



LAW OF SURROGACY

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DEFINITIONS:

According to the black's law dictionary the word Surrogacy is defined as "the process of carrying and delivering a child for another person".¹

The word surrogate mother is defined as "a woman who carries out the gestational function and gives birth to a child for another; especially a woman who agrees to provide her uterus to carry an embryo throughout the pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of a child."²

The word surrogate agreement is defined as "a contract between the person(s) availing of assisted reproductive technology and the surrogate mother" under sec. 2(cc), ART bill 2010. In simple terms surrogacy agreement means a "comprehensive document that lays foundation for governing relation between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensated, payment schedule etc..."³

Surrogacy is the process of in-vitro fertilisation and transfer of embryo into the womb of another woman (surrogate) to be carried for nine months through birth. History is crammed with instances of such acts and many religions and civilisations upholding surrogate mothers with adulation for their noble services of mankind. Modern surrogacy, however, found mention only as recently as late 1970's when lawyer Noel Keane, brokered the first official legal agreement between a couple⁴

TREND OF SURROGACY:

It's her egg and his sperm, and I am just the oven its totally their bun these are the words said by Phoebe Buffay a character on the popular American sitcom Friends as she explained the process of being a surrogate in a speech in 1998. With this surrogacy has become a popular as a common and trendy solution for developing a family.

BACK GROUND:

Surrogacy is gradually becoming a mainstream method of creating a family. But the idea of surrogacy dates back to biblical times. The book of Genesis Abram's wife Sara could not conceive a child so she gave her husband her maid, Hagar, saying "the lord has kept me from bearing children. Have intercourse, then with my maid; perhaps I shall have sons through her."⁵

¹ Surrogacy, BLACK'S LAW DICTIONARY 1674 (10th ed.2009).

² Id. 1168.

³ Sonali Kusum, Legal Glitches Facing Surrogacy Agreement in India (Aug. 8 2019 8:00PM) http://docs.manupatra.in/newslines/articles/Upload/CF C0FA22-6E4C-456D-A920-D069C37A118F.2-b_civil.pdf

⁴ Santosh A. Shah, the Surrogacy Bill 2016 a Boon or Bane? (Aug. 7, 2019, 9:30PM)

<http://www.livelaw.in/surrogacy-bill-2016-boon-bane/>

⁵ Izabela Jargilo, Regulating the trade of commercial surrogacy in India, 15 J.INT'L BUS.& L. 337,360(2016).



REASONS FOR INDIA'S POPULARITY IN SURROGACY

India is stated as the top destination for the fertility tourism. High quality health care, western trained doctors and low medical costs make India attractive to would be western parents. Another reason for India's popularity with infertile couples is the relative scarcity of laws regulating reproductive technologies. In 2005 Indian council of medical research (ICMR) has drafted national guidelines to regulate fertility services.

Since the 1970s, when in vitro fertilization (IVF) first made it possible for a woman to carry a child genetically unrelated to her, governments have grappled with the complex legal, moral and ethical issues raised by IVF surrogate motherhood.⁶

TYPES AND DEVELOPMENT OF SURROGACY:

Surrogacy is categorised into two categories. They are: traditional surrogacy and gestational surrogacy. To many, surrogacy may seem like a radical idea. While there are always changes within the legal and medical arenas of gestational surrogacy, traditional surrogacy has been practiced for thousands of years. In fact, the bible even cites an ancient instance of traditional surrogacy in Genesis – Sarah, who was infertile, requested that her handmaiden, Hagar, carry her husband, Abraham's, child.

While traditional surrogacy has been practiced for ages, gestational surrogacy was developed much more recently. In 1978, the first in vitro fertilization (IVF) baby was

born. Just five years later, in 1982, the first baby from an egg donation was born.

The combination of these two innovative technologies resulted in the emergence of gestational surrogacy, which was first performed in 1985 and has grown exponentially in popularity over the past 20 years.

FIRST LEGAL HURDLE OF SURROGACY:

In 1986, surrogacy encountered its first real legal hurdle when upon giving birth to the child; a traditional surrogate decided that she wanted to keep the child. A two-year-long legal battle between the surrogate and the intended parents eventually resulted in the intended parents retaining custody.

As the practice of gestational surrogacy continued to grow, this landmark case, referred to as 'the Baby M case,' sparked many legal questions in many countries around the world. Today, commercial surrogacy is legal in most U.S. states, and a handful of countries including India, Russia, and Ukraine; however, intended parents from countries where surrogacy is illegal may travel abroad to legally have a child through surrogacy.

SPECIAL PROGRAM OF ASSISTED REPRODUCTION:

In 1999, surrogacy took another step forward with the development of the Special Program of Assisted Reproduction (SPAR). This program allows an HIV-positive man to become the biological father of his children without transmitting the disease.

⁶ Jennifer Rimm, Booming Baby Business: Regulating Commercial Surrogacy in India, 30 U.Pa. J Int'l L, 1429,1462 (2009)



Even more recently, in 2011 several surrogacy records were broken when the oldest-ever surrogate mother, 61, carried her own grandchild. Surrogacy, both traditional and gestational has aided families for centuries.

The practice has developed from a rarely documented occurrence thousands of years ago, to a rapidly growing and viable option for having children. In fact, we just celebrated the birth of our 1500th baby through our surrogacy and egg donation programs! At this pace, we can only imagine what the future holds for surrogacy.⁷

ABSENCE OF LAW:

No Indian law prohibits surrogacy and so surrogacy agreements are governed by the ordinary contract law i.e. the Indian contract act 1872 and the enforceability of any such agreement is within the domain of Indian civil procedural laws .

In the absence of any law governing surrogacy the Indian council of medical research (ICMR) had issued guidelines in 2005 to check the malpractices in India but these guidelines being non statutory are not mandatory, do not have compulsive force and so not enforceable and not justiciable in the court of law in India.

CASE BEFORE SC:

In a case baby Manji Yamada v. Union of India and another judgement today the Supreme Court held that commercial

surrogacy is legal in India. In paragraph 5 of the judgement it stated that the word surrogate was derived from the Latin word subrogate which means appointed to act in the place of it also defined traditional surrogacy (also called as straight method), gestational surrogacy (also called as the host method) altruistic surrogacy, commercial surrogacy etc..

Where in the paragraph 9 of the judgement Supreme Court stated that this medical procedure is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms “wombs for rent”, “outsourced pregnancies”, or baby farms”.⁸

ROLE OF SURROGATE:

The surrogate in India continues to fulfil her role as a gestate according to the surrogate bill of 2018. In keeping with the insistence on gestational surrogacy, which makes the use of IVF and other assisted reproductive technologies mandatory, the current Bill is faithful to the Indian Council of Medical Research’s Draft Assisted Reproductive Technology (Regulation) Bill, 2010. The Assisted Reproductive Technology (regulation) bill 2010 has governed the practice of surrogacy till the Surrogacy Bill of 2016 banning commercial surrogacy comes into effect.⁹

⁷ Kristin Marsoli, History of surrogacy: how surrogacy has evolved, (Aug. 8 2019, 8:30AM) <https://www.circlesurrogacy.com/blog/circle-surrogacy/history-surrogacy-surrogacy-evolved/>

⁸ Anil Malhotra; Ranjit Malhotra Law and Surrogacy Arrangement in India, 2013 INT’L SURV. FAM, L. 151, 174 (2013)

⁹ Anindita Majumdar, What is Altruistic Surrogacy? The Hindu, (Aug. 9 2019, 4:20)



CATEGORIES OF COUNTRIES:

Determination of citizenship has become complicated because of this international surrogacy as different jurisdictions have different approaches. The majority of the nationality laws depicting citizenship are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy, especially in cases of commercial surrogacy unless the country has legalized commercial surrogacy. So in order to 4ardhan this problem the countries are categorized according to their legal regime on surrogacy.

CATEGORY A: countries where commercial surrogacy is legally permitted. India, Ukraine, Russia, panama, Thailand, some states of USA etc.... have adopted laws to synchronize commissioning parent and surrogate born child citizenship.

CATEGORY B: countries where commercial surrogacy is restricted, but altruistic surrogacy (born children of their citizens) is usually allowed in the countries of Canada, UK, New Zealand, Israel, Australia etc...

CATEGORY C: countries where surrogacy is entirely prohibited. France, Germany, china, Spain, Japan, etc... are the countries where surrogacy is entirely prohibited.¹⁰

Indian surrogacy laws make it illegal for foreign intended parents to complete a surrogacy in India. The only people who can complete a commercial surrogacy in India

today are Indian intended parents who have been married for at least five years.

INDIAN SURROGACY LAW:

The ban on foreign intended parents in 2015 was only the start of legislation regulating surrogacy. In December 2018, after almost two years of debate, an Indian surrogacy law was passed that Made commercial surrogacy illegal and Only allows altruistic surrogacy for needy, infertile Indian couples and Requires intended parents to be married for five years and have a doctor's certificate of their infertility, Restricts women to being surrogates only once, and only if they are a close relative of the intended parents, are married and have a biological child, Bans single parents, homosexuals and live-in couples from surrogacy¹¹

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost.

Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK.

DECISION OF SC ON COMMERCIAL SURROGACY:

<https://www.thehindu.com/opinion/op-ed/what-is-altruistic-surrogacy/article25814445.ece>

¹⁰ Sanoj Rajan, Resolving Statelessness Arising Out of Surrogacy i India: A Legal Analysis, 14 ISIL Y.B.

INT'L HUMAN. & REFUGEE L. 177. 198 (2014-2015).

¹¹ Intended Parents, Surrogate.com (Aug. 10 2019 7:30PM), <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-india/>



Surrogacy in India is relatively low cost and the legal environment is favourable. In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India.

At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

LAW COMMISSION REPORT:

The Law Commission of India has submitted the 228th Report on "need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy".

Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such

an arrangement should not be for commercial purposes. This is one of the suggestions made by the law commission on surrogacy.¹²

PARLIAMENTARY STANDING COMMITTEE:

According to the parliamentary standing committee on health, a mere enactment of the Surrogacy (Regulation) Bill would not serve the purpose of controlling commercialisation of surrogacy facilities across the country because surrogacy procedures cannot be conducted within assisted reproductive techniques.

The committee observed that the ART Bill, 2008, has been lying with the government since 2014 after having been revised twice. This bill also included provisions on regulation of surrogacy facilities, it stated in it observed that surrogacy could not be a way out for women living in poverty and should not be allowed as a profession—it supported the provision that restricts a woman from becoming a surrogate more than once.¹³

Until recently India fell into the category of A, where all forms of surrogacy were permitted. However, a recent order from the supreme court of India (the order) has made commercial surrogacy for foreign couples illegal.

This new order has placed India in new category. International commercial surrogacy agreements are now illegal, but Indian couples may continue to commission

¹² Legality, surrogacy laws India, (Aug. 11 2019 7:00PM)
http://surrogacylawsindia.com/legality.php?id=%207&menu_id=71

¹³ Prabha raghavan, surrogacy bill useless without ART bill: committee to Rajya Sabha, the economic

times (Aug. 11 2019, 6:30PM)
<https://economictimes.indiatimes.com/news/politics-and-nation/surrogacy-bill-useless-without-art-bill-committee-to-rajya-sabha/articleshow/60011253.cms?from=mdr>



Indian women for their services as surrogate mothers. Unlike some aspects of commercial surrogacy, altruistic surrogacy continues to be legal in India¹⁴

SURROGACY BILL 2019:

The Lok Sabha on August 5, 2019, passed the surrogacy (regulation) bill, 2019. It was introduced by Union Health Minister Harsh Vardhan. The bill essentially seeks to regulate surrogacy in India while imposing an absolute prohibition on commercial surrogacy.

While the bill allows altruistic surrogacy, a selfless arrangement where only medical expenses and insurance cover are provided to the surrogate mother, and there is no room for any other monetary reward. The bill also provides for constituting national surrogacy board and state surrogacy boards for the regulation of surrogacy.

The bill also provides for the eligibility criteria for a surrogate mother, protection of surrogate child, offences and penalties, major issues covered under the surrogacy.¹⁵

The Rajya Sabha has not yet passed the bill and once it is passed then commercial surrogacy is completely banned and only altruistic surrogacy will be allowed. So let's wait for the consent of Rajya Sabha.

¹⁴ Izabela Jargilo, Regulating the trade of commercial surrogacy in India, 15 J.INT'L BUS.& L. 337,360(2016).

¹⁵ Akshita Saxena LS passed the surrogacy (regulation) bill 2019: read the salient features (Aug. 13, 2019, 8:00AM) <https://www.livelaw.in/news-updates/is-passed-the-surrogacy-regulation-bill-2019-146966>.