

INDIAN SURROGACY LEGAL SERVICES

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January 04, 2013

To

Shri G. V. V. Sarma,
Joint Secretary (Foreigners),
Ministry of Home Affairs
Government of India
NDCC-II Building, Jai Singh Road
Near NDMC Palika Kendra
New Delhi-110001

Re: Notification No. F.No.25022/74/2011-F.1 dated 9th July 2012

Sub: Foreign National intending to visit India for commissioning surrogacy

Sir,

1. We, the undersigned are Lawyers practicing in the Supreme Court of India at New Delhi, High Court of Delhi at New Delhi as well as other Courts of Delhi. Apart from the other usual fields of Law, we specialize in Surrogacy Laws / Assisted Reproductive Technique (ART) Laws under the name and style of 'Surrogacy Laws India' with legally incorporated entity as "Indian Legal Surrogacy Services (LLP)". We have assisted more than 150 (one hundred and fifty) Parents from all across the world, who with our legal assistance have successfully taken back home their babies born in India through Surrogacy.
2. By the present / subject Notification your goodself has been kind enough to spell out the appropriate of visa i.e. medical visa required for all those Foreign National who are intending to visit India for commissioning surrogacy. Further your goodself has been kind enough to list out the conditions that need to be fulfilled before the said medical visa can be granted. It is stated that all the said conditions are significant and have been drafted with care and with due application of mind to make sure that the surrogate mother is not cheated. However, it is pertinent to point out that the guideline (i) i.e. "*The foreign man and woman are duly married and the marriage should have sustained atleast for two years*" has created doubt / uncertainty in the minds of all the parties concerned i.e. the Commissioning Parents, Clinics, Doctors and surrogates as also the Government Officials. Recently, many Commissioning Parents have sighted clear written instructions from the Deputy Commissioner of Police, Mumbai dated 17.12.2012, clarifying this edict to clinics, threatening legal action for non-compliance and asking clinics to provide a list of foreigners already registered for surrogacy. This news has led to much concern across the surrogacy community.
3. It is stated that said guideline (i) of the said Notification is suggesting and / or spelling out contrary to the intention of the existing Guidelines and / or

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Proposed Bill, which is against the law and is needs to reviewed on the following facts and grounds. We hereby take the opportunity to present before your goodself certain facts and legal position related to Surrogacy which is relevant and material to be considered before your esteemed office takes the needful action and the same is laid herein below:-

- (a) At present the Guidelines for the Assisted Reproductive Technique (ART) Clinics, 2005 issued by Indian Council of Medical Research (ICMR) and National Association for Medical Sciences (NAMS) regulate and supervise the services and procedures carried out by ART Clinics in India.
 - (b) As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". The Judiciary in India too has recognized the reproductive right of humans as a basic right.
 - (c) According to the 228th Report of the Law Commission of India, 2009, India is a favorable destination for foreign couples, who look for a cost-effective treatment for infertility and a whole branch of medical tourism, has flourished on the surrogate practice. ART industry in India is now a 25,000 crore-rupee pot of gold.
 - (d) Further as per the 228th Report of the Law Commission, the surrogacy arrangements shall be regulated between the parties through contract which is enforceable in the courts of law and **a child born out to the hetro-sexual or same sex couple / single parent shall be the legitimate child of that parent(s)** and it shall be the responsibility of the that parent to grant name and nationality to the child so born.
4. The Assisted Reproductive Technology (Regulation) Bill 2010 was drafted by a 12-member committee comprised of experts drawn primarily from the medical and legal establishment. Its ambit goes much beyond surrogacy and aims to introduce a comprehensive regulatory framework for the booming ART industry. After being made available for public response, an updated version of the Bill of 2010 and is currently considered by the Indian Parliament.
 5. In the absence of specific Legislature, all the parties concerned i.e. the Commissioning Parents, Clinics, Doctors and surrogates are governed by ICMR Guidelines 2005. Under the said Guidelines as well as the Proposed Bill, there is a clear and unambiguous suggestion that a **'Single Man'** and / or a **'Single Woman'** can go for surrogacy in India.

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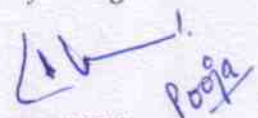
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- (a) Clause 3.5.2 of the ICMR Guidelines 2005 provides *"There would be no bar to the use of ART by a single women who wishes to have a child, and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man."*
- (b) Clause 3.16.4 of the ICMR Guidelines 2005 provides, *"Rights of an unmarried woman to AID - There is no legal bar on an unmarried woman going for AID. A child born to a single woman through AID would be deemed to be legitimate. However, AID should normally be performed only on a married woman and that, too, with the written consent of her husband, as a two-parent family would be always better for the child than a single parent one, and the child's interests must outweigh all other interests."*
- (c) Chapter I, Clause 2 (v) of the Assisted Reproductive Technology (Regulation) Bill 2010 provides definition of *"married couple"*, means *two persons whose marriage is legal in the country / countries of which they are citizens;*
- (d) Chapter I, Clause 2 (dd) of the Assisted Reproductive Technology (Regulation) Bill 2010 provides definition of *"unmarried couple"*, means *two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country / countries of which they are citizens;*
- (e) Chapter VII, Clause 32 of the Assisted Reproductive Technology (Regulation) Bill 2010 provides, *"Rights and duties of patients - (1) Subject to the provisions of this Act and the rules and regulations made thereunder, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples."*
- (f) Chapter VII, Clause 34 (19) of the Assisted Reproductive Technology (Regulation) Bill 2010 provides *".....a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be....."*
- (g) Chapter VII, Clause 35 (3) of the Assisted Reproductive Technology (Regulation) Bill 2010 provides, *"In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man."*


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
6. Thus the intention of the Legislature is very apparent that there is no bar for the single man and / or woman to go for surrogacy in India. In fact the Proposed Bill has gone a step further and have recognized / suggested surrogacy for gay couple(s) married or unmarried. Any Notification or any part thereof suggesting and / or spelling out contrary to the intention of the existing Guidelines and / or Proposed Bill is against the law and needs to be withdrawn.
7. To avoid any inconsistency and not promoting single male / single female coming to India to avail surrogacy under medical visa which is in a way contrary to the existing Guidelines and / or Proposed Bill, the need of the hour is to clarify that "surrogacy in India shall be available to all persons including single persons".

In the light of the aforesaid facts and legal position regarding Surrogacy/ART treatment in India, we hereby request your goodself, to look into the matter and expeditiously resolve the same in the best interest of public policy. We are more than willing to co-operate your esteemed office and can present the relevant data and legal references as well as make ourselves personally available to assist the Learned Officer in arriving at a relevant conclusion.

Thanking You

Yours Sincerely

For Indian Legal Surrogacy Services (LLP)



(Anurag Chawla) & (Pooja Yadav)
Advocates

