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The prospect of an international regime for surrogacy arrangements

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1. Background

Like other areas of assisted reproduction, surrogacy challenges the traditional legal presumptions of parentage, which often follow genetics rather than intentions.[1] The differing social, moral and political attitudes towards surrogacy between countries means that different jurisdictions have developed very different legal approaches towards surrogacy.

There is a wide scale of domestic approaches towards surrogacy. They fall into four broad categories:

a. those states in which surrogacy arrangements are lawful and enforceable;
b. those states where surrogacy arrangements are legal but on specific terms and subject to meeting specific criteria;
c. those states who have made no provision in their domestic legislation at all; and
d. those states where surrogacy is illegal.

This disparity of approach is a key factor in the growing number of intended parents entering into international surrogacy arrangements ('ISAs'). ISAs are generally regarded as surrogacy arrangements where the commissioning parents live in a different jurisdiction to their surrogate. In nearly all ISAs, the child will therefore be born in a country other than the country of intended residence.[2]

There are currently no international laws, treaties or conventions which operate to provide for the recognition of legal parentage established by one jurisdiction in another. Accordingly, differing approaches towards citizenship and parentage between the country of birth and the country of intended residence of the child may come into conflict with each other.

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1 See K. Horsey, this issue, at p. 181.

2 On some of the particular problems that can arise from these arrangements, see E. Jackson, this issue, at p. 197.

As an example, in *Re X and Y (Foreign Surrogacy)*,[3] Hedley J was presented with a situation where the children (twins) had been born through surrogacy in the Ukraine. Under Ukrainian surrogacy law, the children were not considered to be the legal children of their surrogate and thus were not entitled to a Ukrainian passport. However under English law (and British nationality law), the surrogate and, in this case, her husband were considered to be the legal parents. Hedley J aptly described the effect of this conflict of laws being that 'the children were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home.'[4]

Furthermore, issues can arise if families created using surrogacy relocate to another country. They may have established their legal parentage in their original country of habitual residence but the law of their country of residence may attribute legal parentage differently. In such cases, it is often the children who suffer for want of having their legal relationship with their day to day parents being recognised by the laws which govern them.

Even the briefest of online searches will reveal that surrogacy is on the rise, including ISAs. Indeed some jurisdictions have become known as international destinations for surrogacy and there are thriving surrogacy 'industries' in various countries – although these are moveable and subject to change, as jurisdictions often pass reactive legislation regarding surrogacy. In India, for example, there are estimates that the surrogacy industry has been worth over USD 2 billion per year.[5] However, there is a proposed bill[6] currently under consideration in India which could see an end to commercial surrogacy in India and prevent all forms of surrogacy for foreigners, which not only may curtail the industry, but brings additional problems for people already in the system.[7]

2. The work of the Hague Conference

With so many children now being born through surrogacy, the issue of international surrogacy and a possible Convention in this area has been on the agenda of the Permanent Bureau of the Hague Conference on Private International Family Law since 2010. It needs to be remembered that the establishment of a parent-child relationship is specifically excluded from

3 [2008] EWHC 3030 (Fam).
4 *Ibid.*, [10].
5 Jason Burke, 'India's Surrogate Mothers Face New Rules to Restrict "Pot of Gold"', *The Guardian* (20 July 2010).
6 Surrogacy (Regulation) Bill 2016.
7 Lucas Taylor, 'Embryos from overseas couples 'stuck' in India', *BioNews* 874 (24 October 2016).

The Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children by virtue of its Article 4(a).

Even between the Member States of the European Union (EU), EU legislation which provides for the recognition of matters relating to parental responsibility – Brussels II Revised[8] – also excludes the establishment of a parent-child relationship by virtue of Preamble (10). Given the stark approaches towards surrogacy not only among EU countries, but in a wider international context, it is unlikely that any consensus will be reached towards a surrogacy convention in the short term.

The Council on General Affairs and Policy of the Hague Conference ('the Council') convened a meeting of the Experts' Group on its Parentage/Surrogacy Project in February 2016. The mandate of the Group is to consider the 'feasibility of advancing work' on the 'private international law issues surrounding the status of children, including issues arising from [ISAs]'.

The report following the Experts' Group meeting noted that 'the absence of uniform private international law rules or approaches with respect to the establishment of parentage can lead to conflicting legal statuses across borders and can create significant problems for children and families'.[9] The Council invited the Group to continue its work in accordance with its mandate of 2015, and requested the Permanent Bureau to convene a second meeting of the Group. The second meeting is likely to be in late January 2017 before the next meeting of the Council.[10]

3. Should there be an international regime for surrogacy?

As domestic cases have shown, there are certainly conflicts of laws issues which can cause practical and other difficulties for children and families created using surrogacy, some of which would be considered detrimental to the overall welfare of the children and families concerned. A convention that would address these existing problems would be highly desirable and would

8 Council Regulation (EC) No. 2201/2003.

9 The Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy (https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf).

10 Michael Wells-Greco, 'The conclusions of the first meeting of the Hague Experts' Group on The Parentage/Surrogacy project and what next for 2017', *International Family Law Journal* 3 (2016), 268.

undoubtedly be the in best interests of children who are born through surrogacy. However the scope and remit of any potential surrogacy convention is yet to be determined and could be problematic.

As discussed, there is a huge disparity of legal approaches towards surrogacy reflecting individual states' social, moral and political attitudes towards surrogacy and to assisted reproduction more broadly. The prospect of streamlining all of these approaches into one common international view is difficult, if not impossible, to conceive as ever being achieved.

One of the first published works addressing the issue of international regulation of surrogacy following the Parentage/Surrogacy Project being placed on the agenda of the Permanent Bureau was written by Dr Katarina Trimmings and Professor Paul Beaumont of the University of Aberdeen.[11] Beaumont and Trimmings argue for a framework largely modelled on the The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and call for national and international regulation of surrogacy arrangements of surrogacy. It is, however, argued that this would not be an appropriate model for such a convention.

If the convention were to take such an approach, it would need the 'key destination' states for international surrogacy to accede to the convention. The United States of America (US) is one such state. The US surrogacy industry is regulated at the state, rather than national, level. In many ways, the US is a microcosm for the rest of the world; there are states where surrogacy is criminalised, states where there are permissive statutes regarding surrogacy and states where there is no regulation of surrogacy at all. The professionals involved (lawyers, doctors, agencies and others) are subject to their own professional regulation and ethical guidelines. It is unlikely that the US would accede to any convention that would seek to regulate surrogacy to any great degree. Given that the US is a key destination for international surrogacy, its accession to any convention would be necessary in order for the convention to have any effect. Or, if the US did not accede, it would seem to render any agreement by *other* states inadequate, as those wishing to travel to the US for surrogacy would still do so, outside the terms of the convention.

One of the main arguments put forward for there to be some form of international regulation of surrogacy is to address the concerns about the exploitation of women and other human rights abuses, particularly in countries where surrogacy is subject to little, or no, internal regulation and operates largely in

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[11] Trimmings/Beaumont, *International Surrogacy Arrangements* (Hart Publishing, 2013).

the context of the market. It is unfortunate, but true, that human rights abuses might have occurred within the context of surrogacy.[12] However, human rights violations are not excusive to surrogacy and it is argued that the vast majority of surrogacy arrangements, including ISAs, occur without such violations. There is also the concern that the legitimate aim that any international regulation may seek to achieve – that is to say, for example, to prevent the exploitation of women, or commodification of childbirth – may only exasperate human rights abuses if those who practise – and particularly those who facilitate – surrogacy are forced 'underground' rather than continuing to operate in the open.

Fortunately, The Hague Conference on Private International Law (HCCH) has already recognised that the 1993 Hague Intercountry Adoption Convention is not an appropriate model for a convention on international surrogacy.[13] Interestingly, the American Bar Association has recently passed a resolution urging the US State Department to seek a convention that focuses on the conflicts of laws and comity problems inherent in international citizenship and parentage proceedings.[14] Notably, the issue of international regulation would be omitted from the convention and instead it would concentrate on the recognition of parentage orders applying the doctrine of comity so that the parent-child, and citizenship, status of all children will be certain.

There is much to be said for this proposed approach. It would leave the regulation of surrogacy to the national level, whilst still addressing the issues caused by the conflicts of laws, particularly in relation to issues of legal parentage and citizenship. It is also more likely to be a successful convention because the countries with established surrogacy industries are much more likely to accede to it and countries where surrogacy is currently unlawful would not be required to endorse a permissible regulatory scheme on an international level where their own domestic laws are more prohibitive.

It is also arguable that this approach would better serve the best interests of children. The 'best interests' doctrine can be quite difficult to apply in the context of surrogacy because, after all, surrogacy primarily serves the interests of the intended parents in helping them create a child that otherwise would not exist. This can raise questions of the right to procreate, and whether there is a right

12 By way of example, a Japanese multimillionaire fathered 16 children through surrogacy and expressed a desire for many more: 'Interpol investigates "baby factory" as man fathers 16 surrogate children', *The Guardian*, 23 August 2014 (www.theguardian.com/lifeandstyle/2014/-aug/23/interpol-japanese-baby-factory-man-fathered-16-children).

13 Hague Conference on Private International Law, Preliminary Document Number 11.

14 American Bar Association Section of Family Law Report to the House of Delegates, February 2016 (www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf).

to have a child by whatever means. Opponents of surrogacy argue that there is no 'right to reproduce' and that creating a child using surrogacy, where the conception process is somehow commodified, is contrary to the best interests of children generally. The difficulty with this approach is that it ignores the reality that children have been born through surrogacy for decades. There are many thousands of children born as a consequence of surrogacy. The question should therefore be how we meet the best interests of *this* child, who by the time welfare interests are being considered, is already in existence.

The European Court of Human Rights has considered a number of cases arising from surrogacy in recent years involving France[15] and Italy.[16] The author is aware that there are three further cases that were communicated by the European Court of Human Rights in January 2015 concerning France. All of the cases involves ISAs and Member States which do not permit surrogacy. It was found that failure to recognise a child born to nationals of the Member State (insofar as there is a genetic link) was contrary to the *child's* right to family life under Article 8 of the ECHR. It is clear that the focus of the European Court is very much on the rights of child once born, rather than the right of the intended parents to procreate.

This approach does not regard an existing child born through surrogacy as 'collateral damage', as the failure to recognise a parent-child relationship, citizenship or otherwise recognise the rights of a child born through surrogacy by the state can often lead to. It is argued that the current lack of international recognition of legal parentage or citizenship does just that. A convention which serves to address issues of citizenship and recognition of parent-child relationships would solve these problems and afford children born through surrogacy the rights that they need.

It would seem, by the response so far from the HCCH, that the remit of any convention will seek to concentrate on these very issues and the further work by the Permanent Bureau to achieve this aim would be very welcome indeed.

15 *Mennesson v. France* (No. 65192/11) and *Labasse v. France* (No. 65941/11).
16 *Paradiso and Campanelli v. Italy* (No. 25358/12).