IAFL Oslo Week
Surrogacy Worldwide Webinar
Thursday 4th June 2020

Supporting Documents

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Panel: Anne-Marie Hutchinson, OBE QC (Hon)(England), Ranjit Malhotra (India), Else-Marie Merckoll (Norway), Mathias Thorshaug Rengård (Norway), Margaret Swain (Maryland, USA)

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Germany:

- Performance or mediation of surrogate motherhood in Germany is prohibited and punishable under § 1 Embryo Protection Act (ESchG) and §§ 13c, d and 14b Adoption Placement Act (AdVermG). This is in contrast to other states in which either altruistic surrogacy - for example in England - or even commercial surrogacy - as in the Russian Federation, Ukraine and Thailand as well as in almost 20 states of the USA - is permitted

- However, In order to achieve legal parenthood of the intended parents registered as parents in the foreign country in Germany as well, the intended parents can apply for a subsequent certification of the foreign birth at the competent registry office and also have access to a formal recognition procedure for the foreign birth in German

  if the child has already been legally assigned to the intended parents under foreign law und certain circumstances.

  This is primarily based on a first decision of the German Court of Justice in 2014, who affirmed and did not see a violation of German public order,

  If,

  a) the case involves the question of the recognition of a foreign judgment (!)
     or
  b) surrogacy de lege lata is permitted under foreign law (like in Russia) and the (foreign) requirements for a legal assignment of the intended parents as parents of the child are met
     and
  c) a constellation exist, in which at least one parent is genetically related to the child and there is no genetic relationship to the surrogate mother

  Arguments: It can be assumed that there is neither an obstacle to recognition by German public order ground. Nor fundamental or human rights, in particular Article 8 ECHR in relation to the child or surrogate mother, stand in the way of recognition.

  In particular, the recognition of the decision corresponds to the welfare of the child, which would not be taken into account "better" in the context of an adoption.

- Recognition will be denied, in the following constellation although the a legal assignment of child exists from abroad:

  In a case, by which the sperm was donated anonymously and the egg of the surrogate mother was used or if there is an anonymous egg donation and also an anonymous sperm donation and the child was carried out by a surrogate mother. In these cases, no genetic parentage exists of the legally assigned intended parents abroad exists, therefore it must be assumed that recognition of the assignment of this child to the intended parents in Germany will be denied.

- By contrast, adoption is the solution to the following case constellations, since the child is not legally assigned to both intended parents abroad:

  a) The surrogate mother gives birth to a child without a legal assignment of the child to both desired parents - under foreign law. This applies first to cases in which the unmarried intended mother has a child carried by a surrogate mother, irrespective of any genetic relationship. The child is assigned to the mother abroad. In these cases, paternity must be recognized by the father abroad and the child must then be adopted by his (now) wife in Germany by way of stepchild adoption.

  b) A child is born abroad, whereby the egg of the surrogate mother was fertilized with the sperm of a (homosexual) man.

     In the Russian Federation as well as in the Ukraine a legal assignment of the child to the sperm donor man and his German or in Germany living partner or husband is not possible. In this case, the biological father must still acknowledge paternity abroad. The child then receives by a German authority a paper to leave the country and the partner or husband adopts the child born abroad in Germany after the declaration of consent to the adoption by the surrogate mother and, if applicable, her husband has been obtained.

  c) In constellations in which the German couple only receives a birth certificate which identifies them as the parents of the child. Since the birth certificate as such has no constitutive effect on the parentage of the child, it does not contain a decision that can be recognized. On the other hand, the foreign birth certificate has probative force for the descent of the child.

Now the Ministry of Justice is working on a reform of the law of descent taking into account German international procedure law as well as the German substantive international private law. Within these discussions, the legislature will have to deal with the question to what extent there can be statutory provisions, which make it possible to assign the child to its parents in all the constellations described. However, the legislature will have to bear in mind to be committed to the welfare of the involved and born child.

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A.M v. Norway (application no. 30254/18)

Key information:

Plaintiff/applicant	A by attorney Knut S. Skurdal Andresen	
Defendant	B by attorney Tore R. Riedl	
District Court	Asker and Baerum District Court	TAHER-2015-134151
Appeal Court	Borgarting Appellate Court	LB-2015-171953 (15-171953ASK-BORG/04)
Supreme Court	Supreme Court Appeals Committee	HR-2016-529-U
ECtHR	European Court of Human Rights	Application no. 30254/18

Summary:

- The parties, a woman (A) and a man (B), became cohabitants in 2002.
- Contacted surrogacy agency in the US in 2010. No pregnancy. Interrupted the process in 2012.
- Relationship deteriorated. B moved out in September 2012. Relationship definitely over early 2013. B engaged a new relationship with former partner.
- Regardless of their relationship status, the parties picked up the surrogacy process with a new surrogacy agency in 2013.
- In July 2013, a new fertilized donor egg (with B's sperm) was successfully transferred to the new surrogate. Pregnancy confirmed in August 2013.
- The US District Court pronounced a ruling on the 10th of January 2014, stating that A is deemed to be the legal mother under the actual state law.
- The child was born on the 19th of March 2014 in the US. A was entered as "mother" on the birth certificate, in accordance to the US District Courts ruling.
- After returning to Norway, B's request to have the paternity set was accepted (DNA).
- The parties had an agreement in regards to A's access/visitation rights. After mediation and the Child Welfare's advise on a better agreement, the discussion on the practical sides of the custody became even more heated. No agreement.
- B decided to cut off further contact between the child and A on the 14th of August 2015.
- A contacted the Central Authority to have a formal recognition in Norway for maternity, alternatively adoption. The Central Authority decided that A's claims were invalid.

- A brought the case to the District Court, the Appeal Court and tried to appeal the matter to the Supreme Court in Norway. She claimed that:
    - the decision from the Central Authority was invalid
    - she was entitled the maternity in accordance to the surrogacy agreement
    - the ruling from the District Court in the US had to be legally enforced in Norway, cf. the Dispute Act Section 19-16, or under provisions with higher rank than the Dispute Act (the Norwegian Constitution art. 104, UNCRC, ECHR art. 8)
    - she was entitled the maternity in accordance to the Temporary Act No. 9 of 8th of March 2013
    - the best interest of the child was that she was to be acknowledged as the "mother"/could adopt, even if B did not consent.
- The Court(s) ruled that:
    - the decision from the Central Authority was not invalid.
    - The decision from the District Court in the US could not be legally enforced - no legal basis in the Children's Act for recognizing foreign decisions on parental responsibility/no agreement regarding this between Norway and USA.
    - The mother of the child is the woman who gives birth to the child, cf. the Children's Act Section 2. There is no legal authority in the Children's Act for a social mother in a surrogacy relationship to have legal maternity transferred from the biological mother to herself. The only way of achieving status as a parent with no genetic bond, is through adoption that requires the consent from the person(s) with parental responsibility.
    - The Constitution and the international conventions could not provide an independent basis for her claim for maternity, and that Norwegian law was in accordance with Norway's international obligations. The national laws are based on the paramount principle of the best interest of the child.
    - A was not entitled to maternity due to the Temporary Act, as she had not applied during the brief period it was active (opening for applications until 1st of January 2014). Nevertheless that the requirements in the Temporary Act Section 2, that the parties had "a shared wish to raise the child together", was not met.
    - The Court also ruled that following an overall assessment, the Court could not see that considerations of the child's best interest would indicate a different result than what follows from prevailing law.
- The appeal to the Supreme Court was denied.
- A sent an application to the European Court of Human Rights (ECtHR)
    - Violation of her rights under art. 8 and art. 14.
- Norway sent their response to the ECtHR in March 2020. It is expected that the case preparations is to be done during the fall of 2020.

MAJOR HIGHLIGHTS AND BRIEF ANALYSIS OF THE SURROGACY (REGULATION) BILL, 2020 FOR THE WEBINAR SERIES AS PART OF THE IAFL OSLO CONFERENCE FROM 1 – 5 JUNE 2020.

A Presentation by

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MAJOR HIGHLIGHTS AND BRIEF ANALYSIS OF THE SURROGACY (REGULATION) BILL, 2020 FOR THE WEBINAR SERIES AS PART OF THE IAFL OSLO CONFERENCE FROM 1 – 5 JUNE 2020.

- The **Surrogacy (Regulation) Bill, 2020** [hereafter referred to as the 2020 Surrogacy Bill] is an ethical, moral and social legislation as it protects and exploitation of the surrogate mother and protects the rights of the child born through surrogacy. One of the major highlights of the 2020 Surrogacy Bill is that has strongly once again carried forward the ban on commercial surrogacy. For more details See :

https://www.hindustantimes.com/analysis/the-new-surrogacy-bill-protects-the-interests-of-all/story-F4DJy6L5QsfYk57npKVB3H.html

- Primarily, The 2020 Surrogacy Bill proposes to allow / limit altruistic ethical surrogacy to intending infertile Indian married couples only in the age groups 23-50 years (women) and 26-55 years (men). The couple should be Indian citizens, and also include Non Resident Indians, Persons of Indian Origin and Overseas Citizens of India. For details See: In particular Clauses 4.54 and 4.55 at page 31 of the Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019 presented to the Rajya Sabha on 5 February, 2020. For complete details of the report See :

https://www.prsindia.org/sites/default/files/bill_files/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf

…2020 Surrogacy Bill

- However, there are caveats for a couple of Indian origin opting for surrogacy arrangements. They cannot have a surviving child, either biological or adopted, except when they have a child who is mentally or physically challenged or suffers from a life-threatening disorder with no permanent cure. And, yet again this unfortunate position approved by the appropriate authority with a due medical certificate from a District Medical Board. See: Clause 4 as appearing at pages 45 and 46 of the above mentioned report.
- Clause 4 (ii) (a) of Chapter III relating to Regulation of Surrogacy and Surrogacy Procedures of the 2020 Bill and some of the relevant clauses at pages 43 to 45 of the said report mandate as follows.

"4.(ii) No surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:-

(a)when an intending couple has a medical indication necessitating gestational surrogacy:

Provided that a couple of Indian origin or an intending women who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed.

…2020 Surrogacy Bill

Explanation.: For the purposes of this sub-clause and item (I) of sub-clause (a) of clause (iii), the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;

(b) when it is only for altruistic surrogacy purposes;

(c) When it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;

(iii) (I) a certificate of **a medical indication** in favour of either or both members of the intending couple **or intending woman necessitating gestational surrogacy** from a District Medical Board.

*(*III*)* an insurance coverage of such amount and **in such manner** as may be prescribed in favour of the surrogate mother for a period of **thirty-six** months covering postpartum delivery complication from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999;

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Provided that the intending couple or the intending woman [defined explicitly in Section 4 (1) of the 2020 Bill at page 44 of the said report] shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother;

(b)(III) no woman shall act as a surrogate mother by providing her own gametes;

(IV) no woman shall act as a surrogate mother more than once in her lifetime;"

- Fact of the matter is that surrogacy has huge profound psychological implications. Brandishing "**a medical indication certificate,"** can be very stigmatic and outrightly violates privacy. **It can well be justifiably argued that the respective rights of privacy of the respective parties to the surrogacy arrangements will stand violated, certainly both for the commissioning parent and the surrogate mother as well in the event of disclosure to other non-agreed third parties, especially statutory authorities, friends and acquaintances of the parties. Reference in this regard is made to the recent celebrated judgment handed down by the Hon'ble Supreme Court of India in K. S. Puttaswamy V. Union of India (2017) 10 SCC 1. It should also be borne in mind, that the requirement is per se: more than stigmatic.** Both the parties can well most likely encounter administrative obstructions / bureaucratic hurdles from the board and any potential delay in the decision making process, will add to the misery of the parties.

The administrative hierarchy in invoking the jurisdiction of the Board cannot possibly ensure a high degree of sensitivity in the entire process. In sum and substance, in so far relating to this aspect of the matter the parties are well likely to be confronted with typical belligerent administrative apathy at the hands of the Board.

- The opening portion para 4.18 at page 24 of the above mentioned report compares as follows:

  "4.18 Clause 2(p) read with Clauses 2(r), 4(ii)(a) & 4(iii)(a)(*I*) provide the eligibility criteria for availing surrogacy procedure. A number of Members raised objections to the definition of the term "infertility," as the inability to conceive after 5 years of unprotected coitus on ground that it was too long a period for a couple to wait for child…."

  "….Some members took umbrage to the Clause 4(iii)(a)(*I*) which provides for obtaining a certificate of infertility from a District Medical Board on the ground that why should such a certificate be required at all as it is quite offending and insulting. They were of the view that these Clauses need to be revisited."

The penultimate observations of the above mentioned Committee at page 25 of the said report in this regard concluded as follows:

"4.21 In view of the above, the Committee recommends that while Clause 2(p) may be deleted and after this, the clauses may accordingly be renumbered/rearranged."

Certainly, this is an egregious interpretation. Also, socially and culturally more than insensitive as the previous phrase "**infertility**," as used in the 2019 Bill is now substituted with a harsh terminology "**a medical indication**," which at first blush includes more sweeping medical conditions in addition to infertility, still very much retaining in place the stigmatic labelling for both the parties to a surrogacy arrangement. It could also well be argued that the distinction still remains very blurred. Rather, there is no paradigm shift at all in so far relating to this aspect of the matter in the intent of the legislative process in this regard.

- By virtue of the provisions of the 2020 Surrogacy Bill all single/unmarried persons have been automatically excluded for commissioning surrogacy arrangements. Likewise, people in live in relationships also stand excluded whilst on the other hand live in relationships find statutory recognition under the provisions of the Indian Domestic Violence Act, 2005.
- Single woman cannot opt for surrogacy arrangements, but exceptions have been carved out for widows and divorcees. The 2020 Surrogacy Bill **also provides that divorced and widowed women aged between 35 and 45 years should be able to be a single commissioning parent.** For more details See: Definition clauses Section 1 (s) at page 39 of the report.

- The **Regulation of surrogacy clinics is provided in chapter 2** of the 2020 Bill as elaborated pages 41 and 42 of the said report. The licensing regime for **Registration of surrogacy clinics is provided in chapter 4** of the 2020 Bill, as enumerated at pages 47 and 48 of the report. The composition and the functioning of **National State Surrogacy Boards** is provided in great detail in chapter 5 of the 2020 Bill appearing at pages 48 to 57 of the said report but legal expertise as part of the composition of the Board/s is conspicuously missing and national and state surrogacy boards to be so constituted. The provision for an **Appropriate Authority to be set up by Central Government** is mandated in **Chapter 6** of the 2020 Bill at pages 57 to 59 of the said report. The penal clauses are contained under the title **Offences and Penalties** in **Chapter 7** of the 2020 Bill at pages 59 to 62 of the said report.

- The Select Parliamentary Committee which met on 21 January 2020 after taking cognizance on board severe criticism of the earlier provision of confining surrogates to "close relatives only," as envisaged in the Surrogacy (Regulation) Bill, 2019 recommended that the "close relatives," clause should be removed, and any "willing" woman should be allowed to become a surrogate mother provided all other requirements are met and that the appropriate authority has cleared the surrogacy.

- The Committee Report however, "**has not**," recommended expanding the definition of commissioning parent to include single persons, either men or women.

- That after the compilation of the 2020 Surrogacy Bill, the Central Government shifted the spotlight for regulation of other forms of Assisted Reproductive Technologies (ART) with the Union Cabinet approving a related legislation. "The Draft Assisted Reproductive Technology Bill, 2020, seeks to establish a National Advisory Board, State Advisory Boards and a national registry for accreditations, regulation and supervision of all assisted reproductive technology clinics and assisted reproductive technology banks." For complete detail See: https://www.tribuneindia.com/news/nation/after-surrogacy-cabinet-clears-bill-to-regulate-ivf-44199. For more deep analysis also See : https://www.thehindu.com/opinion/editorial/art-of-life-on-assisted-reproductive-technology-regulation-bill/article30873613.ece

SOME OTHER ISSUES OF SIGNIFICANT CONCERN :

(a) Ballpark estimations by the Indian Council of Medical Research (ICMR) put it around 2,000-odd babies per year through commercial surrogacy — when a woman is paid an agreed sum for renting her womb. Confederation of Indian Industry figures say surrogacy is a $2.3-billion industry fed by a lack of regulations and poverty.

(b) There is no reported case on the issue of consent or meaningful consent.

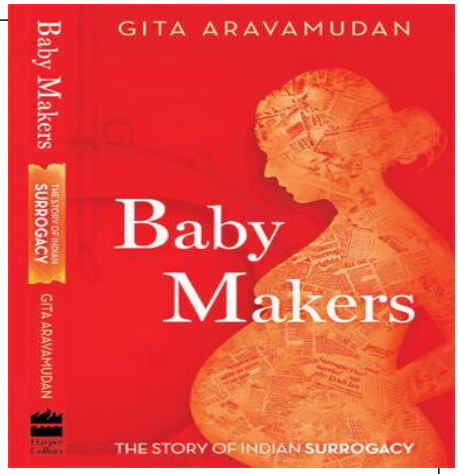
(c) There is no reported case on the invalidity or validity of surrogacy contracts, whilst there are reported decisions abound in civil suits wherein declarations have been sought by commissioning parents as guardians / custodians of minor children borne out of surrogacy arrangements, generally by parents resident overseas primarily for visa facilitation purposes by their respective Embassies / foreign missions. But, this phenomenon now stands extinguished for the last many years, ever since foreigners who were excluded out of the purview of surrogacy since the last many years.

(d) Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy arrangements, the provisions of the Indian Contract Act, 1872 would apply. Alternatively, the commissioning parents can also move an application under the Guardian and Wards Act, 1890, for seeking an order of appointment to be declared as the guardian of the surrogate child. **In comparison, surrogacy contracts are unenforceable in the UK also in terms of reported decision Re TT (surrogacy) [2011] EWHC 33 (Fam).**

(e) There are already serious issues of determining parentage, nationality, issuance of passports, grant of visas and problems of disputed parentage. Corresponding amendments will have to be made in The Births and Deaths Registration Act, 1969 and The Citizenship Act, 1955 as the same contains no provisions for children born out of surrogacy arrangements.

There are a lot many suggestions to be advanced, but given the time constraints of the global panel, the scope of this presentation has been to highlight and briefly analysed the provisions of the Surrogacy (Regulation) Bill, 2020, which has not come out in the public domain so far, but the same has been adequately analysed and enumerated subject wise in the Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019, commissioned by the Parliament of India and presented on 5 February 2020.

CONCLUSION



We have to wait and watch, as to what shape the present 2020 Bill will take and as to what amount of suggestions are seriously taken into consideration by the Government of India.

Thank you for your time and patience.

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SURROGACY – NORWAY

- The use of a surrogate is illegal in Norway, cf. The Biotechnology Act Section 7-5. The sanctions are fines or prison up to three months. It does not apply to:
    - private persons who seek or uses such an offer of surrogacy
    - donors of sperm, eggs and/or embryos
    - persons who participate in research

- Agreement of giving birth to a child for another woman is not legally binding, cf. The Children's Act Section 2 (2).

- The main issue in Norway is the IPs status after birth through surrogacy abroad.

- The determination of the mother and father of a child given birth to by a surrogate must, as a main rule, be based on Norwegian Law, cf. The Children's Act Section 84, cf. 81-83.
    - The woman who gives birth to the child is considered as the mother (both biologically and legally), cf. The Children's Act Section 2 (1)
    - The man who is married to the woman at the time of the birth is automatically considered as the father, cf. The Children's Act Section 3 (1).
        - Does not apply if the couple was separated at the time of birth
        - Common law relationship and no existing relationship – declaration of paternity during or after the pregnancy that is approved or given by the mother, cf. The Children's Act Section 4 (1). If the mother does not give or approve a declaration, the father needs to ask the Court to set the paternity after a DNA test has been taken, cf. The Children's Act Section 9.
    - The woman who is married to the mother at the time of birth is automatically considered as the co-mother, if she did consent to the fertilization and the fertilization was done by an approved health institution, cf. The Children's Act Section 3 (2). The sperm donor has to be known.
        - Does not apply if the couple was separated at the time of birth.
        - Common law relationship – declaration of co-mother during or after the pregnancy that is approved or given by the mother, cf. The Children's Act Section 4 (4).

- Adoption of the child as a stepchild, cf. The Adoption Act Section 13.

- If the father and/or co-mother is determined by foreign law, it will apply in Norway, cf. The Children's Act Section 85 (1).
    - For example: The man who is married to the surrogate is recognized as the child's father by the law in the state where the child is born. The Norwegian "donor" (biologically father) needs to apply to have the paternity changed by the Norwegian Court, in accordance to the genetic relation.
    - There is an opening in Section 85 (2) that a judgement or formal acknowledge by foreign law in regards to who the father and/or co-mother is, can be recognized by Norwegian authorities either in a specific case or as an agreement between countries.
        - There is an agreement between Norway and the Nordic Countries.
        - The option to recognize a judgement or formal acknowledge in a specific case is a narrow exception rule. It is easier if it is a case of paternity, where a foreign Court has ruled that he is the father and the genetic bond between the "donor" and child is documented (DNA test).

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IAFL WEBINAR : SURROGACY WORLDWIDE

The United Kingdom

1. The law relating to surrogacy in the United Kingdom is governed principally by the Surrogacy Arrangements Act 1985. Indeed the United Kingdom was one of the first countries in the world to legislate in respect of surrogacy.

2. The 1985 Act was brought in against the backdrop of the well publicised case of Kim Cotton, a British woman who had acted as a surrogate for an overseas couple for a commercial sum. The legislations currently operates to:
    a. Make agreements unenforceable by or against any party;
    b. Create criminal offences for third parties (such as lawyers and agencies) who broker surrogacy arrangements for a fee;
    c. Creates a number of offences for advertising for, or willingness to be a surrogate.

3. The 1985 Act did not, however, criminalise surrogacy. In fact surrogacy has never been illegal in the United Kingdom.

4. Alongside the 1985 Act which regulates surrogacy, is the Human Fertilisation and Embryology Act 2008. It is this Act which governs the attribution of legal parentage.

5. Under section 33 of the HFE Act 2008, the legal mother of the child is the woman who carried the child regardless of whether she is a gestational surrogate. If she is married, her spouse will be the child's second legal parent. This is the case even where the child is born pursuant to an international surrogacy arrangement and the legal parentage has been established in favour of the intended parents either by operation of law in the jurisdiction of birth or by way of a court order.

6. Thus even in international surrogacy arrangements, intended parents in the United Kingdom should consider applying for a parental order in order to be recognised as legal parents under UK law.

Recent developments in the UK

7. The Law Commission is currently working on proposals for surrogacy law reform. A consultation period ran from June 2019 to October 2019 and which has now closed. The detailed consultation paper is available on the Law Commission website. It is expected that

that the final report with recommendations for reform, and a draft Bill, will be published in early 2022.

8. Issues that the Commission will be considering include a wide range of issues but will include:
    a. Whether the intended parents can have legal recognition at birth and if so, in what circumstances,
    b. The nature of payments that can be made to a surrogate.

9. It is often said that UK law permits only altruistic surrogacy. That is true to the extent that organisations and agencies can only lawfully operate on a not for profit basis. However it is not a criminal offence for intended parents to agree to pay a figure over and above reasonable expenses.

10. When an application is made for a parental order, where payments have been made that exceed out of pocket expenses, the court must authorise those payments before a parental order can be made. The court's approach was laid down by Mr Justice Hedley in Re X and Y (Foreign Surrogacy) (2008). This was the first case which properly considered the issue of commercial surrogacy and the public policy in the UK.

11. The Court set out three questions that the court must consider, namely:

    a. Was the sum paid disproportionate to reasonable expenses;
    b. Were the applicants acting in good faith and without "moral taint" in their dealings with the surrogate;
    c. Were the applicants party to any attempt to defraud the authorities.

12. This approach was further compounded by the introduction of Parental Order Regulations in 2010 which required the Court to have the child's *lifelong best interests* as the court's paramount consideration.

13. Consequently the Family Court routinely authorises commercial payments made in surrogacy arrangements. There are no cases where the court has found that the lifelong best interests of the child would not be met by the court authorising the payments.

14. The issue of public policy of commercial surrogacy was recently considered in the context of a civil claim for medical negligence by the UK Supreme Court in Whittington Hospital NHS Trust (Appellant) v XX (Respondent) [2020] UKSC 14. As a result of the negligence of the hospital, cervical smear tests and biopsies were wrongly reported and by the time the errors were detected, the patient's cervical cancer was too far advanced for her to have surgery which would have preserved her ability to bear a child. The claimant sought damages to enable her to undertake commercial surrogacy in the USA. The hospital accepted liability but contended that the cost of commercial surrogacy was unrecoverable since commercial surrogacy was against UK public policy. At first instance, the High Court determined that the claimant could not claim the cost of commercial surrogacy. The Court of Appeal overturned that decision and the hospital appealed to the UK Supreme Court, who refused the appeal and found (in a majority judgment) that the cost of commercial surrogacy was recoverable.

International initiatives

15. Surrogacy and ART in general can create dilemmas around parentage of people conceived through such arrangements. As matters stand, there are no international conventions which operate to recognise legal parentage. The Permanent Bureau of the Hague Conference on Private International Law has been working on the feasibility of such a convention. Further information can be found on the HCCH website: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy

Developing Issues in International Surrogacy Arrangements: the U.S. Update
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Generally:

- The vast majority of states permit surrogacy, but not all states have laws that guarantee enforcement of surrogacy contracts
- Three states have restrictive/prohibitory laws and compensated surrogacy is not allowed (MI, LA, NE)
- Currently, 11 states have laws that specifically offer enforcement if all statutory requirements are met: CA, CT, DC, DE, ME, NH, NJ, NV, RI, VT, WA (NY joins this list in 2021)

Specific prohibitory statutes:

- Michigan: The Michigan Surrogate Parenting Act MCL Section 722.851 makes all surrogacy contracts, agreements, or arrangements "void and unenforceable as contrary to public policy." In addition, surrogacy contracts for compensation are subject to criminal penalties.
- Louisiana: Surrogacy Bill HB 1102 [MM1] took effect on August 1, 2016. This bill restricts gestational surrogacy to heterosexual married couples using their own gametes and places onerous requirements on such arrangements, including a strict, no compensation requirement. Commercial surrogacy is therefore prohibited in Louisiana. If one enters into a surrogacy agreement that is not sanctioned by the new law, anyone involved is subject to civil and criminal penalties.
- Nebraska: very confusing state statute, R.R.S. Neb. 25-21, 200 (2007). Only uncompensated gestational surrogacy arrangements are permitted, and only the father is listed on the birth certificate. The underlying contract is void and unenforceable.

Uniform Parentage Act 2017

A thorough model act that, among other things, addresses parentage for surrogacy arrangements. This is not a law, but provides the framework for drafting legislation. It may be adopted and passed into law by a state in whole or in part.

New in 2020

The Child Parent Security Act is now the law in NY! Compensated surrogacy in NY was formerly prohibited and NY had one of the most restrictive laws of any state. After years of lobbying efforts and massive rewrites of proposed legislation, the Child Parent Security Act was finally passed into law in 2020. It governs gestational surrogacy, both compensated and compassionate and provides the template for how surrogacy in NY should be approached. At present, there are NY residency

requirements, but this may change in a new legislative session. The new law is effective 2/15/2021.

COVID-19, the U.S. and surrogacy

Public Health powers are generally held and managed at the state level. The federal government plays a major role in resource allocation, and also provides guidance to state officials, but the individual states are responsible for on-the-ground, state-related decisions. Throughout the pandemic, the US government has officially remained a decentralized system except for specific organizations solely under federal control, such as the Department of State and USCIS (United States Citizenship & Immigration Services).

Travel Bans: USCIS issued travel restrictions in March-we have had some success in getting the bans eased or lifted for expecting (sometimes) and new parents (easier after the baby is born) in surrogacy arrangements.

Department of State Passport Issues: restrictions on provision of passport services were put in place on March 19. *"Because of public health measures to prevent the spread of COVID-19, we have extremely limited U.S. passport operations. If you apply or renew now, you will experience* ***significant delays of several months*** *to receive your U.S. passport and the return of your citizenship evidence documents (such as birth certificates or naturalization certificates). Unless you have a life-or-death emergency, please wait until we resume normal operations to apply for or renew your passport."* Newborns in surrogacy arrangements with international parents are not deemed to fall within the "life or death" exception.
https://travel.state.gov/content/travel/en/traveladvisories/ea/passport-covid-19.htm
We have had no luck in getting passports expedited. When the other country allows, we have instead been recommending that parents obtain passports (or other, acceptable travel documents) at their country's embassy within the US.

Birth Certificates: a confounding problem is the delay in issuance of Birth Certificates due to COVID-19 closures and staffing changes. This appears to be a very local issue, with some states promptly providing the certificates and others taking much longer than normal.

Questions:

What have been the practical implications of the travel ban and the passport restrictions on the children born of these arrangements?

What contractual provisions can be made to protect and secure the children's best interests in situations where the legal parents are unavailable?