

FORGING FAMILY TIES THROUGH FULL SURROGACY: AN ARGUMENT IN FAVOR OF RECOGNIZING NON- TRADITIONAL PARENTS IN JAPAN

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Abstract: Currently, there is no statute governing the use of surrogate mothers in Japan. The industry is regulated exclusively by voluntary guidelines promulgated by the Japanese Society of Obstetrics and Gynecology (“JSOG”) banning surrogacy. This has not deterred couples who are able to obtain surrogates in other countries, nor does it prevent individual doctors in Japan who disagree with the ban from facilitating surrogacy. Current statutory law, including the Civil Code and the Family Registration Act, do not define the parent-child relationships that result from surrogacy. Japanese courts are ill-equipped to deal with the results of such surrogate births in the absence of a statutory framework. Most Japanese courts hold that the legal mother is the person who delivers a child. As a result, genetic, but non-birth mothers have been unable to register their children without going through the process of formal adoption. However in one notable case, the Tokyo High Court allowed a genetic but non-birth mother to register twins born by an American surrogate. The fact that courts have come to varied conclusions on the question of non-birth mothers’ status shows the need for a statute that acknowledges the creation of families using reproductive technologies like surrogacy. Additionally, increased public opinion in favor of surrogacy and concern over the decreasing national birth rate suggest there may soon be political support for a law expanding access to surrogacy. However, there is not a consensus among stakeholders to legalize surrogacy. So long as this is the political reality, Japan should employ an incremental approach to expanding access to surrogacy. The Family Registration Act should be amended to promote the best interest of the child, public discussion should continue to be encouraged, and the courts should continue to be used as forums for change.

I. INTRODUCTION

Aki Mukai, a Japanese television personality, and her husband, Japanese wrestler Nobuhiko Takada, are one of many couples who traveled to the United States in search of a surrogate mother and a legal environment more sympathetic to the plight of infertile couples.¹ Mukai and Takada were married in 1994; six years later, Mukai was diagnosed with uterine cancer which required a hysterectomy and radiation therapy.² Knowing they wanted their own genetic children, Mukai and Takada decided to remove and freeze some of Mukai’s eggs to ensure that they were not damaged by

[†] The author would like to thank University of Washington School of Law Professor Anna Mastroianni, Rob Britt, and Miles Emerson.

¹ *TV personality Mukai grateful for chance to have own baby*, DAILY YOMIURI, Feb. 27, 2004.

² *Id.*

radiation treatment.³ Because surrogate pregnancy is largely unavailable in Japan, the couple traveled to the United States to find a surrogate.⁴ In 2003, two embryos genetically related to Mukai and Takada were implanted into a Nevada woman's uterus.⁵ A surrogacy contract between Mukai and Takada and the surrogate mother relinquished all the surrogate's rights to the children.⁶ After the twins' birth, a Nevada District Court proclaimed Mukai and Takada the legal parents.⁷ The couple's application to register the children in Japan, however, was denied on the basis that Mukai was not a legal mother.⁸ Despite the strong stigma associated with infertility in Japan,⁹ Mukai and Takada chose to challenge the denial.¹⁰ Rather than adopting the children or claiming to have given birth overseas,¹¹ the couple sued the Ward Office that denied their registration.¹² In a groundbreaking decision by the Tokyo High Court, Mukai was finally recognized as the twins' mother in October 2006.¹³ Many other couples still find themselves in the unfortunate position of not being recognized as the parents of their genetic offspring in a society that puts high value on family lineage and heredity.¹⁴

While assisted reproductive technologies ("ART") like surrogacy are becoming increasingly common in Japan, the law has not keep pace with science and fails to adequately define the parent-child relationships resulting from surrogacy. There may be as many as three potential mothers involved in a surrogacy arrangement: the birth mother, the genetic mother, and the intended mother.¹⁵ The question of who is the legal mother when a surrogate is involved is not satisfactorily answered under current law.¹⁶ Further, while Japanese couples who use a surrogate can become legal parents through

³ Docket No. Heisei 18 ra 27, September 29, 2006 (in Japanese) (translation on file with author).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Ward office, under instructions from Justice Ministry, appeals surrogate birth ruling*, JAPAN TODAY, Oct. 25, 2006.

⁹ Suvendrini Kakuchi, *Japan's Fertility-Treatment Boom Pressures Women*, WOMEN'S E-NEWS, January 13, 2004, available at <http://www.womensenews.org/article.cfm/dyn/aid/1673/>.

¹⁰ Docket No. Heisei 18 ra 27, September 29, 2006 (in Japanese) (translation on file with author).

¹¹ Many couples who use a surrogate abroad are able to register their child by claiming to have given birth abroad. *Surrogate birth raise complex issues*, PJM NEWS, Oct. 21, 2006.

¹² Docket No. Heisei 18 ra 27, September 29, 2006 (in Japanese) (translation on file with author).

¹³ *Id.*

¹⁴ See Mami Fukae, *Infertility Made Bearable*, ASAHI SHIMBUN, Sept. 18, 1999 (discussing the strong pressure on women to carry on family lines); Kakuchi, *supra* note 9.

¹⁵ Toshihiko Terao, *Progress and Problems in Assisted Reproductive Technology in Japan*, 40 ASIAN MED. J. 260, 263 (1997).

¹⁶ See *infra* Part V.

adoption, this option does not take into account the great importance placed on family lineage in Japanese culture.¹⁷

Japanese statutory law does not provide a legal framework to clarify who constitutes a parent. The laws governing family relations, the Civil Code and the Family Registration Law, do not recognize a parent-child relationship when a mother is genetically related to the child but did not give birth.¹⁸ The right to register one's child as a natural child, an act of great importance in a culture that values family lineage,¹⁹ is reserved for birth parents.²⁰ What, if any, relationship is created when a surrogate is used is simply not addressed under current law. Confusion surrounding this issue will continue to increase as surrogacy becomes more prevalent. Japan should amend the Family Registration Law to define whether a maternal relationship exists when a woman is genetically related to a child to whom she did not give birth.

Regardless of whether the Japanese legislature (the Diet) decides to promote surrogacy, the increase in litigation²¹ shows the need for legislative clarification of what constitutes legal parentage. In the absence of statutory guidance, most courts adhere to precedent from a 1962 Japanese Supreme Court decision in which the court held that birth defines legal motherhood.²² This approach, established before technologies like surrogacy were available, does not address all the complex issues involved. Until Japan creates a legislative framework, the courts should employ a flexible approach when determining the legal relationships created by surrogacy.

This Comment examines current Japanese policy on surrogacy and parent-child relations and makes recommendations for reform. Part II explores infertility and various methods of surrogacy in Japan. Part III discusses the factors that favor expanding access to surrogacy. Part IV describes why an expansion is unlikely given the current political climate. Part V analyzes existing statutory law that governs parent-child relationships. Part VI evaluates how Japanese courts have attempted to resolve disputes over legal parentage. Part VII provides practical policy recommendations in light of the current attitudes toward full surrogacy.

¹⁷ See Fukae, *supra* note 14.

¹⁸ *Id.*

¹⁹ Mayumi Mayeda, *Present state of reproductive medicine in Japan—ethical issues with a focus on those seen in court cases*, BMC MED. ETHICS, April 5, 2006, at 2, available at <http://biomedcentral.com/1472-6939/7/3>.

²⁰ See *infra* Part VI.

²¹ See *Ward office, under instructions from Justice Ministry, appeals surrogate birth ruling*, *supra* note 8; Mayeda, *supra* note 19, at 2.

²² See *infra* Part VI.A; 60 Minshū 445 (2nd Petty Bench of the Supreme Court, April 27, 1962) (in Japanese) (translation on file with author).

II. BACKGROUND

A. *Surrogacy is a Method of Addressing Infertility in Japan*

Infertility is increasingly a problem in Japan.²³ Largely because couples marry and have children later in life, many couples must pursue fertility treatment in order to conceive.²⁴ While surrogacy can be used in a number of circumstances, this paper focuses exclusively on the use of surrogacy by infertile married couples.²⁵ The goal of infertility treatments is to allow a couple to reproduce in the most natural way possible.²⁶ Surrogacy is the application of In Vitro Fertilization (“IVF”) in conjunction with an agreement for one woman (the surrogate) to give birth to the child of another woman (the intended mother).²⁷ Depending on the reproductive capabilities of the parties involved, surrogacy can take various forms. There are two primary methods of surrogacy: partial and full.²⁸ In partial surrogacy, the intended mother does not have a genetic connection with the resulting child and the surrogate’s ova or donor ova are used instead.²⁹ In full surrogacy, an embryo created by IVF using sperm and ova from the intended parents is implanted in the surrogate.³⁰ Full surrogacy is often used when a woman has functioning ovaries but is not capable of carrying a pregnancy.³¹ Because of the genetic link between the intended mother and the child, full surrogacy is the method most likely to gain acceptance in Japan.³² This paper will examine full surrogacy.

²³ See *Govt planning to draft law on surrogacy*, DAILY YOMIURI, Dec. 1, 2006. As many as one in ten Japanese couples is infertile. See Fukae, *supra* note 14.

²⁴ Takahashi Murakami, et al., *The Present Status for Management for Infertility in Miyagi Prefecture, Japan*, 194 TOHOKU J. EXP. MED. 175, 176 (2001). Other factors include increased availability of contraception and abortion and fewer couples having more than one child. Naohiro Ogawa, *Japan’s changing fertility mechanisms and its policy responses*, J. OF POPULATION RES. (2003).

²⁵ Many non-traditional couples also use surrogacy. For instance, gay couples can use a surrogate to give birth to a child that is genetically related to one of the partners and single men or single women incapable of carrying a pregnancy can use a surrogate to become a parent.

²⁶ Naoki Takeshita, Kanako Hanaoka, et al., *Regulating Assisted Reproductive Technologies in Japan*, 20 J. OF ASSISTED REPROD. AND GENETICS 260, 260 (2003).

²⁷ The New York State Task Force on Life and the Law defines surrogacy as “the intention to separate the genetic and/or gestational aspects of child bearing from parental rights and responsibilities.” THE N.Y. STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, iii (1988).

²⁸ DIEDERIKA PRETORIUS, SURROGATE MOTHERHOOD, A WORLDWIDE VIEW OF THE ISSUES 7 (1994).

²⁹ *Id.*

³⁰ *Id.*

³¹ Kohta Suzuki, et al., *Analysis of national representative opinion surveys concerning gestational surrogacy in Japan*, 126 EUR. J. OF OBSTETRICS AND GYNECOLOGY AND REPROD. BIOLOGY 39 (2006).

³² See Shiro Nozawa & Kouji Banno, *Surrogacy*, 47 JAPAN MED. ASS’N. J. 192, 193 (2004).

B. Because Surrogacy is Largely Unavailable throughout Japan, Japanese Couples Access Surrogacy Abroad

Despite a high demand, surrogacy is largely unavailable in Japan. Consequently, an increasing number of Japanese couples access surrogacy abroad in the U.S., South Korea, and other countries with fewer restrictions.³³ It is generally believed that the number of couples accessing surrogacy overseas is increasing.³⁴ Many internet companies in South Korea offer commercial reproductive therapies, including surrogacy.³⁵ For instance, Excellence, a Tokyo-based sperm bank uses a South Korean firm as an intermediary to connect infertile Japanese couples with surrogate mothers.³⁶ Many U.S. companies also match infertile couples with surrogates.³⁷ In 1998, a San Francisco-based agency opened an office in Tokyo to match infertile Japanese couples with American surrogates.³⁸ As long as surrogacy is available overseas, Japan will continue to struggle with defining parent-child relationships once surrogacy has been used.

III. PUBLIC PRESSURE FOR A LAW LEGALIZING SURROGACY WILL INCREASE

A. Public Opinion is Shifting in Favor of Surrogacy

Public officials have acknowledged the rise in public support of surrogacy and have recognized that Japan needs a legal framework governing surrogacy.³⁹ Increased media attention⁴⁰ along with a growing number of Japanese citizens using reproductive technologies have likely

³³ See, e.g. Mayeda, *supra* note 19, at 14; Yuichiro Nakamura, *Japan-ROK fertility group being probed*, DAILY YOMIURI, November 8, 2005; *Couples turning to U.S. fertility clinics*, DAILY YOMIURI, July 11, 1998; *Desperate Couples Seeking Surrogate Mothers in U.S.*, ASAHI SHIMBUN, Oct. 26, 1998.

³⁴ *Surrogate Mother Industry Draws Japanese*, WORLD NEWS CONNECTION, Oct. 17, 2006.

³⁵ Tatsuya Kimura, *Sperm bank ties up with S. Korea firm on surrogacy*, DAILY YOMIURI, Sept. 3, 2005.

³⁶ *Id.*

³⁷ *Couples Choose the U.S. Option*, ASAHI SHIMBUN, Feb. 12, 1999.

³⁸ *Id.*

³⁹ Health Minister Hakuo Yanagisawa said that “We are now seeing rising public opinion in support of [surrogacy].” Hiroshi Hiyama, *Japan leans towards backing surrogate births*, AGENCE FRANCE-PRESSE, Oct. 17, 2006. Tsutomu Araki, president of Nippon Medical School, reiterates this viewpoint and claims that because of the change in public opinion, a “framework suited to the times” is necessary. *New mother or older sister?; Surrogate births complicate legal family relationships*, DAILY YOMIURI, Oct. 16, 2006.

⁴⁰ Surrogacy continues to be a major issue in the Japanese media. In October 2006, a flurry of media attention arose when a woman in her fifties acted as a surrogate for her daughter whose womb had been removed. *Woman gives birth to her own grandchild*, MONTEREY COUNTY HERALD, Oct. 17, 2006.

contributed to an increase in receptivity to the use of surrogacy.⁴¹ In a 2003 survey of Japanese citizens, about fifty percent approved of full surrogacy, and about thirty percent approved of surrogacy when the surrogate maintains a genetic connection with the child.⁴² Additionally, about sixty percent of the public feels that the intended mother should be recognized as a legal parent.⁴³ This represents a dramatic turn in public opinion. A 1999 survey conducted by the same body showed that an overwhelming eighty percent of Japanese citizens disapproved of the use of a surrogate.⁴⁴ As more couples access surrogacy, society will gradually become more accustomed to the practice.

Yahiro Netsu, director of the Suwa Maternity Clinic and the first doctor to facilitate surrogacy in Japan,⁴⁵ played a large role in increasing public awareness surrounding surrogacy. In the past, Netsu pioneered the way for reproductive technologies, offering therapies that were prohibited at the time but have since gained public acceptance.⁴⁶ Netsu argues that the degree to which society accepts medical technology simply depends on the extent to which society has become accustomed to that technology.⁴⁷ Accordingly, as surrogacy becomes more prevalent, it is likely to be more acceptable to Japanese citizens. Stakeholder groups, too, are likely to become more receptive to surrogacy as it becomes more common. For instance, some members of the Japan Society of Obstetrics and Gynecology (“JSOG”) indicated that the group may take a more favorable position toward surrogacy as it gains social acceptance.⁴⁸

⁴¹ Increased approval of surrogacy seems to be related to exposure to the technique. Patients who have used surrogacy and people who know others who have used surrogacy generally tend to support increased access to surrogacy. See Nozawa & Banno, *supra* note 32, at 196. But see Nozawa & Banno, *supra* note 32, at 197. In an article published by board members of the Japanese Society of Obstetrics and Gynecology, the results of several national surveys are interpreted to support the conclusion that “there is no evidence that supports a general public trend towards the acceptance of surrogacy over the last few years.” This interpretation, however, overemphasizes the results of one survey, conducted in 2003, rather than interpreting the general trend that can be seen in the five national surveys conducted between 1990 and 2003. Additionally, the article does not sufficiently consider differences in the surveys’ target populations and methodology as an alternative explanation for the decrease in public opinion toward surrogacy in the 2003 survey.

⁴² See Mayeda, *supra* note 19, at 5-6.

⁴³ *Id.* at 5.

⁴⁴ ‘3rd person’ conception spurned, ASAHI SHIMBUN, May 7, 1999.

⁴⁵ 2nd surrogate birth last year, DAILY YOMIURI, Mar. 7, 2003.

⁴⁶ For instance, while he was expelled for performing external fertilization between non-spouses in the past, this procedure is now approved by the government. *Doctor pushes the line to help infertile couples*, DAILY YOMIURI, June 16, 2001.

⁴⁷ Netsu cites the example of artificial insemination using donor sperm (“AID”) which is now widely practiced and generally accepted. *Should surrogate birth be approved?*, DAILY YOMIURI, Feb. 27, 2004.

⁴⁸ Nozawa & Banno, *supra* note 32, at 202.

B. The Declining Birth Rate in Japan Will Intensify Pressure to Increase Access to Surrogacy

The public's appreciation of the declining birth rate as a national problem will likely result in increased tolerance of and support for surrogacy and other reproductive therapies.⁴⁹ Japan's current birth rate is a low 1.3 children per couple.⁵⁰ During Japan's baby boom in the late 1940s the birth rate reached a high of 4.54.⁵¹ 2006 marked the first year the national birth rate increased in the past six years.⁵² However, the birth rate is expected to drop again in 2007, and if it continues to decline at its current rate, the population is expected to shrink from its current 127 million people to less than ninety million by 2055.⁵³ This major demographic shift has potentially wide-ranging implications, including the social security system becoming insolvent, not having sufficient caretakers for the aging population, and a negative impact on the economy.⁵⁴

In response, Japan's Ministry of Health, Labour, and Welfare recently created a Department of Infertility to combat the declining birth rate by promoting fertility treatments.⁵⁵ Governmental measures designed to increase fertility include increasing unpaid childcare leave, monthly child allowances, and childcare facilities.⁵⁶ Direct subsidies are already provided for some ART treatments like IVF.⁵⁷ While the subsidized therapies are less controversial than surrogacy, the governmental support shows a willingness to use reproductive technologies as a means of addressing the declining birth rate. This willingness could be expanded to include surrogacy.

C. Japanese Women are Under Great Pressure to Reproduce

The case for making surrogacy more widely available to infertile couples is bolstered by immense pressure on Japanese women to reproduce.

⁴⁹ See Mayeda, *supra* note 19, at 2.

⁵⁰ *Number of Infants Born in Japan Expected to Have Increased in 2006, Health Ministry Data Says*, KAISER DAILY WOMEN'S HEALTH POLICY, Jan. 3, 2007. Japan's declining birthrate can be attributed to changes in lifestyle choices, such as the choice to marry and have children later in life. See Kakuchi, *supra* note 9.

⁵¹ See Ogawa, *supra* note 24.

⁵² The Ministry of Health, Labor, and Welfare reported that the birth rate rose to 1.29 in 2006 from 1.26 in 2005. *Number of Infants Born in Japan Expected to Have Increased in 2006, Health Ministry Data Says*, *supra* note 50.

⁵³ *Id.*

⁵⁴ See Ogawa, *supra* note 24.

⁵⁵ See *id.*; Kakuchi, *supra* note 9.

⁵⁶ See Ogawa, *supra* note 24.

⁵⁷ See Mayeda, *supra* note 19, at 15.

While as many as ten percent of Japanese couples suffer from infertility,⁵⁸ there is still a “merciless social pressure to give birth to offspring.”⁵⁹ This often leads to depression and anxiety in women suffering from infertility.⁶⁰ Given the low birth rate, having children is seen as a patriotic duty. Former Prime Minister Yoshinori Mori made a disparaging remark about infertile women during a public debate on the decreasing birth rates, claiming that “women who do not have children are a drag on the economy.”⁶¹ In a speech calling upon women to produce as many children as possible, the Japanese Health Minister recently called women “birth machines.”⁶² The stigma against infertility is prevalent in Japan.

The great importance placed on family lineage also intensifies pressure to produce genetic offspring.⁶³ The focus on heredity also means that some couples may be disinclined to adopt, preferring to carry on their family line.⁶⁴ More so than in other parts of the world, Japanese couples seeking infertility treatment wish to have children with biological links.⁶⁵ This phenomenon will put further pressure on the Diet to expand access to reproductive technologies like surrogacy.⁶⁶ Even the First Lady of Japan, Akie Abe, disclosed that she underwent fertility treatment due in part to the incredible pressure to bear genetically related children.⁶⁷

IV. EXISTING CIRCUMSTANCES MAKE IT UNLIKELY JAPAN WILL PROMOTE SURROGACY IN THE NEAR FUTURE

Despite the effects of the public’s increased receptivity to surrogacy and concern over the national birth rate, a law expanding access to surrogacy

⁵⁸ See Fukae, *supra* note 14.

⁵⁹ *Id.*

⁶⁰ Hidehiko Matsubayashi, et al., *Emotional distress of infertile women in Japan*, 16 HUMAN REPRODUCTION 966, 966 (2001).

⁶¹ See Kakuchi, *supra* note 9.

⁶² Kozo Mizoguchi, *Japan’s health minister rebuked for calling women “birth machines”*, SEATTLE TIMES, Jan. 30, 2007.

⁶³ See Mayeda, *supra* note 19, at 13. Mayeda writes that “in view of social prejudices, it is highly desirable that children can be seen, in terms of the entry in the register, as the legally legitimate children of the concerned couple.” *Id.*

⁶⁴ See Yoshimi Nagamine, *Should humans play divine role?*, DAILY YOMIURI, Feb. 2, 2002.

⁶⁵ See *Should surrogate birth be approved?*, *supra* note 47.

⁶⁶ An unintended impact of expanding access to surrogacy could be an increase in pressure to have children and heightened the stigma of infertility. Infertile couples who choose not to pursue reproductive therapies could be seen as failing to perform their duty. Women’s rights activists in Japan have warned that “the boom in infertility treatments increases societal pressures on women having difficulty conceiving” and that the decision not to undergo fertility treatments must remain one of many options available to women. See Kakuchi, *supra* note 9.

⁶⁷ See *Japan PM’s wife in rare interview*, BBC NEWS, Oct. 12, 2006.

is not politically feasible. Most policy groups that take a position on surrogacy are against the practice.⁶⁸ While not determinative, this opposition will continue to have an influence on policymakers. Further, many believe that the use of surrogacy and other reproductive technologies complicates family relationships and goes against traditional family values.⁶⁹

A. *There is a General Consensus among Key Stakeholders that Surrogacy Should not be Allowed*

The professional association of obstetricians and gynecologists, JSOG, has an industry-wide prohibition on surrogacy. While JSOG has no official authority over a doctor's ability to practice medicine, violating the guidelines means risking expulsion from the professional association.⁷⁰ The organization tends to have conservative views on ART, favoring a prudent and cautious approach over expanded access to new technologies.⁷¹ As reproductive technologies move forward in leaps and bounds, JSOG is forced to act reactively to medical advances that are already employed. For instance, when, in 1996, it was announced that Japanese businesses were involved in the sale of sperm, JSOG announced a policy prohibiting members from participating in the commercial trade of sperm.⁷² Similarly, when the first Japanese surrogate birth was announced in 2001, the JSOG Ethics Committee developed a policy statement against surrogacy, which was formally adopted in 2003.⁷³ JSOG concluded that surrogacy threatens child welfare, is likely to be psychologically and physically damaging to surrogate mothers, is likely to strain family relations, and that surrogacy contracts are not ethically tolerable.⁷⁴ Paradoxically, while the JSOG prohibition influences the Diet to oppose surrogacy, JSOG officials cite the

⁶⁸ See *infra* Part IV.A.

⁶⁹ See *infra* Part IV.B.

⁷⁰ See Nakamura, *supra* note 33; Editorial, *In vitro fertilization talks needed*, DAILY YOMIURI, June 9, 1998.

⁷¹ See Mayeda *supra* note 19, at 9.

⁷² Yukari Semba, *Donor Conception Legislation in Japan*, International Consumer Support for Infertility (iCSI) Network, available at http://www.icsi.ws/information/abstracts_copenhagen_2005/donor_conception_legislation_in_japan.

⁷³ See Nozawa & Banno, *supra* note 32, at 192.

⁷⁴ See Mayeda *supra* note 19, at 9; *First Japanese surrogate birth conducted in Japan*, EUBIOS ETHICS INST. DAILY NEWS, May 21, 2001. JSOG board members cite many U.S. case examples as evidence of the potential for problematic family relations. Specifically, JSOG cites U.S. cases in which the surrogate mother will not hand over the baby, as well as situations in which no one will claim a baby with severe deformities. See Nozawa & Banno, *supra* note 32 at 198.

absence of legal framework as justification for the prohibition.⁷⁵ Accordingly, a well-regulated environment could assuage some of JSOG's concerns with surrogacy.

A legislative subcommittee of the Ministry of Health, Welfare, and Labor also submitted recommendations for a law against surrogacy.⁷⁶ In 1998, as reproductive technologies were becoming more pervasive, the Ministry set up a committee of specialists to make recommendations for a law on reproductive technology.⁷⁷ In December 2000, this committee released a report which recommended banning surrogacy because it violates the principle that humans not be used solely as a means of reproduction.⁷⁸ Following the release of the subcommittee's report, the Ministry set up another committee to study the issue further and consider potential legislation.⁷⁹ This committee also recommended banning surrogacy and equated the treatment to the "use of humans as a tool for reproduction."⁸⁰ The panel recommended that a public organization oversee the use of surrogates and that violations be criminally punishable.⁸¹ As a result of the trends discussed in Section III, Ministry officials announced that the ban should be revisited.⁸²

Other groups, such as the Japanese Bar Association and the National Institute for Research Advancement ("NIRA")⁸³ also recommend banning surrogacy, and do not support recognizing non-birth parents.⁸⁴ The Japanese Bar Association released a report in 2000 that recommended banning surrogacy⁸⁵ and emphasized the right of children to know their blood relations.⁸⁶ In 2001 NIRA recommended that gestation be the determinant of legal parentage.⁸⁷

⁷⁵ Kazuo Sato, former president of JSOG claimed that reproductive technologies were problematic because "there is no legal basis to determine whether the children born to the couple are children of the mother who gave birth or those of the egg donor . . .". *Clear guidelines needed*, ASAHI SHIMBUN, July 24, 1998. Additionally, JSOG leaders have suggested that its members might be allowed to participate in surrogacy arrangements, per review by JSOG, if there were a law clarifying parent-child relations. See Nozawa & Banno, *supra* note 32 at 201.

⁷⁶ See Semba, *supra* note 72.

⁷⁷ See Mayeda, *supra* 19, at 8.

⁷⁸ See *id.*; *First Japanese surrogate birth conducted in Japan*, *supra* note 74.

⁷⁹ Mayeda, *supra* note 19, at 8.

⁸⁰ *Id.*

⁸¹ *Call to tighten up infertility treatment*, DAILY YOMIURI, June 7, 2000.

⁸² See *New mother or older sister?*, *supra* note 39.

⁸³ NIRA is a government approved, independent policy research body. See Nozawa & Banno, *supra* note 32, at 196.

⁸⁴ *Id.*

⁸⁵ See Mayeda, *supra* note 19, at 9.

⁸⁶ *Id.*

⁸⁷ The Development of Life Sciences and Law, 14 NIRA POLICY RESEARCH (2001).

B. The Misplaced Perception that Surrogacy Complicates Family Relationships Weighs Against Promoting Surrogacy

A major theme in most recommendations from policy groups is a desire to avoid complicating families. Justice Minister Jinen Nagase is reluctant to legalize surrogacy for the reason that “it will only cause confusion.”⁸⁸ Before Japan can adopt a law concerning surrogacy, it must first come to terms with various issues, such as defining the parent-child relationship resulting from surrogate pregnancies. Policymakers have cited United States surrogacy cases over legal parentage as justification for opposing surrogacy.⁸⁹ Many of these concerns, however, are misplaced.

A common fear is the possibility that the surrogate will not hand over the child. The United States’ *Baby M* case⁹⁰ has been touted by The Health, Labor, and Welfare Ministry and JSOG as an example of this risk.⁹¹ In that case, a surrogate was artificially inseminated with sperm from the intended father and gave birth to a child to whom she was genetically related.⁹² The surrogate refused to relinquish custody of the child and a legal battle ensued.⁹³ This case, however, dealt with partial surrogacy. In full surrogacy, the surrogate mother has a weaker claim to the child because the intended mother is the only woman with a genetic relationship with the child.⁹⁴ Other U.S. cases support this proposition. For instance, in *Johnson v. Calvert*,⁹⁵ the Supreme Court of California found that a non-genetic birth mother had no claim to the child. Out of the thousands of cases in which surrogates were used in the United States, even JSOG authorities estimate the number of court disputes arising from surrogacy to be less than fifty.⁹⁶ Surrogacy has been practiced in the United States since the 1980s and parentage is undisputed in the majority of surrogacy arrangements. Considering the array of factors favoring expanded access to surrogacy in limited circumstances, the effect of complicated family relationships is not great enough to justify a blanket ban on surrogacy. Furthermore, this fear is no reason to refuse to acknowledge legal parentage once surrogacy has already been employed. In

⁸⁸ See Hiyama, *supra* note 39.

⁸⁹ See *New mother or older sister?*, *supra* note 39; Nozawa & Banno, *supra* note 32, at 198.

⁹⁰ *In Re Baby M*, 537 A.2d 1227 (N.J. 1988).

⁹¹ See *New mother or older sister?*, *supra* note 39; Nozawa & Banno, *supra* note 32, at 198.

⁹² *Baby M*, 537 A.2d 1227 at 1235.

⁹³ *Id.* Ultimately, the Supreme Court of New Jersey found the contract between the surrogate and the intended parents void. *Id.* at 1234.

⁹⁴ See *supra* Part II.A.

⁹⁵ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

⁹⁶ See Nozawa & Banno, *supra* note 32, at 198.

cases like Mukai's, in which a surrogate willingly relinquishes all parental rights, the fear of complicating family relations is unfounded and the genetic mother should be acknowledged as the legal mother. Regardless, the pervasive argument that surrogacy complicates families will likely prevent the promotion of surrogacy.

V. EXISTING STATUTORY LAW DOES NOT ADEQUATELY ADDRESS PARENT-CHILD RELATIONSHIPS FORMED THROUGH SURROGACY

While there is no law regulating the use of ART, various laws affect the legal status of children born using a surrogate. For instance, the Civil Code does not contain a definition of parentage that would recognize a non-birth parent.⁹⁷ The Family Registration Law also bases legal parenthood on birth.⁹⁸ Instructions from the Justice Ministry have also been used to deny recognition of the intended mother in a surrogacy arrangement.⁹⁹ These laws are considerably outdated and were drafted before technologies like surrogacy were envisioned. As a result, social and genetic parents are afforded no legal recognition. The Japanese government acknowledges this problem, and, in addition to a law prohibiting or condoning surrogacy, a revision to the Civil Code parent-child law is being considered.¹⁰⁰

A. *The Civil Code Recognizes Maternity Only Through Blood Relation*

Under current statutory law, "relatives by blood up to the sixth degree" are considered relatives.¹⁰¹ This defines parenthood exclusively by blood relationship. According to the Civil Code, an adopted child has the same legal relationship with its parents as between blood relatives.¹⁰² These laws create two kinds of legal parent-child relationships: blood parents and adoptive parents. There is no guidance as to what, if any, relationship is formed through surrogacy. This is probably because when the Civil Code was drafted, it was unimaginable that maternity could ever be in question because birth was the only way in which a woman could be a natural mother. With the advent of surrogacy and the possibility of a genetic, but non-birth

⁹⁷ See *infra* Part V.A.

⁹⁸ See *infra* Part V.B.

⁹⁹ See *infra* Part V.C.

¹⁰⁰ *Government planning to draft law on surrogacy, supra* note 23. Justice Minister Jinen Nagase and Health, Labor and Welfare Minister Hakuo Yanagisawa have requested that the Science Council of Japan address the issue of a law on surrogacy as well as how, if at all, the Civil Code should be revised to recognize surrogate-child relations. *Id.*

¹⁰¹ MINPŌ [Japanese Civil Code], art. 725 of 1898, *translated in* 2 EHS Law Bull. Ser. No. 2101.

¹⁰² *Id.* art. 727.

mother, this is no longer the case. The notion that the birth mother is always the sole legal mother is no longer an acceptable presumption, as demonstrated by the surge of cases over recognition of legal parentage.

The existence of a presumption of paternity (Article 772 of the Civil Code)¹⁰³ further shows the need for revision to the Civil Code. The presumption applies regardless of whether the father is the genetic father of the child. Thus, under the law, legal parentage is conferred on husbands regardless of their genetic ties to the child, and there is no need to go through any sort of adoption process. Husbands who are unable to reproduce and choose to use a sperm donor are considered legal parents, while mothers who cannot reproduce and must use a surrogate are not. Thus, the Civil Code provides considerable recognition for non-traditional fathers,¹⁰⁴ while rigidly insisting that birth is the only way to establish maternity. Additionally, the presumption of paternity can yield bizarre results when surrogacy is involved. For instance, the husband of a surrogate, a man with no genetic or social ties to the child, is the legal father under the current Civil Code. The Civil Code is not equipped to determine who is or is not a parent when reproductive technologies are involved.

Parents who have used a surrogate do have the option of adopting the child. However, adoption is an undesirable option for many hopeful parents because of the strong importance placed on family ties in Japan.¹⁰⁵ Many couples choose surrogacy because it most closely resembles a natural birth and maintains genetic ties with the child.¹⁰⁶ An adoption proceeding does not acknowledge the important social and genetic ties between parent and child in full surrogacy. Nonetheless, the existence of this option may deter Japanese policymakers from modifying the Civil Code.

¹⁰³ Article 772 of the Japanese Civil Codes creates a presumption that a child born during or within 200 days of a marriage is the child of the husband. *Id.* art. 772.

¹⁰⁴ This construction of the Civil Code was upheld as correct by the Takamatsu High Court in 2004. *See* Mayeda, *supra* note 19, at 7. Some argue that this presumption should not be applied in situations in which the father is not the genetic father. Koichi Bai, Yasuko Shirai, & Michiko Ishii, *In Japan, Consensus Has Limits*, 17 HASTINGS CENTER REPORT 18, 19 (1987).

¹⁰⁵ *See* Nagamine, *supra* note 64.

¹⁰⁶ *See* Takeshita, et al., *supra* note 26.

B. The Family Registration Act Contains No Provisions to Accommodate Parents Who Use a Surrogate

Japan records births, deaths, marriages, and adoptions in a system called the family register.¹⁰⁷ Rather than tracking births through individual registrations, local Ward Offices register births according to family, allowing an individual's lineage to be traced generation by generation.¹⁰⁸ The family register is essentially an official family tree, a specific example of the great importance placed on family lineage.¹⁰⁹ An application to amend a family register can only be denied for "justifiable reason"¹¹⁰ and may be challenged in Family Court.¹¹¹ The denial of applications by non-birth mothers is the central question with which the courts have grappled.¹¹² While children who are legally adopted may be added to the adopted family's register,¹¹³ the child must first be registered on the birth family's register.¹¹⁴ The focus on family lineage in Japan means that a legally recognized direct link between parent and child is particularly important. Therefore, allowing an adopted child to appear on the family's register is not a sufficient remedy.

C. Existing Justice Ministry Regulations Make it Difficult to Recognize a Parent-Child Relationship in Many Surrogacy Cases

A 1961 Justice Ministry administrative instruction requires authorities to confirm births by women ages fifty and older.¹¹⁵ This instruction has been used as a reason to deny the registration of children born to older women suspected of having used a surrogate.¹¹⁶ However, this instruction has been criticized as out of date, and the application of the instruction to women suspected of having used a surrogate is misplaced.¹¹⁷ The Justice Ministry instruction was likely crafted in order to prevent older women from falsely registering children as their own in order to conceal the fact that their unwed

¹⁰⁷ See Mayeda, *supra* note 19, at 2. A new family register is started when a couple marries. When children to the couple are born, they are then added to the register, which is administered and kept by local governments. Family Registration Law, Law No. 224, Dec. 22, 1947, Chapter II, Articles 7 & 15.

¹⁰⁸ *Id.*

¹⁰⁹ See Mayeda *supra* note 19, at 2.

¹¹⁰ KOSEKIHO [Family Registration Law], Law No. 224 of 1947, art. 122.

¹¹¹ *Id.* art. 118.

¹¹² See *infra* Part VI.

¹¹³ KOSEKIHO [Family Registration Law], Law No. 224 of 1947, art. 18.

¹¹⁴ *Id.* art. 13.

¹¹⁵ *Govt won't recognize surrogate kids*, DAILY YOMIURI, October 30, 2003.

¹¹⁶ Hidekazu Tanaka, *Surrogate rules must protect rights*, DAILY YOMIURI, Oct. 30, 2003; *Twins born to U.S. surrogate mom in legal limbo for over 1 year*, DAILY YOMIURI, Oct. 23, 2003.

¹¹⁷ It has been reported that "the legal precedent and instruction, which did not envision the progress of modern reproductive technology, are out of date." Tanaka, *supra* note 116.

daughter actually gave birth to an illegitimate child.¹¹⁸ Because the instruction was probably intended to be used as a means to prevent fraud and not as a method of enforcing an anti-surrogacy policy, its application in these cases is inappropriate.

VI. JAPANESE COURTS GENERALLY FAIL TO USE A FLEXIBLE APPROACH WHEN DEFINING THE PARENT-CHILD RELATIONSHIP WHEN ART IS USED

Courts generally reject parent-child relationships formed through reproductive therapies and instead base parenthood solely on birth, as specified by the Japanese Civil Code and Family Registration Law. In some cases, courts have abandoned the traditional analysis and employed a more flexible approach that considered other factors, such as the best interest of the child, written consent, and the existence of a blood relationship between the parent and child.

A. *The Act of Giving Birth is the Central Factor Courts Use to Determine Whether There is a Parent-Child Relationship*

Japanese courts base the decision on whether a mother-child relationship exists solely on the basis of whether or not the mother gave birth to the child. This rule was established in a 1962 Supreme Court decision.¹¹⁹ In that case a woman gave birth to a child out of wedlock, and the court considered whether the woman needed to acknowledge the child as her own in order for a mother-child relationship to exist.¹²⁰ The court found that she did not, and that “the parental relationship between a mother and a child is based on birth.”¹²¹

This reasoning remains paramount to modern cases involving ART. The act of parturition (childbirth) as the essential facet of parenthood was the basis for a 2003 Justice Ministry decision denying the registration of the twins of a couple who contracted with a U.S. surrogate.¹²² The registration application was stalled for a year, and ultimately, rejected based on the legal

¹¹⁸ *Id.*

¹¹⁹ 60 Minshū 445 (2nd Petty Bench of the Supreme Court, April 27, 1962) (in Japanese) (translation on file with author).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Tanaka, *supra* note 116.

interpretation that legal motherhood exists only when a woman has given birth to the baby.¹²³

In the first court case involving surrogacy, an Osaka Family Court denied the existence of a parent-child relationship when a Japanese couple used donated ova and a surrogate to conceive twins.¹²⁴ Despite being listed as the legal parents on the U.S. birth certificate, the registration was denied.¹²⁵ The Osaka Family Court upheld the Municipality's decision on the grounds that "under the law, offspring born to a married couple should only have a parental bond with the woman who gave birth to them."¹²⁶ The Supreme Court rejected the couple's claim in 2005, holding that "the original decision is warranted."¹²⁷ Again, the only determinant of a parent-child relationship was the act of giving birth and no other factors were considered. Because this case involved partial surrogacy, it is possible that the existence of a genetic relationship could have influenced the Court's decision.

The principle that birth establishes maternal parenthood was reaffirmed in a case involving a Japanese couple that traveled to the U.S. to use a surrogate.¹²⁸ The couple presented their baby's U.S. birth certificate listing them as the parents, but the registration of their child was denied.¹²⁹ In 2004, the Akashi Branch of Kobe Family Court rejected the couple's claim and reaffirmed that the only way to achieve motherhood without adoption was giving birth.¹³⁰ The couple appealed but the Osaka High Court dismissed their claim.¹³¹

B. Some Courts Are Beginning to Use Factors Other Than Parturition to Determine Parent-Child Relationships

The 1962 Supreme Court precedent should be abandoned, as it was decided at a time before surrogacy was practiced. Rather than a standalone test, the act of giving birth should be considered as one of many factors in determining parenthood. While the act of parturition remains central to

¹²³ See *Government won't recognize surrogate kids*, *supra* note 115.

¹²⁴ See *Twins' registration nixed over surrogacy*, DAILY YOMIURI, Aug. 15, 2004; Mayeda, *supra* note 19, at 7.

¹²⁵ See Mayeda, *supra* note 19, at 7.

¹²⁶ See *Twins' registration nixed over surrogacy*, *supra* note 124.

¹²⁷ *Top court rejects registering babies born of surrogate mothers*, JAPAN ECONOMIC NEWSWIRE, November 24, 2005.

¹²⁸ See Mayeda, *supra* note 19, at 12.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

Japanese courts' reasoning, lower courts have begun to consider other factors. In some cases, these factors were sufficient to recognize a parent-child relationship, even in the absence of having given birth.

1. *The Best Interest of the Child Has Been Used to Recognize a Parent-Child Relationship*

When it is in the best interest of the child to recognize a parent-child relationship, some courts have done so even when the parent in question was not a birth parent. This factor was considered in a 1998 decision by the Tokyo High Court, in which a couple conceived using donor sperm and three years later divorced.¹³² While the court awarded custody to the mother, it noted that custody could have been bestowed upon the non-biological father if it had been in the best interest of the child to do so.¹³³ While this case involved a non-biological father, the court was faced with the dilemma of weighing a traditional biological relationship against a non-traditional, purely social parent. By showing a willingness to award custody in the non-biological parent, the court indicated that the best interest of the child should be given significant weight.

As discussed above,¹³⁴ the Tokyo High Court in September 2006 made a groundbreaking decision by recognizing the existence of a parent-child relationship even though a surrogate mother was used.¹³⁵ A contract between parents Mukai and Takada and the surrogate held that the children legally belonged to the couple and the surrogate had no rights or responsibility for them.¹³⁶ Pursuant to a Nevada District Court's order, the Japanese parents were listed on the birth certificate and U.S. government agencies were ordered to accept the certificate.¹³⁷ The application to register the children in Japan was refused in May 2004 on the basis that the Ward Office could not recognize that the mother gave birth to the children, and therefore no legitimate parent-child relationship existed.¹³⁸ The parents sued the Ward Office. In November 2005, a Tokyo Family Court dismissed the claim against the Ward Office on the basis that the U.S. decision was not valid in Japan, the decision was against Japanese public policy, the mother

¹³² *Id.* at 6.

¹³³ *Id.*

¹³⁴ *See supra* Part I.

¹³⁵ Docket No. Heisei 18 ra 27, September 29, 2006 (in Japanese) (translation on file with author). While the Japanese Supreme Court ultimately reversed the decision, the fact that the Tokyo High Court was willing to consider other factors is significant.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

of a child is the person who gave birth to the child, and the parents could not show how their rights were violated since they could become the legal parents by adopting the children.¹³⁹

Reversing the lower court, the Tokyo High Court considered a number of factors that weighed in favor of recognizing a parent-child relationship. The court decided the case in no way harmed public order and morality and therefore the foreign decision could stand.¹⁴⁰ Presiding Judge Toshifumi Minami determined that it was in the best interest of Japan to recognize a parent-child relationship for a number of reasons. First, the twins were blood-related to the couple.¹⁴¹ Second, Mukai was unable to have children any other way.¹⁴² Third, the surrogate was not acting under financial duress, but rather chose to act as a surrogate out of “volunteer spirit.”¹⁴³ Fourth, the Court looked at what was in the best interest of the children and reasoned that the children had nowhere else to go. If the Court did not accept the U.S. decision, the children would have no legal parents. Essentially, the children were “trapped between the laws of both countries.”¹⁴⁴ Finally, while recognizing that the Government has raised concerns with surrogacy, the Court reasoned that since the surrogate birth in this case had already occurred, those concerns were not relevant. Japan is considering a ban on surrogacy, the disputed arrangement already occurred and recognizing a parent-child relationship would not promote surrogacy.¹⁴⁵ Under pressure from the Justice Ministry, the Shinagawa Ward Office filed an appeal to the Supreme Court, which ultimately reversed the Tokyo High Court’s decision.¹⁴⁶

This case has been critiqued for disregarding the significance of the act of parturition, and instead emphasizing the best interest of the child as the paramount factor. Commenting on the case, Justice Minister Jinen

¹³⁹ *Id.*; Carl Freire, *Twins born to US surrogate mum can be registered to Japanese parents, court rules*, ASSOCIATED PRESS, Sept. 30, 2006.

¹⁴⁰ Docket No. Heisei 18 ra 27. In Japan, a foreign decision is binding unless it goes against public policy. MINSOHŌ [Code of Civil Procedure], art. 118. Before weighing whether or not the decision contravened Japanese public policy, the court evaluated whether or not the Nevada decision was valid. The court gave weight to the fact that all interested parties were involved in the Nevada decision, and that the Nevada District Court used due consideration to determine that a parent-child relationship did exist. Rather than just looking at whether or not a valid contract existed, the District Court looked at the totality of the circumstances to determine this was best. Docket No. Heisei 18 ra 27.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Justice Ministry to urge ward office to appeal surrogate birth ruling*, JAPAN TODAY, Oct. 6, 2006; *Japan to consider surrogacy law reform*, BIONEWS, Oct. 22, 2006.

Nagase said that it would confuse people and that “most of the Supreme Court rulings and academic theories are united under the understanding that labor makes up a mother-child relationship, while the high court decision does not seem to have firm grounds.”¹⁴⁷ Nonetheless, the case shows an acknowledgement among lower courts that factors other than parturition may be significant in establishing parenthood.

2. *Consent Has Also Been Used to Justify Recognizing a Parent-Child Relationship*

In some cases, the court gives weight to written agreements transferring or establishing parental rights. For instance, in a 1998 Osaka District Court case, a father-child relationship was denied because there was no written documentation of the intent to form one.¹⁴⁸ In that case, a married couple separated and afterwards the wife conceived using donor sperm.¹⁴⁹ Because the couple had not divorced and remained on the same register, under the presumption of paternity the wife was able to register the child as her husband’s legitimate child.¹⁵⁰ The husband sued to challenge the registration. The court ruled in his favor, finding that the wife’s claim that the arrangement was consensual was not supported by a letter of consent.¹⁵¹ By requiring the husband’s written consent, the Court established a higher burden than the plain language of Article 772 before applying the presumption of paternity.

In a similar case involving posthumous reproduction, the husband’s unwritten consent was sufficient to recognize a parent child relationship, affirming the importance of consent to become a parent.¹⁵² In this case, the husband had to undergo radiation therapy and the couple froze his sperm to avoid damaging his genetic material. It was understood between the couple that the frozen sperm would later be used to artificially inseminate the wife, whether or not the husband was alive. After the husband’s death, the wife successfully used the husband’s sperm to conceive. When her application to register the child as her husband’s legitimate child was denied, she unsuccessfully challenged the decision in Takamatsu District Court. The

¹⁴⁷ See *Ward office, under instructions from Justice Ministry, appeals surrogate birth ruling, supra* note 8.

¹⁴⁸ Hanrei Jihou 2000, 1696:118 (in Japanese); Mayeda, *supra* note 19, at 7.

¹⁴⁹ Mayeda, *supra* note 19, at 7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Kominshu vol. 57, no. 3, 32 (Takamatsu High Court, July 16, 2004) (in Japanese) (translation on file with author).

District Court found that a parent-child relationship could not be recognized because “social perception that a baby born in such a way is a child of the dead husband is not sufficiently strong.”¹⁵³ However, on appeal, the Takamatsu High Court in 2004 reversed. The fact that the husband gave his consent prior to his death, coupled with the fact that there was a blood relationship, was a sufficient basis to recognize a parent-child relationship.¹⁵⁴ In September 2006, the Second Petty Bench of the Supreme Court reversed this decision on the basis that the child was not born within three hundred days of the marriage and that the presumption of paternity therefore did not apply.¹⁵⁵ Nonetheless, the Takamatsu High Court decision shows a trend of considering consent as a factor.

By requiring intent and consent to become a father, the courts laid the groundwork for factors other than the act of giving birth and genetic relationship to establish parenthood. Written consent could be influential in deciding whether or not a non-birth mother could be recognized. Specifically, an agreement between a surrogate mother and the intended mother conferring all parental rights on the intended mother could bolster the case of recognizing a non-birth mother as a legal mother.

3. *The Existence of a Blood Relationship is also Central to the Determination of Legal Parentage*

Family lineage is paid a great deal of attention in Japan. When there is a genetic relationship, courts are more likely to recognize a parent-child relationship. For instance, in the previously discussed case involving post-humus reproduction, the court found the existence of a blood relationship between the father and child to be persuasive.¹⁵⁶ However, other courts ruled differently on very similar facts. In a 2003 Matsuyama District Court decision, the existence of a genetic tie was not enough to recognize a deceased husband as a father, given the lack of social support for such recognition.¹⁵⁷ In cases where the mother and father’s genetic material is

¹⁵³ See Mayeda, *supra* note 19, at 2.

¹⁵⁴ *Id.* at 7. This is in accordance with Article 772 of the Civil Code, which says that a child conceived by a wife during marriage is presumed to be the husband’s child. MINPŌ [Japanese Civil Code], art. 772 of 1898, *translated in* 2 EHS Law Bull. Ser. No. 2101. The Court also found that it would be in the best interest of the child to be registered legitimately. See Mayeda, *supra* note 19, at 7.

¹⁵⁵ Docket No. Heisei 16 (ju) 1748, September 4, 2006 (in Japanese) (translation on file with the author); MINPŌ [Japanese Civil Code], art. 772 of 1898, *translated in* 2 EHS Law Bull. Ser. No. 2101.

¹⁵⁶ See Mayeda, *supra* note 19, at 7.

¹⁵⁷ See Mayeda, *supra* note 19, tbl. 1.

used with a surrogate, the existence of a genetic tie between the parents and the child could help justify recognizing a parent-child relationship.

C. Without Legislative Action, the Act of Giving Birth Will Likely Continue to be the Most Important Factor

While factors such as the existence of a blood relationship and written consent can influence Japanese courts, cases in which non-birth mothers are recognized as legal parents are rare, and the act of giving birth likely will continue to define motherhood. The recent reversal by the Supreme Court of the Tokyo High Court's groundbreaking decision makes this even more likely. Without legislative intervention, birth will be the exclusive mode of establishing legal motherhood, and non-traditional families created through ART will not be provided recognition.

VII. AN INCREMENTAL APPROACH SHOULD BE EMPLOYED TO EXPAND ACCESS TO SURROGACY AND RECOGNIZE PARENTAL RIGHTS

There is a sore need to clarify many of the issues surrounding surrogacy in Japan. Recognizing parents who use a surrogate would strengthen families and help make clear a very ambiguous area of the law. While many of the groups that oppose surrogacy do so in part because they wish to avoid the legal complications surrogacy would create,¹⁵⁸ Japanese courts are currently confronted with disputes in which surrogacy has already been used. Even groups that do not favor legalizing surrogacy recognize that legislation is needed for the best interests of families created through surrogacy.¹⁵⁹ For instance, leaders of JSOG acknowledge an increasing public need for a system that can adequately cope with surrogacy.¹⁶⁰ Pressure will continue to mount in the court system, "forcing the articulation of public policy on a case-by-case basis."¹⁶¹ This is not the ideal method of governing parent-child relationships and often results are inconsistent, as demonstrated by the plethora of contrasting decisions discussed above.

¹⁵⁸ The Japanese Society of Fertility and Sterility opposes legalizing surrogacy on the ground that "legal solutions would be difficult to achieve." See Nozawa & Banno, *supra* note 32, at 195.

¹⁵⁹ President of JSOG Shiro Nowaza and Deputy Secretary of JSOG, Kouhi Banno, write that "social conventions and laws, which ensure that the complex parent-child ties created by surrogacy do not hinder the unborn child's well-being, are necessary, but in present-day Japan, such legal or social guarantees do not exist." *Id.* at 201.

¹⁶⁰ *Id.* at 194.

¹⁶¹ See THE N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 27, at 117.

A. *The Family Registration Act Should be Amended to Recognize Genetic, Non-Birth Mothers as Legal Mothers*

Changing the way in which parentage is conferred on non-birth parents would relieve much of the pressure building in the Japanese court system and strengthen Japanese families created through surrogacy. JSOG leadership has conceded that were there a law defining parent-child relations, certain surrogacy situations may be ethically condonable.¹⁶² Other jurisdictions passed laws clarifying the parent-child relationship, even before they were able to come to a consensus on whether or not surrogacy should be legal.¹⁶³ For instance, a bill introduced in New York in the 1986-1987 Legislature provided that the intended parents would be considered natural parents, unless circumstances had changed since the formation of the surrogacy agreement such that doing so would not be in the child's best interest.¹⁶⁴ A law allowing non-birth mothers to be recognized in Japan, however, could face resistance from those adhering to traditional family values.¹⁶⁵ The current family register system reflects the importance placed on family lineage and heredity.¹⁶⁶ The importance of family lineage is also manifested in various court decisions involving ART.¹⁶⁷ Changing current law to recognize non-birth parents could be perceived as weakening the value on heredity.

If the focus on heredity does not completely prevent revision of the Family Registration Act, it will at least influence what revisions are acceptable. For instance, it is more likely that a parent-child relationship between a non-birth mother and child would be recognized when there is a genetic tie.¹⁶⁸ While sixty percent of the public would recognize the non-birth mother as a legal parent when her eggs were used, only fifty percent would recognize her as the mother if the surrogate's egg was used.¹⁶⁹ JSOG, too, perceives full surrogacy as more socially acceptable than partial surrogacy.¹⁷⁰ Thus, surrogacy is more likely to be tolerated when the

¹⁶² See Nozawa & Banno, *supra* note 32, at 201.

¹⁶³ In the 1980s in the U.S., many pieces of proposed legislation would have clarified the parent-child relationship. See THE N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 27, at 100.

¹⁶⁴ *Id.*

¹⁶⁵ See Mayeda, *supra* note 19, at 2.

¹⁶⁶ *Id.*

¹⁶⁷ In a 1998 Tokyo High Court case, the court declined to find a parent-child relationship, in large part because there was no blood relationship between the father and the child. *Id.* at 6.

¹⁶⁸ *Id.* at 5-6.

¹⁶⁹ *Id.*

¹⁷⁰ See Nozawa & Banno, *supra* note 32, at 193.

intended parents' genetic material is used and the Diet should consider recognizing intended parents involved in full surrogacy arrangements.

There are several ways in which current law could be amended to recognize non-birth mothers in limited situations. The most acceptable solution may be to amend the Family Registration Act to define parentage according to blood relation, in conjunction with intent to raise the child. Such a law would strike a middle ground by recognizing non-birth mothers only in cases where they are genetically tied to the child. Another compromise that could be made would be to allow a judicial determination of parentage in cases of surrogacy. Instead of a presumption of parentage, the law could provide that when a surrogate is used, the intended parents may be considered the natural parents if a family court determines that it is in the child's best interest. This would allow intended parents to be recognized as natural parents in at least some situations, which would be an improvement on the current law.

B. Japan Should Encourage Continued Discourse Among Policy Groups and Other Stakeholders

Japan is referred to as “a country of consensus and harmony.”¹⁷¹ It is unlikely that a law either for or against surrogacy will be seriously considered until there is broad political support. Japan is not currently at the point where the key stakeholders involved in surrogacy are ready to accept legalized surrogacy.¹⁷² Opinions, however, are shifting. The government should be sensitive to this change, and continue to encourage discussion on the topic to gain a better understanding of the viewpoints involved. Health Minister Hakuo Yanagisawa acknowledged this trend and said that “the government must consider its future direction by carefully assessing the trend of public opinion.”¹⁷³

Japanese lawmakers are again broaching the subject of surrogate birth and reproductive therapies. In November 2006, the government asked the Science Council of Japan to debate and discuss the issue of surrogacy and make a recommendation for legislation.¹⁷⁴ Specifically, the Council was asked to debate whether surrogacy should be legalized and under what circumstances. The group was also asked to make a recommendation as to

¹⁷¹ See Bai et al., *supra* note 104, at 18.

¹⁷² See *supra* Part IV.A.

¹⁷³ See Hiyama, *supra* note 39.

¹⁷⁴ *Government asks science council to debate surrogate birth, eyes laws*, KYODO NEWS, Nov. 30, 2006. The Science Council of Japan is an independent agency whose primary purpose is to make policy recommendations on scientific issues. Science Council of Japan Pamphlet, April 2006.

the legal status of children born to surrogates. The academic council is seen as an unbiased group capable of tackling this highly charged issue in a non-controversial manner.¹⁷⁵

Key stakeholders, too, should discuss the matter further. Many groups feel obliged to oppose surrogacy in the absence of more deliberation. For example, the Japanese Society of Fertility and Sterility was unable to come to a recommendation on surrogacy, in part because of a lack of discussion.¹⁷⁶ Other groups would similarly benefit from further discussion. While JSOG has made a strong statement against surrogacy, there is not yet a complete consensus among its members.¹⁷⁷ When JSOG solicited members' opinions on the ethical implications of surrogacy, the response was "widespread and diverse."¹⁷⁸ In fact, the responses collected were so divergent that the drafted policy statement had to be revised to more narrowly state ethical objections to surrogacy.¹⁷⁹ Further discussion within JSOG is needed. Consensus is particularly important among JSOG members, the future providers of surrogacy. Regardless of whether or not surrogacy is legalized, it will not be available to infertile couples until JSOG members are permitted to participate in surrogacy arrangements.

C. *Courts Should Be Flexible in Considering What Constitutes Legal Parentage*

Instead of rigidly adhering to the 1962 precedent that birth is the one and only way of creating a mother, the courts should consider all the relevant factors to determine legal parentage. Factors such as the existence of a genetic link, consent and intent to become a parent, and the best interest of the child should be analyzed in parentage disputes. The previously discussed Matsuyama District Court case supported this approach, holding that "each case should be individually decided based on social acceptance until the enactment of legislation."¹⁸⁰ Even groups currently opposed to surrogacy have placed weight on the best interest of the child. For instance, JSOG concluded that the well-being of the child should be given the highest priority.¹⁸¹ In cases like Mukai's, in which the surrogate willingly relinquishes parental rights and the intended parents bring suit to register the

¹⁷⁵ See *Government asks science council to debate surrogate birth, eyes laws*, *supra* note 174.

¹⁷⁶ See Nozawa & Banno, *supra* note 32, at 195.

¹⁷⁷ *Id.* at 193.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Mayeda, *supra* note 19, at 12.

¹⁸¹ See Nozawa & Banno, *supra* note 32, at 200.

child as their own, it is in the best interest of the child to be recognized as a legitimate child. For the sake of strengthening families that have faced infertility, the Supreme Court should reverse itself and recognize non-traditional parents.

VIII. CONCLUSION

While surrogacy received much attention over the last decade in Japan, the country is still in the early stages of grappling with the difficult legal and ethical issues involved. Meanwhile, couples like Mukai and Takada continue to go abroad to seek the technologies that will allow them to become parents. The courts should recognize there is more than one way to become a parent. People like Mukai and Takada, who invest significant time, resources, and energy to fulfill dreams of becoming a parent, deserve to be recognized as natural parents in the Family Register. Until the Diet issues legislation on surrogacy and the consequent parent-child relations, the courts should use a flexible approach to define whether or not someone is a legal parent.

Ideally, the determination of legal parenthood when a surrogate is used should be made legislatively rather than developed case by case through court decisions. Japan should amend the Family Registration Act to clarify whether or not a non-birth parent may be recognized as a legal parent. Further, Japan must determine whether, and under what circumstances, surrogacy should be allowed. To that end, Japan should continue to foster discussion on the subject, both in the general public, as well as amongst stakeholders and policymakers. These recommendations should be implemented to ensure that technology does not continue to outpace the law.