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The Best Interests of a Child Born to a Surrogacy Arrangement: a Judicial Overview

Lucy Theis

18 May 2015

IAML Surrogacy Symposium

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Surrogacy Arrangement

- Surrogacy – method of reproduction whereby a woman gives birth to a child for intended parent(s).
- A traditional surrogacy is when the surrogate is genetically related to the child she is carrying and a male intended parent provides the gametes or a sperm donor is used.
- Host (or gestational) surrogacy is when assisted conception is used, either with the eggs of the intended mother, or with donor eggs. The surrogate mother does not use her own eggs, and is genetically unrelated to the baby.

2

International Surrogacy Arrangement

- Has added feature of cross jurisdiction issues; where the woman resident in one country carries and gives birth to a child for intended parent (s) who live in another.
- Such an arrangement is either expressly or implicitly permitted or may be unlawful in the country where the child is born.
- Domestic or international arrangements done for variety of different reasons.

3

Legal Context – UK - History

- Prior to Human Fertilisation and Embryology Act 1990 (HFEA 1990) no legal framework for surrogacy arrangements.
- Warnock report followed inquiry which considered ethical, legal and social concerns surrounding all aspects of assisted reproduction (artificial insemination, IVF, egg and embryo donation, and surrogacy).
- Inquiry started in 1982 triggered by the birth of the first IVF baby in 1978 (Louise Brown).
- Report recommended criminal sanctions to limit surrogacy rather than regulate it effectively.

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Legal Context - UK

- In UK surrogacy is not illegal but there are restrictions – commercial surrogacy not permitted.
- Surrogacy Arrangements Act 1985 restricts activities of 3rd party brokers (can't operate for profit), prohibits advertising and makes surrogacy contracts unenforceable.
- Consequently most are informal altruistic arrangements; based on trust, unenforceable with no specific legal framework to fall back on.

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Parental Orders

- HFEA 1990 introduced parental orders – mechanism for transferring parental rights and responsibilities to intended parents and extinguishing those of the surrogate mother and her partner. Limited applicants to married heterosexual couples.
- Attitudes to surrogacy changing - Brazier report commissioned in 1997 to look at surrogacy law and practice *'to ensure that the law continued to meet public concerns'* . Recommendations included centralised code of practice and new legislation to set out more clearly categories of expenses allowed. Not implemented.
- HFEA 2008 extended categories of applicants who could apply for parental orders to civil partners or two persons living in an enduring family relationship (not related).

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General Context

- Although no official figures numbers have increased significantly in last few years.
- Estimated 1 – 2,000 births per year, of which it is estimated only a few hundred are the subject of parental order applications.
- In 2012 there were reportedly 1,000 British passports granted to children born through surrogacy in India. Only c 213 parental orders in this period.

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Child's legal position if born following surrogacy arrangement(1)

- Legal position here is the same whether the child is born in UK or elsewhere.
- The child's legal mother is the woman who gave birth to the child (s 33 (1) HFEA 2008).
- If she is married at the time of the placing in her of the embryo and unless shown he did not consent her husband is treated as the legal father (s 35 HFEA 2008 – or other parent if in same sex marriage s42/44 HFEA 2008).

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Child's Legal Position (2)

- If surrogate not married and intended father has biological connection to the child he is the legal father, but may not have parental responsibility (PR) .
- Person who has PR for a child has the right to make decisions about their care and upbringing.
- Birth mother and her husband have PR, unmarried fathers/civil acquire PR if registered on child's birth certificate, PR agreement or by court order.
- If intended parents wish to acquire parental rights or PR they need an order of the court.

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What is a parent?

- Difference between natural and legal parent
- Legal parent – by operation of law e.g. father of child born to unmarried parents was not legally a parent until Family Law Reform Act 1987
- *Re G [2006] UKHL 43* Baroness Hale para 32 *'To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.'*

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'Natural parent'

- According to Baroness Hale in *Re G* there are three categories of natural parent
- Genetic parent – biological connection
- Gestational parent – carried the child
- Psychological parent – through day to day care
- Some parents may be all 3
- Each may be a very significant factor in the child's welfare, depending on the circumstances.

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Mind the legal parent gap.....

- If no steps are taken to regularise the legal relationship between the intended parents and the child by way of an application to the court the surrogate remains the child's legal mother and retains parental responsibility.
- This is irrespective of whether the child was born in UK or abroad
- If born abroad also irrespective of the legal position in the country of birth (e.g. the surrogate is no longer the legal parent – pre birth order etc)
- In international surrogacy arrangements risk of child being 'marooned stateless and parentless' Hedley J in *Re X and Y [2008] EWHC 3030 (Fam)*

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Steps that can be taken

- Application for a **parental order** pursuant to s 54 HFEA 2008 (intended parents treated as legal parents and acquires parental responsibility) – an order specifically devised for surrogacy arrangements
- Application to **adopt** (intended parent treated as legal parent and acquire parental responsibility)
- Only parental order and adoption extinguish all rights/ responsibilities of surrogate parents and vest all such rights/ responsibilities with intended parents.
- Application for **special guardianship order** (acquire parental responsibility but not become legal parent; SGO exercise of parental responsibility takes precedence over legal parents)
- Application for **child arrangements order** (acquire parental responsibility which share with legal parent)

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Parental Order s 54 HFEA 2008 criteria

- (1) child conceived through assisted conception, carried by woman not one of applicants, child has biological connection with one of applicants
- (2) two applicants (married/civil partners/enduring family relationship)
- (3) application within 6 months birth *Re X [2014] EWHC 3135 (Fam)*
- (4) child's home with applicants and at least one applicant domiciled in UK
- (5) both applicants over 18 years
- (6) both surrogate (and her husband) freely, unconditionally and with full understanding consent to the making of a PO (surrogate consent at least 6 wks after birth) or can't be found/incapable of giving consent
- (7) court authorises any payments other than expenses reasonably incurred

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Parental Order - welfare

- Since 6 April 2010 the court's paramount consideration in relation to a parental order application is the child's lifelong welfare needs (s 1 Adoption and Children Act 2002 – SI 2010/986)
- Prior to that in reaching any decision relating to an application for a PO the court should have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his welfare

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When does making a PO not meet child's lifelong welfare needs.....?

- Hedley J in *Re L (a minor) [2010] EWHC 3146 (Fam)* para 9 and 10

  [9]..the effect [of s 1 ACA 2002]...is that welfare is no longer merely the court's first consideration but becomes its paramount consideration

  [10] The effect of that must be to weight the balance between public policy considerations and welfare..decisively in favour of welfare. It must follow that it will only be in the ***clearest case of abuse of public policy*** *that the court will be able to withhold an order if otherwise welfare considerations supports its making...if it is desired to control commercial surrogacy arrangements, those controls need to operate before the court process is initiated i.e. at the border or before. (emphasis added)*

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Interpretation s 54 criteria

- Courts have endeavoured to purposively interpret s 54 criteria
- 6 month time limit *Re X [2014] EWHC 3135 (Fam) Sir James Munby (President)* have regard to *'the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties...Can Parliament fairly to taken to have intended total invalidity?...the assumption..that Parliament intended a 'sensible' result'*. He concluded court not prevented from making an order merely because the application made after 6 months.
- Two applicants criteria (at time of application and at time of making the order) – male applicant died before final hearing. In *A v P (Surrogacy: Parental Order: Death of Applicant) [2011 EWHC 1738 (Fam)* Theis J made parental order based on analysis Article 8 rights; the statute read down in such a way to ensure the essence of the protected right is not impaired and what is being protected are rights that are practical and effective not theoretical and illusory. Focus protection of family life and identity.

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The effect of a parental order

- Provides legal clarity and certainty as to who the legal parents of the child are.
- It extinguishes, as a matter of law, any legal relationship between the surrogate mother (and her husband, if applicable) and the child.
- It is an order specifically devised for surrogacy, reflects the reality that that child's conception and birth was commissioned by the intended parents, one of the applicants has a biological connection and more accurately reflects the child's identity. It creates legal parentage around an already concluded lineage connection.

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Re X [2014] EWHC 3135 (Fam)

- *Sir James Munby President of the Family Division at para 54*
- *'Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. ..this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences.'*

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What if parental order not available?

- If s 54 criteria not met other orders (adoption, SGO and CAO) provide some certainty/clarity as to the intended parents legal relationship with the child.
- Adoption order results in the child being treated in law as if born as a child of the adopters (s67 ACA 2002). Whilst provides legal certainty also leaves open the risk of a fiction regarding identity e.g. *B v C (Surrogacy Adoption) [2015] EWFC 17*
- SGO and CAO risk future uncertainty if applications made by surrogate or issues arise regarding parental responsibility

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The best interests of a child born to a surrogacy arrangement

- To have clarity and certainty as to the legal relationship between the child and the intended parents.
- In UK this can only be done by an application to the court.
- If such an application is not made the child's legal parents are not the intended parent(s) (save where there is an unmarried surrogate).
- Without an order (PO or adoption) the intended female parent (s) or non biological male intended parent can never be the legal parent to the child; and without an order they have no legal rights in relation to the child and the child will have no/reduced rights against the intended parents

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Why is an order needed?

- In the majority of cases it may make no practical difference to the child's day to day life or the child's relationship with the intended parent(s)
- But difficulties could arise if, for example
- - the intended parents die or separate
- - medical decisions have to be made
- - passports need to be renewed

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Impact on the child if no order

- Arguably psychological and practical.
- Psychological – impact of discovering that the genetic/psychological parent is not the child's legal parent; impact on identity.
- Practical – effect of not being entitled to inheritance or other financial/practical benefits (although arguably could be entitled to inheritance from surrogate mother/husband who remain legal parent...).

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Position in other jurisdictions

- Many US States (e.g. California) have clear legal framework including a system of pre-birth orders that ensure the intended parents are the legal parents from birth and the surrogate (and her husband) have no legal relationship/responsibility for the child
- In South Africa there is a framework in place where the High Court supervises the surrogacy arrangement (pre and post birth) under Children Act 2005
- Many other jurisdictions permit surrogacy (commercial or altruistic) either explicitly (by a legislative framework) or implicitly (by the arrangement not being unlawful) e.g. Ukraine, Georgia etc

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What can be done in UK?

- In the short term –
- - increase public awareness of the legal consequences for a child born to a surrogacy arrangement
- - make the process for applying for parental orders as 'user friendly' as possible
- In the longer term fundamental change can only be through changes to primary legislation.

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An international instrument?

- Even if legal reform in UK there remain the more wide-ranging issues associated with international surrogacy
- Mr Justice Moylan *Re D [2014] EWHC 2121*
- *'There is, in my view, a compelling need for a uniform system of regulation to be created by an international instrument in order to make available an appropriate structure in what can only be described as the surrogacy market'*

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Benefits of an international instrument

- Could include
- - minimum standards of care among 3rd party surrogacy providers to ensure surrogates, parents and children protected
- - appropriate mechanism for recognising children's identity rights which are both recognised and portable to avoid children being born *'stateless and parentless'* due to conflict of law

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Challenges for an international instrument

- Include
- - differing views on the ethics of surrogacy and non-traditional parenting
- - finding a neutral path acceptable both to those who wish to promote surrogacy and same-sex parenting and those who wish to restrict it may prove difficult
- The work being undertaken by the Parentage/ Surrogacy Project of the Hague Conference is to be welcomed

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A way out of the thorn forest?

- In *Re X and Y* Mr Justice Hedley memorably described the surrogacy parents to apply for a parental order following an international surrogacy arrangement as having been '*less on a journey down a primrose path than a trek through a thorn forest'*.
- Both legislative reform to provide a properly supported and regulated framework for all surrogacy arrangements, together with an international instrument, would help bring the journey for future intended parents away from a thorn forest back towards a primrose path, which can only be in the best interests of a child born to a surrogacy arrangement.

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Anne-Marie Hutchinson OBE

Partner

Described as "one of the leading matrimonial lawyers of our time" by the Legal 500, she is also singled out as a "star individual" by Chambers for cross-border disputes and is listed in the top 50 Women Super Lawyers.

Anne-Marie was admitted in 1985 and joined Dawson Cornwell in January 1998 as head of the Children Department. She now heads up an expert and recognised team.

Anne-Marie specialises in all aspects of domestic and international family law and the international movement of children. She has a recognised expertise in international divorce forum and jurisdictional disputes on divorce, with particular expertise in international custody disputes, child abduction (Hague and non-Hague); the EU Regulation on jurisdiction in family matters, relocations and children's law private and public. She acts for the victims of forced marriage, abandoned spouses and Honour Based Violence and has assisted in the protection of 150 plus Forced Marriage victims. She has acted in the leading Forced Marriage and Stranded Spouse cases. Anne-Marie has acted for victims and threatened victims of Female Genital Mutilation.

Anne-Marie is also a specialist in surrogacy arrangements and surrogacy with an international element and co-parenting agreements. Anne-Marie advises in respect of complex domestic and international adoption applications and legal issues arising from the creation and implementation of surrogacy arrangements under The Human Fertilisation and Embryology Act 2008.

Anne-Marie is Co-Chair of the IAML Surrogacy and ARTS Committee.

Anne-Marie is accredited by Resolution as a specialist family lawyer with specialisms in forced marriage and honour based violence, child abduction and children law. She was awarded the inaugural UNICEF Child Rights Lawyer award in 1999. She received an OBE for her services to international child abduction and adoption in the 2002 Queen's New Year's Honours List. In 2004 she was selected as Legal Aid Lawyer of the Year for her work with the victims of forced marriage. In 2010, she received the International Bar Association's Outstanding International Woman Lawyer Award. In 2011 she received a True Honour Award from IKWRO. In 2011 she was awarded an "Albert" by the Albert Kennedy Trust in recognition of her work on an international level in defending the human rights of young lesbian, gay, bi-sexual and transgender people. In 2012 she was named International Family Lawyer of the Year in the Jordans Family Law Awards. In 2014 she was award the prestigious IAML President's Medal.

Anne-Marie is the immediate Chair of the Women Lawyers' Interest Group of the International Bar Association and previous Chair of the Family Law Committee. She is the Chair of the Board of Trustees of Reunite: International Child Abduction Centre. She is a previous member of the International Issues Committee of The Law Society of England and Wales. She is a Governor at Large of the International Academy of Matrimonial Lawyers. She is a Founding Fellow of the International Surrogacy Forum. She is also a member of numerous associations and committees including the International Society of Family Law, the Institute of Advanced Legal Studies, the International Centre for Missing and Exploited Children and many others. She is a member of the National Commission on Forced Marriage at the House of Lords.

She is a regular speaker and lecturer both within the United Kingdom and abroad and has made numerous television and press appearances. She is the UK correspondent for "International Family Law" published by Jordans and the consultant editor of International Child Law also published by Jordans. She is joint author of the text book "International Parental Child Abduction". She sits on the Editorial Board of the Child and Family Law Quarterly, published by Jordans, and is a contributor to Child Case Management Practice 2nd Edition (Family Law). She is the author of numerous legal articles.

Not only is Anne-Marie consistently named as one of the leading family lawyers in London in both Chambers and The Legal 500, but she is singled out by Chambers as the sole "star individual" for cross-border disputes. Anne-Marie is listed in Debrett's.

Anne-Marie was listed in the top 100 UK Super Lawyers and the top 50 Women Super Lawyers.

In April 2014 Anne-Marie was an expert at the United Nations and UNICEF international Roundtable on China's draft Family Violence Law and in May 2014 was invited to be the UK expert for The Asia Pacific Regional Office of the Hague Conference on Private International Law.

She is a regular author, speaker and lecturer both within the United Kingdom and abroad and has made numerous television appearances.

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Stephen Page

Curriculum Vitae- as of 19 March, 2015

Stephen graduated with Bachelor of Laws (Honours) in 1985 from the then Queensland Institute of Technology (now QUT).

In 1987 Stephen was admitted as a solicitor of the Supreme Court of Queensland. In 1989 Stephen was admitted as a solicitor of the High Court of Australia.
In 2013 Stephen was admitted as a Barrister and solicitor of the Supreme Court of South Australia.

Stephen is a partner of Harrington Family Lawyers, one of Brisbane's oldest boutique family law firms.

In 1988, Stephen made a decision to specialise in family law. Since that time, his practice has consisted solely or predominantly of family law.

In 1996, the Queensland Law Society introduced a scheme of Queensland Law Society Accredited Family Law Specialists. Stephen became accredited in 1996. He has remained accredited ever since.

Stephen has practiced in all areas of family law. Stephen has three sub-specialties in family law:
-surrogacy/assisted reproductive technology
-domestic violence
-acting for LGBTI people

He has also:

- Chaired the South Brisbane Immigration Community Legal Centre (now RAILS)
- Chaired the management committee of a domestic violence refuge for some years
- Co-founded a domestic violence service (WAVSS)
- Been the chairperson or secretary of the Mt Gravatt committee of Relationships Australia from 1996 to 2003
- Been a board member of Relationships Australia Queensland 2000-2003
- Been a committee member of a court based domestic violence service (Beenleigh DVAP) 1999-2013
- Been the Honorary Solicitor for the Gay and Lesbian Welfare Association and the Brisbane Gay and Lesbian Business Network.
- Spoken at the launch of Diversity in Gender and Sexuality in 2014.
- Lobbied the Queensland Government in 2011 and 2012 to legislate to remove gay panic defence and to add hate crime legislation
- Lobbied the NSW and Victorian Attorneys-General in 2013 to alter practices to allow Victorian birth records to be altered for children the subject of NSW parentage orders.

- Presented papers and spoken at numerous conferences and presentations including:

Year	Place	Conference	Subject
1999	Gold Coast	State Conference on Domestic Violence	Domestic Violence
2001	Gold Coast	National Conference on Domestic Violence	Domestic Violence
2001	Brisbane	State Men's Conference	Family Law
2002	Townsville	Far North Queensland and North Queensland Law Association	Domestic Violence
2002	Brisbane	Financial Counsellors Conference	Property Settlement
2003	Gold Coast	International Conference on Domestic and Sexual Abuse	Family Court and Sexual Abuse
2003	Brisbane	Queensland Magistrates Conference	Domestic Violence
2003	Brisbane	Family Law Practitioners Association	Domestic Violence
2003	Gold Coast	Gold Coast Practitioners	Domestic Violence
2003	Brisbane	Queensland Law Society	Domestic Violence
2004	Brisbane	Family Law Masterclass	Property Settlement
2005	Brisbane	Queensland Law Society	Domestic Violence
2006	Brisbane	Queensland Law Society	Domestic Violence
2007	Denver	National Conference on Domestic Violence	Domestic Violence and Immigration
2007	Brisbane	Australia's CEO Challenge	Domestic Violence
2007	Brisbane	5th National Health in Difference Conference	Gay Marriage; Same Sex Domestic Violence; LGBTI Property and Estate Issues
2007	Brisbane	National PFLAG Conference	LGBTI family law issues
2007	Brisbane	Australia's CEO Challenge	Family Court and Child Abuse
2008	Brisbane	LexisNexis	Property Settlement
2008	Brisbane	Multicultural Family Law Workers' Forum	Family Law, especially how it impacts on NESB people

2009	Brisbane	Australia's CEO Challenge	Property Settlement
2010	Brisbane	Australia's CEO Challenge	Domestic Violence; Same Sex Domestic Violence
2010	Brisbane	LexisNexis	Chaired, Family Law
2010	Caboolture	Family support network	Training about file notes
2010	Brisbane	Multicultural Family Law Workers Forum, Multicultural Development Association	Family law/domestic violence
2010	Brisbane	Legalwise	Chair, Family Law Session
2010	Sydney	Surrogacy Forum	Surrogacy
2011	Sydney	Surrogacy Forum	Surrogacy
2011	Gold Coast	City Fertility Centre national training	Surrogacy
2011	Gold Coast	Fertility Nurses of Australasia conference	Surrogacy
2011	Brisbane	LexisNexis	Surrogacy
2011	Brisbane	Legalwise	Surrogacy
2011	Brisbane	Life Fertility	Surrogacy
2011	Gold Coast	Qld Law Society/Family Law Practitioners Association Family Law Residential	Surrogacy
2011	Sydney	Westmead Foundation Fertility Symposium	Surrogacy
2011	Las Vegas	American Bar Association Family Law Section ART conference	Surrogacy
2011	Melbourne	World Congress on Reproductive Medicine	Surrogacy
2012	Brisbane	Legalwise	Domestic Violence
2012	Brisbane	City Fertility Centre	Surrogacy
2012	Brisbane	Australia's CEO Challenge	Domestic Violence
2012	Brisbane	Australia's CEO Challenge	Family Law Act Amendments
2012	Brisbane	Queensland Family Law Pathways Network	Domestic Violence
2012	Melbourne	Surrogacy Australia conference	Surrogacy
2012	Brisbane	LexisNexis	Surrogacy
2012	Brisbane	Family Law	Domestic Violence

		Practitioners Association	
2012	Boston	International Commission on Couple and Family Relations	Family Law Collaboration Between the Professions
2012	Glendale, AZ	Arizona State University	Guest lecturer to law students about domestic violence
2012	Brisbane	Caxton Legal Centre	Domestic Violence
2012	Brisbane	Life Fertility Clinic	Surrogacy
2012	Sydney	NSW ANZICA meeting	Surrogacy
2012	Brisbane	Queensland Domestic Violence Conference	Domestic Violence and Immigration
2012	Port Stephens	Hunter Valley Family Law Conference	Surrogacy
2012	Kingaroy	South Burnett Child Protection network	Domestic Violence
2012	Sydney	Presentation to NSW MP's	Surrogacy
2012	Sydney	Surrogacy Forum	Surrogacy
2013	Brisbane	Legalwise	Surrogacy
2013	Melbourne	Australian Psychological Society Family Law and Psychology Interest Group	LGBTI Family Law
2013	Melbourne	Surrogacy Forum	Surrogacy
2013	Melbourne	Surrogacy Australia	Moderating legal panel
2013	Sydney	Surrogacy Forum	Surrogacy
2013	Brisbane	Surrogacy Forum	Surrogacy
2013	Anchorage	American Bar Association Family Law Section Spring Training	Surrogacy
2013	Townsville	North Qld Law Association	Domestic Violence
2013	Brisbane	Presentation to Save the Children Fund	Keeping file notes
2013	San Francisco	LGBT Family Law Institute	Credentialled attendee
2013	Brisbane	Life Fertility Clinic	Surrogacy/ART issues
2013	Sydney	Fertility Society of Australia	Ethical and moral dilemmas of surrogacy
2013	Brisbane	Australian Association of Social Workers Professional Practice Group meeting	Keeping file notes
2013	Charleston,	American Academy of	The dirty dozen rules in

	South Carolina	Assisted Reproduction Technology Attorneys	international ART
2014	Brisbane	Queensland Counsellors Association	Keeping file notes
2014	Brisbane	Television Education	Presentation on behalf of Adam Cooper as to addbacks in property settlement
2014	Brisbane	Merck Sorono satellite conference to Asia Pacific Initiative on Reproduction Congress (ASPIRE) conference	US surrogacy law and practice
2014	Brisbane	So you want to make a baby forum, in conjunction with the LGBTI Legal Service	Surrogacy, egg and sperm donation
2014	Melbourne	Surrogacy Australia conference	Hague, NSW, WA and NHMRC surrogacy reviews; panelist as to State surrogacy laws
2014	Mooloolaba	Fertility Nurses of Australasia conference	Ownership of eggs, sperm and embryos after donation
2014	Brisbane	LGBTIQ families planning day	Egg and sperm donation, family formation, surrogacy
2014	Brisbane	Qld Program to Assist Survivors of Torture and Trauma	Keeping file notes
2014	Melbourne	Association of Family and Conciliation Courts inaugural Australian chapter conference	LGBTIQ people and the Family Law Courts
2014	Brisbane	Scientists in Reproductive Technology conference	Import and export of gametes and embryos
2014	Brisbane	College of Law	Lecture to graduate students about surrogacy
2014	Brisbane	College of Law	Lecture to graduate students about family formation
2014	Brisbane	Legalwise	Chair of Managing Financial Issues after Family Breakdown
2014	Queensland webinar	University of Southern Queensland, School of	Keeping file notes- avoiding the

		Psychology, Counselling and Community	Rottweiler's bite
2014	Stowe, Vermont	Presentation to American Bar Association Family Law Section council	Concerning co-authored paper concerning proposed Hague Convention on private international law concerning children
2014	Brisbane	Domestic and Family Violence Summit	Attendee/participant at invitation of Dame Quentin Bryce
2014	Adelaide	Law Society of South Australia	Presentation about surrogacy in South Australia
2014	Brisbane	Community seminar on ethical surrogacy	
2014	Melbourne	Community seminar on ethical surrogacy	
2014	Sydney	Community seminar on ethical surrogacy	
2015	Canberra	House of Representatives Standing Committee on Social Policy and Legal Affairs	Surrogacy Roundtable
2015	Canberra	Canberra Fertility Centre	Facilitated discussion concerning surrogacy and fertility issues
2015	Brisbane	Donor seminar	Presentation about implications of egg, sperm and embryo donation
2015	Brisbane	Legalwise	Children across borders
2015	Sydney	NSW ANZICA meeting	Surrogacy/fertility update
2015	Sydney	Canadian surrogacy seminar	
2015	Queensland	QAILS webinar	Surrogacy
2015	Brisbane	College of Law	Guest lecturer- surrogacy and fertility
2015	Brisbane	Australian Association of Women Judges- inaugural lecture: Whose rights are they anyway?- with Chief Justice Bryant	Panellist- surrogacy

Stephen currently is a member of:

- Queensland Law Society
- Family Law Section of the Law Council of Australia
- Family Law Practitioners Association of Queensland Ltd
- Fertility Society of Australia
- International Academy of Matrimonial Lawyers
- American Bar Association, (associate), and one of two international representatives of the Assisted Reproductive Technology Committee
- (first international) fellow, American Academy of Assisted Reproductive Technology Attorneys (AAARTA)
- Association of Family and Conciliation Courts, including the Australian Chapter
- (Only non-North American) American Bar Association Commission on Domestic Violence Newslist
- (US) LGBT Bar Association
- (US) LGBT Family Law Institute
- the Legal Aid Queensland panel for Independent Children's Lawyers
- chair, Surrogacy Australia legal committee

Authored works

These include:

- 2009- *Changes to Stamp Duty for Family Lawyers*, Proctor
- 2009- Update of Queensland Practice Manual chapter on child protection
- 2011- Lead researcher and co-author- *State by State Surrogacy Guide*
- 2012- *Trends as to international surrogacy*
- 2013- Update of Queensland Practice Manual chapter on child protection
- 2013/2014- Co-author and co-ordinator- draft position paper for the American Bar Association as to a proposed Hague Convention on International Surrogacy
- 2015- *The right to be a parent- regulating surrogacy in Australia,* Rightnow

Stephen is author of the Australian Divorce Blog, the Australian Gay and Lesbian Law Blog and the Australian Surrogacy and Adoption Blog. He tweets about family law issues as *stephenpagelaw*.

Media

Stephen has spoken extensively in the media about family law, domestic violence and surrogacy issues including to:

TV

International

- Xinhua TV (China)
- Deutsche Welle (Germany)
- Fuji TV (Japan)
- Russia Today

Network Seven
- *The Morning Show*

Nine Network
- *National Nine News*
- *Today*
- *A Current Affair*

Network Ten
- *The Project*
- *Wake Up* (pilot episode)

Australian Broadcasting Corporation (ABC)
- *ABC News*
- *The 7.30 Report*
- *ABC 24*

SBS
- *SBS News*
- *Insight: "Baby Business" (2011), "Surrogacy" (2014)*

Sky News
- *Paul Murray Live*

Newspapers/Websites/Magazines

International
- The New York Times
- The Wall Street Journal
- The Guardian
- Reuters
- The Daily Mirror Australia
- The Daily Beast

Australia/New Zealand
- The Age
- Sydney Morning Herald
- The Sun Herald
- Brisbane Times
- Stuff.co.nz
- The Australian
- News.com.au
- The Herald Sun
- The Daily Telegraph
- The Courier-Mail
- The Western Australian
- Crikey.com.au
- Brisbane Lawyer
- ABC Online
- Cosmopolitan
- Australia.creditcards.com

Radio

International

Radio NZ
- *Afternoon drive*
- *Checkpoint* (current affairs show)

Australian Broadcasting Corporation (ABC)

- News Radio
- *PM*
- *The Law Report*
- *The World Today*
- Radio National's *Life Matters*
- Triple J's *Hack*
- ABC Toowoomba
- ABC NSW
- ABC Gold Coast
- 612 ABC Brisbane
- ABC Mt Isa
- ABC Perth
- ABC Darwin

Sydney radio

- 2GB
- Hope FM *Open House*
- 2SM

Brisbane radio

- 4BC
- B105

Melbourne radio

- 3AW
- MMM
- Mix101.1

Adelaide radio

- Radio Adelaide

Perth radio

- 6PR

Gay media

- 4ZZZ QueerRadio
- Samesame.com.au
- Qld Pride
- Star Observer
- QTV
- Qnews and before that Brother/Sister (for which Stephen has contributed a column since about 2000)

Media recognition

Stephen has been recognised by various media outlets for his expertise:

"One of Brisbane's most respected gay and lesbian friendly lawyers."	Brisbane Lawyer	April, 2008
"Stephen Page is one of Australia's leading surrogacy lawyers."	National Nine News	9 April, 2013
"Stephen Page, a leading Australian surrogacy lawyer"	Daily Telegraph	4 April, 2014
"Stephen Page, one of Australia's leading surrogacy lawyers"	Sydney Morning Herald	1 August 2014
"Prominent Australian surrogacy lawyer Stephen Page"	Sydney Morning Herald	3 August 2014
"Stephen Page, one of Australia's most eminent surrogacy lawyers"	Sun Herald	10 August, 2014
"Stephen Page, one of Australia's leading surrogacy lawyers"	Mix101.1 FM	11 August, 2014
"Stephen Page, a leading Australian surrogacy lawyer"	The Age	11 August, 2014

"Leading Australian surrogacy lawyer Stephen Page"	The Guardian	15 August, 2014
"Leading surrogacy lawyer Stephen Page"	The Courier-Mail	7 September, 2014

Overseas peer recognition

Stephen has been endorsed as the leading surrogacy lawyer in Australia by:

When	Who	Role
April, 2014	Mr Steve Snyder, Minneapolis	Then Chair, Artificial Reproductive Technologies Committee, American Bar Association
April, 2014	Mr John Weltman, Boston	Founder and President, Weltman Law Group and Circle Surrogacy, one of the world's oldest and largest surrogacy agencies
December, 2014	Dr Kim Bergman, Los Angeles	Psychologist, co-founder and co-owner, Growing Generations, one of the world's oldest and largest surrogacy agencies
January, 2015	Mr Rich Vaughn, Los Angeles	Chair, Artificial Reproductive Technologies Committee, American Bar Association

White Ribbon activities

Stephen has been a White Ribbon Ambassador since 2008. His activities include speaking extensively to community groups about domestic violence. He has been a partner of Australia's CEO Challenge from 2003, and a director and deputy chair from 2008 to 2013.

Awards

2001	Certificate of appreciation, Gold Coast Sexual Assault Support Service
2006	Co-recipient, Prime Minister's Awards for Excellence in Community Business Partnerships 2006, State and Territory Business Award
2010	Certificate of appreciation from the Queensland Program of Assistance for Survivors of Torture and Trauma
2011	Finalist, White Ribbon Ambassador of the Year

Queensland Law Society representative as to domestic violence matters

Stephen has represented the Queensland Law Society in relation to the following domestic violence issues:

2011	Queensland Law Society representative and White Ribbon Ambassador representative to two day intensive as to community consultation as to draft domestic violence laws
2014	Queensland Law Society representative on a panel as to proposed *Domestic and Family Violence Protection Rules*

2014	Queensland Law Society representative as to research undertaken by the Department of Justice and Attorney-General concerning private protection order applications

Career highlights
These have included:

1985-	Helping keep clients and their children safe
1994	Co-founding a domestic violence service
1998	Obtaining protection in a domestic violence trial, having been the subject of stalking
2002	Successfully lobbying singlehandedly to change domestic violence laws to protect children
1999-2002	Assisted Queensland Association of Gay and Lesbian Rights in drafting proposed laws to remove discrimination. The efforts culminated in the repeal of most discriminatory laws in Queensland in 2002.
2011	Giving evidence at Tasmanian Parliament inquiry as to its Surrogacy Bill. The evidence resulted in changes to the bill.
2011	Speaking at the world's first international surrogacy legal conference (in Las Vegas)
2012	Being the lawyer for the surrogate in the world precedent case as to what constituted *"conception"*.
2012-2013	Convening Queenslanders for Equality, and stopping proposed discriminatory surrogacy laws
2012	Being appointed as one of two international representatives on the Executive Council, American Bar Association, Family Law Section, Artificial Reproductive Technologies Committee.
2014	Becoming a member of International Academy of Matrimonial Lawyers, and first international fellow of the American Academy of Assisted Reproductive treatment Attorneys (AAARTA)
2014	In one week appearing in surrogacy cases in courts in three States: Victoria, Queensland and South Australia
Nov 2014-Jan 2015	In three months I obtained parentage orders in four States: Queensland, New South Wales, Victoria and South Australia

Volunteering

Stephen has volunteered providing advice at community legal centres:

1988-1990	South Brisbane Community Immigration Legal Centre
2005-2010	Caxton Legal Centre
2010-	LGBTI Legal Service

Other

Stephen has trained counsellors on many occasions about keeping file notes and risk management with file notes.

For several years Stephen was a guest lecturer at Griffith University to post-graduate law students about domestic violence issues. Stephen has previously lectured counselling students at the Ashby Allan Institute about counselling and ethics.

Stephen was for some years the chair of the QUT Law Alumni Group.

CURRICULUM VITAE

1. PERSONAL DETAILS

Name: Esther Susin Carrasco

Place of birth: Barcelona

Date of birth: 16/10/1962

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D.N.I.: 35065262-Z

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Office telephone: 00 34 93 727 20 47

Fax: number: 0034 93 725 50 11

Webpage: www.esthersusin.com

Cell phone: 610 38 41 09

Bar Sabadell, number of license 2.000 (1998)

2. EDUCATION

- Higher education: Bachelor of Law (UNED) in 1995.

- Graduate in Languages: English, French German and Italian (1985).

- Initiation to diplomatic career in 1990, University of Perpignan.

- Community Law 1992 Kings College London. Maastricht Treaty.

- Post Degree at the Universidad Autónoma de Barcelona (UAB): Master in International Family Law during 2009-2011.

- Post Degree at the Universidad Autónoma de Barcelona (UAB) 2011-2012: Master in European Integration. Thesis: The Hague Convention of 1980 articles 13 (a) and 13 (b) in relationship to Article 11 of Regulation (EC) No 2201/2003.

- At present preparing PhD at the Universidad Autónoma de Barcelona (UAB).
  Topic: The Interest of the child in international legal instruments.

- Continuing education in Family Law at the School of European law in Trier (Germany). Family Law. (2006, 2010, 2012, 2013, 2014).

3. PROFESIONAL BACKGROUND

- 1984 - 1997 Interpreter in English, French and German at the Automobile industry and gaming sector.

- 1998 – (self employed) International law firm: E. Susin Gabinet Juridic Internacional. The main focus of the Law Office of **E Susin gabinete Jurídico Internacional** is Family law in the domestic and international

paramount, as well in the field of Child abduction cases and child support.

- 2012 INDEPENDENT EXPERT for the European Commission in the field of Justice, liberty and security Citizenship.

4. OTHERS

- Member of Dones Juristes.
- Member AEAFA (Spanish Association of Family Lawyers)
- Member of SCAF (Catalan Association of Family Lawyers)
- Member of the International Federations of Women of Legal Careers (IFWLC)
- Member of IAML (International Academy for matrimonial lawyers)

5. SPEAKER

- Conference in domestic and gender violence in the Barcelona Bar Association and organized by Dones Juristes (June 2011).

- Conference in family law at the London Bar (October 2011).

- Conference in Private International Law at the Barcelona Bar (March 2012). Key topic: European Regulation 1259/2010 for divorce and separation.

- Conference at the University Kültür in Istambul. Key topic: “The legal protection of women against violence”. I gave an introduction to the Spanish law “ La ley integral de Violencia de género”.

- FIFCJ Rome conference - Key topic: The empowerment of women today, (october 2013).

- IAMl Budapest Conference Key topic: Child relocation cases according to Spanish law and jurisprudence, (june 2014).

- FIFCJ Paris Conference - Key topic The international legal framework: Women and citizenship, (November 2014).

- Conference at Information and Resource Center for Women. DONA SAPIENS (Granollers- Barcelona). Key Topic: Human Rights and Women, (November 2014).

- IAML Conference at the Europa House 9th of december 2014 topic Child relocation Spain - England.

- Terrassa Lawyers Bar (Colegio de Abogados de Terrassa), Regulation 4/2009 and Hague Protocole 2007 (March 2015).

6. ARTICLES PUBLISHED

- Editorial LEX NOVA 2013 nº 60. Relationship between The Hague Convention 1980 and the Regulation (CE) 2201/2003 in child abduction cases.

- Article published at the Article Law Children Journal: butlletí d'Inf@ncia núm. 82 - December de 2014: The right of the Child to express his opinion in family proceedings in the European Unión. The french case.

Mai 2015

Marcus Dearle

Partner and Office Managing Director of Withers, Hong Kong. He is qualified in England & Wales, Hong Kong and the BVI. He has worked at Withers for 25 years, with 19 years in its London office before moving to Asia in 2009 to spearhead the formation of a family department in Hong Kong.

He specialises in complex family law cases often with an international element and has expertise in surrogacy law both in England and Hong Kong: he acted in a leading international surrogacy/Hague convention case of *W and B v H (Child Abduction: Surrogacy)* (No 1) [2002] 1 FLR 1008 and W v H (Child Abduction: Surrogacy) (No 2) [2002] 2 FLR 252 which went to the Court of Appeal in London. As a direct consequence of this case, and the conflict of surrogacy laws between England & Wales and California, Marcus was one of the first to call for international surrogacy regulation in 2001: see Law Society Gazette, London, 1 March 2002: *"Surrogate children left in limbo after ruling on residence"*.

He is a Fellow of the IAML – and is a member of IAML's Assisted Reproduction Technology (ART) Committee. He is also an officer of the Family Law Committee of the IBA. He has regularly lectured on the topic and has published articles on surrogacy including in the UK and Hong Kong: see article in UK Family Law Journal (FLJ) November 2001: *"Avoiding the Pitfalls".* In October 2015, he will be chairing an IBA seminar in Vienna: *"The Legal Pitfalls of International Surrogacy: the need for international regulation of surrogacy arrangements."*

He is listed as a leading individual in Chambers Asia Pacific and is ranked as one of the *"Top 10"* family lawyers in Hong Kong by Spears Magazine.

8 May 2015

Surrogacy Law: Hong Kong SAR

1. Human Reproduction and Technology Ordinance(Cap. 561)
2. Parent and Child Ordinance (Cap. 429)
3. Surrogacy in Hong Kong only open to married commissioning couples/ intended parents: not to same sex couples, unmarried couples or single people.

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withersworldwide

London I Geneva I Zurich I Milan I Padua I New York I Greenwich I New Haven I San Francisco I Hong Kong I Singapore I BVI

Key points

1. Criminal penalties apply.
2. Prohibition of commercial surrogacy on worldwide basis: includes surrogate mothers and commissioning couples.
3. Must not*: "Carry out or participate in any act in furtherance of any surrogacy arrangement where he knows, or ought reasonably to know, that the arrangement"* is a commercial surrogacy arrangement: does this impact on legal advisers?
4. The legislation provides for fertility clinics to obtain licences to carry out surrogacy procedures: but no clinic has a licence in Hong Kong.
5. Parental orders can be applied for: only approximately 3 parental orders have been made since enactment in 1993 (according to enquires at court in 2014).

withersworldwide

London I Geneva I Zurich I Milan I Padua I New York I Greenwich I New Haven I San Francisco I Hong Kong I Singapore I BVI

Surrogacy law: Hong Kong SAR

1. Introduction: Key points

a. This is a brief overview of the law in Hong Kong as at 8 May 2015.

b. Surrogacy arrangements involving any payments in Hong Kong or elsewhere are strictly prohibited under s17 of the **Human Reproductive Technology Ordinance (Cap.561) (HRTO)**.

c. Any form of advertisement for surrogacy arrangements that involves payments is prohibited.

d. Certain payments are allowed under HRTO, such as expenses and loss of earnings incurred by the surrogate mother.

e. Surrogacy (traditional or gestational) is only allowed for intended parents who are married couples, and the gametes must come from the couple and/or the surrogate mother (s14 HRTO).

f. Surrogacy arrangements are not enforceable (s18 HRTO).

g. For issues concerning parentage, see **Parent and Child Ordinance (Cap. 429) (PCO).**

2. Access conditions

a. Surrogate

i. Can be single or married.

ii. If the surrogate is married, gametes must not come from her husband.

iii. No residence stipulations for the surrogate: but fertility treatment effectively has to take place outside Hong Kong, because no fertility clinic in Hong Kong has a licence to carry out surrogacy treatment, although a mechanism for the application for licences is provided for in the legislation.

iv. Code of practice indicates that *"a woman under the age of 21 shall not act as a surrogate mother"*.

b. Intended parents

i. Must be married (same sex marriages not possible in Hong Kong).

ii. No restrictions on residence.

iii. Gametes must come from the married couple and/or the surrogate mother.

3. Prohibition against surrogacy arrangements on a commercial basis:

a. s17 HRTO "*No person shall –*

i. Whether in Hong Kong or elsewhere, make or receive any payment for –

1. initiating or taking part in any negotiations with a view to the making of a surrogacy arrangement;

2. *Offering or agreeing to negotiate the making of a surrogacy arrangement; or*

3. *compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements*

b. *Seek to find a person willing to do any act which contravenes"* paragraph a.

c. "Take part in the management or control of the body of persons corporate or unincorporated whose activities consist of all include any act which contravenes" paragraph a. Or

d. *"Carry out or participate in any act <u>in furtherance of any surrogacy arrangement</u> where he knows, or ought reasonably to know, that the arrangement is the subject of any act which contravenes"* paragraph a.

4. Contract

a. Validity conditions

i. s18 HRTO: *"no surrogacy arrangement is enforceable by law against any of the persons making it".*

ii. Legal advisers cannot charge for advice on the preparation of a surrogacy agreement.

5. Parentage

a. Governed by PCO.

b. No distinction between a traditional or gestational surrogacy arrangement.

c. s9 PCO: surrogate mother is the legal mother of the child from birth.

d. s10 PCO defines the meaning of "father": if the surrogate mother is married, her husband will be the legal father from birth unless it can be shown that he did not consent to the *"placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be)"*.

e. Subject to d., the husband (from the commissioning couple/intended parents) will be the legal father from birth.

6. Relationships

a. Between the husband and wife and surrogate

i. s12 PCO provides for parental orders allowing for *"a child to be regarded in law as the child of the parties to a marriage"*: but only approximately 3 parental orders have ever been made since the legislation was enacted in 1993.

ii. Conditions:

1. The gametes of either the husband or wife or both must have been used to bring about the pregnancy in the surrogate mother.

2. The husband and the wife must apply for a parental order within 6 months of the birth of the child.

3. The child's home must be with either the husband or the wife.

4. Either the husband or wife or both must either be domiciled in Hong Kong, or have been habitually resident in Hong Kong for 1 year, or have a substantial connection with Hong Kong.

5. Both the husband and the wife must be 18 at the time of the making of the parental order.

6. Court must be satisfied that the father of the child and the surrogate mother have *"freely, and with full understanding of what is involved, agreed unconditionally to the making of the order"*.

7. Court must also be satisfied that no money (other than for expenses reasonably incurred) has been received or given by either of the intended parents for or in consideration of the making of the order, any agreement required in 6. above, the handing over of the child to the husband or the wife, or the making of any arrangement with a view to the making of the order.

b. Between the surrogate and the child

i. The surrogate mother will remain the child's legal mother until a parental order is made or the child is adopted.

7. Recognition of foreign surrogacies

a. Difficulties regarding delivery of travelling papers or passport for the child

i. Considerable potential difficulties. There are a large number of surrogacy arrangements being implemented by Hong Kong residents (often expats from Europe, Australia and USA) who are: either

1. In same sex relationships; or are

2. Married intended parents where payments have been paid to surrogacy agencies abroad.

3. Those entering arrangements referred to in 1. and 2. above are committing a criminal offence.

ii. Intended parents entering arrangements referred to in 1. and 2. above generally rely on tourist visas for the children and often face questions from the Immigration Department.

b. Recognition of legal parentage

i. Hong Kong law of legal parentage (under s9 and s10 PCO) will apply and over-ride any foreign determinations of parentage.

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Withers Hong Kong
8 May 2015

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Ranjit Malhotra was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM degree at the SOAS, University of London. He obtained his Degree with merit in 1993, specialising in South Asian family laws. He is an active member of several leading international legal organisations, and regularly has presentations in different major jurisdictions. He is a Fellow of the IAML since January 2007 and is now the Editor of the Family Law Newsletter of IBA for a third term.

He specialises in private international law, commissions expert reports on Indian family law issues in foreign jurisdictions renders expert analysis and testimony for family law, surrogacy and immigration cases and advises foreign lawyers. He is a principal author of "Acting for Non-resident Indian Clients," published in U.K by Jordan Publishing Limited. This book was launched at the House of Lords, London, in April 2005. He has co-authored four books including "Surrogacy in India – A Law in the making," published in May 2013 and International Indians and the Law, which was released on 16 October 2014.

30 April 2015 **Ranjit Malhotra**
Place: Chandigarh, India

Position of Indian law today in surrogacy arrangements

A Presentation by
Ranjit Malhotra & Anil Malhotra, Advocates
Malhotra & Malhotra Associates,
International Lawyers, India

at the IAML Surrogacy Symposium, London
From 17 – 19 May 2015

1

Position of Indian law today in surrogacy arrangements

- **Prevailing legal position in absence of any law to govern surrogacy 2005 ICMR guidelines apply. But being non statutory, they are not enforceable or justiciable in a Court of law.**
- **Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, provisions of the Indian Contract Act, 1870 would apply.**
- **The 2010 Bill legalises commercial surrogacy stating that the surrogate mother may receive monetary compensation and will relinquish all parental rights. Single parents can also have children using a surrogate mother. Foreigners, upon registration with their Embassy can seek surrogate arrangements.**
- **The 2010 draft bill states that foreigners or NRIs coming to India to rent a womb shall have to submit documentation confirming that their country of residence recognizes surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from an Indian mother.**
- **The 2010 draft allows the surrogate mother to receive monetary compensation for carrying the child in addition to health care and treatment expenses during pregnancy.**
- **The 2010 bill mandates surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of commissioning parent/s.**
- **All foreigners seeking infertility treatment in India will first have to register with their Embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.**
- **CONCLUSION : Legislation is still awaited. Not much debate has taken place on the lapsed draft surrogacy bills.**

2

- **If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.**
- **Foreigners or NRIs coming to India seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy till the child is delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking surrogacy must ensure and establish through proper documentation that the country of their origin permits surrogacy and that the child born through surrogacy in India will be permitted entry in the country of their origin as a biological child of the commissioning couple/individual.**
- **Surrogacy be recommended for patients for whom it is medically impossible/ undesirable to carry a baby to term.**
- Recent meetings of Departments and Ministries of the Government of India on 6 and 7 March, 2014 to discuss and review divergent views on the draft Assisted Reproductive Technology (Regulation) Bill, 2013 (ART Bill, 2013), have resulted in a proposal to revise the draft ART Bill with significant changes. **The most crucial proposal is to restrict surrogacy in India to "infertile Indian married couples" only and it would not be allowed to foreigners unless he/ she is married to an Indian citizen. Non-resident Indians (NRIs) excluding Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) shall, however, be eligible.** The purpose of the object sought to be achieved is to prevent exploitation of Indian women who may be tempted to take the risk in the face of financial hardships.
- **Consequently, all single persons and unmarried couples have been declared ineligible from even applying for a visa in any category whatsoever for coming to India for the purposes of surrogacy.**

3

ALEXANDRE
BOICHÉ
PARIS
AVOCATS

IAML

SURROGACY SYMPOSIUM

18th May 2015 – LONDON

A brief overview of the current law in France

France has been partially condemned by the European Court of Human right in two decisions dated 26th June 2014 : *Mennesson v. France (application number n°65192/11)* and *Labassée V. France (application number 65941/11).*

The Mennesson decision is available on the ECHR website in Englsih on the following link :

http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#{"appno":["65192/11"],"itemid":["001-145389"]}

In this case the Court explained with a lot of details the French position related to surrogacy and how the French authorities deal with the situation of children born abroad from a surrogacy agreement. Unfortunately these explanations are mainly available on the French version of the decision and the English translation is essentially focus on the circumstances of the particular case.

The French position is a prohibitive position, surrogacy agreement are prohibited in France and therefore the filiation of children born abroad from a surrogacy agreement was not recognized in France. Initially the position of the Cour de cassation (French Supreme Court for civil of criminal matters) was based on the public policy. The

surrogacy agreement was contrary to the French public policy rules and therefore the filiation of child born abroad from a surrogacy agreement was not recognized in France. Then in two decisions dated 13th September 2013 the Cour de cassation decided that a surrogacy agreement is a fraudulent process and therefore it is void in France. The Cour state that in case of fraud the best interest of the child based on article 3-1 UN Convention or the respect of his privacy and his family life are not be arguable.

In the Menesson and Labassée case, the French position is only condemned by the ECHR because it does not grant for a child the right to have is legal parent-child relationship established, the reasoning is it the following :

"although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society."

…

The Court can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory. Having regard to the foregoing, however, the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.

100. This analysis takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent.

Therefore the Court condemned the French position which does not allow the possibility for the child to establish the legal parent-child relationship with their biological father.

On a legal point of view the solution of the court is really hypocrite, how the court could denied the right for the parents to establish their legal parent-child relationship and grant it to the child. The parent-child relationship is bilateral, if a child establish this legal relation with his parent it means that this relation is also establish from the parent to the child.

The position of the Court could be also criticized because it creates a breach between the parents the father will see is parent-child legal relation establishes but not the mother. The solution is based on the biological truth but what will be the position of the Court if the mother is the biological mother of the child.

On pragmatic point of view, we could say that at least this is a way to recognize the parent-child legal relation create abroad in France between the father and the child, then it will be necessary to file a petition to have the child adopted by the mother. But currently the French court are very difficult on adoption case always very suspicious to the people who wants to adopt a child not sure it will be easy to have an adoption order

made easily for a mother in her relation with a child born by surrogacy abroad when the parent child legal relation will be established with the biological father.

The situation will probably not change soon in France, because the position of the Cour de cassation has often been interpreted as a refusal to take political decisions on the validity of surrogacy which are not its responsibility but the one of the government and the Parliament.

The current position issue of the ECHR decisions is good for everyone in fact because it justifies the prohibition of the surrogacy in France, do not ignore the rights of the child born abroad from a surrogacy agreement even if this is partial and last but not least the politics will not have to take any decision! let's just see what will be the right of the mother.

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OVERVIEW OF THE CURRENT ENGLISH LAW ON SURROGACY FOR THE IAML SURROGACY SYMPOSIUM 18 - 19 MAY 2015

1. Introduction

1.1 The evolution of the law on surrogacy in the UK was undoubtedly advanced by the birth of 2 babies: Louise Brown in 1976, and Baby Cotton in 1985. Although artificial insemination, whether by husband or donor, had long been established as a treatment for infertility in some cases, the birth of Louise Brown, the world's first baby born following IVF, raised issues that had hitherto been unthinkable - that a baby might be born to a woman who was not the child's genetic mother. Louise Brown was in fact the genetic child of both her "mother", who gave birth to her, and her "father", to whom her mother was married. But for the first time the availability of IVF made "full" or "gestational" surrogacy possible.

1.2 In July 1982 the Committee of Inquiry into Human Fertilisation and Embryology was set up under the Chairmanship of Dame Mary Warnock to examine the social, ethical and legal implications of recent, and potential developments in the field of human assisted reproduction. It reported in July 1984[1]. Among its recommendations was that in all cases of assisted reproduction where donor gametes were used, the woman who gave birth should be regarded for all purposes as the child's mother. The Committee was of the unanimous view that there was no place for commercial surrogacy agreements and these should be illegal and criminalised, although it recognised that partial surrogacies (where the surrogate was also the genetic mother) might continue. While the majority view of the Committee was that even non profit making agencies should be prohibited, the dissenting view was that surrogacy should be available as a treatment in certain cases and that the development of surrogacy should be monitored.

1.3 The birth of Baby Cotton following a commercial surrogacy agreement, brokered by a US agency and involving an English surrogate and Swedish commissioning parents, created a sense of urgency and the Surrogacy Arrangements Act 1985 was rushed onto the statute books in advance of other legal changes. It is now a criminal offence in the UK for a person to initiate or take part in any negotiations, offer to agree to negotiate, or compile any information with a view to its use in making or negotiating the making of surrogacy arrangements on a commercial basis[2]. This also applies to advertising / publishing. However, this does not affect the would-be surrogate mother or the commissioning parents, who would not be guilty of committing criminal offences. But, crucially, no surrogacy arrangement is enforceable by or against any of the persons making it[3].

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[1] Thereafter known as the Warnock Report

[2] s2 and s3 Surrogacy Arrangements Act 1985

[3] s1A Surrogacy Arrangements Act 1985

This applies whether or not the arrangement is for altruistic or commercial purposes.

1.4 Thus a surrogate mother cannot be compelled to give up the child after birth, even if she is not the genetic parent, save where following court proceedings the court determines it is in the child's best interests to be cared for by the commissioning couple (or someone else). Nor can the surrogate sue for unpaid fees / expenses under the agreement, even if she has handed over the child.

1.5 It took several years for parliament to settle the legal status of the surrogate mother, commissioning parents, and child, and determine who are the legal parents. That too has been a process of evolution, initially under the Human Fertilisation and Embryology Act 1990 (HFEA 1990) which applied to married and unmarried heterosexual couples, and subsequently the Human Fertilisation and Embryology Act 2008 (HFEA 2008) which now also applies to same sex couples. It is important to note that under English law:

(i) no child can have more than 2 legal parents, although in certain circumstances the child may have only one i.e. the mother who gives carries and gives birth;

(ii) In so far as the Acts are relevant to surrogacy:

(a) the woman who gives birth, irrespective of whether or not she is also the genetic mother, is always the legal mother of the child and remains so unless and until she ceases to be the mother as a result of either a Parental Order[4], or an Adoption Order[5];

(b) if the surrogate mother is married or in a civil partnership, her husband or civil partner will be the legal father / 2nd parent unless it is shown that he / she did not consent[6], again until the grant of either a Parental or Adoption Order;

(c) if the surrogate mother is not married, or her partner did not consent, the commissioning / intended father will be the legal father, *provided that* he is also the child's biological father;

(d) BUT, the commissioning / intended mother will never be the legal mother at birth, even if she is the child's genetic parent and neither her own partner nor the surrogate have any genetic connection to the child;

[4] initially pursuant to s30 HFEA 1990, but now s54 HFEA 2008, hereafter references only to the 2008 Act will be used

[5] s46 Adoption and Children Act 2002, formerly s12 Adoption Act 1976

[6] s35, s42 HFEA 2008

(e) It is important to note that the determination of parent under the HFEA extends to children born outside the UK;

(f) Parental Orders can only be granted in favour of **couples,** whether heterosexual or same sex, and only where at least one of them is a biological parent of the child[7];

(g) Thus where a single woman enters into a surrogacy arrangement in which her own gametes are used, the only means by which she can become the child's legal mother is through adoption as a single applicant[8];

(h) Whereas a single male entering into a surrogacy arrangement in which his sperm is used may be the child's legal father if the surrogate is herself single (or her husband / partner can be shown not to have consented) but in this case the father will share parental responsibility with the surrogate mother unless and until he adopts the child as a single applicant;

(i) If neither commissioning / intended parents' gametes were used for the purpose of the surrogacy, they cannot apply for a Parental Order;

(j) The consent of the surrogate mother (and where applicable her husband / civil partner) is required for the making of a Parental Order, and in the case of the surrogate, such consent will be ineffective if given by her less than 6 weeks after the child's birth[9]. Thus the earliest date upon which an application can be made is 6 weeks after birth.

1.6 Vocabulary

For the purpose of the Surrogacy Arrangements Act 1985, surrogate mother is defined as:

> *"a woman who carries a child in pursuance of an arrangement -*
>
> *(a) made **before** she began to carry the child, and*
> *(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or persons"*[10]

Both HFEA 1990 and HFEA 2008 refer to her not as surrogate mother but *"the woman who carried the child".* Nevertheless, in practice she is

[7] s54(1) and (2) HFEA 2008

[8] Although previously only couples could apply to adopt, adoption by a single applicant is now possible s51 Adoption and Children Act 2002

[9] s54(6) and (7) HFEA 2008

[10] s1(2) Surrogacy Arrangements Act 1985

referred to as the surrogate mother. For the purpose of Parental Orders, the Acts do not distinguish between partial / traditional, or full / gestational surrogacy, the crucial issue being that the gametes of *at least one of the applicants* must have been used. In practice, while all these terms are acknowledged, and from time to time used, it is more usual to see reference to the fact that one or both commissioning / intended parents is/ are the biological parent(s). Again, the Acts refer to the "applicants" for Parental Orders rather than commissioning / intended parents. Both terms are acknowledged and used, but in practice where there is an application for a Parental Order, they are likely to be referred to simply as the applicants.

2. Access Conditions

2.1 General

Fertility treatment in the UK is governed by the HFEA 1990, heavily regulated and licenced by the Human Fertilisation and Embryology Authority ("the HFEA"). Treatment can only be carried out in clinics licenced by the HFEA – *licenced clinics* – which must conform to strict medical, legal and ethical standards. Thus where surrogacy involves IVF or similar treatment, if it is carried out in the UK it will be in a licenced clinic. The clinics are obliged to abide by statue and the terms of its licence and guidance issued by the HFEA. Where non profit making agencies are involved, they may have their own "screening" but this will not replace the screening required of the licenced clinic.

2.2 In practice this does not prevent unregulated "do it yourself" (DIY) surrogacy arrangements e.g. where the surrogate mother is also the biological mother and the intended father's sperm is artificially inseminated by means of syringe or similar (frequently, but not exclusively, introductions are arranged via the internet with minimal if any checks and safeguards considered let alone in place[11]). Nor does it prevent intended parents looking overseas for surrogacy (and indeed gamete donors and fertility treatment). In practice many applications for Parental Orders now involve international commercial surrogacy arrangements, and the numbers are increasing. These fall outside the ambit of the HFEA. In these unregulated cases, the only requirements are those now contained in s54 HFEA 2008 relating to the application for a Parental Order, which falls to be considered post birth. It is important to note that there is no mechanism for transferring parentage prior to birth, or indeed upon birth.

2.3 The HFEA guidance for clinics[12] provides that in addition to the mandatory requirements of s54, no treatment services regulated by the HFEA may be provided unless account has been taken of the welfare of any child born as a result, and of any other child who may be affected by

[11] re TT (Surrogacy) [2011] EWHC 33 (Fam); [2011] 2 FLR 392

[12] HFEA Code of Practice 8th Edition April 2015

the birth[13] and in accordance with the code of practice. The clinic can refuse treatment in appropriate cases, but must act fairly. In the case of a surrogacy arrangement, the clinic should assess both those commissioning the surrogacy and the surrogate (and her partner if she has one) in case there is a breakdown in the surrogacy agreement. In practice such assessments lack the rigour of full best interests or adoption assessments. Further, the clinic should ensure that all those involved have information about legal parenthood, parental orders and the fact that arrangements are unenforceable. They should be encouraged to seek legal advice and offered a suitable opportunity to receive proper counselling about the implications.

2.4 In addition, the storage and use of human gametes is regulated by the HFEA 1990 and licenced by the HFEA, this includes screening for medical conditions etc. Again, this is only possible within a licenced clinic.

2.5 Surrogate

(a) Use of her egg and / or her husband's sperm
Subject to the welfare assessment, counselling and other screening by the clinic, there is no bar to either the use of the surrogate's egg or her husband's sperm, provided that in the case of the former the intended father's sperm is used, and the latter, that the intended mother's egg is used.

(b) Age
Again, subject to the welfare assessment, counselling and other screening by the clinic, there is no age bar. However, given that upon the making of a Parental Order, the court must be satisfied that the surrogate mother (and her husband / partner if applicable) has *"freely, and with full understanding of what is involved, agreed unconditionally to the making of the order"*[14] and that the applicants must be over 18, it is highly unlikely that the surrogate herself will be under 18. There is no upper age limit.

(c) Couple Status
There is no requirement that the surrogate should be part of a couple / single. If she is married or in a civil partnership, it is possible that her husband / partner will be the 2nd legal parent of the child at birth and if so, his / her consent to the making of a Parental Order will also be required[15].

(d) Former pregnancy or child

[13] Mandatory requirements 8A
[14] s54(6) HFEA 2008
[15] s35/ 41 and s54(6) HFEA 2008

In practice it is likely that most surrogates will have children of their own. However, this is not a requirement and in the case of DIY surrogacies there is of course no guidance or regulation.

(e) Medical indications

Sperm, eggs and embryos donated through a licenced clinic must be medically screened and sperm and embryos will be quarantined for 6 months. The HFEA Code of Practice Guidance requires the clinic as part of its welfare assessment prior to treatment, to have regard to medical history where this indicates a child is likely to suffer from a serious medical condition. Clearly this will not apply where the surrogacy is unregulated.

(f) Residence

It matters not where the surrogate mother resides. The surrogacy and birth can take place outside the jurisdiction, however who is a parent will be determined by HFEA 2008.

(g) Others

As per paragraphs 2.2 and 2.3 above, the clinic must ensure a welfare assessment is carried and the appropriate advice and counselling offered. If not satisfied, it may refuse treatment.

2.6 Intended parents

(a) Use of their egg and / or sperm

The gametes of at least one of the intended parents must have been used in order to satisfy the requirements of s54 for a Parental Order. Although in theory it may be possible to adopt a child born to a "surrogate" where neither commissioning / intended parent has a genetic connection to the child, in practice this is unlikely and indeed it may be that the arrangement gives rise to criminal offences under the Adoption and Children Act 2002.

(b) Age

The only age requirement is that at the time of making a Parental Order both applicants must have attained the age of 18[16]. However, where a UK licenced clinic is used, it will have to undertake a welfare assessment in relation to any child who may be born as a result, in advance of treatment (which it may then refuse in light of that assessment). The HFEA guidance requires the clinic to consider factors likely to cause a risk of significant harm or neglect to any child who may be born, and to consider past or current circumstances that are likely to lead to an inability to care throughout childhood, including mental or physical

[16] s54(5)

conditions[17]. While it is unlikely that age per se would be a bar, there may be circumstances where the general health, age and lack of social support etc may be such that it seriously impairs their ability to care for the child throughout childhood.

(c) Couple Status and sexual orientation

Parental Orders can be made in favour of married or unmarried couples, whether of opposite or same sex. But if neither married nor civil partners, they must be living as partners in an enduring family relationship and are not within the prohibited degrees of relationship to each other e.g. siblings, parent / child [18]. Applications for Parental Orders can only be made by a couple, although where one of them has died prior to the making of an order, the court has power to make the order in favour of both i.e. also naming the deceased applicant[19]. Surrogacy agreements are unenforceable but save in respect of commercial surrogacies, are not illegal. While there is nothing to prevent a single person entering into a surrogacy arrangement, the intended parent cannot apply for a Parental Order and there may be difficulties recognising them as legal parent (e.g. if the intended parent is female or if male, the surrogate is married) and /or applying to adopt the child[20].

(d) Former pregnancy or child

This should not present difficulties save that a licenced clinic must have regard to any impact upon an existing child in its welfare assessment (see above).

(e) Medical indication - See above for surrogate.

(f) Residence

There is no requirement that the intended parents must be resident in the UK. However, it is a requirement for the making of a Parental Order pursuant to s54 that at the time of the application and the making of the order, either or both applicants must be ***domiciled*** in the UK, Channel Islands or the Isle of Man[21]. Domicile should not be confused with residence and provided at least one of

[17] HFEA Code of Practice 8.10

[18] s54(2) HFEA 2008

[19] A v P [2011] EWHC 1738; [2012] 3 WLR 369

[20] In B v C v D v A [2015] EWFC 17, the surrogate mother was the mother of the child's biological and intended father – also the sole commissioning parent. Parental orders not being available to single applicants, he had to adopt his child. This was only possible because he was a "relative" of the child – in law the child's brother. Had this not been the case, he and his parents would have been guilty of a criminal offence in arranging the adoption of a child, s92 & s93 Adoption & Children Act 2002

[21] s54(4) HFEA 2008

the applicants meets the domicile requirement, they may reside outside the UK, Channel Islands or the Isle of Man[22].

(h) Others

S54(3)HFEA 2008 requires that the application must be brought within 6 months of the child's birth. However it is now accepted that applications outside the time limit may be allowed[23].

It is also a requirement that at the time of the application and the making of the order the child 's home must be with the applicant[24].

Commercial surrogacy agreements are of course illegal in the UK, however this does not prevent the court granting Parental Orders where such agreements have been entered into (in practice outside the UK) but the court must authorise *"money or other benefits (other than for expenses reasonably incurred)"*[25].

3. Contract

This is not applicable. *"No surrogacy arrangement is enforceable by or against the person making it*"[26].

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29 April 2015

[22] re Q (A Child) (Parental Order: Domicile) (also known as CC v DD) [2014] EWHC 1307; [2015] 1 FLR 704 – British-French applicants living in France
[23] re X (A child) (Parental Order: Time Limit) [2014] EWHC 3135; [2015] 2 WLR 745; [2015] 2 WLR 745
[24] s54(4) HFEA 2008
[25] s54(8) HFEA 2008
[26] s1A Surrogacy Arrangements Act 1985

From Baby M to Baby M(anji): Regulating International Surrogacy Agreements

International Academy of Matrimonial Lawyers, London Surrogacy Symposium

Dr. Yehezkel Margalit
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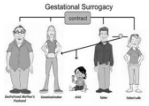
Why Do We Need International Regulation?

- Profound moral and ethical concerns (similar to bio-technologies).
- Collective responsibility of international community to prevent surrogate coercion.

2

Why Do We Need International Regulation?

- Global issues require global, rather than unilateral, solutions.
- Social justice - Since it transcends geographic and cultural boundaries, regulations would more effectively promote social justice.
- Administrative cooperation needed to prevent discrimination against children born to surrogates.



3

What Can be Done a Priory to Properly Regulate?

1. Fully permit international surrogacy.
2. Full ban and/or criminalization of international surrogacy.
3. Allow and encourage the use of domestic surrogacy.
4. International or domestic regulation of international surrogacy.
5. Propose a Hague convention on international surrogacy.

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What Can be Done a Priory to Properly Regulate?

The focus of this article will be on the desirability of a long term Hague convention on international surrogacy. The article also advocates for the adoption of supplemental domestic regulation to counteract some of the limitations of an international Hague convention.

Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, THE JOURNAL OF LAW & POLICY (2016, forthcoming)

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Proposing a Hague Convention on International Surrogacy

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

"To secure the recognition in Contracting States of adoptions made in accordance with the Convention."

"An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States…"

Articles 1 c) and 23 of the Hague Convention on Intercountry Adoption

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Proposing a Hague Convention on International Surrogacy

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

a. the Central Authority of that State has ensured that the prospective adoptive parents agree;

b. the Central Authority of the receiving State has approved such decision…

c. the Central Authorities of both States have agreed that the adoption may proceed…

Article 17 of the Hague Convention on Intercountry Adoption

HAGUE ACCREDITED

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The Objectives of the New Hague Convention

The convention will have the following objectives:

- To protect the welfare of the child born as a result of such agreements, *inter alia*, by:

a. **Appointing a local guardian** who would be legally responsible for caring for the baby until he/she is surrendered.

b. **Issuing emergency travel certificates** by the receiving country so that the child may remain with the parents while the matter is pending in court.

c. **Allowing entry visas on a humanitarian basis** or by court decisions.

Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, THE JOURNAL OF LAW & POLICY (2016, forthcoming)

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The Objectives of the New Hague Convention

- To establish a system of cooperation amongst signatory countries to ensure that the respective authorities work together to uphold the objectives of the convention;
- To establish a system by which the agreements approved in accordance with the convention receive recognition and parenthood rights are honored in member states;

Margalit, ibid

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The Objectives of the New Hague Convention

- To establish internationally centralized bodies that will have the duty to:
  a. approve surrogacy agreements **prior** to their inception and to ensure, **ex ante**, that the child is given a nationality upon birth;
  b. obtain consent from the foreign intended parents' government/Central Authority before proceeding with ART procedures;
  c. oversee the organizations and clinics involved in arranging and conducting the procedures and ensure against the improper payment of money in excess of the reasonable expenses.

Margalit, ibid

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Possible Drawbacks of a New Convention

- Critics: the Hague Adoption Convention does not sufficiently guard against abuse.
- It is unlikely that this matter will be addressed by convention given the diverse attitudes and even hostility to commercial surrogacy, which exists in many countries, as opposed to adoption that is universally recognized.
- Surrogacy requires regulation in so many areas of law that any convention will be unlikely to achieve the necessary political support.

Margalit, ibid

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Possible Drawbacks of a New Convention

- A new regime will require a long-term renegotiation of the meanings of filiation, its significance for citizenship etc.
- Further delays may be caused by the time it takes for a Contracting State to implement the Convention.
- Stateless surrogate children may still be born in states that are not parties to the proposed convention.

Margalit, ibid

12

The Israeli Perspective

State of Israel
Ministry of Health
משרד הבריאות, ישראל

- In Israel, an approval committee must be petitioned to approve each domestic surrogacy agreement.
- The Committee should make sure the agreement was obtained through informed consent and free will, that there is no foreseeable harm and that the agreement does not deprive any of the parties' rights.

Margalit, ibid

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The Israeli Perspective

State of Israel
Ministry of Health
משרד הבריאות, ישראל

- Israeli model: the only country with a Central Authority that resembles the Adoption Convention's model.
- Central Israeli Authority should apply its own standards, similar to the Adoption Convention's standards.

Margalit, ibid

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Additional Domestic and Unilateral Regulation

1. Therefore the committee hopes that international surrogacy will be regulated in the future by an international convention, such as exists for inter-country adoption...

2. **In the domestic sphere of Israel** - the committee recommends that Israel regulates the manner in which surrogacy carried out outside of Israel is recognized. A track should be established which guarantees, even if not fully, preservation of the rights of women who are surrogates.

The Public Commission for Revision of the Legislative Regulation of Fertility and Childbearing in Israel 68 (the Mor-Yosef Commission) (May, 2012), http://www.health.gov.il/PublicationsFiles/BAP2012.pdf.

15

Additional Domestic and Unilateral Regulation

a. An inter-ministerial committee will recognize clinics abroad, based on an examination of documents relating to its medical facilities, and on consideration of…conditions provided to surrogates under the agreements.

b. Recognition will be given after ascertaining that the law of the country permits and recognizes surrogacy.

c. Surrogacy under the conditions laid forth in this track will ease the requirements for recognition of the parenthood thereof and entry into Israel.

The Mor-Yossef Commission, p. 68-69

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Additional Domestic and Unilateral Regulation

17 IV No person shall implant a fertilized egg into a surrogate mother, outside of Israel, unless in a certified clinic and in the framework of a surrogacy agreement outside of Israel made through an approved intermediary or by an independent agreement approved by the advisory committee… and under the terms of the agreement.

17 X(A) The child will be considered the child of the intended parents for all intents and purposes and not the child of the surrogate mother…

(B) The child can be taken out of the said country.

Memorandum of Surrogacy Agreements Law (approval of agreement and status of newborn) (Amendment - definition of intended parents and agreements made outside of Israel), 2014

17

Additional Domestic and Unilateral Regulation

17 XV(B) An approved intermediary will carry out its activities under this chapter in good faith, integrity and under the full provisions of the law, while ensuring the best interests of the parties to the external surrogacy agreement and the welfare of the child to be born as a result of the agreement and respecting the basic rights of all parties involved, including those recognized in international law

Memorandum of Surrogacy Agreements Law (approval of agreement and status of newborn) (Amendment - definition of intended parents and agreements made outside of Israel), 2014

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What next?

The legal and ethical dilemmas involved in such international agreements are far more complicated than domestic surrogacy agreements, as was reflected in the cases of baby Manji and baby Gammy. Since this is a transnational phenomenon and problem, it requires an international regulatory solution and the cooperation of the international community.

Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, THE JOURNAL OF LAW & POLICY (2016, forthcoming)

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What next?

Indeed, given the various pitfalls of international surrogacy, the Hague conference, at its March 2015 meeting, should move expediently to facilitate a Hague convention on international surrogacy in a manner consistent with the proposals contained in this article. In the short run, however, due to the complexity of such regulation coupled with the time it will take for any such regulation to become effective, there is a parallel need for domestic unilateral regulation in various countries.

Margalit, ibid

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What next?

Such regulation can be modeled after Israeli legislation. This dual process of achieving a long term international convention while simultaneously advancing domestic regulation will help address the risks and pitfalls of international surrogacy, and thereby protect the thousands of parents and surrogates who will utilize international surrogacy in the future, as well as the resulting children.

Margalit, ibid

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She is also Professor of Family Law at the University of Louvain and the University Saint-Louis – Brussels. She has been Editorial director or codirector of various books, e.g. on surrogacy (*La gestation pour autrui : vers un encadrement ?*, sous la direction de G. SCHAMPS et J. SOSSON, Bruxelles, Larcier, 2013). She published various articles on surrogacy in Belgian and international surrogacy law (see namely « La jurisprudence européenne et la gestation pour autrui », *Journal du droit européen*, 2015 ; with G. WILLEMS, « Légiférer en matière de gestation pour autrui : quelques repères de droit comparé et de droit international », in *La gestation pour autrui : vers un encadrement ?*, sous la direction de G. SCHAMPS et J. SOSSON, Bruxelles, Bruylant, 2013, pp. 239-286).
She also takes part to international researches on this topic.

BELGIAN LAW

Jehanne SOSSON
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Introduction

a. Legal system and evolution about surrogacy

Belgium does not currently have a specific legislation on surrogacy. So no legal conditions are fixed.
But in practice, there are various cases of non-profit surrogacy operated by some clinics do exist in Belgium.
There are currently discussions in the Parliament about the possibility of adopting a law about surrogacy.

b. Vocabulary : distinction traditional / gestational surrogacy ?

Distinction can be made (see below).

1. Access conditions : surrogate and intended parents

When a surrogacy is operated in a Belgian clinic, each clinic fixes its conditions as there is no legal framework.

Most of the time, both parents have a genetic link with the child, but surrogacy with donation of ovocyte or sperm is also possible on a case-by-case basis. Most of the time also, the surrogate is a parent or a friend of the intended parents : clinics favour “relational surrogacies”.

For the moment, mostly heterosexual couples seem to have access to surrogacy, as medical indications of sterility of the intended mother or her incapacity to complete a successful pregnancy are set by hospitals that accept those demands. But some surrogacies for homosexual seems to be reported.

Non Belgian intended parents are accepted (namely French couples).

2. Contract

A surrogacy contract is considered as void because its object is considered to be in opposition to general law principles such as the non-availability of the human body and the invalidity of a contract concerning a person. Consequently, as a void contract cannot be enforced, a surrogate mother (being or not the genetic mother of the child) cannot be forced to give the child after its birth.

3. Parentage

If all parties respect the (void) contract, and if the surrogate mother gives the child to the intended parents, the parentage with them has to be established by affiliation and/or adoption, because, in the absence of a specific legislation, the general rules determining maternal and paternal parentage apply: the surrogate, even if she has no genetic relation with the child, will be considered as the legal mother, as the name of every woman who gives birth to a child has to be written in the birth certificate (article 312 Belgian Civil Code). If the surrogate is married, her husband will be automatically considered as the legal father (presumption of paternity, article 318 Belgian Civil Code). If the surrogate is not married, the intended father can acknowledge the child if the surrogate agrees (in this case, only the intended mother will have to adopt the child).

Belgian Courts generally agree to pronounce full adoptions after surrogacy as most of them consider that this adoption fulfils the legal requirement for an adoption to be granted, namely being based on "fair motives" ("*justes motifs*", article 344.1. Belgian Civil Code) and respecting the best interest of the child. Case law shows that, after being more restrictive (notably in a case where the surrogate was the genetic mother of the child), most of Belgian Courts now consider in domestic cases (surrogacy taking place in Belgium between a surrogate mother and intended parents of Belgian nationality) of non-profit surrogacy, that adoption can be granted. In opposite, in 2012, the Court of Appeal of Ghent refused to grant the full adoption requested because it appeared that the adoption dissimulated the buying-selling of a child (the surrogate had received 1,600 euros per month during the pregnancy, which exceeds, for the Court, the normal costs of a surrogacy) and considered that for-profit surrogacy is contrary to the human dignity; as a consequence, the Court considered that the adoption was not based on "fair motives", and that the *de facto* relationship established between the child and the adoption candidate did not thwart this analysis.

The adoption procedure is organised according to the classic rules governing adoption in Belgium. A full adoption has the effect to make all legal links with the surrogate (and, if so, with her husband) disappear and to allow the child to acquire Belgian nationality as it can be attributed on the basis of the nationality of the father, the mother or the adopting parent (article 8 of the Belgian Nationality Code).

4. Relationships

As "relational surrogacies" (surrogate being a sister, a friend…) are favoured by Belgian clinics, relationships exist between the surrogate and the intended parents and potentially the child.

5. Recognition of foreign surrogacies

International cases of surrogacy, i.e. surrogacy taking place abroad, especially in Ukraine, India or the United States, lead to more technical difficulties.

A. Difficulties may arise regarding delivery of passports for the child or travelling papers. Belgian diplomatic authorities currently may refuse to deliver the proper papers for travelling with the child in case of surrogacy abroad. In this case, an interim Court's decision may be

necessary to obtain them (except for the U.S.A., where the child can travel with American papers due to his American nationality).

B. When the child is in Belgium, parentage with the intended parents as established by the birth certificate or following a Court order in the country where the surrogacy took place and where the child is born, is most of the time recognised by Belgian authorities, either directly by the Registrar Officer, either after a Court order, based on article 23 and 27 of the Belgian International Private Law Code. Case law evolves recently to recognition by this way of affiliation links with heterosexual parents or even with one parent of homosexual couples, even if some Courts in first instance still try to oppose "public order" to deny recognition.

C. Intended parents, if not directly recognised as parents, can adopt the child. Belgian Courts generally consider such an adoption to be in the best interest of the child, even if it take place after a void contract. This possibility could be actually considered as more problematic after a commercial surrogacy.

SURROGACY AND ART IN ARGENTINA. THE SURROGACY "MARKET" IN LATIN AMERICA

1. Surrogacy and ART in Argentina
1.1. The surrogacy framework that was not included in the Civil Code
1.2. The new Civil Code and ART
1.2.1. ART and Filiation in the Civil Code
1.2.2. Birth Certificate
1.2.3. Consent in the assisted human reproduction
1.2.4. Donor System in Argentina
1.2.5. LGBT and ART
1.2.6. Cross border surrogacy
1.2.7. Jurisprudence
2. Latin America and Surrogacy: a new market for surrogacy that leaves children in a real legal limbo

1. Surrogacy and ART in Argentina

Congress approved a new Civil Code in Argentina that will be effective in August 2015. However, the Civil Code does not regulate surrogacy as it was supposed to be.

1.1. The surrogacy framework that was not included in the Civil Code

There were some rules concerning surrogacy that are not included in the new law. The rules contemplated not only the intended parents, the gestational gestational carrier, the free consent in the assisted reproductive technologies (ART), but also the surrogacy agreement between the gestational carrier and the intended parents. The prior, free and informed consent of the people involved in the surrogacy was also considered. A special law had to regulate the main rules of the Civil Code.

The filiation of a newborn took into account:
The intended parents, the gestational carrier and the free consent duly approved by a Court.
A Court was supposed to approve the surrogacy agreement only if, in addition to the rules provided by a special law, it was proved that:

I. The surrogacy was done in the best interest of the child to be born;
II. The gestational carrier was in her legal capacity and in good physical and mental health condition;
III. At least one of the principals had provided its gametes;
IV. The principals could not conceive or carry a pregnancy to term;
V. The gestational carrier had not provided her gametes;
VI. The gestational carrier had not received money for the surrogacy agreement
VII. The gestational carrier had not been subjected to a surrogacy process more than two (2) times;
VIII. The gestational carrier had given birth at least one (1) child.
IX. IVF Centers were required prior court approval in order to deal with surrogacy.

Unfortunately, even if Argentina is a secular country, the pressure of the Catholic and the Vatican was so strong that surrogacy was not considered in the New Civil Code under the promise that a special law would regulate it. The special law is not draft until now.

1.2. The new Civil Code and ART

The techniques of human reproduction are now recognized as a source of filiation in the Civil Code and surrogacy can find legal grounds there together with court decisions.

We can say that surrogacy is now better than it was a couple of years ago. The Argentine Constitution provides that the private actions done by any person that do not offend the public order or the morality, or injure the rights of a third party are only reserved to God and are exempted from the authority of the judges. Nobody in Argentina shall be obliged to do what the law does not request or shall be deprived of what it is not forbidden. (Art. 19.)

The Convention on the Rights of the Child in its article 3 provides that all actions concerning children should have as their main consideration the best interest of the child. Article 7 in its first paragraph also indicates that any child shall be registered immediately after birth and shall have from it, the right to a name, to acquire a nationality and, as far as possible, to know their parents and to be cared for by them. Article 8 paragraph 1 indicates that the States that signed the Convention undertake the duty to respect the rights of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Paragraph 2 establishes that when a child is illegally deprived of some or of all the elements of their identity, the States Parties shall provide appropriate assistance and protection with a view to re-establishing speedily his or her identity. The Pact of San Jose, Costa Rica in Article 17 also states that the family is the natural and fundamental group unit of society and it is entitled to protection by the society and the State.

1.2.1. ART and Filiation in the Civil Code

The filiation through assisted reproductive technologies implies a radical change in the law. The Civil Code recognizes that filiation can also take place by ART. (Civil Code, article 558.)

The assisted reproductive technologies are based on an act derived from medical science and, consequently, are volitional, regardless of who provided the genetic material. The Civil Code in this way complements the norms with the law 26,862, and with the Murillo leading case of the Inter-American Court of Justice that decided that the embryo was not a person but property. State cannot forbid this kind of practices in ART.

The techniques of assisted human reproduction currently practiced can be classified as follows:

I. Low complexity techniques: Those procedures where the artificial insemination is done without general anesthesia, depending on where the sperm is inoculated; in the bottom of the vagina, cervix, or through intraperitoneal fluid in the uterine cavity;
II. High complexity techniques: In this category, we refer to the in vitro fertilization (IVF) with all its variants, which involve a highly complex process that requires highly specialized laboratories in which the egg is fertilized in a womb, through extraction by surgical methods.

Today we can say that a newborn may be conceived by assisted reproductive technologies in the following cases:

I. A man and woman married or not; two women married or not; a woman with implantation of an embryo in her womb. The embryo may be completed with egg donation, sperm donation or both of them; or maybe there could be an embryo donation.
II. Following events are subject to court decision in the absence of specific regulation: Two men married or not; a man; the cases in paragraph 1 when the embryo is provided by the intended parents, with or without sperm, egg donation, even in the case of embryo donation but when the embryo is to be transferred and gestated by a third woman—a gestational carrier—who does not provide any genetic material for the conception.

1.2.2. Birth Certificate

Article 559 of the Civil Code rules that the Office of Vital Records and Statistics should not issue birth certificates indicating whether the person was born because of assisted reproductive technologies.

1.2.3. Consent in the human assisted reproductive technologies

Before dealing with any embryo transfer or embryo gamete/donation, the medical institution must obtain a prior, free and informed consent of all the persons submitted to the use of assisted human reproduction techniques. This consent must be renewed each time the gametes or embryos are used again. (Civil Code, article 560.)

According to law 26,862 the consent may be revoked if there was no conception in the woman or in the implantation of the embryo.

Law 26,862 provides that written consent must be notarized. In this regard, article seven of Decree 956/2013 rules that consent and its revocation must be documented in the medical record with the signature of the person expressing its will.
Law 26,529 stipulates patient rights in relation to health institutions and professionals, and the provisions of law 25,326 rule the data protection of the donor to guarantee anonymity, with the exceptions of article 564 of the Civil Code.

Under article 562 of the Civil Code, the children born by assisted reproductive technologies are children of the man/woman who gave birth and of the man or woman who has given his or her prior consent. Under articles 560 and 561, the registration of the birth in the Office of Vital Records and Statistics, is done regardless who provided the gametes.

Filiation by ART is indestructible and irrevocable.

As a general principle, out of wedlock filiation is determined by the recognition, by the prior, free and informed consent to the use of assisted reproductive technologies, or by court decision. (Art. 570.) Within wedlock, the presumption is that children born during wedlock and up to 300 days after the divorce or annulment was filed in court, separation or death, if the child was conceived by techniques of assisted reproductive technologies with a prior, free and informed consent, then it is a child of the married mother and father. (Art. 566.)

The nature of the presumption, which becomes rebuttable, makes sense. It means that contesting paternity can be proved.

No action or claim contesting paternity or filiation is acceptable if the parents agreed to conceive a child by using assisted reproductive technologies.

1.2.4. Donor System in Argentina

The law grants the most protective value to such filiation. Information about egg or sperm donors can be allowed by a court decision only in some extraordinary and exceptional situations. The idea is to preserve the effectiveness of the donor system to avoid the possibility that the child claims paternity because it will decrease the number of gamete donors, whose contribution is necessary to carry out these procedures.

The person born by assisted reproduction techniques has the right to know that. The information regarding the person born by the use of assisted reproductive technologies with gametes from a third party must be included in the file when the birth is registered. (Civil Code, article 563.)

1.2.5. LGBT and ART

Argentina does not discriminate between sexual orientation and the right to build a family.

The free consent is based on the freedom, where one or two individuals, either homosexual or heterosexual, agree to assume parental responsibilities about the child, regardless the source of the gametes used to create the embryo.

1.2.6. Cross border surrogacy

Filiation using assisted human reproduction techniques from other country will be recognized in Argentina considering the public order principle, specially the best interest of the children. (Civil Code, article 2364.)

1.2.7. Jurisprudence

Courts have ordered the issuance of a birth certificate for a newborn from a surrogacy process.

The Judges in Argentina are very concerned about the child, the consent of the intended parents, the gestational carrier, and the way legal representation was granted before a Public Notary. The gestational carrier is always asked the way she met the intended parents, the relationship between them and the way the gestational carrier's family and principals' family faced the surrogacy, especially concerning the children.

Some judges want to know whether the gestational carrier received any money from the intended parents; however, there is not any punishment for doing that. Judges are interested in the gestational carrier's health and the compensation she received. Their main concern is the newborn, its real identity and its family, which in fact are the intended parent that wanted to have a child. [1]

[1] Cases nn por inscripción de nacimiento. National Civil Court 86. 19-06-2013. MJ-JU-M-79552-AR. B. M. A. c/ F. C. C. R. 19-11-2013. MJ-JU -M-83567-AR

The truth must prevail over everything in order to make the legal filiation be coincident with the real one. Parents should also undertake the commitment to tell their children about their pregnancy and birth.

Judges acknowledged that there is still no legal regulation to enable or forbid surrogacy.

The main factor in determining the parenthood of those children born through assisted human reproduction techniques is the free consent of the intended parents and the gestational carrier in the process.

In some cases, it was required to issue the birth certificate under the name of the intended parents even if there was an egg donation, thus avoiding the issuance of a first birth certificate under the name of the gestational carrier.

However, in other cases, a first birth certificate was issued under the name of the gestational carrier and the intended father. After that, it was required in court a rectification of the birth certificate, changing the name of the gestational carrier or eliminating it by the real father/mother, under the grounds of the best interest of the child and the free consent of all parts involved, together with a DNA and all medical and psychological reports.

The Supreme Court of Buenos Aires, in a recent case (March 2015) decided that the principle of transparency must prevail in the determination of filiation, that is, the search for the truth with extreme responsibility and cooperation of the litigants, avoiding obstacles to arrive to said transparency. It is considered that truth has to serve first to the person who has the right to know his or her origin, and that the society has the right to know the real status of a person. [2]

2. Latin America and Surrogacy: a new market for surrogacy that leaves children in a real legal limbo

The State of Tabasco in Mexico is the only state that includes some rules concerning surrogacy in the Civil Code.

Brazil and Uruguay only allow surrogacy with relatives inside the family circle, so no other type of surrogacy is allowed.

Peru, Chile, Paraguay, Venezuela, Colombia, Ecuador and Bolivia in South America, have no surrogacy laws. Central America has the same situation.

However, I must affirm that in Argentina and other countries such as Peru and Colombia, the surrogacy process is hidden as a natural birth. Therefore, motherhood and filiation are contested in court.

Nevertheless, most of the cases occur in a “black area”, not even a “gray area”. The intended parents want to become parents at any price. They do not consult any responsible ART lawyer, and if they

[2] C. 116.430, "P.M. G. contra M.G., J.M. Filiación". 15-3-2015. SCBA

do, they do not follow the legal advice received. The gestational carrier needs money and she only cares about that, so she offers to carry a baby in Facebook, Twitter, special blogs and landing pages. There is an IVF Clinic that carries the process and makes the intended parents and the gestational carrier sign documents as if the gestational carrier received an embryo donation.
The worst irresponsible part of this kind of surrogacy is carried by the hospital where the birth will have place, together with the doctors who assist the birth of the newborn.

In some cases, the birth is registered as if the intended mother had the baby and the gestational carrier never existed, even if the embryo was created with an egg donor. After that, the document in the IVF clinic disappears and we have a newborn that will have to face that he or she came to this world in the worst way, with professionals hiding the truth and only thinking about making money.

The worst situation I know so far is the one I listened to from a client who sought legal advice, a concerned a woman from other country than Argentina. She had rented her womb to a homosexual couple in Argentina (two men). The embryos were transferred in Buenos Aires. After that, the couple decided to give up the process, but the gestational carrier was already pregnant and she did not know what to do with the baby to be born. The gestational carrier knew a new couple in Internet, so she offered the baby to another homosexual couple. The new couple agreed, as it were a "pizza delivery" and the gestational carrier gave birth in Argentina. The baby was registered with the gestational carrier as the mother and the father was one of the men from the homosexual couple, who recognized the baby as his son.

The gestational carrier returned to her country and she said that she had signed some documents in a Notary in Argentina where she understood that she had relinquished her right as a mother.

The real situation is—if the gestational carrier said the truth—that by fishing a new customer for surrogacy in Internet, we have a baby who will never know his or her real origin. The father and mother that appear in the birth certificate are not the real parents.

It would be advisable either to allow or to forbid surrogacy, but not to let this issue in a gray area. In my opinion, if the State considered money compensation for the gestational carrier as a salary, then nobody would have to hide what has been paid or not to the gestational carrier. This way, it would be more transparent for everybody. It would be regulated by law. The gestational carrier, the baby and the parents would have all the guaranties they lack today. It is necessary that the State authorizes an amount of money that the surrogate will receive. In fact, if a baby-sitter is paid for her services why not compensating the gestational carrier, in some way she is also a baby sitter. The amount to be paid could be a salary similar to a baby-sitter plus all guarantees, such as health insurance and life insurance during and after the surrogacy process.
We cannot deny surrogacy is growing up. It is important to rule surrogacy first in each country, after that it would be easier to recognize surrogacy decisions done in other countries, and it would avoid giving up babies, in a legal and factual limbo.

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Away from the office, Rich is a proud advocate for LGBT equality and gay and lesbian parenting and the Family Equality Council and provides community service in the medical, health and wellness

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ABA Position Paper
Regulation of International Surrogacy Arrangements

Executive Summary

Issue

Recent advancements in medical technology have enabled the expansion of third-party assisted reproduction (surrogacy) for infertile couples and single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and the resulting child may be uncertain. Situations where "stateless" children were born through international surrogacy arrangements have prompted a discussion about whether a Hague Convention on International Surrogacy is needed.

Background

The Hague Conference on Private International Law's Council on General Affairs and Policy is currently engaged in research to determine how to effectively address the issues posed by international surrogacy arrangements. Of greatest concern are situations where the legal parentage, nationality, and immigration status of the child born through international surrogacy is unclear due to conflicting national laws governing these matters. Of additional concern are the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of women.[1]

ABA Position

[1] In one of the first published articles addressing the issues that sometimes result from international surrogacy arrangements, Dr. Katarina Trimmings and Prof. Paul Beaumont of the University of Aberdeen School of Law, through a grant by the Nuffield Foundation, have developed a framework for a Hague Convention on International Surrogacy, largely modeled on the Hague Convention on Adoption. The framework proposed by Trimmings and Beaumont calls for national and international regulation of international surrogacy arrangements. While the proposal calls for flexibility for the scope of regulation at the national level to be decided by each nation, several recommendations are proffered, including: evaluation of the parental fitness of the intended parents, reliance on the "best interest of the child" doctrine, the requirement of a biological connection between intended parents and the child, and guidelines for compensation of the surrogate and gamete donors.

While the ABA fully supports the notion of an international convention concerning international surrogacy, the ABA feels that the appropriate focus of an international convention should be on the conflict of law and comity issues that arise in international surrogacy rather than on regulating the industry itself. Any such convention should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying the existing Hague Convention on Adoption to an inapposite set of legal circumstances. The Hague Conference itself has acknowledged that the existing adoption convention may not suitable to address the issues raised by international surrogacy.[2] No convention at all would be preferable to applying an adoption model to surrogacy. Rather, a collective international approach to reconciling different ways of viewing and implementing the distinct and unique process of cross-border surrogacy should be developed. The ABA believes that conflict of laws and comity should be the cornerstone of such a collective international approach.

The ABA's position is:

1. **Surrogacy is most closely analogous to natural procreation.**

   The ABA recognizes that individuals in all countries procreate naturally without excessive regulatory interference. Surrogacy is a form of procreation through the use of assisted reproduction. The legal position of intended parents creating their own offspring through a surrogacy arrangement should be viewed as distinct from the legal position of adoptive parents seeking to raise someone else's existing child as their own.

2. **Surrogacy and adoption are different processes and should not be conflated.**

   The ABA recognizes that surrogacy and adoption are separate and distinct solutions for people to achieve parenthood. Surrogacy is a medical solution to infertility, whether the infertility is physiological or social (based on relationship status), and is, therefore, a method of reproduction. Adoption is the transfer of legal responsibility over an existing child from one party (or the state) to another. All societies permit adoption, while many jurisdictions ban gestational surrogacy in one way or another. Regulating these two processes in similar fashion is inappropriate.

3. **Different processes ought to be regulated differently.**

   The ABA is concerned that an approach to regulating surrogacy that is substantially equivalent to adoption regulation will frustrate intended parents' right to reproduce. The state appropriately exercises great care in adoption process, as this process concerns an existing citizen child. The state does not, however, have a role in

[2] Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Preliminary Document No. 11 of March 2011 for the Attention of the Council of April 2011 on General Affairs and Policy of the Conference, p. 21, Para. 40(e) (Mar. 2011), available at: http://www.hcch.net/upload/wop/genaff2011pd11e.pdf.

regulating so-called "natural" reproduction, as this would be an offence to the right to reproduce. The state concern in the surrogacy process is to ensure that the rights of the parties involved are upheld. Any regulation of surrogacy should be viewed in this context.

4. <u>Establishing Central Authorities to oversee surrogacy arrangements is opposed.</u>

The ABA is concerned that establishing Central Authorities to regulate surrogacy is likely to lead to:

- Increased interference with intended parents' ability to reproduce;
- Increased risk of discrimination in the surrogacy process;
- Decreased flexibility/freedom to contract for all parties (surrogates and intended parents);
- Increased cost for intended parents;
- Increased delay for intended parents;
- Decreased transparency and certainty in the process; and
- Increased burdens upon taxpayers

Further, the ABA feels that establishing Central Authorities would not significantly increase in protection for surrogates or children. Such protection is more effectively managed on a scale broader than just within the context of surrogacy arrangements.

5. <u>Discriminatory screening of potential intended parents should not be allowed.</u>

It is a matter of concern that many countries currently discriminate against intended parents who are single, older, disabled, or homosexual in the adoption process. While the ABA supports the principle of screening intended parents for the narrow purpose of suitability to engage in the surrogacy process, the ABA is concerned that screening will be used by many countries to deny their citizens the ability to seek to become intended parents because of their sexual orientation, marital status, or other inappropriate characteristics.

6. <u>Bilateral treaties to regulate international surrogacy arrangements should be discouraged.</u>

The ABA does not believe that, in addition to the proposed Convention, countries on a case-by-case basis should enter into bilateral treaties as to commercial surrogacy. The ABA is very concerned that this will lead to:

- A plethora of disparate treaties;
- which will take many years to negotiate;
- which will be very hard to dismantle if and when a comprehensive multilateral solution is reached; and
- will, in turn, unnecessarily complicate matters and severely reduce legitimate reproductive options currently available.

In sum, the ABA is concerned that these treaties may cause further cost, delay, and heartache to intended parents who choose to pursue surrogacy.

7. **The Hague Conference should be more focused on reducing conflicts of laws affecting intended parents and children born through international surrogacy and encouraging comity.**

   To the extent that the Hague might facilitate a new convention to regulate international surrogacy arrangements, the ABA's position is that the Hague's most effective role is to help the various countries involved navigate the legal conflicts among participating nations. The Hague Conference should assist in developing a framework among nations to allow those nations to navigate the conflict of laws and comity problems that sometimes result from international surrogacy arrangements and thereby avoid the problems of stateless children, conflicting parentage determination processes, and the lack of recognition of those children in the intended parents' home country.

8. **It is not necessary to require a genetic link between intended parent and child.**

   The journey for intended parents who choose to pursue surrogacy is often the journey of last resort. In general, most intended parents pursuing surrogacy seek a child who is their genetic offspring. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, after many years of IVF, a couple may find that the female partner is unable to carry a baby safely to term. The couple may also find that their own gametes are insufficient to conceive after the many delays associated with this process, leading them to turn to donated genetic material. If there is a requirement that this couple must have a genetic link to their child born through surrogacy, they will be denied the ability to reproduce - even if they use genetic material from siblings or other family members. This hypothetical differs only in the use of a surrogate from the cases where children, born to a woman in the context of a marriage, are deemed to be children of the marriage even when donor gametes are used. As long as the parties involved consent to the use of donor gametes, the law in many jurisdictions has long recognized the legal parentage of the intended parents. This recognition should be maintained even in the case where the child is born via surrogacy.

   Further, a requirement for a genetic link to a child born through surrogacy forecloses the possibility of using donated genetic material, including embryos, in the process. Many unused embryos remain stored in cryopreservation; these embryos are an existing source of potential genetic material that could be used in surrogacy arrangements rather than being destroyed.

9. **That the rights of expatriate intended parents must be respected.**

   It is not uncommon that intended parents who are citizens of country A, but living in country B, seek a child through surrogacy in country C. These intended parents must navigate a minefield of regulation to ensure that the child can return to country B but be a citizen of country A. A Convention that focuses on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings (which are

generally required in surrogacy matters) would serve the needs of the expatriate intended parents as well as other intended parents who pursue surrogacy across national borders and the children resulting from these arrangements. Further, by focusing on the conflict of laws and comity problems, the needs of all expatriate parents can be met, not just those expatriate parents who pursue surrogacy.

10. **That any Convention is unlikely to be successful without the accession of both the United States and India, and that the appropriate course is to ensure appropriate regulation in India.**

The United States and India have the largest surrogacy industries. The Indian industry has grown exponentially in the last few years. The ABA understands that the Indian surrogacy industry is now estimated to be worth over $2 billion a year. The ABA understands that the concerns raised at the Hague Conference stem in part because of unstated concerns about the rise of surrogacy in India and other under-regulated surrogacy destinations but also extend to encompass issues of the status of children globally. The issue of under-regulated destination countries is best dealt with not by a Convention but by the passage of appropriate laws in those countries regulating surrogacy clinics and associated entities, such as donor clinics. It is noted that there have been bills drafted to regulate Assisted Reproductive Technology (ART) in India in one form or another since 2008. The various forms of proposed legislation, and the uneven enforcement of existing regulations over the years, have resulted in widespread confusion over the legal aspects of surrogacy in India. Therefore, India and other burgeoning international destinations to pursue surrogacy should be encouraged to regulate their respective ART industries in a transparent manner so that the current uncertainties may be mitigated. Appropriate laws should allow for the protection of children, surrogates, and intended parents so as to maximize standards and informed consent and minimize exploitation.

By contrast, the United States' surrogacy industry is regulated at the state level. There is a wide range of approaches to surrogacy in the United States, from prohibitions (including criminalization) to statutorily defined processes for surrogacy. Further, the professionals (lawyers, doctors, and others) are subject to standards, ethical guidelines, and codes of conduct. Given the various interests at stake (states and professional groups), accession of the United States to a Convention that would regulate the particulars of surrogacy arrangements seems unlikely. A Convention focused on conflict of laws and comity problems could be more successful within our political process.

11. **That human rights abuses are not necessarily inherent in or exclusive to surrogacy arrangements, and, therefore, should be addressed separately from surrogacy arrangements.**

The ABA understands that concern over human rights abuses is part of the impetus of the focus on international surrogacy arrangements at the Hague Conference.

Exploitation of women, trafficking of women and children, and other abuses are often cited by critics of surrogacy. While it is unfortunately true that human rights violations have occurred within the context of surrogacy, violations of human rights do not occur only within the context of surrogacy. Human rights abuses must be addressed on the broad scale internationally and locally: if a woman is trafficked, the human rights violation must be addressed whether the trafficking is for the purpose of surrogacy, sex, forced labor, or any other reason. Regulation of the surrogacy industry for the purpose of reducing human rights violations has the potential to distract from the greater problems of trafficking and exploitation and to unnecessarily and inappropriately stigmatize surrogacy arrangements (and the children born through them).

12. That the fundamental rights, interests, and status of children, both for parentage and citizenship, are also an important concern in the all contexts, including surrogacy.

The ABA believes that protecting the interests and status of children is an important driver in this analysis; however, the ABA also believes it is not appropriate to focus solely on interests of the children to be born in the overall analysis and implementation of surrogacy. Before the intended parents using surrogacy initiate the process, they exist and the child does not. At this point in time, the only interest of the child is whether the child will exist or not. The ABA believes it is better to allow the intended parents to exercise their reproductive rights (in whatever form they may exist from country to country) and consider and protect the child's rights only after it is born through other already existing conventions and protections to prevent them from being trafficked or otherwise harmed or abused. The ABA does not believe parents procreating to have their own offspring should be subject to fundamentally different regulation, governmental authority, or discrimination than parents procreating naturally. Once a child is born of the surrogacy process, the rights and interests of that child are then equally important, but that child's best interests will almost universally be served by establishing the child's legal relationship with the intended parents (who have gone through considerable effort, emotional stress, and expense to have their own child) and recognizing the child as a citizen of the intended parents' home country. The alternative is to place the child with the state or other parents through the adoption process and, possibly, leave the child stateless. This is clearly not in any child'

Discussion

A. INTRODUCTION

Recent advancements in medical technology have enabled the expansion of third-party assisted reproduction (surrogacy) for infertile couples and single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and the resulting child may be uncertain. Situations where "stateless" children were born through international surrogacy arrangements have prompted a discussion about whether some form of international regulation is needed, such as a Hague Convention on International Surrogacy.

The Hague Conference on Private International Law's Council on General Affairs and Policy is currently engaged in research to determine how to effectively address the issues posed by international surrogacy arrangements.[3] Of greatest concern are situations where the legal parentage, nationality, and immigration status of the child born through international surrogacy are unclear due to conflicting national laws governing these matters. Of additional concern is the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of the resulting children and women who act as gestational carriers.

The question, therefore, is how to establish a regulatory framework to help avoid stateless children and exploitation of women. One approach would be to regulate the international surrogacy industry itself. This industry regulation could take the form of a Convention on Surrogacy that establishes rules specifically for surrogacy arrangements involving participants from more than one country. Another approach would be to regulate the acceptance of parentage documents between states. This approach could potentially be accomplished with existing

[3] Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Preliminary Document No. 11 of March 2011 for the Attention of the Council of April 2011 on General Affairs and Policy of the Conference, p. 21, Para. 40(e) (Mar. 2011), available at: http://www.hcch.net/upload/wop/genaff2011pd11e.pdf.

international agreements or through the implementation of new international agreements that are not necessarily specific to international surrogacy arrangements.

Surrogacy itself may not be the real issue. Rather, the uncertainty with these arrangements is a symptom of a more general problem of irreconcilable family and citizenship laws at the international level. It is important to note that these legal issues may arise in cases that do not involve surrogacy.[4] Thus, international regulation focused solely on surrogacy arrangements may be under-inclusive. Rather than focus on the regulation of the international surrogacy market itself, international agreement on the status of children and their assignment of parentage and citizenship would be more helpful to mitigate the issues in this market.

B. OVERVIEW OF THE MARKET

Before examining potential options for a solution to the problems that sometimes occur in the context of international surrogacy arrangements, it may be helpful to examine the parameters of the international surrogacy market.[5] It is undeniable that the commissioning of children through surrogacy – for money – represents a market.[6] Any solution to problems posed by international surrogacy arrangements must take into consideration the underlying market forces at work in these arrangements.

[4] Consider a scenario where a US citizen woman living in the UK with her British husband. If she carries a child conceived with her husband's sperm and a donor egg from another British citizen, US immigration law will not consider the resulting child to be a US citizen should the family decide to relocate to the US.

[5] *"Market"* and related terms are used here deliberately, despite the risk that discussing surrogacy in market terms may conjure up images of human commodification, a frequent criticism of modern surrogacy arrangements. This discussion addresses the market forces that react to regulation, and therefore relies on market terms for clarity.

[6] Kimberly D. Krawiec, *Price and Pretense in the Baby Market, in* BABY MARKETS, 41 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

Although not universally accepted by all countries, the choice to reproduce is perceived as a fundamental human right in some countries,[7] and, without reference to which view a particular country may take on this issue, the desire to reproduce is a powerful force in this market. Modern gestational surrogacy can be seen as a legitimate fertility treatment option for the infertile who wish to reproduce. There are many ways in which people can choose to reproduce, including surrogacy. Surrogacy is often conflated with adoption, but the markets for surrogacy and adoption are distinct. People who choose to pursue surrogacy do not always do so as an alternative to adoption.

Surrogacy has existed in various forms throughout history.[8] When fertility treatment advanced to separate the component parts of conception and gestation, market forces drove the growth of international surrogacy.[9] The international surrogacy market exists for two reasons: barriers to domestic surrogacy or other assisted reproductive options (evidenced by the pursuit of surrogacy in the US by European and other international intended parents), and cost savings (evidenced by the growth of surrogacy in lower cost nations).[10] The overall value of the market is unknown, but a report in 2010 estimated that the value of the surrogacy industry in India alone would reach $2.3 billion by 2012.[11] In order to maximize profits, international surrogacy

[7] Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), ¶ 4, (11 Dec., 1969). Available at: http://www2.ohchr.org/english/law/pdf/progress.pdf; *Meyer v. Nebraska*, 262 U.S. 390 (1923)(finding the 14th Amendment includes right to "bring up children"); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)(declaring compulsory sterilization a violation of fundamental right to procreate).

[8] We can trace certain practices of surrogacy back into biblical times. Genesis 16 and 30 both tell stories of women bearing children for others.

[9] Deborah L. Spar, THE BABY BUSINESS, 85-88 (Harvard Business School Press, 2006).

[10] Richard F. Storrow, QUESTS FOR CONCEPTION: FERTILITY TOURISTS, GLOBALIZATION AND FEMINIST LEGAL THEORY, 57 Hastings L.J. 295, 301 (2005).

[11] Jason Burke, INDIA'S SURROGATE MOTHERS FACE NEW RULES TO RESTRICT 'POT OF GOLD', The Guardian (30 July 2010), http://www.guardian.co.uk/world/2010/jul/30/india-surrogate-mothers-law (last accessed 17 July 2012).

brokers will operate in the countries with the lowest regulatory restrictions.[12] Price is not everything in this market, however, as the intended parents will have their own personal criteria for deciding in which country to pursue surrogacy.[13]

Comparisons between the surrogacy market and the adoption market are frequent, but adoption and surrogacy are not *"so similar that analysis of one can suggest solutions for the other"* as suggested by one scholar.[14] Nor are adoption and surrogacy interchangeable substitutes for all prospective parents – persons seeking parenthood do not always move smoothly and seamlessly between the two options.[15] Adoption affords the adoptive parents the legal right to "parent" someone else's child over whom they would otherwise not possess legal authority; surrogacy affords the intended parents their sole opportunity to "reproduce," thereby creating their own child using, in the vast majority of cases, at least some of their own genetic material. "Parenting" and "reproducing" are two distinct and inherently different processes. Some intended parents will accept solutions to their infertility through either option, but many will be firmly committed to only one or the other. The similarity between surrogacy and adoption rests solely in the fact that a woman other than one of the intended parents gestates the child. Any similarity quickly ends there.

[12] Angie Godwin McEwen, SO YOU'RE HAVING ANOTHER WOMAN'S BABY: ECONOMICS AND EXPLOITATION IN GESTATIONAL SURROGACY, 32 Vand. J. of Transnat'l L., no. 1 (Jan. 1999). *See also* Iris Lebowitz-Dori, WOMB FOR RENT: THE FUTURE OF INTERNATIONAL TRADE IN SURROGACY, 6 Minn. J. Global Trade 329, 334 (1997).

[13] As an example, there remains a strong domestic market for surrogacy in the US despite the potential cost savings for intended parents to pursue surrogacy internationally. Potential explanations for this include the desire of intended parents to participate more fully in the process, and the desire of intended parents to avoid legal complexity and mitigate legal risk. In addition, some intended parents may choose a higher-cost market for surrogacy over a lower-cost market in order to mitigate the very ethical and human rights concerns cited by the Hague Conference.

[14] Iris Lebowitz-Dori, WOMB FOR RENT: THE FUTURE OF INTERNATIONAL TRADE IN SURROGACY, 6 Minnesota Journal of Global Trade 329, 338, (1997).

[15] Kimberly D. Krawiec, *Price and Pretense in the Baby Market, in* BABY MARKETS, 44-45 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

Adoption is a process to transfer parental rights and responsibilities from one or more parties to another party or parties. In adoption, the state responsibility toward the existing child is paramount, particularly where the child is in state custody.

Surrogacy, on the other hand, is a therapeutic option for the infertile, specifically those for whom being pregnant is physically impossible or medically contra-indicated. Surrogacy is a reproductive process where a child is created directly as a result of the actions of the intended parents. Of course, modern surrogacy[16] is achieved through medical intervention.

It is also important to remember that adoption is a generally accepted mechanism to deal with the issue of raising children who (for any number of reasons) have no legal or *de facto* parents, while commercial surrogacy remains a sometimes controversial process that is permitted in certain jurisdictions and banned - or rising to the level of a criminal offense - in others.[17]

Certainly, adoption and surrogacy may be seen as alternate processes to achieve *parenthood*. However, surrogacy may be pursued as a logical extension of fertility treatment that may start when a heterosexual couple fails to conceive "naturally" – beyond achieving *parenthood*, surrogacy achieves *reproduction*. Likewise, the "socially infertile" (such as a homosexual male couple) may have no realistic choice but to pursue surrogacy (including reproduction for one or both of the partners) in order to have children. The surrogacy market and the adoption market must therefore be seen as separate, overlapping markets for the simple reason that prospective parents have certain barriers and choices in how to achieve parenthood.

[16] Specifically, gestational surrogacy - where the woman who gives birth to the child has no genetic connection to the child.

[17] Compare : Family Code, CA STAT, Div 12, Part 7, §§ 7960-7962 (2012) (allowing surrogacy) and EMBRYONENSCHUTZGESETZ (ESchG) (The Embryo Protection Act), Dec 13, 1990, Federal Law Gazette, Part I, No. 69, issued in Bonn, 19th December 1990, page 2746 (Ger.) (with criminal penalties for creating a surrogate pregnancy).

Market-based mechanisms have allowed international surrogacy to operate efficiently, with the result that this reproductive option can often happen as quickly and as cost effectively as humanly possible. For intended parents who have often waited many years to fulfill the lifelong dream of having children, the availability of surrogacy as a choice is extremely beneficial. It is not unusual for there to be extraordinary delays in being able to adopt a child internationally. In addition to the delays in meeting the eligibility processes set out by adoption authorities (including the Central Authority in the adoptive parents' country), once approved to adopt from the overseas country, delays of three to five years are not uncommon, and those delays are increasing.[18] In Australia, for example, delays have been described as "glacial" and have been up to 8 years from beginning to end.[19] If an adoption-based model of regulation were extended to international surrogacy, the effect on the intended parents' right to reproduce would be disastrous. Consider, as an example, a married couple where the woman has just had a hysterectomy. This couple may choose to pursue surrogacy to have a child, but will need to move quickly in order to use the woman's eggs in the process. A lengthy application and vetting process could prevent the couple from having a child genetically related to both of them.

Market forces are central to the consideration of international regulatory schemes for international surrogacy arrangements. While the market is price-sensitive, with the concomitant shift to lower-cost areas, it is not completely elastic. The desire to reproduce and the timing issues inherent in human reproduction are powerful influences in the decision-making of the intended parents. Significant barriers to international surrogacy arrangements will necessarily force some market participants to other means of achieving parenthood, with perhaps more risk

[18] Australian Institute of Health and Welfare, ADOPTIONS AUSTRALIA 2010-2011, p.5; accessed at www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420773(last accessed on 17 July 2012).

[19] Malcolm Farr, *Deborra-Lee Furness' calls for adoption help that ministers never returned*, NEWS.COM.AU, (November 09, 2011 4:14AM), http://www.news.com.au/national-news/deborra-lee-furness-calls-for-adoption-help-that-ministers-never-returned/comments-e6frfkw9-1226190335342.

and less legitimacy. If we lose sight of these market forces that underlie international surrogacy, attempts to regulate this market may lead to unwanted consequences that defeat the purposes of regulation and shift the issues elsewhere.

C. IS SURROGACY THE REAL ISSUE?

The real issue with surrogacy arrangements, and with ART in general, is that they challenge societal notions of identity and the family structure in relation to the public and private spheres.[20] This challenge creates the false notion that international surrogacy arrangements themselves are the problem, rather than the inconsistent manner in which nations assign parentage and nationality. When the problem is viewed as inherent to international surrogacy arrangements, inappropriate conclusions about how to mitigate the negative effects of the market may result.

There are conflicting views and opinions of the efficacy of the application of an adoption model to the complex issues that surrogacy raises.[21]. The ABA does not share this perspective, and the purpose of this position paper is to offer another, more applicable and appropriate alternative viewpoint and recommendation.

The ABA agrees that "highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood

[20] Susan Markes, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION, 176, (University of California Press, 2007).

[21] Dr. Katarina Trimmings and Professor Paul Beaumont were awarded a grant of more than £112,000 by the Nuffield Foundation in July 2010. The purpose of the grant was to study private international law aspects of international surrogacy arrangements, ways to regulate the international surrogacy market, and to prepare a document that could help shape a future Convention on international surrogacy. Their article favors an adoption model based largely on the 1993 Hague Intercountry Adoption Convention. *See* University of Aberdeen School of Law, INTERNATIONAL SURROGACY ARRANGEMENTS: AN URGENT NEED FOR A LEGAL REGULATION AT THE INTERNATIONAL LEVEL, accessed at http://www.abdn.ac.uk/law/surrogacy/ (last accessed 17 July, 2012).

and the nationality of the child."[22] There are many examples of international surrogacy arrangements that have resulted in "stateless" children.[23] These situations are the result of the conflicting legal regimes for determining parentage and citizenship - ***these are not situations where the intended parents and the surrogate contest the parentage of the child***. Avoiding these situations is crucial to the overall status of children globally.

It is crucial to understand that the problems of "stateless" children are essentially disputes between States, not between private citizens. The real problem is that there are potentially conflicting legal regimes for determining parentage and citizenship among the nations involved in an international surrogacy arrangement. These are not typically situations where the intended parents and the surrogate contest the parentage of the child. Rather, the children are deemed "stateless" precisely when the intended parents attempt to take the children back to their home country pursuant to their cooperative and intact agreement with the gestational carrier. The direct conflict between the private contract between the parties and the national laws of their respective home countries creates the issue of "statelessness."

The question is whether an international regulatory scheme specific to surrogacy will sufficiently address such problems. *"Even if all means of artificial reproduction were outlawed..., courts will still be called upon to decide who the lawful parents really are and who...is obligated to provide maintenance and support for the child. These cases will not go away."*[24] International surrogacy arrangements bring issues with conflicting national laws to the

[22] Katarina Trimmings and Paul Beaumont, INTERNATIONAL SURROGACY ARRANGEMENTS: AN URGENT NEED FOR REGULATION AT THE INTERNATIONAL LEVEL, 7 J. Private Int'l L. 627, 630, (2011).
[23] *E.g.*, *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (U.K.)(where twin children were delivered by a Ukrainian gestational surrogate for British intended parents, and both states denied citizenship to the children while claiming that the children were citizens of the other state.)
[24] *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410 (1998).

fore; regulation of international surrogacy as a proxy for addressing these conflict of law issues could lead to an exacerbation of the problems it seeks to solve.

In fact, the legal complexity surrounding international surrogacy arrangements may actually be *helpful* in the absence of a broader regulatory scheme. Because of the legal pitfalls involved, the intended parents who pursue international surrogacy arrangements must do so with extreme care and planning. The daunting complexities and potentially disastrous pitfalls serve as a deterrent to intended parents and as an incentive for legal practitioners to exercise a high degree of caution in these arrangements.[25] In contrast, those intended parents who choose to pursue international surrogacy without regard to the legal complexities will also likely not be dissuaded by a new Convention. This is the fundamental challenge facing regulation of international surrogacy: some individuals will pursue international surrogacy without regard to law or Convention. Surrogacy-specific regulation will therefore be ineffective to resolve the difficult problems posed by these cases.

It is not that there is no existing regulation for international surrogacy; rather, the issue is that each state manages the legal infrastructure underpinning these arrangements differently. It is precisely this legal infrastructure that structures the arrangements.[26] The problem is that the legal infrastructure in one country may not be compatible with that in another country. What is needed, therefore, is a framework of cooperation to resolve issues as they arise from incompatible laws. In fact, the notable cases where the legal complexities were improperly navigated forced nations to work together to solve the problems created by the conflicts of law.[27]

[25] Kimberly D. Krawiec, *Price and Pretense in the Baby Market, in* BABY MARKETS, 48-49 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

[26] For a discussion of the legal infrastructure that supports surrogacy arrangements, see John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry, in* BABY MARKETS, 195-196 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

[27] For example, the recent case where Germany and India disagreed about the citizenship status of twins born to an Indian surrogate for German intended parents was only resolved when the countries granted exceptions to the

The danger with a comprehensive regulatory scheme focused on international surrogacy is that it will be too restrictive, pushing legitimate participants out of the market and into the 'grey' or 'black' market.[28] An example of the effect of over-regulation can be seen in Italy. The heavy regulation of ART, including surrogacy, has contributed to the growth of international solutions for Italian citizens.[29] Faced with laws prohibiting domestic surrogacy, Italian intended parents must avail themselves of surrogacy in the international market if they choose to pursue this reproductive option. Similarly, if a new Convention were to be too restrictive, some intended parents in Convention nations might choose to pursue surrogacy in non-Convention nations or in less legitimate markets.

It has been suggested that an international regulatory scheme would "promote the exchange of information...reduce 'limping' or unrecognized surrogacy arrangements...[and] help to combat trafficking in women and children."[30] While the exchange of information would undoubtedly improve, the other two effects are not so certain. Specifically, increased regulation will result in the exclusion of people from the market. Some of these people will seek surrogacy outside of the regulatory scheme – in the 'grey' and 'black' markets. As regulation pushes people out of the market, the risk of trafficking and exploitation in the grey and black markets may actually increase.

D. CONSIDERATION OF VARIOUS REGULATORY MISPERCEPTIONS

children. A summary of the conclusion can be found at: http://articles.economictimes.indiatimes.com/2010-05-27/news/27577615_1_surrogate-twins-german-couple-inter-country-adoption (last accessed 29 July 2013).

[28] Lee, Ruby L., NEW TRENDS IN GLOBAL OUTSOURCING OF COMMERCIAL SURROGACY: A CALL FOR REGULATION, Hastings Women's Law Journal, Vol. 20, p. 275, 285 (2009). (Attributing the increase of 'reproduction tourists' from certain countries to those countries' heavy regulation of the fertility industry.)

[29] Richard F. Storrow, QUESTS FOR CONCEPTION: FERTILITY TOURISTS, GLOBALIZATION AND FEMINIST LEGAL THEORY, 57 Hastings L.J. 295, 306-307 (2005).

[30] Trimmings and Beaumont, at 636.

To the extent that efforts continue to define an international regulatory scheme focused on surrogacy arrangements, the adoption framework warrants closer examination. This discussion is necessary because the key points of such a model are ideas that appear regularly in the discussion of ways to regulate the international surrogacy market.

There have been numerous recommendations made for a regulatory scheme regarding international surrogacy arrangements. One describes a flexible framework in which countries maintain an open dialogue regarding issues surrounding international surrogacy. This approach would leave a great deal of autonomy to individual countries to apply the framework with the context of their own laws or to negotiate bilateral agreements with other countries. This is a sensible starting point, given that every country will have its own body of law, particularly family law, where any changes would have far-reaching effects throughout their societies. Great care must be taken to respect the public policies of every county participating in such a regulatory scheme. The most important aspect of this legislative approach is an underlying recognition that international surrogacy arrangements exist, and that nations need to cooperate when conflicts of law surrounding these arrangements arise.

Despite this well-placed focus on flexibility and cooperation, this approach has two major flaws. First, the focus on regulating the international surrogacy market itself is misplaced. The legal issues that arise in international surrogacy are, in reality, conflict of law and comity problems that can arise in non-surrogacy contexts and are, therefore, more effectively addressed outside the context of surrogacy. Second, to the extent that international surrogacy is to be regulated, using international adoption as a template for such regulation is misguided, and leads to several inappropriate proposals for regulatory solutions. Ultimately, the indirect abuses (such

as human trafficking and exploitation) that are feared may instead be exacerbated if such regulation were implemented.

Any Convention on International Surrogacy should be developed with an eye to navigating the conflict of laws and comity problems in international surrogacy arrangements. As a starting point, some look to the regulatory scheme in the 1993 Hague Intercountry Adoption Convention. This foundation for a surrogacy convention misconceives the market and reinforces unhelpful biases against international surrogacy.

1. The 1993 Hague Intercountry Adoption Convention is an inappropriate model for a surrogacy convention

The Hague Conference on Private International Law has already recognized that the 1993 Hague Intercountry Adoption Convention (Adoption Convention) is not appropriate as a model for a convention on international surrogacy.[31] Nevertheless, some still suggest the Adoption Convention can be a template for a convention on surrogacy. This suggestion is based on two key elements of the Adoption Convention: its political success and its flexible approach.

However, underlying any proposal that the Adoption Convention be used as a template for a surrogacy convention is the mistaken idea that adoption and surrogacy are more alike than not. Even though many recognize that there are fundamental differences between surrogacy and adoption, they nevertheless conflate the two.

2. Some helpful insights

[31] Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (PRELIMINARY DOCUMENT NO 11 FOR THE ATTENTION OF THE COUNCIL OF APRIL 2011 ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE), p. 21 (Mar. 2011), available at: http://www.hcch.net/upload/wop/genaff2011pd11e.pdf.

Even some proponents of the application of the Adoption Convention recognize the existence and the effect of surrogacy arrangements and recommend that nations uphold the enforceability of surrogacy arrangements even if the arrangements are not made pursuant to the local law.[32] Agreement among nations to recognize the citizenship and parentage decisions made by other nations pursuant to the principle of comity would go a long way to solving the majority of issues with international surrogacy in particular and ART in general. This is, however, perhaps the most politically sensitive recommendation; it implicates the internal law and sovereignty of nations in terms of their determination of who is a citizen and how families are structured in relation to the society. In fact, the questions of local family and immigration law are the controlling factors at the very core of the issues we see in international surrogacy arrangements.

Even Trimmings/Beaumont suggest that the "details of financial accountability of accredited bodies should be left to domestic regulation."[33] This is appropriate, as the service of navigating the legal and medical complexities is relative to many factors. Certainly, the differing factual situations and legal challenges of every surrogacy arrangement render a mandated fee structure unrealistic.

3. Provisions that should be considered for a surrogacy convention

Reliance on the Adoption Convention as a template excludes certain alternative viewpoints. As adoption and surrogacy are not identical markets, provisions specific to the surrogacy market should be considered.

[32] Trimmings and Beaumont, at 645.
[33] Trimmings and Beaumont, at 644.

(a) Intent-based parentage analysis

Some jurisdictions use an intent-based approach to parentage, relying on the concept that *"but for"* the actions of the intended parents, the child born through surrogacy would not exist.[34] This theory is certainly not universally accepted. Nevertheless, intent plays a significant role in the expectations that each party in a surrogacy arrangement has from the outset of the process and is typically expressed in any contractual instruments involved. Even without reducing surrogacy to the contractual sphere, however, the examination of the intention of all of the parties can be helpful in the analysis of legal issues that arise. The doctrine of intent offers a sound legal basis for recognizing those whose actions brought about the child as the legal parents of the child born through surrogacy.[35]

As further support for considering the doctrine of intent, the Adoption Convention does state, *"the policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless."*[36] When applied to surrogacy, the logical result is the determination of citizenship for the child based on the country of citizenship or habitual residence that all parties intended for the child. This is certainly in the best interests of the child and mirrors the intent-based parentage model.

Finally, it is important to remember the distinction between adoption and surrogacy when considering the doctrine of intent. Surrogacy is a process through which a child is conceived, gestated, and born based on the intended parents' desire to procreate. The collective intent of both the parent(s) and the surrogate is established and documented in advance of any medical procedure or actual gestation. The actions of the intended parents exclusively set this process in

[34] *Johnson v. Calvert*, 5 Cal. 4th 84, 93(1993).
[35] Charles P. Kindregan, Jr. and Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, (A.B.A., 2nd ed., 2001).
[36] Trimmings and Beaumont, at 646.

motion. If the intended parents never chose to reproduce, the surrogate would never get pregnant, and the child born through surrogacy would not exist. Thus, the doctrine of intent can be useful to navigate issues that arise in the process.

(b) Reproductive experience of the gestational carrier

An area for further consideration in an international agreement is the reproductive experience of the surrogate. Specifically, only those women who have previously given birth should be permitted to serve as a surrogate for others. This requirement would serve a twofold purpose. First, it enhances the stability of the surrogacy arrangement by affording the woman serving as a surrogate the ability to enter into the arrangement from a more fully-informed consent and emotional perspective. From the intended parent perspective, it gives a level of comfort that the woman can physically carry a pregnancy successfully to term. Second, this requirement helps to alleviate concerns of at least one type of exploitation – that of reproductive substitution.[37] Particularly where the carrier has children of her own, the issue of allowing the "advantaged" intended parents to reproduce while the "disadvantaged" surrogate cannot becomes less relevant. This provision should be considered as a core provision for the protection of all parties involved.

4. Provisions that should be reconsidered

Several common suggested reference points or requirements for surrogacy include the "best interests of the child" a mandatory genetic connection between the child born of

[37] Reproductive substitution is the idea that the gestational carrier generally cannot have children of her own during the time that she is participating in the surrogacy process. In effect, the surrogacy process shifts the benefit of the reproductive capacity of the gestational carrier to the intended parents.

international surrogacy and one or more of the intended parents,[38] and an evaluation of the "parental fitness" of the intended parents, among others. While these may be important principles in other contexts, they are overly exclusionary as central principles for surrogacy.

(a) The "Best Interests" doctrine is not the best doctrine for surrogacy

The *"best interests of the child"* doctrine is inadequate to deal with the complexities of surrogacy, particularly in the international context. In surrogacy, the child is a newborn – there is no basis from his or her experience to attribute a "*best interest"*. Therefore, a court will necessarily need to determine "*best interests"* based on the characteristics of all of the parties involved – raising issues of socio-economic status, class, race, and culture along the way. When all parties agree on the expectations for parentage and citizenship of the child in advance, the *"best interests"* doctrine is unnecessary.

In the case of *Baby M*, a contested surrogacy, the best interests of the child was presumably the basis on which custody was determined.[39] However, the *"best interests"* evaluation of *Baby M* took into account the father's economic status and the actions of the surrogate during the custody proceedings.[40] Ultimately, the analysis has little to do with the infant's *"best interests"* and more to do with the societal conceptions of the parents' fitness. In the international context, the question of *"best interests"* becomes even more complicated, as it inevitably will weigh the relative wealth of the parties involved, the ethnic background of the child, and the various societies in which the parties live. The analysis could quickly become fraught with cross-cultural judgment.

[38] Trimmings and Beaumont, at 640.
[39] *In re Matter of Baby M.*, 537 A.2d 1227, 1256 (N.J. 1988).
[40] *Id.*, 1257-1259.

Furthermore, referencing the child's best interests would simply bring legal uncertainty into the otherwise certain and reliable establishment of parentage and citizenship intended cooperatively by all the parties involved. Given the fact that in virtually all but a very few, exceptional, and extremely rare cases the parties involved remain in complete accord - the surrogate and her spouse, if any, do NOT want custody of or parental rights to the resulting child while the intended parents DO want to be the child's legal parents for all purposes - it simply cannot be successfully argued that analyzing the child's best interests and potentially forcing the unwilling surrogate to accept custody of or rights to the child is in the child's best interests.

Finally, we do know for any infant—even one not yet born—is that its best interests require certainty of parentage from the moment of birth, as well as not being left stateless. Thus, any consideration of the best interests of a child born via surrogacy must come at this issue from the viewpoint of granting the child legal certainty on these two issues from the moment of birth (if not before).

(b) Genetic Link

This proposed requirement is inappropriate and violative of the privacy of intended parents. It could also lead to disastrous results for the practice of fertility treatment. Trimmings/Beaumont argues, *"there is no need to create more children as there are millions of children around the world who are in need of adoption, waiting for a loving home. The Convention ... must give a clear message that the proper route to obtaining a genetically non-related child is through adoption."*[41]This perspective is extremely biased and short-sighted. If applied to ART in general, it would prevent a married couple from using donated gametes (eggs and/or sperm) to conceive and carry a child even without the services of a surrogate. The logical

[41] Trimmings and Beaumont, at 641.

extension of this perspective is that all ART procedures involving donor gametes should be rationed according to the supply of adoptive children; that those who are unable to have children *"naturally"* must forego their reproductive choice until all available adoptive children are placed. Even worse, this requirement could further suggest that all fertility treatment – and even *"natural"* reproduction – could be curtailed in order to address the needs of adoptive children.

More practically, imposing a mandatory genetic link means that necessarily some intended parents will be denied the dream of parenthood. It is current practice that intended parents seek a child who is their genetic offspring. However, the journey for intended parents seeking surrogacy is often the journey of last resort. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, a married couple may try fertility treatment and IVF for several years with no success. Upon further medical evaluation, they may find that the woman is unable to carry a child safely to term, and that the man's sperm is not of sufficient quality to conceive. By this time, the woman may have reached an age where her eggs are also not of sufficient quality to conceive. This couple will necessarily need to rely on a surrogate, an egg donor and a sperm donor to be able to achieve their dream of becoming parents. Another couple may discover that they both are carriers of a gene for a condition that would be incompatible with any of their genetic child's ability to survive. Another couple who cannot use their own gametes to conceive may turn to their respective siblings for genetic material. To require a genetic link between these hypothetical intended parents and their children born through surrogacy would deny these individuals the fundamental right to reproduce and would interfere with their private medical decisions. In addition, this requirement also precludes the use of donor embryos in international

surrogacy arrangements, eliminating a viable use of this valuable resource by willing individuals and encouraging the destruction of such stored embryos.

A proposal for a mandatory biological connection between the intended parents and children born through surrogacy comes from the misguided conflation of the adoption and surrogacy markets. It is an attempt to address the problems seen in one market (adoption) with a manipulation of the regulatory scheme in another market (surrogacy). Such a proposal is overbroad, and leads to undesirable conclusions about the regulation of both markets. It also flies in the face of the parties' intent since the intent of the intended parent(s) and surrogate remains the same even if the embryo formed for transfer and gestation does not contain the genetic material of either of the intended parents.

(c) Evaluation of parental fitness

If the Adoption Convention is referenced, it would be logical to have each state be responsible for the evaluation of intended parents' fitness to create a child.[42] This is again a conflation of the issues of adoption (transferring legal responsibility over another person's child after birth) and surrogacy (establishing legal authority over one's own child from the moment of birth). More importantly, it will serve to inappropriately restrict intended parents' ability to reproduce. *"Parents have the exclusive right to determine freely and responsibly the number and spacing of their children."*[43] If we are to judge the parental fitness of those who would create a child through surrogacy, then there is no logical distinction to be made between judging the parental fitness of those who would pursue parenthood through any ART method. From

[42] Trimmings and Beaumont, at 642.
[43] Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), ¶ 4, (11 Dec., 1969). Available at: http://www2.ohchr.org/english/law/pdf/progress.pdf.

there, it is not a difficult logical leap to require an evaluation of parental fitness for any parent who would create a child through any means – including "natural" reproduction.

Supporters of the parental fitness requirement often raise the specter of individuals creating a child through surrogacy for the express purpose of exploiting the child in some way, seemingly ignoring the reality that children born "naturally" are exploited with alarming regularity today. It is no more likely that someone will create a child through surrogacy for the express purpose of exploitation than via any other means. In fact, it seems less likely; if one is engaged in commodification of children to such an extreme, there are far more cost-effective ways of procuring them.

It is most disconcerting that an evaluation of parental fitness may be used as an excuse by countries to deny same sex couples or single intended parents the ability to reproduce through surrogacy. It may also be used as an invasive process of investigating a couple's sex life, finances, criminal history, and medical status.[44] A notorious example of an assessment of intended adoptive parents being deemed 'unsuitable' to adopt were actor Hugh Jackman and his wife Deborra-Lee Furness, who, following enormous difficulties in seeking to adopt in their home state of New South Wales, gave up and instead adopted their children in the United States.[45]

A more productive recommendation would be some form of social counseling for the intended parents focused on how they will explain the child's origins to him or her. Also, a discussion of the various risks and outcomes that may be encountered throughout the process is important. Through this introspective exercise, the intended parents can determine if

[44] Lucie van den Berg, *Victorian adoption process likened to criminal investigation*, HERALD SUN, (10 November 2011, 8:14 AM), http://www.heraldsun.com.au/news/victoria/victorian-adoption-process-likened-to-criminal-investigation/story-fn7x8me2-1226190850588 (last accessed 17 July 2012).

[45] Kirstin Murray, *Celebrity campaign to reform adoption laws*, AUSTRALIAN BROADCASTING CORPORATION, (13 March, 2008), http://www.abc.net.au/7.30/content/2007/s2188906.htm (last accessed 17 July, 2012).

international surrogacy is the best option for them, or if another process to achieve parenthood is more appropriate for their circumstance. This would be an appropriate analysis of the intended parents' understanding of and suitability for participating in surrogacy rather than an invasive and restrictive determination of their fitness to reproduce.

(d) "Habitual residence" as determinative factor

It is tempting to argue that the concept of *"habitual residence"* should be applied uniformly across member nations.[46] This proposition makes conceptual sense, and it applies beyond issues of surrogacy. Likewise, the provision that the child be presumed a citizen of the nation of the intended parents' habitual residence could help resolve the citizenship and immigration issues that arise. However, there are often practical difficulties when the intended parents are citizens of one country, but resident in another, and they undertake surrogacy in a third. For these intended parents and their child, sorting out the residency and nationality issues cannot be easily solved by relying on a simple "habitual residence" construct. In order to determine the nationality and residency status of a child born through surrogacy, a more effective (and efficient) means would be to indulge in a legal fiction that a surrogate is not involved in the birth of the child; a legal fiction that the child was born to one of the intended parents. With this approach, nationality and residency are determined as simply as they are for a "natural" born child. The legal fiction approach would be consistent with the heart of the arrangement: that the intended parents are in fact the parents of the child. It would also be consistent with the intent of the parties and, ultimately, the interest of the child in not being stateless.

[46] Trimmings and Beaumont, at 639.

(e) Administrative oversight

Another proposal is that nations create a regulatory agency to approve international surrogacy arrangements (and, presumably domestic ones, as well) and to monitor compliance.[47] While this solution may work for some nations, others may prefer to rely on alternate institutions for regulation. For instance, medical standards of care and professional ethics for lawyers are critical elements of surrogacy arrangements, and regulation of these can be effectively achieved without a specific governmental agency. These non-governmental institutions form part of the "market infrastructure" that regulates surrogacy arrangements today.[48] Thus, nations should be able to choose how they structure the regulation in their society.

Central regulatory agencies specific to surrogacy would add unnecessary cost to the system. A new layer of administration could burden taxpayers and participants in the market. Further, such a layer of administration focused on international surrogacy risks being redundant and incomplete. Additional administrative oversight risks changing a relatively rapid process (surrogacy) to one of glacial pace, with attendant increased costs and frustration for the intended parents. There is the risk that by creating a new bureaucracy, the new bureaucracy becomes self-justifying and imposes unnecessary requirements that unduly burden the process. Governmental intervention of this sort in "natural" reproduction is offensive to modern notions of autonomy, privacy, and the freedom to reproduce; likewise, such intervention for *one reproductive choice* must be very carefully considered. To the extent that the majority of the problems encountered by international surrogacy are really issues with existing legal and social structures, a central authority that seeks to resolve these issues only in the context of surrogacy

[47] Trimmings and Beaumont, at 641.
[48] John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry, in* BABY MARKETS, 195-196 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

misses the mark. Worse, overregulation could exacerbate the risks of exploitation. As the cost of the process increases, some market participants will seek less costly (and perhaps less legal) alternatives to parenthood.

(f)Licensing requirement

It is proposed by some that all surrogacy arrangements not made with licensed agencies be outlawed.[49] While understandable at first blush, this proposal may be overbroad. Is there to be a license to practice international surrogacy? Alternatively, will state permission to practice law or medicine suffice? What if the participants piece together the necessary elements of a surrogacy program with a relative without the intervention of services of an agency? If an agency is required, does this add to the already prohibitive cost of the surrogacy process? This last hypothetical raises an important point: regardless of the form of any international instrument, surrogacy will continue outside the boundaries of the "market." The individuals - and children - in the non-market arrangements deserve just as much protection as those in the market. Licensing of participating agencies is a sound idea, but requiring the use of a licensed agency limits freedom of choice and flexibility of the process.

Currently, participants in the international surrogacy market take enormous risk if they do not work with a competent practitioner. The inherent uncertainty in the current market gives people pause before they enter the market. In this sense, the complexity of the market is self-regulating, giving participants a strong incentive to act with caution and care. Using a competent broker is part of the calculation of the intended parents; those who choose not to work with one do so at their own peril.

[49] Trimmings and Beaumont, at 643.

This proposal also raises an important issue for any regulatory framework: the consequences of regulatory violations. If a subset of surrogacy arrangements is outlawed, then the logical recourse when such arrangements occur is to punish the parties involved, including the intended parents. A severe punishment for intended parents would be removal of the child. Short of removal of the child, fines or criminal sentences could be imagined for the intended parents. Whatever penalty is applied, it would ultimately serve to punish the people that the regulation purports to protect: the children born of surrogacy.

In addition, the requirement that all economic activity must pass through licensed agencies necessarily limits the availability of surrogacy agency services. In turn, supply of these services would be restricted, resulting in upward pressure on price. Such a result would increase risk of exploitation of the intended parents and surrogates alike as individuals move to the grey or black markets to seek lower costs and less oversight.

(g) Compensation for the gestational carrier and gamete donors

Compensation for the gestational carrier is important, as it allows the market to function by balancing the rights of the carrier with the responsibilities of the intended parent(s). However, caps on compensation may increase the possibility of exploitation. *"Debate centers around two distinct issues: commercialization, or the fact that a surrogate is paid for her services, and exploitation, which is the idea that surrogates are paid too little for their services."*[50] International surrogacy arrangements heighten the concern of exploitation as a main factor behind the existence of the international surrogacy market is price. On the one hand, lower costs for surrogacy arrangements give more people access to this reproductive option. On

[50] Angie Godwin McEwen, SO YOU'RE HAVING ANOTHER WOMAN'S BABY: ECONOMICS AND EXPLOITATION IN GESTATIONAL SURROGACY, 32 Vand. J. of Transnat'l L., no. 1 (Jan. 1999).

the other hand, higher compensation for gestational services may be seen as potential coercion for women in underdeveloped countries to become surrogates. Achieving a balance is a challenge, one best left to local regulatory expertise and market factors.

When approaching compensation to surrogates, many commentators assert that a maximum limit to compensation should be part of the regulation.[51] The idea that overly coercive amounts of money will be offered to women in underdeveloped countries may be somewhat exaggerated. The market for international surrogacy is highly price-sensitive.[52] The surrogacy market has expanded to lower-cost areas precisely because those areas are lower-cost. As prices rise in a particular geographic market, the attractiveness of that market diminishes.

For gamete donors, the concerns may similarly be overstated. In the US, the egg donation market is rife with myths of eggs regularly sold for six-figure amounts. The reality is that the vast majority of egg donors in the US receive between five and ten thousand dollars per donation, conforming to the ASRM standards for egg donor compensation.[53] Here, again, the concerns of coercive exploitation of women through excessive sums of money are exaggerated.

Rather than income-based caps for compensation, a flexible approach to compensation is more appropriate. Nations and localities should be able to monitor and manage the delicate balance between market demand and market exploitation without conforming to a global formula, as the management of this balance will be based on each society's notion of fairness in this market. Nevertheless, care should be taken to avoid additional pressure for intended parents to move from the legitimate market to a less desirable means of achieving parenthood.

[51] Trimmings and Beaumont, at 644.
[52] Deborah L. Spar, THE BABY BUSINESS, 30 (Harvard Business School Press, 2006) ("In this market, therefore, price acts harshly as a constraint on demand.").
[53] American Society for Reproductive Medicine, 88 FERTILITY AND STERILITY, No. 2, 305(Aug. 2007).

(h) Access to Birth Records by Children Born Through Surrogacy

There are also varying views as to the access of a child via surrogacy to his or her birth records.[54] While international law may highly value a child's rights to know his or her origins, especially within the adoption model, the applicability of this concept to children born of gestational surrogacy is uniquely problematic, particularly when donor gametes are not involved. Varying legal conceptions of the privacy of the family and medical information may warrant greater flexibility on this point. Ideally, each individual should have a clear view of his or her origins. However, children of "natural" birth are afforded no such guarantee, as parents are not obligated to disclose to their children any irregularities with their conception. Children born through surrogacy may likewise need to rely on the disclosures or approvals of their parents for complete information, just as are children born through fertility treatment (including use of donor gametes) without surrogacy.

E. Conclusion

Regulation of international surrogacy as a proxy for other issues in the international private law sphere will have unintended consequences. It will almost certainly drive some people out of the market and into less desirable means of achieving parenthood. Further, regulation of the narrow issue of surrogacy will not address the structural challenges with international parentage decisions generally.

In the end, the practical problems with international surrogacy are grounded in conflicts of laws and comity issues surrounding parentage, family structure, nationality, and immigration. Any Surrogacy Convention should be limited to a framework for open dialogue between nations about the reconciliation of these conflicts, particularly when the issues are not contested by the

[54] Trimmings and Beaumont, at 646.

parties involved.. In reality, the conflicts of family and immigration law are the issue, not surrogacy.

If we fear coercion and exploitation in the international surrogacy market, then each nation should consider developing an approach to protect all parties who participate in such arrangements. The definitions of ‘coercion’ and ‘exploitation’ vary from society to society. At the international level, a framework of cooperation to resolve conflicts of these society-dependent notions of coercion, exploitation, family, and citizenship may suffice to resolve the tensions in this market.

[The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or the Section of Family Law. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials are intended for educational and informational purposes only. This position paper had not yet been approved by either the Section of Family Law, any other ABA section, or the ABA Board of Governors.]

July 25, 2014 Addendum to Draft ABA Position Paper

by the Assisted Reproductive Technologies Committee

In re: Regulation of International Surrogacy Arrangements

The role of the American Bar Association in adopting a position as to a proposed Hague Convention as to private international law concerning children, including as to international surrogacy arrangements is vital, in demonstrating global leadership to aim for a workable international system that protects the interests of intending parents, surrogates and their partners, and above all the children resulting from international surrogacy arrangements.

Since preparation of the ART Committee's draft paper, which was presented to the Family Law Section Council in October 2013, there have been two significant international developments.

1. **Hague position paper**

In April, 2014 the Hague Conference on Private International Law (HCCH) published a report entitled *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project*. This paper provided a summary of the HCCH's findings from surveys completed by member states, lawyers who practice in the field of ART, and surrogacy agencies. The recommendation of the HCCH is that work continue on the project, but with a broad focus to address the legal status of children no matter the circumstances of their birth. The HCCH has taken the view in this report that the legal challenges that can occur with international surrogacy arrangements (ISAs) are not exclusive to ISAs, and will only become more frequent in the future with advances in technology and evolution of society. With this view of the key issues in international surrogacy arrangements, the HCCH's reasoning is in alignment with the core of the draft ABA position paper on ISAs.

A companion report by the HCCH, dated March 2014 entitled, A *Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements,* is a comprehensive report on private international law on cooperation and rules concerning legal

parentage as well as a closer analysis of international surrogacy arrangements. Key points from the study include:

- The conflicts of law regarding the legal status of children and intending parents involved in ISA's may result in lengthy, complex, financially and emotionally draining processes to get home and establish the child's legal parentage and nationality.
- Whilst a different context from adoption may require a different approach, some basic, minimum standards are required in order to protect children from harm and to comply with basic human rights standards.
- The US Department of State ("DOS") recommended that no further work should be done on this project at this time.

The findings from the study are largely consistent with the draft ABA position paper on ISAs, and several members of the ART committee are quoted (unattributed) in both the study and the summary report on the desirability and feasibility of further work. It is the opinion of the ART Committee that the ABA should continue with the draft position paper, particularly in light of the US DOS recommendation that no further work be done on this project - we feel that the ABA is uniquely positioned to contribute a valuable voice to this ongoing discussion on the international stage.

2. European Court of Human Rights

In recent parallel cases of *Mennesson* v *France* and *Labassee* v *France,* Mr. and Mrs. Mennesson and Mr. and Mrs. Labassee had children born to surrogates in the US. Surrogacy is not legal in France. The French government and French courts refused to recognize the children as children of Mr. and Mrs. Labassee and Mr. and Mrs. Mennesson.

The European Court of Human Rights ruled, on June 26, 2014, that while France has a right to declare surrogacy illegal in its territory, France's refusal to recognize the citizenship of the children and their parent-child relationship with their parents was an infringement of the children's right to respect for their private lives.

This ruling supports the ART Committee's position paper that the right to reproduce is a fundamental right. The ABA should be voicing its opinion as public international policy on this topic begins to evolve.

Richard B. Vaughn, Chair
Assisted Reproductive Technologies Committee

25 July 2014

AMERICAN ACADEMY OF ASSISTED REPRODUCTIVE TECHNOLOGY ATTORNEYS

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Judith Sperling-Newton is a co-founder of the Law Center for Children & Families, Adoptions of Wisconsin, and The Surrogacy Center, in Madison, Wisconsin. She is committed to social justice and is an ardent advocate for the rights of children and equality for LGBT persons. She is an experienced *guardian ad litem* for abused or neglected children. Ms. Sperling-Newton has practiced for over three decades in the areas of adoption, assisted reproduction, surrogacy, child protection, and parentage for same-sex partners. She has worked with clients worldwide.

Experience:

Ms. Sperling-Newton is very experienced in children's law. She also acted for many years as a Referee, appointed by the Wisconsin Supreme Court in attorney disciplinary matters. Ms. Sperling-Newton served as a Peace Corps Volunteer in Colombia and is fluent in Spanish.

Education:

Ms. Sperling-Newton received her law degree *cum laude* from the University of Wisconsin. She is a graduate of Indiana University, having majored in Spanish and French, and she earned a Master's Degree in Adult Education from Northern Illinois University.

Teaching and Writing Experience:

Ms. Sperling-Newton is the author of *Voluntary Termination of Parental Rights and Adoption* and the juvenile chapter of the *Guardian ad Litem Handbook,* both published by the State Bar of Wisconsin. She is a frequent speaker on best practices and ethics in assisted reproduction law, particularly surrogacy, and she is a regular presenter at the Lavender Law Family Law Institute (FLI).

Recognition:

Ms. Sperling-Newton has been recognized for outstanding public service by the Center for Public Representation, and she is a 2004 recipient of the Congressional Coalition on Adoption Angel in Adoption Award. In 2014, Ms. Sperling-Newton was recognized as an Ally for Justice by the National LGBT Bar Association and the American Bar Association, an award given to "attorneys who have allied with the LGBT community and made noteworthy contributions to the struggle for civil rights and equality."

Professional and Volunteer Service:

Ms. Sperling-Newton is a Past-President of the American Academy of Adoption Attorneys (AAAA), and since 2009, she has served as Director of the American Academy of Assisted Reproductive Technology Attorneys (AAARTA). She is a fellow of the International Academy of Matrimonial Lawyers (IAML) and a member of the American Society for Reproductive Medicine (ASRM), the National LGBT Bar Association (NLGLA), the Family Law Institute (FLI), and the National Family Law Advisory Council (NFLAC), sponsored by the National Center for Lesbian Rights (NCLR). Ms. Sperling-Newton works year-round as a public affairs volunteer with the American Red Cross. She also serves as an interpreter for medical/ surgical missions in Central and South America and volunteers every summer on the South Carolina Loggerhead Turtle Patrol.

Family:

Ms. Sperling-Newton, along with her husband, Bruce Newton, is the parent of three children, two of whom are adopted, although she can't always remember which two. She is the adoring grandmother of four grandchildren.

Abbreviated Biographical Sketch

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Margaret Swain is an attorney in private practice in Baltimore, Maryland, representing local, national and international clients in ART and adoption law matters. A former surgical, delivery room and IVF clinical registered nurse, her legal practice concentration in Assisted Reproductive Technology Law, Adoption and Guardianship spans more than two decades. Ms. Swain is a fellow of the American Academy of Adoption Attorneys, where she chaired the ARTs Committee, and served four years on the Academy's Board of Trustees. She is a long-standing member of the American Society for Reproductive Medicine and co-chaired the formation of its Legal Professional Group, of which she is a Past-Chair and was a five year member of the Executive Council. A member of the ABA and its Family Law Section on ART, Ms. Swain is also a charter fellow of the American Academy of Assisted Reproductive Technology Attorneys, serves as its Deputy Director and Chair of its CLE and legislative committees, and is an appointee to the AAARTA Executive Council. Ms. Swain served for three years on the Executive Council of ASRM's affiliate, The Society for Assisted Reproductive Technology. Ms. Swain has authored a number of textbook chapters, is a frequent lecturer, and has taught as adjunct faculty at the University of Baltimore School of Law. She is a 2008 recipient of the national Congressional Coalition on Adoption Institute's "Angels in Adoption" award.

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EDUCATIONAL BACKGROUND:

Bachelor of Arts, *Cum Laude*, Psychology, 1976. Member, *Psi Chi* National Psychology Honor Society.
Associate of Arts in Nursing, 1981. Application to and acceptance by the Maryland State Board of Nursing, Registered Nurse, 1981.
Juris Doctor, 1987. Editorial staff, The Law Forum. Author, Recent Developments in Maryland Case Law, *In Re* The May Company, Spring 1987. Application to and admission to the Maryland State Bar, 1987.

PROFESSIONAL BACKGROUND:

The Johns Hopkins Medical Institutions, Clinical Nurse, Maternal Child Health, 1981 - 1982.
The Greater Baltimore Medical Center, Clinical Nurse: Operating Room, 1982-1986; Fertility Center and IVF Program, 1986-1988.
Bodie, Nagle, Dolina, Smith & Hobbs, 1988 - 1993. Associate attorney with practice concentration in litigation, toxic tort and products liability defense, and independent adoptions and related matters. 1993 - 1996, Of Counsel, with continuing concentration in the above matters, and assisted reproduction law.
Creative Family Options, Inc., 1994-1996. President.
Law Offices of Margaret E. Swain, 1996-Present. Practice concentration in adoption, assisted reproductive technology law and guardianship.
Anne Arundel Community College, Institute of Criminal Justice and Legal Studies, Adjunct Professor, 2000.
St. Agnes Health Care, Counsel for adoption and related matters, 1996-present.
University of Baltimore School of Law, adjunct professor.

PROFESSIONAL ASSOCIATIONS and CERTIFICATIONS

***Fellow, American Academy of Adoption Attorneys*.** Chair, ART Committee, 2003-2006; Board of Trustees, 2005-2009 (Recording Secretary 2006-2007). Co-Chair, 2005 Annual Midyear Meeting; ART CLE Chair, 2012 & 2013 Annual Meeting. Chair, Annual Meeting, 2015; CLE Chair, Mid-year meeting, 2013.
Deputy Director & Fellow, American Academy of Assisted Reproductive Technology Attorneys, Charter Member. Appointed Deputy Director, 2013 (current). Executive Council, 2011-present. Current Chair, Continuing Legal Education Committee, and CLE co-chair, Annual & Midyear Meeting on ART, 2011, CLE Chair, Annual & Midyear Meeting on ART, 2013. Legislative Committee Co-Chair, 2011-2012, Legislative Response Team Chair, current. Chair, 2015 Annual Conference.
Diplomat, American Society for Reproductive Medicine: Member, Mental Health Professional Group & Nurses' Professional Group. Founding member and Past Chair, Legal Professional Group; LPG Representative to SART Executive Council, 2009-2013.

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Guardianship Panel, Baltimore County Circuit Court.

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Married to Dr. James Ricely and reside in Baltimore, with our three children.
Board of Directors, L'Hirondelle Club, Baltimore, Maryland (1996-2000): Recording Secretary, 1996-1998, Vice-President (1998-1999), President (1999-2000) & Member, Executive Committee; Roland Park Country School, Upper School Parent Network Chair, and Parents' Association Board, Executive Counsel and Board Member, 2004-2006; Mothers' Club Board, Loyola Blakefield, 2006-2007, numerous additional school, recreational council and community-based volunteer assignments, and Juvenile Diabetes Research Foundation, gala planning committee, 2009, co-chair, 2010, chair 2011, 2012 & 2013, Committee, 2014.

PRESENTATIONS

- "Ethical and Legal Considerations of an Anonymous Egg Donor Program", presented at the 8th IVF Nurse Coordinator National Conference, Boston, Massachusetts, May, 1995.
- "Legal and Practical Aspects of the Egg Donor Process", presented as in-service instruction, The Union Memorial Hospital, Baltimore, Maryland, October, 1995.
- "Legal and Ethical Considerations in the Assisted Reproductive Technologies", presented at Recent Advances in Genetic Diagnoses: From Embryo to Nursery, Greater Baltimore Medical Center, Baltimore, Maryland, April, 1996.
- "Introduction to the Adoption Process", in-service instruction, St. Agnes Hospital, Baltimore, Maryland, July, 1996.
- "An Overview of the Adoption Process", presented at Pediatric Grand Rounds, St. Agnes Hospital, Baltimore Maryland, September, 1996.
- "Domestic Adoption", presented as college-level instruction, Wesley College, Division of Para-Legal Education, Dover, Delaware, Spring, 1997.
- "Ethical and Legal Issues in Adoption and the Assisted Reproductive Technologies", Patient Information Seminars, The Greater Baltimore Medical Center, May, 1997 and 2001.
- "Alternatives in Family Building from a Legal Perspective", round table presentation, Eleventh National Conference for Nurses and Support Personnel in Reproductive Medicine, St. Petersburg, Florida, May 16, 1998.
- "Informed Consent: A Review and Application of Principles to the ART Laboratory", and "Products Liability Issues & the ART Laboratory", International Perspective on Legal and Ethical Considerations for the ART Lab, presented at the American Society for Reproductive Medicine, International Professional Conference, Post-Graduate Course, San Francisco, California, October , 1998.

- "The Medical/Legal Issues of Adoption & Assisted Reproductive Technologies", at The Institute for Criminal Justice, Law Enforcement, and Legal Studies, in coordination with The Anne Arundel Community College, December 1, 1999.
- "The Practical and Legal Aspects of Egg Donation and Other Third-Party Assisted Reproductive Efforts", Organon IVF Directors Meetings, Atlanta, Georgia; Chicago, Illinois; and Laguna Nigel, California, Spring, 2000.
- "Legal Aspects of Third-Party Reproduction", presented at the Thirteenth International Conference for Nurses and Support Personnel in Reproductive Medicine, Monterey, California, May, 2000.
  "Adoption: Introduction to Legal Aspects", presented as round table discussion, Thirteenth International Conference for Nurses and Support Personnel in Reproductive Medicine, Monterey, California, May 2000.
- Planning Committee (faculty contacts, topic selection, program development, information presentations), Fourteenth International Conference for Nurses and Support Personnel in Reproductive Medicine, Phoenix, Arizona, May 2001.
- "Assisted Reproductive Technologies and Legal Concerns", industry sponsored (IVP Care) forum, "Ask the Experts", presented at the American Society for Reproductive Medicine Conference (separate program), San Diego, California, October 2000.
- "Legal Aspects of Egg Donation", industry-sponsored (IVP Care) forum, "Ask the Experts", presented at the American Society for Reproductive Medicine Conference (separate program), Orlando, Florida, October, 2001.
- "Gestational Surrogacy: Legal and Practical Aspects for Physicians", presented as Grand Rounds, The Greater Baltimore Medical Center, February, 2002.
- "Disposition of Frozen Embryos", presented at the Fifteenth International Conference for Nurses and Support Personnel in Reproductive Medicine, Fort Myers, Florida, May, 2002.
- "An Introduction to Surrogacy", presented at the Association of Women's Health, Obstetric and Neonatal Nurses ("AWHONN") International Conference, Boston, Massachusetts, June 24, 2002.
- "Legal Challenges of the ART Family", "Development of an Ethical Perspective on Reproductive Choices", and "Consumerism, Commercialism and Conscience: A Review of Current ART Business Practice", presented at the American Society for Reproductive Medicine, International Professional Conference, Post-Graduate Course, Seattle, Washington, October 13, 2002.
- "Approaches to the ARTs for the Legal Practitioner", and "Third-Party Screening" (panel moderator), presented at the American Academy of

Adoption Attorneys Mid-Year Meeting and ARTs conference, October 24-25, 2002, Nashville, Tennessee. Member, planning committee.

- "Legal Landscape of ART" and "Contracts in Third Party Assisted Reproduction", presented at the National American Infertility Association Seminar and Conference, New York, New York, April 27, 2003 and April 25, 2004.
- "Adoption Practice", Lorman Professional Legal Education Seminar, selected topics in independent adoption, Baltimore, Maryland, December, 2003.
- "Nuts and Bolts of Gestational Carrier Arrangements", The American Academy of Adoption Attorneys, Annual Meeting (panel presentation), Philadelphia, Pennsylvania, April, 2004. (Retained and submitted)
- "Bedside Blunders, Treatment Tragedies and Documentation Disasters: Don't Let It Be You!", Seventeenth International Conference for Nurses and Support Personnel in Reproductive Medicine, San Diego, California, May, 2004.
- "Chin Up, Nose Clean, Ducks in a Row and Finger on the Legal Pulse of REI Nursing", and, "Real Life Courtroom Drama: You be the Judge";, Post-Graduate Course, American Society for Reproductive Medicine, International Annual Meeting, Philadelphia, Pennsylvania, October 17, 2004.
- "Providers' Right to Refuse Treatment" Symposia., Mental Health Professional Group Panel Presentation, American Society for Reproductive Medicine, International Annual Meeting, Philadelphia, Pennsylvania, October 18, 2004.
- "Adoption: What the Fertility Practice Needs to Know", Roundtable Presentation, American Society for Reproductive Medicine, International Annual Meeting, Philadelphia, Pennsylvania, October 18, 2004.
- "Egg, Sperm and Embryo Donation", ART and Embryo Law: Practice, Policy, Regulation and Ethics, November 12, 2004, Cambridge, Massachusetts.
- "The ART Practice and Refusing Treatment to a Patient Requesting Services", Opinion Article, The Mental Health Professional Group of the American Society for Reproductive Medicine, Newsletter, Spring, 2005.
- "ART and the Law", at RESOLVE of Washington D.C., Maryland and Virginia; Conference, Shady Grove, Maryland, April 2, 2005.
- "Egg Donation and the Law", at AIA Conference, New York City, NY, April 17, 2005.
- American Academy of Adoption Attorneys, Mid-Year Conference on the ARTs, Planning Committee Conference Co-Chair, September, 2005.
- "Consumerism, Commercialism and Conscience-ART and Marketplace Forces", ///A mid-year conference on the ARTs, September 7, 2005, Washington, D.C.

- National Adoption Day, Baltimore County Bar Association, planning committee and volunteer coordinator, 2005-present.
- "Creating Life in the Fast Lane: The history, evolution and legal implications of assisted reproductive technology". The Maryland Chapter of the American Pharmacology Association, December 11, 2005, Baltimore, Maryland.
- "Assisted Conception, Reproductive Technology and the Law'. Advanced Adoption Practice, New Jersey Institute for Continuing Legal Education, January 14, 2006.
- "ART for the non-ART practitioner-It's not your Father's Practice", an overview of ART, presented to The Dissenters Legal Club, Spring, 2006.
- Assisted Reproductive Technology for the Legal Practitioner", Adoption and Family Law Seminar, Maryland Institute for Continuing Professional Education of Lawyers, March 10, 2006 , May 21, 2006.
- "Nuts and Bolts of Reproductive Technology Law", spring cumulative legal education presentation (telephone conference), sponsored by the American Academy of Adoption Attorneys, April, 2006.
- "Nursing Malpractice and Infertility Nursing: What You are Afraid to Ask, but Need to Know", Chair, American Society for Reproductive Medicine annual international meeting, symposia, October, 2006.
- Legal Professional Group of the American Society for Reproductive Medicine, co-chair of founding committee, inaugural meeting, October, 2006.
- "Assisted Conception, Reproductive Technology and the Law", Women's Issues class, University of Maryland, Baltimore County, March 29, 2007.
- "Money Management in ART Arrangements", and "Ethical Issues in Adoption and ART", American Academy of Adoption Attorneys Annual Conference, Williamsburg, Virginia, May 4-6, 2007.
- Planning Committee, midyear national conference, American Academy of Adoption Attorneys, "International Adoption after The Hague", October 11-13, 2007.
- "Adoption Law Overview and Update", Adoption and Family Law Seminar, Maryland Institute for Continuing Professional Education of Lawyers: 2006, 2007, 2008.
- Co-chair, program development, midyear national conference, American Academy of Adoption Attorneys, "Decisions, Dilemmas and Discourse in ART", October 16-17, 2008, Chicago, Illinois.
- "Religious Perspectives in ART", American Academy of Adoption Attorneys, midyear conference, "Decisions, Dilemmas and Discourse in ART", October 16-17, 2008, Chicago, Illinois.
- "Strategic Choices in Egg Donation" and "Informed Consent", Practice Manager's Post-Graduate Course, American Society for Reproductive

Medicine, International Annual Meeting, San Francisco, California, November 8-12, 2008.

- "Informed Consent", Family Law Mid-Year Meeting, American Bar Association, Baltimore, Maryland, April 25, 2009.
- "What Every Adoption Practitioner Needs to Know about Assisted Reproductive Technology", The American Academy of Adoption Attorneys, annual meeting, Portland, Oregon, April 30-May 2, 2009.
- "Religion and ART: an overview". Practice Managers Post-Graduate course, The American Society for Reproductive Medicine Annual Meeting, Atlanta, Georgia, October, 2009.
- "Where Should We Go From Here: proposals regarding regulation, policy and affirmative action by medical practitioners in ART" symposia presented by ASRM, Washington, D.C., December 14, 2009.
- "Should the Adoption Model be Applied to ART: A Debate", presented by the Family Law Section, ABA, New Orleans, LA, April, 2010 .
- "At the Crossroads: comparative analysis of ART and Adoption Models", American Academy of Adoption Attorneys, annual meeting, Cambridge, Massachusetts, April, 2010.
- "Legal Implications of Electronic Medical Records". Practice Managers Post-Graduate course, The American Society for Reproductive Medicine Annual Meeting, Denver, Colorado, October, 2010.
- Chair, Legal Professional Group of the ASRM Post-Graduate Course on legal issues in ART. "The Role of the ART Attorney and the Unique Language of ART", "Legally Problematic Issues in ART", and "Review of Ethically Complex Cases", ASRM Annual Meeting, Orlando, FL, October, 2011.
- "Informed Consent and the ART Nurse". Interactive session for the Nurses' Professional Group, ASRM Annual Meeting, Orlando, FL October 2011.
- "Meeting the Ethical Challenges of ART Practice", symposia for the Nurses' Professional Group, ASRM Annual Meeting, Orlando, FL, October, 2011.
- "No Partner, No Problem? Representing the single client in family formation cases", AAAA Mid-Year Meeting on ART, San Francisco, CA, November, 2011.
- "ART and the Law", Maryland State Bar Family Law CLE program, Annapolis, Maryland, March, 2012.
- "Terms of ART", Practicing Law Institute, New York State Bar Association, New York, N.Y., June, 2012.
- "Adoption Law and Practice", Maryland State Bar Association Continuing Legal Education. Co-Author, practice guidelines, and faculty, seminar presentation, Columbia, Maryland, August, 2012.
- "Family Formation in a Brave New World", Maryland State Bar Association CLE Program, Towson, Maryland, March, 2012
- "Adoption Law in Maryland", NBI Seminar, Baltimore, MD, September, 2012.

- "Embryo Disputes, Disposition and Abandonment", (with Kimberly Surratt), American Academy of Adoption Attorneys Annual Meeting, San Diego, California, April, 2013.
- "Disputed Embryo Disposition", Baltimore City Bar Association, October, 2013.
- "Same-Sex Marriage, Child Custody and Family Formation", Baltimore County Bar Association, Family Law Committee CLE Program, October, 2013.
- "ART Case Law Update and Case Interpretation", AAARTA Mid-Year Meeting on Global ART, Charleston, South Carolina, November, 2013.
- "Adoption Law from Start to Finish", NBI Seminar, Baltimore, Maryland February 10, 2014.
- "Introduction to ART"; and, "Parallel Perspectives, Intersecting Interests, Take Two: Viewing ART through the Prism of Adoption Law Principles. Reviewing Concerns, Reassessing Concepts, Revising Conclusions, American Academy of Adoption Attorneys Annual Meeting, New Orleans, Louisiana, May, 2014.
- "The Embryo: Creation, Conflict and Controversy" Co-Chair, ASRM Post-Graduate Course, "Embryo Disposition", "Legislation and the Embryo", "Abandoned Embryos", "Integration of Scientific, Psychological, Ethical and Legal Perspectives into ART", ASRM Annual Meeting, Honolulu, HI, October, 2014.
- "Case Law Updated and Impact on ART", Roundtable presentation, ASRM Annual Meeting, Honolulu, HI, October, 2014.
- "Embryo Disposition, Dispute and Abandonment", American Academy of Adoption Attorneys and AAARTA Annual Conference, St. Pete Beach, Florida, April, 2014.

PUBLICATIONS

- "Products Liability and What the CJD Scare Has Taught Us", a review of current legal events and implications, ASRM Embryology Special Interest Group Newsletter, Spring, 1999 (International Distribution).
- "Assisted Reproductive Technology and the Law", Author, Chapter 17, in Adoption Law and Practice in the 21st Century, Zimmerman, G., Editor New York State Bar Association, 2004.
- "Adoption Law Overview", chapter co-author, Baltimore County Bench-Bar Handbook, 2007.
- "Informed Consent", chapter in *Family Advocate*, Vol. 50, Fall, 2011, ABA Section of Family Law.
- "Legal Issues in Infertility Counseling", Chapter Author in Infertility Counseling: A Comprehensive Handbook for Clinicians, 2nd Edition, hammer-Burns L. and Covington S., Editors, Cambridge University Press, NY, NY (2006).
- "Legal Issues in Surrogacy" and "Legal Issues in Egg Donation", Chapters Author. Third-Party Reproduction: A Comprehensive Guide, Goldfarb, James, Ed., Springer Publishing, Marlton, NJ 2013.

- (Submitted and accepted, book not published) "Legal Issues in Infertility Counseling", chapter Author, Infertility Counseling: A Comprehensive Handbook for Clinicians, 2nd Edition, Hammer-Burns L. and Covington S., Editors, Cambridge University Press, NY, NY Revised Edition, 2014.
- "Legal Issues for Fertility Counselors", Chapter Co-Author, Fertility Counseling: Clinical Guide and Case Studies, Covington S., Ed. Cambridge University Press (publication pending).

Numerous presentations to patient and community groups concerning legal aspects of infertility treatments, parentage after third party collaborative reproduction, legal process in third party arrangements and adoption.

AWARDS

Recipient of national "Angels in Adoption" award, presented by the Congressional Coalition on Adoption Institute, Washington, D.C. September, 2008.

APPOINTMENTS

Deputy Director, American Academy of Assisted Reproductive Technology Attorneys, 2013-present.

Executive Council Member, American Academy of Assisted Reproductive Technology Attorneys, 2009-present

Legal Professional Group representative to SART Executive Council, 2009-2013.

CLE Chair, AAARTA Mid-Year Conference, Charleston, SC, 2013

Chair, ///A and AAARTA Annual Conference, St. Pete Beach, FL 2015