I. Introduction

Recently, it has been brought to the attention of various members of The Hague Conference and its staff that problems have occurred in establishing parentage and citizenship of children born through international, cross-border surrogacy arrangements. It was decided in response to these discussions that The Hague would appoint certain individuals to gather information and begin the process of possibly developing and proposing a new convention to govern international surrogacy arrangements.

The problems presented by cross-border surrogacy programs generally revolve around establishment of parentage and citizenship of the resulting children when they return to their parents’ home country. Countries that have adopted an express political policy rejecting surrogacy (i.e. – France, Germany, and others) are increasingly refusing to allow the parents to register their children as full citizens of their native country. Some, like Norway and the U.K., insist that the surrogate who gave birth to the child is the child’s legal mother (and, often, her husband the father) without taking any notice of or giving effect to express court orders to the contrary in the country where the surrogacy occurred that effectively terminate those rights. This creates parentage, citizenship, residence, and social benefit issues that adversely impact the child and the child’s family when they return home.

Even if countries have not officially passed regulations banning surrogacy, unexpected citizenship and immigration outcomes derive from the genetic composition and place of birth of the children resulting from cross-border surrogacy. Children born in the Ukraine and India, for example, are not, pursuant to the laws in those countries, Ukrainian or Indian citizens and cannot obtain passports from those countries. If the resulting children do not have the necessary genetic relationship to the intended parents to establish nationality in the parents’ home country, this prevents the intended citizenship of and travel to the home country of the child. Such cases are becoming increasingly common.

A simple solution to some of the problems and issues cited above, particularly with regard to surrogacy programs completed in the U.S., is for the countries-of-origin of the intended parents to give full force and effect to the U.S. court orders and judgments establishing the parentage of the intended parents and terminating the parental rights of the surrogate (and her husband, if any). This would be done under the principle of international comity.¹

¹ “Comity” is defined as “a willingness to grant a privilege, not as a matter of right, but one of deference and good will.” Black’s Law Dictionary 267 (6th ed. 1990). Under principles of international comity, courts of one country or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Hilton v. Guyot is a landmark United States Supreme Court opinion, which based recognition of foreign judgments on “the comity of nations” and formally established the rules of international comity and
Unfortunately, there seems to be resistance to this solution based, most notably, on the substantially varying political views and policies regarding surrogacy as a morally acceptable and permissible family-building option from country to country. Refusal to recognize foreign court orders and judgments may, in part, be rooted in the home country’s effort to enforce its internal policy on surrogacy outside its borders by refusing to recognize the court orders and judgments from more permissive countries and denying establishment of the intended parentage, nationality, and citizenship of the resulting children. This effectively has a chilling effect on the home country’s citizens’ desire to participate in surrogacy in another country where it is, indeed, permitted. Unfortunately, this ongoing common refusal to readily and efficiently establish parentage and citizenship in international surrogacy cases is certainly not rooted in deference to the best interests of the resulting children since those interests are not served at all under the current international system, or lack thereof.


The Tenth Amendment to the United States Constitution states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Under this provision and the concept of “state sovereignty” that it creates, the power to establish and regulate parentage has always been historically a state, not a federal, function. Thus, there is no federal statute or regulation of which I am aware that affects surrogacy and the parentage of the resulting children. It is up to each state individually to determine whether and how its respective laws will treat surrogacy arrangements and the parentage of the resulting children.

The social and legal reaction to and perception of surrogacy in the U.S. has evolved significantly over the last thirty years. In the early 1980s, there was no established law of any kind in the U.S. that governed surrogacy, and in vitro fertilization (IVF) was a new medical procedure that was relatively unreliable. Therefore, the vast majority of surrogacy arrangements during this time were traditional surrogacies, meaning that the surrogate was artificially inseminated with the sperm of the intended father (or sperm donor) and then gestated and subsequently delivered to the intended parent(s) a child that
was her own genetic offspring. This was an unprecedented and ethically uncertain concept for many, and public attention across the U.S. was irresistibly focused on the issue when the first dispute over custody between a surrogate and the intended parents was litigated and decided in New Jersey in *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (N.J. 1988).

The New Jersey Supreme Court in *Baby M* publicly wrestled for the first time with the social ramifications of surrogacy as a new family-building procedure, the dearth of any previous legal context for determining parentage in surrogacies, and the inadequacy of existing law to resolve the ethical quandary of intent versus genetic relationship in determining such parentage. The court’s dilemma was highly publicized and sensationalized by every newspaper and in every state in the U.S. Ultimately, the court in *Baby M* decided that existing parentage law could not be used to deprive a genetically-related birth mother of parental rights to her child without her consent. In the five years following *Baby M*, there was clear legislative response to surrogacy as it was presented in that case. Approximately ten states passed prohibitive or restrictive legislation regarding surrogacy, most of which did not distinguish between traditional surrogacy and gestational surrogacy.3

While various state legislatures were passing this restrictive legislation, surrogacy evolved with the advent of more reliable and successful IVF procedures. By the early 1990s, the majority of surrogacies were gestational surrogacies. This eased the ethical dilemma for many, and surrogacy became more common and socially accepted. In 1993, the California Supreme Court decided *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (cert. denied 510 U.S. 874, 114 S.Ct. 206, 126 L.Ed.2d 163) (Cal. 1993), adopted the first phase of California’s intent analysis (stating that the person(s) who initiate a surrogate pregnancy with the intent of becoming the resulting child’s legal parents are entitled to become the child’s legal parents as against the rights of the gestational mother and the genetic contributors), and judicially ratified the enforceability of gestational surrogacy arrangements in California. In 1998, the California courts extended the intent test in *Buzzanca v. Buzzanca*, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (Cal. Ct. App. 1998), and thereafter approximately ten other states passed permissive or facilitative legislation regarding surrogacy. The tide has turned, and the strong trend in U.S. state surrogacy legislation is now to permit and effectively regulate surrogacy, not prohibit it.

State law concerning surrogacy varies widely and generally falls into one of three categories. The first category includes states whose legislatures have been proactive in passing specific legislation, whether permissive or prohibitory, that specifically applies to and/or governs surrogacy. (See statutes of Texas.4) The second category includes states

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3Surrogacy via *in vitro* fertilization in which the egg of the intended mother or an egg donor is fertilized outside the womb in a petri dish with the surrogate gestating the resulting embryo so that the surrogate delivers a child of whom she is not the genetic mother.

4Vernon’s Texas Code Annotated, Family Code, § 160.750, et seq.
that have no statutes that apply to surrogacy but whose appellate courts have affirmatively decided contested and litigated surrogacy cases to create case law precedent that applies to and/or governs surrogacy. (See statutes and case law of California.\(^5\)) The third category includes those states that have neither statutes nor case law that applies to and/or governs surrogacy. (See statutes of Minnesota.\(^6\)) In states that fall into this last category, surrogacy rises or falls on the application of and options available under existing parentage, termination of parental rights, and adoption law as it existed before surrogacy became a viable family-building option. The preexisting law of parentage, termination of parental rights, and adoption are applied to create the parental relationships originally intended by the parties to a surrogacy arrangement.

In all states that fall into each of these three categories (including those with prohibitory legislation), surrogacy is being successfully carried on and concluded with the blessing of the relevant courts of law in uncontested cases in which parentage orders can be entered with the cooperation and approval of all the parties. This is the case in virtually all surrogacies in the U.S.\(^7\) Even in New York and Michigan, where compensated surrogacy is criminalized, there are existing court orders affirming the parentage of intended parents under existing law as long as the parties are all in agreement. (See Arredondo v. Nodelman, 622 N.Y.S.2d 181 (1994).)

III. Effect of Court-ordered Parentage in Surrogacy Proceedings.

A. What is different among the various states?

The primary difference among the states is the procedure with which parentage is finally established following the birth of a child under a surrogacy agreement. As discussed above, there are numerous states that allow surrogacy by statute and establish clear procedures as to how parentage of the child is established. Examples are: Texas and Utah, which have adopted the surrogacy provisions of the Uniform Parentage Act of 2000, as amended in 2002, and which require court preapproval of a written surrogacy agreement in order to establish the intended parent(s)' legal parentage and notification to the court following the child's birth to amend the birth certificate; Virginia, in which a similar procedure is used under the Uniform Status of Children of Assisted Conception


\(^6\)Minnesota Statutes Annotated Chapter 257.

\(^7\) Based on an anecdotal study of surrogacies as referenced in 2002, of an estimated 14,000-16,000 reported surrogate births through that date, only 88 had resulted in any dispute between the surrogate and the intended parents, most of which never reached the courts. Debra Morgenstern Katz, ‘Why More and More Infertile Women Are Turning to Others to Bear Their Babies’ (December/January 2002) Parenting Magazine 88. Of those 88, only 23 were surrogates who threatened to keep the baby (usually to leverage some contractual benefit to themselves, not because they really wanted the child), and 65 were parents who did not want the resulting children (because of divorce, bankruptcy, health condition, number, etc.). If true, this evidences an uncontested success rate of greater than 99.5%. The cases that are contested in court get the most publicity, but they are definitely in the very vast minority. This conforms to my professional experience, as well.
Act (1988); Florida, in which a similar procedure is used under Florida’s independent surrogacy laws; and Illinois, in which parentage is automatically administratively established without court involvement prior to birth by attorney “letters of compliance” with all of the provisions of the governing surrogacy law.

There are other states in which parentage following surrogacy is established pursuant to appellate law developed by decisions in litigated court cases. Examples are: Massachusetts, in which pre-birth establishment of parentage in surrogacies has been formally ratified by its Supreme Court in Culliton v. Beth Israel Deaconess Medical Center, 435 Mass. 285 (2001), and Hodas v. Morin, 442 Mass. 544 (2004); California, in which pre-birth orders are also permitted in surrogacies pursuant to Johnson v. Calvert, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (cert. denied 510 U.S. 874, 114 S.Ct. 206, 126 L.Ed.2d 163) (Cal. 1993), and Buzzanca v. Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (Cal. Ct. App. 1998); and Ohio, in which intended parents may establish parentage post-birth pursuant to Belsito v. Clark, 644 N.E.2d 760 (1994), and J.F. v. D.B., 879 N.E.2d 740 (2007).

Finally, there are some states with statutes that expressly limit or prohibit surrogacy and a much larger majority of states with no legislation or case law that either affirm or prohibit surrogacy. In states like Michigan and New York, where surrogacy is purportedly illegal, as previously stated above, there are still numerous examples of cases in which the courts have signed and entered court orders establishing the intended parentage of children born to surrogate mothers pursuant to written surrogacy agreements. (See Arredondo v. Nodelman, 622 N.Y.S.2d 181 (1994).) In the larger majority of states with no statutes or case law regarding surrogacy, parentage is established according to pre-existing statutes regarding paternity, maternity, termination of parental rights, and adoption.

In both of the immediately foregoing categories of states, surrogacy can still be accomplished; however, the exact nature and procedure of the parentage proceedings varies depending on the genetic make-up of the child in gestation and the specific laws of each state. If the child is the genetic product of both of two opposite-sex intended parents (intended mother’s egg, intended father’s sperm) who both want parental rights, a simple paternity/maternity establishment proceeding may be all that is necessary to establish parentage based on genetic relationship alone. This results in a single judgment for paternity/maternity and a birth certificate with both intended parents’ names on it.

If there is a sperm or egg donor with only one genetic intended legal parent (male or female), then a paternity or maternity proceeding to establish the genetic parent’s parentage is followed by a termination of the parental rights of the surrogate (and/or egg donor, if known). This results in a judgment for paternity (usually) followed by a judgment terminating the surrogate’s parental rights and a birth certificate with just the single intended genetic parent’s name on it.

If there is a sperm or egg donor with only one genetic intended parent and a second non-genetically-related intended parent (whether opposite sex or same sex partners), both of whom desire legal parental rights, the genetic parent’s paternity (or maternity) is
established through a paternity or maternity proceeding and, only in those states in which a simple parentage order establishing the parentage of both intended parents is unavailable, a second-parent adoption may be performed to create the legal relationship with the second, non-genetically-related intended parent. This results in a judgment for paternity or maternity that may also be followed by a judgment for adoption and a birth certificate with both intended parents’ names on it.

Thus, depending on the law of each particular state and the manner in which it addresses (or doesn’t address) surrogacy, surrogacy may still be accomplished, but the procedure in each such state will vary.

B. What is the same among the various states?

What is identical from state to state is that, once a court does approve and ratify the intended parentage in a surrogacy matter, the intended parent(s) obtain a judgment of the court that confirms their parentage and establishes their right(s) to be named on the child’s birth certificate. It does not matter whether the state in which such a judgment is obtained is one with positive law supporting surrogacy, negative law restricting or prohibiting surrogacy, or no law. If, under the circumstances of the particular case, a court has considered the parties’ request for a parentage order and determined that it is in the child’s best interests that the intended parent(s) received legal parentage, a judgment is entered, and it is enforceable against all necessary parties who received notice of and participated in the proceeding. This is true in any state in the U.S. for all purposes once the judgment becomes final.

Essentially, a judgment becomes final when it is no longer appealable. If a judgment is rendered in a federal court (which would not be the case in a surrogacy proceeding since they are governed by state law), a party who disagrees with or contests the judgment must appeal it within thirty (30) days of the date the judgment was entered. Federal Rule of Appellate Procedure 4 (2010). This period of time may vary for judgments entered in state courts. In Minnesota, the time to effect an appeal from a judgment is sixty (60) days from the date the judgment was entered. Minnesota Rule of Appellate Procedure 104 (2010). This period of time will generally be between thirty (30) and sixty (60) days in virtually every state. If the judgment is not appealed, it becomes final for all purposes subject to very narrow provisions that grant relief on other, specified grounds.

In cases in which all parties agree and mutually consent in adequate court pleadings and/or testimony to the entry of judgment (as in virtually all surrogacy proceedings), it would be virtually impossible to successfully appeal or overturn such a judgment. This is the reason that all U.S. courts of which I am personally aware ignore this theoretical appeal period and allow the amendment of the relevant birth certificates, obtain of passports, and departure from the U.S. to foreign jurisdictions in the case of all international intended parents before the appeal period has actually expired. The U.S. courts seem to accept the practical reality that all such surrogacy parentage determinations are final and effective as against all parties for all purposes in spite of the appeal period. The fact that virtually all surrogacy parentage determinations in the U.S.
are stipulated to with the collective consent of all parties makes them essentially impervious to any such appeal. This appeal period should not be the basis for any delay in recognizing the intended parents as the child’s parents immediately upon their return to their home country.

If a judgment is not timely appealed and becomes final, a party can only seek additional relief from the judgment for a few very narrow reasons. If a party alleges that there has been fraud, mistake, newly discovered evidence that was not previously available, or certain other limited grounds, the party may make a motion asking for relief from the judgment. Such a motion must be made within a “reasonable time” and no later, in most cases, than one (1) year after the date the judgment was entered. (See Federal Rule of Civil Procedure 60 (2010) and Minnesota Rule of Civil Procedure 60 (2010).) To my knowledge, this ground for appealing a surrogacy judgment has never been asserted in the U.S., and I do not expect it to be relevant to any past, current, or future surrogacy parentage determinations in the U.S.

It is important to emphasize that a judgment is only effective against necessary parties who receive notice of and participate in the proceeding. In a surrogacy case, this would obviously include the surrogate, her spouse, if any, and the intended parent(s). These parties always appear in surrogacy parentage cases either by actual appearance or signed pleadings.

However, such cases often involve either sperm or egg donors. If that is the case, the donors also have presumptive parental rights my virtue of their genetic relationship to the child under virtually all state parentage statutes that can only be terminated by judicial order, and, at least according to the courts in Ohio, they are entitled to notice of and participation in the parentage proceedings. (See Dantzig v. Biron, 2008 WL 187532 (Ohio App. 4 Dist. 2008) (Appeal denied.) and Rice v. O.Flynn, 2005 W.L. 2140576 (Ohio App. 9 Dist. 2005), each stating that an egg donor (originally anonymous in those cases) is “necessary party” entitled to notice of and participation in legal proceedings to determine the parentage of a resulting child through surrogacy.)

The practical problem in surrogacy parentage proceedings in the U.S. is that the vast majority of them that involve donors involve anonymous donors. By definition and express agreement, such donors cannot be identified and cannot be given notice of or participate in the parentage court proceedings. As a result, most such donors are never aware of the parentage proceedings, and the effectiveness of the de facto “termination” of their legal rights usually relies solely on their continuing anonymity. I do not have any reason to believe that this insulating anonymity will be changed, voluntarily by the parties or legislatively by the federal or state governments, any time in the near future.

On the other hand, if a donor is known, then the donor can be given notice of the parentage proceeding at the conclusion of the surrogacy and make an appearance by
signing the pleadings and requesting the termination of any presumptive legal parentage he or she may retain by virtue of his or her genetic link to the child. As to donors who are so joined, the termination of their parental rights also becomes final once the judgment becomes final.

Therefore, subject to the foregoing discussion, an intended parent will obtain a judgment evidencing his or her parentage of the child following a surrogate birth whether that judgment is for parentage, termination of parental rights, or second-parent adoption. The same judgment will issue in any state where parentage proceedings are initiated. Once an intended parent obtains such a judgment, that judgment will generally become final, subject to only rare and limited exceptions not usually present in surrogacy cases, within a period from thirty (30) to sixty (60) days following the date on which it is entered. It would be a very rare occasion on which a judgment entered based on the mutual consent of all parties as in a surrogacy proceeding ever be appealed, and it is highly unlikely that any such appeal would succeed. The judgment will become final to the same degree in all cases whether the surrogate appeared personally at a court hearing or appeared only through her signed consents or other pleadings.

Once the judgment becomes final, it goes without saying that all of the surrogate’s actual or presumptive parental rights disappear, and the surrogate no longer has any legal standing or basis to claim any legal relationship to or authority over the resulting child. The surrogate has absolutely no further legal rights to exert any control over the child or the child’s subsequent parentage. As a result, it is unnecessary to have the surrogate appear in any subsequent step/second-parent adoption or other proceeding, and her legal consent thereto is no longer necessary. Asking the surrogate for any consent after such a judgment in order to establish legal parentage in either the U.S. or in the child’s home country would be contrary to logic and the established legal relationships at that point in time.

C. Why are such state judgments effective in all U.S. states?

My basis for stating that a judgment of parentage/termination of parental rights/adoption in any U.S. state is effective in all U.S. states lies in the Full Faith and Credit Clause. The Full Faith and Credit Clause — Article IV, Section 1, of the U.S. Constitution — provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The statute that implements the clause, 28 U.S.C.A. § 1738, further specifies that "a state's preclusion rules should control matters originally litigated in that state." The Full Faith and Credit Clause insures that judicial decisions rendered by the courts in one state are recognized and honored in every other state.

In drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states. The Supreme Court reiterated the Framers’ intent when it held that the Full Faith and Credit Clause precluded any further
The litigation of a question previously decided by an Illinois court in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935). The Court held that by including the clause in the Constitution, the Framers intended to make the states "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

The Full Faith and Credit Clause is invoked primarily to enforce judgments. When a valid judgment is rendered by a court that has jurisdiction over the parties, and the parties receive proper notice of the action and a reasonable opportunity to be heard, the Full Faith and Credit Clause requires that the judgment receive the same effect in other states as in the state where it is entered. A party who obtains a judgment in one state may petition the court in another state to enforce the judgment. When this is done, the parties do not re-litigate the issues, and the court in the second state is obliged to fully recognize and honor the judgment of the first court in determining the enforceability of the judgment and the procedure for its execution.

This principle has even recently been invoked to establish the recognition of a pre-birth order establishing parentage in a surrogate birth in California (a state which formally recognizes surrogacy via appellate court authority) for the intended parents who reside in New York (a state which criminalizes compensated surrogacy arrangements). (See *D.P. v. T.R.*, F-04079-10.)

**D. What is the U.S. Department of State’s position regarding the adoptions often required in surrogacy matters?**

As chair of the American Bar Association (ABA) Family Law Section Assisted Reproductive Technology (ART) Committee, I have had numerous occasions to speak with representatives of the U.S. State Department. The representatives to whom I have spoken have attended a number of our ART committee meetings. This individual is the person who had general responsibility of evaluating and addressing all ART-related parentage and citizenship issues for U.S. citizens. She is also the person to whom other countries direct inquiries regarding whether adoptions in ART-related matters such as surrogacy are subject to The Hague Adoption Convention.

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8 Brady Klein Weissman won a significant ruling in a full faith and credit case last month. In *D.P. v. T.R.*, F-04079-10 (2010), a New York State court upheld a California pre-birth order and judgment of paternity for twins conceived through gestational surrogacy. The court ruled that the U.S. Constitution's full faith and credit clause trumps New York's public policy barring surrogacy. In fact, the court stated that both federal and state law hold that a state's policy is not a valid basis to deny full faith and credit to another state's properly adjudicated judgment. In the case at hand, a gay couple had twins through gestational surrogacy in California, and obtained a pre-birth order of dual paternity in 2001. In 2010, the couple became involved in a child support proceeding where one of the men sought to escape support obligations by challenging the validity of the California parentage ruling in light of the New York state anti-surrogacy policy. As noted by attorney Steven J. Weissman, "This decision gives a good deal of surety, especially to the non-biological father, that his parentage cannot later be challenged because of New York's public policy against surrogacy."
I have spoken to this representative in detail about these issues. According to the representative, to date, she has responded to all international inquiries as to whether U.S. second-parent adoptions in surrogacy matters are subject to the Hague Convention by replying that such adoptions effected in the U.S. are not subject to the Hague Convention. As a result, whether any particular surrogacy parentage proceeding requires a second-parent adoption has no effect on the fact that, once the U.S. court judgment becomes final, the U.S. State Department policy to date is that no additional action is necessary in any other home country to finalize the parentage of the resulting child. The child is, for all purposes in all U.S. states, fully and finally the child of the intended parents as declared by any U.S. state court in such a proceeding.

E. What is the citizenship status of children born in the U.S. to parents of other home countries?

The 14th Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Since the children born as the result of surrogate arrangements between U.S. resident surrogates and intended parents from countries outside the U.S. are eventually born in the U.S., each of them is a citizen of the United States without further legal action under the 14th Amendment. Each such child is entitled to a U.S. passport. The issuance of such passports and the child’s citizenship status and are in keeping with applicable U.S. federal immigration and constitutional law.

In addition, such children are subject to the citizenship rules of the countries of their parents’ origin. Thus, whether each such “home country” recognizes the citizenship of the children of surrogacy depends on each such country’s individual rules and, very likely, upon the genetic relationship of the child to a current citizen of that country. Nevertheless, assuming the genetic relationship of at least one intended parent to the resulting child and the home country’s recognition of the U.S. judgments rendered in surrogacy parentage proceedings under the concept of international comity, intended parents should be able to easily return home with their children and establish their children’s citizenship with no further legal proceedings to establish their parentage or legal relationship. This will, however, depend directly on the public policy of the home country regarding surrogacy in general.

Respectfully submitted by,

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