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Recognition of parental responsibility:
biological parenthood v. legal parenthood,
i.e. mutual recognition of surrogacy
agreements:
What is the current situation in the MS?
Need for EU action?

NOTE



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LEGAL AFFAIRS

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Abstract

The note presents the main challenges to the national jurisdictions in the EU resulting from the advance in medicine, free movement and children's rights as well as the current legal position across EU member states on legal parenthood with a focus on surrogacy arrangements. Their cross-border implications are addressed with a view on possible EU action.

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LIST OF ABBREVIATIONS

- ART** Assisted Reproductive Techniques
- AI** Artificial Insemination
- AID** Artificial Insemination by Donor
- CE** Council of Europe
- DNA** Deoxyribonucleic acid (genetic material)
- ECtHR** European Court on Human Rights in Strasbourg
- EU** European Union
- HFEA** Human Fertilisation and Embryology Act (UK)
- IVF** In vitro fertilisation
- MAR** Medically Assisted Reproduction
- SA** Surrogacy agreements
- SAA 1985** Surrogacy Arrangements Act 1985 (UK)
- UN CRC** United Nations Convention on the Rights of the Child

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EXECUTIVE SUMMARY

The note outlines at the outset the changing notion of parenthood resulting from the advance in reproductive medicine. Until recently, family law in Europe considered legal parenthood as stemming solely from the existing genetic link between the parent and the child. The biological truth as a fundamental principle in recognition of the parents of the child is now challenged by the rapid advance in technology. New technology makes it possible for babies to be born with no genetic link to the parent (via sperm and egg donation) and sometimes as a result of contractual arrangements between adults. The response of legal doctrine and legislation in Europe to these social changes was to re-think both the concept and law of parenthood. Parenthood is now recognised as a social rather than as a natural construct, though many implications of assisted reproductive techniques (ART) relating to the concept and values of parenthood are still under discussion.

The new concept of parenthood focuses strongly on the intentions of adults to become parents with the application of ART. The intention to be a parent is an important locus to provide a solution to the complexity of challenges to recognise first, the fatherhood of a non-biological father and second, the parenthood in surrogacy arrangements (SA). The note only mentions some of the contentious issues raised by the parenthood based on surrogacy. Apart from the increased number of potential parents, it creates a number of ethical dilemmas, including (i) the welfare of the child to be born, (ii) contracts (agreements) preceding the child birth, which make the procreation a commercial activity and commoditise children, and (iii) the depersonalisation of women, arguably making them baby incubators. The key legal issues of surrogacy are discussed below in the note.

Some jurisdictions oppose this development. They consider the biological link between the parent and the child as a sole basis for legal parenthood. This results in legal prohibition of surrogacy as a medical practice and no legislation on surrogacy agreements.

The welfare of donor conceived children as well as of children born from surrogacy agreements is another important concern. There are still many open questions relating to the information to be provided to the child in order to respect his or her sense of identity.

The note highlights the existing 'common core' of law in EU Member States concerning the recognition of legal motherhood based on childbirth and of legal fatherhood for married fathers (the presumption of paternity). It is also makes clear that the intention to be a parent is increasingly becoming a factor equally important to biological/genetic links in recognition of legal parenthood in EU Member States. This means that for the unmarried father's legal parenthood to be established, his consent in a form of acknowledgment or consent for the treatment is necessary. The consent in the case of surrogacy is framed in the SA as intention to become a parent. The application of ART also avails so called 'non-conventional' families (single people, civil unions of different or same sex couples or same sex married couples) to become parents. Information is provided on the legislation with regard to the legal techniques to establish legal parenthood for the co-parent.

The note highlights the different responses of EU Member States to surrogacy. Only the UK and Greece expressly legalise surrogacy, whilst in Germany, Austria, Italy, Norway, France, Bulgaria and in Sweden surrogacy is prohibited. The other Member States do not

specifically legislate on the issue. The note focuses on the concept and enforceability of the SA, with a particular focus on the central issue of the contract, namely the surrogate mother's consent to carry out and to give birth as well as to hand over the child to the commissioning woman (couple). The role of the SA is limited between the parties but it also has an important value as information to the court to decide on the legal parenthood subsequently (in the UK) or prior to child birth (in Greece). The note highlights the existing common ground of laws of Member States that allow surrogate mothers to deny the legally binding character of the SA, which means that they are unenforceable. The reasons behind these laws are twofold; first, the surrogate mother cannot be bound by any contractual obligation to give up her child, i.e. she must have the final choice about whether or not to hand over the baby and, second, legal parenthood can be established only by the means set forth in the law but not by a contract.

The note further deals with the key legal problems for the EU Member States legalising surrogacy: how to establish parenthood and how to address the commercial elements of the SA. A common approach is identified; legal parenthood does not follow automatically from the SA but rather from the established legal techniques to recognise both the legal motherhood and fatherhood. In order to recognise the legal parenthood of intended parents, if the child is with them, the law in the UK and in the Netherlands applies the known technique of adoption. The implication of this approach regarding the child's birth certificate is: (i) the birth certificate issued at birth includes the names of the birth mother and her husband (if any) and (ii) after the adoption, a new birth certificate is issued with the names of the adoptive parents. The existing consensus on the second legal issue is presented: Member States only allow non-commercial surrogacy but the intended parents may compensate the surrogate mother for some 'reasonable' costs during the pregnancy. Some Member States only allow 'altruistic surrogacy' (i.e. Denmark).

More attention is given to the UK as leading Member State in legislating on surrogacy in Europe. The approach of Greece, where surrogacy arrangements are also legal, is stressed as being different from the one in the UK: based on the SA a 'pre-birth' court order is to be granted that approves the gestational surrogacy and results in automatic recognition of the motherhood for the intended mother reflected in the birth certificate. The note further concludes that only two, out of 27, Member States expressly legalise surrogacy and its outcomes related to legal parenthood. The majority of the EU member states (16) hold more or less a restrictive position towards it. A comment is made on the common approach taken in regard with the regulation schemes of surrogacy. A brief note is made on the issue of feasibility of harmonisation of national substantive laws of Member States regarding surrogacy.

Central for the note is the issue of cross-border surrogacy and the actions to be undertaken to address its key legal implications: on the legal parenthood (legal status of the child) and the nationality of the child. Note is taken of the fact that the cross-border surrogacy has not been a subject of prolific research in particular with a view to its legal consequences. The current 'Study on the Private International Law Aspects of International Surrogacy Agreements' is presented with some of its assumptions and objectives.

In order to illustrate the problem of cross-border surrogacy a few cases are presented and discussed (involving British, French, Spanish, Dutch and Belgian couples entered in SA in California and in Ukraine). The possible application of the principle of mutual recognition that has already been implemented in some areas of civil and family law (EU regulations Brussels I and IIbis) was considered. The note provides some thoughts on its limited

value against the approach taken by Member States in dealing with cases of cross-border surrogacy to apply their national conflict of law rules. The note invokes arguments for the necessary efforts towards harmonisation of private international laws on parenthood especially on parenthood after cross-border surrogacy agreements.

The need for EU action is well grounded on the current strategy of the Union outlining its political and legal priorities – the Stockholm programme. The needs of infertile couples, though a minority, seeking treatment abroad as well as the interests of children born call for action at supranational level. The cases of international surrogacy give examples of the most difficult problems such as the risk of non-recognition of the legal parenthood and subsequently the child remaining parentless and in need of public care. In order to frame the possible action, the note highlights two facts: the already well established application of adoption as a legal technique for the transfer of the parenthood from the legal parents (at birth) to the intended parents and second, the global nature of cross-border surrogacy that needs a global rather than an EU response. In such a context, the note proposes concerted efforts at the level of the EU and the Hague Conference for Private International Law in two directions: (i) to study cross-border surrogacy (its nature, magnitude and personal experiences) and (ii) to produce an international Convention on private international aspects of surrogacy arrangements following the model of the Hague Intercountry Adoption Convention. The harmonised rules will have to secure the necessary certainty and predictability of the decisions for the welfare of children and intended parents in order to prevent more contentious issues of international surrogacy such as baby selling and exploitation of women.

1. INTRODUCTION

The problems of cross-border surrogacy agreements have already been defined as an emerging area of international family law. This briefing note will outline the complex issues related to the national substantive family law on parenthood and the outcomes of the application of national conflict of law rules to international surrogacy cases. Proposals will be made for possible action to address the issue at the EU level.

1.1 Methodology and sources of information

The briefing note is a result of a desk review of the accessible legislation in the field of attribution of parenthood in the EU Member States and the academic research in this field. The review gave a special focus to the related documents of the Council of Europe (Conventions, consultation papers and reports¹) and of the jurisprudence of the European Court on Human Rights. Important policy papers produced in the EU Member States as well as in the US, Australia and New Zealand were also consulted.² All the sources were examined against the EU relevant legislation, recent policy decisions and other documents.³

1.2 Scope and outline of the briefing note

This note concerns only the attribution of parenthood in circumstances related to the birth of the child and not in any other circumstances (e.g. in adoption). It deals primarily with the status of parents, with the view of its importance to children since the parenthood determines both the child's legal status and the holders of parental responsibility. The focus of the note is legal parenthood only, and not the issue of acquisition and content of parental responsibilities.⁴

The note starts with a short review of the main challenges to the national laws in EU member states resulting from the technological advance in medicine, plurality in family forms, free movement and legal recognition of children's rights. A brief evaluation follows

¹ 2001 "White Paper" on Principles Concerning the Establishment and Legal Consequences of Parentage CJ-FA (2001) 16 rev. "Study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation (CJ-FA (2008) 5)" - A Report for the attention of the Committee of experts on family law by Nigel Lowe Professor of Law and Director of the Centre for International Family Law Studies, Cardiff Law School, Cardiff University, Wales, UK, (CJ-FA (2008) 5). Lowe, N. An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law A Report for the attention of the Committee of Experts of Family Law (CJ-FA), 2006.

² These reports illustrate the awareness of the potential ethical and legal consequences of the development of ART as well as proposals for the legislative actions. In the early 1980, debates on ART were informed by the: "Report of the Committee of Inquiry into Human Fertilisation and Embryology", Department of Health and Social Security, UK, 1984 ("Warnock report"), Discussion Paper 18 (1988) – "Artificial Conception: Surrogate Motherhood" (Australia), Report by Benda Commission in Germany (1985) and others. More recent papers considered for this Briefing note are: "Surrogacy. Review for health ministers of current arrangements for payments and regulation." ("Brazier report"), UK, 1998; "New Issues in Parenthood", Discussion paper, New Zealand, 2004; Consultation on a review of Parental Order Regulations Prepared by Health, Science and Bioethics Division, Department of Health, UK, 2009. Lowe, N. An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law A Report for the attention of the Committee of Experts of Family Law (CJ-FA), 2006.

³ European Council. The Stockholm programme — an open and secure Europe serving and protecting citizens. (2010/c 115/01). Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Comparative Study on Authentic Instruments (Study for the European Parliament No IP/C/JURI/IC/2008-019).

⁴ See more in: Boele-Woelki, K., Ferrand, F., González Beilfuss, C., Jänterä-Jareborg, M., Lowe, N., Martiny, D. and Pintens, W. "Principles of European Family Law Regarding Parental Responsibilities" (Intersentia: 2007).

of the current legal position across Member States on the attribution of legal parenthood with a special focus on surrogacy arrangements in a sample of States. Then, the existing relevant international obligations, consultation and policy documents are presented. At the end, the issue of cross-border recognition of surrogacy agreements is addressed and recommendations on possible EU actions on these matters are formulated.

2. THE NEW CONCEPT OF PARENTHOOD IN THE ERA OF ASSISTED REPRODUCTIVE TECHNIQUES: CHALLENGES AND DISCUSSIONS

KEY FINDINGS

- the concept of legal parenthood is being challenged by the possibility of technological conception of a child. The key factor has changed from genetic lineage to the intention to be a parent
- the welfare of donor conceived children should be a paramount consideration.

It might be symbolic that the Nobel Prize for 2010 for medicine was awarded to Professor Robert Edwards for the development of in-vitro fertilization (IVF). It is reported that since then about four million IVF babies have been born globally and with Europe initiating approximately 54 % of all reported ART cycles (see *Annex 1*).

2.1 The advance in medicine and the changed concept of parenthood

Assisted reproductive techniques (ART) have a long history. It starts with the practice of artificial insemination (AI) followed by AI by donor sperm (IAD), to reach 1978 when the first baby was born as a result of IVF.⁵ Furthermore, the medical practices allowing for egg and embryo transfer made it possible for babies to be born as result of contractual relationships – surrogacy agreements. Nowadays the acceptance of ART as a service for infertility and the increasing approval of surrogacy as a response to unwanted childlessness have been proved by research and reflected in the national laws, though differently.

Apart from the many ethical problems posed, the rapid advance in science and reproductive medicine challenged the whole **concept of parenthood**. Until recently the answer to the question 'who is the parent of the child' seemed straightforward in principle and the subject trivial. Family law across Europe considered the biological/genetic parents as the legal parents of the child. The principle of biological truth was the basis for legal parenthood. This foundation was challenged via technologies making it possible for babies to be born with no genetic link to their parents (via sperm and egg donation). The response of the legal doctrine alongside with the legislation in Europe was to re-think the concept and the law of parenthood. It is now recognised as a social rather than as a natural construct, though many implications of ART relating to the concept and values of parenthood are under discussion.⁶ Concepts of parenthood of today can be divided into genetic, social and legal parenthood.⁷ This notion not only reflects technological procreation but also attempts to legalise the different 'contribution' of adults involved in the child as well as in his/her

⁵ 'Warnock report', pp. 15- 42. See also Annex 2 for a Glossary of ART.

⁶ See: Douglas, J. "Marriage, Cohabitation, and Parenthood – from Contract to Status?" In: Katz, S., Eekelaar, J. and Maclean, M. (eds.) *Cross Currents. Family Law and Policy in the US and England*. (Oxford University Press: 2000), pp. 223-230.

⁷ The notion to divide the parenthood on the basis of the adult's 'contribution' to the child has been elaborated in: Eekelaar, J. "Parental responsibility: State of Nature or Nature of the State?". In: *Journal of Social Welfare and Family Law*, 1991, pp.36-50 (legal v. social parent). Bainham, A. "Parentage, Parenthood and Parental Responsibility: Subtle, Elusive, yet Important Distinctions". In: A. Bainham at all (eds) *What is a Parent?* (Oxford: Hart, 1999). See also: Herring, J. *Family Law* (Longman: 2001), pp.265-266. Divided parenthood is an enshrined notion in the 2001 "White Paper" on Principles Concerning the Establishment and Legal Consequences of Parentage" of the Council of Europe.

upbringing. It legitimises the social contribution: the care and affection invested in the child or the intentions towards it, thus diminishing the importance of genetic material endowed.⁸

The new concept of parenthood focuses strongly on the **intentions** of adults to become parents with the application of ART. The intention to be a parent is an important locus to provide a solution to the complexity of challenges to recognise first, the fatherhood of non-biological fathers and second, parenthood in surrogacy arrangements.⁹ The old concept of parenthood based on biological links did not consider that factor shortly because, the legal parenthood has been acquired via the fact of birth (for motherhood) and via the *pater est rule* (the presumption of fatherhood of the married father). Both techniques, accommodated by virtually all national laws of Member States, were challenged by the application of ART either of AI by donor sperm and IVF using donor gamete and embryo donation. Thus the **consent** given prior to the medical intervention became a factor equally important to the genetic link in order for parenthood to be attributed to the intending parents.¹⁰ Another ramification of ART that needs to be considered is the increased access to ART of non-conventional families, including de-facto families, single women and same sex couples (See Section 3.3).

2.2 Surrogacy

The whole research corpus on surrogacy is unanimous that this practice creates complex and still unsettled problems. The problems have been soundly described as a clash of "...truth about genetic origins versus the happiness of infertile couples".¹¹ Surrogacy widens the circle of adults involved in procreation. Depending on the type of surrogacy, in the extreme case, (See Annex 2) the child may result from the intention of two parents (both incapable of natural procreation), two gamete donors (of sperm and of egg) and one gestational mother. The situation would be more complex if the gestational mother had a husband. The child born from such arrangements will have genetic parents that would not have the parentage, will have a mother that does not intend to raise the child and would have two adults that wish to become his/her legal parents.

Apart from the increased number of potential parents, the SA creates a number of controversial ethical issues, including (i) the welfare of the child to be born, (ii) contracts (agreements) preceding the child's birth, which make procreation a commercial activity and commoditises children, and (iii) the depersonalisation of women, arguably making them simply baby incubators.¹²

⁸ See more on this subject: Steinbok, B. "Defining Parenthood". In: The International Journal of Children's Rights, vol. 13, No 1-2 2005, 287-310 (Martinus Nijhoff Publ.), Schwenger, I. (ed.) "Tensions Between Legal, Biological and Social Conceptions of Parentage". In: Tensions between Legal, Biological and Social Parentage. (Intersentia: 2007). Annas, G. "The Shadowlands: The Regulation of Human Reproduction in the United States". In: Family Law and Policy in the US and England. (Oxford University Press: 2000), pp.143-164. Hinman, L. Reproductive Technology and Surrogacy: An Introduction to the Issues. In: <http://ethics.sandiego.edu/LMH/Papers/Introduction%20to%20Reproductive%20Technologies.html> last visited September, 2010.

⁹ The role of the intention / consent has been discussed also in the light of contractualisation of parenthood. See Douglas, J. "Marriage, Cohabitation, and Parenthood – from Contract to Status?" In: Katz, S., Eekelaar, J. and Maclean, M. (eds.) *Cross Currents. Family Law and Policy in the US and England*. (Oxford University Press: 2000), pp. 223-230 and others.

¹⁰ See more in: Vonk, M. "The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch Law". In: <http://www.utrechtlawreview.org> Vol. 4, Issue 2, (June 2008) as well as supra note 7.

¹¹ Deech, R. "The Legal Regulation of Infertility Treatment in Britain". In: Katz, S., Eekelaar, J. and Maclean, M. (eds.) *Cross Currents. Family Law and Policy in the US and England*.

¹² See: Freeman, M. "The new birth right?" In: The International Journal of Children's Rights 4: 273-297, 1996 and the referred by him O'Donovan, K. "A Right to Know One's Parentage?" In: International Journal of Law and

The complex issue of parenthood in the era of ART is illustrated in Table 1.

Table 1: Division of parenthood

Who is the parent	Definition	Note
Genetic (biological) parent	The man and the woman whose gametes produce the child	Genetic parent may differ from the biological in case of surrogacy
Social Parent	The parent that provides everyday care for the child	
Legal Parent	The parent recognised by the law	
Parenthood in surrogacy arrangements (incl. in same sex couples)	Definition	Note
Surrogate mother	The woman that carries the embryo to term and gives birth to a child	Also known as the gestational or biological mother
Intentional parent	The man or the woman who intends to have a child	They may be the genetic parents
Co-mother	The partner of lesbian mother that has a parental status	
Co-father	The partner of a gay father (adoptive) that has acquired parental status via step child adoption	
Co-parent	The legal parent in same sex couples.	
Legal concepts related to parentage	Holder	Note
Parentage	Genetic (biological) parents	
Parenthood	Legal parents (regarded by law as parents)	
Parental responsibilities	Those who have the rights and duties towards the child	

Source: See footnote 7.

the Family, 27, 29 (1988). Also: Wallbank, J. "Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child". In: Medical Law Review, 10, Autumn 2002, pp.271-294.

2.3 The rights of the child

Several studies indicate that in the course of debates and policy developments around ART the rights of donor conceived children have been underestimated.¹³ The **right of the child to identity / to know his/her origin** creates a major concern. It is accepted that the UN Convention on the Rights of the Child protects such a right (Article 7)¹⁴ and the practice of **donor anonymity** infringes this right. Parallels are made with adopted children and the guarantees provided to them to access information of their biological parents. The legislator in Sweden was first to outlaw donor anonymity in 1984. This was followed by laws in the Netherlands, Germany, UK and Finland.¹⁵ Still there are many open questions in this field: what information is to be provided to the child, how is it to be provided, who is obliged to respect this right of the child, should we oblige the parents to tell the donor conceived children the truth about their genetic parents and how does this relate to the welfare of the child and of the family?

¹³ See more in: Freeman, M. Ibid. Also: Richards, M. "Assisted Reproduction and Parental relationships". In: Bainham, A., Lindley, B., Richards, M. and Trinder, L. (eds.) Children and Their Families. Contact, Rights and Welfare. (Hart: 2003) and the recent studies of: Blauwhoff, R. "Tracing down the historical development of the legal concept of the right to know one's origins. Has 'to know or not to know' ever been the legal question?" In: Utrecht Law Review <http://www.utrechtlawreview.org/> Volume 4, Issue 2 (June) 2008 and Blyth, E., Frith, L, Jones, C. and Speirs, J. "The Role of Birth Certificates in relation to Access to Biographical and genetic History in Donor Conception". In: The International Journal of Children's Rights 17 (2009) 207-233.

¹⁴ Article 7 (1) of UN CRC stipulates that: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

¹⁵ See: Replies by the CE member states to the questionnaire on the access to medically assisted procreation (MAP) and on the right to know about their origin for children born after MAP. Council of Europe Steering Committee on Bioethics. CDBI/INF (2005) 7. pp.60-62. Also: the Finish Act on Assisted Fertility Treatments (1237/2006) in: <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Finland/page.aspx/536>

3. RECOGNITION OF THE LEGAL PARENTHOOD IN THE EU MEMBER STATES

KEY FINDINGS

- a 'common core' exists in EU Member States concerning the recognition of legal motherhood based on childbirth and of legal fatherhood for the married father (presumption of paternity),
- the intention to be a parent is increasingly becoming a factor equally important to the biological / genetic link in recognition of the legal parenthood in the EU (consent of the unmarried father and where ART is applied, including under SA).
- the 'common core' in SA covers their non-enforceability, the ban on commercial surrogacy and the creation of regulatory mechanisms.

3.1 The legal mother

According to current research for the Council of Europe, a unanimous approach exists in EU Member States in establishing legal motherhood (maternal affiliation).¹⁶ The woman who gives birth is regarded *ex lege* as the legal mother regardless of her marital status and irrespective of the genetic link with the child.¹⁷ In contrast with such a common position, the Greek Civil Code creates a rebuttable 'presumption of maternity' for the intended mother in case of surrogacy (Article 1464).

The name of the birthmother as a child's legal mother has to be registered in the birth certificate.

The principles of genetic affiliation and legal certainty justify the legal consensus on the attribution of motherhood: legal motherhood is based on an observed fact (the birth of the child).¹⁸ Therefore the corresponding common legal position is that the motherhood cannot

¹⁶ See: "A study into the Rights and Legal Status of Children being brought up in various forms of Marital and Non-marital Partnerships and Cohabitation." A Report for the attention of the Committee of Experts on Family Law by Professor Nigel Lowe. Document (CJ-FA (2008) 5) prepared by the Secretariat of the Directorate General of Human Rights and Legal Affairs – Council of Europe. Also: Schwenger, I (ed) Tensions Between Legal, Biological and Social Conceptions of Parentage.

¹⁷ This common legal stipulation creates **a common core** in establishing the legal mother in the EU Member States. It corresponds to the international standards aimed to harmonise the national substantive law, namely to the Article 2 of the 1975 CE Convention on the Legal Status of Children Born Out of Wedlock ("maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child"), Principle 1 of the CE White paper on parentage ("... all previous circumstances concerning the conception and pregnancy (e.g. cases of surrogacy) and any subsequent modification of the legal parentage (e.g. adoption by another person) will not affect the legal maternal affiliation at the moment of birth.") Furthermore, it is in the line with the interpretation given by the ECtHR in the Marckx judgment according to which it is a fundamental right for a mother and her child to have their link of affiliation fully established as from the moment of the birth (Eur. Court HR, Marckx v. Belgium judgment of 13 June 1979, Series A, no.31).

¹⁸ France does not follow the principle of automatic recognition of legal motherhood based on the childbirth. Further actions are needed such as acknowledgment of the child by the mother. France still, though under critique, allows the woman to give anonymous birth and, thereby, to escape the legal motherhood. More in: Schwenger, I (ed) Tensions Between Legal, Biological and Social Conceptions of Parentage (Intersentia: 2007), pp. 3-4; See also: Kees, J. S. "European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage". Dissertation: 2010. In: <http://arno.unimaas.nl/show.cgi?fid=19540> visited in October 2010, pp.41-44.

be challenged, e.g. by the woman who is the child's genetic (but not gestational) mother. Further, the legal motherhood of the birthmother is recognition of: (i) her 'investment' in the child through the period of gestation and the established bond with child and (ii) the childbirth.¹⁹

3.2 The legal father

The recognition of the legal father is much more complex than the recognition of the legal mother. Several factors should be considered in attribution of legal fatherhood, including the marital status of the couple, the consent to application of ART (if appropriate) and any specific regulations on donor anonymity.

A uniform approach exists among EU Member States in recognition of legal parenthood for the **married father**. In the case of a child born to a married woman, her husband is regarded as the legal father (the rebuttable presumption of paternity).²⁰ The recent research in this area suggests that the importance of presumption is decreasing due to the influence of various factors, i.e. the rise in extramarital childbirths (to unmarried couples, and single mothers), increased access to DNA testing for the establishment of the biological truth in fatherhood and ART.²¹

The legal techniques applied by the Member States to recognise the legal parenthood of the **unmarried father** are either by acknowledgment or by court order (if there is no voluntary acknowledgment).²² Usually the consent of the mother is required where the father wishes to acknowledge the child. Unlike maternity, paternity can always be challenged since it is based not on observed facts but on presumptions and intentions.²³ The name of the legal father shall appear on the birth certificate of the child.

As far as legal paternity of children conceived as a result of **ART** is concerned, again, the Member States to a large extent share a common approach. The sperm donors are not treated as legal fathers, whereas husbands who consent to their wives' treatment are so regarded.²⁴ This is a so called 'extension' of the presumption of paternity to the married father consented to ART. It means that precedence is given to the social (consenting) father who becomes a legal father though he is not the biological father of the child (where the AID is applied). Some countries extend the presumption to informal unions, meaning that the consenting male cohabitant is considered to be the legal father (Austria, Denmark, France, Estonia, Netherlands, Norway Spain, Sweden and the United Kingdom).

¹⁹ Steinbok, B. op. cit, supra note 4 and Annas, G. op. cit, supra note 4.

²⁰ (CJ-FA (2008) 5), p.11. For the existing deviations of this rule in some national jurisdictions, see the same study.

²¹ Boele-Woelki, K. "What comparative family law should entail?" In: Utrecht Law Review <http://www.utrechtlawreview.org/> Volume 4, Issue 2 (June) 2008. Dethloff, N and Ramser, C. "Tensions between Legal, Biological and Social Conceptions of Parentage in German Law". In: Schwenzer, I (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage*. p. 181.

²² (CJ-FA (2008) 5), p.11. Schwenzer, I. In: Schwenzer, I. (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage*. (Intersentia: 2007).

²³ CE White paper on parentage enshrines the same position regarding the recognition and challenging of paternity. This is in line with Article 3 of the 1975 Convention which states "Paternal affiliation of every child born out of wedlock may be evidenced or established by recognition or by judicial decision". Interesting regulation exists in the Dutch law to prevent circumvention of adoption law – the biological father who is married to another woman cannot acknowledge the child.

²⁴ (CJ-FA (2008) 5), pp.12, 29.

3.3 The co-parent

The figure of **co-parent** (the second legal parent) appears in same sex couples (married or in registered unions). Not all Member States regulate de-facto unions as well as the same sex unions (Bulgaria among them). Some states do not provide access to infertility treatment for lesbian women (e.g. France).²⁵ The techniques to establish legal parenthood for the partner of the parent applied in Member States vary depending on status of the couple (in marriage, in civil partnership or in informal cohabitation) as well as on the consent to the infertility treatment. Adoption of the child is available to *married couples* (e.g. in Sweden²⁶ and in the Netherlands²⁷). The spouse that adopted the child becomes his/her second legal parent.

In the UK, the Human Fertilisation and Embryology Act 2008 (HFEA) introduces a new concept of parenthood for a mother's female partner in civil unions, making equivalent provision to that for opposite sex couples. The legal parenthood of the female partner of the birth mother is established by the operation of law – on the basis of the consent for treatment (extension of the presumption of paternity).²⁸ The same is the position of law in Sweden,²⁹ Norway and Spain.³⁰

3.4 Legal parenthood after surrogacy agreements

Member States differ in their approaches to surrogacy. Only **the UK and Greece** expressly legalise SA (therefore the respective laws will be commented separately). In **Germany, Austria, Italy, Norway, France, Bulgaria** and in **Sweden** the surrogacy is prohibited. **German** law bans SA as well as egg donation with no exceptions (Embryo Protection Act) and consequently - embryo transfer.³¹ **French** legislation also expressly bans surrogacy on public policy grounds. However, a change of attitude towards surrogacy in France has been reported.³² **Belgium, Cyprus, Czech Republic, the Netherlands, Estonia, Finland, Latvia, Luxemburg, Malta, Portugal, Romania, Spain and Slovakia** do not have specific laws on SA but MAR techniques that could lead to surrogacy are allowed (egg and embryo transfer and IVF).³³

What is a surrogacy agreement? The SA is a contract between the surrogate mother (and her husband, if married) and the intended parents (couple). Central to the contract is the agreement for a baby to be born as a result of the surrogate mother's consent to carry out and to give birth as well as to hand over the child to the commissioning woman or

²⁵ See: Kees, J. S. "European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage". Dissertation: 2010. In: <http://arno.unimaas.nl/show.cgi?fid=19540> visited in October 2010, p.30.

²⁶ Singer, A. Equal Treatment of Same-sex Couples in Sweden. In: Atkin, B. (ed.) The International Survey of Family Law. (2010), pp. 396-397.

²⁷ See: Vonk, M. "Parent – Child Relationships in Dutch Family Law". In: Schwenzer, I (ed) Tensions Between Legal, Biological and Social Conceptions of Parentage. (Intersentia: 2007), pp. 281-282.

²⁸ See: section 42 of the HFEA 2008.

²⁹ See: Kees, J. S. Op. cit, supra note 26, pp. 26-28. Also in (CJ-FA (2008) 5), pp.12, 29.

³⁰ For Norway and Spain, see: (CJ-FA (2008) 5), pp.12, 29.

³¹ The only exception, not regulated specifically, is transfer of an embryo not belonging to the recipient woman but not created for that purpose (remaining embryo). See: Detloff, N. Tensions Between Legal, Biological and Social Conceptions of Parentage in German Law. In Schwenzer, I (ed) Tensions Between Legal, Biological and Social Conceptions of Parentage. Intersentia, 2007. pp. 177-178.

³² <http://www.rue89.com/2009/04/24/should-surrogate-mothers-be-legalised-ten-keys-to-the-debate> last visited October 2010 and Kees, J. S. supra note 26, p.17.

³³ Replies by the CE member states to the questionnaire on the access to medically assisted procreation (MAP) and on the right to know about their origin for children born after MAP. Council of Europe Steering Committee on Bioethics. CDBI/INF (2005) 7. pp.32-35.

couple. The SA may also involve other issues: (i) financial (e.g. pregnancy related costs to be covered by the commissioning couple, (ii) complications with the child or with the surrogate mother, (iii) requirements to the surrogate mother (e.g. life style during pregnancy).³⁴ The role of SA is limited between the parties but it has value as information to the court to decide on the parenthood subsequently or prior to the treatment (in Greece). **It is a strict common ground that the SA is not legally binding– it is unenforceable.** Two sets of reasons could be invoked in this regard. Since there is a common position on the recognition of the legal mother as the birthmother, the surrogate mother cannot be bound by any contractual obligation to give up her child, i.e. she must have the final choice about whether or not to hand over the baby.³⁵ Second, legal parenthood could be established only by the means set forth in the law but not by a contract. The opposite would be contrary both to the established public policy in the field of parenthood (see: 3.1 – 3.2) and human dignity. This position is expressed in the UK Surrogacy Arrangements Act 1985 (SAA) that states: “**surrogacy arrangements are not enforceable in law**” (section 1A).

Surrogacy produces, apart from the ethical dilemmas, two major legal problems: how to establish parenthood and how to address the commercial aspects of the SA. It is a common approach that the legal parenthood of the child does not follow automatically from the SA. The couple (person) that arrange(s) for surrogacy will not gain any parental status notwithstanding the fact that the child may be genetically linked to them. It is rather the reverse – based on the existing legal consensus, the mother is the woman giving birth to the child and the father (if she is married) will be her husband. In order to recognise the legal parenthood of intended parents, if the child is with them, the law applies the known technique of adoption. Under **Dutch law**, SA are possible but not enforceable. In order to establish their legal parenthood, the commissioning couple should apply for adoption and prove a genetic link.³⁶ The situation in **Cyprus** is similar.³⁷ The effects of this approach regarding the child’s birth certificate are that the birth certificate issued at birth includes the names of the birth mother and her husband (if any) and, after the adoption, a new birth certificate is issued with the names of the adoptive parents.

A consensus exists on the issue of financial transactions in SA – Member States only allow non-commercial surrogacy.³⁸ It is not against the law, though, for the commissioning couple to cover some ‘reasonable’ costs of the surrogate.³⁹ The **UK SAA 1985** prohibits any financial inducement to encourage SA or profit for third parties from making such arrangements (section 2). Under **Dutch law**, commercial surrogacy is prohibited (article 151b of the Criminal Law)⁴⁰ but compensation for the surrogate is possible and enforceable

³⁴ See more in: Dermout, S, Wiel, H., Heintz, P, Jansen, K and Ankum, W. „Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997 to 2004”. In: Human Reproduction, Vol.25, No.2 pp. 443–449, 2010.

³⁵ Brazier, M., Golombok, S. and Campbell, A. “Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation” Consultation document and questionnaire. In: Human Reproduction Update 1997, Vol. 3, No. 6 pp. 623–628. See also Re: X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

³⁶ See Vonk, M. supra note 28.

³⁷ In: <http://www.klztlaw.com/articles/general/surrogacy-in-cyprus-surrogacy-agreements> last visited October 2010.

³⁸ It is a common policy reflected in the legislation of EU member states that allow surrogacy, to prohibit any other financial transfer related to it. The main ground is to prevent commercialisation and marketisation of parenthood and commodification of children. The public policy in some countries takes this as a key reason not to allow surrogacy but to allow it just between members of the family – Denmark.

³⁹ The Belgian First instance court has refused to recognise a birth certificate of children born after SA. One of the grounds has been the commercial type of surrogacy. <http://conflictoflaws.net/2010/belgian-judgment-on-surrogate-motherhood/>

⁴⁰ CRC/C/OPSC/NLD/Q/1/Add.1, p.9.

if agreed in the contract.⁴¹ In **Denmark** any payment and advertising of the service is forbidden (the same is the position of the UK SAA 1985). SA are possible in Denmark only in a 'close typically familial kinship' between two women and in addition where the surrogate has parented the child genetically (so called 'altruistic surrogacy').⁴²

The UK is the leader in the EU in legalising and regulating SA (the SAA 1985 and the HFEA 1990, last revised in 2008). The law in the UK provides for the transfer of legal parenthood to the commissioning couple either via *adoption* or by means of *parental order* conditional to fulfilment of several requirements: (i) the commissioning couple must be over 18 years and married, in a civil partnership or living together and at least one of them must be domiciled in the UK, (ii) a genetic link must exist between at least one of the couple, (iii) the child must live with the couple (after being handed over to them) that means that the surrogate mother consents with the parental order to be made, (iv) no remuneration may be paid (other than reasonable costs) and (v) the application for a parental order must be lodged within six months of the child being born.⁴³ The UK law also provides for the establishment of an administrative mechanism to **regulate** and control the practice – the Human Fertilisation and Embryology Authority (HFEA). The HFEA has a mandate of a standard setting and licensing body.⁴⁴

The Civil Code in **Greece** allows SA. The law does not require an adoption procedure for the transfer of legal parenthood. Rather a 'pre-birth' court order is to be granted (Article 1458) that approves the gestational surrogacy. The result is that the presumed mother is not the woman giving birth but the woman who obtained court permission, regardless of her genetic connection with the child (article 1464).⁴⁵ Prior to issuing the order, the court must be satisfied that the following conditions exist: (i) a written SA, (ii) no financial benefits, (iii) medical reasons for the surrogacy and (iv) both parties to the agreement must be permanent residents of Greece. The outcome concerning the birth certificate of the child is that the name of the commissioning mother appears but not the name of the woman that has given birth. It seems that the Greek law uses the 'pre-birth' court order as a mechanism for a recognition of the **enforceability of the surrogacy contract** (a written form is necessary). This poses questions on: (i) the right of the surrogate mother to withdraw from the contract especially after the childbirth and (ii) the right of the child to access information on his/her origin.⁴⁶

To sum up, only two, out of 27 Member States expressly legalise surrogacy and its outcomes related to legal parenthood, though applying different approaches (the UK and Greece). A group of nine states have a permissive rather than purely restrictive approach. So, the majority of the Member States (16) hold more or less a **restrictive position** towards surrogacy.

⁴¹ See Vonk, M. supra note 28.

⁴² Source: Danish Council of Ethics, web site visited in September 2010.

⁴³ Under Section 54 of the Human Fertilization and Embryology Act 2008.

⁴⁴ <http://www.hfea.gov.uk/133.html>

⁴⁵ Similar is the surrogacy law in California. The California Office of Vital Records will only allow the intended parents' name(s) to go on the birth certificate if the certificate is accompanied by a Superior Court judgment naming the intended parent(s) as the legal parent(s) of the child. Without such a judgment, the surrogate's name (and if she is married, her husband's name) must go on the birth certificate. In: <http://www.surrogacy.com/legals/article/calaw.html> last visited October, 2010. Ukraine applies the unique approach to surrogate motherhood. For instance, article 123, para 2 of the Ukrainian Family Code establishes ex lege legal motherhood for the intended mother: http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks_engl.pdf

⁴⁶ The assessment on Greece is based only on the available translations of the articles from the Greek Civil Code.

The positions of two jurisdictions that regulate surrogacy **differ** substantially. The UK law accommodates principles that are agreed in the academic research in regard with the legal parenthood and the rights of the child, whilst the Greek legislator seems to support more the aspirations of the childless couple seeking treatment.

What is a common ground among Member States is that the surrogacy should be **regulated**. The UK creates a special public body, the Netherlands and Belgium assign the power to investigate the case to the child protection authorities⁴⁷ and in Greece the court has the regulatory authority. The concept of regulation is another aspect that makes the surrogacy very much similar to adoption.⁴⁸

The prevailing restrictive domestic response to surrogacy has been identified as one of the 'push factors' to international surrogacy.⁴⁹ This raises, *inter alia*, the question about the feasibility of some *harmonisation of substantive laws* of Member States on ART (not particularly on surrogacy), an issue that has been a topic for discussion for 20 years.⁵⁰ Several proposals have been examined – either to take a 'better law' approach or to stick to imposing a minimum set of standards. Also, discussion has involved a number of opinions against such harmonisation.⁵¹ A tendency of convergence of laws allowing for application of ART has already been identified.⁵² Such a tendency could be empowered by a **recent judgment of the ECtHR** on the case of *S. H. and others v. Austria (2010)*.⁵³ The court held that the legislation in question was in breach of Article 14 of the ECHR and was therefore discriminatory. The Court considers that '**concerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ova donation. Such reasons may be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general.**...' but since ART have already been allowed '... the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention'.

It is worth also mentioning the efforts of the Council of Europe aimed to harmonise the substantive laws on parenthood and the child's legal status, though not very successful so

⁴⁷ If the intended parents have taken on the care and upbringing of the child concerned, they must report this to the executive of the municipality in which the child is resident (section 5 of the Foster Children Act). If the intended parents wish to adopt a child under six months of age who was born to a surrogate mother, they require prior written consent from the Child Protection Board. Failure to obtain this consent is a criminal offence (art. 442a of the Criminal Code; art. 151a of the Criminal Code). Furthermore, in such a case, the Child Protection Board may ask the a court order to appoint a temporary guardian for the child (*voorlopige voogdij*) (art. 1:241, paragraph 3, of the Civil Code). See: CRC/C/OPSC/NLD/Q/1/Add.1/ 30.12.2008, pp. 7-8.

⁴⁸ See more in: Freeman, M. "The new birth right?", pp.279-281. Freeman, M. 'Does Surrogacy Have a Future After Brazier?' In: Family Values and Family Justice. Collected Essays in Law (Ashgate: 2010), pp. 278-280.

⁴⁹ See: Pennings, G. "Legal harmonisation and reproductive tourism in Europe". In: Human Reproduction, Vol.19, No 12, p. 2693. 2004. Blyth, E. and Farrand, A. "Reproductive tourism – a price worth paying for autonomy?" In: Critical Social Policy 2005 91; online version in: <http://csp.sagepub.com/content/25/1/91> , Deech, R. "Reproductive Tourism in Europe: Infertility and Human Rights". In: Global Governance, Vol. 9, 2003.

⁵⁰ See Pennings, G. op. cit.

⁵¹ Ibid, as well as Blyth, E. op. cit, supra note 47.

⁵² A comparison between the Council of Europe study of 1998 and a survey conducted by the International Federation of Fertility Societies in 2007 shows that in the field of medically assisted procreation legal provisions are developing quickly. In Denmark, France and Sweden sperm and ova donation, which was previously prohibited, is now allowed since the entry into force of new legal provisions in 2006, 2004 and 2006 respectively. In Norway sperm donation for IVF has been allowed since 2003, but not ova donation. See: Judgment of the ECtHR on the case of *S. H. and others v. Austria (2010)*.

⁵³ Application no. 57813/00. The applicants, four Austrian citizens, lodged an application against the ban of IVF using sperm or egg donor under the Artificial Procreation Act as a discriminatory treatment under Article 14 in conjunction with Article 8 of the European Convention on Human Rights (ECHR).

far. The consultation process based on the *"White Paper" on Principles Concerning the Establishment and Legal Consequences of Parentage* (2001) has indicated the complex and the sensitive nature of this legal area.⁵⁴ Based on a recent (2009) Study a proposal is made that the CE should complete its work on modernising the 1975 Convention on the Legal Status of Children Born Out of Wedlock by adopting a new Convention on Family Status rather than on the Establishment and Legal Consequences of Parentage (upon which the CJ-FA were specifically mandated to work from 1997).⁵⁵

⁵⁴ CJ-FA (2001) 16 rev; http://www.coe.int/t/e/legal_affairs/legal_cooperation/steering_committees/cdcj/Documents/2004/cdcj-bu%20_2004_%203%20e%20-%20White%20Paper.pdf CDCJ-Bu (2004) 3

⁵⁵ See: CJ-FA (2001) 16 rev. and CJ-FA (2008) 5.

4. CROSS-BORDER SURROGACY: A NEW AREA OF INTERNATIONAL FAMILY LAW

KEY FINDINGS

- cross-border surrogacy may put at stake the legal parenthood and citizenship of children born,
- there is a need for common private international law standards in recognition of legal parenthood in cross-border surrogacy globally.

4.1 Cross-border surrogacy and problems faced by EU citizens

The position held by the majority of Member States towards surrogacy - either to ban it or to ignore it, has given a rise to '**cross-border**' (**international**) **surrogacy**. There is no doubt that the cross-border surrogacy is part of the phenomenon that has been already termed as 'procreative' ('reproductive') tourism and more recently as 'cross-border reproductive care'.⁵⁶ It has been defined as: "*movement of citizens to another state or jurisdiction to obtain specific types of medical assistance in reproduction that they cannot receive at home*".⁵⁷ The research on 'reproductive tourism' but not so much on cross-border surrogacy, discusses the reasons for its growth as well as the possible policy responses to control it and to provide satisfactory services at the 'tourist's own' country.⁵⁸ Considering the solutions researches always make the point on the restrictive legislation as a push factor for 'procreative tourism' and on the need to establish minimum standards for the European Union.⁵⁹

Cross-border surrogacy has not been a particular subject of research. The background section of the current 'Study on the Private International Law Aspects of International Surrogacy Agreements'⁶⁰ assumes that '*the majority of "procreative tourists" are childless Western couples attracted by "low-cost" surrogacy services and a ready availability of surrogate mothers in places like India, Eastern Europe and South America.*' Being part of 'cross-border reproductive care' the cross-border surrogacy has its **specific** problems. The most prevalent among them and the focus of this briefing note are the questions of **legal parenthood and the nationality of the child**.

⁵⁶ See: Shenfield, F. et al. (2010) 'Cross border reproductive care in six European countries'. In: <http://www.eshre.eu/ESHRE/English/Press-Room/ESHRE-News/page.aspx/619>. The ESHRE Task Force study is the first to provide data on patients crossing borders: it says that patients seeking care cross borders, mainly because of restricted local treatment and limited financial access, came from 49 countries, with high numbers from Italy (31.8%), Germany (14.8%), the Netherlands (12.1%) and France (8.7%). Legal reasons are predominant for patients from Italy (70.6%), Germany (80.2%), France (64.5%) and Norway (71.6%). Difficulties accessing treatment were more often noted by UK patients (34.0%) than by patients from other countries, and expected quality was an important factor for most patients. As per their relational status, majority of patients are married couples and same sex couples.

⁵⁷ See: Pennings, G. op. cit., supra note 47.

⁵⁸ See: Blyth, E. and Farrand, A. op.cit, supra note 47. Deech, R. op.cit, supra note 47.

⁵⁹ Ibid and Pennings, G. op. cit, supra note 47.

⁶⁰ It is a two year study commenced on 1 August 2010. In: http://conflictoflaws.net/2010/a-study-on-the-private-international-law-aspects-of-international-surrogacy-agreements/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+conflictoflaws%2FRSS+%28Conflict+of+Laws+.net%29

In order to illustrate the problem a few cases, involving British, French, Spanish, Dutch and Belgian couples will be briefly presented. In *X & Y (Foreign Surrogacy)*,⁶¹ twins were born as a result of a SA between a married British couple and a married Ukrainian host surrogate. Under Ukrainian law, the British couple became the legal parents of the children and were registered as such on the birth certificates. Under English law, however, the parents of the twins were the host surrogate and her husband. The conflict between English and Ukrainian law resulted in parental status being lost for both couples. This left the children without legal parents and without rights to either British or Ukrainian citizenship. As a result, the children were, in the words of Mr Justice Hedley, “marooned, stateless and parentless, whilst the couple could neither remain in the Ukraine nor bring the children to the UK”. In the end, following a long delay due to DNA tests, the children were granted discretionary leave to enter the UK “outside the rules” to make it possible for the couple to apply for a parental order under s30 of the HFEA 1990. The decision was based on the principle of the welfare of the child. Hedley J, however, noted that grant of a parental order did not automatically confer nationality.

In *K (Minors)*,⁶² twins were born (May 2009) as a result of a commercial SA between the applicants, habitually resident in England, and a married couple in India. The court had to consider whether to give an indication that a s30 Parental Order was likely to be granted in the future in order to assist parents seeking Entry Clearance for children coming into the UK. Since the children had not been in the country the court did not have a jurisdiction and the application could not be progressed. In addition, the welfare decision required as part of the s30 application could not have been completed for the same reason – children were not living with the parents in the country. Hedley J concluded that the court should say nothing in its order about the probable outcome of a s30 application however he did make obiter comments about the case. He made it clear that whether the Entry Clearance Office finds these comments helpful is a matter for them.⁶³ The case was generally adjourned with liberty to restore. If and when the children enter the country and only then can the court proceed further with the application.

In the next case twins were born to a same sex married couple from Spain by a surrogate mother in California (*RDGRN 2575/2008, 18 February 2009* (Spain)).⁶⁴ Since the intended parents were denied a visa for the babies by the Spanish embassy to enter Spain, they lodged an application for review before the Dirección General de los Registros y el Notariado (hereinafter DGRN). The DGRN applied a procedure **for recognition** of a foreign public document that resulted with recognition of the Californian certificate of registration. At this stage the position of the DGRN was that the issue is about a ‘request for registration in Spain of a birth certificate from a foreign authority that arouses **questions of recognition and not of conflicts of law**’.⁶⁵ However, on 20 September 2010 the Tribunal de Primera Instancia at the request of the Public Prosecutor, declared the entry at the

⁶¹ Re: *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) <http://www.familylawweek.co.uk/site.aspx?i=ed28706>

⁶² Re *K (Minors)* (Foreign Surrogacy) [2010] EWHC 1180. Summary by [Alfred Procter](#), barrister, [1 Garden Court](#)

⁶³ See the Leaflet produced by the UK Border Office to provide information to British citizens regarding the problems with cross-border SA, in: <http://www.ukba.homeoffice.gov.uk/>

⁶⁴ In: <http://conflictoflaws.net/2010/surrogate-motherhood-and-spanish-homosexual-couple-iii/>

⁶⁵ Therefore article 81 *Reglamento del Registro Civil* was applied. According with this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain: (i) it must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered “full evidence” (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation are usually called for; so does translation; (ii) the public authority granting the document has to be equivalent to the Spanish ones; (iii) the act contained in the foreign registration certificate must endorse a legality test involving three elements: international jurisdiction of the foreign authority, due process, and compatibility with Spanish *ordre public*.

certificate null. The Spanish court has refused to recognise the foreign birth certificate on the ground *that it is against the law* in Spain that establishes the legal parenthood at birth (to the birthmother). The intended parents decided to appeal against the ruling. In addition, on 5 October 2010 the DGRN issued an Instruction about the regulation of affiliation registration in cases of surrogate pregnancy in order to protect the best interests of the child and the interests of the women who give birth.⁶⁶ According to the Instruction, a prerequisite is required for the registration of births by surrogate motherhood: it is necessary to produce before the Spanish responsible of the Registro Civil a judicial resolution of the competent Court of the country in which the surrogate pregnancy occurred. The decision of the foreign court must determine the affiliation of the child, which again raises a question of recognition in Spain. The DGRN considers decisions on affiliation matters as non-contentious, which do not need to pass an *exequatur* procedure but rather to be recognised by the DGRN if some requirements are met: a) the formal validity of the foreign decision b) that the original court had based its international jurisdiction in conditions equivalent to those provided by Spanish law c) the due process respect d) that the interests of the child and the pregnant mother had been guaranteed e) that the foreign decision is a final decision and that the consents given in the contract are irrevocable. DGRN states that foreign registration certificates do not support affiliation registration in the Registro Civil.

In the next case, a **Belgian** same sex married couple was named as fathers on the birth certificates of twins born by a surrogate mother in California.⁶⁷ When the parents came back with their twin daughters to Belgium, the local authorities **refused to give any effect to the birth certificate**, in effect denying the existence of any parent-children relationship. The parents challenged this refusal before the Court of First Instance, which was denied (March 2010). Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorised, prior to the birth of the children, that the birth certificates mention the names of the two fathers, **but rather the recognition of the birth certificates**, the court applied the test laid down in Article 27 of the Code of Private International Law, under which foreign acts relating to the personal status may only be recognised in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.⁶⁸

Similar were the arguments invoked by the **Dutch court** in two cases of 2009. The court held that a foreign birth certificate that does not name the birthmother of the child, while it is known who gave birth to the child, violates Dutch public policy. The first decision concerned a case of a Dutch surrogate and two Dutch men (commissioning parents) all living in the Netherlands. The surrogate mother gave birth anonymously in France to make sure that she did not appear on the child's birth certificate. One of the men acknowledged his paternity before the French civil status registrar. The court held that the French birth certificate violated Dutch public policy concerning the establishment of the legal maternity of the birthmother. It observed also that it is a violation of the international law (Article 7 UN CRC). The second decision concerned a case of a Dutch and an American man and their children born to a Californian surrogate mother. At the moment of the birth all the persons involved habitually resided in the USA. The Californian court determined that the two men

⁶⁶ See: [BOE, n. 243, 7.10.2010](#)

⁶⁷ <http://conflictoflaws.net/2010/belgian-judgment-on-surrogate-motherhood/>

were the legal parents of the child and they also appeared as the parents on the Californian birth certificates of the children. Shortly after they moved to the Netherlands the court refused to recognise the two men as the legal parents of the child on the basis of the same reasoning as in the case of the French birth certificate. Since the Californian authorities did not establish the legal maternity of the birthmother, neither the documents nor the parenthood of the commissioning parents could be recognised.⁶⁹

The final example is of twins born in 2000 to a **French** married couple by a surrogate mother in California (*CA Paris, 25 October 2007* (France)).⁷⁰ The children were denied passports by the French Embassy and they returned home as holders of U.S. passports. In France civil proceedings were initiated by the prosecutors against the recognition of the Californian birth certificate in order to get a judicial declaration that the couple was not the parents of the children. It is reported that the Paris court of appeal has dismissed the proceedings. It ruled that the children should be considered for all purposes as daughters of the couple. Another French couple to whom a child was born (2001) by a surrogate in Minnesota, USA was not so lucky. Both the French first instance court and the Paris Court of Appeal ruled against the couple (2009). The debate focused on whether the American judgments could be recognised in France (it does not seem that the issue of whether the birth certificate could be recognised was raised). The Paris Court of appeal noticed that there were no international conventions between the U.S. and France on the recognition of foreign judgments, and that it followed that the French common law of judgments as laid down by the *Cour de cassation* in *Avianca* applied. The Court only explored whether one of the conditions was fulfilled, namely whether the foreign judgments **comported with French international public order**. It simply held that it did not, as the **Civil code provides that surrogacy is forbidden in France** (Article 16-7 of the Civil Code), and that the rule is mandatory (*d'ordre public*: see Article 16-9 of the Civil Code).⁷¹

The cases illustrate first, the difference in the approach to surrogacy between *substantive laws* at countries of destinations and the laws in Member States. Commercial surrogacy is lawful in California and in Ukraine whereas the common approach in Europe is against that. Contrary to the principles of legal parenthood in Member States all cases show that in the respective jurisdictions the intended parents acquire parental status either automatically – *ex lege* (Ukraine) or through a judgment (such as a Californian 'pre-birth order'). As a result the intended parents are named in the original birth certificates as legal parents of the children.

Second, the above cases illustrate the *international private law aspects* of cross border surrogacy. Obviously it is an emerging area of international family law. For the moment, however, none of the existing international instruments contains specific provisions designed to regulate it.⁷² In such circumstances each of the jurisdictions confronted by the international surrogacy applied a specific approach though all invoked their international private laws. The UK approach was consistent in both cases: the court applied *lex fori* to decide the cases. In France, once the court focused on the **recognition of the foreign judgment** (the one of the court of Minnesota) and applied the French conflicts of law (ruled out the judgment as against the *d'ordre public*). On the second case, the focus was

⁶⁸ The court held that the SA in that case was against the public policy in Belgium based on the fact that it is against the right of the child to know his/her origin as per article 7 of the UN CRC and because of the commercial element in the contract that is against human dignity protected under article 3 of the ECHR.

⁶⁹ See: Kees, J. S. Op. cit, supra note 26, p. 272.

⁷⁰ <http://conflictoflaws.net/2007/flying-to-california-to-bypass-the-french-ban-on-surrogacy/>

⁷¹ <http://conflictoflaws.net/2009/french-court-denies-recognition-to-american-surrogacy-judgement/>

⁷² See: Study on the Private International Law Aspects of International Surrogacy Agreements'.

the **birth certificate** and it was recognised. The **recognition of the birth certificate** has been a focus for the courts in Spain, Belgium and in The Netherlands. The birth certificates were rejected based on the finding of being in violation with public policy or national law. So, the procedure for the recognition of the birth certificates ended up in application of the respective private international law provisions concerning the attribution of the legal parenthood (the national law of the parents but not the law at the birth place of the child). The birth certificate in cross-border surrogacy in general has been questioned in relation with the authenticity of its content.⁷³

In all cases at stake is the legal parenthood of children who may end up parentless and stateless. This justifies the need of common private international law standards in establishing the legal parenthood in cross-border surrogacy is apparent.

4.2 Mutual recognition of Surrogacy Agreements?

In the Stockholm Programme, the European Council has underlined that mutual recognition of documents in the area of civil law should extend to areas not yet covered, yet essential in daily life, such as successions, and wills, matrimonial regimes and the patrimonial consequences of the separation of couples. The European Council further stressed that this should be achieved while according proper respect to the varied legal systems of the Member States, namely their national legal traditions in this area. The European Council considers that the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary, like separation and divorces.

A conclusion may be drawn that a new initiative is planned to implement the principle of mutual recognition of judgments and public documents concerning the recognition of legal parenthood.⁷⁴ Two points need to be considered for discussion in this direction. It should be clear that when speaking of 'mutual recognition of SA' we have to understand rather the decisions or acts of public bodies regarding SA: either court orders on legal parenthood or birth certificates named the intended parents as legal parents. None of the examined jurisdictions of Member States recognises the enforceability of SA.⁷⁵

The issue of mutual recognition of SA could be observed in the context of the principle of mutual recognition endorsed by the European Council as the "cornerstone of judicial cooperation in civil... matters within the Union".⁷⁶ It has already been implemented in some

⁷³ See the definition of the authentic instruments given by the European Court of Justice in the Unibank decision¹, following the Jenard-Möller Report, and by the EC legislator in Article 4 (3) (a) Regulation (EC) No 805/2004 on the European Enforcement Order. Reference from the Comparative Study on Authentic Instruments (Study for the European Parliament No IP/C/JURI/IC/2008-019).

⁷⁴ See the important analyses of this issue of Kees, J. S. "European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage", op. cit supra note 26.

⁷⁵ The legal power of SA should not be mixed up with those agreements on parental responsibility that have been recorded in an authentic instrument and contain an enforceable obligation under Brussels II bis

⁷⁶ Upon the basis of the Treaty of Amsterdam, which brought judicial co-operation in civil matters squarely into the community framework. Subsequent to Amsterdam the European Council set out the so-called "Tampere milestones", named after its meeting held in Tampere in October 1999 (Bulletin EU 10-1999) which included the notion that "enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights". It is accepted that EC competence is limited by the Art 65 of the Treaty of Amsterdam to cross-border issues affecting the proper functioning of the internal market which therefore excludes matters of purely domestic substantive family law (Lowe, N. An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law A Report for the attention of the Committee of Experts of Family Law (CJ-FA), 2006, p.8).

areas of civil and family law, most notably in EU regulations Brussels I⁷⁷ and IIbis⁷⁸. These instruments implement the principle of mutual recognition of *judgments and public and private documents*. The Brussels IIbis Regulation applies to *all* civil matters relating to the attribution, exercise, delegation, restriction and termination of parental responsibility. The Regulation does *not*, however, apply to recognising or contesting parenthood and other matters (Article 3). Further on, Article 46 of Brussels IIbis refers to authentic instruments and agreements: '*Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.*' Are the birth certificates 'authentic instruments'?

A recent Comparative Study on Authentic Instruments (Study for the European Parliament No IP/C/JURI/IC/2008-019) provides a definition of the 'authentic instrument' as well as classifies the birth certificate as one of these instruments.⁷⁹ Interpreting article 46 of Brussels IIbis, the same study draws the important conclusion that: '*... the underlying legislative intent appears to have been to apply the grounds for non-recognition (Article 22 ss.) also to the enforcement and thus to limit further the cross-border enforcement of authentic instruments that deal with the status of persons and maintenance disputes.*'⁸⁰ Further on, the study suggests that: '*...the concept of mutual recognition cannot simply be transferred from judgments to authentic instruments since authentic instruments do not have res judicata effect. Authentic instruments record contracts or other legal acts of the parties with probative value and make them enforceable, however the authentic instrument does not preclude court proceedings attacking the validity of the instrument or the underlying transaction.*'⁸¹ In above cited cases of cross-border surrogacy the birth certificates were not recognised exactly because their content has been examined against the national conflict of law rules. So, to apply the principle of mutual recognition in cross-border surrogacy will not be appropriate without some level of harmony at national laws regulating surrogacy.

4.3 A need for EU action?

Addressing the problems of cross-border surrogacy at EU level will well fit to the political priorities set forth by the Stockholm programme: '*... to focus on the interests and needs of citizens.*' The needs of infertile couples, though a minority of the population, seeking treatment abroad as well as the interests of children born call for action at supranational level. The cases of international surrogacy give example of the most difficult problems such as the risk of non recognition of the legal parenthood and subsequently – the child remaining parentless and in need of public care.

What type of action is needed? Because of the variety of domestic responses to surrogacy – from complete ban to very liberal approach, any action at supranational level should consider setting of common standards both for substantive and private international law on legal parenthood after surrogacy. The resemblance of surrogacy to adoption (see 3.3)

⁷⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁷⁸ Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁷⁹ Comparative Study on Authentic Instruments (Study for the European Parliament No IP/C/JURI/IC/2008-019), pp. 108-110.

⁸⁰ Ibid, pp. 123-124.

⁸¹ Ibid, p. 124-125.

makes the idea of taking the model of the regulation of intercountry adoption attractive for consideration.⁸² The harmonised rules will have to secure the necessary certainty and predictability of the decisions for the welfare of children and intended parents in order to prevent most contentious issues of international surrogacy such as baby selling and exploitation of women.

The cross-border surrogacy is not an EU but a global phenomenon. Therefore the issue of setting of common standards should be discussed in a much broader perspective - towards international private law convention.

The problem of cross-border surrogacy has been recognised not only at the EU level. It was identified as an emerging international family law issue that requires further study and discussion in August 2009 at the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions.⁸³ The need for action at the global level was also defined by the Hague Conference for Private International Law. The Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Intercountry Adoption Convention hereafter) held in June 2010 recommended that ‘the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.’⁸⁴ Such a Study has been commissioned and should be completed in 2012.⁸⁵ The ultimate goal of the study is to prepare a document that would serve as a basis for a future international Convention on aspects of surrogacy arrangements. The project aspires to outline the underlying concepts of the Convention. The inquiry will focus on four interrelated objectives. The objectives of the Study are presented in the Table 2 below where some comments of the note are also listed. The idea (not at all expressed in the Study outline) is to develop an international convention on cross-border surrogacy following the model of the Hague Intercountry Adoption Convention.

Table 2:

Objective of the Study	Comments of the note
A system of legally binding standards that should be observed in connection with international surrogacy arrangements	(substantive family law); i.e. concerning the welfare of the child, SA, financial matters, minimum requirements to the surrogate mother, standards for mutual recognition of decisions on legal parenthood.
A system of supervision to ensure that these standards are observed	Central authority to supervise – based on or the model of the Central authorities under the Hague Convention on Intercountry Adoption or conferring additional mandate to the same authorities

⁸² The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993.

⁸³ The International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions 2009, Cumberland Lodge, England, 4-8 August 2009, Conclusions and Resolutions, p. 4. <http://www.hcch.net/upload/resolutions_famlawconf09.pdf> accessed October 2010.

⁸⁴ See: Conclusion and Recommendations adopted by the Special Commission, p. 25-26. See in: <http://www.abdn.ac.uk/law/surrogacy/about.shtml> last visited October 2010.

	(statistically the surrogacy cases are not so many).
A model of co-operation between jurisdictions involved (i.e. the country of a surrogate mother and the country of intended parents)	Again, similar to the model of Central authorities as well as involving the courts to apply adoption to transfer the legal parenthood and public child protection authorities.
A model of formal channels of communication between jurisdictions involved (i.e. the country of a surrogate mother and the country of intended parents).	Central authorities, child protection services, possibly accredited bodies.

Against this background, the proposal is the Study of the legal aspects of international surrogacy should be supported and taken into consideration at EU level. Based on the findings of the Study, the EU should put efforts into the elaboration of international convention on private international law aspects of cross-border surrogacy in a close communication with the Hague Conference for Private International Law.

ANNEX 1:

ART FACT SHEET - JUNE 2010

Background

- One in six couples worldwide experience some form of infertility problem at least once during their reproductive lifespan. The current prevalence of infertility that lasts for at least 12 months is estimated to be an average of 9% worldwide for women aged 20-44.
- 20-30% of infertility cases are linked to physiological causes in men, 20-35% to physiological causes in women, and 25-40% of cases are due to a joint problem. In 10-20% no cause is found. Infertility is also associated with life-style factors such as smoking, body-weight, stress and age.
- It is estimated that over 3.75 million babies have been born worldwide since the first baby (Louise Brown) was born 32 years ago using ART. In 2002, an estimated 240,000 ART babies were born around the world.
- Most ART treatments take place in women aged between 30 and 39.

Number of cycles / treatments

- Europe leads the world for ART treatment, initiating approximately 54 % of all reported ART cycles.
- In 2006, 458,759 treatment cycles were reported in 32 European countries. This compares globally with 138,198 cycles from the USA and 53,543 cycles from Australia and New Zealand. The number of cycles performed in many developed countries has grown 5-10% per annum over the last 5 years.
- France (65,749 treatment cycles), Germany (54,695), Spain (49,943) and the UK (43,953) make up 56% of all cycles initiated in Europe.
- Other European countries perform a significant number of cycles such as Italy (40,748), Turkey (37,468), Belgium (22,730), Russia (21,274) and The Netherlands (17,770).
- The number of ART cycles performed in Europe in 2006 represented a 9.7% increase on the previous year. This was partly due to the fact that more clinics reported data. Reduction in the reimbursement for ART results in a sharp decline of cycles in Germany between 2003 and 2004 (from 102,000 to 57,000). Number of cycles in 2006 is still low with almost 55,000 cycles.
- In 28 European countries that reported delivery from IVF, ICSI and Fresh Embryo Transfer 87,705 babies were born. The true number of European ART babies is unknown because not all clinics report.
- There were 117,318 regular IVF treatments, 232,844 intracytoplasmic sperm injection (ICSI) cycles, 86,059 frozen embryo transfer cycles (FER), 12,685 egg donor cycles (ED), 6,561 preimplantation genetic diagnosis/screening cycles (PGD/PGS) and 241 in vitro maturation cycles (IVM).
- 22 countries reported data on intra-uterine inseminations (IUI) with 134,261 cycles using partner's sperm (IUI-H) and 24,339 cycles donor sperm (IUI-D).

Availability of ART

- For the first time in 2006 the EIM reported on cycle outcome (pregnancies and deliveries) in relation to reproductive age. The Nordic countries tended to have the highest ART availability in terms of cycles per million of women aged 15-45. Denmark had the highest availability at 10,132 cycles per million of women in that category, followed by Belgium (9,383), Finland (7,827), Sweden (7,337) and Iceland (7,088). Austria (2,582), Germany (2,843), Italy (2,993) and the UK (3,039) have comparably low availability of ART treatment.
- The average number of treatment cycles per million inhabitants is 1,127 in Europe. By comparison, there was an average of 463 treatments per million in the USA in 2006.
- The percentage of ART babies were above 3.0% in most Nordic countries, whereas this percentage was between 1.0% and 1.7% in the largest European countries (Germany, France and UK). ART techniques accounted for 4.1% of all children born in Denmark, 3.3% in Belgium and Finland, 3.4% in Iceland, 3.3% in Sweden, 2.8% in Norway, 1.6% in

France, 1.7% in the UK and 1.5% in Germany. In Italy only 1.0% of children are conceived with ART. In comparison with 54,656 babies born, the CDC estimates this to be slightly more than 1% of total births in the US2.

Pregnancy / delivery rates

- The average pregnancy rate per embryo transfer was 32.4% after IVF, 33.0% after ICSI, 21.6% after FER and 43.5% after ED.
- For IUI in women aged younger than 40, the delivery rate was 9.2% for IUI-H and 13.3% for IUI-D. Over 40, the corresponding rates were 4.4% and 4.1%.

Source: European Society of Human Reproduction and Embryology, in:

<http://www.eshre.eu/ESHR/English/Guidelines-Legal/ART-fact-sheet/page.aspx/1061> last visited September, 2010

ANNEX 2:

GLOSSARY OF THE ASSISTED REPRODUCTIVE TECHNOLOGY (ART)

Artificial insemination	artificial insemination (AI) is used to refer to the placing of semen inside a woman's vagina or uterus by means other than sexual intercourse
Assisted Reproduction Technology (ART)	All treatments that include in vitro handling of human gametes (eggs and sperm) and embryos to establish a pregnancy – often called MAR (Medically Assisted Reproduction)
Blastocyst	5-6 days old embryo
Clone	a copy of a (DNA) molecule, a (stem) cell or an individual. Cloning of an individual is done by replacing the nucleus of an egg cell with the genetic material from a somatic (non-germ) cell. Cloning can also be done to produce stem cells, the undifferentiated early cells from which all types of cells develop. This technique may in future enable people to access life-saving treatments tailored-made from their own DNA.
Cryopreservation	frozen storage of sperm, eggs, embryos or ovarian and testicular tissues
Delivery rate	number of deliveries per 100 cycles (aspiration or embryo transfer cycles)
Deoxyribonucleic acid (DNA)	a chemical consisting of a sequence of hundreds of millions of nucleotides found in the nuclei of cells. It contains the genetic information about an individual and is shaped like a double-stranded helix
Embryo	the product up to eight weeks after fertilisation, later it is called a foetus
Embryo donation	transfer of an embryo that did not originate from the recipient and her partner
FER	frozen embryo replacement
Fertilisation	a sperm penetrates the egg leading to a combination of genetic material resulting in a fertilised egg

Follicle:	a fluid filled sac that contains an immature egg. Located in the ovaries, follicles develop each cycle, one ovulates into an egg.
Gamete	a reproductive cell, egg in females and sperm in males
Gamete intra-fallopian transfer (GIFT)	process by which eggs and sperm are introduced in the Fallopian tube.
Infertility:	a disease of the reproductive system defined by the failure to conceive after 12 months of regular unprotected sexual intercourse
Intracytoplasmic sperm injection (ICSI)	process by which an egg is fertilised by injecting a single sperm into the egg
Intrauterine Insemination (IUI)	the insemination of washed semen directly into the uterus
In vitro fertilisation (IVF)	fertilisation of an egg by sperm in a laboratory dish
Pre-implantation genetic diagnosis (PGD)	diagnostic technique involving genetic tests on an embryo or a polar body (a cell structure inside the egg). Usually done when the embryo is at the 6-8 cell stage. One cell is removed for analysis of its DNA or chromosomes to determine if the embryo is likely to develop a genetic disease
Pre-implantation genetic screening (PGS)	technique to check if an embryo has the correct number of chromosomes. Used particularly for older women (at increased risk of chromosomal abnormalities) and for women who have had recurrent miscarriages (often due to chromosomal abnormalities). It is still in the experimental phase, since it is not yet evidence based
Single Embryo Transfer (SET)	method of selecting one embryo for transfer to lower the risk of multiple pregnancies
Surrogacy	practice whereby one woman carries a child for another with the intention that the child should be handed over after birth
Surrogate mother	The woman that gestates and gives birth
Commissioning parents	The couple that wishes to have a child
Partial surrogacy	The surrogate is the genetic mother – i.e. using her own egg
Host/ full / gestational surrogacy	The surrogate mother – host – is implanted with an embryo, which is not her own. It may be provided by the commissioning couple.

- Sources:** 1. **European Society of Human Reproduction and Embryology**, in: <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/ART-glossary/page.aspx/1062> - last visited September, 2010
2. Report of the Committee of Inquiry into Human Fertilisation and Embryology. Department of Health & Social Security, UK, 1984. (Warnock Report).
 3. <http://www.familytreedna.com/glossary.aspx>
 4. Brazier, M., Golombok, S. and Campbell, A. "Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation" Consultation document and questionnaire. In: Human Reproduction Update 1997, Vol. 3, No. 6 pp. 623–628.

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