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# Surrogacy: A Fight by Humanity Against Nature and Law

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## ABSTRACT

*Hopeful parents can fulfil their ambitions through surrogacy for LGBTQ couples who have suffered with infertility for years. For many, surrogacy provides the solution after years of fruitless attempts to conceive for those whose medical conditions make conception impossible. Very little has changed in our legal system to keep up with technological advancements. This essay's goal is to investigate the origins and current status of surrogacy. In a country such as India, where it was formerly customary and a source of livelihood but is currently forbidden for business use. The situation in developed countries is also examined in this research paper such as France, the United States, and the United Kingdom. The author has provided a quick overview of surrogacy and its types of agreements and surrogacy. The author then discussed the surrogacy industry globally. What is the current state of international surrogacy situation in which United States, United Kingdom, France, India, and the Kingdom have all been thoroughly discussed. The pros and cons of the current legislation have been carefully highlighted, and the author's concluding remarks and suggestions are given in the conclusion.*

**Keywords:** Surrogacy, LGBTQ, Livelihood, Customary, Infertility.

## I. INTRODUCTION

When a woman agrees to become a mother in order to benefit of the parents by intention, this arrangement is known as surrogacy. One kind of artificial insemination is surrogacy. The idea of surrogacy is not new; it has existed since the Bible. The phrase also shows also in the Babylonian code of Hammurabi. A contract for surrogacy is an amazing choice for those who want to fulfil their desire to become parents because, in the modern world, having genetically engineered offspring is more appealing to parents than travelling in order to adopt. The two most popular many surrogacy arrangements are conventional and gestational. In a typical surrogacy agreement, the mother who is being surrogated also acts and shares genetics with the child as an egg donor. Conversely, in a gestational surrogacy, the intended parents' eggs and sperm are surgically placed in a substitute who isn't connected to the kid genetically. In both situations, the surrogacy contract's legal provisions are essentially the same. In India, surrogacy

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has grown to be a multibillion-dollar industry, which has led to an abundance of disagreements and disputes. In India, it was permitted even though it takes advantage of the surrogate as well as the young one. There have been several attempts to control the surrogacy market, however none of them was totally effective. The National Guidelines of the Medical Council of India, the India Law Commission Report, as well as government notifications governing both surrogacy on a national and international level is one of the many initiatives undertaken in this guidance. The most recent rule is relevant in the Surrogacy (Regulation) Act 2021, which generally considers business-related surrogacy to be unlawful.

## **II. SURROGACY (REGULATION) ACT, 2021**

The Assisted (Reproductive Technologies) measures 2008, 2010, 2014, and the Surrogacy (Regulation) Bills 2016, 2019, 2020 are the draft measures that regulate surrogacy that come before the current Act. The Lok Sabha enacted the Surrogacy Act on August 5, 2019. (Regulation) Bill, 2019, which was thereafter forwarded for in-depth analysis, conversation, and submit a report to the twenty-three Rajya Sabha members that make up the Select Committee. On February 26, the Union Cabinet enacted the Surrogacy (Regulation) Bill, 2020. The Act Regulating Surrogacy, after obtaining the President's approval on December 25, 2021, was ultimately put into effect. This became operative on January 25, 2022.

### **(A) Characteristics of the Act**

The Surrogacy Act grants many rights and safeguards to the substitute as well as the surrogate mother and child. The Act also establishes authorities for surrogacy and surrogacy therapies.

### **(B) Surrogacy Clinic Regulation And Prohibition<sup>2</sup>**

According to the Act, no surrogacy facility may engage with, be affiliated with, or support surrogacy-related activities unless they are registered under the Act. It is not permitted to any individual or organisation, such as a gynaecologist, paediatrician, or surrogacy clinic, embryologist, licensed physician, or other health care provider, from participating in any kind of commercial surrogacy refers to the practice of encouraging women to take on the role of surrogate mothers through publishing, canvassing, propagating, or advertising. It is illegal to carry out or cause an abortion during a replacement of a deceased the specific agreement of both the substitute mother and a licensed healthcare professional (paediatricians, gynaecologists, embryologists, prospective parents, and others). This law clearly prohibits motherhood operations like commercial surrogacy, or the monetisation of surrogate pregnancy

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<sup>2</sup> Section 10 (3), Surrogacy Regulation Act, 2021.

or clinics and any other place where these kinds of operations could be carried out. It's stipulated by the Act's provisions that surrogacy shall not be performed unless the essentiality certificate that the proposed pair acquired. Additionally, it is stipulated that the certificate needs to be validated and issued by the right authority and by the surrogacy clinic's manager as well. Additionally, the intended parents are needed to present the District Medical Board's certificate of infertility, which will verify when one or both of the prospective parents are infertile. The Act stipulates that the surrogate mother has to obtain any problems following childbirth insurance that lasts for 16 months. That needs to be delivered via a registered insurance provider or agent by the Insurance Regulatory and Authority for Development.

### **(C) Surrogacy Clinic Registration**

The Act stipulates that in order to offer services of surrogacy, the surrogacy clinic must complete the registration procedure. It is necessary to register within sixty days following the date of the appointment of suitable power under the Act. The Act prohibits the surrogacy centre from handling any surrogacy-related process, unless and until registration is completed upon the passing of sixty days following the date on which the relevant authority was appointed. It is additionally stipulated that the validity of this registration will only last for three years later, the clinic must compel the completion of the registration process.

### **(D) Creation of State And National Surrogacy Boards As Well As Other Authorities Under The Act**

Act allows for the creation of state and national surrogacy bodies, with the latter being the most thorough. The Minister in charge of the Health Ministry and Family Welfare will serve as an ex officio member to chair the Board; Vice-President will serve as the Secretary to the Indian Government and will possess leadership of the Department addressing the surrogacy issue and serving as the board's chairman; two of the three female members of Parliament who make up the Board's membership will be chosen by the three Ministry members, one each from the Council of States and the House of the People responsible officials of the Central Government, including one from the Legislative Department, one from the Ministry of Home Affairs, another from the Ministry of Law and Justice, and additionally, the Central Government's Director General of Health Services shall be a Member, ten knowledgeable Members that the Central Government will designate; the Central Government will designate State Board Chairpersons by rotation to symbolise the United States and the two Union territories are listed alphabetically and two in the prescribed numbered sequence; also, the Director General of Health Services at the Central Government in its capacity as a Member. Established by the Act is the National

Assisted Reproductive Technology and Surrogacy Registry is utilised to register clinics for surrogacy, among other things.<sup>3</sup>

#### **(E) Qualifications For a Surrogate**

The Act stipulates that a surrogate must be a woman who has a minimum of one child, has been married, and she must be between the twenty-five and thirty-five years old on the day of the implant. Additionally, it states that she needs to be limited to the pair getting marrieds' close relatives. Moreover, she should abstain from serving as a surrogate mother and supplying her own gametes more than once over her entire life. Moreover, it stipulates that surrogates need to get a certification of psychological and physical health appropriateness for surrogacy and related services from a licensed healthcare professional prior to undergoing the operation.<sup>4</sup>

#### **(F) Qualifications For A Prospective Couple**

The Act mandates that the age of the intended pair on the date of certification for a female will be twenty-three to fifty years of age and in the case of a male, between twenty-six and fifty-five years. Additionally, it requirements that the intended partners be must have been Indian citizens for at least five years. Additionally, it is necessary that the prospective couple has never had any kids, biological, adopted, or raised through surrogacy, who are continuing to live. The guardians of kids with physical or mental disabilities, who either have a terminal illness or a life-threatening condition for which they since there isn't a treatment at the moment, you can also ask the relevant authorities for permission and before proceeding, get a medical certificate from the District Medical Board. Additionally, the Act mandates that widowed and divorced women among the ages of 35 to 45 years old are eligible to act as a single commissioning parent.<sup>5</sup>

### **III. SURROGACY'S LEGAL SITUATION INTERNATIONALLY**

A few legal concerns surround the surrogacy agreements, such as whether the contracts are binding, null and unlawful, or forbidden in the event that circumstances change after they are either charitable or commercial surrogacy. If there's a substitute for post-birth designating the intended parents as the adoptive or biological parents in a lawful way? The rules of different jurisdictions differ significantly. In the majority of countries that allow intending parent(s) and/or surrogate must fulfil residence requirements before citizenship prerequisites. Nations without these guidelines usually draw since they are popular locations for fertility tourism,

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<sup>3</sup> Section 15, Surrogacy Regulation Act, 2021.

<sup>4</sup> Section 4(b), Surrogacy Regulation Act, 2021.

<sup>5</sup> Section 4(c), Surrogacy Regulation Act, 2021.

outside guests. In some nations, including the US, Canada, and Australia, state-by-state variations region.

### **(A) United States**

The United States lacks federal legislation pertaining to surrogacy; hence, the process by which the legality of the processes to proceed with the surrogacy will determine that particular state. Certain states have created legislation to handle issues relating to surrogacy laws, whilst some have established common law frameworks. Each State has a different legal position regarding surrogacy, hence it is impossible to cite the legality or illegality of it. While many states allow surrogacy, there are a few that are referred to as "Surrogacy Friendly States," meaning that the established practise allows intended parents and surrogates to place greater trust in the law to shield them in most circumstances. Regarding the permissibility of gestational and conventional surrogacy, gestational surrogacy is currently more frequently used. It is still possible for parents and surrogates to finish a traditional surrogacy. States that are supportive of surrogacy include States like California, Washington, Delaware, Connecticut, Maine, New Hampshire, and others.<sup>6</sup>

Conversely, the Non-Friendly Surrogacy States exist, which do not acknowledge or uphold surrogacy agreements, and they have published case law or statutes in place prohibiting paid surrogacy. In these states, pre-birth directives are not permitted, and conventional surrogacy is not enforceable or discouraged. Commercial surrogacy arrangements or surrogacy contracts that break state law could lead to penalties or further legal consequences.

There are certain states who are in grey, they are neither friendly nor non-friendly, they fall somewhere in the middle. Although surrogacy is permitted in certain states, intended parents and surrogates may be entitled to varying degrees of legal protection. The court case could be more challenging than in states that support surrogacy, and the results of cases of surrogacy are unclear. Among the states in this category, some are more surrogacy-friendly than others. Statutory authorisation for gestational surrogacy or absence of statutes that forbid surrogacy in states with friendlier legislation. Prenatal appointments could be allowed, and in certain states, the marital status of the intended parents, their genetic connection to the kid, or any additional elements. In this group, a few friendlier states are specifically Illinois, Kentucky, Maryland, New Jersey, Alabama, Hawaii, and Florida. Conversely, a few fewer welcoming states are Alaska, Arizona, Indiana, Virginia, Mississippi, and other places. Although surrogacy is legal

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<sup>6</sup> Lawrence, Dale Elizabeth, "Surrogacy in California: Genetic and Gestational Rights", *Golden Gate University Law Review*, Vol. 21, Issue 3 [1991], Art. 3

in some states, there are certain extra-legal roadblocks and procedures. In some circumstances, pre-birth orders may not be given or the surrogacy contracts may not be enforceable. The majority of state-by-state surrogacy statistics in the US comes from rulings provided in earlier surrogacy instances. Therefore, the process of legal surrogacy can include depending on the particulars of each case, and in some states, surrogacy cases may be acted differently in a given county or even in a different court. From one legal perspective, the location of the contract's finalisation, the gestational carrier's residence, and the place of the child's birth are important factors. Utilising a surrogate who dwells in a friendly state and plans to give birth there permits individuals who reside in an unfriendly states to nevertheless benefit from the surrogacy legislation in those areas.

### **(B) India**

India's surrogacy regulations have an intriguing past. India was among the most well-liked nations for the commercial surrogacy tourism because of the straightforward process and affordable Indian surrogacy organisations' accessibility.<sup>7</sup> According to estimates from 2012, the industry is valued about \$400 million a year, with more than 3,000 fertility clinics located across the nation. In 2013, surrogacy became illegal for overseas heterosexual couples and single parents. Strict visa regulations had been published by the Union Home Ministry in 2013. As stated by the decree, alone Foreign "men and woman" who have been wed for two years shall be allowed to carry their child with the assistance of an Indian surrogate. Gay pairs as well as singles Indian surrogates will no longer be available for usage by foreigners. India forbade foreigners from employing Indian surrogates in 2015. As a result, in the Parliament, a Surrogacy (Regulation) Bill<sup>8</sup> was put out in 2016. The invoice suggested that the prospective pair have at least one infertile member and that be citizens of India and married for a minimum of five years. The surrogate mother must be a close family member who is married and has her own child. However, due to the parliament session's sine die adjournment, the bill expired. The Indian Health Minister reintroduced the 2016 bill in 2019 after a three-year break stating that it is a "need of the hour" and providing an approximate estimate of between 2,000 and 3,000 unlicensed clinics in the nation right now.<sup>9</sup>

### **(C) United Kingdom**

Surrogacy rules are in a murky area. Although surrogacy is permitted in the UK, the agreements

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<sup>7</sup> Richa Yadav and Sonali Anand, 'COMMERCIAL SURROGACY: LEGAL, SOCIAL, ETHICAL ISSUES' [October 2018] 4(5) JOURNAL OF LEGAL STUDIES AND RESEARCH 290-300

<sup>8</sup> The Surrogacy (Regulation) Bill, 2016

<sup>9</sup> Sharma RS. Social, ethical, medical & legal aspects of surrogacy: an Indian scenario. Indian J Med Res. 2014 Nov;140

made for surrogacy are not legally binding. As a result, agreements regarding surrogacy are not legally enforceable; instead, the parties must rely on each other to uphold the agreement about all matters, including turning over the child, costs as well as additional factors. The main legislation that governs surrogacy is the Surrogacy Arrangements Act of 1985 was enacted in response to a notorious Case of Baby Cotton<sup>10</sup> (where a British woman was hired to serve as a surrogate for a couple in Sweden through a US agency). No surrogacy contract can be enforced by or against any party making it, in accordance with Section 1B of the Act.

While it is permissible to enter into a surrogacy arrangement, the agreement is not legally binding with regard to commercialisation, Section 2 of the Act forbids the initiating and negotiating commercial surrogacy arrangements. According to Section 3, It is illegal to publish or advertise commercially. Regarding the payment to surrogates, there is no restriction on the payments to substitutes for "reasonable expenses," despite the lack of a definition for fair expenses in the segment. This suggests that commercial surrogacy is prohibited in the United Kingdom. "Reasonable expenses," or reimbursement for any expenses that may arise directly from of the pregnancy, are allowed to be given to a surrogate in the form of reimbursement for medical expenses for loss of income, etc.<sup>11</sup>

The Law Commission has recognised that there is a lack of clarity in the definition provided in the Act over the precise definition of "fair expenses". The judiciary has used retroactive authorised surrogate payments above and beyond appropriate costs when they decided that doing so was in the child's best interests, but because there aren't always clear boundaries, it's unclear what will and won't be allowed. Surrogacy is subject to regulation, which is handled by the Human Fertilisation and Embryology Act (HFEA) 1990 was modified in 2008 by the HFE Act.

When an IVF technique is utilised in the UK as a component of a surrogacy agreement, the clinic ought to obtain a licence by meeting the requirements and qualifications outlined in the HFEA.<sup>12</sup> In accordance with Act section 13(5), the physician must take into account the wellbeing of any prospective child and any further kids who might be affected by the birth prior to provide a woman with therapeutic services. In addition to the impact of the surrogacy connection on the surrogate's own children, a physician should take into resulting child prior to starting therapy. Independent implications counselling and information regarding must be provided to all parties lawful parenthood as per the Code of Practice of the HFEA.

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<sup>10</sup> Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

<sup>11</sup> Anu, Kumar P, Inder D, Sharma N. Surrogacy and women's right to health in India: Issues and perspective.

<sup>12</sup> HFEA 9th Code of Practice (HFEA, 2019) paras 14.7–14.10.

Furthermore, it suggests clinics should be alert for any signs of coercion and protect customers from signing into improper or immoral agreements. When surrogacy legislation was created, non-traditional families were seen with less acceptance. However, in over the past forty years, surrogacy has grown significantly in popularity. The law in the UK has not kept up with this regime's changes. Insufficient regulation results in difficulty to monitor the surrogacy procedure, the participants, and ensure the highest standards are upheld. Lastly, it is difficult to place the because of the uncertainty surrounding surrogacy payments, legislation has not been made clear.

#### **(D) France**

In contrast to the USA, India, and UK, surrogacy is illegal in France, where it is now classified as a black status. The law prohibits surrogacy regardless of whether it is charitable or commercial (art. 16-7 of the Civil Code).<sup>13</sup> Laws pertaining to bio-ethics, which were passed in 1994, prohibit surrogacy. French surrogacy laws evolving before 2014, children created through surrogacy were not recognised in France. Even after these children were placed in the civil register, the French authorities refused to register them. The intended parents were granted recognition as the parents by a foreign order. There was no well-established case law to go to. The European Court of Human Rights in this instance denounced France and made decisions "France can outlaw surrogate parenthood, but it cannot deny legal status to parent-child relationships for children born to surrogates moms."

Following this ECHR verdict, case laws were continuously changing. The Court of Cassation, France's highest appellate court, decided that the government may acknowledge children born abroad to surrogate parents. They'll be qualified to get French birth documents and have the ability to petition for French citizenship.

It decided in 2017 to permit an intended parent to adopt a kid delivered via substitute parenting. On October 4, 2019, the Court of Cassation ultimately determined that the parents of a surrogate kid could request a transliteration of the child's legal status document. But French legislation hasn't changed at all. Laws are gradually changing although not far enough, the 2017 ruling gave same-sex couples some relief. It is unclear if these cases will be successful in establishing precedents and has the power to amend the legislation. France's Catholic organisation Printemps Français, backs legislation that would allow couples to use surrogates and opposes legislation that would allow get around the ban by taking a foreign trip.

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<sup>13</sup> French Civil Code 2016.

#### **IV. DISCUSSION ON COMMERCIAL SURROGACY: IS PAYMENT FOR SURROGACY APPROPRIATE?**

All kinds of surrogacy are contentious and are the subject of debate in various parts of the world. But the most contentious issue in this discussion is commercial surrogacy. Still, the debate over changes to the surrogacy law is highly contentious in and of itself. There is no agreement on what the regulation should be on a national or worldwide level. To restate what commercial surrogacy is, it is usually understood to be a deal when the woman receives payment for her services above payment for the medical bills she incurred.<sup>14</sup> There have been numerous debates centred on morals and ethics. Nowadays, money may be used to purchase nearly anything, but they should everything be on sale? is the question. Marketisation is a divisive issue, particularly when human bodies are involved. There is often a noticeable feeling of distaste connected to the trade of bodies. For example, the majority of countries prohibit prostitution, and organ sales are not allowed. Likewise, a lot of people think it weird that women may rent out their uteruses.

##### **(A) What makes surrogates unpaid?**

The main ethical arguments against paying for surrogacy centre around how it treats women and kids are like goods. It could be viewed as purchasing the child as a good instead of compared to the assistance of someone bearing a kid for you. It has the power to transform women into commodities, and perhaps low-paid individuals will genuinely "sell" their bodies to surrogates in the event of financial hardship. It's possible for women to "rent their wombs" as a result of injustice and poverty. A few of them may even feel that they are being "coerced" into doing this action, which is insulting. Ladies might take chances and suffer physical and mental harm as a result of their susceptibility and absence of autonomy. There are further concerns about the commoditisation of the bodies of women. Abuse and issues related to power relations may arise. Similar to the instance of some American surrogate parents who declined to utilise their surrogate who was disabled child, or the tale of a rich Japanese who "ordered" sixteen Thai surrogate infants mothers. Furthermore, the traditional hierarchical gender division of employment is strengthened by the monetisation of the labour of women who reproduce. Since commercial surrogacy is viewed as "baby selling," it is against the worldwide ban on the selling of individuals. Certain things should not be purchased with money, and wombs shouldn't be "for rent." Some fear that impoverished women would become desperate and turn to surrogacy if they had limited options in life. Consequently, it is our civic duty to keep children safe from

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<sup>14</sup> Jaiswal, S. (2012), Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights.

exploitation by affluent people who might not care about their morals or well-being. Following the legalisation of commercial surrogacy in India in 2002, the country became a hub for international surrogacy. This was mostly due to the fact that fertility is unregulated by law. Facilities are affordable, and many impoverished women are willing to volunteer as stand-ins. But the ladies who choose to volunteer as surrogates endured unethical treatment, exploitation, and poor housing. The moral implications public criticism of commercial surrogacy didn't surface until the controversial case about **Union of India v. Baby Manji Yamada**.<sup>15</sup>

### **(B) What justifies paying surrogates?**

Commercial surrogacy offers a number of benefits when it is lawful. It has enabled individuals who otherwise wouldn't be able to procreate, such those who are those who are single, infertile, or disabled, as well as members of the LGBTQ community. It has also made it possible for society to enlarge the concept of what constitutes a family. Benefits of surrogacy also extend to the two consenting partners. An additional contention is that not everyone finds it enjoyable to assist the couples who are unable to conceive only from benevolence. For instance, the well-known figure PHOEBE figure from the online series BUDDIES. Still, not everyone would be at ease putting their body through a taxing process in order to benefit someone else, making it easier to find a total stranger willing to help. With her consent, the surrogate is engaging in "labour" and ought to be paid appropriately. Significant physical risks accompany pregnancy, which makes it more difficult to continue operating as usual, and in some ways, serve as the surrogates' jobs. When surrogates are paid exorbitant sums of money because this increases the wealth disparity and may discourage those with lower socioeconomic status from volunteering as surrogates. But when it comes to payment for surrogacy, consent is the most important consideration. Prohibiting commercial surrogacy ignores UDHR Article 23 and Article 7 of the ICESCR, which required human labour to be compensated fairly. In Georgia and Russia, for example, commercial surrogacy is practiced in spite of the absence of laws governing surrogacy in these nations, which acknowledge surrogates' legal entitlement to exchange. In addition to enhancing the perception of motherhood as a worthwhile endeavour, women's capacity to act as surrogates and obtain high remuneration rewarding their labour may really increase the surrogate's sense of worth and control.

## **V. CONCLUSION**

Surrogacy has become a reality because to the collaboration of science, society, services, and individuals. Both the surrogate mother and the infertile couple gain from surrogacy. The couple

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<sup>15</sup> *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518 : (AIR 2009 SC 84)

who are infertile can fulfil their dream, and the surrogate mother is fairly rewarded. There is definitely a great deal of moral and ethical discussion. Commercial surrogacy is also a difficult and intricate problem. Legalisation of commercial surrogacy should occur in poor countries like India. Currently, the law prohibits paying a surrogate mother which allows fertility clinics to bill thousands of dollars for assisted reproductive medicine. Prohibiting commercial surrogacy in India is a bad idea. Even so, the absence of laws and exploitation are recognised, the possibility that a criminal market will emerge or that individuals will have to relocate to new areas where they will have much less access to safety and healthcare, which may lead to an even greater increased exploitation and an unregulated industry.

In the UK, it is urgently needed, and in addition to this creative solution, there regulations and safeguards for the surrogate mother in order to prevent exploitation. Children born via overseas surrogacy require reforms, and there needs to provide consistent guidance on immigration and nationality-related issues. In light of the decisions rendered in various cases, France ought to modify its laws. The use of IVF and other assisted reproductive technologies is growing in the vibrant civilisation of today. Same-sex marriages and civil unions are becoming more common, and the public and media now support and encourage them for the purpose of surrogacy. Thus, the author suggests legislation as an alternative to outlawing commercial surrogacy that enables the open practice of commercial surrogacy by qualified, licensed health, the best protection might come from specialists working in facilities under licence and supervision for them and any future offspring conceived via surrogacy.

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