

C.L.A.R.A

**International surrogacy :
Protecting the best interests of
the children
18 February 2012**

Anne-Marie Hutchinson OBE

Dawson Cornwell

[Dawson Cornwell](#) the family law firm

Structure

- Background to this issue
- The consequences of the current lack of any international agreement
- Existing international agreements which could potentially be used to regulate international surrogacy
- Initiatives currently underway to establish internationally recognised standards in this area
- Suggestions for possible ways forward

Responses of individual states to the question of surrogacy

- Responses have been diverse and disparate. They broadly fall into four broad categories:
 - those states where surrogacy arrangements are legal and enforceable;
 - those states where surrogacy arrangements are legal, but strictly controlled and subject to meeting specific criteria;
 - those states where surrogacy is illegal; and
 - those states which have made no provision in their domestic legislation.

International surrogacy: an overview

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

Approaches to surrogacy between states

- wide variety of approaches
 - prohibited in France and Germany
 - surrogacy arrangements are regulated and strictly controlled in the United Kingdom
 - no federal laws regulating surrogacy in the United States. Instead, surrogacy laws vary from state to state
- differences between jurisdictions led to a rise in ‘reproductive tourism’ - potential surrogates, donors and parents look for the most favourable legal, social and commercial environments

What this means for commissioning parents, gestational mothers and the children born from an international surrogacy arrangements

- most jurisdictions, a mother who gives birth to a child (whether or not she has any biological connection with the child) is treated as the child's parent
- Legal uncertainty as to their parentage can only be a disadvantage to the child
- *ad hoc, ex post facto* (eg: *Parental Orders*) remedies have been found with a view to reducing the harmful impact of this legal limbo for children

International surrogacy in practice:

Mr and Mrs A

- Irish nationals and habitually resident in England.
- couple arranged through a reputed commercial agency in the USA for a surrogate to be implanted with the embryo created from Mrs A's egg and Mr B's sperm; (therefore will be the couple's full biological child)
- obtained from the local USA Court a full parenting order extinguishing the rights of the gestational surrogate and her husband in respect of the child.
- Obtained a USA passport for the child and travelled to Ireland in the hope of registering their child with the Irish Authorities and obtaining Irish citizenship.
- Irish Authorities refused to recognise the child as the child of Mr and Mrs A
- treated the birth gestational mother and her husband as the parents.
- Child is unable to acquire Irish citizenship.

International surrogacy in practice:

Mr C and Mr D

- same sex couple in an enduring and committed family relationship
- entered into a gestational surrogacy arrangement in the USA through a commercial agency using Mr D's sperm
- Obtained a pre-birth order in the USA and, on the birth of twins, a passport for each child
- Couple are both from a European country in which surrogacy is illegal and have been living in England for a period of one year
- They retain their respective EU nationalities
- Neither of them can claim a domicile in the UK to allow them to apply for a UK parental order
- accordingly their claim for parentage of the children is not recognised within any EU state and their children are not able to obtain the nationality of any EU state.

International surrogacy in practice: child abduction

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

International surrogacy in practice:

X and Y (Foreign Surrogacy) [2009] 1 FLR 733

- English couple reached entered a full gestational surrogacy arrangement with a Ukrainian woman
- surrogate mother gave birth to twins
- Under Ukrainian law, once the surrogate mother had given birth and delivered the children to the commissioning couple, the surrogate mother and her husband were free of all obligations to the children
- Accordingly the minor children were not entitled to a Ukrainian passport or Ukrainian nationality
- application for a British passport for the children was refused on the basis that the gestational surrogate and her husband remained the parents as a matter of English law and accordingly the minor children were not entitled to British citizenship
- The children were therefore left as legal orphans and stateless

The consequences of a lack of international regulation

- Some states have begun to establish minimum standards for assisted reproduction and surrogacy arrangements. These include:
 - a detailed assessment of commissioning couples and gestational surrogates prior to any course of treatment being commenced;
 - a requirement that commissioning couples and the surrogates commit to and engage in a course of counselling throughout the conception and pregnancy process;
 - an obligation on the commissioning couple to pay for independent legal advice for the gestational mother;
 - the establishment of medical, legal and other professional bodies to set best practice provisions.

DIY surrogacy arrangements

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

Existing conventions/multilateral instruments: The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993

- Hague Conference has noted the following problems arising making the 1993 Convention an inappropriate vehicle for international surrogacy arrangements:
 - Article 4(c)(3) states that commercial adoptions are prohibited under the Convention;
 - Article 4(c)(4) states that the consent of the mother must be given after the birth of the child. In surrogacy cases the surrogate mother will often have given her consent before the child has even been conceived;
 - Article 4(b) sets out the subsidiarity principle, namely that consideration must be given to the possibility that the child may be placed in the state of origin; this will not apply to many surrogacy cases, particularly international cases.
 - Article 29 sets out a general rule that there should be no contact between prospective adopters and the child's parents; this is unlikely to be workable in surrogacy cases as contact will have to take place when the surrogacy arrangement is entered into and when any reproduction process or treatment takes place.

Existing conventions/multilateral instruments:

The Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 19th October 1996

- Article 4(a) the Convention specifically excludes from its scope “*the establishment or contesting of a parent-child relationship*”.
- unlikely for such a fundamental provision of the Convention to be renegotiated, not least because of the likely dispute between state parties any proposed alteration would cause.

Existing conventions/multilateral instruments:

The Brussels II Revised Regulation, 2003

- tenth preamble states that the Regulation is not concerned with issues of parenthood “*nor to other questions linked to the status of persons.*”
- wide differences in approach taken to surrogacy between EU Member states mean that any harmonisation process will be fraught with difficulties.

International initiatives

- Hague conference on Private International Law
- April 2010 the Council and General Affairs on Policy for Hague Conference invited the Permanent Bureau to provide a note to the Council on Private International Law issues relating to the status of children born of surrogacy arrangements
- issue was addressed in June 2010 at a meeting of the Special Commission on the practice and operation of the Hague Child Protection Convention 1993
- recommended that the Hague Conference on Private International Law carry out a further study of the legal, especially the Private International Law issues surrounding international surrogacy.
- 10th March 2011 the Permanent Bureau of the Hague Conference produced a preliminary document on the Private International Law issues surrounding the status of children, including issues arising from International Surrogacy arrangements. T
- intention is to produce an interim report in March 2012 and a full report in 2013.

Hague Conference – Basic criteria to be covered by international agreement

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

Work of the Council of Europe

- The proposal is currently being drafted by the Council of Europe to cover the rights and legal status of children and parental responsibility
- will include provisions relating to legal parentage in the context of medically assisted reproduction.
- European Union is currently considering the possibility of facilitating the creation of simple status documents within in the EU for the recognition of legal parentage between EU member states

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

- study into private international law aspects of international surrogacy arrangements
- ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that could assist in the process of preparation of a possible future international Convention on surrogacy
- The project is carried out in collaboration with the Hague Conference on Private International Law (see <http://www.abdn.ac.uk/law/surrogacy/> for more details).

The International Surrogacy Forum

- June 2011, the International Surrogacy Forum was formed, a not for profit organisation
- The legal status of children born of international surrogacy arrangements is complex and uncertain.
- The Forum intends to work towards establishing harmonised international recognition of the legal parentage of children born of such arrangements (see <http://internationalsurrogacyforum.com/> for more details).

The way forward

- The time has come to unify the various efforts to deal the issues surrounding international surrogacy into a multi-lateral convention, providing a framework for the growing number of international surrogacy arrangements being entered into
- the convention would establish safeguards and the minimum standards which agencies and state authorities must meet.

X and Y (Foreign Surrogacy)

[2009] 1 FLR 733, Hedley J

- surrogacy arrangement in the Ukraine
- sums paid to the surrogate were 235 Euros per month and 25,000 Euros as a lump sum on the live birth of twins
- was in excess of reasonable expenses incurred
- *Retrospective authorisation given and Parental Order made.*

Re S (Parental Order)

[2010] 1 FLR 1156, Hedley J.

- surrogacy arrangement in Californian
- The sum paid to the surrogate was \$23,000
- Sum was in excess of reasonable expenses incurred
- *Retrospective authorisation given and Parental Order made.*

Re L (Commercial Surrogacy)

[2011] 1 FLR 1423, Hedley J.

- Surrogacy arrangement in Illinois
- sum paid to the surrogate was undisclosed but that it was clear that payments were made in excess of reasonable expenses
- *Retrospective authorisation given and Parental Order made.*
- court made clear that **“welfare was no longer the court’s merely the court’s first consideration but had become its paramount consideration; as a result the balance between public policy considerations and welfare was now weighed decisively in favour of welfare”** [paragraph 9]

Re IJ

[2011] EWHC 921

- Ukrainian case
- sum paid to the surrogate was undisclosed but involved payment beyond reasonable expenses
- would have been invalid under English domestic law.
- *Retrospective authorisation given and Parental Order made.*

Re K

(Foreign Surrogacy) [2010] EWHC 1180 (Fam)

- Twins were born in India as a result of a commercial surrogacy agreement
- Children handed over at birth but remained in India with grandparents
- After 6 months, parents applied to UKBA to bring twins to UK. UKBA asked for 'evidence (that) suggests that such a (parental) order is likely to be granted'
- Court said they were not in a position to give an absolute indication
- Essential to take prior immigration advice

Re TT

(surrogacy) [2011] EWHC 33 (Fam)

- Full surrogacy
- Domestic Case
- Reminder:
 - surrogacy contracts are unenforceable in the UK
 - Best interest test prevails

A v A v P v P v B

[2011] EWHC 1738

- Indian case where the principal issue related to whether a parental order could be made in light of the death of a commissioning father after the issue of the application but prior to the making of the order
- the surrogate was paid compensation of £4,500 and on the information it was likely that the sums were more than expenses reasonably incurred.
- *Retrospective authorisation given and Parental Order made.* [see paragraphs 32-34]

A v A v P v P v B

(continued)

- One of the commissioning couple dies after application made but before the order
- Best interest paramount
- Art 8 HRA engaged
- Best interests of child to secure his legal status with both Mr and Mrs A

Reminder

- Importance of skilled legal advice in cases concerning overseas surrogacy agreements
- applicants must be aware of the difficulties that can arise and the need to ensure that the legal status of the child is secure.

INTERNATIONAL SURROGACY ARRANGEMENTS – TIME FOR A MULTI-LATERAL CONVENTION?

Anne-Marie Hutchinson OBE

Dawson Cornwell

[Dawson Cornwell](#) the family law firm