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INTERNATIONAL SURROGACY AND CHILDREN'S RIGHTS

EDITORIAL

The international resort to surrogacy: A new challenge to be addressed urgently

The resort to surrogate mothers at international level has experienced rapid growth, beyond any regulations, and already affects thousands of children, mothers and parents each year. Today, it has become urgent for the international community to address this issue.

'Sarai, Abram's wife, bore him no children. She had a servant, an Egyptian, whose name was Hagar. Sarai said to Abram, 'See now, the Lord has restrained me from bearing. Please go in to my servant. It may be that I will obtain children by her.' Abram listened to the voice of Sarai. Sarai took Hagar the Egyptian, her servant, and gave her to Abram her husband. He went in to Hagar, and she conceived. [Genesis 16]'. The concept of 'surrogate mother' does therefore not date back to yesterday, given that the story of Sarai and Abram already mentions a surrogate mother, who may offer Abram the children that Sarai has not been able to bear for him. It is worth mentioning, in addition, that Hagar is a servant and Egyptian, thus, that she is a foreigner and of a lower social status than the 'intending couple'.

Medical developments over the past 30 years have deeply changed this particular means of parentage (*filiation*), and now makes it possible to have several schemes of genetic material between the father, the intending mother and the surrogate mother. As for globalisation, it has added an international dimension, as the intending parents have the possibility to resort to a surrogate mother, who lives in a country that allows surrogacy, even when their country of residence does not enable them to do so. The resort to surrogate mothers has therefore expanded to developing countries and to some European countries, where foreign intending parents go to in increasingly larger numbers. Agencies have also been created to offer a personalised service to couples wishing to conceive a child via this means.

In its note *Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements* (see p. 4),

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TABLE OF CONTENTS

EDITORIAL

The international resort to surrogacy: A new challenge to be addressed urgently 1

CALL FOR ACTION BY THE ISS NETWORK

International surrogacy and donor conceived persons "Preserving the best interest of children" 3

BRIEF NEWS

General Comment N° 14 on the right of the child to have his best interests taken as a primary consideration 4

ACTORS 4

LEGISLATION

The Parentage / Surrogacy Project of the Hague Conference on Private International Law 4

The search for origins applied to the practice of surrogacy 6

PRACTICE

Surrogacy: Imported from India – The need for a regulatory Law 8

READERS' FORUM

Children born from surrogacy: What are the concerns? 10

The impact of intrauterine life on the child and his prospective attachment capacity 12

Children born through surrogacy: Are they being told and what are their feelings? 13

INTERDISCIPLINARY RESOURCES

Expert interview on medical and health perspectives relating to the rights of the child in international surrogacy matters 15

SOME READING SUGGESTIONS FOR PARENTS 16

FORTHCOMING CONFERENCES AND TRAININGS 18



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the Permanent Bureau of the Hague Conference emphasises that '[a] brief Internet search of "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques and surrogacy: for a price. It is now a simple fact that surrogacy is a booming, global business'. According to the sources, the Permanent Bureau underlines that the reproductive market represents USD 400 million a year in India only. This development generates various types of abuse, as shown by the article on this country (see p. 8).

A risky legal gap

The international resort to a surrogate mother generates legal and ethical imbroglios that are already complex, to which those issues affecting the child are to be added. The latter risks, for example, to remain without a legal identity, even stateless, given that the establishment of parentage raises a major problem in the 'receiving' countries that prohibit this practice. Cases of rejection of the child by the intending parents have already been reported, either when he suffers from a pathology, or when the parents separate. The financial character of the transaction also risks leading to numerous abuses, as several reports have already informed on the exploitation of surrogate mothers, attracted by an unexpected remuneration given their living conditions, the constraints they suffer and the total absence of security to protect them. Furthermore, to lead a pregnancy to term in these conditions surely is not without consequences on the development of the child to be born, even though at this stage, these remain unknown. The articles by Dr Cohen-Herlem, Psychotherapist Rizzo and Dr Shearer explore these issues. Thereafter, the child's access to his origins – only explored to a limited extent to date – will also arise, as presented by legal expert Mathieu and Dr Jadvá (see pp. 10-15).

It is just as urgent to examine the potential regulations of any agency that may intervene in the process of international surrogacy. Currently, the regulation by the State of the establishment of such agencies varies considerably, as numerous agencies act not only in the process of 'contact' (between the intending parents and the surrogate mother), but also in the medical treatment, which they undertake themselves. Even though, in some States, these agencies are only authorised if they are not-for-profit, in others, they achieve important financial gains.

A new Hague convention?

A potential model of regulation would be to follow the process that led to the 1993 Hague Convention, with the establishment of Central Authorities, of a system of recognition of the decisions made, of procedural guarantees and the 'accreditation' of bodies delivering services. The article on page 4 outlines the work that is already being undertaken by the Permanent Bureau of the Conference.

One must, however, exclude the application, by analogy, of the rules relating to adoption: the latter is, above all, a measure of child protection for children deprived of their family environment, which is very different from the 'organised' conception of a child. Let us remember that the Conclusions and Recommendations issued by the 2010 Special Commission 'viewed as inappropriate the use of the Convention in cases of international surrogacy'.

In conclusion, surrogacy may be absolutely admissible within the same State (intending parents and surrogate mother being resident in that country), when this State has decided to establish a legal system, which provides a framework for this practice. However, it is clear that the international component is likely to introduce a completely unbalanced relationship between the surrogate mother, the intermediary agency, the intending parents and, finally, the child. The resort to surrogate mothers at international level constitutes therefore a new field of research, which requires important study, advocacy and fundraising work – a process, which ISS is already involved in, as reflected in our position statement below.

The ISS/IRC team
August 2013



INTERNATIONAL SURROGACY AND DONOR CONCEIVED PERSONS
“PRESERVING THE BEST INTEREST OF CHILDREN”
CALL FOR ACTION BY THE INTERNATIONAL SOCIAL SERVICE NETWORK
JULY 2013

Over the last few years, international surrogacy has continued to increase around the world. Today, it is estimated that approximately 20,000 children are born through this specific mode of reproduction annually, and the numbers are expected to increase. The ISS global casework load is increasingly dealing with individual surrogacy cases but must work in the absence of a consistent, coordinated legal framework.

While some countries have legalised and codified international surrogacy as an option for reproduction, others have either made the process illegal, or simply failed to provide any legislative guidelines on the practice. In general, on the international level, the issue remains unregulated, creating a situation that paves the way, not only for very lucrative business opportunities, but also to potentially worrying activities and practices of intermediary agencies, specialised clinics and candidates for parenthood. Unless international surrogacy is consistently regulated, the evident economical imbalance between wealthy prospective parents and an ever growing number of women ready to bear a child for someone else for remuneration, can only lead to abuses.

There have already been several individual cases around the world that have highlighted the potential problems and likely abuses of unregulated reproduction through surrogacy. Furthermore, the rights of children to be born through this practice have not been addressed and ISS strongly believes that protecting those children’s rights must be addressed in both the legal and psycho-social arenas.

Therefore, ISS asserts that international surrogacy is not only a private matter between the prospective parents and the surrogate, but is an issue that must be addressed by the international legal, social service, psycho-social and child advocacy communities.

Furthermore, ISS believes that addressing the myriad of questions and concerns raised by the practice of international surrogacy is a matter of great urgency and calls for, among other possible actions, the following initial steps:

- explore and document existing good practices;
- study current practices and trends, including domestic laws, the economic impact, a geography of actors, the exploitation of women and protection of children, the bonding of the surrogate parent(s) with the child and special situations, such as those of disabled children so seriously disabled that they have little life expectancy;
- address the concerns of donor conceived persons, and anonymous sperm, egg and embryo donations;
- address the citizenship of the donor conceived or surrogate born children;
- create a network-wide campaign to advocate in favor of a new General Comment on surrogacy by the UN Committee on the Rights of the Child and a Hague convention on international surrogacy and donor conceived children;
- convene international conferences, gathering State representatives to reach an agreement on the necessity to regulate surrogacy at the international level.

While keeping the best interest of the child as the driving force for all actions it takes, ISS intends, in the very near future, to work on the following areas related to surrogacy:

- utilise the ISS network to be the voice of children born through all forms of artificial reproduction in order to preserve the best interest of those children;
- continue to work for the best individual solution for each individual child in his best interest and in the best interest of the involved adults, especially the surrogate mother through casework mandated by national public authorities;
- develop and disseminate a special training program for its casework professionals;
- share individual casework experience within the ISS network and with relevant external stakeholders, with a view to regulating this field in the best interest of the child;
- develop an advocacy campaign that will be developed within the framework of a call for a General Comment on surrogacy by the Committee on the Rights of the Child and the need for a new Hague convention on surrogacy.



BRIEF NEWS

General Comment N° 14 of the Committee on the Rights of the Child on the right of the child to have his best interests taken as a primary consideration

On 29 May 2013, the Committee adopted a new General Comment, in which it establishes a framework for the assessment and the determination of the child's best interests. This instrument aims to improve the understanding and the respect for this fundamental right of the child and to promote a change of attitude in relation to it. With regards to adoption-related decisions, the Committee states, more precisely, that the child's best interest must be the determining factor, i.e. that it should not only be 'a primary consideration', but '*the* primary consideration'. The Committee also reiterates that, in addition to being a right and a core principle, the child's best interest is a procedural standard and therefore offers some guidance for its implementation. It details the two stages to be complied with when making a decision for a child: to determine those relevant elements to assess his best interests and to determine the procedure to be undertaken to respect the legal guarantees required by the implementation of this right. Thus, the Committee lists these elements by reiterating the necessary balance amongst them: the child's opinion; his identity (sex, cultural identity, personality, etc) – which requires particular attention when considering the child's family or other type of placement as well as in adoption cases; his potential situation of vulnerability (disability, minority group, etc); the preservation of the family environment; etc. In relation to the latter, the Committee reasserts the principles of necessity and suitability of the alternative care measure, as promoted by the *Guidelines for the Alternative Care of Children*. The Committee subsequently encourages all States and stakeholders to draw attention to a comprehensive series of guarantees, such as to have qualified professionals, the child's legal representation, mechanisms aimed at examining and reviewing decisions, etc.

Source: For further information, see: <http://www2.ohchr.org/english>.

ACTORS

- **Azerbaijan, Canada, Germany, Greece, India, Mongolia and Panama:** These countries have updated the contact details of their Central Authorities.
- **Sweden:** This country has updated the contact details of its Central and Competent Authorities.
- **Swaziland:** Following its accession and the appointment of its Central Authority on 14 March 2013, the HC-1993 came into force in this country on 1 July 2013.

Source: Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=43&cid=69.

LEGISLATION

The Parentage / Surrogacy Project of the Hague Conference on Private International Law

This article by the Hague Conference on Private International Law offers an overview of the work undertaken at the Hague Conference on the issue of parentage and international surrogacy arrangements. It shares information about the ongoing research and reflection on the potential development of a new international treaty.

In 2001, during informal discussions concerning the future work programme of the Hague Conference, it was suggested that the organisation could work on the '*private international law issues surrounding the status of children and, in particular, the recognition of*

parent-child relationships (filiation). However, it was only in April 2010 that the Members of the Hague Conference decided to include this topic in the work programme of the Permanent Bureau (PB). At this time, Members also acknowledged the complex issues



of Private International Law and child protection arising from the growth in international surrogacy arrangements.

Use of the HC-1993

In June 2010, at the Special Commission on the practical operation of the HC-1993, it was noted that the number of international surrogacy arrangements was increasing rapidly. Concern was expressed about the uncertain status of many of the children, who are born as a result of these arrangements. The Special Commission concluded that the use of the HC-1993 in cases of international surrogacy is inappropriate and recommended that the Hague Conference should carry out further study of the legal, especially Private International Law, issues surrounding international surrogacy.

Preliminary research on the problems arising from international surrogacy

In March 2011, the PB drafted a *Preliminary Note on the Private International Law issues surrounding the status of children, including issues arising from international surrogacy arrangements*. This Note presented the background to the topic, explaining why it was that legal parentage (filiation) had become a matter of international concern. It also provided some case examples, which illustrated the problems arising from international surrogacy arrangements, and hypothesised about the problems that might arise in relation to legal parentage in cross-border situations outside the international surrogacy context (e.g. in relation to paternity establishment/disestablishment, parentage following assisted reproductive technologies (not involving surrogacy) or same-sex parenting).

The paper also provided a brief comparative summary of the approaches of States to the establishment or contestation of legal parentage from a Private International Law perspective. It also presented some of the broader concerns regarding international surrogacy arrangements, such as the child protection concerns, the vulnerability of all parties involved (i.e. the surrogate mother, intending parent(s) and the child), the possibilities for exploitation and abuse, and the challenges arising from unregulated intermediaries. Finally, the paper summarised the existing international and regional efforts and described how the Hague Conference might be able to assist in relation to this topic in the future.

Comparative overview of the various approaches of countries

In March 2012, the PB presented a *Preliminary Report on the issues arising in relation to international surrogacy arrangements*. This Report looked at why the practice of international surrogacy had developed in the last decade or so, and had seemingly increased sharply in recent years. It continued with a comparative overview of the position of countries globally in relation to surrogacy, first in relation to their internal (domestic) law, and then with regards to their approach to international surrogacy cases. This latter point was examined from a Private International Law perspective, but also more broadly (e.g. in relation to immigration/nationality issues). Lastly, the paper provided tentative thoughts (following on from the 2011 document) concerning some possible avenues for Members of the Hague Conference to consider in the future in light of the preliminary research undertaken.

Current further research

The 2012 Report was warmly received by Hague Conference Members and the PB was asked to undertake further research, including by circulating questionnaires on the topic. This work is currently underway and several questionnaires have been prepared: Questionnaire N°1 is addressed to Hague Conference Members and other interested States; Questionnaire N°2 is addressed to those legal practitioners with relevant practical experience in the field; Questionnaire N°3 is addressed to health professionals working in the field; and Questionnaire N°4 is directed at surrogacy agencies. These questionnaires seek detailed information, including on the needs to be addressed by any potential future work in this field and on the approaches, which might be taken by the international community.

Thoughts for the future

The PB will be writing a final Report for the next meeting of the Hague Conference's Council on General Affairs and Policy (the annual meeting at which the organisation's work programme is determined), scheduled for April 2014. This Report will facilitate consideration of, amongst other matters, whether the development of a new international treaty (i.e. a new Hague Convention) on this topic might be desirable and feasible, or whether any other work should be undertaken by the Hague Conference to resolve the Private International Law issues arising in relation to international surrogacy arrangements, and/or in relation to the legal parentage of children (or filiation) more broadly. The Council of the Hague



Conference will take the final decision in relation to whether any further work is undertaken by the organisation and, if so, in what form and with what priority.

The PB encourages anyone with relevant experience in this field to complete the relevant Questionnaire and/or to share their experience with the PB by e-mailing secretariat@hcch.net, addressing their e-mail for the attention of Laura Martinez-Mora

(Principal Legal Officer) and Hannah Baker (Senior Legal Officer). Any such information will be greatly appreciated and will inform the writing of the final Report. Please note, however, that the PB does not have the means or mandate to intervene in individual cases and this information is sought for research purposes only: a response is therefore not guaranteed.

Source:

All documents mentioned above are available on the webpage of the Hague Conference at <http://www.hcch.net>, under *The Parentage / Surrogacy Project*.

The search for origins applied to the practice of surrogacy

This article by Géraldine Mathieu, Assistant–Doctoral candidate in Family Law in Namur, Belgium, aims to comprehend surrogacy from the perspective of the search for origins and to highlight the difficulties and issues that may arise during a search for origins by a child/adult born through this particular method.

The term ‘origins’, according to its Latin meaning, refers to the event of our birth as well as to the ‘preceding causal process, the phenomenon of the genesis of this factual moment in itself’¹. With regards to surrogacy, the issue of the nature of the bond that is created between a child and the woman that bears him – whether or not they are genetically related – arises. In both cases, one may rightfully wonder about the importance for a child to know this woman. This preamble outlines the complexity of the access to origins in the framework of surrogacy. An assessment and reflection lines are suggested below.

The issues of anonymity and secrecy

The search for origins – whether in relation to surrogacy, adoption or the resort to medically-assisted procreation techniques through donation – requires a distinction between the secrecy of the means of conception on the one hand, and the potential anonymity of the ‘parent’ of origin or donor, on the other. Even though the Law has the power to abolish the latter, it can only, with difficulty, oblige parents to disclose the circumstances of his conception to the child. This choice falls into their private life. The issue of the secrecy of the means of conception under the hypothesis of a resort to surrogacy will, however, be most of the time without any relevance to third parties: surrogacy draws upon the gestational capacity of another woman and the intending couple – *a fortiori* when it is a couple of men – will only be able, with difficulty, to hide from their family circle what cannot go unnoticed. With regards to the preservation of the surrogate mother’s

anonymity in relation to the intending parents, it is unrealistic: the parties will meet and sign an agreement. Some legal instruments advocate for a surrogate mother not to be someone close to the intending parents; others, on the contrary, favour the intentional parents’ choice of the surrogate mother. Independently, ‘surrogacy may only be considered as a process of collaboration, which excludes that the surrogate woman remains unknown to those for whom she will bear a child’². Even though the issue of the secrecy of the means of conception and anonymity in the framework of surrogacy may then seem to have little relevance from the adults’ perspective, it, nonetheless, arises in relation to the affected child. Faced with this issue, the law-maker may choose to replace – or not – the parents’ potential silence.

The right of access to origins

In countries in which surrogacy is not regulated, or in which it is even prohibited, the child’s legal status will be determined by the common law of filiation. The surrogate mother will most often be named as the child’s legal mother and her husband as the father. In this case, only an adoption by the intending parents may be conceivable, insofar as the resort to surrogacy does not stand in the way of its declaration. If the surrogate mother is not married, a recognition by the intending father may take place, thanks to the surrogate mother’s consent when required. As to the intending mother, only an adoption will enable her to establish a tie with the child. The access to origins will then depend on the internal legislation on adoption³.



In those States in which surrogacy is authorised and regulated, the child's access to his origins has not been a major concern of the law-maker. Currently, the response to this issue is given by the means of attachment of the child to his intending parents in accordance with domestic law. Two approaches emerge. Either the intending parents are registered as the child's parents from the time of birth, by means of a preliminary authorisation when required. In this case, no mention of the surrogate mother will appear on the documents of the Civil Registry and the child will never have access to his origins, except if his parents or a relative disclose them. Or the intending parents become the child's legal parents later, via a 'transfer of parenthood'. In accordance with this reasoning, the position of the surrogate mother is not fully eluded: she is the child's legal mother for a short term (from several weeks to several months) and sometimes even retains the right not to consent to the transfer of parenthood⁴. Under this logic of 'supplement', and by means of the adjustment of a right of access to his original birth certificate, the child has an opportunity to know the identity of the woman, who has carried him (and of her husband, should this be the case).

The States' different practices

Among those States, which provide a framework for surrogacy, if the filiation bond is established in relation to the intending parents from the time of the child's birth (Ukraine, South Africa, Greece, the states of Illinois, California, Virginia, Utah, Texas, New Hampshire), no position is granted to the surrogate mother after the birth, nor a right for the child to access his 'origins'. A 'contractualisation' of future contacts between the child and the surrogate mother may, however, be considered. In particular, South African Law foresees that the surrogate mother, her husband if relevant, as well as her relatives, have no rights at all in relation to the child, but it authorises the parties to depart from this principle by agreeing on the preservation of the contacts in an agreement that has previously been concluded⁵. In California, this aspect remains subject to the will of the parties. Some reproductive medical centres offer so-called 'open' processes, in accordance with which postpartum contacts may exist between the child and the surrogate mother, whilst others ensure that such contacts are contractually excluded.

On the contrary, when the 'supplement' logic is chosen (Israel, New Zealand, United Kingdom), the child is registered on the central Birth Register as having been born from the surrogate mother (and her husband, if this is the case), and parenthood is only transferred to the intending parents following a judicial intervention, like in an adoption procedure. Thus, in the United Kingdom, with the issuance of a Parental Order⁶, a new birth certificate is established without the initial certificate being cancelled. Like an adoptee, the child born through surrogacy will be able to have access to his original birth certificate (from the age of 16 years in Scotland, 18 years in the remaining United Kingdom).

Conclusion

To sum up, no legal system explicitly recognises a right of access to his origins to the child born through surrogacy. In those countries in which surrogacy is prohibited or unregulated, the child will be able, if necessary, to draw upon the tools enabling him to access information on his origins from the provisions applicable to adoption. In those countries providing a framework for surrogacy and having opted for a logic of 'supplementary' filiation, the child may also find a trace of the surrogate mother's identity in his original birth certificate, insofar as he has access to it. Finally, in those countries having given priority to the child's attachment to his intending parents 'from the beginning', the child's access to his origins is totally dependent on his parents will.

The number of children born through surrogacy is undoubtedly still too low to know their feelings on this issue. However, do we have to wait? Should the principle of precaution not prevail in a field in which the child's interest should remain, more than elsewhere, predominant? If the law-maker assumes the power to multiply those situations, in which a gap exists between biological and legal filiation, thereby increasing those situations that will provoke questioning in relation to origins, does he not have the basic duty to prevent any risk linked to the potential consequences on the development of the child's personality, at times in which the importance of transparency and honesty for the issue of origins does no longer have to be demonstrated?



Sources:

The full and detailed version of this article is available upon request at the ISS/IRC.

¹ National Consultative Ethics Committee (France), *Avis n° 90 du 24 novembre 2005 relatif à l'accès aux origines, anonymat et secret de la filiation*, <http://www.ccneethique.fr>, p. 6.

² Brunet, L., «La globalisation internationale de la gestation pour autrui», *Travail, genre et sociétés*, 2012/2 N° 28, p. 204, <http://www.cairn.info/revue-travail-genre-et-societes-2012-2-page-199.htm>.

³ See ISS/IRC's documents, <http://www.iss-ssi.org>.

⁴ The Permanent Bureau of the Hague Conference on Private International Law, *Preliminary Report on the issues arising in relation to international surrogacy arrangements*, Prel. Doc. N° 10, March 2012, <http://www.hcch.net/upload/wop/gap2012pd10e.pdf>.

⁵ Art. 297, 1, c and d, *Children's Act* (2005).

⁶ Parental order: Procedure that enables, following surrogacy, the transfer of parenthood from the parents of origin to the intending parents; see: <http://www.surrogacyuk.org/>.

See also 'The right to information of donor-conceived people: Lessons learnt from adoption', by D Martin, *ISS/IRC Monthly Review* N° 09/2012.

PRACTICE

Surrogacy: Imported from India – The need for a regulatory Law

This article was kindly prepared by Anil Malhotra¹ and Ranjit Malhotra², as lawyers practising in India, who are confronted with many issues arising from international surrogacy, focusing on anomalies in both the existing law and proposed new legislation in the country.

Today, the reproductive tourism industry promoting surrogacy in India is estimated at Rs. 25,000 crores (USD 550 million) promoted by over 200,000 IVF clinics with websites offering wombs, sperms and eggs. Surrogacy packages, which reportedly cost USD 100,000 in Europe or the U.S.A., are easily available in India in the range of USD 10,000. Surprisingly, surrogate hiring of wombs exists in India even though *The Transplantation of Human Organs Act, 1994*, bans the sale of human organs, loaning of organs and any commercialisation of the trade of human organs. Moreover, surrogates are nowhere as freely available as in India to single parents, same-sex couples or unmarried partners, despite the fact that same-sex relationships are not permissible in India. The primordial urge to have a biological child of one's own flesh, blood and DNA, aided with technology and purchasing power of money, coupled with the Indian entrepreneurial spirit, has generated this flourishing Indian reproductive tourism industry.

An anomalous law

Economic necessity fuels the surrogate trade. Ironically, medical data indicates that, in India, there is a need every year of about 1,750,000 kidneys, 50,000 hearts and 50,000 livers for transplantation, and each year about 1,400,000 people die waiting for a kidney. Life saving organs are not available but wombs on hire

are. Even though commercial surrogacy is an anti-thesis of transplantation laws, it is a medically accepted practice reflected in the 2005 *Indian Council of Medical Research (ICMR) Guidelines* and the *Assisted Reproductive Technology Regulation Bill, 2010 (ART Bill)*, prepared by the Health Ministry. Clearly, surrogacy flourishes legally because it is medically not illegal. No doubt, the Supreme Court in *Baby MY's case* (2008) observed that 'commercial surrogacy' reaching 'industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms'. India is set to be the only country to legalise commercial surrogacy through the proposed law – an already glaring reality.

Courts to the rescue

As the legislation is being outstripped by realities, the courts are being asked to step in. In December 2011, the High Court in London granted parental orders to a British couple under the *British Human Fertilisation and Embryology Act, 2008*, for their two children born to Indian surrogate mothers after both children were given British passports and allowed to leave India. Sir Nicholas Wall, speaking for the Court, held that 'it is plainly in the interests of these two children that they should be brought up by Mr. & Mrs. A as their parents'. The couple had paid GBP 27,405



for a surrogacy package in India because of a lack of surrogate mothers in the United Kingdom, as there was a three-year waiting list in the United Kingdom.

Likewise, after a frustrating two-year legal battle in India on behalf of their surrogate sons – N and L –, the German couple JB and SL were allowed to return to Germany after the Supreme Court of India intervened on 26 May 2010. The twins were born in the State of Gujarat in January 2008 and were registered as children born of a foreign couple through an Indian surrogate mother. Upon being declined birth certificates, JB moved the Gujarat High Court, which ruled that since the surrogate mother was an Indian national, the children would also be treated as Indian nationals and would be entitled to Indian passports. However, the Government of India challenged this decision, stating that the toddlers, being surrogate children, could not be granted Indian citizenship, which rendered them stateless. The German authorities had also refused visas to the twins on the ground that German law did not recognise surrogacy as a means to parenthood. Ultimately, JB and SL went through an intercountry adoption process in India, upon which the Indian Government granted exit permits to the German surrogate twins to enable their journey back home to Germany.

Surrogacy is also popularly resorted to by same-sex couples in India. Israeli gay couple YG and OG became parents to a child born to them with the help of a Mumbai-based surrogate mother in 2008. Subsequently, in 2010, DG and AA, also from Israel, were another gay couple to whom twin baby boys were born in Mumbai from an Indian surrogate mother. In this case, a DNA test was required to prove the paternity. Thereafter, in 2011, a gay Spaniard couple, M and J, became parents of female twins born to them through a surrogate mother in India. More such occurrences will follow in times to come.

Proposed ART Bill 2010 is flawed

The only face saving, which can be pondered and deliberated, is how to regulate surrogacy, prevent exploitation, besides resolving issues of citizenship, nationality and parentage. In this context, the ART Bill, 2010 suffers from serious lacunas and shortcomings. Some questions left unanswered in the Bill are enumerated below:

- the remedies available to biological parents to obtain exclusive legal custody of surrogate children and the waiver of rights of the surrogate mother besides restricting the rights of sperm or egg donors;
- the mode of statutorily establishing the genetic constitution of a surrogate baby;

- the legal process of recording the parentage of a surrogate child;
- the process of determination of citizenship and nationality rights;
- guardianship/adoption proceedings in respect of children born out of surrogacy agreements as Hindu laws do not allow non-Hindu parents to adopt in India;
- custodial rights of single/same-sex couples/unmarried/divorced parents;
- the legal validity of surrogacy agreements vis-à-vis existing Indian laws;
- the rights to prevent exploitation of surrogate mothers.

The ART Bill, 2010 is flawed. It has neither designated, nor authorised or created any Court or judicial forum to resolve issues, which will require adjudication in problems arising out of surrogacy. The National and State Advisory Boards created by the Bill will not serve the purpose of determining issues of parentage, nationality, issuance of passports, grant of visas and problems of disputed parentage. It is extremely necessary to create a statutory procedure for mandatorily adjudicating these issues before the surrogate child leaves India. Even rampant exploitation of surrogate mothers has to be curbed, checked and punished upon detection. The Bill does not address these issues.

Where to now?

It seems that the question of whether India should be the surrogate motherhood capital of the world or not is now a far cry. Social and economic necessities, besides medical professional sponsorships, have ensured that surrogacy is here to stay. Therefore, an active legislative intervention to facilitate the correct uses of this new technology of ART may be a more plausible approach in grappling with commercial surrogacy. The proposed law has to also take care that the use of ART and IVF does not graduate to unethical practices in the making of designer babies, by choosing traits or embryo selection now made possible by stem cell research and cloning. Medical personnel must be guided by a strict law to prevent any malpractices. Above all, trading of any form in human merchandise by other unethical agents in the so called business of babies must be curbed with a heavy hand.

A regulatory law supported by a legislative machinery and effective rules to look at all the problems associated with surrogacy must be put in place. Besides, Embassies and High Commissions of Foreign Missions of different countries in India are



also looking for a law which will help them make their own policies adapted to surrogacy besides resolving issues of surrogate children born to their countrymen to enable them to achieve dreams of

parenthood. Thus, a proactive, well drafted surrogacy law requires to be urgently put in place forthwith without any delay. This, it seems, is now the call of the born surrogate child.

References:

¹ Anil Malhotra practices at the High Court and has co-authored *Indians, NRIs & the Law, India, NRIs & the Law*, and *Acting For Non Resident Indian Clients*. He is a Fellow of The International Academy of Matrimonial Lawyers, London. He can be reached at anilmalhotra1960@gmail.com.

² Ranjit Malhotra, a Felix Scholar has attained his LL.M. degree from the University of London. He is a Chandigarh based lawyer specialising in areas of Private International Law. He has co-authored two books, and the recent book titled *Indians, NRIs and the Law* was published in November 2011.

READERS' FORUM

Children born from surrogacy: What are the concerns?

It is often an exclusive issue relating to adults, to their grief, even to the injustice that overwhelms them. Dr Fanny Cohem-Herlem, a Psychiatrist and Child Psychiatrist, who engages with ISS, has decided to position herself from the child's perspective and hereafter shares the concerns raised by surrogacy in relation to the child.

There is no child without parents. The issue raised is the means through which the child has been conceived and the context, which he has been abandoned in and then handed over to other 'parents'. In adoption, a couple or a single person is entrusted with a child as he comes, irrespectively of his background, with the story that precedes him and which they do not always know about. They receive him like their own, in flesh and spiritually, in order to make him grow and become an adult. This child has nothing from them from a genetic perspective.

In cases of resort to a surrogate mother, the couple will, apparently, have preferred to have a child from birth and issued from its genes – at least partially – as if they had conceived him. This practice raises numerous issues relating to the child's psychological development as well as to the risks it generates, starting with the risk of denial of the events experienced by the foetus in the womb of the woman, who has carried him.

Numerous unresolved questions...

When we address the practice of surrogacy nowadays, there are more questions than answers, due to a lack of sufficient distance from this relatively recent practice. Let us position ourselves from the perspective of a child born from a surrogate mother:

1. What will he think of the fact of having been voluntarily deprived of his filiation bond without knowing it even prior to being born? It is a matter here of reflecting on how the child will experience the

fact that he was conceived and carried in a project of planned abandonment before his birth. The practice of surrogacy implies that the child is considered like totally different and foreign to the woman, who has carried and given birth to him – a questionable hypothesis, as will be seen further below.

2. How will the child already born from this woman be able to feel safe if his own mother may carry a child like she carried him in order to subsequently abandon him? Moreover, if one explains to a child that this gift is a gift of love, this places him in a situation of permanent insecurity, creating in him a feeling that he may still be given 'for love'. Let us question here the concept of love as conveyed to the child: love supposed to consist in a woman 'lending' her uterus and carrying the child of another.

3. From the child's perspective, surrogacy implies mourning his surrogate mother from the moment of birth: will he be able to do so and how? Is there not a risk of creating in the child a fear that all women become potentially 'abandoning' maternal characters (as may be seen among some abandoned and adopted children)?

4. As to the child's parents, what will happen with their endless debt towards the woman/couple, who will have accepted to carry the child for them? One may reasonably think that this debt may bear weight on the child's psychological development.



Impact of the relationship between the foetus and his mother during pregnancy and after birth (see also p. 12)

Freud said that the weight of the relationships between the foetus and his mother were still unknown. Even though nowadays we still know very little, we know, nonetheless, that the child is fed by the blood of his mother via the placenta. We also know that the foetus is sensitive to the sounds he hears, filtered by the amniotic liquid, as well as to the movements of the woman, who carries him. During her pregnancy, the latter prepares herself physically and psychologically for childbirth and for welcoming this child. It is the beginning of a form of identification of the mother with the infant. This identification enables the mother, at birth, and if all goes well, to have this particular capacity, this empathy, that consists in knowing what her infant needs. This increased sensitivity lasts for the first weeks and encourages the mother to give up on her personal interests in order to redirect these towards the child.

This 'primary maternal concern' (D Winnicott) conditions the beginning of the child's structuring of his Self. The infant is, with his mother, like in an egg that protects him, offering him everything he needs: warmth and nourishment, words and emotions. He still does not know that the mother is a different being from himself but that she protects him from stimuli that are too intense. The infant generates very strong emotions in his mother, who must be able to bear them and send them back to him by filtering them and giving them a meaning. Thus, this is how the child slowly structures his capacity to think/dream. One may state that the mother, having assumed uterine gestation, carries her infant in her mind and therefore generates his psychological life. Women, who experience surrogacy, deny any emotional relationship with the child. One may therefore question how the foetus will then have experienced this absence, this non-recognition of his present and future being. We may think that there will be considerable work to be undertaken in order for the woman, who will be his mother, to be able to recognise his primary needs and adapt herself to him. It is not certain that he (and she) will be able and manage to do so.

Consequences for the child's psychological development

Whilst the child dreams of being a good response to the wish of childbirth of both his parents, of being the result of their union, and this is in fact, as highlighted by the Psychiatrist and Psychoanalyst C Flavigny, what creates the melting pot of his psychological development, through surrogacy, the child is considered like an object and not a subject; the object of the wish of a man and a woman, who have experienced a hard time conceiving and who do not want to give up on this wish. For the woman, who carries him (in order to 'give' him), this child is not the result of her desire for a man, but the result, the product of a transfer of a combination of gametes in her body. The child then becomes a product of science and not of desire – a situation that will undoubtedly have an impact on his capacity to become a thinking and desiring subject.

Furthermore, in the building of his family story (fantastical building, through which the subject imagines his filiation), the child dreams of having had parents other than the ones he has, of having been stolen, of the other parents having been much better. Here, a part of the dream becomes a reality; however, the fantasy of having been sold or stolen is at risk of taking root in the reality of his origins. The fact of having been 'given up' for others, even though he was wished for and expected by them, jeopardises the child's narcissism.

If one finds people, who believe that surrogacy should be legalised, it is because there is indeed a demand for it. However, should society, on the one hand, respond to all the demands of the social body? Does society think that it should repair the 'damages' of nature and 'injustices'? On the other hand, how many women are ready to become surrogate mothers? I also think of the prospective arrival of artificial uteruses. The women/mothers will then have disappeared, the men/fathers too, and it will be necessary to legislate again given that citizens will here again want to be equal when faced with these technical reproductive opportunities. Orwell will then have described a little too soon what would be about to happen, i.e. the arrival of children born without a sexual relationship, in test tubes and grown in artificial uteruses. I believe that we have a duty to be reasonable for future generations with regards to what we prepare for them with so much diligence...



The impact of intrauterine life on the child and his prospective attachment capacity

Nino Rizzo, a Psychologist and Psychotherapist, who has considerable experience working with adopted adolescents, and other adolescents born through surrogacy – addresses here the issue of the impact of intrauterine life on their ability to build attachment bonds.

An issue obsesses me increasingly since I have been working with adopted adolescents and their parents. Even in situations in which the child has been adopted as a very young baby, even immediately following his birth, through a prepared and agreed transfer between the surrogate mother and the adoptive mother, which all happens in indisputably harmonious family scenarios, I sometimes witness pubertal explosions of incredible destructive violence that leave all actors stunned, including me. Why? What happened? At what moment of the child's life? Thus, I have slowly started asking myself what may have happened during these children's intrauterine lives and have grown an interest in works relating to perinatology, with a particular focus on those opinions developed in relation to Haptonomy.

Intrauterine life: The child's first attachment experience?

Haptonomy (in Greek, *haptein* = touch to heal and *nomos* = rule) studies the creation of the bond between the body and the psyche, and acts, through the sense of touch and speech, on the bond that is being built very early between the mother and the child she carries. This approach – developed by the Dutch Medical Dr Frans Veldman¹ – states that, from the moment of gestation, the child is equipped with a sensory and psychological mechanism, which provides him with some autonomy and that, thanks to the latter, in his exchanges with his mother, he searches for what provides him with pleasure. It is this early search for well-being – which will also organise all extrauterine life from birth to death, and which will be called the wish for life – that drives the child to enter into connection with his mother from this stage of his existence. The way he will feel carried and touched will eventually give him the basis for this fundamental 'confirmation' that will enable the forming of the feeling of oneself even in this foetal period. The 'holding' – this maternal ability to carry and care for the baby, to which Winnicott has drawn so much of our attention, and which constitutes the necessary condition for the birth and the preservation of the feeling of the being's existence – seems to start well

before birth and to take root in the intrauterine experience.

To be in connection means to develop bonds, as early as they may be, and more precisely, attachment bonds and health dependence, which reassure and allow to grow. The first attachment experiences are undergone by the human being in his mother's womb. Whether or not she experiences rather well her pregnancy, she transmits her sensations and feelings of well-being to her child.

The premises of attachment disorders in cases of unwanted pregnancy

An unwanted pregnancy may cause in the future baby the premises of attachment disorders. Indeed, the very first experience of a meaningful bond with the mother during gestation is made impossible by the counter attitudes that she may possibly develop as a consequence of unwanted pregnancy, if this pregnancy is perceived by her as something that, in general, seriously puts her existence at risk. The child then comes into the world with a deep feeling of existential insecurity, i.e. a narcissistic wound, which will probably remain unnoticed for a short or longer while, but which will keep its deconstructive potential all his life. According to Catherine Dolto², 'this flaw may reveal itself at a very late stage during adolescence, or during the first experience of maternity or paternity'.

If we now turn to the situation of our imaginary adolescent who, entering into its puberty, provokes and breaks the significant bonds of his life (in the family, at school, in society), even though the scenario in which he was born and then adopted was reasonably and frankly good, we must then take a step back and question ourselves on his intrauterine life. Let us take the case of this young woman, who was contacted by a nice Western couple with whom she agreed on the adoption of the child she conceived but does not 'want' to keep. She is certainly relieved by the idea that her baby will be taken care of and prepared for a much better future than the one she could have promised him. And then? What will she experience in her long moments of silence in which she will be alone faced with herself, the hands laid on



this child in her, who does not know anything about what will happen to him, when she does know? Certainly, an important part of this child's life is already at stake at that moment: a tragedy about to be created.

The adoptive mother, thereafter, will eventually be able to help 'her' child in undoing it, but it will be

necessary for her to be aware of the challenge, which she gets into, by avoiding the pitfalls of omnipotence and guilt, and by remaining confident in her ability to love.

Despite all I have just said, I admit that what, nonetheless, remains incredible is that the adventure of adoption is still and always worth it!

Sources:

The full version of this article is available in French on Nino Rizzo's website: www.ninorizzo2.com.

¹ Veldman, F., 'La science de l'haptonomie' in *Fantasmies et masques de grossesse*, under the coordination of Clerget, J., Presses universitaires de Lyon, 1986.

² Dolto, C., 'L'accompagnement haptonomique de la grossesse ...' in *Présence haptonomique*, March 2005, N°7.

Children born through surrogacy: Are they being told and what are their feelings?

Dr Vasanti Jadva, a Senior Research Associate at the Centre for Family Research, University of Cambridge, shares with us some of the early findings of a study undertaken on the impact of surrogacy on the children conceived and born through this method – from the children's perspective.

In the United Kingdom, surrogacy is becoming an increasingly popular method for family building. No accurate statistics are available on the number of surrogacy arrangements that take place each year though estimates suggest that it could be in the region of 150¹. The laws on surrogacy allow altruistic surrogacy; this means that the surrogate can receive only reasonable expenses. Commercial surrogacy is prohibited. Surrogacy arrangements are either traditional or gestational. A traditional surrogacy arrangement, also sometimes called 'straight' or 'genetic' surrogacy, is where the surrogate uses her egg and conception usually occurs by artificial insemination of the intending father's sperm. In gestational surrogacy, also referred to as 'host' surrogacy, the surrogate does not use her egg and conception occurs via In Vitro Fertilisation (IVF) of the intending couple's embryo.

Families created using surrogacy

Whilst the prevalence of surrogacy increases, little is known about the impact of surrogacy for the resulting children. Researchers at the Centre for Family Research, University of Cambridge, started a longitudinal study of surrogacy families at the turn of the new millennium. The study is the first and the only study to examine parenting, parent-child relationships and child outcome in families created using surrogacy. Data were collected at five time points, when children were aged one, two, three, seven and 10 years. A total of 42 families were seen when children were

aged one year and by the time they were 10, 33 families remained in the study. All the families had carried out surrogacy arrangements in the UK. Approximately two thirds of the intending parents did not know their surrogate prior to the surrogacy arrangement. The remaining families surrogates were either a family member or a friend².

Overall, the findings showed that parents, who have a child using surrogacy are committed parents who score highly on measures assessing the quality of parenting specifically, warmth, sensitivity and positive interaction. In fact, in earlier phases they were found to score higher than a comparison group of parents who had conceived their child without any medical intervention³. These more positive findings are perhaps unsurprising given that parents who have experienced infertility are likely to be very involved with their children when they finally attain their wish of becoming parents. In terms of children's psychological adjustment, the findings have shown that children born using surrogacy do not experience psychological problems^{4,5,6}. Longitudinal analyses of the data suggests that children born using surrogacy may experience more difficulties at around the age of seven years compared to children born using other forms of assisted reproduction, specifically, egg donation and sperm donation, however this difference disappeared by age 10 years and may be a result of more surrogacy children being aware of their birth in comparison to children born using gamete donation⁷.



Telling children about their surrogacy birth

Unlike other forms of assisted reproduction where the mother experiences a pregnancy and gives birth to the child, for surrogacy parents, the method of their child's conception is much more difficult to conceal. Studies have found that some parents who use donor gametes to conceive do not inform their child about this⁸. Our study found that all parents who had a child using surrogacy intended to tell the child about surrogacy when their child was aged one, and many of the parents had told their child when the child was aged three years⁹. In terms of the reasons for parents wanting to tell their child about surrogacy, parents often said that they had no reason not to tell the child, and that they didn't want the child to find out from someone else. Parents often explained surrogacy using a narrative of how their mummy's tummy was broken and how the surrogate helped grow them. There are now a number of books available to parents to help explain surrogacy to young children (see *Some reading suggestions for parents* at p. 16).

'Well my Mum's womb, I think ... well it was a bit broken, so [...] [surrogate] carried me instead of my Mum.'

Children's feelings about surrogacy

It is thought that early disclosure of surrogacy is beneficial for the child. This idea stems from studies of adoption which have found that children benefit from openness and honesty about their origins. At age seven years, we found that some children had a basic understanding of their surrogacy birth and used terms such as 'broken tummy' when explaining surrogacy. However by age 10, children were better able to demonstrate their understanding of surrogacy¹⁰, for example, one child said: 'Well my Mum's womb, I think ... well it was a bit broken, so [...] [surrogate] carried me instead of my Mum.' Children were asked how they felt about being born through surrogacy. Most felt either neutral or indifferent about it, for example, 'Um, I feel fine. I don't feel bad or cross in anyway. It's just pretty much nature so I can't do anything about it. I wouldn't like to do anything about it...' Many children said they did not discuss their birth with anyone; of those that did talk to others, they spoke mainly to their friends. One child spoke about how she found it difficult to explain surrogacy to her peers at school: 'Some people at school sometimes bring it up, and they ask me I'm adopted and I'm like [bored voice] 'No, I'm surrogate, don't let me explain it, it takes forever' because I just can't tell anybody, well I can, but I just can't put it in the right words and they just don't understand me...'

Some of the children in our study were in contact with the surrogate and of these, most were either happy with the amount of contact they had with her or would have liked to have seen her more. From the perspective of surrogates in the United Kingdom, a separate study found that surrogates, who remain in contact with the children value this relationship and build strong friendships with the intending parents they help¹¹. Surrogates who have no contact with the child (either because they prefer not to, or because the intending parents stop contact) said they would welcome contact by the surrogate child in the future and that they would be happy to answer any questions the child had. The majority of children said they liked their surrogate and described her as being 'nice' or 'kind'. They often referred to their surrogate either by her name or by terms such as 'tummy mummy', 'auntie' or 'special auntie'. The children in our study were relatively young, and it is likely that their views of surrogacy are influenced by their parents' narratives. It is perhaps not until they are older that they will be able to form their own opinions of how they feel about their surrogacy birth and towards their surrogate. It is also important to note that some of the children in this study were genetically related to the surrogate and that this could also affect how they feel about surrogacy.

Surrogacy is a contentious issue, with laws and regulation differing from one country to the next. As surrogacy becomes more widely used, it is of paramount importance that we evaluate the impact of this form of family building on the children it helps create. Whilst our research has shown that surrogacy in the United Kingdom appears to have positive outcomes for families and children up to the age of 10 years, there remain many unanswered questions. Further studies need to focus on the longer term impact of surrogacy for these children. The United Kingdom has also seen a rise in the number of couples accessing commercial surrogacy abroad, which raises additional questions and concerns. The impact of surrogacy on these children is unknown.



Sources:

- ¹ Crawshaw, M., Blyth, E., van den Akker, O., 'The changing profile of surrogacy in the UK – implications for national and international policy and practice', *J Soc Welfare & Fam L* 2012; 34: 267-277.
- ² Golombok, S., Murray, C., Jadva, V., MacCallum, F. and Lycett, E. (2004), 'Families created through surrogacy arrangement: parent-child relationships in the 1st year of life', *Developmental Psychology* 40, 400-11.
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ Golombok, S., MacCallum, F., Murray, C., Lycett, E. and Jadva, V. (2006), 'Surrogacy families: parental functioning, parent-child relationships and childrens psychological development at age 2', *Journal of Child Psychology and Psychiatry* 47, 213-222.
- ⁶ Golombok, S., Murray, C., Jadva, V., Lycett, E., MacCallum, F. and Rust, J. (2006), 'Non-genetic and non-gestational parenting: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3', *Human Reproduction* 21, 1918-1924.
- ⁷ Golombok, S., Blake, L., Casey, P., Roman, G., Jadva, V. (2012), 'Children born through reproductive donation: a longitudinal study of psychological adjustment', *J Child Psychol Psychiatry*, 23. doi: 10.1111/jcpp.12015.
- ⁸ Indekeu, A., Dierickx, K., Schotsmans, P., Daniels, K.R., Rober, P. and D'Hooghe, T. (2013), *Factors contributing to parental decision-making in disclosing donor conception: a systematic review*, doi: 10.1093/humupd/dmt018
- ⁹ Jadva, V., Casey, P., Blake, L. and Golombok S. (2012), 'Surrogacy families ten years on: Relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins', *Human Reproduction* 27, 3008-14.
- ¹⁰ *Ibid.*
- ¹¹ Jadva, V., Imrie, S. and Golombok S. (2013), 'Surrogate mothers: contact and relationships with families created through surrogacy', *Abstracts of the 29th Annual meeting of the European Society of Human Reproduction and Embryology*, 28 (suppl 1): i261-i282. doi: 10.1093/humrep/det218.

INTERDISCIPLINARY RESOURCES

Expert interview on medical and health perspectives relating to the rights of the child in international surrogacy matters

Dr Morven Shearer, Academic Fellow at the School of Medicine, University of St Andrews, Scotland provides her expert views on the potential impact of an international surrogacy on the child.

1. Are you aware of any ethical standards relating to the protection of the child in international surrogacy matters? If not, what kind of issues do you think should be covered in such standards?

International surrogacy currently takes place within a regulatory vacuum: there are no international treaties or conventions, or even global ethical guidelines. This leaves the child unprotected and vulnerable. Any legislation introduced must act to uphold the rights of the child to their identity and nationality and address concerns of commodification (Articles 7, 8 and 35 UNCRC and Optional Protocol on the sale of children, child prostitution and child pornography).

2. Are you aware of any medical/health standards (health defined as emotional, physical and mental) relating to the child in surrogacy matters? If not, what kind of issues do you think should be covered in such standards?

There are no global medical/health standards covering children produced through international surrogacy but the best interests of the child (Article 3 UNCRC) and the welfare of the child (*Human Fertilisation and Embryology Act* 2008) are often cited as being the key principles governing cases (e.g. in *Re L (A Minor)* (2010), the judge stated that the welfare of the child must be the court's 'paramount consideration'). However, the breadth of what these terms encompass and their application is unclear, and one journalist recently posed the question: 'can it ever be in the best interests of a child to be conceived for the purpose of being removed from the woman who gave birth to that child?' (Hirsch, 2012).



3. Are you aware of any cases that show an emotional impact of being born from an international surrogacy? If not, what do you think could potentially arise for the child?

The long-term effects on a child of international surrogacy have not been extensively studied. However, an ongoing longitudinal study of children born through domestic surrogacy has shown that there were no differences in maternal positivity or negativity, or child adjustment at age 7 (Golombok *et al.*, 2011), but the families did display less positive mother-child interactions than those where children were naturally conceived. How this then plays out with the added dimension of cross-boundary surrogacy is not known. It should also be borne in mind that not all parents may choose to reveal to their children that they were conceived through the use of a surrogate. Studies involving gamete donation for example have revealed that although disclosure is encouraged by clinics, many parents (89%) do not tell their children of their origins (Gottlieb *et al.*, 2000, cited in Jackson, 2010, p. 788).

4. Are you aware of any cases that show a physical impact of being born from an international surrogacy? If not, what do you think could potentially arise for the child?

There will be some physical impact of being born through international surrogacy due to diet, environment, antenatal care and vaccinations, which all vary from country to country. Quite how those variables affect health, epigenetics and physiological development is unknown. Were any international standards to be drawn up regarding maternal behaviour and antenatal care, a wealth of ethical issues would have to be addressed.

5. Are you aware of any cases that show a mental impact of being born from an international surrogacy? If not, what do you think could potentially arise for the child?

No extensive studies have been carried out, but issues here again relate to whether the child has been told of the circumstances of their birth, and the relationship the intentional parents have with their surrogate, during the pregnancy and thereafter. Some principles may be applicable here from the arenas of both domestic surrogacy and international adoption.

6. If the surrogate mother has health issues (health defined as emotional, physical and mental), what potential risks are there for the child and how can the child be protected from these issues?

There are no international regulations in place to protect the child from maternal health issues. In Israel, where surrogacy is legal, it is stated in law that no-one has the right to control the surrogate's way of life during pregnancy (e.g. nutrition, alcohol), nor can anyone interfere in prenatal care, or stop her from seeking a termination (Benshushan and Shenker, 1997). However, as noted in the *Kelley* case below, in private commercial surrogacy arrangements, contracts may be drawn up that dictate aspects of the surrogate mother's health and behavior.

There are different health risks depending on whether the surrogacy is a partial surrogacy, or a full surrogacy. In the latter case then the risks are related to the environment of the womb, which could be affected by a number of stressors particular to the surrogate, including any established medical conditions, infections or toxins. However, if the surrogate is the genetic mother of the child, then there are all the additional risks associated therein.

SOME READING SUGGESTIONS FOR PARENTS *

Telling and Talking 0-7yrs* and *Telling and Talking 8-11yrs by Olivia Montushi

De Cadeaubuik by Marlies Slegers and Sandra Kelder (in Dutch)

Surrogacy, A Magical Delivery by Tamra Martin and Jason Tinker

Why I'm So Special: A Book About Surrogacy by Carla Lewis-Long

The Very Kind Koala: A Surrogacy Story for Children by Kimberly Kluger-Bell

For further examples, see also: <http://booksfordonoroffspring.blogspot.ch/>

* These suggestions are external contributions, and have not been reviewed, nor approved, by the ISS/IRC.



7. If a health issue is detected with the child during the pregnancy (e.g.: disability and rare medical condition), what protections exist to prevent the child from being relinquished/rejected?

No protections currently exist at an international level to safeguard the child. Regrettably much of the discussions that take place regarding what ought to happen if the child develops a health issue *in utero* concern legal protections to be put in place for the surrogate mother or the intending parents. There is little discussion about protecting the child himself, or what his best interests might be.

The recent case of Crystal Kelley in the US highlights some of the problems which can arise when the baby is found to have developmental disabilities (Alsop, 2013) with the commissioning couple in this case telling Crystal (the gestational carrier) of her 'contractual obligation to abort the foetus if it displayed signs of abnormality'. They offered to pay her USD 10,000 to do so. She refused and carried to term.

8. For the health well-being of the child, are there advantages/disadvantages in maintaining a tie with the surrogate mother?

There are concerns that maintaining a tie with a surrogate is unnecessary and may cause feelings of confusion and instability for the child. However, others argue that surrogate parenthood should not be either/or but that children born through surrogacy arrangements have two mothers and ought to be able to maintain contact with both: 'We need to centralise the welfare of the child... the welfare principle encompasses a thorough consideration of the basic need for children to have knowledge of their birth origins and where possible their wider kinship network.' (Julie Wallbank, quoted in Jackson, 2010 p. 835). These networks may be complex, as in *Re X and Y (Children)* (2011), where British intending parents, having created IVF embryos using an anonymous egg donor and the father's sperm, used two different commercial surrogates from India as gestational carriers at the same time. These biological siblings thus share the same anonymous genetic mother, the same known social mother, but different gestational mothers.

In addition to the emotional well-being of knowing and maintaining ties with one's origins, for children born through partial surrogacy, the maintained contact with their genetic mother could confer advantages in terms of medical knowledge of hereditary conditions.

References:

- Alsop, H., (2013), 'US surrogate mother Crystal Kelley flees after baby's parents order her to abort foetus', *Daily Telegraph* (online edition), 5 March 2013; available at: <http://tinyurl.com/kwqdkkd> Accessed: 21:41 23/07/13.
- Benshushan, A. and Schenker, J.G. (1997), 'Legitimizing surrogacy in Israel', *Human Reproduction*, 12(8): 1832-1834.
- Gamble, N. (2012), 'Surrogacy: creating a sensible national and international legal framework', *IFL* September: 308-311.
- Golombok, S., Readings, J., Blake, L., Casey, P., Marks, A. and Jadva, V. (2011), 'Families created through surrogacy: mother-child relationships and children's psychological adjustment at age 7', *Dev Psychol* 47(6): 1579–1588. doi:10.1037/a0025292.
- *Human Fertilisation and Embryology Act* 2008; available at: <http://www.legislation.gov.uk/ukpga/2008/22/contents> (accessed on 23 July 2013).
- Hirsch, A. (2011), 'Our surrogacy laws put children at risk – change is overdue', *The Guardian* (online edition), 9 February 2011; available at: <http://tinyurl.com/mnoj4c8> Accessed: 22:00 23/07/13.
- Jackson, E. (2010), *Medical Law: Text, Cases and Materials (Second Edition)*, Oxford University Press.



FORTHCOMING CONFERENCES AND TRAININGS

- **Faroe Islands:** *Nordic Adoption Council Meeting*, Torshavn, 13-14 September 2013. For further information, see: <http://www.nordicadoption.org/>.
- **France:** **a)** *Adoption, attachement et mémoire du corps* [Adoption, attachment and the body's memory], COPES, Paris, 1 October 2013 (beginning of the session); **b)** *L'adoption: entre l'agrément et l'arrivée de l'enfant – Quel soutien pour les futurs parents* [Adoption: Between the suitability certificate and the child's arrival – What support for prospective parents], COPES, Paris, 7 October 2013 (beginning of the session); **c)** *Handicaps et cultures – Approche théorique et clinique, ici et ailleurs* [Disabilities and cultures – Theoretical and clinical approaches, here and elsewhere], COPES, Paris, 23 October 2013 (beginning of the session). For further information, see: <http://www.copes.fr/Annexes/Formations>.
- **Japan:** *IFCO 2013 World conference, XVII Biennial Conference*, Osaka, 13-16 September 2013. For further information, see: <http://ifco2013.com>.
- **Mexico:** *Strengthening the advances – Creating tools for the accomplishment of the Rights to live in a family and in a community*, RELAF, Guanajato, 3-4 October 2013. For further information, see: http://www.relaf.org/index_engl.html.
- **Switzerland:** *Children's rights and international law*, Third module of the Interdisciplinary Master on Children's Rights, Sion, 23-27 September 2013. For further information, see: www.iukb.ch/mcr.
- **United Kingdom:** *Fostering resilience – Achieving positive outcomes for children and young people in adoption and fostering*, BAAF, London, 24 October 2013. For further information, see: <http://www.baaf.org.uk/training/allevts/2013-10-24t000000>.

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