RESOLVED, That the American Bar Association urges the United States Department of State to seek the following in negotiations concerning a possible Hague Convention on private international law concerning children, including international surrogacy arrangements:

a. That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, will be certain; and

b. That any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements; and

c. That a Central Authority model to regulate surrogacy arrangements is not an appropriate model for any collective international approach regarding surrogacy; and

d. That any Convention should recognize the clear distinctions between adoption and surrogacy; and

e. That the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy; and

f. That rather than requiring a genetic link, an intent-based parentage analysis is the most appropriate parentage doctrine for surrogacy; and

g. That human rights abuses are not necessarily inherent in or exclusive to surrogacy arrangement; and, therefore should be addressed separately.
REPORT

Introduction & Summary
Recent advancements in medical technology have enabled the global expansion of assisted reproductive technology ("ART") and third party assisted reproduction for infertile and same-sex couples as well as single individuals. Surrogacy is one of the forms of third-party assisted reproduction. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and that of the resulting child may be uncertain. Situations where “stateless” children were born through International Surrogacy Arrangements (ISAs) have prompted a discussion about whether a Hague Convention on International Surrogacy is needed.

The Hague Conference on Private International Law (HCCH) is engaged in research on this issue. The US Department of State (DOS) has expressed opposition to a new Convention on international surrogacy, and has requested that the ABA provide a professional opinion that reflects the knowledge and expertise of the organization. By adopting this Resolution, the ABA will be providing its expertise and assistance to the US Department of State for its use in negotiations concerning a possible Hague Convention on private international law concerning children, including surrogacy arrangements.

Background
The Council on General Affairs and Policy of the HCCH has published a report finding that it is both desirable and feasible to continue work on the project of exploring options to address the issues that can be seen in, but are not exclusive to, ISAs. The HCCH report provided a summary of the HCCH’s findings from surveys completed by member states, lawyers who practice in the field of ART, and surrogacy agencies. The recommendation of the HCCH is to continue work on the project, but with a broad focus to address the legal status of children no matter the circumstances of their birth. The HCCH has taken the view in its report that the legal challenges that can sometimes occur with ISAs are not exclusive to ISAs, and will only become more frequent in the future with advances in technology and evolution of society. With this view of the key issues in ISAs, the HCCH’s reasoning is in alignment with the core of this Resolution.

A companion report by the HCCH provides a closer analysis of international private law, cooperation, and rules involved with ISAs. Key points from the study include:

The conflicts of law regarding the legal status of children and intending parents involved in ISAs may result in lengthy, complex, financially and emotionally draining processes to get home and establish the child’s legal parentage and nationality.

Whilst a different context from adoption may require a different approach, some basic, minimum standards are required in order to protect children from harm and to comply with basic human rights standards.

The findings from the study are largely consistent with this Resolution on ISAs, and several members of the Sponsors are quoted (unattributed) in both the study and the summary report on the desirability and feasibility of further work.

The ABA Model Act Governing Assisted Reproductive Technology (2008) (“Resolution 107”) was developed, in part, to provide individual states with a framework to address issues with assisted reproduction at a local level. The Sponsors believe that local governance of issues with assisted reproduction is appropriate in order to account for local culture and concerns over this area of law. At the international level, however, the Sponsors believe that it is inappropriate to implement a uniform set of rules governing surrogacy arrangements between private parties which would usurp the local cultures and concerns involved. Adoption of this Resolution would provide further support for self-governance of the surrogacy process within the United States and the principles established by the ABA Model Act Governing Assisted Reproduction Technologies as well as self-governance of the surrogacy process within each country.

**Sponsors’ Position**

While the Sponsors generally supports the notion of an international Convention concerning children, including international surrogacy arrangements, the Sponsors feel that the appropriate focus of such a Convention should be on the conflict of law and comity issues that arise in international surrogacy rather than on regulating the industry itself and individual surrogacy arrangements between private parties.⁵

Any Convention concerning ISAs should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying the existing Hague Convention on Adoption to an inapposite set of legal circumstances. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suitable to address

---

⁵In one of the first published articles addressing the issues that sometimes result from international surrogacy arrangements, Dr. Katarina Trimmings and Prof. Paul Beaumont of the University of Aberdeen School of Law, through a grant by the Nuffield Foundation, have developed a framework for a Hague Convention on International Surrogacy, largely modelled on the Hague Convention on Adoption. The framework proposed by Trimmings and Beaumont calls for national and international regulation of international surrogacy arrangements.
the issues raised by international surrogacy.\(^4\) It would be preferable to have no
Convention at all than to create an instrument that applies an adoption model to
surrogacy. Rather, the Sponsors believe that a collective international comity approach
allowing recognition and registration of parentage judgments issued by foreign countries
should be the cornerstone of any such international instrument.

The following key points are central to this position:

1. **Surrogacy is a form of procreation through the use of assisted reproduction.**
The Sponsors recognize that individuals in all countries procreate naturally without
excessive regulatory interference. Surrogacy is a form of procreation through the use of
assisted reproduction typically involving "a contract between intended parents and a
gestational carrier intended to result in a live birth."\(^5\) The legal position of intended
parents creating their own child through a surrogacy arrangement should be viewed as
distinct from the legal position of adoptive parents seeking to raise someone else’s
existing child as their own.

2. **Surrogacy and adoption are different processes and should not be conflated.**
The Sponsors recognize that surrogacy and adoption are separate and distinct ways for
people to achieve parenthood. Surrogacy is a medical solution to infertility, whether the
infertility is physiological or social (based on relationship status), and is, therefore, a
method of reproduction. Adoption is the transfer of legal responsibility over an existing
child from one party (or the state) to another. Most, if not all societies permit adoption in
some form, while many jurisdictions ban gestational surrogacy in one way or another.
Regulating these two processes in similar fashion is inappropriate.

3. **Different processes ought to be regulated differently.**
The Sponsors are concerned that an approach to regulating surrogacy that is substantially
equivalent to the Hague Convention on Intercountry Adoptions will frustrate and create
barriers to intended parents’ right to reproduce. The state appropriately exercises great
care in the adoption process, as this process concerns an existing citizen child. The state
does not, however, have a role in regulating so-called "natural" reproduction, as this
would be an offence to the right to reproduce. The state concern in the surrogacy process
is to ensure that the rights of the parties involved are upheld, particularly the right of the
child to have a swift determination of parentage. Any regulation of ISAs should be viewed in this context.

---


\(^5\) ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 102 (15) (2008)
4. **Establishing Central Authorities to oversee surrogacy arrangements is opposed.**

The Sponsors are concerned that a model which would establish Central Authorities to regulate ISAs is likely to lead to:

- Increased interference with the ability of intended parents to reproduce;
- Increased risk of discrimination in the surrogacy process;
- Decreased flexibility/freedom to contract for all parties (surrogates and intended parents);
- Increased cost for intended parents;
- Increased delay for intended parents;
- Increased risk that parties will act ‘outside’ the system;
- Decreased transparency and certainty in the process; and
- Increased burdens upon taxpayers

Further, the Sponsors feel that establishing Central Authorities would not significantly increase protection for surrogates or for children. Such protection is more effectively managed on a scale broader than one that is limited to the context of surrogacy arrangements.

5. **Discriminatory screening of potential intended parents should not be allowed.**

It is a matter of concern that, in the adoption process, many countries currently discriminate against intended parents who are single, older, disabled, or homosexual. In the context of surrogacy, the Sponsors support the general principle of screening prospective intended parents for the narrow purpose of suitability to receive assisted reproduction services from service providers. However, the Sponsors are concerned that extensive screening requirements will be used by some countries to deny their citizens the ability to seek to become intended parents because of their sexual orientation, marital status, or other inappropriate characteristics. Again, the Sponsors re-iterate the position that surrogacy is more akin to procreation (where there is no screening of prospective parents) than it is like adoption (where the interests of an existing child need to be considered because the child is being moved from one family, and perhaps country, to another). Therefore, the Sponsors disapprove of the creation of international standards dictating who can - and cannot - access ISAs.

6. **Bilateral treaties to regulate international surrogacy arrangements should be discouraged.**

The Sponsors do not believe that, instead of or in addition to the proposed Convention, countries on a case-by-case basis should enter into bilateral treaties as to commercial surrogacy. The Sponsors are very concerned that this:

- Will lead to a plethora of disparate treaties;
- which will take many years to negotiate;
which will be very hard to dismantle if and when a comprehensive multilateral solution is reached; and
• which will, in turn, unnecessarily complicate matters and severely reduce the legitimate reproductive options currently available.

In sum, the Sponsors are concerned that these treaties may cause further cost, delay, and heartache to intended parents who choose to pursue surrogacy.

7. The HCCH project should focus on encouraging comity and reducing conflicts of laws affecting intended parents and children born through international surrogacy. To the extent that the HCCH may facilitate a new Convention concerning children, including international surrogacy arrangements, the position of the Sponsors is that the most effective role for the HCCH is to assist in developing a framework among participating nations which allows them to navigate the conflict of laws and comity problems that sometimes result from ISAs and, thereby, to avoid the problems of stateless children, conflicting parentage determination processes, and the lack of recognition of those children in the intended parents’ home country.

8. To require a genetic link between intended parent and child in order to become a legal parent will create a barrier to reproductive choice. The journey for intended parents who choose to pursue surrogacy is often the journey of last resort. In general, most intended parents pursuing surrogacy seek a child who is their genetic offspring. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, after many years of IVF, a couple may find that the female partner is unable to carry a baby safely to term. The couple may also find that their own gametes are insufficient to conceive after the many delays associated with this process, leading them to turn to donated genetic material. If there is a requirement that this couple must have a genetic link to their child born through surrogacy, they will be denied the ability to reproduce - even if they use genetic material from siblings or other family members. It is only in the use of a surrogate that this hypothetical differs from the cases where children, born to a woman in the context of a marriage, are deemed to be children of the marriage even when donor gametes are used. As long as the parties involved consent to the use of donor gametes, the law in many jurisdictions has long recognized the legal parentage of the intended parents. This recognition should be maintained even in the case where the child is born via surrogacy.

Further, a requirement for a genetic link to a child born through surrogacy forecloses the possibility of using donated genetic material, including embryos, in the process. Many unused embryos remain stored in cryopreservation; these embryos are an existing source of potential genetic material that could be used in surrogacy arrangements rather than being destroyed.

In taking this position, the Sponsors are in alignment with the position of the 2008 ABA Model Act Governing Assisted Reproduction as well as the position of the American Society of Reproductive Medicine (ASRM), which states that donated embryos are an important option for those who need assistance in the reproductive process. 7

9. **The rights of expatriate intended parents must be respected.**

It is not unusual that intended parents who are non-resident citizens of country A and living in country B engage in surrogacy in country C. These intended parents must navigate a minefield of regulation to ensure that the resulting child can be a citizen of country A (like her parents), and reside in country B (with her parents). The Sponsors feel that a Convention that focuses on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings (which are generally required in surrogacy matters) would serve the needs of all expatriate intended parents as well as intended parents who pursue surrogacy across national borders and of the children resulting from these arrangements.

10. **Any international instrument is unlikely to be successful without the accession of both the United States and India, and international regulation of ISAs does not take into account the differing systems in these two countries.**

The United States and India have the largest surrogacy industries. The Indian industry has grown exponentially in the last few years. The Indian surrogacy industry is now estimated to be worth over $2 billion/year. The concerns raised at the HCCH stem, in part, from unstated concerns about the rise of surrogacy in India and other under-regulated surrogacy destinations, but these concerns also extend to encompass issues of the status of children globally. The issue of under-regulated destination countries is best dealt with not by a Convention that would apply to all countries but by the passage of appropriate laws in those under-regulated countries – laws based on the culture and political system of that country. It is noted that, since 2008, bills to regulate Assisted Reproductive Technology (ART) have, in one form or another, been drafted in India. The various forms of proposed legislation, and the uneven enforcement of existing regulations over the years, have resulted in widespread confusion over the legal aspects of surrogacy in India. Therefore, India and other burgeoning international destinations where intended parents pursue surrogacy should be encouraged to regulate their respective ART industries in a transparent manner so that the current uncertainties may be mitigated. Appropriate laws should allow for the protection of children, surrogates, and intended parents so as to maximize standards and informed consent and minimize exploitation.

By contrast, the United States’ surrogacy industry is regulated at the state level. There is a wide range of approaches to surrogacy in the United States, from prohibitions (including criminalization) to statutorily defined processes for surrogacy. Further, the

---

7Ethics Committee of the American Society for Reproductive Medicine, DEFINING EMBRYO DONATION: A COMMITTEE OPINION, 99 Fertility and Sterility, No. 7, 1846 (June 2013), available at: https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publishations/Ethics_Committee_Reports_and_Statements/Defining%20embryo%20donation2013.pdf
professionals (lawyers, doctors, and others) are subject to standards, ethical guidelines, and codes of conduct. Given the various interests at stake (states and professional groups), accession of the United States to a Convention that would regulate the particulars of surrogacy arrangements seems unlikely.

Therefore, a Convention focused on conflict of laws and comity problems would likely be more successful.

11. Human rights abuses are not necessarily inherent in or exclusive to ISAs, and, therefore, should be addressed separately from ISAs.
The Sponsors understand that concern over human rights abuses is part of the impetus for the focus on ISAs at the HCCH. Exploitation of women, trafficking of women and children, and other abuses are often cited by critics of surrogacy as byproducts of the process. The Sponsors are deeply concerned about human rights abuses.

While it is, unfortunately, true that human rights violations have occurred within the context of surrogacy, violations of human rights do not occur only within the context of surrogacy. Human rights abuses must be addressed on a broad scale internationally and locally; e.g., if a woman is trafficked, the human rights violation must be addressed whether the trafficking is for the purpose of surrogacy, sex, forced labor, or any other reason. Regulation of the surrogacy industry for the purpose of reducing human rights violations has the potential to distract from the greater problems of trafficking and exploitation and to unnecessarily and inappropriately stigmatize surrogacy arrangements (and the children born through them). Moreover, regulation of ISAs themselves could actually exacerbate human rights issues if those wishing to reproduce begin to operate outside of the international regulatory framework in order to avoid the burdens that the process would entail. Therefore, the Sponsors would prefer to address human rights issues on a broader, more holistic scale than to try to solve a subset of problems in the limited context of ISAs.

12. The fundamental rights, interests, and status of children, for both parentage and citizenship, are an important concern in all contexts, including surrogacy.
The Sponsors believe that protecting the interests and status of children is an important driver in this analysis; however, the Sponsors also believe that, in the overall analysis and implementation of surrogacy, it is not appropriate to focus solely on the interests of the children to be born. Before intended parents initiate the surrogacy process, the child does not. At this point in time, the only interest of the child is whether the child will exist or not. The Sponsors believe it is better to allow the intended parents to exercise their reproductive rights (in whatever form they may exist from country to country) while protecting the rights of children through other, already existing, Conventions and protections designed to prevent them from being trafficked or otherwise harmed or abused.

The Sponsors do not believe parents procreating through assisted reproduction should be subject to fundamentally different regulation, governmental authority, or discrimination.
because of their choice of a legal method of procreation. Once a child is born of the surrogacy process, the rights and interests of that child are then equally important, but that child’s best interests will almost universally be served by establishing the child’s legal relationship with the intended parents (who have gone through considerable effort, emotional stress, and expense to have their own child) and recognizing the child as a citizen of the intended parents’ home country. The alternative is to place the child with the state or other parents through the adoption process and, possibly, to leave the child stateless. This is clearly not in any child’s best interest.

Discussion

A. INTRODUCTION

Recent advancements in medical technology have enabled the expansion of third-party assisted reproduction (surrogacy) for infertile and same-sex couples as well as single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and of the resulting child may be uncertain. Situations where “stateless” children were born through international surrogacy arrangements have prompted a discussion about whether some form of international regulation, such as a Hague Convention on International Surrogacy, is needed.

The Council on General Affairs and Policy of the Hague Conference on Private International Law (HCCH) is currently engaged in research to determine how to effectively address the issues posed by International Surrogacy Arrangements (ISAs). Of greatest concern are situations where the legal parentage, nationality, and immigration status of the child born through international surrogacy are unclear due to conflicting national laws governing these matters. Of additional concern is the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of the resulting children and women who act as gestational carriers.

The question, therefore, is how to establish a regulatory framework to help avoid stateless children, child trafficking and the exploitation of women. One approach would be to regulate the international surrogacy industry itself. This industry regulation could take the form of a Convention on Surrogacy that establishes rules specifically for surrogacy arrangements involving participants from more than one country. Another approach would be to regulate the acceptance of parentage documents between states. This approach could potentially be accomplished with existing international agreements or through the implementation of new international agreements that are not necessarily specific to international surrogacy arrangements.

Surrogacy itself may not be the real issue. Rather, the uncertainty with these arrangements is a symptom of a more general problem of irreconcilable family and citizenship laws at the international level. It is important to note that these legal issues may

---

arise in cases that do not involve surrogacy. Thus, international regulation focused solely on surrogacy arrangements may be under-inclusive. Rather than focus on the regulation of the international surrogacy market itself, international agreement on the status of children and on the assignment of parentage and citizenship to them would be more helpful in mitigating the issues in this market.

B. OVERVIEW OF THE MARKET

Before examining potential options for a solution to the problems that sometimes occur in the context of international surrogacy arrangements, it may be helpful to examine the parameters of the international surrogacy market. It is undeniable that the commissioning of children through surrogacy – for money – represents a market. Any solution to problems posed by international surrogacy arrangements must take into consideration the underlying market forces at work in these arrangements.

Although not universally accepted by all countries, the choice to reproduce is perceived as a fundamental human right in some countries, and, without reference to which view a particular country may take on this issue, the desire to reproduce is a powerful force in this market. Modern gestational surrogacy can be seen as a legitimate fertility treatment option for the infertile who wish to reproduce. There are many ways in which people can choose to reproduce, including surrogacy. While surrogacy is often conflated with adoption, the markets for the two are distinct. People who choose to pursue surrogacy do not always do so as an alternative to adoption.

Surrogacy has existed in various forms throughout history. When fertility treatment advanced to separate the component parts of conception and gestation, market forces drove the growth of international surrogacy. The international surrogacy market exists for two reasons: barriers to domestic surrogacy or other assisted reproductive options (evidenced by the pursuit of surrogacy in the US by European and other international intended parents), and cost savings (evidenced by the growth of surrogacy in lower cost nations). The overall value of the market is unknown, but a report in 2010 estimated that the value of the surrogacy industry in India alone would reach $2.3

---

10 "Market" and related terms are used here deliberately, despite the risk that discussing surrogacy in market terms may conjure up images of human commodification, a frequent criticism of modern surrogacy arrangements. This discussion addresses the market forces that react to regulation, and therefore relies on market terms for clarity.
13 We can trace certain practices of surrogacy back into biblical times. Genesis 16 and 30 both tell stories of women bearing children for others.
billion by 2012.\textsuperscript{16} In order to maximize profits, international surrogacy brokers will operate in the countries with the lowest regulatory restrictions.\textsuperscript{17} Price is not everything in this market, however, as the intended parents will have their own personal criteria for deciding in which country to pursue surrogacy.\textsuperscript{18}

Comparisons between the surrogacy market and the adoption market are frequent, but adoption and surrogacy are not "so similar that analysis of one can suggest solutions for the other" as suggested by one scholar.\textsuperscript{19} Nor are adoption and surrogacy interchangeable substitutes for all prospective parents – persons seeking parenthood do not always move smoothly and seamlessly between the two options.\textsuperscript{20} Adoption affords the adoptive parents the legal right to "parent" someone else's child over whom they would otherwise not possess legal authority; surrogacy affords the intended parents their sole opportunity to "reproduce," thereby creating their own child using, in the vast majority of cases, at least some of their own genetic material. "Parenting" and "reproducing" are two distinct and inherently different processes. Some intended parents will accept solutions to their infertility through either option, but many will be firmly committed to only one or the other. The similarity between surrogacy and adoption rests solely in the fact that a woman other than one of the intended parents gestates the child. Any similarity quickly ends there.

Adoption is a process to transfer parental rights and responsibilities over a living child from one or more parties to another party or parties. In adoption, the state responsibility toward the existing child is paramount, particularly where the child is in state custody.

Surrogacy, on the other hand, is a therapeutic option for the infertile, specifically those for whom being pregnant is physically impossible or medically contra-indicated. Surrogacy is a reproductive process where a child is created directly as a result of the actions of the intended parents. Of course, modern surrogacy\textsuperscript{21} is achieved through medical intervention.

It is also important to remember that adoption is a generally accepted mechanism to deal with the issue of raising children who (for any number of reasons) have no legal


\textsuperscript{18} As an example, there remains a strong domestic market for surrogacy in the US despite the potential cost savings for intended parents to pursue surrogacy internationally. Potential explanations for this include the desire of intended parents to participate more fully in the process, and the desire of intended parents to avoid legal complexity and mitigate legal risk. In addition, some intended parents may choose a higher-cost market for surrogacy over a lower-cost market in order to mitigate the very ethical and human rights concerns cited by the HCCH.


\textsuperscript{21} Specifically, gestational surrogacy, where the woman who gives birth to the child has no genetic connection to the child.
or de facto parents, while commercial surrogacy remains a sometimes controversial process that is permitted in certain jurisdictions and banned - or rising to the level of a criminal offense - in others.\footnote{Compare: Family Code, CA STAT, Div 12, Part 7, §§ 7960-7962 (2012) (allowing surrogacy) and EMBRYONENSCHUTZGESETZ (ESchG) (The Embryo Protection Act), Dec 13, 1990, Federal Law Gazette, Part I, No. 69, issued in Bonn, 19th December 1990, page 2746 (Ger.) (with criminal penalties for creating a surrogate pregnancy).}

Certainly, adoption and surrogacy may be seen as alternate processes to achieve parenthood. However, surrogacy may be pursued as a logical extension of fertility treatment that may start when a heterosexual couple fails to conceive “naturally”. Beyond achieving parenthood, surrogacy achieves reproduction. Likewise, those unable to conceive without assisted reproduction (such as a same-sex couple or a single individual) may have no realistic choice but to pursue surrogacy (including reproduction for one or both of the partners) in order to have children. For the simple reason, therefore, that prospective parents have certain barriers and choices in how to achieve parenthood, the surrogacy market and the adoption markets must be seen as separate, but overlapping, ones.

Market-based mechanisms have allowed international surrogacy to operate efficiently, with the result that this reproductive option can often happen as quickly and as cost effectively as humanly possible. For intended parents who have often waited many years to fulfill the lifelong dream of having children, the availability of surrogacy as a choice is extremely beneficial. It is not unusual for there to be extraordinary delays in being able to adopt a child internationally. In addition to the delays in meeting the eligibility processes set out by adoption authorities (including the Central Authority in the adoptive parents’ country), once approved to adopt from the overseas country, delays of three to five years are not uncommon, and those delays are increasing.\footnote{Australian Institute of Health and Welfare, ADOPTIONS AUSTRALIA 2010-2011, p.5; accessed at www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420773 (last accessed on 17 July 2012).} In Australia, for example, delays have been described as “glacial” and have been up to 8 years from beginning to end.\footnote{Malcolm Farr, Deborra-Lee Furness' calls for adoption help that ministers never returned, NEWS.COM.AU, (November 09, 2011 4:14AM), http://www.news.com.au/national-news/deborra-lee-furness-calls-for-adoption-help-that-ministers-never-returned/comments-e6frkw9-1226190335342.} If an adoption-based model of regulation were extended to international surrogacy, the effect on the right of the intended parents to reproduce would be disastrous. Consider the case of a married couple where the woman has just had a hysterectomy. This couple may choose to pursue surrogacy in order to have a child, but will need to move quickly in order to use the woman's eggs in the process. A lengthy application and vetting process could prevent the couple from having a child who is genetically related to both of them.

Market forces are central to the consideration of international regulatory schemes for international surrogacy arrangements. With the concomitant shift to lower-cost areas, the market, while price-sensitive, is not completely elastic. The desire to reproduce and the timing issues inherent in human reproduction are powerful influences in the decision-making of the intended parents. Significant barriers to international surrogacy arrangements will, by necessity, force some market participants to other means of achieving parenthood - means which carry, perhaps, more risk and less legitimacy. If we
lose sight of these market forces that underlie international surrogacy, attempts to regulate this market may lead to unwanted consequences that defeat the purposes of regulation and shift the issues elsewhere.

C. IS SURROGACY THE REAL ISSUE?

The real issue with surrogacy arrangements, and with ART in general, is that they challenge societal notions of identity and of the family structure in relation to the public and private spheres. This challenge creates the false notion that ISAs themselves are the problem, rather than the inconsistent manner in which nations assign parentage and nationality. When the problems are viewed as inherent to ISA, inappropriate conclusions about how to mitigate the negative effects of the market may result.

There are conflicting views and opinions of the efficacy of the application of an adoption model to the complex issues that surrogacy raises, and some scholars have suggested that ISAs should be regulated like international adoptions. The Sponsors do not share this perspective, and the purpose of this paper is to offer another, more applicable and appropriate alternative viewpoint and recommendation.

The Sponsors agree that “highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the questions of legal parenthood and of the nationality of the child.” There are many examples of international surrogacy arrangements that have resulted in “stateless” children. These situations are the result of the conflicting legal regimes for determining parentage and citizenship - these are not situations where the intended parents and the surrogate contest the parentage of the child. Avoiding these situations is crucial to the overall status of children globally.

It is essential to understand that the problems of “stateless” children are essentially disputes between States, not between private citizens. The real problem is that there are potentially conflicting legal regimes for determining parentage and citizenship among the nations involved in an international surrogacy arrangement. These are not typically situations where the intended parents and the surrogate contest the parentage of the child. Rather, the children are deemed “stateless” precisely when, pursuant to their cooperative and intact agreement with the gestational carrier, the intended parents attempt to take the children back to their country of residence. The direct conflict between the

---

26 Dr. Katarina Trimmings and Professor Paul Beaumont were awarded a grant of more than £112,000 by the Nuffield Foundation in July 2010. The purpose of the grant was to study private international law aspects of international surrogacy arrangements, ways to regulate the international surrogacy market, and to prepare a document that could help shape a future Convention on international surrogacy. Their article favors an adoption model based largely on the 1993 Hague Intercountry Adoption Convention. See University of Aberdeen School of Law, INTERNATIONAL SURROGACY ARRANGEMENTS: AN URGENT NEED FOR A LEGAL REGULATION AT THE INTERNATIONAL LEVEL, accessed at http://www.abdn.ac.uk/law/surrogacy/ (last accessed 17 July 2012).
28 E.g., X & Y (Foreign Surrogacy) [2008] EWHC 3030 (U.K.) where twin children were delivered by a Ukrainian gestational surrogate for British intended parents, and both states denied citizenship to the children while claiming that the children were citizens of the other state.)
private contract between the parties and the national laws of their respective home countries creates the issue of "statelessness."

The question is whether an international regulatory scheme specific to surrogacy will sufficiently address such problems. "Even if all means of artificial reproduction were outlawed..., courts will still be called upon to decide who the lawful parents really are and who...is obligated to provide maintenance and support for the child. These cases will not go away." ISAs bring issues with conflicting national laws to the fore; regulation of international surrogacy as a proxy for addressing these conflict of law issues could lead to an exacerbation of the problems it seeks to solve.

In fact, the legal complexity surrounding international surrogacy arrangements may actually be helpful in the absence of a broader regulatory scheme. Because of the legal pitfalls involved, the intended parents who pursue international surrogacy arrangements must do so with extreme care and planning. The daunting complexities and potentially disastrous pitfalls serve as a deterrent to intended parents and as an incentive for legal practitioners to exercise a high degree of caution in these arrangements. In contrast, those intended parents who choose to pursue international surrogacy without regard to the legal complexities will also likely not be dissuaded by a new Convention. This is a fundamental challenge facing regulation of international surrogacy: some individuals will pursue international surrogacy without regard to law or Convention. Surrogacy-specific regulation will, therefore, be ineffective in resolving the difficult problems posed by these cases.

It is not that there is no existing regulation for international surrogacy; rather, the issue is that each state manages the legal infrastructure underpinning these arrangements differently. It is precisely this legal infrastructure that structures the arrangements. The problem is that the legal infrastructure in one country may not be compatible with that in another country. What is needed, therefore, is a framework of cooperation to resolve issues as they arise from incompatible laws. In fact, the notable cases where the legal complexities were improperly navigated forced nations to work together to solve the problems created by the conflicts of law.

The danger with a comprehensive regulatory scheme focused on ISAs is that it will be too restrictive, pushing legitimate participants out of the market and into the 'grey' or 'black' market. An example of the effect of over-regulation can be seen in

32 For example, the recent case where Germany and India disagreed about the citizenship status of twins born to an Indian surrogate for intended parents resident in Germany was only resolved when the countries granted exceptions to the children. A summary of the conclusion can be found at: http://articles.economictimes.indiatimes.com/2010-05-27/news/27577615_1_surrogate-twins-german-couple-inter-country-adoption (last accessed 29 July 2013).
Italy. The heavy regulation of ART, including surrogacy, has contributed to the growth of international solutions for Italian citizens.\textsuperscript{34} Faced with laws prohibiting domestic surrogacy, Italian intended parents must avail themselves of surrogacy in the international market if they choose to pursue this reproductive option. Similarly, if a new Convention were to be too restrictive, some intended parents in Convention nations might choose to pursue surrogacy in non-Convention nations or in less legitimate markets.

It has been suggested that an international regulatory scheme would “promote the exchange of information...reduce ‘limping’ or unrecognized surrogacy arrangements...[and] help to combat trafficking in women and children.”\textsuperscript{35} While the exchange of information would undoubtedly improve, the other two effects are not so certain. Specifically, increased regulation will result in the exclusion of people from the market. Some of these people will seek surrogacy outside of the regulatory scheme—in the ‘grey’ and ‘black’ markets. As regulation pushes people out of the market, the risk of trafficking and exploitation in the grey and black markets may actually increase.

D. CONSIDERATION OF VARIOUS REGULATORY Misperceptions

To the extent that efforts continue to define an international regulatory scheme that is focused on ISAs, the adoption framework warrants closer examination. This discussion is necessary because the key points of such a model are ideas that appear regularly in the discussion of ways to regulate the international surrogacy market.

Numerous recommendations for a regulatory scheme regarding ISAs have been made. One describes a flexible framework in which countries maintain an open dialogue regarding issues surrounding international surrogacy. This approach would leave a great deal of autonomy to individual countries to apply the framework within the context of their own laws or to negotiate bilateral agreements with other countries. This is a sensible starting point, given that every country will have its own body of law, particularly family law, where any changes would have far-reaching effects throughout their societies. Great care must be taken to respect the public policies of every country participating in such a regulatory scheme. The most important aspects of this legislative approach are the underlying recognition that international surrogacy arrangements exist and that nations need to cooperate when conflicts of law surrounding these arrangements arise.

However, two major flaws can be seen in recommendations for a regulatory scheme. First, any focus on regulating the international surrogacy market itself is misguided. The legal issues that arise in ISAs are, in reality, conflict of law and comity problems that can arise in non-surrogacy contexts and are, therefore, more effectively addressed within a broader context than that of surrogacy.

Second, to the extent that international surrogacy is to be regulated, using international adoption as a template leads to inappropriate proposals for regulatory solutions. Ultimately, if such regulation were implemented, the indirect abuses that are feared (such as human trafficking and exploitation) may, instead be exacerbated. As a


\textsuperscript{35} Trimmings and Beaumont, at 636.
starting point, some look to the regulatory scheme in the 1993 Hague Intercountry Adoption Convention. This foundation for a surrogacy convention misconceives the market and reinforces unhelpful biases against international surrogacy. Any Convention on International Surrogacy should be developed with an eye to navigating the conflict of laws and comity problems in ISAs.

1. The 1993 Hague Intercountry Adoption Convention is an inappropriate model for a surrogacy convention.

The HCCH has already recognized that the 1993 Hague Intercountry Adoption Convention (Adoption Convention) is not appropriate as a model for a convention on international surrogacy. Nevertheless, some still suggest the Adoption Convention can be a template for a convention on surrogacy. This suggestion is based on two key elements of the Adoption Convention: its perceived political success and flexible approach.

However, underlying any proposal that the Adoption Convention be used as a template for a surrogacy convention is the mistaken idea that adoption and surrogacy are more alike than not. Even though many recognize that there are fundamental differences between surrogacy and adoption, they nevertheless conflate the two.

Even some proponents of the application of the Adoption Convention recognize the existence and the effect of surrogacy arrangements and recommend that nations uphold the enforceability of surrogacy arrangements even if the arrangements are not made pursuant to the local law. Agreement among nations to recognize the citizenship and parentage decisions made by other nations pursuant to the principle of comity would go a long way to solving the majority of issues with international surrogacy in particular and ART in general. This is, however, perhaps the most politically sensitive recommendation; it implicates the internal law and sovereignty of nations in terms of their determination of who is a citizen and how families are structured in relation to the society. In fact, the questions of local family and immigration law are the controlling factors at the very core of the issues we see in ISAs.

2. A framework based on the Adoption Convention would lead to the consideration of several provisions that are inappropriate in the context of surrogacy.

Important principles in adoption contexts are overly exclusionary as central principles for surrogacy. These include “best interests of the child”, a mandatory genetic connection between the child born of international surrogacy and one or more of the intended parents, and an evaluation of the “parental fitness” of the intended parents, among others.

37 Trimmings and Beaumont, at 645.
38 Trimmings and Beaumont, at 640.
(a) The "Best Interests" doctrine is not the best doctrine for surrogacy

The "best interests of the child" doctrine is inadequate to deal with the complexities of surrogacy, particularly in the international context. In surrogacy, parentage determinations can sometimes be made before the birth of the child. However, the "best interests" doctrine was developed to address the needs of a child who has already been born. Before a child is born, there is limited (or no) basis from his or her experience to attribute a "best interest," and a best-interests analysis could simply become a pre-determination of whether the child's best interests is in being born at all. This is a philosophical and existential conundrum that courts will not entertain. Consequently, a court will, out of necessity, need to determine "best interests" based on the characteristics of all of the parties involved — raising issues of socio-economic status, class, race, and culture along the way. Ultimately, the "best interests" doctrine is unnecessary when all parties agree on the expectations for parentage and citizenship of the child in advance.

In the case of Baby M, a contested surrogacy, the best interests of the child was presumably the basis on which custody was determined.\(^{39}\) However, the "best interests" evaluation of Baby M took into account the father's economic status and the actions of the surrogate during the custody proceedings.\(^{40}\) Ultimately, the analysis has little to do with the infant's "best interests" and more to do with the societal conceptions of the parents' fitness. In the international context, the question of "best interests" becomes even more complicated, as it inevitably will weigh the relative wealth of the parties involved, the ethnic background of the child, and the various societies in which the parties live. The analysis could quickly become fraught with cross-cultural judgment.

Furthermore, referencing the child's best interests would simply bring legal uncertainty into the otherwise certain and reliable establishment of parentage and citizenship intended cooperatively by all the parties involved. Given the fact that in virtually all but a very few, exceptional, and extremely rare cases, the parties involved remain in complete accord — the surrogate and her spouse, if any, do NOT want custody of or parental rights to the resulting child while the intended parents DO want to be the child's legal parents for all purposes — it simply cannot be successfully argued that analyzing the child's best interests and, potentially, forcing the unwilling surrogate to accept custody of or rights to the child is in the child's best interests.

Finally, we know that the best interests of any infant— even one not yet born— require certainty of parentage from the moment of birth, as well as not being left stateless. This principle was expressed as a right of identity for the child in the *Mennesson v. France* decision from the European Court of Human Rights in 2014.\(^{41}\) Thus, any consideration of the best interests of a child born via surrogacy must come at this issue from the viewpoint of granting the child legal certainty on these two issues from the moment of birth (if not before).

---


\(^{40}\) *Id.*, 1257-1259.

\(^{41}\) *Mennesson v. France*, European Court of Human Rights 65192/11, 26 June 2014, paragraphs 96-101.
(b) Genetic Link

A proposal for a mandatory biological connection between the intended parents and children born through surrogacy comes from the misguided conflation of the adoption and surrogacy markets. It is an attempt to address the problems seen in one market (adoption) with a manipulation of the regulatory scheme in another market (surrogacy). Such a proposal is overbroad, and leads to undesirable conclusions about the regulation of both markets. It also flies in the face of the parties' intent since the intent of the intended parent(s) and the surrogate remains the same even if the embryo formed for transfer and gestation does not contain the genetic material of either of the intended parents.

This requirement, proposed by some, 42 that any child born through surrogacy must be genetically related to at least one of the intended parents is inappropriate and violative of the privacy of intended parents. On a practical level, a mandatory genetic link means that some intended parents will be denied the dream of parenthood. It is current practice that intended parents generally seek a child who is their genetic offspring. However, the journey for intended parents seeking surrogacy is often the journey of last resort. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, a married couple may try fertility treatment and IVF for several years with no success. Upon further medical evaluation, they may find that the woman is unable to carry a child safely to term, and that the man's sperm is not of sufficient quality to conceive. By this time, the woman may have reached an age where her eggs are also not of sufficient quality to conceive. This couple will need to rely on a surrogate, an egg donor and a sperm donor to be able to achieve their dream of becoming parents. Another couple may discover that they both are carriers of a gene for a condition that would be incompatible with the ability of any genetic child of theirs to survive. Another couple who cannot use their own gametes to conceive may turn to their respective siblings for genetic material in order to maintain a family connection. To require a direct genetic link between these hypothetical intended parents and their children born through surrogacy would deny these individuals the fundamental right to reproduce and would interfere with their private medical decisions. 43 Situations where only one donor is needed could result in intended parents having an unequal position with regard to their rights toward the child if a genetic link is required. In addition, this requirement, by precluding the use of donor embryos in international surrogacy arrangements, eliminates a viable use of this valuable resource by willing individuals and encourages the destruction of such stored embryos.

(c) Evaluation of parental fitness

If the Adoption Convention is referenced as a model for regulating ISAs, it would be logical to have each state be responsible for the evaluation of intended parents' fitness to create a child. 44 This is again a conflation of the issues of adoption (transferring legal

---

42 Trimmings and Beaumont, at 641.
43 Although this paper focuses primarily on the reproductive rights of the parties involved, ART implicates privacy rights with regards to the medical treatment. The choice of how to source the gametes or embryos involved in the process should be left to the intended parents, and their relationship to the child born through the process should not be determined by this choice.
44 Trimmings and Beaumont, at 642.
responsibility over another person’s child after birth) and surrogacy (establishing legal authority over one’s own child from the moment of birth). More importantly, it will serve to inappropriately restrict intended parents’ ability to reproduce. “Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.”

If we are to judge the parental fitness of those who would create a child through surrogacy, then there is no logical distinction to be made between judging the parental fitness of those who would pursue parenthood through any ART method. From there, it is not a difficult logical leap to require an evaluation of parental fitness for any parent who would create a child through any means – including “natural” coital reproduction.

Supporters of the parental fitness requirement often raise the specter of individuals creating a child through surrogacy for the express purpose of exploiting the child in some way, seemingly ignoring the reality that children born through a coital reproduction process are exploited with alarming regularity today. It is no more likely that someone will create a child through surrogacy for the express purpose of exploitation than via any other means. In fact, it seems less likely; if one is engaged in commodification of children to such an extreme, there are far more cost-effective ways of procuring them.

It is most disconcerting that an evaluation of parental fitness may be used as an excuse by countries to deny same sex couples or single intended parents the ability to reproduce through surrogacy. It may also be used as an invasive process of investigating a couple’s sex life, finances, criminal history, and medical status. A notorious example of an assessment of intended adoptive parents being deemed ‘unsuitable’ to adopt were actor Hugh Jackman and his wife Deborra-Lee Furness, who, following enormous difficulties in seeking to adopt in their home state of New South Wales, gave up and instead adopted their children in the United States.

A more productive recommendation would be some form of social counseling for the intended parents focused on how they will explain the child’s origins to him or her. In addition, a discussion of the various risks and outcomes that may be encountered throughout the process is important. Through this introspective exercise, the intended parents can determine if international surrogacy is the best option for them, or if another process to achieve parenthood is more appropriate for their circumstance. Rather than being an invasive and restrictive determination of their fitness to reproduce, this would be an appropriate analysis of the intended parents’ understanding of, and suitability for, participating in surrogacy.

Available at: http://www2.ohchr.org/english/law/pdf/progress.pdf.


"Habitual residence" as determinative factor

It is tempting to argue that the concept of "habitual residence" should be applied uniformly across member nations. This proposition makes conceptual sense, and it applies beyond issues of surrogacy. Likewise, the provision that the child be presumed a citizen of the nation of the intended parents' habitual residence could help resolve the citizenship and immigration issues that arise. However, there are often practical difficulties when the intended parents are citizens of one country, but resident in another, and they undertake surrogacy in a third. For these intended parents and their child, sorting out the residency and nationality issues cannot be easily solved by relying on a simple "habitual residence" construct. In order to determine the nationality and residency status of a child born through surrogacy, a more effective (and efficient) means would be to indulge in a legal fiction that a surrogate is not involved in the birth of the child; a legal fiction that the child was born to one of the intended parents. With this approach, nationality and residency are determined as simply as they are for a "natural" born child. The legal fiction approach would be consistent with the heart of the arrangement: that the intended parents are in fact the parents of the child. It would also be consistent with the intent of the parties and, ultimately, the interest of the child in not being stateless.

Administrative oversight

Another proposal is that nations create a regulatory agency to approve international surrogacy arrangements (and, presumably domestic ones, as well) and to monitor compliance. While this solution may work for some nations, others may prefer to rely on alternate institutions for regulation. For instance, medical standards of care and professional ethics for lawyers are critical elements of surrogacy arrangements, and regulation of these can be effectively achieved without a specific governmental agency. These non-governmental institutions form part of the "market infrastructure" that regulates surrogacy arrangements today. Thus, nations should be able to choose how they structure the regulation in their society.

Central regulatory agencies specific to surrogacy would add unnecessary cost to the system. A new layer of administration could burden taxpayers and participants in the market. Further, such a layer of administration focused on ISAs risks being redundant and incomplete. Additional administrative oversight would run the risk of changing a relatively rapid process (surrogacy) to one of a glacial pace, with attendant increased costs and frustration for the intended parents. There is also the risk that by creating a new bureaucracy, the new bureaucracy becomes self-justifying and imposes unnecessary requirements that unduly burden the process. Governmental intervention of this sort in "natural" reproduction is offensive to modern notions of autonomy, privacy, and the freedom to reproduce; likewise, governmental intervention into individual reproductive choices must be very carefully considered. To the extent that the majority of the problems encountered by international surrogacy are really issues with existing legal and social structures, a central authority that seeks to resolve these issues only in the context

---

48 Trimmings and Beaumont, at 639.
49 Trimmings and Beaumont, at 641.
of surrogacy misses the mark. Worse, overregulation could exacerbate the risks of exploitation. As the cost of the process increases, some market participants will seek less costly (and perhaps less legally sound) alternatives to parenthood.

(f) Licensing requirement

It is proposed by some that all surrogacy arrangements not made with licensed agencies be outlawed. While understandable at first blush, this proposal may be overbroad. Is there to be a license to practice international surrogacy? Alternatively, will state permission to practice law or medicine suffice? If an agency is required, does this add to the already prohibitive cost of the surrogacy process? What if the participants piece together the necessary elements of a surrogacy program with an overseas relative without the intervention of services of an agency? This last hypothetical raises an important point: regardless of the form of any international instrument, surrogacy will continue outside the boundaries of the "market." The individuals - and children - in the non-market arrangements deserve just as much protection as those in the market. Licensing of participating agencies is a sound idea, but requiring the use of a licensed agency limits freedom of choice and flexibility of the process.

Currently, participants in the international surrogacy market take enormous risk if they do not work with a competent practitioner. The inherent uncertainty in the current market gives people pause before they enter the market. In this sense, the complexity of the market is self-regulating, giving participants a strong incentive to act with caution and care. Using a competent broker is part of the calculation of the intended parents; those who choose not to work with one do so at their own peril.

This proposal also raises an important issue for any regulatory framework: the consequences of regulatory violations. If a subset of surrogacy arrangements is outlawed, then the expectation when such arrangements occur is that the parties involved will be punished, including the intended parents. A logical punishment for intended parents would be removal of the child. Short of removal of the child, fines or criminal sentences could be imagined for the intended parents. Whatever penalty is applied, it would ultimately serve to punish the people that the regulation purports to protect: the children born of surrogacy, as they will suffer for the punishment and the disruption to their family.

In addition, the requirement that all economic activity must pass through licensed agencies necessarily limits the availability of surrogacy agency services. In turn, supply of these services would be restricted, resulting in upward pressure on price. Such a result would increase risk of exploitation of the intended parents and surrogates alike as individuals move to the grey or black markets to seek lower costs and less oversight.

(g) Compensation for the gestational carrier and gamete donors

Compensation for the gestational carrier is important, as it allows the market to function by balancing the rights of the carrier with the responsibilities of the intended parent(s). However, caps on compensation may increase the possibility of exploitation. "Debate centers around two distinct issues: commercialization, or the fact that a surrogate is paid for her services, and exploitation, which is the idea that surrogates are

51 Trimmings and Beaumont, at 643.
paid too little for their services.\textsuperscript{52} ISAs heighten the concern of exploitation, as a main factor behind the existence of the international surrogacy market is price. On the one hand, lower costs for surrogacy arrangements give more people access to this reproductive option. On the other hand, higher compensation for gestational services may be seen as potential coercion for women in underdeveloped countries to become surrogates. Achieving a balance is a challenge, one best left to local regulatory expertise and market factors.

When approaching compensation for surrogates, many commentators assert that a maximum limit to compensation should be part of the regulation in order to avoid coercion.\textsuperscript{53} The idea that overly coercive amounts of money will be offered to women in underdeveloped countries may be somewhat exaggerated. The market for international surrogacy is highly price-sensitive.\textsuperscript{54} The surrogacy market has expanded to lower-cost areas precisely because those areas are lower-cost. As prices rise in a particular geographic market, the attractiveness of that market diminishes.

For gamete donors, the concerns may similarly be overstated. In the US, the egg donation market is rife with myths of eggs regularly sold for six-figure amounts. The reality is that the vast majority of egg donors in the US receive between five and ten thousand dollars per donation, conforming to the ASRM standards for egg donor compensation.\textsuperscript{55} Here, again, the concerns of coercive exploitation of women through excessive sums of money are exaggerated.

Rather than income-based caps for compensation, a flexible approach to compensation is more appropriate. Nations and localities should be able to monitor and manage the delicate balance between market demand and market exploitation without conforming to a global formula, as the management of this balance will be based on each society’s notion of fairness in this market. Nevertheless, care should be taken to avoid additional pressure for intended parents to move from the legitimate market to a less desirable means of achieving parenthood.

\textit{(h) Access to Birth Records by Children Born Through Surrogacy}

There are also varying views as to the access of a child via surrogacy to his or her birth records.\textsuperscript{56} While international law may highly value a child’s rights to know his or her origins, especially within the adoption model, the applicability of this concept to children born of gestational surrogacy is uniquely problematic, particularly when donor gametes are not involved. Varying legal conceptions of the privacy of the family and medical information may warrant greater flexibility on this point. Ideally, each individual should have a clear view of his or her origins. However, children of “natural” birth are afforded no such guarantee, as parents are not obligated to disclose to their children any irregularities with their conception. Children born through surrogacy may

\textsuperscript{53} Trimmings and Beaumont, at 644.
\textsuperscript{54} Deborah L. Spar, \textit{THE BABY BUSINESS}, 30 (Harvard Business School Press, 2006) (“In this market, therefore, price acts harshly as a constraint on demand.”).
\textsuperscript{55} American Society for Reproductive Medicine, \textit{FINANCIAL COMPENSATION OF OOCYTE DONORS}, 88 Fertility and Sterility, No. 2, 305(Aug. 2007).
\textsuperscript{56} Trimmings and Beaumont, at 646.
likewise need to rely on the disclosures or approvals of their parents for complete information, just as are children born through fertility treatment (including use of donor gametes) without surrogacy.

E. INTENT-BASED PARENTAGE ANALYSIS SHOULD BE APPLIED TO SURROGACY

Some jurisdictions use an intent-based approach to parentage, relying on the concept that "but for" the actions of the intended parents, the child born through surrogacy would not exist.\textsuperscript{57} This theory is certainly not universally accepted. Nevertheless, intent plays a significant role in the expectations that each party in a surrogacy arrangement has from the outset of the process and is typically expressed in any contractual instruments involved. Even without reducing surrogacy to the contractual sphere, however, the examination of the intention of all of the parties can be helpful in the analysis of legal issues that arise. The doctrine of intent offers a sound legal basis for recognizing those whose actions brought about the child as the legal parents of the child born through surrogacy.\textsuperscript{58}

As further support for considering the doctrine of intent, the Adoption Convention does state, "the policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless."\textsuperscript{59} When applied to surrogacy, the logical result is the determination of citizenship for the child based on the country of citizenship or habitual residence that all parties intended for the child. This is certainly in the best interests of the child and mirrors the intent-based parentage model.

Finally, it is important to remember the distinction between adoption and surrogacy when considering the doctrine of intent. Surrogacy is a process through which a child is conceived, gestated, and born based on the intended parents' desire to procreate. The collective intent of both the parent(s) and the surrogate is established and documented in advance of any medical procedure or actual gestation. The actions of the intended parents exclusively set this process in motion. If the intended parents never chose to reproduce, the surrogate would never get pregnant, and the child born through surrogacy would not exist. Thus, the doctrine of intent can be useful to navigate issues that arise in the process.

F. CONCLUSION

Regulation of ISAs as a proxy for other issues in the international private law sphere will have unintended consequences. It will almost certainly drive some people out of the market and into less desirable means of achieving parenthood. Further, regulation of the narrow issue of surrogacy will not address the structural challenges with international parentage decisions generally.

\textsuperscript{57} Johnson v. Calvert, 5 Cal. 4th 84, 93 (1993).
\textsuperscript{58} Charles P. Kindregan, Jr. and Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, (A.B.A., 2\textsuperscript{nd} ed., 2012).
\textsuperscript{59} Trimmings and Beaumont, at 646.
If we fear coercion and exploitation in the international surrogacy market, then each nation should consider developing an approach to protect all parties who participate in such arrangements. The definitions of ‘coercion’ and ‘exploitation’ vary from society to society; therefore, at the international level, a framework of cooperation to resolve conflicts of these society-dependent notions of coercion, exploitation, family, and citizenship may suffice to resolve the tensions in this market.

In reality, surrogacy is not the issue: the conflicts of family and immigration law are. In the end, the practical problems with ISAs are grounded in conflicts of laws and comity issues surrounding parentage, family structure, nationality, and immigration. Accordingly, any Convention should be limited to a framework for open dialogue between nations about the reconciliation of these conflicts, particularly when the issues are not contested by the parties involved.

While the Sponsors support the notion of an international Convention on private international law concerning children, including international surrogacy arrangements, the Sponsors recommend that conflict of laws and comity (i.e., cross-border recognition of parentage judgments) should be the cornerstone of any such collective international approach.

A Convention of this type should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying legal frameworks created for adoptions, such as the existing Hague Convention on Adoption, to surrogacy arrangements. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suited to address the issues raised by international surrogacy. The Sponsors’ position is that the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

The Sponsors strongly urge that any Convention allows individual member countries to regulate surrogacy as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements.

Most importantly, the Sponsors’ position is that rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.

Respectfully submitted,

Greg Ortiz, Chair
ABA Section of Family Law
February 2016
GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law
Submitted By: Greg Ortiz, Chair, ABA Section of Family Law

1. Summary of Resolution(s). Rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.

2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on November 9, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA Model Act Governing Assisted Reproduction Technologies was unanimously ratified by the ABA House of Delegates in 2008. Resolution 107, adopted by the House of Delegates in February 2008, established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship in the United States.

The Sponsors believe that local governance of issues with assisted reproduction is appropriate in order to account for local culture and concerns over this area of law. At the international level, however, the Sponsors believe that it is inappropriate to implement a uniform set of rules governing surrogacy arrangements between private parties which would usurp the local cultures and concerns involved. Adoption of this Resolution would provide further support for self-governance within the United States and the principles established by the ABA Model Act Governing Assisted Reproduction Technologies.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but some urgency exists in that this is a very time-sensitive matter for the United States Department of State, which has requested the ABA to weigh in on the possibility of an international Convention and what it should or should not address. It is urgent that the ABA formulate a response as quickly as possible now that the Hague Conference has already begun convening its experts group for the formulation of policy proposals in 2016.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Submission to the United States Department of State for adoption.

8. Cost to the Association. (Both direct and indirect costs). None.


10. Referrals. The Section of Family Law circulated the substantive draft documents in 2013 and 2014 to the following entities, who were also invited to take part in a Working Group session on May 9, 2015: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division. A second Working Group session was held on August 2, 2015, and the following entities were invited to participate: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division; Solo, Small Firm & General Practice Law; Tort Trial & Insurance Practice Law. The Section of Health Law has provided substantive comments, resulting in revisions to the underlying documents which are the subject of this Resolution. The Section of Science and Technology and the Section of Real Property, Trusts and Estates have also provided substantive input and have actively participated in the drafting of the documents which are the subject of this Resolution.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

   Anita M. Ventrelli, Esq.
   Schiller, DuCanto & Fleck LLP
   200 N. LaSalle Street, 30th Floor
   Chicago, IL 60601-1019
   312-609-5506
   AVentrelli@sdflaw.com

   Marshall J. Wolf, Esq.
   Wolf & Akers
   2200 One Cleveland Center
   1375 E. 9th Street
   Cleveland, OH 44114-1739
   216-623-9999
   MW@wolfakers.com
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Anita M. Ventrelli, Esq.
Schiller, DuCanto & Fleck LLP
200 N. LaSalle Street, 30th Floor
Chicago, IL  60601-1019
312-609-5506
AVentrelli@sdflaw.com

Marshall J. Wolf, Esq.
Wolf & Akers
2200 One Cleveland Center
1375 E. 9th Street
Cleveland, OH  44114-1739
216-623-9999
MW@wolfakers.com

Richard B. Vaughn, Esq.
International Fertility Law Group Inc.
5757 Wilshire Blvd., Suite 645
Los Angeles, CA 90036
323-904-4728
Rich@IFLG.net
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges the United States Department of State to seek, in negotiations concerning a possible Hague Convention on private international law concerning children, including international surrogacy arrangements, the following:

a. That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, will be certain; and

b. That any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements,

c. That any such Convention recognizes the clear distinctions between adoption and surrogacy and that The Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

2. Summary of the Issue that the Resolution Addresses

Recent advancements in medical technology have enabled the global expansion of third-party assisted reproduction (surrogacy) for both infertile couples and single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and that of the resulting children may be uncertain. Situations where “stateless” children were born through international surrogacy arrangements have prompted discussion about whether a Hague Convention on private international law concerning children, including international surrogacy arrangements is needed. Of additional concern are the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of women.

The United States Department of State has requested the ABA to weigh in on the possibility of an international Convention and what it should or should not address, and the Sponsors have prepared a position paper (the Report) on these issues. Additionally, it is the Sponsors’ view that international regulation of surrogacy arrangements could lead to other problems that will complicate the issues rather than resolve them.
3. **Please Explain How the Proposed Policy Position will address the issue**

While the Sponsors support the notion of an international Convention on private international law concerning children, including international surrogacy arrangements, conflict of laws and comity (i.e., cross-border recognition of parentage judgments) should be the cornerstone of any such collective international approach as opposed to regulation of the surrogacy industry itself. A Convention of this type should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying legal frameworks created for adoptions, such as the existing Hague Convention on Adoption, to surrogacy arrangements. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suited to address the issues raised by international surrogacy. The Sponsors’ position is that the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

The Sponsors strongly urge that any Convention allows individual member countries to regulate surrogacy as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements.

Most importantly, the Sponsors’ position is that rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.

4. **Summary of Minority Views**

At the time of the writing of this Resolution with Report and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.