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LEGAL CONTRACTS FOR SURROGACY COLLABORATION

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Abstract

Whenever a couple sees darkness in becoming parents, there is an opportunity in modern times for their wish to come true. This all took place in the year 1976 when Michigan Lawyer Noel Keane created the first legal surrogacy contract in the United States. Later, from the

1980's, paid surrogacy arrangements started taking place. In India, under the Surrogacy Act of 2020, the surrogate cannot receive any financial compensation other than medical expenses and insurance. Surrogacy is a process in which a surrogate woman carries and gives birth to a child for another woman or couple. It is a complex process as it involves medical, legal, emotional, and financial considerations. As in surrogacy contracts, there is no explicit compensation structure mentioned, which leads to disputes between the parties. According to Surrogacy Bill 2020, only altruistic surrogacy is allowed in India, which deprives the surrogate of the benefits and advantages of commercial surrogacy. The impact of the Surrogacy Act, 2020 indirectly suggests to parents who are planning for surrogacy to consider other alternative options like adoption, foster parenting, fertility treatments and many more. To promote surrogacy in India the governments should take initiatives to establish standard surrogacy laws and guidelines to prevent exploitations, ensuring surrogates receive adequate and fair monetary compensation. The researcher has undertaken the topic to understand the meaning and concept of surrogacy and laws related to surrogacy.

To understand the various reasons that influence people to opt for surrogacy.

Key words: Surrogacy, Surrogate, fertility, parents, child.

1. Introduction

A surrogacy contract or legal agreement contains the person who carries the pregnancy and gives birth and the person or persons who take custody of the child after birth. The person giving birth is called the birth mother or gestational carrier or surrogate mother or surrogate.

In traditional surrogacy, the gestational mother is also a genetic mother as the donation of her ova takes place, and both the ova eggs when artificially fused with the father's sperm would have a genetic link to the child; such conditions may give rise to claim legal motherhood in future. Moreover, a shift from transitional to gestational surrogacy has been observed in

which the intending parents donate either or both egg and sperm or receive donated eggs and/or sperm, the ovum is fertilized and then implanted into the surrogate's womb. The central and most important aspects of a surrogacy contract are that the surrogate has no parental rights to the child. It is seen that the primary regulation of commercial surrogacy is through contractual agreements. It has been contended that contract laws are best to serve the interest of parties to surrogacy agreements; however, there are certain aspects to keep consideration.¹⁵⁵

¹⁵⁵ Lexology <https://www.lexology.com/library/detail.aspx?g=3e4bac97-0d80-4b14-81f5-ca36115c4a57> February 21 2025, 11.29 am

For transnational agreements, there may be concerns regarding the process of contract formation and the ability of surrogates to enforce terms. The vast majorities of surrogacy contracts do not involve claims of contract breach and are completed without difficulty. But where conflicts do arise, the specter of exploitation also looms. As such, regulating contracts and contract enforcement to ensure fairness potentially reduces both domestic and transnational controversies. There is a misconception that the contracting parties are in relatively equal bargaining positions whereas it is a choice for all, in order for the bargain to be fair, there must be adequate disclosure of the terms and informed consent. Each Surrogacy contract must contain terms and conditions as per the state surrogacy laws. But in common a surrogacy contract must possess some of these essential elements.¹⁵⁶

1. Historical Background:

First in 1976, a lawyer named Noel Keane negotiated and drafted the world's first legal surrogacy agreement. The agreement was designed for a traditional surrogacy and that time the surrogate was not compensated monetarily for her services. Keane remained a strong proponent of surrogacy throughout his life.

Events that led to the contract started in early 70's when in California a couple advertised for a woman to carry a child through artificial insemination. A woman responded to the advertisement and agreed to carry their child in exchange for a \$7,000 fee and \$3,000 in medical and legal costs. Soon, the news of this agreement spread across the country, prompting a Michigan couple to ask Keane for help finding a surrogate and working out a similar contract.

Looking for assistance writing the contract, Keane turned to a judge for an opinion. A judge told Keane that it wasn't illegal for a surrogate to be inseminated, carry a child to term, and

give up her parental rights upon birth. It was also perfectly legal for the intended parents to pay medical expenses related to surrogacy. However, Michigan's laws could make it illegal for the intended parents to pay a fee to the surrogate for carrying the child. At the time of this writing in 2022, **Michigan's laws do not favor surrogacy** and CFC is not able to accept surrogate candidates who live in Michigan. Surrogacy contracts are void and unenforceable in Michigan, and those involving compensation to a surrogate are subject to criminal penalties.¹⁵⁷

In The Baby M. case:

In the early 1980s, there still were no laws in the United States clearly outlining the permissibility of surrogacy arrangements. These circumstances changed with the

Baby M. case, The Baby M. case was a custody dispute between William and

Elizabeth Stern, the intended parents, and Mary Beth Whitehead, the surrogate. Whitehead agreed to be a traditional surrogate for the couple and give up her maternity rights once the baby was born. She also agreed to name William Stern on the birth certificate as the baby's father and allow the intended parents to name the child. But, when Whitehead gave birth, she included her husband's name on the birth certificate and named the baby without involving the Sterns.⁴

Since the birth certificate did not list William Stern, he legally had no right to claim custody of the child. Whitehead refused to give the child to the Sterns, so they went to court. First, a New Jersey judge found their surrogacy contract enforceable and terminated Whitehead's parental rights. Then, Whitehead appealed, and the New Jersey Supreme Court determined the agreement was unlawful because it violated adoption laws that prohibit compensation for children. Whitehead regained her rights, but

¹⁵⁷ Creative family creations

<https://creativefamilyconnections.com/blog/history-of-surrogacy/> February 21 2025, 11.38 am. ⁴ *Ibid*

¹⁵⁶ *Ibid*

William Stern received full custody to serve the child's best interests. The Baby M. case shone a national spotlight on traditional surrogacy and the associated legal risks, demonstrating a reason for states to develop surrogacy laws. Finally, the Baby M. case highlighted a need for surrogacy agencies to properly screen surrogates, offer clear legal contracts, and provide adequate support to intended parents and surrogates.¹⁵⁸

The first ethically IVF was successful and completed IVF embryo transfer happened in the late '70s. It started in 1976 when Dr. Patrick Steptoe and Professor Robert Edwards teamed up together to help an infertile couple named Lesley and John Brown to conceive a child. It took several attempts, but by timing it precisely, Steptoe and Edwards successfully transferred an embryo to Lesley Brown. In 1978, she gave birth to Louise Joy Brown, the first baby in the world born from an IVF treatment.

2. Present Status of Surrogacy Contracts in India:

The Surrogacy (Regulation) Act, 2021 prohibits commercial surrogacy. Only altruistic arrangements where women acting as surrogates do not receive any monetary remuneration or compensation are allowed. Further, it allows only gestational surrogacy where Assisted Reproductive Technologies (ARTs) such as In-Vitro Fertilisation (IVF) are used to induce the surrogate pregnancy. It also laid down age and other criteria for both the people intending to be parents through surrogacy and those who could act as surrogates. Only married couples and ever-married single women (widowed or divorced) can seek a surrogacy. The intending parents additionally have to produce a "certificate of essentiality" that attests to medical indications that justify use of gestational surrogacy. The

Rules necessitated the use of their own gametes by intending parents.¹⁵⁹

3. Surrogacy and LGBTQ+ Community:

The 2021 Act bars homosexual couples from using altruistic surrogacy. It plays into a stereotyped view of a family, not only in a heteronormative household dynamic but also presuming a lack of autonomy on the part of women. Indian law, societal standards, and religious doctrine declare that both parents must be from two different sexes for the holistic development of a child. In contrast to this mindset, the hypocrisy in this idea is founded on the fact that it permits the utilization of ART services by widowed and divorced women. This is discriminatory and excludes the LGBTQIA+ community from the purview of surrogacy.¹⁶⁰

Case Law: In the Navtej Singh Johar v. The Union of India case,

The Supreme Court of India unanimously declared that Section 377 was unconstitutional. The judges presiding on this case proclaimed that to "attack" the LGBTQIA+ community on account of their sexual orientation is against the fundamental rights to equality, freedom of speech, right to choose, and the right to dignity. The LGBTQIA+ community was also assured to be entitled to equal legal rights and to be treated equally in society without experiencing any stigma.

Through surrogate arrangements in India, many gay couples from Spain and Israel were successful in starting families. This provides evidence that parenting a same-sex child is the same as raising a child of a heterosexual marriage. Due to the effective surrogacy ban in the region, there has been a marked surge of single gay men or gay couples as well as single lesbian females or lesbian couples choosing to

¹⁵⁸ Creativefamily <https://creativefamilyconnections.com/blog/history-of-surrogacy/> February 22 2025, 11.00 am. a

¹⁵⁹ Indian Express [https://indianexpress.com/article/opinion/columns/on-surrogacy-indian-law-goes-a-step-further-but-not-far-enough-9187014/#:~:text=The%20Surrogacy%20\(Regulation\)%20Act%2C,remuneration%20or%20compensation%20a re%20allowed](https://indianexpress.com/article/opinion/columns/on-surrogacy-indian-law-goes-a-step-further-but-not-far-enough-9187014/#:~:text=The%20Surrogacy%20(Regulation)%20Act%2C,remuneration%20or%20compensation%20a re%20allowed) February 22 2025 12.00 pm

¹⁶⁰ National Library of Medicine <https://pmc.ncbi.nlm.nih.gov/articles/PMC10199460/> February 22 2025 1.30 pm

become parents in Mexico or the US. Although decriminalizing homosexuality was a welcome step, revolutionary

constitutionalism and its incorporation into public policy still have a long way to go. Despite the repeal of Article 377, the LGBTQIA+ population continues to face societal stigma and denial of fundamental civil rights. In the landmark decision of the National Legal Services Authority v. Union of India, the Supreme Court recognized transgender people as a third gender. The 2021 Act makes no mention of granting the people belonging to the third gender equal rights.¹⁶¹

Even living relationships couples have been excluded from these rights to have baby through IVF. Live-in partners are not covered under the Act's regulatory scope. Contrary to popular belief, live-in relationships between consenting adults are not against the law in India.

Case Law: In the 2006 case of Lata Singh v. State of UP, the same was upheld. In S. Khushboo v. Kanniammal, the Supreme Court ruled that a live-in relationship is covered and protected by

Article 21 (right to life). In Badri Prasad v. Director of Consolidation, the Supreme Court upheld the legality of a 50-year live-in partnership. The Allahabad High Court stated in Payal Sharma v. Superintendent, Nari Niketan, that "a man and a woman, even without getting married, can live together if they choose". The courts have thus made it clear that not all socially unacceptable behavior must be deemed unlawful. However, why the right to choose the path of parenting is not extended to these couples is unclear and remains to be addressed.

¹⁶¹ *Ibid*

4. Surrogacy Laws in India :

Eligibility for Intended Parents

Criteria	Details
Marital Status	Only married Indian heterosexual couples & eligible single women (widowed/divorced, 35-45)
Age Requirement	Female: 23-50 years / Male: 26-55 years
Medical Indication	A certificate proving medical infertility is mandatory
Child Status	Must not have a biological/adopted child , except for terminal illness cases

Surrogate Mother Criteria

Criteria	Details
Eligibility	Only a married woman (25-35 years) with at least one biological child
Number of Surrogacies	A surrogate can only participate once
Compensation	No monetary compensation —only medical expenses & insurance
Legal Documentation	Must obtain eligibility certificate from authorities

Legal Note: Same-sex couples and single men cannot pursue surrogacy in India.

Legal Process for Surrogacy in India

Step-by-Step Process

- Obtain a Medical Certificate – Proof of infertility from a government-approved medical board.
- Apply for Surrogacy Authorization – Get a Certificate of Essentiality & Certificate of Eligibility from the relevant authorities.
- Legal Agreement & Court Order – Documentation must be notarized and approved by a First-Class Magistrate.
- Surrogate Selection & Medical Screening – Must be approved by a registered ART clinic.

- IVF & Embryo Transfer – The surrogacy process begins after legal and medical approvals.

- Parental Rights & Child Documentation – Intended parents obtain a court-issued parentage order post-birth.¹⁶²

Important: Only ART-registered clinics can legally perform surrogacy in India.

Surrogacy approval process in India

The surrogacy legal process in India is not straightforward forward and many legal

¹⁶² IVF Conceptions <https://www.ivfconceptions.com/latest-surrogacy-law-in-india/#:~:text=Altruistic%20Surrogacy%20Law%20in%20India,%2C%20strictly%20banning%20commercial%20surrogacy.> March 22, 2025, 12.00 pm
¹⁰ *Ibid*

compliances need to be fulfilled before starting your surrogacy journey in India as surrogate rules in India have been severely changed.¹⁰

The documents needed as per Surrogacy Act India:

- Approval for availing surrogacy from the state ART board has to be produced.
- Certificate of eligibility of intending couple or woman,
- Certificate of eligibility of surrogate mother,
- Certificate of essentiality,¹⁶³

5. Challenges faced in Surrogacy:

- Exploitation of the Surrogate and the child born through surrogacy. Banning of commercial surrogacy from the rights-based approach to a needs-based approach, thus removing the women's autonomy to make their own reproductive decisions and right to parenthood. One could argue that the state must stop the exploitation of poor women under surrogacy and protect the child's right to be born. However, the current Act fails to balance these two interests.
- Reinforces Patriarchal Norms: The Act reinforces traditional patriarchal norms of our society that attributes no economic value to women's work and, directly affecting the fundamental rights of the women to reproduce under [Article 21 of the constitution](#).
- Emotional Complications: In altruistic surrogacy, a friend or relative as a surrogate mother may lead to emotional complications not only for the intending parents but also for the surrogate child as there is great deal of risking the relationship in the course of surrogacy period and post birth.
- Altruistic surrogacy also limits the option of the intending couple in choosing a surrogate mother as very limited relatives will be ready to undergo the process.

- No Third-Party Involvement: In an altruistic surrogacy, there is no third-party involvement. A third-party involvement ensures that the intended couple will bear and support the medical and other miscellaneous expenses during the surrogacy process.

- Overall, a third party helps both the intended couple and the surrogate mother navigate through the complex process, which may not be possible in the case of altruistic surrogacy.¹⁶⁴

Legal Restrictions & Uncertainty

The Surrogacy (Regulation) Act, 2021 bans commercial surrogacy, allowing only altruistic surrogacy for married Indian couples. This limits the availability of surrogates.

Same-sex couples, single parents, and foreigners are not allowed to enter surrogacy contracts in India.

Enforceability of Contracts

Surrogacy contracts often lack clear legal enforceability, leading to disputes. If the surrogate changes her mind and refuses to give up the child, the intended parents may face legal difficulties.

Parental Rights & Custody Issues

There have been cases where intended parents refuse to accept the baby, especially in cases of birth defects.

Lack of legal clarity on the rights of the surrogate mother can lead to conflicts.

Ethical & Human Rights Concerns

Some argue that even in altruistic surrogacy, the surrogate may be coerced due to family or societal pressure.

There is potential for exploitation of poor women who agree to become surrogates without full knowledge of medical and legal risks.

Financial Disputes

¹⁶³ PRS India <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019> March 23, 2025, 1.00 pm

¹⁶⁴ Dristi IAS <https://www.dristiias.com/daily-updates/daily-news-analysis/surrogacy-law> February 23 2025, 12.00 pm

Since commercial surrogacy is banned, only medical expenses can be reimbursed, which might discourage women from becoming surrogates.

Disagreements may arise over payment for medical complications or additional costs during pregnancy.

- Medical & Health Risks

Surrogates may not always get proper medical care or insurance coverage for complications.

There is no clear policy on post-delivery care for surrogates.

- Citizenship & Documentation Issues

If intended parents are from a different country, obtaining citizenship and travel documents for the baby can be difficult.

Bureaucratic delays in issuing the birth certificate can create legal hurdles.

Conclusion

While India has attempted to regulate surrogacy, the strict laws have led to reduced availability of surrogates and legal complexities in enforcing contracts. A more balanced approach may be needed to protect both intended parents and surrogate mothers while preventing exploitation.

6. Cases related to Surrogacy contracts:

- Johnson v. Calvert (5 Cal. 4th 84 - California, 1993)

A gestational surrogate, Anna Johnson, carried a baby for Mark and Crispina Calvert but later claimed parental rights. Ruling: The California Supreme Court upheld the surrogacy contract, stating that the intended parents (the Calverts) were the legal parents. The impact of this case affirmed the legality of gestational surrogacy agreements in California.

- In re C.K.G. (173 S.W.3d 714 - Tennessee, 2005)

A woman agreed to be a surrogate using her own eggs, then sought custody after birth. The Tennessee Supreme Court ruled that both

genetic and intended parents could be recognized as legal parents, leading to a shared custody arrangement.

This Highlighted the complexities of surrogacy laws in states without clear statutes.

Indian case laws :

- Baby Manji Yamada v. Union of India (2008 SCC 3 717)

A Japanese couple, the Yamadas, entered into a surrogacy contract in India. Before the baby was born, they separated, and the intended mother abandoned the process. The biological father, Dr. Yamada, sought custody, but Indian laws did not allow single parents to adopt at the time. The Supreme Court of India ruled in favor of the biological father, allowing him to obtain travel documents for the child. This case highlighted the need for surrogacy regulations, eventually leading to the Surrogacy (Regulation) Act, 2021.

- Jan Balaz v. Anand Municipality & Others (2010 Guj. HC)

A German couple, Jan Balaz and his wife, used an Indian surrogate. However, Indian authorities refused to grant the child an Indian passport because Germany did not recognize surrogacy-born children as citizens. The Gujarat High Court ruled that the child was an Indian citizen by birth but left the citizenship issue to be resolved diplomatically. This case raised concerns about international surrogacy and stateless children, influencing India's decision to ban foreign intended parents from pursuing surrogacy.

Initiatives that should be implemented:

- Awareness: To eliminate the exploitation of surrogate mothers they need to be made aware of their rights and the associated risks to gain their informed consent.
- Clarity: There is a need to clearly define terms such as close relatives, infertility etc. Also, the definition of infertility should be expanded to take into account the medical factors, and diseases of the intended parents.

- Reduce the age limit: For intending women who intend to avail surrogacy from a minimum of 35 years.
- Make more inclusive: The possibility to include unmarried women, same-sex couples, and unmarried and single men from availing of surrogacy should be explored.¹⁶⁵
- Many people are unaware of the ban on commercial surrogacy.
- Surrogate mothers often face lack of legal knowledge, leading to exploitation.
- Legal counsel and ethical awareness are crucial before entering into a surrogacy contract.
- The Surrogacy (Regulation) Act, 2021 governs surrogacy in India. It permits only altruistic surrogacy, meaning that surrogate mothers cannot be compensated beyond medical expenses and insurance coverage. Commercial surrogacy is banned.¹⁶⁶
- Indian married couples (heterosexual) who have proven infertility.
- Widows and divorcees (aged 35-45).
- Single men, LGBTQ+ individuals, and foreign nationals are not allowed to opt for surrogacy in India.
- Consent & Rights of The surrogate mother must give informed consent and cannot claim parental rights over the child.
- Medical Care & Insurance must include in The contract must outline medical expenses, insurance coverage (up to 36 months post-delivery), and healthcare rights for the surrogate.
- The intended parents are the legal parents from birth, and the surrogate cannot claim custody.

- No Monetary Compensation to the surrogate cannot receive any payment except for medical expenses, as per the law.

7. Suggestions:

Suggested Reforms for Surrogacy Contract Law in India. India's Surrogacy (Regulation) Act, 2021 has imposed strict limitations, leading to legal, ethical, and procedural challenges. To make the law more balanced and effective, the following reforms can be introduced:

1. Expanding Eligibility Criteria :- Allow single parents, LGBTQ+ couples, and foreigners to access surrogacy under regulated conditions.

Permit widows and divorcees to opt for surrogacy, ensuring gender equality in reproductive rights.

2. Strengthening Contract Enforceability : Ensure that surrogacy agreements are legally binding, clearly defining the rights and responsibilities of intended parents and the surrogate.

3. Protect the surrogate's right to fair treatment and informed consent, while ensuring intended parents' custody rights post-birth.

4. Allowing Ethical & Regulated Compensation : Instead of banning commercial surrogacy, introduce a regulated compensation model to ensure surrogates are fairly compensated. Establish government-monitored surrogacy agencies to prevent middlemen exploitation.

8. Conclusion:

Surrogacy contracts in India are strictly regulated under the Surrogacy (Regulation) Act, 2021 to protect both the surrogate mother and the intended parents. Only altruistic surrogacy is allowed, meaning no payment beyond medical and insurance expenses. The contract ensures that the surrogate mother gives informed consent, receives proper care, and has no legal rights over the child. However, awareness about these legal aspects is still low,

¹⁶⁵ Vision IAS <https://visionias.in/current-affairs/monthly-magazine/2024-03-15/social-issues/surrogacyregulation-amendment-rules-2024#:~:text=Reduce%20the%20age%20limit%3A%20For,oP%20surrogacy%20should%20be%20explored.> February 23 2025, 7.08 pm

¹⁶⁶ *Ibid*

and it is important for all parties to understand their rights and responsibilities before entering into a surrogacy arrangement. Proper legal guidance can help ensure a smooth and ethical surrogacy process. By promoting awareness and responsible legal practices, surrogacy in India can be a more ethical and transparent process, protecting the interests of both surrogates and intended parents while ensuring the well-being of the child.

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