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The Hague Convention on Surrogacy:
Should we agree to disagree?

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Introduction


The debate in relation to the need for a Convention governing international surrogacy arrangements, akin to the 1993 Inter-country Adoption Convention which governs international adoptions, is long overdue. With international and commercial surrogacy arrangements on the increase, the risks and consequences produced by so called ‘global reproductive tourism’ now needs to be addressed at a global level.

Surrogacy law both domestic and international has been playing catch up. The responses of individual states to the question of surrogacy have been diverse and disparate. They broadly fall into four broad categories:

(a) those states where surrogacy arrangements are legal and enforceable;

(b) those states where surrogacy arrangements are legal, but strictly controlled and subject to meeting specific criteria;
(c) those states where surrogacy is illegal; and

(d) those states which have made no provision in their domestic legislation.

There is a wide variation in approach between states to such fundamental questions as whether a sperm donor should be a legal parent or how the law should treat a person who has carried a child but has no genetic link to that child. When one throws into the mix the issue of the rights of parenthood to be ascribed to same sex partners, the spectrum of approaches becomes even wider.

With so many children born by way of surrogacy arrangements, the time has now come for the establishment and implementation of international standards by way of a multi-lateral convention. This paper sets out the background to this issue and the consequences of the current lack of any international agreement. It also looks at the existing international agreements which could potentially be used to regulate international surrogacy and the initiatives currently underway to establish internationally recognised standards in this area. Finally, some suggestions are made for possible ways forward.

**International surrogacy: an overview**

An international surrogacy arrangement is one which involves more than one country of habitual residence, nationality or domicile of the commissioning parents, donors and the gestational mothers. There are currently no international laws which make provision for rights of parentage either from the perspective of the commissioning parents, gestational mothers or most importantly the child. Indeed there is no instrument which allows for the
recognition of international surrogacy arrangements, in another state, following an administrative or judicial process in a state where such arrangements are lawful.

If the commissioning parents wish to have their rights of parentage already acquired in the birth state recognised in the state in which the child will live, they have to commence a process *de novo* in their home State. There are no means by which internationally mobile parents can ensure that parental rights acquired in one state can (if they relocate or indeed have more than one country of habitual residence) be recognised in their new state of habitual residence.

A further complication is the wide variety of approaches to surrogacy between states. Surrogacy is prohibited in France and Germany, though an amendment to the law in Germany is expected. In the United Kingdom, surrogacy arrangements are regulated and strictly controlled. In the United States there are no federal laws regulating surrogacy. Instead, surrogacy laws vary from state to state. Even within states, the laws can vary from county to county. The differences between jurisdictions has led to a rise in ‘reproductive tourism’, as potential surrogates, donors and parents look for the most favourable legal, social and commercial environments.

Also important is the general shift in many legal systems away from whether a child is legitimate or illegitimate, towards a focus on the parental obligations towards children based on parenthood. Those obligations are in many legal systems, though not yet in England and Wales, entirely independent of any adult relationship. The concept of legal parenthood is now the starting point for establishing many of the rights of children and the obligations of their
parents to them. A state’s approach to surrogacy must always be placed within the context of its approach to parenthood more generally.

**What does this mean for commissioning parents, gestational mothers and the children born from an international surrogacy arrangement?**

In most jurisdictions, a mother who gives birth to a child (whether or not she has any biological connection with the child) is treated as the child’s parent. Persons who are willing to act as surrogate mothers, whether for altruistic or commercial reasons, often wish to be assured that their rights of parentage ascribed to them at the birth of the child can be revoked and vested in the commissioning parent, without a long and complicated legal process and without any stigma of parental failure.

The United Nation Convention on the Rights of the Child and the European Convention on Human Rights confirm a child’s right to parentage, a right to know their parentage and a right to non-discrimination through their status acquired at birth by virtue of their parentage. The determination of who has legal parentage for a child has far reaching consequences, which will affect the child not only in childhood but also into adulthood. Parentage determines nationality, rights of citizenship, rights of abode, who is responsible for a child’s care and who is responsible to provide for a child.

Legal uncertainty as to their parentage can only be a disadvantage to the child. The reality is that, after the birth of the child, the surrogate mother usually does not wish to care for the child while the intending parents do. In a number of States *ad hoc, ex post facto* remedies have been found with a view to reducing the harmful impact of this legal limbo for children.
Parental orders in England and Wales are an example of this. But it would surely benefit people wishing to enter surrogacy arrangements not to have to rely on such remedies, which will in any case vary from state to state.

Quite apart from these legal issues, the socio-psychological issues around a child’s right to know its biological heritage cannot be ignored. Many States which have a sophisticated regime for surrogacy arrangements have made no provision for children on reaching adulthood to become aware of their actual biological parentage. There is likely to be a minority of cases in which the child seeks to establish their parentage, but finds that the donor or surrogate mother has no rights even to trace them.

**International surrogacy in practice: some examples**

A. Mr and Mrs A are Irish nationals and are habitually resident in England. Mrs A is unable to carry another child to full term due to problems during the birth of their first child. The couple arranged through a reputed commercial agency in the USA for a surrogate to be implanted with the embryo created from Mrs A’s egg and Mr B’s sperm; which would therefore be the couple’s full biological child. They obtained from the local USA Court a full parenting order extinguishing the rights of the gestational surrogate and her husband in respect of the child. They obtained a USA passport for the child and travelled to Ireland in the hope of registering their child with the Irish Authorities and obtaining Irish citizenship.

The Irish Authorities refused to recognise the child as the child of Mr and Mrs A and treated the birth gestational mother and her husband as the parents. The child is therefore unable to acquire Irish citizenship.
B. Mr C and Mr D are a same sex couple in an enduring and committed family relationship. They entered into a gestational surrogacy arrangement in the USA through a commercial agency using Mr D’s sperm. They obtained a pre-birth order in the USA and, on the birth of twins, a passport for each child. They are both from a European country in which surrogacy is illegal and have been living in England for a period of one year. They retain their respective EU nationalities. Neither of them can claim a domicile in the UK to allow them to apply for a UK parental order and accordingly their claim for parentage of the children is not recognised within any EU state and their children are not able to obtain the nationality of any EU state.

C. A couple entered into a commercial surrogacy arrangement in the USA utilising the sperm of the father, an unknown egg donor and a gestational surrogate. They bring their child into the United Kingdom where the child resides solely on the USA passport. No further steps are taken to regularise the position in the United Kingdom. The couple have problems in their relationship and the father abducts the child to a Hague Convention state in South America. He is now refusing to return the child. The father is named on the USA birth certificate, but the commissioning mother is not. The father’s defence in the Hague Convention proceedings commenced by the mother is that the mother has no legal rights of custody in respect of the minor child and at no time held parental rights over the child.

D. The facts of *X and Y (Foreign Surrogacy)* [2009] 1 FLR 733 are all too common. An English couple reached entered a full gestational surrogacy arrangement with a Ukrainian woman. The surrogate mother gave birth to twins. Under Ukrainian law, once the surrogate mother had given birth and delivered the children to the commissioning couple, the surrogate
mother and her husband were free of all obligations to the children. Accordingly the minor children were not entitled to a Ukrainian passport or Ukrainian nationality. An application for a British passport for the children was refused on the basis that the gestational surrogate and her husband remained the parents as a matter of English law and accordingly the minor children were not entitled to British citizenship. The children were therefore left as legal orphans and stateless.

The consequences of a lack of international regulation

The examples cited above indicate just some of the complexities in this field and the problems which flow from the lack of international consensus. The proliferation of fertility agencies and clinics around the world mean that this is now a global phenomenon requiring global solutions. Some states have begun to establish minimum standards for assisted reproduction and surrogacy arrangements. These include:

- a detailed assessment of commissioning couples and gestational surrogates prior to any course of treatment being commenced;
- a requirement that commissioning couples and the surrogates commit to and engage in a course of counselling throughout the conception and pregnancy process;
- an obligation on the commissioning couple to pay for independent legal advice for the gestational mother;
- the establishment of medical, legal and other professional bodies to set best practice provisions.
These standards provide not only a starting point but also a framework for the creation of internationally recognised minimum standards. However, in many jurisdictions control mechanisms are either non-existent or are not as rigorous as they should be and there is often a strong financial motivation for commissioning couples to use such jurisdictions for their surrogacy arrangements. Another worrying development is the rise in what might be termed DIY surrogacy arrangements, which are established largely through the internet. These arrangements remain entirely unregulated, are often illegal and are fraught with difficulties.

The recent English case of *CW v NT and another* [2011] EWHC 33 highlights some the difficulties that can arise with informal arrangements made over the internet. In that case, an arrangement had been made whereby the surrogate mother would be inseminated by the father and would hand over the child to the commissioning parents upon birth. During the pregnancy, however, the surrogate mother changed her mind and refused to hand over the baby as planned. This led to a bitter dispute in the courts over the terms of the agreement. The informal nature of the agreement only increased the difficulties and level of acrimony. The court was left to decide where the child should live and, on the facts, held that the child should live with his birth mother rather than the commissioning couple.

The lack of international standards or regulation also raises serious child protection concerns. Without any rules on screening or assessment of intending parents, there is a very real danger that children born through unregulated surrogacy arrangements may be exposed to child abuse or child trafficking. In the *Huddleston* case (*Huddleston v Infertility Centre of America Inc.* 700 A.2d 453 (Pa. Super. Ct. 1997)) in Pennsylvania, the surrogate mother was artificially inseminated with the intending father’s sperm. She handed the child over to the father after the child’s birth, in accordance with the surrogacy arrangement. The child died
six weeks later as a result of repeated physical abuse. A further problem is the pressure put on some parties to enter surrogacy arrangements, particularly surrogate mothers.

**Existing conventions/multilateral instruments**

**The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993**

At first sight the 1993 Hague Intercountry Adoption Convention would appear to be an ideal instrument, with a few adaptations, to regulate international surrogacy arrangements. Indeed it has been reported that where there is no provision for bespoke parental orders, adoption orders can be made as if the arrangement were an intercountry adoption. However, the Hague Conference has noted the following problems arising making the 1993 Convention an inappropriate vehicle for international surrogacy arrangements:

- Article 4(c)(3) states that commercial adoptions are prohibited under the Convention;
- Article 4(c)(4) states that the consent of the mother must be given after the birth of the child. In surrogacy cases the surrogate mother will often have given her consent before the child has even been conceived;
- Article 4(b) sets out the subsidiarity principle, namely that consideration must be given to the possibility that the child may be placed in the state of origin; this will not apply to many surrogacy cases, particularly international cases.
- Article 29 sets out a general rule that there should be no contact between prospective adopters and the child’s parents; this is unlikely to be workable in surrogacy cases as contact will have to take place when the surrogacy arrangement is entered into and when any reproduction process or treatment takes place.

The 1996 Convention could also potentially be an appropriate vehicle for regulating international surrogacy arrangements. The Convention was long in the making and is now being broadly accepted internationally. However, Article 4(a) the Convention specifically excludes from its scope “the establishment or contesting of a parent-child relationship”. It would be unlikely for such a fundamental provision of the Convention to be renegotiated, not least because of the likely dispute between state parties any proposed alteration would cause.

The Brussels II Revised Regulation, 2003

Harmonisation within the European Union could be a positive first step towards a global system of regulation. But it is doubtful whether this can be achieved through the Brussels II Revised Regulation. The tenth preamble states that the Regulation is not concerned with issues of parenthood “nor to other questions linked to the status of persons.” Although the Regulation may be of some use in resolving disputes as to parental responsibility, it will not assist in resolving the wider disputes about parentage which can arise in surrogacy cases.

Further, the wide differences in approach taken to surrogacy between EU Member states mean that any harmonisation process will be fraught with difficulties. In Italy and Malta, for example, surrogacy arrangements are illegal; in the United Kingdom they are legal but strictly controlled; and in Belgium and Sweden no provision has been made at all for the recognition or making of surrogacy arrangements.
International initiatives

The Hague conference on Private International Law has begun to focus on the issue of international surrogacy arrangements, in particular the status of such arrangements under Private International Law and the status of children born through international surrogacy arrangements.


The issue was addressed in June 2010 at a meeting of the Special Commission on the practice and operation of the Hague Child Protection Convention 1993. The Special Commission noted that the number of international surrogacy arrangements was on the increase. It also noted, however, that the 1993 Child Protection Convention would not be appropriate for regulating international surrogacy cases. It recommended that the Hague Conference on Private International Law carry out a further study of the legal, especially the Private International Law issues surrounding international surrogacy.

On the 10th March 2011 the Permanent Bureau of the Hague Conference produced a preliminary document on the Private International Law issues surrounding the status of
children, including issues arising from International Surrogacy arrangements. The intention is to produce an interim report in March 2012 and a full report in 2013.

The Hague Conference has identified the basic criteria that would need to be covered by any comprehensive international and multinational agreement:

(i) uniform rules on the jurisdiction of courts or other authorities to make decisions as to legal parentage;
(ii) uniform rules on the applicable law governing the surrogacy arrangement;
(iii) corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage;
(iv) uniform rules on the applicable law as to the establishment of legal parentage by way of operation of law or by agreement;
(iv) uniform rules on the principles of recognition concerning the establishment of parentage by voluntary acknowledgment (ie birth certificates).

The Permanent Bureau has also recommended that any international instrument would have to be backed up by safeguards to protect children born of surrogacy arrangements. This would include, as a minimum, assessment of commissioning parents and gestational mothers. There would also need to be a system of licensing and control of agencies and authorities providing surrogacy services.

**Work of the Council of Europe**
An ‘instruct’ is currently being drafted by the Council of Europe to cover the rights and legal status of children and parental responsibility. This will include provisions relating to legal parentage in the context of medically assisted reproduction.

The European Union is currently considering the possibility of facilitating the creation of simple status documents within the EU for the recognition of legal parentage between EU member states. Research papers have suggested that the work should extend to surrogacy arrangements; it may well be that the status documents provide a mechanism for the effective recognition of the rights of parents involved in surrogacy arrangements.

**Research by the University of Aberdeen “International Surrogacy Arrangements: An Urgent Need for a Legal Regulation at the International Level” (the Aberdeen Model)**

In July 2010, the Nuffied Foundation awarded a grant to Professor Paul Beaumont and Dr. Katarina Trimmings to conduct a study into private international law aspects of international surrogacy arrangements. The ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that could assist in the process of preparation of a possible future international Convention on surrogacy. The project is carried out in collaboration with the Hague Conference on Private International Law (see http://www.abdn.ac.uk/law/surrogacy/ for more details and “Regulating International Surrogacy March [2012] IFL 125). The final work of Professor Beaumont and Dr Trimmings is expected to be published in May 2013.
A warning

There are understandable concerns at a prescriptive and restrictive approach to international surrogacy arrangements. The inter country adoption convention has been said by many to have led to a reduction in the number of such adoptions worldwide because it has made the bureaucratic hoops insurmountable. Thus whilst international comity and certainty is a laudable aim there is unlikely to be international consensus. A meeting of minds of those states that are likely to follow a prescriptive regime (such as the Aberdeen model) and those such as the USA that support a liberal and non interventionalist regime is unlikely.

A prescriptive regime could lead to discrimination for commissioning parents choosing to build their family through surrogacy by forcing them to jump through hoops that natural parents do not have to.

The International Surrogacy Forum

In June 2011, the International Surrogacy Forum was formed, a not for profit organisation; two of the founding members being the authors of this article. Its purpose is the creation of a forum of experts in the field of international surrogacy. The legal status of children born of international surrogacy arrangements is complex and uncertain. The Forum intends to work towards establishing harmonised international recognition of the legal parentage of children born of such arrangements (see http://internationalsurrogacyforum.com/ for more details).
The way forward

As the initiatives set out above indicates, international surrogacy is now firmly on the international agenda. The time has come to unify the various efforts to deal the issues surrounding international surrogacy into a multi-lateral convention, providing a framework for the growing number of international surrogacy arrangements being entered into.

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