

**INTERNATIONAL SURROGACY ARRANGEMENTS: THE PROBLEM OF  
RECOGNITION OF LEGAL PARENTHOOD**

by Tetiana Isterevych

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## **Executive Summary**

The practice of cross-border surrogacy brought to international arena the matters that before were governed purely by national policies. The recognition of parent-child relationship is one of such issues. In the setting of surrogacy parenthood is perceived as a social construct based largely on the intent of commissioning parents and not on their biological relation.

The determination of parenthood in international surrogacy agreements raises many problems that affect the rights of all persons involved, especially the most vulnerable ones – children. The conflict of domestic laws on surrogacy and parenthood exposes the child born out of a surrogacy agreement to the risk of being left parentless and stateless.

This paper demonstrates that the difference of national laws is a cause of numerous challenges that intended parents face when pursuing cross-border surrogacy arrangements. It explains the different approaches to surrogacy and recognition of parenthood on the example of three countries: Ukraine, the United Kingdom and France. Furthermore it models the interaction of these countries in the role of providers (Ukraine) and consumers (the UK and France) of surrogacy services and illustrates it with the examples of actual cases.

Finally, this paper stresses the need for international regulation of cross-border surrogacy, considers the possible options for its implementation and offers a framework for the development of a comprehensive multilateral instrument designed for the needs of foreign surrogacy.

## Introduction

The developments in the area of reproductive medicine have reached the stage, where there is a range of various treatment options available for infertile couples to choose. Unfortunately, sometimes due to specific health conditions the couple's ability to choose is extremely limited; and despite the existing variety of options there is only one possible way for them to become parents of a child genetically related at least to one of them. Their last resort is surrogacy.

Surrogacy can be defined as an assisted reproductive technique when a woman (surrogate mother) carries a child for another couple (intended parents) pursuant to an agreement made before she became pregnant, according to which she transfers the child's care to the intended parents at, or shortly after the birth.<sup>1</sup> There are two types of surrogacy: traditional and gestational. In case of traditional surrogacy the surrogate mother is genetically related to a child, because the child is conceived through insemination of the surrogate mother's egg with the sperm of the intended father or with a donor sperm. In gestational surrogacy no genetic material of the surrogate mother is used. "An embryo is created by *in vitro* fertilization using the egg of the intended mother (or donor) and the sperm of the intended father (or donor)".<sup>2</sup>

Surrogacy entered the public discussions in the mid-1980s through the cases of *Baby Cotton* in the United Kingdom and *Baby M* in the United States.<sup>3</sup> Since then its popularity among the methods of reproductive technology is increasing steadily, notwithstanding the

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<sup>1</sup> Trimmings, Katarina, Beaumont, Paul. 2011. "International Surrogacy Arrangements: an Urgent Need for Legal Regulation at the International Level". *Journal Of Private International Law*, 7, 3, p. 627.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

major ethical controversies it raises.<sup>4</sup> Apart from a large scape of medical literature for a long time the discussion on surrogacy had focused on its moral, ethical and philosophical grounds.<sup>5</sup> Surrogacy became a phenomenon of interest for psychology.<sup>6</sup> The debate about the legal issues surrounding surrogacy was largely limited to the matters of the need for national regulation, the issues of enforceability of surrogacy agreements<sup>7</sup> and protection of the persons involved from exploitation.<sup>8</sup> In the meantime surrogacy transcended the territorial boundaries and raised even more complex issues.

Due to a very sensitive nature of the concept of surrogacy each State addresses it in a way it considers appropriate. The approaches of States differ a lot: some countries prohibit it (e.g. France and Germany), some simply ignore it (e.g. Belgium and Finland) others generously allow it (Ukraine, India) or strictly regulate it (e.g. UK, Israel).<sup>9</sup> In the same time the regulations of the latter are very different, especially concerning the access to this kind of treatment and the commercial aspect of surrogacy. Therefore many couples are incentivized to engage in a so-called “procreative tourism.”<sup>10</sup> They travel abroad seeking for the most favorable conditions to enter into the surrogacy agreement. However, the fulfillment of their dream is often overshadowed by unexpected legal problems. Usually, the complications are caused not merely by lack of awareness and/or legal advice; they arise from a lacuna in the

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<sup>4</sup> See Steinbock, Bonnie. n.d. *Legal and ethical issues in human reproduction / edited by Bonnie Steinbock*. n.p.: Aldershot, Hants, England ; Burlington, VT : Ashgate/Dartmouth, c2002.

<sup>5</sup> See Macnaughton, M. 1997. "Ethical Issues in Surrogate Motherhood." *Human Reproduction (Oxford, England)* 12, no. 11 Suppl: 93-94.

<sup>6</sup> See Tangri, Sandra S., and Janet R. Kahn. 1993. "Ethical Issues in the New Reproductive Technologies: Perspectives from Feminism and the Psychology Profession." *Professional Psychology: Research And Practice* 24, no. 3: 271-280.

<sup>7</sup> See Lascarides, Denise E. 1997. "A Plea for the Enforceability of Gestational Surrogacy Contracts." *Hofstra Law Review* 25, 1221.

<sup>8</sup> See Stark, Barbara. 2012. "Transnational Surrogacy and International Human Rights Law." *ILSA Journal Of International & Comparative Law* 18, no. 2: 369-386; Wilkinson, S. "The Exploitation Argument Against Commercial Surrogacy." *Bioethics* 17, no. 2 (n.d.): 169-187.

<sup>9</sup> *Supra* note 1. p. 629.

<sup>10</sup> *Ibid.*

corpus of private international law and lack of any international regulation of the sphere of surrogacy.

This research is going to consider the most topical of the problems that occur in the course of international surrogacy – the problem of recognition of legal parenthood of the child born in a result of cross-border surrogacy arrangement. It is particularly serious because it implicates adversely “the fundamental rights and interests of children, including the right to have his or her best interests regarded as primary consideration in all actions concerning him or her, as well as the child’s right to acquire a nationality and to preserve his or her identity and the right not to suffer adverse discrimination on the basis of birth or parental status”.<sup>11</sup> The children are not the only vulnerable parties in cross-border surrogacy. It also raises a lot of concerns regarding the reproductive rights of the intended parents, the right to respect of their private and family life, the rights of surrogate mother not to be subject to exploitation, to her bodily integrity, etc.<sup>12</sup> With regard to all these issues the present research will focus only on the question of legal parenthood and will touch upon the immigration and nationality issues that are linked to it. The ethical, medical and psychological issues as well as such legal problems as fraudulent arrangements, contractual disputes and the threat of black market’s emergence cannot be ignored,<sup>13</sup> but are also beyond the scope of this research.

The urgency of the need for international regulation of recognition of effects of cross-border surrogacy arrangements on the status of the child is confirmed by the recent efforts of the Hague Conference on Private International Law. Its Permanent Bureau is currently working on discovering the practical needs in the area of international surrogacy arrangements, gathering the comparative information on the developments in domestic and

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<sup>11</sup> A Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference ‘A Preliminary Report on Issues Arising from International Surrogacy Arrangements’, p. 4.

<sup>12</sup> Stark, Barbara. 2012. "Transnational Surrogacy and International Human Rights Law." *ILSA Journal Of International & Comparative Law* 18, no. 2. pp. 377-380.

<sup>13</sup> *Supra* note 1. p. 632.

private international law in this area and evaluating the prospects of reaching consensus on an multilateral regulatory instrument.<sup>14</sup> The final report on the work of the Permanent Bureau was expected to come out in April 2014<sup>15</sup>, but its release was postponed to 2014.<sup>15</sup>

Professor Paul Beaumont and Dr. Katarina Trimmings from the University of Aberdeen carried out a study on possible methods of international regulation of surrogacy, the results of which were published in May 2013.<sup>16</sup> It is expected that the findings of this study will assist in the drafting process of the future convention on surrogacy.

The present work aims to demonstrate the existing need for a comprehensive international regulation of surrogacy on the example of three countries that interact as providers (Ukraine) and consumers (the UK and France) of surrogacy services. It is very important to look at both sides of this coin, because it is impossible to detect the source of the problems following a one-sided approach.

The first chapter of this research will explain the concept of parenthood, its role and the emerging new approach to its meaning. The second chapter will illustrate the variety of methods of determination of legal parenthood in the context of the countries' approaches to surrogacy. The comparison will start with the example of Ukraine that due to its loose regulation of surrogacy and special rules on parenthood in such cases became a major provider of surrogacy services in Europe. Then it will proceed to the jurisdiction of the United Kingdom, which takes a restrictive approach to surrogacy and uses inherent to the common law tradition *lex fori* method when determining the legal parenthood in international surrogacy arrangements. Another approach of prohibition of surrogacy an application of a

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<sup>14</sup> Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements', para 54, p.25.

<sup>15</sup> See Conclusions and Recommendations Adopted by the Council on General Affairs and Policy of the Hague Conference of Private International Law (9-11 April 2013). Available at: [http://www.hcch.net/upload/wop/gap2013concl\\_e.pdf](http://www.hcch.net/upload/wop/gap2013concl_e.pdf) (Accessed November 2, 2013).

<sup>16</sup> Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited, 448.

‘conflict of law’ or ‘recognition’ method to the question of parental rights will be explained on the example of France. Alongside to the description of national laws of the chosen countries this chapter will provide the insight on their interaction in the setting of cross-border surrogacy. It will point out the problematic areas and illustrate them with the examples of relevant cases. The next part of this research will consider the possible ways of resolving the identified problems at the international level and offer some recommendations on the development of a comprehensive solution.

## Chapter I. New Concept of Parenthood

For a long time in legal literature references to the ‘status of the child’ have been regarded as relating to the question of whether the child was born in or out of marriage – thus determining if the child was “legitimate or illegitimate”.<sup>17</sup> After the adoption and entry into force of the United Nations Convention on the Rights of the Child (1989) the parents’ birth or other status cannot be used anymore as a ground for distinction between children and otherwise will be regarded as discrimination.<sup>18</sup> Therefore the emphasis in determining the status of the child has shifted from the character of adult relationship to the establishment of parent-child relationship. Following this change in approach this research will refer to the ‘status of the child’ as relating to the legal parenthood of children.

Nowadays the concept of parenthood is not that clear. The combination of many factors had influenced its change, with the advances in medical science and reproductive technology and changing of family patterns having the biggest impact on this process.

Until recently the answer to a question ‘who is a parent of the child?’ seemed rather trivial. The principle of biological truth predominated in the family law of most States recognizing biological parents to be the legal parents of the child.<sup>19</sup> This affirmation was challenged by the advances in reproductive medicine, such as surrogacy, which in some cases draws a distinction between biological and genetic parents and makes it possible for the babies to be born with no genetic or biological connection to their parents (due to sperm and egg donation). Moreover, it allows the children born as a result of this technique to have five different parents: the genetic father – the donor of sperm, the genetic mother – the egg donor,

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<sup>17</sup> Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference ‘Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements’, para 4, p.4.

<sup>18</sup> Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990. See Article 2.

<sup>19</sup> Meyer, David D. 2006. "Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood." *The American Journal Of Comparative Law*. p. 125.

the biological (surrogate) mother who carries and bears the child, and the intended parents who have no biological or genetic connection to the child.

Indeed nowadays even the involvement of five persons in the child's conceiving is not a limit. Due to a technique of somatic cell nuclear transfer<sup>20</sup> the child may receive the genetic material from two different women. This leads to a multiplication of the concept of genetic mother and raises the number of claimants of parental rights for the child to six persons.

Another impulse for the change of the concept of parenthood is the emergence of plurality of family forms. The changes in the values: the increase in the age of first marriage, the general decrease in marriages as a whole, the high divorce rate contribute to the growing number of single parent families, children born out of wedlock to unmarried cohabiting parents or living in stepfamilies.<sup>21</sup> In the same time many States offer different alternative to marriage forms of union (e.g., registered partnerships); and some of them are available to same-sex couples.<sup>22</sup>

The evolution in family forms and reproductive medicine calls for the proper response of the legal doctrine to these advances. Trying to meet the new needs many States started to change their approach from re-thinking the concept of parenthood. According to Mary Shanley there are four major bases of parenthood:<sup>23</sup>

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<sup>20</sup> Somatic cell nuclear transfer (SCNT) is a technique in which the nucleus of a somatic (body) cell is transferred to the cytoplasm of an enucleated egg (an egg that has its own nucleus removed). Currently this technique raises many controversies, therefore has yet never been allowed to apply. *Encyclopædia Britannica Online*. Available at: <http://www.britannica.com/EBchecked/topic/1382860/somatic-cell-nuclear-transfer> (Accessed November 23, 2012).

<sup>21</sup> Schwenzer, Ingeborg H. n.d. *Tensions between legal, biological, and social conceptions of parentage* / Ingeborg Schwenzer (editor). n.p.: Antwerpen : Intersentia ; Holmes Beach, Fla. : Distribution for North America, Gaunt Inc. , c2007, n.d. p. 15.

<sup>22</sup> Harnois, C., Hirsch, J. 'Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships' Preliminary Document No 11 of March 2008, p.34.

<sup>23</sup> Shanley, Mary Lyndon, Nancy D. Polikoff, Amy Nichols-Belo, Susan J. Ferguson, Julie Novkov, Charlotte Abbott, Sarah F. Gold, and Mark Rotella. 2001. *Making babies, making families: what matters most in an age of reproductive technologies, surrogacy, adoption, and same-sex and unwed parents*. n.p.: 2001. pp. 135-136.

- 1) Genetic link – this approach allows gamete donors to seek legal recognition of their parenthood.
- 2) Contract or “intent-based” parenthood – establishes parentage “based entirely on a person’s role of facilitating conception with the intention of assuming the responsibilities of parenthood”<sup>24</sup> (without any genetic or biological tie to a child).
- 3) Social parenthood – favors the caregiving and other social functions of “de facto” or “psychological parents” over biological or genetic relation.<sup>25</sup>
- 4) Best interest of a child – places a child at the center of analysis and focuses on the child’s needs.<sup>26</sup>

In case of surrogacy this list may be supplemented with another basis – a biological link that a gestational or biological surrogate mother has to a child she carries to a term and gives birth to, but to which she is not genetically related.

Which of these bases should prevail in determining the legal parenthood of a child? What sort of connection is stronger? Legal regulations across the States differ a lot; “there is no international consensus on how to establish and contest legal parenthood in these new circumstances.”<sup>27</sup>

According to the research conducted among the EU Member States most States share the same position in establishing legal motherhood, which flows from the recognition of the natural fact of birth.<sup>28</sup> It means that a woman who gave birth is regarded *ex lege* as the legal mother “irrespective of all previous circumstances concerning the conception and pregnancy

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<sup>24</sup> *Supra* note 19. p. 5.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra* note 23. pp. 135-136.

<sup>27</sup> *Supra* note 18. para 9, p. 6.

<sup>28</sup> Todorova, Velina. 2010. “Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Arrangements: What is the Current Situation in the MS? Need for EU Action?” *Policy Department C: Citizens’ Rights and Constitutional Affairs, European Parliament*. p. 16.

(e.g., cases of surrogacy).”<sup>29</sup> However, in France for example, legal motherhood is not automatically recognized on the basis of the fact of childbirth. It requires additional actions such as acknowledgement of the child by the mother. Moreover, the woman is allowed to give birth anonymously, thus escaping legal motherhood.<sup>30</sup>

For fathers the law traditionally presumes that a man married to a woman is the legal father of her child.<sup>31</sup> The value of this presumption is decreasing largely due to the advent of DNA testing that allows establishing paternity with a certainty over ninety-nine percent<sup>32</sup> and the raise in extramarital childbirth. The widespread use of Assisted Reproductive Techniques (ART) has also made States to extend the presumption of paternity to the married father’s consent to his wife’s treatment.<sup>33</sup> In the United Kingdom such an extension goes even further applying to informal (civil) partnerships<sup>34</sup> of lesbian couples meaning that a female partner of the birthmother will be recognized as a legal parent of the child on the basis of her consent for treatment.

These developments of legal doctrine show that parenthood “is now recognized as a social rather than as a natural construct.”<sup>35</sup> Making the established parenting intention and caregiving functions essential or at least equal to biological connection, determinants of parenthood broadens the conception of parenthood and makes it more flexible.<sup>36</sup> However, it also gives rise to many difficulties both ethical and legal. How should be weighted the respective claims of blood, marriage, caregiving, intent for parental duties and best interests of the child?

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<sup>29</sup> Report on Principles Concerning the Establishment and Legal Consequences of Parentage – “the White Paper”, Committee of Experts on Family Law (CJ-FA), Council of Europe (2006) 4 e, pp.7-8.

<sup>30</sup> *Supra* note 21. pp. 16-17.

<sup>31</sup> *Supra* note 19. p. 2.

<sup>32</sup> Carbone, June. 2004. "Legal Definition of Parenthood: Uncertainty at the Core of Family Identity" *Louisiana Law Review* no. 4: 1303. p. 8.

<sup>33</sup> *Supra* note 28. p. 17.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* note 28. p. 17.

<sup>36</sup> *Supra* note 19. p. 6.

Some authors claim “the new concept of parenthood focuses strongly on the intentions of adults to become parents”<sup>37</sup> (with application of ART, especially surrogacy). It flows from a simple logic that a child would have never been born if the intended parents had not both agreed to use surrogacy services.<sup>38</sup> Therefore the consent given prior to the engagement into the surrogacy arrangement should be a decisive factor for establishing legal parenthood.

However, this position is weakened by the fact that in most States surrogacy arrangements are not legally binding - unenforceable.<sup>39</sup> The UK Surrogacy Arrangements Act 1985 expressly states: “surrogacy arrangements are not enforceable in law”.<sup>40</sup> This position of States’ legal systems can be explained by a set of reasons. Due to the commonly accepted recognition of the birthmother as a legal one it is thought that she cannot be bound by any contractual obligation to give up her child.<sup>41</sup> The birthmother should be given the right of the final choice to hand over the child to the intended parents or not. Another reason for States’ regarding the surrogacy arrangements as unenforceable is that their enforceability would contradict the existing public policy in the field of parenthood, which provides that the status of the child cannot be established by a contract, but only by the means set forth in law.<sup>42</sup> There is also a precaution that enforceability of surrogacy arrangements would be contrary to the concept of respect for human dignity.<sup>43</sup>

This threat loses its probability if the best interest of a child standard is given a priority in recognition of the legal parenthood. This approach moves away from the status quo, when the rights of children were largely underestimated. It reflects the idea that “children are not

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<sup>37</sup> *Supra* note 28. p. 13.

<sup>38</sup> *Buzzanca v. Buzzanca*, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998).

<sup>39</sup> *Supra* note 28. p. 19.

<sup>40</sup> Surrogacy Arrangements Act 1985. See Section 1.A .Available at <http://www.legislation.gov.uk/ukpga/1985/49> (Accessed 10 March 2013).

<sup>41</sup> Brazier, M, S Golombok, and A Campbell. 1997. "Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation." *Human Reproduction Update* 3, no. 6: 623-628.

<sup>42</sup> *Supra* note 28. p. 19.

<sup>43</sup> *Ibid.*

chattels in which adults have rights,”<sup>44</sup> which flows from the fundamental innovation brought about by the UN Convention on the Rights of the Child 1989 that recognized children as “individual subjects in all procedures bearing influence on their interests.”<sup>45</sup> Favoring the interests of the child assumes that “to the extent that recognition of parental rights would be adverse to the child’s interest, the parental rights must give way to the child’s best interests.”<sup>46</sup> The advantage of the best interest of the child approach comparing to the other bases for parenthood is that it takes into account important ethical considerations. It places the child into the center of analysis and concentrates on the child’s needs. However, it has its own flaws and difficulties as well.

First of all, how do we determine what is in child’s best interest? Will the absence of neglect or abuse suffice? Is it better for children to have two parents rather than one? Does their sexual orientation or level of income matter? The answers to these questions will inevitably have to be formed on case-by-case basis and influenced by moral, social and political views of a certain society. Therefore the best interest of the child approach is often criticized for being influenced by and reflective of social prejudices.<sup>47</sup> There is also a risk that it can be misused against poor or people belonging to racial, ethnical or other minorities.<sup>48</sup>

However, even if the best interest of the child is evaluated on the basis of the right values it does not become easier to determine. Therefore the States should try at least to minimize the harm to children. In any situation it is obvious that it is better for children not to be involved at all in disputes over legal parenthood. That is why it is so important for States to provide regulations on recognition of legal parentage that will aim to prevent and avoid such conflicts especially in cross-border surrogacy cases.

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<sup>44</sup> Richards, Janet Leach. 1993. "Redefining Parenthood: Parental Rights Versus Child Rights [article]." *Wayne Law Review* no. 3: 1227.

<sup>45</sup> *Supra* note 21. pp.16-17.

<sup>46</sup> *Ibid.*

<sup>47</sup> Steinbock, Bonnie. 2005. "Defining Parenthood [article]." *International Journal Of Children's Rights* no. Issue 1-2. p. 302.

<sup>48</sup> *Ibid.*

## Chapter II. National Regulatory Approaches and Their Interaction

### i. UKRAINE

In Ukraine surrogacy is regulated by the Family Code<sup>49</sup>, the Law on “Fundamentals of Health Protection” and the Decree of the Ministry of Health Protection on “Approval of the Instruction on the Use of Assisted Reproductive Techniques”. These regulations are quite loose and have only few limitations.

First, only a married couple can resort to surrogacy<sup>50</sup>; the cases of single intended parent are excluded. Quite recently, in September 2011, the clarification of the reference to a married couple as ‘husband and wife’ was made. This change excluded the possibility of foreign<sup>51</sup> married same-sex couples getting surrogacy services in Ukraine.

Second, surrogacy can be used only if certain medical indications listed in p. 7 (2) of the Instruction on the Use of Assisted Reproductive Techniques exist, for example, the absence of uterus (congenital or acquired), deformation of the cervix, severe illness that precludes gestation because of the threat to a woman’s life or health it may create, but which does not affect the health of a future baby, 4 or more unsuccessful attempts of ART, etc. Therefore, no ‘celebrity surrogacy’ without any medical indications is possible in Ukraine.

The requirements for a surrogate mother are: maturity, legal capacity, having her own healthy child, her voluntary written consent and the absence of medical contraindications. Both types of surrogacy – altruistic and commercial are tolerated. The free choice of any type is guaranteed by the freedom of contract.<sup>52</sup>

The situation might change if Ukraine will ratify the Convention of the Council of Europe on Human Rights and Biomedicine (4 April 1997), which it has already signed

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<sup>49</sup> Family Code of Ukraine. 10.01.2002, № 2947-III, available at <http://zakon4.rada.gov.ua/laws/show/2947-14> (last visited 24.02.2013).

<sup>50</sup> *Ibid.* Article 123 (2).

<sup>51</sup> Same-sex marriages are not legalized in Ukraine.

<sup>52</sup> Civil Code of Ukraine. Article 627 (1).

without reservations on 22 March 2002. Article 21 of the Convention states: “the human body and its parts shall not, as such, give rise to financial gain.”<sup>53</sup> When Ukrainian Parliament ratifies the Convention it will become part of the national legislation; and therefore will prohibit any payments that go beyond the reasonable expenses in surrogacy agreements, which may also reduce the attractiveness of Ukraine for procreative tourism.

One of the reasons why Ukraine is currently such an appealing foreign surrogacy destination is that among its rules on determination of legal parenthood Ukrainian law holds a special provision for surrogacy cases. Article 123 (2) of the Family Code regulates the determination of origin of a child born in a result of a surrogacy arrangement. It provides:

In case of transfer of an embryo created by spouses (husband and wife) to the body of another woman by the use of ART the spouses are considered as parents of that child.

According to this provision the intended parents are automatically recognized as legal ones as long as one of them has a genetic link to the child; and they can apply to be registered as such.<sup>54</sup>

There is no direct limitation as to whether a surrogate mother can be a donor of genetic material. Some authors disagree with this observation. Druzenko in Trimmings is of the view that the abovementioned provision of Article 123 (2) makes it impossible to register another woman as legal mother of a child, if the genetic mother and surrogate mother is the same person. He emphasizes that according to this provision it is *an embryo* that has to be transferred to *another woman's body*.<sup>55</sup> From this provision it is only clear that existing legal regulations do not envisage the possibility of a surrogate mother to be impregnated *in vivo*.

<sup>53</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Oviedo, 4 April 1997. Entry into force 1 December 2009. See Article 21. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm> (Accessed November 02, 2013).

<sup>54</sup> Decree of the Ministry of Health Protection on “Approval of the Instruction on the Use of Assisted Reproductive Techniques”, 23.12.2008, № 77, paragraph 7 (11), available at <http://zakon1.rada.gov.ua/laws/show/z0263-09> (Accessed February 24, 2013).

<sup>55</sup> Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited, p. 360.

However, if an embryo created *in vitro* is transferred to a surrogate mother's womb, there is no direct prohibition for her to be a donor of genetic material. Especially since the Instruction on the Use of Assisted Reproductive Techniques allows for a donor's anonymity that is protected by the principle of confidentiality.<sup>56</sup>

If one of the spouses is genetically related to a child no matter who is the donor of the other genetic material, the intended parents will be registered as legal ones subject that they satisfy all the requirements of the registration procedure. This procedure requires that intended parents submit a certificate from an accredited medical institution confirming the genetic ties between the child and at least one of them. However, there is no official information on what institutions are authorized to issue such certificates.

To register their parental rights together with the proof of their genetic relation and the document confirming the fact of birth of the child by a surrogate mother the intended parents must submit her notarized written consent for their registration as legal parents of the child.<sup>57</sup> From this provision it is not clear what role exactly such consent of a surrogate mother has. Its complex interpretation together with Article 123 of the Family Code allows to conclude that the legislator is on the side of intended parents and aims to protect their interests. Moreover, Article 139 (2) of the Family Code expressly states that surrogate mother has no parental rights and cannot contest the motherhood of the intended mother. Therefore, the surrogate mother's consent for the registration of parenthood is more of a formal requirement. The recognition of parenthood of intended parents will not be prejudiced without it. In such case they would just have to bring an action to a court asking to order the registration authority to list them as legal parents. Though no similar case has been documented so far, the outcome of such action is quite predictable. Since the requirement of a notarized surrogate

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<sup>56</sup> *Supra* note 54, para 5 (1).

<sup>57</sup> Decree of the Ministry of Justice on "Approval of the Rules of Registration of Civil Status Acts", 18.10.2000, N 52/5, paragraph 2 (2), available at <http://zakon4.rada.gov.ua/laws/show/z1058-03> (Accessed February 24, 2013).

mother's consent is set by the Rules of Registration that have the status of secondary legislation, Article 123 of the Family Code prevails in the hierarchy of norms favoring the intended parents in such situation.

The current regulations are rather favorable to the intended parents, which make Ukraine an appealing destination for reproductive tourism. However, they do not provide sufficient protection of the rights of a child born in a result of surrogacy agreement, especially in cases of cross-border surrogacy. As a result Ukraine is often in the middle of scandalous cases where a child born on its territory out of surrogacy agreement is not recognized in the countries, where surrogacy is banned; and intended parents resort to illegal methods such as smuggling their child to return to their home country. The concrete examples will be considered further in this chapter. Though at this point it is important to mention the Ukrainian legislator's reaction to such instances.

The Ukrainian Parliament decided to improve its legislation on surrogacy. On October 16, 2012 it adopted the Law on "The Amendments to Certain Legislative Acts Concerning the Limitation of the Use of Assisted Reproductive Techniques", which was supposed to enter into force starting January 1, 2013<sup>58</sup>. These changes add another clarification to the Family Code's provision on determination of the origin of a child born in a result of the surrogacy arrangement. It extends the application of this article to the cases of placement of an embryo, created not only by a married couple (husband and wife), but also "by one of them with the written consent of another"<sup>59</sup> in the body of another woman by the use of ART. This does not substantially change the previous regulation of surrogacy, because the possibility of using the genetic material of only one of the intended parents flows from the paragraph 7. 11 of the Instruction on the Use of Assisted Reproductive Techniques, which states that "the

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<sup>58</sup> Draft of the Law on "The Amendments to Certain Legislative Acts Concerning the Limitation of the Use of Assisted Reproductive Techniques", 23.03.2011, № 8282, available at [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=8282&skl=7](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8282&skl=7) (last visited 24.02.2013).

<sup>59</sup> *Ibid.* para. 1.

registration of the parenthood of a child born in a result of a surrogacy agreement is conducted in accordance with current Ukrainian legislation when the intended parents provide the document certifying the genetic link of either of them with the child.”<sup>60</sup> Yet including the express reference to it in the Article 123 (2) of the Family Code will only improve the quality of the law by making it clearer and excluding the possibility of its wrong interpretation.

The change that is more substantial is complementing Article 48 of the Law on “Fundamentals of Health Protection” with the provision stating that “the use of surrogacy as an assisted reproductive technique is limited to Ukrainian nationals or foreigners that are nationals or reside in the country where this method is legally recognized.”<sup>61</sup> This clause provides an assurance that the situations of the conflict of laws with the countries where surrogacy is banned will not emerge. It is intended to protect the interests of the child in the first place, but also it protects the intended parents from being trapped in a situation, when they are not able to be officially recognized as legal parents of their child in their home country and experience the joy of parenthood there. Unfortunately this proviso still does not address the possibility of the clash between Ukrainian law and the law of the country, where surrogacy is legal. For instance, the example of the case mentioned before shows that many contradictions between the English and Ukrainian laws on surrogacy still exist, even though surrogacy is legal under the regulations of both countries.

Another amendment to Article 48 of the Law on “Fundamentals of Health Protection” sets the conditions for the use of surrogacy. These are: the existence of the genetic link between the child and at least one of the intended parents and the absence of such link with the surrogate mother, except for the situations when a relative of one of the intended parents is acting as a surrogate mother.<sup>62</sup> This paragraph makes a significant contribution to the

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<sup>60</sup> *Supra* note 54. para 7 (11).

<sup>61</sup> *Supra* note 58. para. 2.

<sup>62</sup> *Ibid.*

improvement of the quality of Ukrainian legislation concerning surrogacy. It outlaws traditional surrogacy and makes it clear that the only type of surrogacy allowed by law is gestational one.

In general the purpose of all these amendments is to protect the rights of the child by means of statutory limitations of the use of assisted reproductive techniques, especially their use by foreign nationals. Unfortunately President Yanukovich vetoed the law introducing these amendments for technical reasons, because it operates the terms such as ‘surrogate mother’, ‘genetic link between the surrogate mother and the child’, ‘assisted reproductive techniques’, etc. but does not provide the definitions of these concepts and neither does the current legislation concerning this topic. One of the amendments also creates the internal clash between the norms of one document, where most of the provisions leave certain issues concerning the ART to be determined by the discretion of the Ministry of Health Protection, and the newly added provision refers the same issues to the Cabinet of Ministers.<sup>63</sup> All these remarks can be easily fixed, so it is reasonable to expect that the amendments will be adopted and will come into force shortly after the corrections will be done.

Though these changes are not a panacea and will not solve or prevent all possible problems, they are an important step on the way to insuring sufficient protection to the rights of the child born in a result of a surrogacy agreement and to improving the reputation of Ukraine as a country that is capable of protecting the rights of persons under its jurisdiction.

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<sup>63</sup> Recommendations of the President of Ukraine concerning the Law on “The Amendments to Certain Legislative Acts Concerning the Limitation of the Use of Assisted Reproductive Techniques”. 2012, available at [[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=8282&skl=7](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8282&skl=7)] (Accessed 24 February 2013).

## ii. UNITED KINGDOM

Many authors have described the approach of the UK law to surrogacy as ‘restrictive’<sup>64</sup>, meaning that it permits surrogacy, but only if it fits the model prescribed by law. The UK holds a leading position in legislating on surrogacy among other states in Europe.<sup>65</sup> The British legislator chose to regulate surrogacy arrangements quite strictly. This policy decision was partially based on the results of the 1984 Warnock Report,<sup>66</sup> where the Committee having analyzed the potential difficulties that may arise took the view that surrogacy agreements should be discouraged. Another factor was high public attention to the case of *Baby Cotton*<sup>67</sup> that involved British surrogate mother that had carried a baby for American couple. Under these circumstances the policy maker’s primary concern was to prevent commercialization of surrogacy, so the adopted Surrogacy Arrangements Act 1985<sup>68</sup> expressly prohibited the involvement of third parties in negotiation of surrogacy arrangements on a commercial basis<sup>69</sup> and for surrogates and commissioning parents themselves it made it illegal to advertise.<sup>70</sup> The Human Fertilization and Embryology Act 1990 (HFEA 1990) further condemned commercial surrogacy. It emphasized the principle that only ‘reasonable expenses’ can be paid to a surrogate.<sup>71</sup> It also made it clear that surrogacy agreements are not enforceable.<sup>72</sup> Therefore, a surrogate mother is not bound by any prior agreement to give the child away. All these

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<sup>64</sup> Wells-Greco, Michael in Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited. p. 368.

<sup>65</sup> *Supra* note 28. p. 8.

<sup>66</sup> Report of the Committee of Enquiry into Human Fertilization and Embriology. 1984. (known as ‘Warnock Report’), available at <http://www.hfea.gov.uk/2068.html> (Accessed 10 March 2013).

<sup>67</sup> *Re C (A Minor)* [1985] FLR 846 (Latey, J.).

<sup>68</sup> Surrogacy Arrangements Act 1985. Available at <http://www.legislation.gov.uk/ukpga/1985/49> (Accessed 10 March 2013).

<sup>69</sup> *Ibid.* Section 2.

<sup>70</sup> *Ibid.* Section 3.

<sup>71</sup> Human Fertilization and Embryology Act 1990. Section 30. Available at <http://www.legislation.gov.uk/ukpga/1990/37/contents> (Accessed 10 March 2013).

<sup>72</sup> *Ibid.* Section 36.

principles still shape the model of surrogacy arrangements that is legally acceptable in the UK. This model can be described as “altruistic, consenting, and privately arranged.”<sup>73</sup> This restrictive type of policy drives many couples from the UK to look for surrogacy services overseas, where they are less regulated and easier to get from “professional surrogacy providers.”<sup>74</sup>

At present the framework of the UK model of regulation of surrogacy is defined by the following documents: the Surrogacy Arrangements Act 1985, the Adoption and Children Act 2002, the Human Fertilization and Embryology (Deceased Fathers) Act 2003, the Human Fertilization and Embryology Act 2008 (HFEA 2008)<sup>75</sup> that amended the abovementioned HFEA 1990 and certain statutory documents such as the Human Fertilization and Embryology (Parental Order) Regulations 2010.<sup>76</sup>

The provisions concerning legal parenthood also reflect the consenting nature of the allowed model of surrogacy. The UK law identifies the woman that carried the child as his or her legal mother at birth regardless of whether she is genetically related to that child.<sup>77</sup> The place where the agreement was conducted (in or outside the UK) or the place of birth of the child does not make any difference either.

When the surrogate is married the child’s legal father is determined according to the well-known presumption of a child being born inside wedlock. Thus her husband holds legal fatherhood unless it can be proven that he did not consent to his wife’s treatment.<sup>78</sup> The same

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<sup>73</sup> *Supra* note 64.

<sup>74</sup> Gamble, Natalie. 2012. “Surrogacy: Creating a Sensible National and International Legal Framework.” *International Family Law*, September. p. 310.

<sup>75</sup> Human Fertilization and Embryology Act 2008. Available at <http://www.legislation.gov.uk/ukpga/2008/22/contents> (Accessed 10 March 2013).

<sup>76</sup> The Regulations 2010 serve to apply, with modifications, certain provisions of the Adoption and Children Act 2002, Articles of the Adoption (Northern Ireland) Order 1987 and the Adoption and Children (Scotland) Act 2007 to parental orders. Available at <http://www.legislation.gov.uk/uksi/2010/985/contents/made> (Accessed 11 March 2013).

<sup>77</sup> *Supra* note 75. Section 33.

<sup>78</sup> *Ibid.* Sections 33 and 38.

rule applies to the partner of a surrogate living in a civil partnership at the time of treatment.<sup>79</sup>

This also means that in such cases even when the child was conceived using the genetic material of the intended father the later would not be automatically recognized as his or her legal parent. The intended father that was the donor of gametes might be treated as a legal one either when the surrogate mother is single, or when it is shown that she underwent the treatment without her husband or civil partner's consent. In contrast, under the same circumstances the intended mother would not obtain legal parenthood even when her oocytes together with a sperm of a donor (other than her husband) were used for conception. In such situation the child would have only one legal parent at birth – the surrogate mother.<sup>80</sup>

As it was mentioned earlier in the Chapter I of this work the UK regulations on legal parentage are based on the recognition of the natural fact of birth and the marital presumption of paternity with a very limited role of the genetic links and with no regard to the contract or intent-based grounds for parenthood. Therefore, in various situations a child born of surrogacy agreement may have two parents with just one or even none of them being genetically related to that child, or only one legal parent to whom it may or may not be genetically linked.

The intent of commissioning parents is acknowledged by the possibility of transfer of legal parenthood to them from a surrogate by obtaining a Parental Order. This instrument was introduced by HFEA 1990<sup>81</sup> and is designed specifically for cases of surrogacy. Prior to its introduction the transfer of parental rights and responsibilities from a surrogate to intended parents was only possible under the regulations on adoption.<sup>82</sup> The nature of parental order is quite similar to adoption orders in a sense that when it is granted the child is “for all purposes

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<sup>79</sup> *Ibid.* Section 42.

<sup>80</sup> *Supra* note 64 at p. 370.

<sup>81</sup> *Supra* note 71. Section 30. Now it is governed by Section 54 of HFEA 2008.

<sup>82</sup> Crawshaw, Marilyn, Eric Blyth, and Olga van den Akker. 2012. "The changing profile of surrogacy in the UK - Implications for national and international policy and practice." *Journal Of Social Welfare & Family Law* 34, no. 3, p. 267.

treated in law as a child of the couple.”<sup>83</sup> They have full parental responsibility over this child, without sharing it with anybody else.

Even though the Human Fertilization and Embryology (Parental Order) Regulations 2010 use the exact wording from the Adoption and Children Act 2002 to explain the mechanism of reassigning the parenthood, Natalie Gamble draws a distinction between the two instruments – a parental and an adoption order.<sup>84</sup> The difference lays within the conditions for issuing these documents. Comparing to an adoption order there is a rather small time-window to apply for a parental order. The commissioning parents have to do it within six months from the child’s birth.<sup>85</sup> It is also required that at the time of the application for a parental order the child should already be in the care of the applicants. These conditions together with the fact that in the end of this process the child’s birth certificate is reissued show that “the effect of parental order is to clarify and affirm parenthood rather than in any real sense to transfer it from one family to another.”<sup>86</sup> There is no reason to disagree with the finding. The legislator did take into account the peculiarities of surrogacy and the links that the commissioning couple has to the child born of it by providing a unique remedy for legalizing those links.

In the same time the mechanism of parental order is not an absolute solution to all the problems that may arise in the surrogacy process. It is criticized for being quite lengthy and not recognizing the intended parents as legal ones timely enough<sup>87</sup> to avoid the uncertainty of the status of their child, which is often created by the conflict of laws in cross-border surrogacy arrangements. Since this research focuses on international surrogacy arrangements, it offers to look at the procedure of obtaining a parental order by the commissioning parents

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<sup>83</sup> *Supra* note 73 at p. 371.

<sup>84</sup> *Supra* note 74 at p. 309.

<sup>85</sup> *Supra* note 75. Section 54 (3).

<sup>86</sup> *Supra* note 74.

<sup>87</sup> *Ibid.*

from the UK in case of transnational surrogacy where Ukraine is a destination country. It will allow to spot the possible complications along the way.

A parental order is granted by a UK civil/family court. Both intended parents need to submit an application to the court filling out the Form C51 (in England and Wales) and Form 22 (in Scotland). At that time they must be more than eighteen years of age<sup>88</sup> and domiciled<sup>89</sup> in the UK or in the Channel Islands or the Isle of Man.<sup>90</sup> They must be married, civil partners, or live “in an enduring family relationship and be not within the prohibited degrees of relationship in relation to each other.”<sup>91</sup> However, only husband and wife can be the intended parents under Ukrainian law,<sup>92</sup> so this example will not consider the possibility of obtaining a parental order by lesbian and gay couples. As it was mentioned earlier the application needs to be filed within six months from the child’s birth. It is impossible to extend this time limit notwithstanding the possible reasons for the delay.

The application may be successful only if certain conditions are satisfied. The first one requires at least one intended parent to be genetically related to the child.<sup>93</sup> Ukrainian law imposes the same prerequisite on the conclusion of the surrogacy agreement<sup>94</sup>, so there can be no conflict of laws at this point. Another criterion to satisfy the court is a free, full and unconditional consent of the surrogate mother and her husband (if she is married) to transfer their legal parentage. The consent is documented and provided to the court through the Form C52 (in England and Wales) and Form 23 (in Scotland). It should be noted that the UK law

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<sup>88</sup> *Supra* note 75. Section 54 (5).

<sup>89</sup> The person’s domicile is generally considered the country of his or her permanent home. See Robertson, Gerald B. 2010. "The Law of Domicile: Re Foote Estate." *Alberta Law Review* 48, no. 1: 189-194.

<sup>90</sup> *Supra* note 75. Section 54 (4b).

<sup>91</sup> *Ibid.* Section 54 (2c).

<sup>92</sup> *Supra* note 50.

<sup>93</sup> *Supra* note 75. Section 54 (1a,b).

<sup>94</sup> *Supra* note 54.

forbids a surrogate mother to cede her parental rights before the child is six weeks old.<sup>95</sup> Any consent given before that date will be considered void for the purposes of parental order application. However, the court cannot disregard the properly given consent or refusal of the surrogate mother even the child's welfare is prejudiced by it as it is possible under the law on adoption.<sup>96</sup>

The Ukrainian law requires the notarized consent of the surrogate mother to enable the intended parents to register the child as their own.<sup>97</sup> Though as it was shown earlier in this chapter it does not have a decisive role in this process, in contrast to the UK regulations. So even if the commissioning couple can overbear in court the Ukrainian surrogate's refusal to them being registered as legal parents under Ukrainian law, they still will not be able to obtain a parental order in the UK without the proof of her free consent.<sup>98</sup>

The last requirement reflects the policy makers' initial concern – the prohibition of commercial surrogacy. It states that the applicants need to demonstrate that “no money or other benefit (other than for expenses reasonably incurred) has been given”<sup>99</sup> to the surrogate mother for concluding or complying with any part of the agreement. It is difficult to prove; and there are no official guidelines on how it can be shown or what ‘reasonable expenses’ are. It would not be easier if such guidelines were available, because the expenses paid would differ from country to country and in each specific situation. It is clear that the cost of medical care will fall within the reasonable expenses, but it is very uncertain when it comes to any non-medical expenses. That is why Section 54 (8) of HFEA 2008 gives the courts discretion to rule on it in every particular case. They have the power to authorize

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<sup>95</sup> *Supra* note 75. Section 54 (7).

<sup>96</sup> *Supra* note 73 at p. 374.

<sup>97</sup> *Supra* note 57.

<sup>98</sup> There were no such cases yet, however it is possible in theory.

<sup>99</sup> *Supra* note 75. Section 54 (8).

retrospectively the payments made to the surrogate mother even if they exceed the reasonable barrier.

There were numerous cases dealing with the problem of payments' approval,<sup>100</sup> so the courts have adopted a clear policy in adjudicating on it. The case of *Re: X & Y*<sup>101</sup> illustrates it well. The applicants, a British couple entered into a surrogacy agreement with the Ukrainian married woman, as a result of which she was implanted with an embryo conceived using a donor egg (the donor being anonymous) and the sperm of the intended father and gave birth to twins. The commercial element of the surrogacy agreement was one of the main issues in this case.

As it was stated before commercial surrogacy is allowed and even encouraged under Ukrainian law. However, the UK law does not allow for any financial or other benefit, "other than for expenses reasonably incurred"<sup>102</sup>, to be received by the parties of the surrogacy agreement. In the present case according to the evidence accepted by the court the payments made to the surrogate mother significantly exceeded such expenses, which clearly constituted the offence of the English law and could become an obstacle for granting the parental order to the intended parents, because the whole surrogacy agreement would be considered invalid.

Nevertheless the court authorized these payments upon finding that the applicants acted in good faith and did not attempt to defraud the authorities.<sup>103</sup> Though Justice Hedley admitted that making such decision was "most uncomfortable."<sup>104</sup>

"What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognized that as the full rigor of that policy consideration will bear on the wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigor must be mitigated by the application of a

<sup>100</sup> See e.g., *Re: X & Y* (Foreign Surrogacy), [2008]; *Re: S*, [2009]; *Re: L (A Minor)*, [2010]; *Re: IJ (A Child)*, [2011]; *A and A v P, P and B* [2011].

<sup>101</sup> *Re: X & Y* (Foreign Surrogacy), [2008] EWHC 3030.

<sup>102</sup> *Ibid.* para.17.

<sup>103</sup> *Ibid.* para.21.

<sup>104</sup> *Ibid.* paras.23-24.

consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order."<sup>105</sup>

The most important point here is the application of the welfare test by Justice Hedley. The application of this test was later included to the parental order procedure by the Human Fertilization and Embryology (Parental Order) Regulations 2010. Its provisions were actually taken from Section 1 (the Welfare Checklist) of Adoption and Children Act 2002. As a result it was officially affirmed that the welfare of the child should be the court's "paramount consideration"<sup>106</sup> when making a decision on granting a parental order.

Justice Hedley's concern about the circumstances, when the child's welfare considerations may be outweighed was later addressed in *Re: S* case.<sup>107</sup> There the Court stated that it may be done when the "commercial surrogacy arrangement was used to circumvent childcare laws"<sup>108</sup> in the UK. Moreover a parental order cannot be granted even when the child's welfare so requires, if the payment made according to the surrogacy agreement *de facto* meant that the child has been purchased.<sup>109</sup> Also the sum paid to the surrogate mother though it may be modest on surface cannot have the effect of actually overbearing her will.<sup>110</sup> This precondition mirrors the requirement of free full and unconditional consent and serves to protect the surrogate mother's rights. It also proves the statement made earlier in this subchapter that the court may not disregard the surrogate mother's will even when the child's welfare is prejudiced by it.<sup>111</sup> Those standards are now used by the courts in all cases that call for adjudication on question of commercial element of surrogacy arrangements.

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<sup>105</sup> *Ibid.* para.24.

<sup>106</sup> Adoption and Children Act 2002. Section 1 (2).

<sup>107</sup> *Re: S*, [2009] EWHC 2977.

<sup>108</sup> *Ibid.* para. 7 (1).

<sup>109</sup> *Ibid.* para. 7 (2).

<sup>110</sup> *Ibid.* para. 7 (3).

<sup>111</sup> *Supra* note 96.

When considering an application for a parental order the court is assisted by a social worker (a Guardian or Parental Order Reporter) appointed by it to investigate the parties and conditions of the agreement.<sup>112</sup> As a result of such enquiry the Reporter provides a detailed written report for the court. The studies of the work of Parental Order Reporters show that the most common concerns documented by them in cases of international surrogacy are the potential misuse of expenses paid to a surrogate and limited access to the results of assessment carried out by surrogacy agencies overseas.<sup>113</sup> However, the role of the Reporter's conclusions is quite limited.<sup>114</sup> Even in cases where they expressed their concerns about certain conditions of the surrogacy agreements the court issued the parental orders on the basis of the dominance of the child's welfare principle.

The compliance with the requirements of Section 54 of HFEA 2008 is not the only problematic area of the process of recognition of legal parenthood. Very often the difficulties arise even before the parental order application can be made when the intended parents try to bring the child home to the UK. They find themselves having troubles with the child's obtaining the British nationality and being able to enter the UK. This usually happens because of the clash of laws on parenthood and citizenship<sup>115</sup> of the countries involved in a surrogacy agreement.

In many countries the rules on acquisition of nationality at birth differ a lot. However, in all of them they are based on the combination of two principles *jus sanguinius* and *jus*

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<sup>112</sup> Crawshaw, Marilyn, Eric Blyth, and Olga van den Akker. 2012. "The Changing Profile Of Surrogacy In The UK - Implications For National And International Policy And Practice." *Journal of Social Welfare & Family Law* 34, no. 3. p. 269.

<sup>113</sup> Purewal, S, M Crawshaw, and O van den Akker. 2012. "Completing The Surrogate Motherhood Process: Parental Order Reporters' Attitudes Towards Surrogacy Arrangements, Role Ambiguity And Role Conflict." *Human Fertility* 15, no. 2: 94-99.

<sup>114</sup> *Supra* note 112. p. 275.

<sup>115</sup> The terms "citizenship" and "nationality" are used as synonyms in this work. Though they are distinguishable. See e.g. Oommen, T. K. n.d. *Citizenship, nationality, and ethnicity : reconciling competing identities* / T.K. Oommen. n.p.: Cambridge, Mass. : Polity Press, c1997, n.d.

*solis*.<sup>116</sup> In the countries where the operation of *jus sanguinius* principle prevails the question of nationality is closely connected with the recognition of parenthood. The latter can be quite a difficult task when the two countries involved have different approaches to the regulation of surrogacy.

The UK legislator ‘resolves’ the possible conflict of laws simply by interpreting the situation solely under the UK law without any regard to the rules of another country involved. The practice shows that it is not an effective solution; to the contrary – it leads to the emergence of peculiar legal situations that put the child in an even more vulnerable position. The abovementioned case of *Re: X & Y*<sup>117</sup> is a good example of such discrepancy that endangered the child’s welfare. In the situation described there according to Ukrainian law the applicants were legal parents of the children born of surrogacy agreement and were registered as such in the birth certificate, so the twins had no right of residence or citizenship in Ukraine. However, the UK law recognized the surrogate mother and her husband as legal parents of the twins, although genetically unrelated to them. Therefore, the intended parents could not confer nationality on them and had no legal right to bring the twins to the United Kingdom. In fact, the children were left parentless and stateless. The intended father had to prove to immigration authorities that he is a biological father of the twins with DNA test results. Only then were the children granted discretionary leave to enter the country as an exception, so that the applicants would have the opportunity to settle their status under the English law and to apply for the parental order.

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<sup>116</sup> *Jus soli* principle allows obtaining the citizenship of a state to all who are born on its territory. *Jus sanguinius* principle means that citizenship is passed on according to the nationality of the child’s parents. See e.g. Tina, Lin. 2013. "Born Lost: Stateless Children in International Surrogacy Arrangements." *Cardozo Journal of International & Comparative Law* 21, no. 2.p. 555.

<sup>117</sup> *Supra* note 101.

It is not a coincidence that a year after this case, in 2009, the Home Office UK Border Agency issued guidance on ‘Inter-Country Surrogacy and the Immigration Rules.’<sup>118</sup> The purpose of this document is to provide the information that should be taken into account when considering a cross-border surrogacy agreement. It emphasizes that it is the UK definition of who constitutes a parent of the child born as a result of a surrogacy agreement that affects whether the child will obtain the British nationality and how this child may be brought into the UK.<sup>119</sup>

It further describes three legal routes of the child’s entering the UK under the current immigration rules. All of them depend upon the recognized legal parenthood ties in different circumstances of the surrogacy agreement that in their turn define the child’s nationality. The most favorable is the situation when the male of the commissioning couple is the genetically related to the child person (he is the sperm donor); and the surrogate mother is single (unmarried). It was already explained that then the intended father would be considered the child’s legal father provided that this fact is supported by DNA evidence and his name is mentioned in the official documentation (e.g. the child’s birth certificate). In such cases the question of the child’s nationality is governed by Sections 2 and 50 of the British Nationality Act 1918.<sup>120</sup> Section 2 allows acquiring the citizenship of the UK according to *jus sanguinius* principle to the kids born abroad. Section 50 provides definitions of a legal parent for the purposes of this Act. Those definitions correspond to the ones provided in the HFEA 2008. Therefore, the biological child of the intended father of British nationality born by an unmarried surrogate mother will automatically obtain British citizenship at birth. It will be

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<sup>118</sup> Home Office UK Border Agency. 2009. “Inter-Country Surrogacy and the Immigration Rules.” Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Inter-country-surrogacy-leaflet> (Accessed 2 November 2013).

<sup>119</sup> *Ibid.* para 10.

<sup>120</sup> British Nationality and Status of Aliens Act 1918. Available at [http://www.legislation.gov.uk/ukpga/1914/17/pdfs/ukpga\\_19140017\\_en.pdf](http://www.legislation.gov.uk/ukpga/1914/17/pdfs/ukpga_19140017_en.pdf) (Accessed November 2, 2013).

possible for him or her to enter the UK freely with the British passport gained at the nearest British Diplomatic Post.<sup>121</sup>

It is however possible that in the same circumstances as described above the child will still not be able to acquire British citizenship automatically. It may happen when the intended father that established his paternity to the child himself is a British citizen by descent and thus cannot pass on his citizenship to the child, or he simply is not a British citizen. His surrogate child will still be able to enter the UK, but in the status of a dependent child,<sup>122</sup> if the father's application for entry clearance is successful. Then the child will obtain an Indefinite Leave to Enter the UK and will be eligible for registration as a British citizen according to Section 3(1) of the British Nationality Act 1981 after the Parental Order is granted.

The situation gets more complicated when the surrogate mother is married. In this case the intended father will not be able to establish his parenthood for the purposes of immigration even if his genetic material was used to create an embryo.<sup>123</sup> The Immigration Rules do not foresee the procedure for the child's entry to the UK in these situations. Therefore, every such case falls outside the Rules. It is left to the discretion of the Secretary of State whether to grant the entry clearance in such circumstances. It can only be granted when the intended parents have intention and enough time to file an application for a parental order and satisfy all the requirements necessary to obtain such order, so that it is likely to be issued.<sup>124</sup> As it was explained earlier the DNA evidence of genetic connection to the child is one of the requirements for a successful parental order application. Therefore, it will be necessary to prove it when requesting an entry clearance as well as the surrogate mother's and her husband's consent to cede their parental rights to the commissioning couple with a

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<sup>121</sup> *Supra* note 118 at para. 36.

<sup>122</sup> UK Immigration Rules. para. 297 Available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/> (Accessed November 5, 2013).

<sup>123</sup> *Supra* note 118 at paras. 26-27.

<sup>124</sup> *Ibid.* para. 59(g).

document confirming it. The entry clearance granted in such cases of surrogacy will allow the child to enter and stay in the UK for twelve months. Once the parental order is obtained the parents should apply for Indefinite Leave to Remain<sup>125</sup> on behalf of the child and afterwards register their child as a British citizen according to Section 3(1) of the British Nationality Act 1981. The same procedure shall be followed in cases of surrogacy agreements where the intended mother is the donor of genetic material no matter if the surrogate mother is married or not, since in such situation none of the intended parents will be able to establish parenthood officially before the parental order is granted.

The difference in approaches to regulation of surrogacy in Ukraine and the UK gives rise to the issues of: a) recognition of parenthood at birth that in its turn creates uncertainty as to the child's nationality and often leads to problems with immigration and b) satisfying the non-commercial surrogacy requirement of Section 54 of HFEA 2008 that may jeopardize the issuance of a parental order. It is argued that the first issue may be resolved by introducing in the UK a system of pre-birth orders<sup>126</sup> like in some States in the US.<sup>127</sup> This idea was even voiced at the Parliament by John Healey MP on 17 April 2012.<sup>128</sup> However, even if this problem will be solved in the UK, this will not satisfy the need for change of the wider picture at the international level.

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<sup>125</sup> *Ibid.* para. 62.

<sup>126</sup> Pre-birth order is a judgment establishing the legal parenthood of intended parents issued before the child's birth, so that after birth the intended parents are immediately registered as the child's parents in a birth certificate. See Snyder, Steven H., and Mary Patricia Byrn. 2005. "The Use of Pre-birth Parentage Orders in Surrogacy Proceedings." *Family Law Quarterly* no. 3. p. 633.

<sup>127</sup> E.g. California, Massachusetts, New Hampshire. See *Ibid.*

<sup>128</sup> *Supra* note 74.

### iii. FRANCE

France represents the prohibitive approach to regulation of surrogacy. It bans all types of surrogacy arrangements whether it is commercial or altruistic, traditional or gestational.<sup>129</sup> This approach takes its origin from a domestic surrogacy case that was brought in 1991 before the *Cour de cassation*.<sup>130</sup> In this case the *Cour de cassation* expressed the view that any agreements made with the intention of giving up the child at birth run contrary to such principles of public policy as “*l’indisponibilité du corps humain*” and “*l’indisponibilité de l’état des personnes*.”<sup>131</sup> In the context of surrogacy agreements the first principle prevents both the body of the surrogate mother and the child’s body from becoming a subject to a contract. The courts never resorted to this principle after the adoption of the “Act Concerning Respect for the Human Body”<sup>132</sup> 1994 also known as Bioethics Act. It was not included in the Act, since it was considered to have a too broad effect.<sup>133</sup>

The second principle is inherent to French legal system where the legal status of persons is subject to regulation by the State exclusively.<sup>134</sup> All the information concerning the legal status of persons is kept in a special register (‘*les registres de l’état civil*’). Any changes to it may derive “from events, the operation of law, judgments, or administrative decisions,”<sup>135</sup> but not from any private arrangements. Therefore in cases of surrogacy it is impossible to register the intended parents as legal ones, because the surrogacy agreements have no effect on the civil status of the child.

<sup>129</sup> Perreau-Saussine, Louis and Sauvage, Nicolas in Beaumont, Paul, Trimmings, Katarina (ed.). 2013. “International Surrogacy Arrangements. Legal Regulation at the International Level.” Oxford and Portland, Oregon: Hart Publishing. p. 121.

<sup>130</sup> Cass. Ass. plén., 31 Mai 1991.

<sup>131</sup> “Neither the human body nor the civil status of persons may be subject to private agreements.” *Supra* note 129.

<sup>132</sup> *Ibid.* See *Loi no 94-653 du 29 juillet 1994 relative au respect du corps humain*. Available at <http://www.legifrance.gouv.fr> (Accessed 15 September 2013).

<sup>133</sup> *Supra* note 129. p. 125.

<sup>134</sup> *Ibid.* p. 120.

<sup>135</sup> *Ibid.*

The position of the *Cour de cassation* in the abovementioned 1991 decision was later upheld by the Parliament in the “Act Concerning Respect for the Human Body,”<sup>136</sup> which introduced the relevant provisions to the French Civil Code.<sup>137</sup> The Article 16-7 expressly states: “All agreements relating to procreation or gestation on account of a third party are void.”<sup>138</sup> There are no exceptions to this proviso. Therefore any domestic surrogacy agreement in France is invalid *a priori*.

The prohibition of surrogacy is also reflected in the French criminal law. Article 227-12 of the Penal Code makes it an offence to incite and act as an intermediary to the conclusion of a surrogacy agreement.<sup>139</sup> Article 227-13 prohibits modifying the civil status of a child by means of concealment, false representation of birth or willful substitution. In addition, any medically assisted procreation with the purpose that runs contrary to the ones allowed by the Public Health Code (e.g. surrogacy treatment) are condemned by the Article 511-24 of the Penal Code.

The prohibition of surrogacy agreement and penalization of any such practices excludes surrogacy in France at the national level. However, it fosters the growth of procreative tourism among the infertile French couples. The informal statistics suggests that around 150-200 children in French families are born abroad with the help of surrogate mothers.<sup>140</sup> The French law’s position as to the recognition of foreign surrogacy arrangements was clarified recently by the *Cour de cassation*. In its decision in April 2011<sup>141</sup> the Court stated that it contravenes the national public policy to give effect to any surrogacy agreement concluded

<sup>136</sup> *Ibid.* See *Loi no 94-653 du 29 juillet 1994 relative au respect du corps humain*. Available at <http://www.legifrance.gouv.fr> (Accessed 15 September 2013).

<sup>137</sup> Code Civil (Dernière modification : 1 septembre 2013). Available at <http://www.legifrance.gouv.fr> (Accessed 18 September 2013).

<sup>138</sup> Translation of the French Civil Code by Georges Rouhette. Available at <http://www.legifrance.gouv.fr> (Accessed 18 September 2013).

<sup>139</sup> Code Pénal (Dernière modification : 13 octobre 2013). Available at <http://www.legifrance.gouv.fr> (Accessed 20 October 2013).

<sup>140</sup> *Supra* note 129, p.119.

<sup>141</sup> Cour de cassation, civile, Chambre civile 1, 6 avril 2011, 09-66.486, Publie au bulletin.

abroad. The French law also does not allow for establishing parenthood of the intended parents and has no mechanism for that. However, does it recognize the parenthood status established abroad? The answer is positive. There are few mechanisms for this that differ depending on a way, in which the parenthood status was formalized in a foreign country: a) automatically in a birth certificate, or b) by a court's judgment.

The French law takes a quite liberal approach when the parenthood is established and documented in the child's birth certificate or any other civil status record. Article 47 of the Civil Code<sup>142</sup> provides the presumption of truthfulness for foreign civil status records presented to the French authorities. This presumption can be rebutted only if there is evidence showing that the record is forged, irregular or that the facts declared therein do not reflect reality. However, there were cases when the French authorities had refused to recognize parenthood on the grounds other than stated in the Article 47, namely on a suspicion that the child was born from a surrogacy arrangement, which contravenes the French public policy.

One of examples of such cases is the experience of Le Roch couple that entered into a surrogacy agreement in Ukraine.<sup>143</sup> As a result the couple became parents to the twin girls and was automatically recognized as such under the Ukrainian law having their names stated in the birth certificates. However, when applying for the French passports on behalf of the babies they hid the fact of surrogacy arrangement from the embassy officer.<sup>144</sup> The authorities suspected surrogacy and asked to provide the medical records of the birth. When the couple failed to do that the Embassy rejected their application.<sup>145</sup> Therefore, the children were denied entry to France. In the same time they could not obtain Ukrainian citizenship, because both of

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<sup>142</sup> *Supra* note 129. p.120.

<sup>143</sup> Grushenko, Kateryna. 2011. "French Couple's Desire for Child Brings Trouble." *Kyiv Post*. Available at <http://www.kyivpost.com/content/ukraine/french-couples-desire-for-child-brings-trouble-102433.html> (Accessed 15 October 2013).

<sup>144</sup> Mohapatra, Seema. 2012. "Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy." *Berkeley Journal Of International Law* 30. p. 421.

<sup>145</sup> Associated Press. 2001. "French family detained for smuggling 2 infants from Ukraine." *Kyiv Post*. Available at <http://www.kyivpost.com/content/ukraine/frenchman-faces-fine-in-ukraine-for-baby-smuggling-103727.html> (Accessed 15 October 2013).

their parents were French. The desperate father tried to smuggle the children from Ukraine, but was stopped by the Ukrainian Border Service on his way to Hungary. He faced a criminal charge for smuggling attempt.<sup>146</sup> Apparently the problem in this case was partially the intended parents' fault. If they had not hidden the fact of the surrogacy arrangement and provided the proof of the commissioning father's genetic link to the children, subsequently they would have better chances to defend their case in the court.

The case of the *Conseil d'Etat* from 4 May 2011<sup>147</sup> is an example of successful resolution of the similar problem faced by the French intended father who concluded a surrogacy agreement in India. After the French authorities refused to recognize his parenthood and issue the passport to his child on the basis of public policy considerations that prohibited surrogacy he filled an application to the *Conseil d'État*. Given the urgency of the situation the *Conseil d'État* reacted by granting a '*laissez-passer*'<sup>148</sup> to the child. In their reasoning the *Conseil d'État* first confirmed that the Indian birth certificate was truthful on the basis of the DNA evidence of the applicant's paternity. Secondly, they stated that the fact that the child was conceived through a contract that under the French law is considered void should not compromise the obligation of the State authorities to "give primary consideration to the best interests of the child in all actions concerning children."<sup>149</sup>

The Ministry of Justice supported the approach of *Conseil d'État* and on 25 January 2013 issued a memorandum interpreting Article 47 of the Civil Code in order to eliminate the discrepancy of positions of the diplomatic authorities and the administrative courts.<sup>150</sup> The document emphasizes that the authenticity and integrity of the foreign record of civil status can be questioned only on the grounds stated in Article 47. As long as the requirements of

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<sup>146</sup> *Ibid.*

<sup>147</sup> Conseil d'Etat, 4 Mai 2011, requête No348778.

<sup>148</sup> A '*laissez-passer*' is a provisional measure based on the presumption of the French nationality of person that allows this person one entry to the country as an exception. See <http://www.ambafrance-uk.org/Laissez-passer-vol-ou-perde-de>.

<sup>149</sup> *Supra* note 129. p. 123.

<sup>150</sup> *Ibid.*

this Article are satisfied the child's nationality should be recognized and the French passport issued. The child's possible involvement in a surrogacy arrangement is not a sufficient ground for refusing his or her claim for nationality.<sup>151</sup> It should be noted that the truthfulness of the records establishing parenthood still has to be proven by DNA evidence. Though it will work only when the paternity of the intended father is supported by the evidence of his genetic link to the child. The documented maternity of the commissioning mother will not be considered truthful even when it can be shown that she was the donor of genetic material<sup>152</sup> since the French law favors the birth mother's rights rather than the genetic mother's.<sup>153</sup> Therefore, this mechanism of the French law can only establish the legal parenthood of the intended father that in its turn gives rise to the child's claim to French nationality. After the memorandum's entry into force there should be much less problems with recognition of parenthood and nationality of the child born as a result of a foreign surrogacy agreement in the country where the intended parents' parenthood is established and fixed in the civil status record.

The situation is not that optimistic in cross-border surrogacy cases where the commissioning couple obtains legal parenthood rights through a judgment of the court. At the first glance, there are only three grounds, on which the enforcement of a foreign judgment in France may be refused: a) the absence of indirect jurisdiction of the foreign court; b) the judgment was obtained with the aim to circumvent French law; c) the decision breaches the French public policy in terms of substance or procedure.<sup>154</sup> However, the last one basically dooms the enforcement of all foreign judgments regarding surrogacy to failure.

Even in cases where the commissioning couples managed to obtain the French civil status records for their children born of surrogacy on the basis of judgments of the foreign

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* p. 126.

<sup>154</sup> Cour de cassation, civile, Chambre civile 1, 20 février 2007, 05-14.082, Publie au bulletin.

courts<sup>155</sup> these registrations were later voided by the *Cour de cassation*.<sup>156</sup> The action was brought by the *Ministère public*<sup>157</sup> and substantiated by the claim of conflict with the public policy. The fact that the *Cour de cassation* sustained the ministerial request proves that the French law does not allow the enforcement of judgments concerning surrogacy agreements and also does not recognize the legal consequences that these judgments produce. The Court was of the view that this decision did not prevent the children from living with their commissioning parents in France and did not adversely affect their welfare, because they had acquired American citizenship according to the *jus soli* principle.<sup>158</sup> However, can the child's residing in a State that does not recognize his or her caregivers as legal parents fully satisfy the needs of this child's welfare? It is doubtful. Even though in those circumstances the French law allowed the intended fathers to establish their paternity by means of acknowledgement, it would provide only a partial remedy, because the mothers were still not accorded such possibility.

It may not be said that the positions of the *Conseil d'État* and the *Cour de cassation* contradict each other. It is necessary to understand that they deal with different issues.<sup>159</sup> The former focuses on administrative matters like the recognition of foreign civil status records (issued automatically); and the latter considers the enforcement of the foreign judicial decisions (that had become the basis for issuing a foreign birth certificates), which is the civil law issue. Both approaches seem to respect the principle of primacy of the child's welfare and support the determination of legal parenthood in favor of the commissioning genetic fathers. However, in no event do they allow establishing legal parentage of the intended mothers, which places them in a quite vulnerable position in case of separation or divorce, since they

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<sup>155</sup> The US courts – California and Minnesota. See *Supra* note 129.

<sup>156</sup> *Supra* note 141.

<sup>157</sup> Article 423 of the Code of Civil Procedure gives the *Ministère public* the power to act in defense of the public policy in any circumstances. See *C cass* Chambre civile 1, 17 décembre 2008, 07-20.468, Publie au bulletin.

<sup>158</sup> *Supra* note 141.

<sup>159</sup> *Supra* note 129.

will not be able to protect their parental rights even over their own biological children. In terms of the first approach the public policy considerations banning surrogacy have less value than the rules of Article 47 of the Civil Code<sup>160</sup> on recognition of civil status records. According to the second approach the conflict of laws is resolved by favoring the public order. It is often criticized for that because of the existence of another common principle of the French conflict of laws that allows for a less strict application of public policy considerations when the situation at issue “is closely linked to the French legal system”<sup>161</sup> as it usually is in cases of surrogacy. The accordance of this approach with Article 8 of the European Convention on Human Rights and Fundamental Freedoms might soon be checked, since the application of one of the couples concerned to the European Court of Human Rights was already communicated.<sup>162</sup>

The position of the French law on the issue of recognition of legal parenthood still creates many problems for the French infertile couples on their way to becoming parents. The French embassies in popular surrogacy destinations countries warn their citizens about numerous problems they may encounter under the French law when entering into a surrogacy agreement.<sup>163</sup> However, this is unlikely to stop the flow of French nationals craving to experience parenthood to the countries with quite realistic possibilities for the fulfillment of their dreams. Therefore, the French legislator began to consider the options that would provide more practical solutions to the problems that nowadays are impossible to avoid.

In 2008 the Senate’s commission on social affairs in its report<sup>164</sup> introduced the idea of lifting the ban on surrogacy in certain circumstances and building a strict regulatory policy

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<sup>160</sup> *Supra* note 137.

<sup>161</sup> *Supra* note 129. p. 129.

<sup>162</sup> Application No 65941/11, *Labassee and others v. France*, introduced on 6 October 2011.

<sup>163</sup> See <http://www.ambafrance-ua.org/Gestation-pour-autrui> (Accessed 15 November 2013).

<sup>164</sup> *Rapport d’information* de Mme Michèle André, MM. Alain Milon et Henri de Richemont, fait au nom de la commission des Affaires sociales du Sénat no 421 (2007-2008) – 25 juin 2008. Available at <http://www.senat.fr/rap/r07-421/r07-4211.pdf> (Accessed 15 November 2013).

for such cases. Following it two bills<sup>165</sup> elaborating this idea were drafted and submitted to the Senate, but never actually discussed there. Another effort to change the situation was the revision of the Bioethics Act<sup>166</sup> in 2011. The *Conseil d'État* contributed to the revision process by conducting a study<sup>167</sup> that turned to the question of determination of legal parenthood. In this context it insisted on keeping the prohibition on recognition of parental rights of intended mothers, but offered to give them the opportunity to obtain some custodial rights in respect of the children upon the agreement of the surrogate mother.<sup>168</sup> Unfortunately, this recommendation was not accepted and did not affect the final version of the revision.<sup>169</sup> The latest development in this sphere is the abovementioned memorandum of the Ministry of Justice from 25 January 2013. However, it was aimed to clarify the question of acquisition of nationality, rather than the recognition of parenthood.<sup>170</sup> Therefore, this issue still remains to be addressed preferably by a comprehensive international instrument.

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<sup>165</sup> *Propositions de loi no 233 et 234 (2009-2010) tendant à autoriser et encadrer la gestation pour autrui*. Available at <http://www.senat.fr/leg/ppl09-233.html> and <http://www.senat.fr/leg/ppl09-234.html> (Accessed 15 November 2013).

<sup>166</sup> *Supra* note 132.

<sup>167</sup> *'La révision des lois de bioéthique'*, étude du Conseil d'Etat parue a la Documentation française. Available at [http://www.conseil-etat.fr/media/document/etude-bioethique\\_ok.pdf](http://www.conseil-etat.fr/media/document/etude-bioethique_ok.pdf) (Accessed 18 November 2013).

<sup>168</sup> *Ibid.* Proposition 7. p.118.

<sup>169</sup> *Supra* note 129. p. 128.

<sup>170</sup> *Ibid.*

### Chapter III. International Regulatory Framework

The previous chapter covered three main types of surrogacy regulations that many states follow nowadays. On the example of the three chosen countries it was also shown what rules they use for determination of parenthood in cross-border surrogacy arrangements. It is important to stress that it was chosen to show the correlation between those approaches in the context of the countries' interaction as home country and surrogacy destination country from the point of view of intended parents. Such form of presentation helped to observe all the problems that the commissioning couples often encounter after the birth of their children; and how all these legal difficulties affect the status of children.

Unfortunately, the mentioned efforts of individual countries have proven to be insufficient for solving the existing problems and even more impotent for preventing the future ones. The nature of the issues of recognition of parenthood in international surrogacy arrangements goes beyond the influence of a particular country. It calls for a multilateral answer. This need was acknowledged by numerous countries<sup>171</sup> and activated the work of the Permanent Bureau (hereinafter the Bureau) of the Hague Conference on Private International Law that in 2011 carried out a study on the issues concerning the status of children in international surrogacy arrangements.<sup>172</sup> This study analyzed the capacity of already existing

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<sup>171</sup> E.g. Israel in the Working Document No3 for the attention of the Council on General Affairs and Policy of the Hague Conference on Private International Law (7-9 April 2009); and New Zealand that addressed the Secretary General of the Hague Conference to clarify if the 1993 Convention on Intercountry Adoption could be applied to resolve the problems of international surrogacy. See Baker, Hannah. 2011. "A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention?" in Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited, p. 412.

<sup>172</sup> Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference "Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements."

instruments for tackling the current and future problems in this sphere, but still arrived to the conclusion that a special comprehensive instrument is needed for that.<sup>173</sup>

One of the documents that potentially could regulate international surrogacy is the 1993 Hague Intercountry Adoption Convention (hereinafter 1993 Convention).<sup>174</sup> However, many authors have agreed with the Bureau that it is not an appropriate solution.<sup>175</sup> The concepts of adoption and surrogacy are different in nature.<sup>176</sup> Surrogacy is a form of realization of the adults' right to procreation and adoption is rather seen as realization of the child's right to have family. Therefore "some *basic* requirements of the 1993 Convention simply cannot be fulfilled in international surrogacy cases."<sup>177</sup>

First of all, it is the question of the moment of consent of the birth parents for relinquishment of their parental rights.<sup>178</sup> It is a common practice that parents agree (when it is necessary) to give their child for adoption after his or her birth. However, in most surrogacy cases the surrogate mother and her husband technically agree to transfer their parental rights as soon as they enter the surrogacy agreement, even when they are required to give their formalized consent upon the child's birth. Next logical question arises from the requirement of Article 29 of the 1993 Convention to eliminate the possibility of contact between the birth parents and the persons willing to adopt as an assurance of free and full consent of the former ones.<sup>179</sup> This condition cannot possibly be satisfied in cases of

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<sup>173</sup> *Ibid.* paras. 43-54.

<sup>174</sup> Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. Concluded 29 May 1993. Available at: <http://www.hcch.net/upload/conventions/txt33en.pdf> (Accessed November 10, 2013).

<sup>175</sup> See Tina, Lin. 2013. "Born Lost: Stateless Children in International Surrogacy Arrangements." *Cardozo Journal of International & Comparative Law* 21, no. 2. p. 568.

<sup>176</sup> Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference 'A Preliminary Report on Issues Arising from International Surrogacy Arrangements', p. 29.

<sup>177</sup> *Supra* note 172. p. 21.

<sup>178</sup> *Ibid.*

<sup>179</sup> There are two exceptions to this rule: for cases of in-family adoption and when the contact is authorized by a competent authority and conducted under the conditions set out by it. See Article 29 of the 1993 Convention.

surrogacy, because the agreement itself is a form of contact, not to mention the need to take part in medical treatment. Another guarantee to prevent any influence on the consent of the birth parents is set out by Article 4.c (3) of the 1993 Convention. It forbids inducing such consent by compensation of any kind, especially financial. While this rule is in accordance with the position on surrogacy of many countries that allow this practice only on altruistic grounds, it clearly contradicts the commercial surrogacy arrangements that are yet very common. In the context of international surrogacy there is also no room for the subsidiarity principle used in intercountry adoption procedure that requires the authorities first to consider the possibility of the child's placement in the country of origin.<sup>180</sup> The authorities can have no power over the choice of parties to the private agreement, especially to the surrogacy agreement.

Lastly, the adoption process presupposes that all prospective parents must undergo a number of inspections and be proclaimed eligible and suitable to adopt, before they will be allowed to do so.<sup>181</sup> There is serious discussion as to whether any prior checks can be carried out in respect of intended parents.<sup>182</sup> Why should they be checked before conceiving their own biological child and thus be treated differently from any fertile couple in their decision to procreate? How to strike a balance between the intended parents right to respect for private and family life and the future child's welfare? It is for the State to decide. The UK, for example, chose to apply the presumption that favors the commissioning parents' right to procreate; and only after the child has been born in case of any dispute the focus will shift to the best interest of the child.<sup>183</sup> Given the fact that this issue is very controversial in the surrogacy setting it would be not appropriate to apply the 1993 Convention in this part either.

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<sup>180</sup> *Supra* note 174. Article 4 (b).

<sup>181</sup> *Ibid.* Article 17.

<sup>182</sup> Gamble, Natalie. 2012. "Surrogacy: Creating a Sensible National and International Legal Framework." *International Family Law*, September. p. 309.

<sup>183</sup> *Ibid.* p. 310.

The examples provided are only the most obvious reasons for the 1993 Convention being not suitable to solve the difficulties of international surrogacy. However, it does not prevent this document from being one of the sources of inspiration for a new instrument that would address the specific needs of cross-border surrogacy.<sup>184</sup> The drafting process will also certainly need to take into consideration all the ongoing work in this sphere. The attention should be given to the activity of International Commission on Civil Status because of the mandate it holds in the civil status matters.<sup>185</sup> Any regional initiatives of the Council of Europe and European Union will be of great value in the process of creation of a multilateral agreement.

Starting from the 1975 European Convention on the Legal Status of Children Born Out of Wedlock<sup>186</sup> the Council of Europe has been concerned about the legal status of children. In 2010 its Committee of experts in Family Law drafted a Recommendation on the rights and legal status of children and parental responsibilities.<sup>187</sup> This document introduces a set of rules on parenthood that are specific to medically assisted reproduction techniques,<sup>188</sup> but does not envisage surrogacy among them. This document is now under examination of the Committee of Ministers that is considering its adoption.<sup>189</sup> Therefore the present need for regulation of the recognition of legal parenthood is still to be addressed presumably by a separate document.

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<sup>184</sup>See Baker, Hannah. 2011. "A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention?" in Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited. pp. 415-419.

<sup>185</sup> *Supra* note 172. p. 23.

<sup>186</sup> 1975 European Convention on the Legal Status of Children Born Out of Wedlock. CETS No.: 085. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/085.htm> (Accessed November 20, 2013).

<sup>187</sup> Draft Recommendation on the rights and legal status of children and parental responsibilities of the Committee of experts in Family Law of the Council of Europe. CJ-FA-GT3 (2010) 2 rev. 4 (April 2011 version) Available at [http://www.coe.int/t/dghl/standardsetting/family/Meetings\\_drafting\\_committee\\_en.asp](http://www.coe.int/t/dghl/standardsetting/family/Meetings_drafting_committee_en.asp) (Accessed 20 November 2013).

<sup>188</sup> *Ibid.* Article 17.

<sup>189</sup> See "What's new..." at <http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/>.

The EU has long recognized the need to harmonize the conflict of law rules by means of mutual recognition of civil law documents.<sup>190</sup> This principle has already been applied in the EU regulations Brussels I<sup>191</sup> and II bis.<sup>192</sup> Though the latter regulation covers the matters of parental responsibility, it is not applicable to the issues of recognition of parenthood<sup>193</sup> that are of our interest here. The rules on legal parenthood differ so much among the EU Member States<sup>194</sup> as well vary their approaches to surrogacy.<sup>195</sup> Therefore, without at least some level of consensus on these subjects it will be very hard to introduce the principle of mutual recognition to the sphere of cross-border surrogacy. In the same time it should be noted that the aim of such initiative would be mutual recognition of decisions and/or acts establishing parenthood in surrogacy cases and not recognition of surrogacy arrangements (their enforceability).<sup>196</sup> In her research on the topic Professor Velina Todorova rightly stated: “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.”<sup>197</sup>

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<sup>190</sup> Todorova, Velina. 2010. “Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Arrangements: What is the Current Situation in the MS? Need for EU Action?” Policy Department C: Citizens’ Rights and Constitutional Affairs. European Parliament. p. 27.

<sup>191</sup> Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML> (Accessed November 18, 2013).

<sup>192</sup> 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 1374/2000. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> (Accessed November 18, 2013).

<sup>193</sup> *Ibid.* Article 3.

<sup>194</sup> See *Supra* note 190. pp. 16-23.

<sup>195</sup> See *Ibid.* p. 18.

<sup>196</sup> *Ibid.* p. 27.

<sup>197</sup> *Ibid.* p. 29.

The opponents of surrogacy are quite skeptical about the positive effect of its international regulation.<sup>198</sup> They argue that it might have the “unintended consequence of encouraging more international surrogacy arrangements.”<sup>199</sup> However, ignoring this phenomenon is not a response either. Prohibiting it will only worsen the problem and move the practice to the black market.<sup>200</sup> The international community has acknowledged the need for a comprehensive instrument to regulate the difficulties related to cross-border surrogacy. However, there is no unified idea yet as to what this instrument is supposed to be like. First thing to think about is what should be the nature of this document? There can be no doubt that, as any international agreement, the convention on surrogacy must be framed by the principles of international human rights law. The question that arises at this point is whether it will require choosing one of the variety of approaches to surrogacy. If not, do all the approaches followed by different countries accord with the international human rights law?<sup>201</sup> This question especially concerns the two contrasting approaches – permissive and prohibitive.

It is very interesting to see what position the European Court of Human Rights will take when it delivers the decision in *Labassee and others v. France*<sup>202</sup> the case that is pending at the moment. However, it is logical to assume that the Court will not consider if the position of the French legislator is right or wrong, since surrogacy is a very sensitive question that falls within the state’s margin of appreciation that is wider in cases where there is no

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<sup>198</sup> Browne-Barbour, Vanessa S. 2004. "Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?." *Whittier Law Review* 26, p. 429.

<sup>199</sup> Trimmings, Katarina, Beaumont, Paul. 2011. “International Surrogacy Arrangements: an Urgent Need for Legal Regulation at the International Level”. *Journal Of Private International Law*, 7, 3, p. 647.

<sup>200</sup> *Ibid.*

<sup>201</sup> Ergas, Yasmine. “Thinking ‘Through’ Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy” in Trimmings, Katarina and Beaumont, Paul (ed.), 2013. *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited. pp. 430-431.

<sup>202</sup> See *Supra* note 162.

international consensus.<sup>203</sup> It will only look whether the decision of French authorities constituted an interference in the commissioning parents' and their surrogate children's right to respect for private and family life and if so apply its three-stage test<sup>204</sup> to it. However, following the *Cour de cassation's* reasoning when applying the prohibitive regime is not going to have the consequence of leaving the child without legal parents and nationality, but simply defining the child's status according to the certain rules rather than another, it does not contradict the international human rights law.

In any event the convention on surrogacy may not adopt either of the approaches as the only right one. It cannot oblige all of its future states parties to allow surrogacy. It will just introduce a minimum set of standards to apply if they decide to do so. It will also reflect the reality where the need for international surrogacy services is inevitable in the countries where they are prohibited, especially when this need can always be satisfied in more loyal countries. It is impossible to hide the reality even behind the strictest policies; therefore the convention will invite States to cooperate in such environment.

Taking into consideration the fact recognized at the very beginning of this work that international surrogacy seriously implicates the rights of all its participants making them vulnerable in many ways the convention dedicated to this concept must be a human rights treaty. It means that it should not only accord with the existing corpus of human rights law formed by such instruments as International Covenant on Civil and Political Rights,<sup>205</sup> International Covenant on Economic, Social and Cultural Rights,<sup>206</sup> the Convention on

<sup>203</sup> See *A, B and C v. Ireland* [GC], no. 25579/05, § 232-233, ECHR 2010.

<sup>204</sup> When the Court finds that there was interference into one of the rights prescribed in the ECHR, it applies a test checking the three characteristics of the interference: whether it was prescribed by law, followed a legitimate aim and was necessary in a democratic society. See Gomien, Donna. n.d. *Short guide to the European Convention on Human Rights / Donna Gomien*. n.p.: Strassbourg : Council of Europe, 1991. pp. 80-85.

<sup>205</sup> International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976. See Articles 17(1), 23, 24.

<sup>206</sup> International Covenant on Economic, Social and Cultural Rights. Adopted and opened for

Elimination of all Forms of Discrimination Against Women,<sup>207</sup> Convention on the Rights of the Child<sup>208</sup> and its Optional Protocol on the Sale of Children<sup>209</sup>, but also build upon it and introduce further safeguards to protect the parties of surrogacy agreements.<sup>210</sup>

It is important to ensure that the persons involved in the surrogacy process are safe from exploitation and trafficking. This work is not the place to consider the details for it, but it should be noted that within the framework of special convention on surrogacy it could be done only indirectly through the stipulation of rules preventing such violations and the supervision of their observance.<sup>211</sup> The fear of surrogacy's becoming a way to abuse the person's right to procreate, while so many children in the world are waiting for adoption<sup>212</sup> can be and is already addressed in many countries by the requirement of at least one intended parent to have genetic link to a resulting child. It shows that surrogacy is a measure of last resort for the infertile persons to have children genetically related to them; and if genetic link is not at stance the proper way to parent a child is through adoption.<sup>213</sup> This principle should form the basis of the future instrument.

There is no doubt that, as it was offered by many authors, the comprehensive instrument regulating international surrogacy should also be based on a fundamental principle

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signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976. See Articles 12 (1), 15 (1.b).

<sup>207</sup> Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981. See Articles 6, 9 (2), 11 (1.f), 16.

<sup>208</sup> Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

<sup>209</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. Entry into force on 18 January 2002.

<sup>210</sup> *Supra* note 176 at p. 27.

<sup>211</sup> *Supra* note 199 at p. 636.

<sup>212</sup> *Ibid.* p. 641.

<sup>213</sup> *Ibid.*

of the best interests of the child.<sup>214</sup> However, for the reasons mentioned earlier we cannot agree that the best way to implement this principle is “ensuring that the intended parents are suitable”<sup>215</sup> by exposing them to rigorous inspection. The children born through surrogacy are not in any greater danger of abuse than any kid born by both fertile parents. Therefore, all the protective measures should apply to them according to a general rule – after birth. At the earlier stage the reproductive and privacy rights of intended parents should be given a greater weight.<sup>216</sup>

It is important to understand that in the surrogacy setting most problems that actually infringe the child’s rights arise not from the parents being unable to ensure his or her welfare, but from the laws and regulations that often leave the child parentless and stateless. Hence, the best interests of the child will be better protected by developing proper procedures for cooperation of States and recognition of legal effects of surrogacy arrangements. That is why the instrument regulating cross-border surrogacy should combine its human rights value with the functions of judicial and administrative co-operation and serve as a private international law instrument.<sup>217</sup>

One of the ways offered by the Permanent Bureau to achieve this goal is by placing an emphasis on harmonization of private international law in the sphere of recognition of parenthood and including some provisions on co-operation.<sup>218</sup> Ideally it will encompass the unification of rules on the choice of law applicable to the establishment of parenthood (by operation of law, voluntary acknowledgment of by agreement), defining similar rules on the jurisdiction of courts or other bodies entitled to make decisions concerning parenthood and

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<sup>214</sup> See *Ibid.* p. 640; Edward, Michael. “Surrogacy: National Approaches and International Regulation.” Report on the proceedings at the Workshop on National Approaches to Surrogacy, University of Aberdeen between 30 August 2011 and 1 September 2011. Available at: <http://www.familylawweek.co.uk/site.aspx?i=ed87773> (Accessed May 15, 2013).

<sup>215</sup> *Supra* note 199. p. 641.

<sup>216</sup> *Supra* note 182. p. 310.

<sup>217</sup> *Supra* note 176. p. 27.

<sup>218</sup> *Ibid.* p. 28.

creating consistent rules on recognition and enforcement of such decisions.<sup>219</sup> However, this plan will not be easy to implement. Any kind of unification usually needs to be fought through. Bearing in mind the differences in existing approaches it is hard to predict the willingness of states to reach consensus without more comprehensive comparative information. There are also many concerns as to the efficiency of such approach. If consensus on the rules of private international law will be reached, it will most likely include the provisions protecting the states' public order from the contradicting foreign laws or decisions at least in respect of the most controversial issues like the determination of legal maternity for example.<sup>220</sup> This will not eliminate the situations where due to the operation of such clause the foreign (usually more lenient and beneficial for the parties) law cannot be applied and the national legal regulations place the persons involved particularly children into a very undesirable situation of uncertainty over their status.

The Permanent Bureau came up with an alternative approach that focuses on creation of a system of co-operation rather than harmonization of legal rules.<sup>221</sup> In this event the 1993 Convention may be a very useful example, because it was drafted following exactly this formula. The key element is its Article 17, according to which the adoption process may only proceed if the states involved give their prior approval.<sup>222</sup> This requires the states to divide the responsibilities and conduct the exchange of information and allows them to prevent abuses and clashes of laws. It also makes it easier for the persons involved in the process to avoid the possible problems giving them a degree of certainty.

To ensure the execution of these ideas in respect of international surrogacy a special body delegated with the functions of co-operation and supervision needs to be established in each member state involved. The concept of such body can be similar to the Central

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<sup>219</sup> *Supra* note 172. p. 24.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.* pp. 29-30.

<sup>222</sup> *Supra* note 174. Article 17.

Authority suggested by the 1993 Convention. To minimize the resources needed the parties to the 1993 Convention that already have such Central Authorities in place may as well entrust them the implementation of the obligations under the surrogacy convention.<sup>223</sup> Analogously to the 1993 Convention such functions may also be assigned to other public<sup>224</sup> or even accredited private bodies.<sup>225</sup> If this idea is accepted the convention on international surrogacy will also have to set forth the conditions for such accreditation, which preferably still has to be granted by the Central Authority. It will also need to set up an internal system of accountability and co-operation between the Central Authority and other agencies providing surrogacy services within the State.

The division of responsibilities between the authorized bodies of the countries involved in surrogacy should be conducted with respect to the country's role in this process. For example, the country of origin should be concerned with protecting the interests of the surrogate mother and facilitating the child's departure to the receiving country. Consequently, that country the authorities should take care of making sure that the intended parents can resort to the surrogacy services, consult them on all legal issues and consequences of this process and make sure that in the end the child can enter the country with his or her parents and that they will be officially recognized as such.<sup>226</sup> This distribution of functions will streamline the administrative processes and minimize the risk of unrecognized surrogacy agreements.

Another concept that can be adopted from the 1993 Convention is the scheme of recognition of filiation through the use of "certificate of conformity."<sup>227</sup> Such document would verify that surrogacy agreement was concluded in accordance with the Convention. It

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<sup>223</sup> *Supra* note 199. pp. 641-642.

<sup>224</sup> See *Supra* note 174. Articles 8 and 22.

<sup>225</sup> See *Ibid.* Articles 9 and 22.

<sup>226</sup> *Supra* note 199. pp. 641-642.

<sup>227</sup> See *Supra* note 174. Articles 23 and 26.

would mean that the co-operation of the countries involved had taken place and all the shaky questions had been agreed on. Therefore the status of the child could be automatically recognized in the receiving Contracting State without any additional procedures.<sup>228</sup> It would be probably one of the most important initiatives with the greatest significance for the research question of this work. It would preclude the common problem of recognition of legal parenthood in surrogacy agreements and all the immigration and nationality issues that derive from it. Therefore, out of the two offered by the Permanent Bureau approaches we support the option of multilateral regulation through setting up a framework of co-operation, because this approach is more flexible and will provide actual solutions to the existing problems.

Another beneficial side of this approach is that the most problematic and controversial questions can be left for the states to settle them bilaterally<sup>229</sup>, so that they will not hold back the whole drafting process. One of the issues that will be better resolved in this way is the commercial element of surrogacy. It has been shown that the positions of countries on this topic differ a lot starting from a total prohibition and ending with a complete support of commercial surrogacy. Economic aspects of intercountry adoption were probably the hardest issues to agree upon during the negotiations of the 1993 Convention.<sup>230</sup> It cannot be expected that in respect of surrogacy arrangements the consensus over these questions will be easily reached. Therefore it is better to leave the regulation of financial issues to the Member States. It will be easier for them to come to a common denominator in a form of bilateral agreement that allows considering the commercial aspects of surrogacy in more detail.

Together with the questions as to the substance of the multilateral document regard should be given to the proper organization of its drafting process, because the effectiveness of the future instrument directly depend on it. To ensure the future success of the document it is

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<sup>228</sup> Mohapatra, Seema. 2012. "Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy." *Berkeley Journal Of International Law* 30. p. 450.

<sup>229</sup> *Supra* note 199. p. 635.

<sup>230</sup> See *Supra* note 184. p. 418.

essential that the drafting process is most inclusive. The list of states invited to participate should not contain only the ones that are willfully or not engaged in the surrogacy arrangements. It should also invite the interested countries that are not members of the Hague Conference on Private International Law to express their thoughts on the topic. It is not a secret that often states do not accede even to the most important documents just because they did not have the opportunity to take part in their negotiation and have their positions heard. It is still quite promising that the prominent international entities and organizations like the EU and the Council of Europe have expressed their interest in participation in the elaboration of the multilateral instrument on cross-border surrogacy. This will certainly raise the document's credibility and contribute to its success.

Not only it is important that the convention receives a widespread support, it is also essential for the future influence of this document that among the supporting countries there will be some balance of the receiving states and the states of origin.<sup>231</sup> This aspect should not fall out of the attention of the drafters. Their goal should be to make the convention equally attractive and useful for the home and receiving states. Though if this cannot be achieved according to some authors it is better to place the emphasis on the countries that are providers of surrogacy services, because often the problems originate there.<sup>232</sup>

Of course, the drafting process can be quite lengthy itself; and together with the time needed for adoption and ratification of the convention it cannot bring immediate results. Even after its ratification further delay may be caused by the time necessary for the implementation mechanisms to be developed and start working. This was the case with the 1993 Convention. Its preparation started in 1988, the draft was finished only in 1992; and the signing process took another, so the Convention was completed in May 29, 1993.<sup>233</sup>

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<sup>231</sup> *Ibid.* p. 446.

<sup>232</sup> *Supra* note 182. p. 311.

<sup>233</sup> *Supra* note 175.

Nevertheless some commentators question the surrogacy convention's ability to solve the existing problems even when such instrument will be finalized.<sup>234</sup> Their biggest concern is that this document would still regulate only the international surrogacy arrangements between the states that are parties to this convention. It means that any of the earlier described problems may still occur in the states that decide not to become parties to the convention. The situation will represent a real threat to the effectiveness of the multilateral instrument of regulation if some of the most active in the provision of surrogacy services countries end up to be among those states. It may actually be the case with Ukraine, which is currently one of the most common surrogacy destinations. Taking into account the fact that Ukraine still has not signed the 1993 Hague Intercountry Adoption Convention<sup>235</sup> it may as well be reluctant to accede to the proposed convention on international surrogacy. Of course, this would not be desirable, but even this happens the participation of any country involved will still be a valuable step forward to the solution of the problem. Even somewhat limited regulations are still better than none, especially when the practice of international surrogacy is so chaotic as it is at present.

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<sup>234</sup> *Ibid.* p. 569.

<sup>235</sup> See the Status Table of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (last updated on May 21, 2013). Available at: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (Accessed on 25 November, 2013).

## Conclusion

It was shown that in cases of surrogacy the question of parenthood should be interpreted not as a biologically proven fact, but as a social construct based on the considerations of the best interest of the child. Unfortunately, at present the national laws of many countries fail to reflect this statement. It is not a catastrophe when legal regulations lag behind certain scientific and social developments. In fact, it is already an ordinary situation. However, it is essential that law reacts to the need that had emerged timely enough. An especially swift response is needed in cases where such legal lacuna adversely affects the implicated human rights.

The determination of parent-child relationship is one of the major current problems surrounding the cross-border surrogacy arrangements. Its importance is undeniable and is demonstrated by the far-reaching consequences that flow from it. The parentage status is a precondition for determining the child's nationality, immigration rights and the persons responsible for the child's care, etc.<sup>236</sup> The non-regulation of international surrogacy arrangements and the application of national conflict of law rules in this sphere compromises all of these rights of the child as well as the rights of intended parents.

It was demonstrated with concrete examples that national laws may not only serve to resolve problems, but also lead to a bigger confusion, since it is domestic regulations that usually drive the commissioning couples to resort to procreative tourism and complicate their way back. The challenges of recognition of parenthood in surrogacy setting are usually created or contributed to by strict, inflexible regulations or their complete absence. The role of law in those conflicts is primary. Though individual state's action cannot satisfy the need

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<sup>236</sup> Hutchinson, Anne-Marie. 2012. "The Hague Convention on Surrogacy: Should We Agree to Disagree?" *ABA Section of Family Law 2012 Fall CLE Conference Philadelphia*. p. 5.

for a comprehensive solution, it can still be very helpful while the work on development of such solution proceeds. The legislators may amend national laws in order to remedy at least the most typical situations that occur. In any event the harmonization of national rules at the most important points is necessary.

It is obvious that the international instrument for regulation of surrogacy is long awaited. The debates over the most suitable form for it are in full swing. The final report of the Permanent Bureau explaining the pros and cons of the offered approaches and defining the chances of any of those approaches being accepted and what is more important effective is to be published in 2014. From the information available so far and gathered in this research we may conclude that the ideal solution is the development of a multilateral instrument of combined nature, which would include the characteristics of a human rights instrument, mechanism of judicial and administrative co-operation and a private international law instrument. The accent should be made on setting up of a framework of cooperation between home and surrogacy jurisdictions. It is reasonable to believe that this approach would be the most acceptable for the international community at this stage.

The work of the Hague Conference on Private International Law is still at the early stage. It might be a long time before the international treaty on surrogacy appears. Whichever approach will be chosen and put in the basis of the future instrument it is very important that the Permanent Bureau is aware of its shortcomings, possible problematic points of negotiations and challenges inherent to the process of building an international consensus that were covered in this research.

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### **Ukraine**

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