
INHERITANCE RIGHTS OF A CHILD BORN OUT OF SURROGACY

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ABSTRACT

This paper aims to examine the complex issue of inheritance rights of children born through surrogacy arrangements. It explores the gaps in existing personal and succession laws, evaluates the legitimacy and parentage of surrogate-born children, and argues for reforms that align inheritance rights with the legal recognition of intended parents. The study seeks to highlight how current inconsistencies create ambiguity, and emphasizes the need for clear legislative amendments to protect the rights of children born out of surrogacy.

Procreation of children is one of the main objects of marriage. It is a natural desire of every human being to leave behind his descendants for the continuity of lineage. Matrimonial happiness depends not only on satisfying biological need of sexual urge but also on begetting of a child. A situation of childlessness results in depression and insecurity amongst the parents and affects them not only psychologically and socially, but also discontinues their lineage. Surrogacy has been found to be a more suitable alternative than adoption for such couples¹, as the child which is born has a genetic connection with the parents². The Universal Declaration of Human Rights, 1948³ opines, *inter alia*, that “Men and women of full age without any limitation due to race, nationality or religion have the right to marry and form a family”.

The roots of surrogacy in India can be traced back to 3 October 1978, as on this date, Kanupriya alias Durga was born in Kolkata using the In Vitro Fertilization (IVF) technique, few months after the world’s first IVF boy, Louise Joy Brown, was born in Great Britain on July 25, 1978⁴. Following the Supreme Court’s decision in *Manji Yamada v. Union of India*⁵ India

¹S. Bhattacharya & A. Kamath, *Perspectives of Infertility and Assisted Reproductive Technologies in India*, 25 Reprod. Health Matters 98 (2017).

²Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 Signs 969 (2010).

³U.N. General Assembly, *Universal Declaration of Human Rights*, art. 16(1), Dec. 10, 1948, U.N. Doc. A/RES/217A (III).

⁴*Report of the Law Commission of India*, 228 (2009) P 9.

⁵*Manji Yamada v. Union of India*, AIR 2009 SC 84.

emerged as a global hub⁶ for international surrogacy owing to the absence of statutory regulation and the legalization of commercial surrogacy. However, this permissive regime later underwent a fundamental shift. With growing concerns about exploitation of women, commodification of children⁷, and ethical issues, Parliament enacted the Surrogacy (Regulation) Act, 2021, which criminalises commercial surrogacy and permits only altruistic surrogacy under strict conditions.

The lesson of Jan Balaz⁸ is directly relevant to inheritance. Citizenship and succession both hinge on the recognition of a child's legal status. While Jan Balaz exposed the risks of statelessness due to lack of clarity on surrogacy, a similar risk persists in inheritance if succession laws remain silent on the rights of surrogacy-born children. Just as judicial uncertainty in Jan Balaz prompted legislative intervention culminating in the Surrogacy (Regulation) Act, 2021⁹, it is now imperative to harmonize succession laws with the surrogacy framework to pre-empt parallel disputes in the domain of inheritance.

I. Introduction

Surrogacy is a constituent of human assisted reproduction. It is derived from a Latin word 'Surrogare' which means a substitute i.e. appointed to act in place of. According to Black's Law Dictionary, Surrogacy means "the process of carrying and delivering a child for another person".¹⁰ The desire to have a biological relationship with their child is one of the main reasons intended parents decide to use surrogacy. The embryo that is implanted in the surrogate is frequently the result of genetic material contributed by at least one of the intended parents. This is a benefit that cannot be enjoyed by those who choose to adopt a child. Earlier, surrogacy was essentially looked at as a contract of service that involves three promises:

- i. The surrogate who offers her services carries the baby according to the terms of the contract, either in the capacity of the gestational mother or genetic mother.
- ii. The surrogate and her husband agree to relinquish all parental rights at the birth of the child and;

⁶Nikita Kaushik, Law in Surrogacy, Int'l J. Health & Med. L. (2019); Sayantani Bhattacharya, *India's Surrogacy (Regulation) Bill: Striking a Balance between Commercialisation and Exploitation*, 7 NUJS L. Rev. 1 (2014).

⁷Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

⁸Union of India (UOI) and Ors. Vs. Jan Balaz and Ors., MANU/SC/1362/2015.

⁹Surrogacy (Regulation) Act, No. 47, Acts of Parliament, 2021 (India).

¹⁰'Surrogacy', Black's Law Dictionary (21st ed., 2019).

iii. The intended parents agree to remunerate the surrogate for her service.

However, post the The Surrogacy (Regulation) Act, 2021¹¹ surrogacy is mandated to be altruistic in nature which means iii) as mentioned above would not hold since any provision that involves any monetary compensation for the act of carrying out surrogacy would result in the contract being void. The act explicitly levies a ban on commercial surrogacy.

While surrogacy can be an umbrella term, we can divide it further into two specific types on a genetic basis:

1) Natural surrogacy

Often also referred to as, traditional surrogacy and partial surrogacy as this type of surrogacy involves the surrogate mother being pregnant with her own biological child but conceived with the intention of giving the child to another, such as the biological father and his spouse¹². This type of surrogacy is basically a result of artificial insemination of the surrogate mother with the intended father's sperm, making her a genetic parent along with the intended father.¹³ It may also be done through intrauterine insemination (IUI) or intra-cervical insemination (ICI) which is performed at a fertility clinic.

2) Gestational Surrogacy

This type of surrogacy is also referred to as host surrogacy or full surrogacy. It involves both intended parents having a non genetic connection with the child. It involves an arrangement in which an embryo from the intended parents or from a donated oocyte or sperm is transferred to the surrogate uterus.

Both kinds of surrogacy involve more than one parent. Certain parents have biological or genetic ties to their child, while others have ties through the act of giving birth and caring for the child at a young age, and still others have ties through raising and keeping the child. It is necessary to further delve into the three types of surrogacy. In the first form, the intended couple donates oocyte and sperm to form an embryo and this embryo is transferred to the surrogate

¹¹The Surrogacy (Regulation) Act, 2021.

¹²Megha Gupta, *Surrogacy Laws in India*, INT'L J.L. MGMT. & HUMAN. (2023), <https://ijlmh.com/paper/surrogacy-laws-in-india/>.

¹³Nayana Hitesh Patel et al., Insight into Different Aspects of Surrogacy Practices, 11 J. Hum. Reprod. Sci. 212 (2018).

mother. The second form is when a father donates the sperm and another woman donates the oocyte to form the embryo and this embryo is transferred to the surrogate mother. In the third type, if the intended couple both are infertile then the oocyte and the sperm is donated by different woman and man and the embryo is transferred to the surrogate mother. In the second type of gestational surrogacy, there are three types of mothers: one is the biological mother, second is the surrogate mother and third is the mother who intends to raise the child and one father. In the third type of surrogacy, there are three types of mothers same as the second type of gestational surrogacy and two fathers one is the biological father and another is the father who intends to raise the child. The following is the list of potential parents for the surrogate child.

- Surrogate Mother - A woman who carries the embryo and gives birth to the child.
- Biological Mother - A woman whose genetic composition forms the embryo.
- Biological Father - A man whose genetic composition forms the embryo.
- Intended Mother - A woman who raises and maintains the child.
- Intended Father - A man who raises and maintains the child.

This list of parents are roles assumed by persons and depending upon the type of surrogacy and sex of the person, one person can play multiple roles in relation to the surrogate child.

A meaningful assessment of the rights and status of children born through surrogacy requires examining their position under Hindu personal laws both before and after the enactment of the Surrogacy (Regulation) Act, 2021.

Prior to 2021, surrogacy was a grey area having an ambiguous framework with the laws of the child not clearly defined. This caused confusion and necessitated a definitive legislative framework to be formulated. It was especially necessary in areas like marriage and inheritance aspects of personal laws.

II. POSITION OF THE SURROGATE CHILD PRIOR TO THE SURROGACY ACT

In assessing the position of a child born through surrogacy, this brief will refer primarily to the

Hindu Succession Act (hereinafter HSA)¹⁴, which was codified in 1956 and later amended in 2005 to bring daughters on par with sons in matters of inheritance. The amendment came in light of the fact that despite the law being codified, some aspects of inheritance were left customary as per the Mitakshara Laws.¹⁵ For the purposes of the HSA, children must be either legitimate or deemed legitimate (i.e., those born out of void or voidable marriages¹⁶) in order to be entitled to succeed from both their father and mother and to have an interest in ancestral property, with the distinction that deemed legitimate children could succeed from both parents but only to the father's share in coparcenary property, without being treated as coparceners themselves. Illegitimate children, on the other hand, were severely restricted, as they could inherit only from their mother and not from their father or his coparcenary property. In traditional surrogacy, where the surrogate mother was also the biological mother, such children were often treated as illegitimate and could therefore claim rights only in the mother's property unless the intended parents formally adopted them. In gestational surrogacy, the position varied: if both gametes were contributed by the intended parents, the child could be treated as legitimate; however, if donor gametes were used or if the surrogate mother was married, presumptions under the Indian Evidence Act¹⁷ sometimes made the child legitimate in the surrogate's marital family. Given these complexities, adoption was the only secure method for intended parents to legitimise a surrogate child and confer upon them the full spectrum of rights under the HSA.

III. POSITION OF SURROGATE CHILD POST THE SURROGACY ACT

The Surrogacy (Regulation) Act, 2021 simplified the fragmented inheritance position by deeming a surrogate child to be the natural and legitimate child of the intended parents. In terms of the HSA, such a child now enjoys full coparcenary rights in the intended father's joint Hindu family property, standing on the same footing as a naturally born son or daughter and is also entitled to succeed to the separate property of both intended parents. The earlier distinction between legitimate, deemed legitimate and illegitimate children becomes irrelevant for surrogacy-born children, as the statute places them firmly in the category of legitimate heirs. Consequently, questions of presumptions under the Evidence Act or tracing rights through the biological mother or surrogate's marital family no longer arise. For devolution from the child,

¹⁴The Hindu Succession Act, No. 30 of 1956.

¹⁵The Hindu Succession Act, No. 30 of 1956, § 6, India Code (1956).

¹⁶Hindu Marriage Act, No. 25 of 1955, § 16, India Code (1955); Paras Diwan, *Family Law* (10th ed. 2018).

¹⁷Indian Evidence Act, No. 1 of 1872, § 112, India Code (1872).

the intended mother is recognised as the “mother” in Class I heirs, while the intended father and his kin form the line of succession through Class II. In the case of a female surrogate child, her property devolves under section 15 of the HSA, with the intended parents and their heirs treated as her natural parents. Thus, post-2021, adoption is no longer required to confer legitimacy or inheritance rights and the law streamlines both devolution upon and devolution from a surrogate child entirely through the intended parents, removing the earlier uncertainties linked to genetic contribution or marital presumptions.

However, there is a big catch to this improved stance. Only heterosexual married couples who have been together for at least five years are eligible to use surrogacy, according to the Act. Commissioning surrogacy is not available to same-sex couples, single people or unmarried partners¹⁸. This limitation has a significant effect on inheritance since the right to inherit is only granted to a surrogate child whose parents fulfil the legal requirements of marriage. In other words, the intended parents' marital status determines inheritance rather than the child's status as a child. Ironically, this limitation contradicts the direction of the Hindu Succession Act. Since it was first codified in 1956, the HSA has gradually changed to become more inclusive. The patriarchal belief that only sons could carry on the family line was dismantled when the 2005 amendment gave daughters equal coparcenary rights. By designating them as "deemed legitimate" for succession purposes, Section 16 of the Hindu Marriage Act (HMA) also expanded protections for children born of void or voidable marriages.

While we recognise that a surrogacy arrangement would not be possible to begin with, unless the intended parents meet the required criteria, we are more concerned on whether the marital status or other criteria are not being met by the time of the birth. This produces a striking inconsistency. In the case of biological children, Hindu Marriage Act guarantees that they can inherit both parents' property, even if they were born into a void or voidable marriage¹⁹. The parents' marital status has no bearing on their inheritance; however for children born out of surrogacy, the very question of their legitimacy is tied to the marital status of their intended parents. In a situation where either of the intended parents die before birth, both of the intended parents die before birth, divorce of intended parents during surrogacy, etc. the law has no sort of safety net for the child born out of surrogacy. Although the surrogacy act provides for the

¹⁸Paras Chaudhary & Narender Kumar Bishnoi, Challenging Boundaries: *Legal Gaps in India's Surrogacy Regulation*, 12 BLDE Univ. J. Health Sci. 41 (2025).

¹⁹Revansiddappa v. Mallikarjun, AIR 2011 SCW 2447.

rights of a child born out of surrogacy to be the same as those of a natural born, it does not mirror it in a pragmatic sense.

A natural born child's inheritance rights are never in a position of jeopardy due to these factors.

This disparity leaves the surrogate child vulnerable. The false promise of equal treatment under the Surrogacy Act remains largely theoretical since the child's inheritance rights can collapse at any time due to no fault of its own if any of the unforeseen circumstances as discussed above occur. The law, therefore, creates a hierarchy between natural born children, whose rights are secured regardless of marital status and surrogate children, whose rights are conditional. This undermines the fundamental principle that inheritance should flow from the status of being a child rather than the circumstances of parenthood.²⁰

The whole point of inheritance laws is to build a sort of certainty and predictability when it comes to succession and determining legal heirs. When a child born through surrogacy is potentially deprived of his/her rights due to circumstances discussed, the law introduces an element of uncertainty and unpredictability into an area that was specifically incorporated to provide stability; thereby, losing the foundational purpose of succession law, which is to allow families and beneficiaries to plan their financial and legal affairs with confidence. By allowing such a practice to continue, the framework risks creating an entire class of heirs whose rights are contingent rather than definitive. Indian family law has one of its cornerstones in prioritising the child's best interests²¹ in contexts of guardianship, adoption, custody, etc. and this gap blatantly violates that. It moves away from the child-centric approach used by Indian courts. This principle is also embedded in international law. Article 3(1) of the United Nations Convention on the Rights of the Child provides that "In all actions concerning children, the best interests of the child shall be a primary consideration."²²

Additionally, the creation of this gap in inheritance laws, there is ambiguity regarding who can contest claims. For example, in a situation where parental relationships have broken down or intended parents have passed away, relatives, guardians or even donors and surrogates could contest claims. In such a situation, the litigation not only adds to the emotional and financial

²⁰Mulla, *Principles of Hindu Law* (22d ed. 2016) (LexisNexis); *Tulsa and Ors. Vs. Durghatiya and Ors.*, AIR 2008 SC 1193.

²¹Dube, S., Child Custody and the Best Interests of the Child: Legal Framework in India, 29 J. Fam. L. 91, 91-107 (2017); *Gita Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149.

²²Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

burden on the child but also destabilises the succession system itself. As a result, the law, rather than behaving as a mechanism for resolving disputes, risks becoming a source of contention, thereby eroding the efficiency that succession laws aim to provide.

IV. POLICY RECOMMENDATIONS

The concerns identified above, uncertainty in inheritance rights, the vulnerability of the child, conflict with the welfare principle and the risk of future disputes make it clear that legislative intervention is required. To ensure that inheritance law protects children born through surrogacy and reflects the principles of legal certainty and child welfare, targeted reform is essential.

First and foremost, the law ought to clearly state that surrogate children are the intended parents' full heirs, with rights that are unassailable and independent of the parents' marital status or survival. This would remove any doubt and prevent inheritance rights from becoming unstable as a result of separation, divorce or untimely death.

Second, by securing the child's parentage and inheritance rights right away, such a mechanism would lower the risk of litigation involving guardians, relatives or surrogates and guarantee prompt access to the child's legal rights. While the surrogacy act already makes a mention of the rights of a child born out of surrogacy, it would be helpful to include a dedicated provision directly in the Hindu Succession Act while keeping in mind the current inequality the law has. This would make the framework more definitive and clear, avoiding the need for referring to statutes other than the succession act while inheritance is in question.

Additionally it would make sense to amend the HSA directly because when the HSA was originally enacted in 1956, surrogacy was not a common practice, which explains the absence of such provisions. However, since the Surrogacy (Regulation) Act now formally recognises surrogacy as a practice, it is both logical and necessary to update the HSA to reflect this social and legal reality. Their rights must be unconditional and unaffected.

Further, the law should expressly affirm that a child's best interests prevail over technical objections in succession matters. Currently, obstacles related to the legality of the surrogacy agreement, the use of donor gametes, or the parents' marital status can all undermine inheritance rights. The protection logic already present in Indian family law, where custody,

guardianship, and adoption are all governed by the child's welfare as the primary consideration, would be brought into line with succession law if it were codified that such objections cannot be used to reduce or eliminate a surrogate child's rights. This would guarantee that the child's lifetime right to protection, stability and inheritance is not compromised by adult disputes or formalities and that the HSA not only ensures predictable succession but also reflects a child-centric approach.

Finally, in the interim, judicial interpretation should be purposive and protective, favouring the rights of surrogate children and recognising their full entitlement to inherit from the intended parents. Such purposive interpretation would not only uphold the immediate welfare of individual children but also build a body of jurisprudence that recognises surrogate children's inheritance rights as inherent and non-negotiable. Together, legislative reform and judicial guidance would establish a coherent, child-focused framework that reduces avoidable litigation, strengthens predictability in succession and guarantees both dignity and long-term security for surrogate children.

V. CONCLUSION

In conclusion, there is still uncertainty and fragmentation in the legal framework pertaining to surrogate children's inheritance rights. Surrogate-born children are left vulnerable and frequently disqualified from claims for legitimate inheritance because succession laws continue to function under outdated ideas of legitimacy, even though surrogacy laws acknowledge the intended parents as the legal parents. The urgent need for surrogacy and inheritance laws to be harmonized is highlighted by this contradiction. In addition to being required by law, ensuring that children born via assisted reproductive technologies have the same inheritance rights as those born naturally is also a matter of justice and human dignity. To protect these children's interests and maintain their proper position in the family and society, a progressive legislative approach is necessary.