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Borrowing the Womb of a Second Wife: An Indonesian Legal Perspective

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Article Info

Article history:

Accepted: 7 January 2025

Published: 1 March 2025

Keywords:

Surrogacy;

Second Wife;

Child Status.

Abstract

The purpose of marriage is to form a happy and eternal family, one way to achieve this is to have offspring that come from the husband and wife's own gamete cells. One of the obstacles faced by a married couple is when the wife is unable to conceive and give birth to a child due to a problem with the wife's uterus. One way that can be taken to overcome this obstacle is through surrogacy, namely the husband and wife rent another woman's uterus as a surrogate mother to conceive and give birth to their fetus in exchange for a sum of money. Currently, renting another woman's uterus without a valid marriage bond is prohibited in Indonesia, making this act illegal. Renting a uterus to be valid in the eyes of the law must be based on a valid marriage, namely by marrying a surrogate mother. The problem is how to arrange borrowing the womb of a second wife based on Law Number 16 of 2019 concerning Amendments to Law Number 1 of 2019 concerning Marriage and the legal status of children born from the first wife by the second wife based on the Civil Code. The type of research used in this study is normative library research. The type of data used is secondary data. Drawing conclusions is done by starting from general things to then be applied to specific things. The purpose of a husband's marriage with more than one wife because the wife cannot bear children changes the term rent to borrow. The marriage law has accommodated this, where the court grants permission to a husband who will have more than one wife if one of the requirements is that the wife cannot bear children. A husband who applies to the court to have more than one wife must meet the requirements, namely obtaining approval from the wife; certainty that the husband is able to guarantee the necessities of life for his wife and children; guarantee that the husband will be fair to his wife and children. The legal status of a child can be determined from the marital status of the child's parents or the qualification of not being related by blood to the parents as determined by the court. The legal status of a child born to a second wife for a first wife based on the Civil Code (KUHPer) is determined by whose the gamete belongs. The KUHPer states that a legitimate child is a child who is born or raised during a marriage, has a husband as his father, so if the gametes come from the husband and first wife, then the legal status of the child is a legitimate child of the first wife, because the child born is not genetically related to the surrogate mother because it does not use the surrogate mother's ovum cells. If the gamete involves the surrogate mother's ovum cells, then the child is the legitimate child of the second wife.

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1. INTRODUCTION

The wife's inability to get pregnant, even give birth, can be caused by several factors, one of which is the wife's reproductive health. Along with the development of technology in the health sector, assisted reproductive technology was created with the term Assisted Reproductive Technology (ART). One method of assisted reproductive technology is surrogacy.

Surrogacy in the Kamus Besar Bahasa Indonesia (KBBI) means renting a womb. Rent in KBBI means money paid to use or borrow something, so renting a womb is paying a sum of money as an agreed reward for using or borrowing a womb. According to the author, this is one of the factors that causes womb rental to be prohibited in Indonesia, because it is commercial in nature without a marriage bond.

There are two types of surrogacy, namely gestational surrogacy and traditional surrogacy. Gestational surrogacy is done by collecting gametes (reproductive cells) of couples who want to have children. ovum from the wife and sperm from the husband are fertilized in the laboratory. Fertilized gametes that become embryos are then selected. The best embryo will then be placed into the uterus of a woman as a surrogate mother. In the uterus of the surrogate mother, the fetus will grow and develop until it is born. The child born is not genetically related to the surrogate mother because it does not use the surrogate mother's ovum; while traditional surrogacy is done through an artificial insemination process in which the doctor takes the husband's sperm and then places it into the uterus of the surrogate mother. The placement of sperm is done using a small catheter, when the surrogate mother ovulates. The ovum used come from the surrogate mother, so the child conceived and born is genetically related to the surrogate mother.

In further developments, there was a shift in meaning and substance, from its initial substance as an alternative to existing medical disorders (due to congenital defects or diseases) to a social direction and exploitation of the value of a uterus, where the renter is no longer for medical reasons, but has shifted to cosmetic and aesthetic reasons, while for the rented party it will become a new business field by renting out their uterus as a means of earning a living (especially in low-income communities).

Indonesian laws and regulations do not specifically regulate surrogate mothers. Indonesia only regulates efforts to obtain pregnancy outside of natural means, namely fertilization by a husband and wife that is implanted into the wife's uterus which is the source of the ovum. Efforts to obtain pregnancy outside of natural means are called the In Vitro Fertilization (IVF) method. Currently, renting another woman's uterus without a legal marriage bond is prohibited in Indonesia, making this action illegal.

For womb rental to be legal, it must be based on a legal marriage, by marrying a surrogate mother. The problem is how to regulate the borrowing of a second wife's womb based on Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and what is the legal status of a child born to a second wife for the first wife based on the Civil Code.

2. RESEARCH METHOD

The type of research used in this study is normative library research by conducting a search for library materials in the form of literature and legislation related to surrogacy and marriage with more than one wife. The type of data used is secondary data obtained through library studies which are arranged in the form of literature consisting of books, journals, legislation and writings related to surrogacy and marriage with more than one wife. Drawing conclusions is done by starting from general things and then applying them to specific things.

3. RESEARCH RESULTS AND DISCUSSION

Borrowing the Womb of a Second Wife Based on the Marriage Law

The primary purpose of marriage is not to have children, but to live together. Marriage feels incomplete if the husband and wife do not have children. In this regard, the husband and wife can adopt children, run an IVF program, or even surrogacy. As for forming a happy and eternal family, one way to achieve this is by having children from the husband and wife's own gametes. The obstacle faced by a husband and wife is when the wife is unable to conceive and give birth to a child due to problems with the wife's uterus. One way to overcome this obstacle is surrogacy, where the husband and wife rent another woman's uterus as a surrogate mother to conceive and give birth to their fetus by receiving compensation.

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Uterine rental is prohibited in Indonesia, this is stated in the Government Regulation which states, medical personnel and health workers in carrying out practices have the right to reject the wishes of patients or other parties that are contrary to professional standards, service standards, operational procedure standards, codes of ethics, or provisions of laws and regulations. The right to refuse as referred to is carried out in the event that the patient requests find a surrogate mother or rent a uterus resulting from reproduction with the assistance of a legally married couple.

Indonesia regulates that assisted reproduction can only be carried out by legally married couples with the provision that the results of fertilization of sperm and ovum from the husband and wife concerned are implanted in the uterus of the wife from whom the ovum originated. This rule is clarified in the Government Regulation which states that assisted reproduction or pregnancy outside of natural means can only be carried out by legally married couples who are experiencing infertility or infertility to obtain offspring. The assisted reproduction referred to is specifically in the field of In Vitro Fertilization (IVF) and embryo transfer (IVF-PE) using the latest equipment and methods. Assisted reproductive technology services can only be provided to legally married couples and as a last resort to obtain offspring and based on a medical indication.

The practice of uterine rental is medically possible, considering that the process is broadly the same as IVF. Uterine rental and IVF have similarities, namely that they both use gametes from a legitimate married couple. The difference between uterine rental and IVF is that uterine rental uses a host uterus that is different from the ovum origin, called a surrogate mother, while IVF uses the host uterus from which the ovum originates.

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For a womb rental to be legally valid, it must be based on a valid marriage, namely by marrying a surrogate mother. The requirements for a valid marriage are divided into material requirements and formal requirements. Material requirements are requirements that concern the personal aspects of the prospective husband and wife who will be married, while formal requirements are requirements that concern the formalities that must be met or carried out during the marriage.

Material requirements are divided into general material requirements and special material requirements. General material requirements are requirements regarding the personal self of a person who will enter into a marriage that must be fulfilled by a person in order to enter into a marriage, including:

a. Free consent

Both prospective husband and wife agree to bind themselves in a marriage bond without coercion. Marriage is carried out with the awareness of the prospective husband and wife of the consequences of the marriage they are conducting.

b. Age requirements

The age limit for marriage for men and women has reached 19 (nineteen) years.

c. Not in marital status

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A person who is still married to another person cannot remarry, except in the cases stated in Article 3 paragraph (2) and Article 4 of the Marriage Law.

d. Waiting time applies

The main idea is to prevent seed mixing, which means to avoid difficulties in determining who the real father of the child is.

Special material requirements are requirements that only apply to certain marriages consisting of several things that may and may not be done in marriage. In the case of a husband having more than one wife, he is prohibited from marrying his wife's sibling or as his wife's aunt or niece.

Formal requirements are requirements that concern or are related to the formalities that precede and accompany a marriage, which include:

- a. Notification of the marriage;
- b. Recitation;
- c. Recording;
- d. Announcement;
- e. Continuation of the marriage;
- f. Signing of the marriage certificate.

1 The marriage law has accommodated this, where the court grants permission to a husband who will have more than one wife if one of the conditions is that the wife cannot bear children. A husband who applies to the court to have more than one wife must meet the requirements, namely obtaining approval from the wife; there is certainty that the husband is able to guarantee the necessities of life for his wife and children; there is a guarantee that the husband will be fair to his wife and children.

1 Marriage law provides a way out for couples who are biologically unable to have children, this can be done as long as the couple's religious law allows the husband to practice polygamy. Therefore, for husbands who will remarry, they need to pay attention to the following: first, this must be an agreement or desire of the couple concerned; second, the husband must obtain the consent of the wife to submit an application to the court, while for civil servants, permission from the authorized official is also required.

4 The purpose of a husband and wife's marriage with more than one wife because the wife cannot produce children changes the term rent to borrow. The Civil Code (KUHPer) regulates rent and borrow as follows. Based on the provisions of Article 1548 of the Civil Code, renting is an agreement, by which one party binds himself to provide enjoyment of an item to another party for a certain period of time, with payment of a price agreed upon by the latter party. People can rent various types of goods, both fixed and movable, while the phrase borrowing is known in civil law as stated in Article 1740 of the Civil Code, borrowing is an agreement by which one party hands over an item for free use to another party, with the provision that the party receiving the item after using it or after a certain period of time, will return the item. The definition of borrowing and renting has similarities, namely using someone else's property for a certain period of time and returning the item when the period ends. The difference is, borrowing is free of charge, while renting is commercial in nature with payment of an agreed rental price.

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9 A husband who is going to have more than one wife must pay attention to the requirements and procedures that have been set out in the Marriage Law. First, a husband is not allowed to have more than one wife, if he does not meet the requirements for the reasons and procedures that have been set out in the Marriage Law. Second, pay attention to religious provisions, whether the religion practiced by the husband and wife allows a husband to have more than one wife. Third, pay attention to moral provisions, then a husband in exercising his rights must not act arbitrarily towards his wife, and not do things that deny the meaning contained in Article 33 of the Marriage Law, namely that husband and wife must love each other, respect each other, be faithful, and help each other physically and mentally.

Legal Status of Children Born by a Second Wife to a First Wife Based on the Civil Code

The legal status of a child can be determined from the marital status of the child's parents or the qualification of not having a blood relationship with the parents as determined by the court. In the Indonesian legal system, there are regulations related to children based on the marital status of the child's parents with the following division:

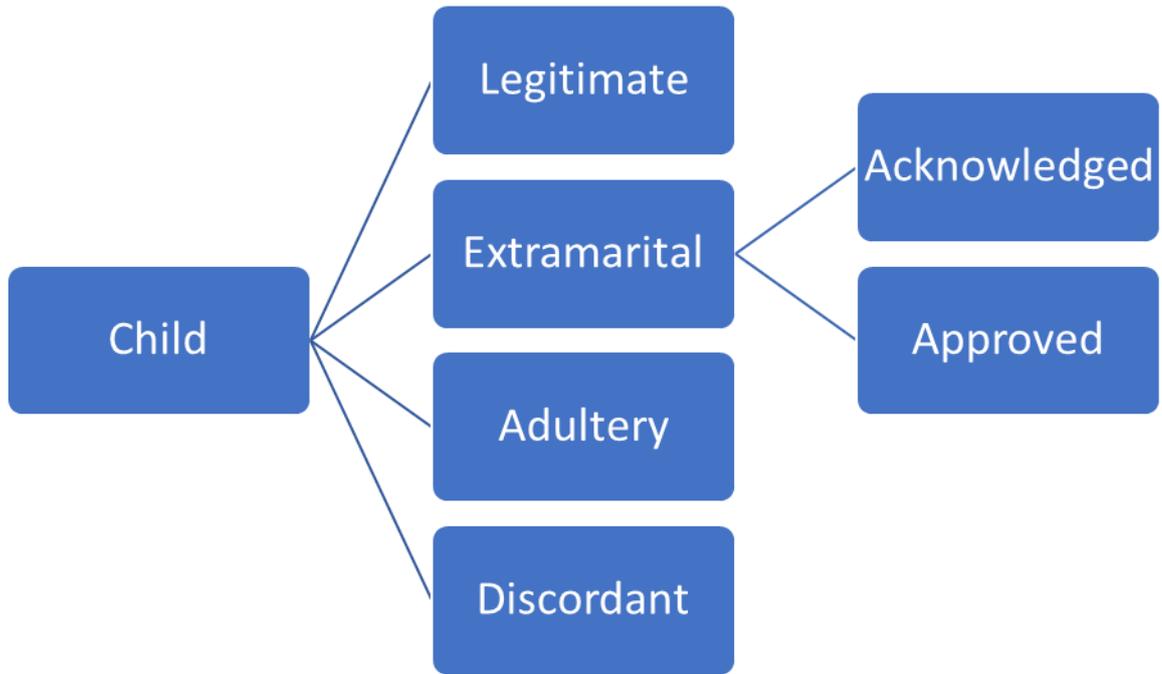


Image 1. Division of the term child in the Civil Code

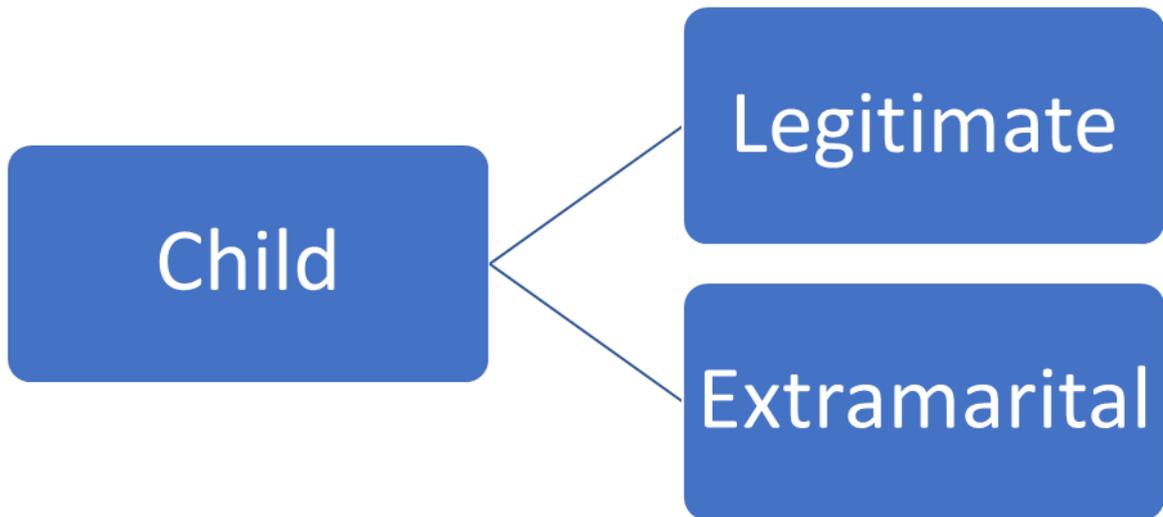


Image 2. Division of child terms in the Marriage Law

a. Legal marriage

Legal marriage is a marriage that has been carried out by fulfilling the requirements of marriage which include material and formal requirements. The valid marriage referred to is not only valid based on religion, but also valid according to state regulations because it is registered at the religious affairs office for Muslims, while for non-Muslims it is registered at the civil registry office as evidenced by an official marriage certificate. Children born in or as a result of a valid marriage are called legitimate children.

b. Invalid marriage

Invalid marriages are categorized into 3 (three) things, namely:

(1) An underhand marriage is a marriage that has been carried out by fulfilling the requirements of marriage which include material requirements without formal ones. The marriage in question is only valid based on religion because it is not recorded. Children from an underhand marriage are called illegitimate children. Children outside of marriage are grouped into 2 (two), namely children outside of marriage who are recognized and legalized.

(a) Illegitimate children are recognized voluntarily

Voluntary recognition of an illegitimate child is done by issuing a statement that the child is one's child.

(b) Illegitimate children are recognized by force

This recognition occurs if a judge's decision determines that there is a descendant of a child born out of wedlock, or that there is a descendant of a particular parent in a process concerning the determination of a person's legal status.

A legitimate illegitimate child is a child who was conceived when both parents were not married and then when the child was born there was a marriage bond.

(2) Marriage due to adultery is a marriage that has been carried out by one party or both parties who have been bound in another marriage. Children born in an adulterous marriage are called adulterous children.

(3) A marriage due to incest is a marriage that has been carried out by people who have a close kinship relationship, such as between father and daughter, mother and son, or between siblings or half-siblings. Children born in an incestuous marriage are called illegitimate children.

The legal status of a child born to a second wife for a first wife, in this case the second wife is a surrogate mother, is determined by the type of surrogacy used. If surrogacy is used gestational where the gametes come from the husband and the first wife, then the legal status of the child is the legitimate child of the first wife, because the child born is not genetically related to the surrogate mother because it does not use the surrogate mother's ovum. If using traditional surrogacy where the gametes involve the surrogate mother's ovum, then the child is the legitimate child of the second wife. A child born through surrogacy is called a legitimate child because the child is born in or as a result of a legitimate marriage.

The provisions related to legitimate children are stated in the Civil Code (KUHPer), Marriage Law, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. The KUHPer states that a legitimate child is a child born or raised during a marriage, with a husband as the father. The Marriage Law states that a legitimate child is a child born in or as a result of a legitimate marriage. Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law states that a legitimate child is (a) a child born in or as a result of a legitimate marriage; (b) the result of a legitimate fertilization of a husband and wife outside the womb and born by the wife; however, this part (b) does not accommodate children born through surrogacy, but rather through the IVF process.

4. CONCLUSION

The purpose of marriage is not only to form a happy and eternal family, but also to have children. The Marriage Law has accommodated this, where the court grants permission to a husband who will have more than one wife, if one of the requirements is that the wife cannot bear children. A husband who applies to the court to have more than one wife must

12 meet the requirements and procedures stipulated by the Marriage Law, namely first, the husband obtains approval from the wife; there is certainty that the husband is able to guarantee the necessities of life for his wife and children; there is a guarantee that the husband will be fair to his wife and children. Second, paying attention to religious provisions, whether the religion embraced by the husband and wife allows the husband to have more than one wife. Third, paying attention to moral provisions, so the husband in exercising his rights must be in such a way that he does not act arbitrarily towards his wife, and does not do things that deny the meaning contained in Article 33 of the Marriage Law, namely that husband and wife are obliged to love each other, respect each other, be faithful and provide physical and spiritual assistance to each other.

9 The legal status of a child born to a second wife for a first wife, in this case the second wife is a surrogate mother, is determined by the type of surrogacy used. If using gestational surrogacy where the gametes come from the husband and first wife, then the legal status of the child is the legitimate child of the first wife, because the child born is not genetically related to the surrogate mother because it does not use the surrogate mother's ovum. If using traditional surrogacy where the gametes involve the surrogate mother's ovum, then the child is the legitimate child of the second wife. A child born through surrogacy is called a legitimate child because the child is born in or as a result of a legitimate marriage that determined by the marital status of the child's parents.

7 11 5. ACKNOWLEDGEMENT

The author would like to thank Universitas Trisakti for giving me the opportunity to carry out this research and helping to ensure the smooth running of the entire.

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