawful cause, but according to Article 1336 BW, if a cause is stated, but there is a lawful cause or if there is a reason other than the one stated in the agreement, it is still valid.

A cause is prohibited if it is prohibited by law or if it is against decency or public order (Article 1337 BW). Thus, an agreement is null and void if it does not have a certain object that can be determined and has a cause that is prohibited by law or is contrary to decency or public order. Therefore, if there is a Notary who continues to pour into a Notary deed of a surrogate mother agreement, the deed becomes null and void. A notary who is confronted by a client or an attorney who wants to make a notary deed related to the surrogate mother agreement he has made, the notary can provide legal counseling regarding the implementation of uterine rental in Indonesia and advise the client to apply

for a determination by the District Court where the client entered into a uterine rental agreement.

### **3.2 Evidence of Mother Surrogate Agreement on Notary Deed**

Proof is a trial process in which each a person tries to convince or provide certainty to the Judge through the evidence presented regarding the truth or untruth of certain events or circumstances. Thus, the purpose of proof is the judge's decision on the case being examined which is based on that evidence. What is the judge's decision? Although in civil cases it is not material truth that is the goal, it is not excessive if the decision should be objective based on the evidence submitted. Thus the decision, at the same time creates a legal certainty or certainty of the rights of each party. This is also the purpose of the evidence carried out by each party.

An authentic deed is perfect evidence for both parties and all those who get rights from it. What is stated in it regarding the subject matter and content and the authentic deed is considered undeniably true, unless it can be proven that what the public official recorded is true but this is not the case.

The power of perfect evidence and authentic deed against both parties is meant if a dispute arises before a judge regarding a matter and one of the parties submits an authentic deed, then what is stated in the deed is considered perfectly evidenced. If the opposing party denies the truth of the contents of the authentic deed, then he is obliged to prove that the contents of the deed are not true.

In a civil case process, if one of the plaintiffs / defendants submits an authentic deed as evidence, in this case, as explained above, the legal conditions of the agreement are not fulfilled.

If we look at Article 1338 of the Civil Code, all parties are given the freedom to make their own agreements in this article. The author's opinion is that the principle of freedom of contract (freedom of contract) is not absolute in making an agreement because there are limitations provided by other articles of the Civil Code which make this principle have the following limitations in response to a surrogate mother/lease agreement, as follows:

- a. Article 1320 of this Civil Code cannot be separated from Article 1338 of this Civil Code which reads "All agreements made legally ..." from the sound it can be interpreted that all agreements made by the parties are valid, the meaning of the word legally This legality is the essence of a valid condition of an agreement contained in Article 1320 of the Civil Code. It is known that all agreements still refer to Article 1320 of the Civil Code, which is a condition for the validity of an agreement. It can be seen that the surrogate mother/uterine rental agreement cannot be said to be valid because it cannot fulfill the four conditions "lawful reasons" which causes this agreement to be null and void (Nietig van Rechtswegs, Null and Void).
- b. Article 1332 which reads "Only goods that can be traded can be the subject of an agreement" which become goods that are traded are objects in an agreement. Objects that can be traded are any objects that can be traded, such as motor vehicles, household furniture, electronic equipment, and other goods that can be traded. It is known that the object of this surrogate mother agreement is the womb of a woman, not objects or goods that can be traded or rented.
- c. Article 1337 which reads "A cause is prohibited, if prohibited by law, or contrary to good decency or public order". One of these causes relates to lawful causes that cannot be contrary to the law, decency, and public order. In this case, the surrogate mother agreement is not allowed under positive law in Indonesia.



- d. Article 1339 which reads "An agreement is not only binding for things that are expressly stated in it, but also for everything which 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 agreed agreement, but are also bound by propriety, custom or law.

It can be interpreted that the parties are given the freedom to make their own agreements, but there are also limitations that must be obeyed by the parties who make them. There are several reasons for the author so that the surrogate mother agreement is invalid based on the fourth condition in the validity of an agreement, namely based on "the existence of a lawful cause" and the existence of several other reasons that make the agreement invalid are

1. There is (positive law): a. Law Number 36 Year 2009 concerning Health Article 127 paragraph 1. b. Government Regulation Number 61 of 2014 concerning Reproductive Health c. Regulation of the Minister of Health of the Republic of Indonesia Number 73/Menkes/PER/II/1999 concerning the Implementation of Artificial Reproductive Technology Services. d. Regulation Minister of Health of the Republic of Indonesia No. 039/SK/2010 concerning the Implementation of Assisted Reproductive Technology Services.
2. Contrary to decency: a. Not in accordance with moral norms and customs or general habits of the Indonesian people or in their environment, b. Contrary to the belief held by one religion (Islam) because there are main elements that forbid the practice of surrogate mothering, namely the element of adultery, 94 c. Can eliminate maternal instincts for surrogate mothers, because they have to give up the child they are born with, and d. Eliminate mawra and glory for women, because the womb of a woman is not goods or services that can be traded or rented.
3. Contrary to public order: a. Will become gossip in society so that a woman who becomes a surrogate mother is likely to be ostracized from society, b. Moreover, if the status of a woman who becomes a surrogate mother is a girl or a widow, c. It will have a broad impact, if this practice is legalized it will become a commercialization for women whose wombs are fertilized as a means of earning a livelihood, d. Make husband and wife not want to bother to get offspring through the normal process, and prioritize surrogate mother / surrogate mother to have offspring, e. Submission children from a surrogate mother to a husband and wife pair and accompanied by compensation from the husband and wife pair. It can be described as the existence of human trafficking (human trafficking) against children, and f. The possibility of identity falsification, such as the child's birth certificate, there is the possibility of the parents being falsified from the surrogate mother to the husband and wife who ordered it.
4. Contrary to the main points of the agreement or the engagement itself, where the womb is not an object and cannot be rented out (lease law) contained in the Civil Code (Book of Civil Law).

Indeed, in this case, the role of the Notary is very necessary because not every party in making the agreement is in accordance with the provisions of the legislation, from some parties there must be the will of the parties who violate the rules, therefore the role of the Notary here must straighten the will of the parties so that the deed later published without legal defects.

Then the Notary Deed is declared null and void if the deed does not meet the objective elements of the deed, namely a lawful cause. In such a case, legally without any request from the parties, thus the agreement is considered to have never existed and is not binding on anyone.

Although the Notary in making or ratifying a deed has freedom, it does not mean that the freedom is made freely. For this reason, if the Notary is facing a problem who clearly knows what will happen if it is ratified as a Notary deed, then the Notary should be able to refuse the parties who come to him who ask for a deed where the deed is contrary to the law acting like that will lose clients, but it would be better for the Notary to provide legal counseling about how the legal arrangements in Indonesia are related to the uterine rental agreement in Indonesia.

#### IV. Conclusion

In making a Notary deed, it is only to confirm the will of the parties, based on the authority that exists in the Notary as referred to in Article 15 of the UUJN and the strength of proof of the Notary deed, then there are 2 (two) understandings, namely:

- a. The job of a Notary is to formulate the wishes/actions of the parties into an authentic deed, taking into account the applicable legal rules.
- b. A Notary Deed as an authentic deed has perfect evidentiary power, so it does not need to be proven or supplemented with other evidence, if there are people/parties who judge or state that the deed is not true.

There is no regulation that expressly regulates in this case it does not have a legal umbrella regarding Surrogate Mother in Indonesia, then the legal force of the Agreement as outlined in the form of a Notary Deed is null and void, because it does not meet the legal requirements of the agreement. Civil Code.

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