

## **Surrogacy in India: Legality**

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Abstract: Surrogacy in India is becoming the concern issue these days because in India surrogacy plays an important role for those who does not have the capacity to have her own child. Now a days India becomes the best place known for the surrogacy because of so many reasons and one reason behind this is the legality of surrogacy in the country. In this article I only discuss the about the surrogacy, its types and what is the legality behind surrogacy.

*Key Words: Surrogacy, Motherhood, Women, legalized.*

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Nature has bestowed the beautiful capacity to procreate a life within women. Unfortunately some women because of some physiological conditions cannot give birth to their own child. The desire for motherhood leads them to search for an alternate option and surrogacy itself presents a viable solution for it. Surrogacy, what comes first in our mind when we hear this word: Surrogacy? A woman who have your baby for you? Yes this is particularly the simple term to understand about the surrogacy. Surrogate mother is a woman who carries a child usually for an infertile couple. Many questions come under this. Like why surrogacy is needed and to what extent it is legalized, in what circumstances a women agrees to be a surrogate mother? Is this only money behind it for her or something else?

First of all it is necessary to understand the meaning of surrogacy and types of surrogacy. Let's start with the definition of surrogacy. A relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child, also called mothering by proxy.

**Types of surrogacy:** There are four types of surrogacy: traditional, gestational, commercial and altruistic.

First, in traditional surrogacy the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others such as the biological father and possibly his spouse or partner and thus the child that results is genetically related to the Surrogate mother. The

child may be conceived via sexual intercourse, home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination), which is performed at a fertility clinic. Sperm from the male partner of the 'commissioning couple' may be used, or alternatively, sperm from a sperm donor can be used. Donor sperm will, for example, be used if the 'commissioning couple' are both females or where the child is commissioned by a single woman. Second is gestational surrogacy, in which a surrogate is only a carrier/female host and is not genetically or biologically related to the child. The Surrogate is implanted with an embryo that is not her own, and becomes pregnant with a child to which she is not the biological mother. After birth, the surrogate relinquishes the child to the biological mother and/or father to raise, or to the adoptive parent(s) (in which case, the embryo would have been a donated embryo). The surrogate mother may be called a gestational carrier ([surrogacylawsindia.com](http://surrogacylawsindia.com)).

Third is a kind of Commercial Surrogacy. It a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved or people who save or borrow in order to complete their dream of being parents. This procedure is legal in several countries including India. Commercial surrogacy is also known as wombs for rent, outsourced pregnancies or baby farms. And the fourth is Altruistic surrogacy where the surrogate receives no financial reward for her

pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, accommodation, diet and other related expenses) (ibid).

After dealing with the meaning of surrogacy and types if surrogacy it necessary to look at the beginning of it. From where and when it is originated first?

### **How modern surrogacy came about:**

The first official legal surrogacy agreement was enacted in the mid-1970's with the child who was referred to as Baby M. The same lawyer who brokered this agreement went on to found the Infertility Center, a company that arranges hundreds of surrogate births every year. During that same time frame, surrogacy made the national and international news with the world's first "test tube" baby, Louise Joy Brown. Although this was not technically a surrogate mother situation, this event did pave the way towards what is now known as gestational surrogacy – a practice that is used today for implanting both sperm and egg in a laboratory to later be placed into the surrogate mother's uterus ([www.modernfamilysurrogacy.com](http://www.modernfamilysurrogacy.com)).

It wasn't until 1980 though, that the first paid traditional surrogacy arrangement was conducted. In this case, the surrogate mother, a 37-year old woman, was paid \$10,000 for the successful delivery of a baby boy. Yet, even though the procedure was extremely successful on a physical and mental level, the surrogate mother

did not initially realize how strong her connection would be with the baby until it came time to give him up to the intended parents. In fact, later on, the surrogate mother in this case actually became an advocate against surrogacy, stating that it had a negative effect on her emotions, her family, and even her husband's career. It is for this reason that even though surrogacy can be a very positive and rewarding experience for both the surrogate mother and the biological parents, it is also important for those who intend to become surrogate mothers to be not just physically prepared, but emotionally as well (ibid).

Not long afterwards, in 1983, was the first successful pregnancy done via egg donation. In this case, a woman was able to give birth to a baby through the use of eggs that were donated from another. It was this event that later led to the first gestational surrogacy in 1985 (ibid).

Over the years, surrogacy has become a much more popular process and procedure than it was just a few decades ago. In fact, over the past dozen years, certain events have taken place that has made surrogacy history. For example, in 2001 the oldest surrogate mother at that time gave birth to her own grandchild, while in 2005, a 58-year old surrogate mother gave birth to her own twin granddaughters (ibid).

Here we only look at the surrogacy in India. How does it work in India. Firstly the legality of surrogacy in India. The legal aspects surrounding surrogacy are, complex, diverse and mostly unsettled. In most of the countries world over, the women giving birth to a child is considered as the legal mother. However in very

few countries, the intended parents are recognized as the legal parents from birth by the virtue of the fact that the surrogate has contracted to give the birth of the child for the commissioned parents. India is one country amongst the few, which recognized the intended/commissioned parents as the legal parents. There are few points why India is the best destination for surrogacy:

1. Commercial surrogacy has been legal in India since 2002.
2. Surrogacy treatment is economical in India and it is best of IVF doner ([www.delhi-ivf.com](http://www.delhi-ivf.com)). Indian surrogates have been increasingly popular for their fertile capability. Indian clinics have sometimes become more competitive, not just in pricing, but in the hiring and retention of Indian females as surrogates. Surrogacy in India is relatively low cost and the legal environment is favorable ([www.surrogacylawsindia.com](http://www.surrogacylawsindia.com)).
3. Legal aspects of surrogacy as law are in favor of surrogacy treatment. In 2008 Supreme Court of India decided 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 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 (ibid).

4. International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commoditization of Children, the law commission has submitted it's report with the relevant suggestion:

5. The Law Commission of India on August 2009 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." (ibid). The following observations had been made by the Law Commission: -

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.

(b) A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

(c) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

(d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

(e) Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

(f) The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

(g) Right to privacy of donor as well as surrogate mother should be protected.

(h) Sex-selective surrogacy should be prohibited.

- (a) 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

- (i) Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy. However, this is a great step forward to the present situation.

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