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SELLING A MIRACLE? SURROGACY THROUGH INTERNATIONAL BORDERS: EXPLORATION OF UKRAINIAN SURROGACY

Shany Noy Kirshner*

INTRODUCTION: HOPE BECOMING A REALITY IN UKRAINE

When two children have play dates, they almost always play “house.” The game commences with a mock wedding. The pint-sized pair dress up in bridal attire and walk down the aisle to say, “I do,” in front of their dolls who serve as witnesses. The game continues with the introduction of imaginary babies. The children pretend to be parents who tend to their teddy bear offspring. This coming of age role-play, involving marriage and child bearing, confirms the notion that, in our culture, it is every young child’s dream to get married and have children of their own.

However, for many those dreams often come to a complete halt. Countless couples in their twenties, thirties, and forties have a desire to start a traditional family. However, many are unable to bear children of their own for various reasons. In recent years, many families have turned to surrogacy because it helps them to form families “when desire and intent are impeded by nature.” This influx in surrogacy can be attributed to a majority of factors, including a decrease in the number of babies available for adoption, an increase in the number of women discovering that they are infertile, and thus unable to bear children, and men learning they cannot produce sperm or have a low sperm count, and couples desiring to have a genetic link to their children. Additionally, the amount of couples engaging in surrogacy is growing because the “do-it-yourself sperm donation” has declined due to both

* Candidate for J.D., Hofstra University School of Law, 2015. I dedicate this Note to my family, who have always provided me with endless support and inspiration. A special thanks to my husband Gabriel and daughter Ava, who have patiently endured my absence throughout both this process and my law school career. Thank you to my parents for helping watch our daughter Ava and always making my dreams come true. I would also like to extend my gratitude to Professor DiFonzo for his guidance in writing this Note. A special thank you is given to the Journal of International Business and Law, especially Christina Coombe and Nicole SanPhillipo, for all their help in preparing this Note for publication.

1 See Michael E. Eisenberg, Comment, What’s Mine is Mine and What’s Yours is Mine – Examining Inheritance Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law, 3 BARRY L. REV. 127, 127 (2002) (explaining that, yearly, there are millions of couples that find out that they are incapable of producing children).


4 Kevin Yamamoto & Shelby A.D. Moore, A Trust Analysis of a Gestational Carrier’s Rights to Abortion, 70 FORDHAM L. REV. 93, 100 (2001) (stating that infertility affects approximately 10% of women in the United States and is expected to dramatically increase over the next 25 years).

the prevalence of AIDS and child-support payments. Therefore, since the “traditional” method of conception is unavailable for many couples, an innovative, popular method of reproductive technology, surrogacy, is becoming a worldwide phenomenon.

A surrogate mother is a woman who carries a child pursuant to an arrangement [contract] made prior to her pregnancy. She carries the child with the sole intention of giving said child to another person, or persons. Therefore, at birth, the surrogate mother relinquishes all rights to the child. For many surrogates, this practice has become a necessary means of income.

Several international options are available for Americans seeking surrogacy. Due to the ample options available, surrogacy often leads to “rampant forum shopping by couples seeking the best surrogacy prices and conditions.” Couples consider other countries for surrogacy because each jurisdiction has its own, unique, legal approach, resulting in either simplifying or complicating surrogacy making it either easier or harder for couples to use surrogacy as a means to expand their family.

This Note presents a comparison of Ukrainian and American surrogacy. Ukraine is being utilized as a comparison in order to illustrate the need for an International Consensus.

Today, the international surrogacy market is both widely discoverable and accessible due to the Internet. For example, if you simply search the term “Ukraine surrogacy agencies” dozens of websites regarding such resources are readily available. Recently, the use of the

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7 See Laura A. Brill, ‘When Will the Law Catch Up with Technology? Jaycee B v Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy,’ 39 CATH. L. 241, 241 (1999); see also in Re X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030, [26], [2009] Fam. 71, http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html (cautioning that “as babies become less available for adoption … more and more couples are likely to be tempted to follow the applicants path to commercial surrogacy in those places where it is lawful”).
8 See Brill, supra note 7.
13 See Ryznar, supra note 11, at 1016.
15 See Reich & Swink, supra note 10, at 242-43.
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Internet has drastically increased. In June 2012, there were approximately 2,405,518, 376 Internet users opposed to approximately 1,966,514,816 Internet users in June 2010. Notably, around eighty percent of said users were adults seeking health information. Further, majority of said inquiries regarded reproductive health. As such, the Internet may be partly responsible, at least to a degree, in the recent influx in surrogacy.

While, two types of surrogacy exist, this Note will primarily focus on gestational surrogacy within the Ukraine, a country where surrogacy is regularly spoken about and is “no longer taboo.” Due to both Ukraine’s relaxed attitude and other similar aspects, it is estimated that surrogacy rates will increase approximately forty percent in the coming year.

This Note consists of four parts. Part I focuses on both the recent increase in International Gestational Surrogacy sought by Americans and the decrease in adoption rates in America. Part II explores cross-border regulation of International Gestational Surrogacy. This includes a discussion of both American and Ukrainian laws pertaining to surrogacy, as well as the exploitation aspect inherent in surrogacy. Part III sets forth a proposed resolution: the development and implementation of an International Consensus. Part IV will conclude with an analysis of why said proposed resolution will positively impact the lives of many intended parents [couple attempting to engage in surrogacy].

I. INTERNATIONAL GESTATIONAL SURROGACY

A. What is Gestational Surrogacy?

Many couples turn to surrogacy due to their desire to have children and start a family. Despite the belief that surrogacy was first emerged in the 1980s, surrogacy actually dates back to as early as Biblical times. However, the practice of surrogate motherhood became particularly well-known in the 1980s following a case entitled In re Baby M. In this case, the intended parents, William and Elizabeth Stern, were unable to conceive children and therefore decided to partake in the process of surrogacy. Therefore, the Sterns contracted with Mary Beth Whitehead. Both parties agreed that Ms. Whitehead would be artificially inseminated with Mr. Stern’s sperm, carry the baby to term, and then legally surrender the

17 Reich & Swink, supra note 10, at 253.
19 Reich & Swink, supra note 10, at 254.
20 Id.
21 Id. at 243.
23 Id.
24 DiFonzo & Stern, supra note 2, at 411.
25 See Genesis 16:2 (surrogacy started when Sarah, Abrams wife could not become pregnant. Sarah told her maidservant, Hagar to bear a child for her. Sarah said “perhaps I can build a family through her.”).
26 In re Baby M, 537 A.2d 1227, 1234 (N.J. 1988).
27 Id. at 1235.
28 See id.
child to the Stems after birth. However, when Ms. Whitehead gave birth, she felt the child was hers and refused to give the baby to the Stems, contrary to what the parties had originally agreed to. This case is noteworthy because it introduced the concept of third-party reproduction to many families in the United States for the first time.

Two types of surrogacy exist, traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate’s eggs are first fertilized with the intended father’s sperm and are then implanted in the surrogate. In gestational surrogacy, the intended mother generally is incapable of physically carrying the fetus, but she is capable of producing healthy eggs. Therefore, the surrogate is implanted with the couple’s embryos, and, thus has no genetic relation to the child. Simply put, gestational surrogacy involves a woman’s own eggs, fertilized with a man’s sperm and implanted in a third-party’s uterus, who then carries the child to term for the couple. In many gestational surrogacy cases, the surrogate agrees to the surrogacy as a business transaction, purely for monetary compensation.

Additionally, gestational surrogacy typically involves a contract. Most importantly, these contracts relinquish the surrogate’s parental rights after she delivers the baby. A standard surrogacy contract includes the surrogate’s fees, as well as provisions for payment of the surrogate’s medical bills, maternity clothes, transportation, disability insurance, and additional agreed upon stipulations. Overall, all surrogacy contracts vary as they are uniquely tailored to fit the parties needs and concerns.

See id. at 1235-37.
Id.; see also Iver Peterson, Baby M, Ethics and the Law, N.Y. TIMES (Jan. 18, 1987), http://www.nytimes.com/1987/01/18/nyregion/baby-m-ethics-and-the-law.html?pagewanted=all&src=pm&pagewanted=print (demonstrating that Baby M was national news with every newspaper and television broadcaster talking about it and the probable outcome); Kenneth R. Clark, ‘Baby M’ Filled with Headlines and Heartache, CHI. TRIB. (May 22, 1988), http://articles.chicagotribune.com/1988-05-22/entertainment/8801010123_1_william-stern-surrogacy-baby-m-case (demonstrating that before the case even left the courtroom there was conversation about making a movie about it).

DiFonzo & Stern, supra note 2.
See CHERYL L. MEYER, THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN 70 (1997) (stating that traditional surrogacy is referred to as “partial surrogacy” since the surrogate supplies the egg and is therefore partially the mother); see also Yamamoto & Shelby, supra note 4, at 95. In traditional surrogacy the surrogate mother becomes pregnant with the sperm of the surrogate father, thus making the mother genetically related to the child. See MEYER, supra note 32.

MEYER, supra note 32, at 70. (demonstrating that gestational surrogacy is also known as “full surrogacy” since the surrogate mother carries the baby but has no genetic connection to the baby); Yamamoto & Shelby supra note 4, at 95.
McEwen, supra note 5.
Id. at 275.
Id. If the mother and father cannot contribute an egg or sperm they should use a donor and not the surrogate because if they use the surrogate it will be deemed traditional surrogacy. See id. at 275-76.
Id. at 275.
Id. at 292-93.
Id at 276.
Id. at 276-77.
Id. at 276.
Id. at 277 (demonstrating that surrogate who receive payment, need to follow various obligations both during and after pregnancy). While the surrogate is carrying a baby, she needs to keep the parents informed during her
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B. Decrease In Adoption Leads To Surrogacy

Over the past decade, the number of international adoptions has decreased by approximately fifty percent.\(^4\) This decrease can be partly attributed to the recent decline in babies put up for adoption.\(^4\) In 2004, 22,884 international adoptions involved adoptive parents from the United States; yet in 2012 that number decreased to a mere 8,668.\(^4\) However, while the amount of adoptions has significantly decreased, the instances of surrogacy have done just the opposite..\(^4\) Specifically, “by the end of the twentieth century, the combined birth rate from donor insemination, [In Vitro Fertilization [IVF]], and surrogacy arrangement[s] was 76,000, while only 30,000 healthy children were available for adoption.”\(^4\)

Several other factors can be attributed to the influx in surrogacy in addition to the decrease in adoptable babies.\(^4\) One such reason being that many individuals “have been barred [from international adoption] because of their sexual orientation, age or martial status.”\(^4\) However, although there has been such a drastic increase in surrogacies, there has also been “such an outcry in some quarters over concerns about ‘baby selling’ and the possible exploitation of poor women.”\(^5\) As a result, various countries have outright banned surrogacy.\(^5\)

II. CROSS-BORDER SURROGACY

Countries and societies have different views on how to approach the ethical questions regarding surrogacy.\(^5\) This is due to the fact at “each step along the path of reproductive surrogacy, risk of abuse and of human rights violations – loom large.”\(^5\) Many women living in poverty are enticed by the monetary benefits or pressured into becoming surrogates.\(^5\) Often, these women are both unaware of the complications that could potentially

doctor visits and must refrain from drinking or smoking. During delivery, she must allow the parents to be present. Id.
\(^4\) Id.
\(^4\) Kevin Voigt & Sophia Brown, International Adoptions in Decline as Number of Orphans Grows, CNN WORLD (Sept. 17, 2013, 6:52 AM), http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/
\(^4\) Id. (regarding statistics of American families adopting from other countries).
\(^4\) Id.
\(^4\) Id.
\(^4\) See id.
\(^4\) Id.
\(^5\) See id.
\(^5\) X & Y, supra note 7.
\(^5\) Id.
occur and forced to enter into contracts. As a result, many countries resorted to developing their own legal approach to surrogacy, or alternatively, banning surrogacy entirely. This Note closely examines the legal frameworks of both the United States and Ukraine regarding surrogacy to truly address and provide insight into the legal complexities involved.

A. Surrogacy In The United States

1) Historical Legal Aspects

Historically, within the United States, there have been many social and legal reactions to surrogacy. Prior to the 1980s, no laws existed governing any aspect of surrogacy. This lack of regulation was primarily due to the fact that surrogacy was a relatively new procedure, which many believed unreliable. However, during this time, traditional surrogacy still occurred. Finally, in 1988, the United States decided its first famous case, *In re Matter of Baby M*, involving surrogacy. This case is paramount regarding United States surrogacy. Ultimately, the case resulted in individual state legislatures recognition of the existence and prevalence of surrogacy. This recognition resulted in approximately ten states passing either prohibitive or restrictive legislation regarding the practice of surrogacy.

The United States has no overarching federal law regarding surrogacy; as the power to regulate parentage has always been a state, not federal, function. Furthermore, most surrogacy agreements are contractual and each individual state holds the authority to deem contracts void or enforceable. Some states, through legislation and the imposition of criminal penalties for violations, ban surrogacy entirely. For instance, Michigan imposes

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55 Id.
56 TRIMMINGS & BEAUMONT, supra note 9, at 443.
57 STEVEN H. SNYDER, United States of America, in INTERNATIONAL SURROGACY ARRANGEMENT, LEGAL REGULATION AT THE INTERNATIONAL LEVEL 387, 388 (KATARINA TRIMMINGS & PAUL BEAUMONT eds., 2013).
58 See id.
59 Id.
60 Id.
61 DiFonzo & Stern, supra note 2, at 346.
62 Id.
63 Id.
64 SNYDER, supra note 57, at 389.
65 Id. at 388.
66 Id.
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harsh penalties on parties that enter into surrogacy agreements.\footnote{See Mich. Comp. Laws § 722.859 (2014).} Such penalties impose monetary fines up to $50,000, as well as incarceration.\footnote{Id.} Other states, such as New York, have declared surrogate contracts void as against public policy, and therefore unenforceable.\footnote{N.Y. Dom. Rel., § 122.} This lack of uniformity, within the United States, has left couples with no other option but to essentially go “forum shopping for the most receptive jurisdiction for a particular surrogacy arrangement” internationally.\footnote{McEwen, supra note 5, at 290.}

In 1988, the lack of uniformity among American states, resulted in the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) adoption of the Uniform Status of Children Assisted Conception Act (“USCACA”).\footnote{Vanessa S. Browne-Barbour, Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?, 26 Whittier L. Rev. 429, 444 (2004).} This Act provided states with two options regarding surrogate agreements.\footnote{Id.} Notably, only two states, North Dakota and Virginia, adopted the restrictive position.\footnote{Id. at 290.} Conversely, the vast majority of states believed that surrogacy agreements were essentially contracts to sell babies and, therefore, “violat[ed] federal and state prohibitions against the sale of humans.”\footnote{Id. at 445.} With surrogacy agreements rapidly increasing, the American Bar Association [ABA], recognizing the need for uniformity amongst the states, attempted to draft the American Bar Association Model Act Governing Assisted Reproductive Technology.\footnote{See American Bar Association Sec. Fam. L. Committee on Reprod. & Genetic Tech., American Bar Association Model Act Governing Assisted Reproductive Technology (2008) http://apps.americanbar.org/family/committees/artmodelact.pdf.} Additionally, in 2002, the Uniform Parentage Act [“UPA”] was amended to further address the issue of surrogacy.\footnote{Browne-Barbour, supra note 72, at 446 (providing changes and additional information regarding surrogacy compared to the 2000 UPA).} The UPA stipulates that agreements between the surrogate and the couple, which lack court approval, are unenforceable but not void.\footnote{Id. at 446-47 (stipulating that intended parents who enter into such agreement but neglect to adopt the baby are potentially liable for child support).} Additionally, the surrogate may be paid “reasonable compensation” for her services.\footnote{Id. at 446.} However, to date, merely nine states have adopted the UPA, forcing many American families to venture abroad to attain a surrogate.\footnote{Reich & Swink, supra note 10, at 260 (listing Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming as the nine states that enacted the UPA).} Further, to date, numerous states have yet to address the issue of surrogacy agreements in any case law.\footnote{See id.}

The United States does recognize surrogacy in the Ukraine, and “[t]he U.S. Embassy Consular section provides all the information necessary to obtain U.S. citizenship and [a] passport” for the newborn.\footnote{Q&A, Ukranian Surrogacy Solutions, http://ukrainiansurrogacy.com/index.php/en/q-a (last visited Nov. 19, 2014).} However, the United States requires the existence of a

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\begin{itemize}
  \item \footnote{See id.}
  \item \footnote{Reich & Swink, supra note 10, at 260 (listing Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming as the nine states that enacted the UPA).}
  \item \footnote{See id.}
\end{itemize}
Overall, it is common for Americans to resort to Ukraine for surrogacy purposes. This results in the necessity for intended parents to attain an attorney to assist in both preparing and obtaining the child’s legal documents to allow the family to legally return to the United States.

2) Economic Aspects

While many intended parents residing in the United States are provided with the option of finding a surrogate mother domestically, the significant cost associated can be prohibitive. The process in the United States costs anywhere from $40,000 to $100,000. However, in 2012, the median household income in the United States stands at approximately $51,017. This, coupled with a long-term decline in income throughout the United States, has led many families to seek out alternative options for expanding their families; ways that do not cost more than double their annual household income. Therefore, many couples are left with no other option than to go overseas to engage in the surrogacy process.

B. Surrogacy in Ukraine

The lack of uniformity among American states, as well as cost concerns, serve as primary reasons why many American couples resort to finding surrogates in the Ukraine. Ukraine, unlike other jurisdictions worldwide that prohibit surrogacy, has one of the most “liberal approaches toward surrogacy.”

In 1995, Ukraine had their first successful surrogacy, and since then, the country has progressed immensely regarding the practice of surrogacy. In 2013, there were approximately “one hundred and twenty successful surrogate pregnancies in Ukraine ... many of them resulting in multiple births.” Further, the number of surrogates in Ukraine is quickly rising. It is estimated that surrogacy has been increasing by twenty percent per year and will continue to increase by approximately forty percent this year due to the vast amount of clinics.

83 Id.
84 Id.
85 Id.
86 Stateless Babies & Adoptions Scams, supra note 67 at 422, 429.
87 Reich & Swink, supra note 10, at 248.
89 Id.; see Cohen, supra note 10.
90 See Cohen, supra note 10.
91 Gennady Druzenko, Ukraine, in International Surrogacy Arrangement, Legal Regulation at the International Level 440 (Katarina Trimings & Paul Beaumont eds. 2013).
92 Id. at 357 (this surrogacy took place in Kharkiv City; it was the first successful attempt at surrogacy in the Ukraine and all of Commonwealth of independent states).
93 Bigg & Brooks, supra note 22 (noting, however, that number is estimated to be around 30% higher, since private clinics have no duty to report).
94 Id.
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that are opening. Additionally, Ukraine offers various regarding surrogacy. For instance, in Ukraine, the intended parents are permitted to determine the gender of their baby.

1) Legal Aspects

The Ukrainian Family Code does not contain the terms “surrogate mother” or “surrogacy.” However, the current law does protect the intended parents. The Parent Registration in Ukraine is rigorously imposed to protect the intended parents. Regarding this, the law states that, for the intended parents to be registered in Ukraine as the parents, they must provide the Ukrainian register office with a certificate proving that the baby’s genetic materials come from one of the intended parents. This process consists of filing various documents in the register’s office. This is one of Ukraine’s most stringent policies, which all genetic parents must adhere.

The Ukrainian law states that “[i]f an ovum conceived by the spouses (man and woman) is implanted [in] to another woman, the spouses shall be the parents of the child.” Therefore, Ukraine does not cover traditional surrogacy, because, the surrogate would then be the genetic mother. According to the law, the embryo must be implanted in another women in order for the legal right of the intended parents to attach.

While surrogacy is legal in Ukraine, surrogates are not provided with any legal standing. The surrogate could attempt to protect herself by a civil law contract, however, the Ukrainian Code contains a provision which prevents her from claiming any type of “maternal affiliation with the child” that was implanted in her womb. Therefore, typically the contract, the “services agreement,” details the obligations of the contracting parents.
However, Ukraine does not address a surrogates ability to such a contract. Attempts have been made through proposed legislation in Ukraine with the goal of aiding surrogate mothers in this respect. Ultimately, the proposed bill failed, due to the lack of Ukrainian governmental support.

Attempts have been made through proposed legislation in Ukraine with the goal of aiding surrogate mothers in this respect. Ultimately, the proposed bill failed, due to the lack of Ukrainian governmental support. Many couples that partake in international surrogacy receive little to no legal advice prior to engaging in the arrangement. Therefore, many couples are left uniformed of the burdens they will likely encounter when attempting to bring their surrogate-born child home, to their own country. To bring the child home, the intended parent(s) must show a number of things, including that: (1) “the sum paid was not disproportionate to reasonable expenses; (2) they were acting in good faith without moral taint in their dealings with the surrogate; and (3) they did not attempt to defraud the authorities.”

Additionally, requirements for potential surrogates exist. For a woman to be capable of being a surrogate, she must be over the age of eighteen, have delivered at least one healthy baby, have no medical problems, and have provided a “notarized written consent for the registration [of the] … legal parents of the child.” Additionally, the woman must not engage in any harmful habits, such as smoking or drinking, and cannot have a criminal record.

2) Economic Aspects

Many couples decide on Ukraine for surrogacy due to its low tariffs and lenient legislation. Compared to other countries, Ukraine offers one of the least expensive commercial surrogacy programs. As a result, between 2005 and 2007, there was a tremendous influx in the amount of couples venturing overseas to attempt surrogate pregnancy. Currently, there are thirty licensed clinics in Ukraine that specialize in infertility with approximately ten percent of patients being foreigners.

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10 Stateless Babies & Adoption Scams, supra note 67, at 432.
11 Zhyla, supra note 98.
12 Id.
14 Id. at 607 (demonstrating a couple who was trying to bring their child back from Ukraine into England did not have the requisite parental order to bring their child back).
15 Id.
16 DRUZENKO, supra note 91, at 361.
17 Id. (“There is no explicit, legally-binding age limit for potential surrogate mothers…[a]lthough most clinics recommend choosing … a mother aged between 18 and 35.”).
18 Id.
20 Bigg & Brooks, supra note 22.
21 Id. (comparing Ukraine to India, where Ukraine is one of the least expensive alternatives regarding surrogacy; India is one of the only countries where surrogacy is even cheaper).
22 See Cohen, supra note 10.
23 DRUZENKO, supra note 91, at 357
In Ukraine, a foreigner seeking surrogacy is charged a fee ranging from $30,000 to $45,000; approximately $10,000 to $15,000 of said fee is paid to the surrogate mother. Therefore, the cost is approximately half of what surrogacy costs in the United States. Further, this cost is estimated to decrease due to the surplus of Ukrainian women in Ukraine who desire to become surrogates.

C. Exploitation of Surrogates

At first glance, many assume that surrogacy is a wonderful practice, providing couples with the opportunity to become the parents they had always dreamed of. However, conversely, many commentators believe that surrogacy is actually a form of exploitation. While many believe that a woman carrying a baby for those who cannot conceive is giving a couple the “gift of life,” there are also those who deem this “baby selling.” This has resulted in several jurisdictions around the world becoming “anti-surrogacy jurisdictions.”

Those against surrogacy consider the monetary payment to the surrogate as money in exchange for her services of carrying the baby. These commentators argue that a baby is a commodity that should not be sold. Further, many commentators argue that surrogacy deals are “degrading because [they] exploit[] poor or ignorant women for the benefit of rich men and women.” They further argue that the exploitation arises as a result of a fee being paid to surrogates that is far too low. Also, a vast amount of individuals fear that, in countries where surrogacy is illegal, surrogates lack any bargaining power, and consequently, they receive even less compensation. This is the quintessential situation of the rich taking advantage of the poor. Additionally, many fear that foreign countries are forcing women to become surrogates against their will.

Various studies have shown that many women become surrogates as a last resort in an attempt to feed and financially support their own families. In fact, many foreign surrogates will attest that the reason they go through the grueling, nine-month, period of

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125 See Cohen, supra note 10 (demonstrating a comparison to the $50,000 - $80,000 they would have spent for each attempt if they had used a surrogate in the United States).
126 Stateless Babies & Adoption Scams, supra note 67, at 431.
127 McEwen, supra note 5, at 290.
128 Id.
129 TRIMMINGS & BEAUMONT, supra note 9, at 463. Id. Examples of such jurisdictions are Germany, China, and Mexico.
130 McEwen, supra note 5, at 291.
131 Id.
133 McEwen, supra note 5, at 292.
134 Id.
136 See McEwen, supra note 5, at 293.
carrying a couple’s baby is solely due to their poverty status. This is precisely why critics criticize the practice of surrogacy. Further, many fail to realize that, in addition to concerns of coercion, the surrogates’ lives are forever changed. An example of this can be seen by considering the story of one surrogate who gave birth in 2008, and is still “haunted by the memory” of carrying that child. Even after giving birth and receiving payment, the surrogate still “think[s] about the child...and pray[s] that the child is safe and happy and is taken care of well.” Yet, on the other hand, a great amount of surrogates report back that the surrogacy arrangement was satisfactory for them.

Conversely, other commentators view these arrangements as a mere contract that benefits both the surrogate and the intended parents. Thus regarding it as merely a way for a surrogate to obtain a job, and the intended parents to extend their family. These commentators argue that, due to the mutual benefits for both parties, surrogacy should merely be regarded as compensation for carrying a baby to full term.

IV. PROPOSAL: INTERNATIONAL SURROGACY CONVENTION 2014

International surrogacy is a phenomenon that is taking place primarily across Eastern Europe, Asia, and North America. However, despite the prevalence, there is currently no law that directly pertains to international surrogacy. Therefore, an international surrogacy consensus between various countries should be adopted. Although some countries may decide against adopting such a treaty, other countries can benefit from the enactment of a uniform, safe process.

In order to effectuate an international legal standard for surrogacy, the international community should turn to the treatment of international adoptions for guidance. As such, these proposed solutions are modeled after the Hague Convention on Protection of Children and Co-Operation In Respect of Intercountry Adoption. With regard to international adoption, the international community has recognized the necessity of an international convention due to the vast amount of families involved.

Because surrogacy is quickly becoming a “globalized enterprise, with all the concomitant risks of disparate impacts on different countries,” an international consensus

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137 Id.
138 See id.
139 Cohen, supra note 10.
140 Id.
141 Mortazavi, supra note 132, at 2284.
142 McEwen, supra note 5, at 293.
143 See id.
147 See id.
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must be implemented. Furthermore, there are no international conventions, or reciprocal arrangements, for the recognition of the legal parentage of a child born through surrogacy. Since Ukraine is a favorable country for surrogacy, attracting an increasing amount of foreigners annually, it should be interested in “negotiating and [adopting] an international convention on cross-borders aspects of surrogacy.” To initiate this, the Hague Convention contains many provisions and ideas that could be adopted to assist in formulating an international surrogacy consensus.

A. International Adoption Standards

The Hague Convention held approximately forty conventions, fourteen of which discussed family law issues. In May 1993, At the Hague Convention of Protection of Children and Co-Operation In Respect of Intercountry Adoption, unambiguous guidelines and procedures were outlined, prohibiting “improper financial” gain, providing security to the parties involved, and mandating “transparency for all parties to the adoption, including prospective adoptive parents.” This Convention occurred as a result of various countries common desire to provide adopting families with protection.

The Convention established many guidelines that parties must adhere to. Most importantly, the Convention sets forth a “system of co-operation amongst contracting states to ensure that those safeguards are respected.” As in adoption, the intended parents in surrogacy deserve the same protection. A couple, who has already been through the trauma of discovering they cannot conceive a child the traditional way, should be able to enter a country and safely remove their biological child.

B. International Surrogacy Problems: A Proposed Solution

There is an urgent need for regulation regarding this area of family law. The proposed protocol stems from the ideas of the Intercountry Adoption Convention. This Note advocates for the implementation of the existing Hague Convention procedure to be applied

148 Brugger, supra note 145, at 678
150 DRUZENKO, supra note 91, at 365.
155 Id.
to the practice of surrogacy. The Hague Convention on Intercountry Adoption has been successful due to the numerous countries that have adopted it. The Convention implements specified procedures for intercountry adoption. Similarly, the proposed solution demonstrates why such a Convention is necessary for international surrogacy and further how it should be implemented.

1. Proposed Protocols

The Convention mandates that each contracting party establish a Central Authority to be the “authoritative source of information and point of contact in that country.”156 The Central Authority of each country would also be a beneficial resource regarding surrogacy. Similar to the adoption process, the authoritative figures in each state would, in conformity with the proposed protocol, cooperate and exchange information regarding their State surrogacy laws and “other general information, such as statistics and standard forms” to the intended parents.157 However, in addition to assisting the intended parents these Central Authorities also attempt to “eliminate any obstacles to its applications.”158 Thus, these authorities would ensure that fundamental human rights are not being abused.159

As in the adoption process, the Central Authorities would play a vital role in international surrogacy.160 Couples wishing to adopt, couples wishing to begin the process of surrogacy should “apply to the Central authority in the State of their habitual residence.”161 That authoritative figure shall “collect, preserve and exchange information” regarding the parents and intended surrogate and facilitate the proceeding.”162 The agency should screen the intended parents and ensure that they are mentally capable to engage in the surrogacy process. Further, the intended parents should be given a background check to ensure that they do not possess any criminal history. Then, only when the agent is satisfied with the intended parents, a report should be sent out to a country that is a party to the Convention.163 Upon receipt, the surrogate state will review the report and make a determination.164 If satisfied, the State shall prepare a report detailing the surrogate’s information, including her identity, background, social environment, medical history, family history, religious background, ethnicity, and cultural background.165 As a precursor, the surrogate country should be obligated to provide counseling for potential surrogates prior to authorizing her as a surrogate. Thus, the state would ensure that the potential surrogate is both psychologically and physically capable of carrying a baby to full term, and then parting with that baby. Additionally, the State should ensure that the surrogates are “psychologically supported” throughout the entirety of the pregnancy.166

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156 INTERCOUNTRY ADOPTION BUREAU OF CONSULAR AFFAIRS, supra note 138.
158 Id.
159 Mortazavi, supra note 132, at 2256.
160 See id.
161 Convention on Protection of Children, supra note 146.
162 Id.
163 Id.
164 Id.
165 Id.
166 Mortazavi, supra note 132, at 2285.
IN UKRAINE, some new parents encounter legal issues when attempting to return home with their child after the child had been born to a surrogate. Therefore, as in the adoption process, the Central Authorities should take “all necessary steps to obtain permission for the child to leave the State of Origin and enter and reside permanently” in the parents’ home state.\footnote{\textit{Convention on Protection of Children}, supra note 146.} Currently, when surrogate babies are born, some are restricted from joining their biological parents in their country of residence.\footnote{\textit{Mortazavi}, supra note 132, at 2285} The proposed Convention must address such issues. For instance, Baby Samuel, born in November of 2008 to a surrogate in Ukraine, was prohibited from leaving with his parents after birth.\footnote{\textit{See Baby, Stranded in Ukraine, to Join Belgian Parents}, FOX NEWS (Feb. 21, 2011), http://www.foxnews.com/world/2011/02/21/baby-stranded-ukraine-join-belgian-parents-1916799428/.} The reasoning for this being, Belgian Foreign Ministry refused to issue a passport to him.\footnote{\textit{Id.} (forcing the child to reside in an orphanage).} This is a prime example of why regulatory measures are necessary regarding surrogacy. If both states had been a party to a surrogacy convention akin to the one proposed in this Note, the family would have avoided this predicament.\footnote{\textit{See id.}} However, as occurs much too often, the intended parents were left with no other option but to lie to the embassy alleging that the father “had an affair with a local girl who wanted nothing to do with the baby.”\footnote{\textit{Id.}} Although, this proved futile; and the parents then resorted to attempting to smuggle the baby across the country’s borders.\footnote{\textit{Id.}} However, again to no avail and ultimately the baby was prohibited from leaving Ukraine.\footnote{\textit{Id.}}

Never did the couple conceive such a possible outcome. Instead, they believed the struggles to be in the past. Any concerns they had prior to initiating the process, they merely, “asked about them from the very beginning.”\footnote{\textit{See id.}} However, as is common with numerous countries, the Belgian Foreign Minster asserted that a “gap in the law” existed, which made it problematic for Belgium to recognize the use of surrogate mothers in other countries, including Ukraine.\footnote{\textit{Id.}} However, thankfully, after two years and three months, the Ministry finally rendered a favorable decision, and, issued the essentially homeless boy a Belgian passport.\footnote{\textit{Id.}}

It is imperative that the Proposed Surrogacy Convention address in detail the intended parents’ relationship with the surrogate. Are the intended parents obligated to visit the surrogate? Should there be open communication between the surrogate and the intended parents? Currently in Ukraine, the rule is that “intended parents have to travel to Ukraine twice: the first time for IVF/ICSI, and the second time to pick up the baby.”\footnote{\textit{Id.}} Although Ukraine requires that the intended parents be in the country for three to five weeks following the birth of the child, this timeframe should be determined by each country.\footnote{\textit{Id.}} The Proposed Convention must address the amount of visits and duration the intended parents must travel to

\begin{thebibliography}{99}
\item \textit{Convention on Protection of Children}, supra note 146.
\item \textit{Mortazavi}, supra note 132, at 2285
\item \textit{Id.} (forcing the child to reside in an orphanage).
\item \textit{See id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Ukrainian Surrogacy Solutions}, supra note 82.
\item \textit{Id.}
\end{thebibliography}
the country; however, each state should have the discretion to impose different requirements based on the child’s health, passport regulations, etc...

2. Legal Parentage

The Proposed Convention must be proactive by addressing potential conflicts; namely between either the intended parents and the surrogate or the intended parents and the country. Should a treaty created be “guided principally by the best interest of the child standard”?

This standard is defined to be the place where the child is most likely to flourish. Additionally, if there is a question as to who the biological parents are, should there be a paternity test immediately following the birth of the child? This would be inappropriate and therefore should not be the standard or the determining factor because many of the surrogates are not implanted with the intended parents sperm or egg but rather a donor’s. What would the intended parents do in a situation where both the egg and sperm are donated by a donor? Should that child not return to his intended parents who spent tens of thousands of dollars to have a child of their own? Clearly, the answer is no. Therefore, the existence of a genetic relationship should not be the determining factor for a child’s best interest; and thus, this must be clearly stipulated.

Instead, the determining factor should be the intent standard. Parental rights should be granted to the “parents who brought about the birth of the surrogate child.” Various reasons support the adoption of such a standard. First, such standard protects the rights of the intended parents. They are entitled to such as the ones who took the initial steps to begin the whole process. Additionally, the intended parents financed this process with dreams of having a child of their own. No matter what approach the Convention takes, the rights of the intended parents should be at paramount. Therefore, to prevent both a genetic and intent question, traditional surrogacy should never be used. Traditional surrogacy would only lead to an additional legal and emotional battle that the intended parents would have to overcome in their question for a child.

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180 Id.
181 Mortazavi, supra note 132, at 2256.
182 Id. at 2257.
183 Id. at 2280.
184 Id. at 2279.
185 Id. at 2280; Johnson v. Calvert, 851 P.2d 776 (1993). This this case defines the intent rule. In the case the wife was unable to have children, but could produce eggs. The intended parents had their zygote implanted in the uterus of Anna Johnson, who agreed to relinquish all her parental rights. The couple agreed to pay Anna $10,000. However, Anna asked the court to invalidate surrogacy contracts completely claiming that is analogues to baby selling. Although California statutes recognize both genetic consanguinity and giving birth as means of establishing a mother/child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about birth of a child that she intended to raise as her own – is the natural mother. Id.
186 See id.
187 Mortazavi, supra note 132, at 2280.
188 Id.
189 Id. at 2281.
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An important factor that must be determined prior to the initiation of the surrogacy process is the possibility of termination. If the biological parents want to abort due to a discovered disability in the fetus, do they possess said authority? Further, if the surrogate refused such an abortion would the intended parents, therefore, be absolved of their responsibility towards the child, surrogate, and overall surrogacy process? This is an important and necessary term that must precede the surrogacy process. Therefore, the contract must stipulate the process in the event this occurs. For instance, consider the case of a couple from Canada, who quickly discovered the surrogate was carrying a fetus that was likely to be born with Down syndrome. The surrogate refused to terminate the pregnancy, which raised a legal issue. Some argued that terminating the pregnancy is like “stopping the production line: ‘Oh, oh, there’s a flaw.’” On the other hand, many could argue it is the genetic offspring of the intended parents being carried by the surrogate, and, as such, it should be the genetics parents’ decision to raise the child, or to terminate the pregnancy. In this case, the surrogate decided to terminate the pregnancy because of her familial obligations.

Lastly, the Proposed Convention must address an initial, yet very important question; who can participate in surrogacy agreements. Currently, Ukrainian legislation restricts surrogacy to the following categories: single potential parents; unmarried couples; same-sex couples (regardless of marital status); and citizens of the countries where surrogacy is banned. To avoid such confusion, the Convention must further define, in detail, these terms. Does the term ‘couples’ includes same sex couples? Does single include two singles individuals that are living together for a period of years but not legally married? Regardless of an individual’s situation, is it not true that all are entitled to the right to have a child of his/her own?

3. Surrogates’ Rights

The Proposed Convention should address the rights of the surrogates. All expenses that a surrogate incurs due to the pregnancy should be reimbursed. However, as in any transaction, this would need to be one of the criteria discussed and agreed to prior to the pregnancy. The Convention should address signing a contract prior to the surrogate being

190 UKRAINIAN SURROGACY SOLUTIONS, supra note 82.
192 Id.
193 Id.
194 Id.
195 Id.
197 UKRAINIAN SURROGACY SOLUTIONS, supra note 82.
198 If able to meet the qualifying factors.
199 Mortazavi, supra note 132, at 2284 (including medical, psychological, and all legal expenses).
implanted with the eggs and sperm. The contract should further include that the payment the surrogate shall receive should “not be contingent on the ultimate birth of the live child.”

The surrogate should be compensated for the physical and psychological process of carrying a child, rather than for producing a healthy baby. Further, all contracts should clearly state that the surrogate shall not have any legal rights to the child. This includes obtaining custody of the child. To date, there has not been one reported claim arising from legal custody, in Ukraine.


Although in 2010, the Hague Special Commission for Surrogacy held a convention and rejected any instrument that would address international surrogacy, there is light at the end of the tunnel for those intended parents seeking cross-border unification of surrogacy practices. Recently some nations have taken a stance and The Hague Conference on Private International Law held a General Affairs and Policy Council [“Council”] meeting on April 3rd 2013. At this meeting, the Permanent Bureau held that it will continue its study of international surrogacy issues and will present a report to the Council in 2014; such regulations would ensure the safety of the baby, surrogate, and the intended parents.

The study of international surrogacy issues by the Council began in 2010 when the Special Commission decided that using the Intercountry Adoption Convention for International Surrogacy was inappropriate. This should be discredited because as mentioned in Part B of the resolution, there are various ideas that can be taken and incorporated from the Adoption Convention. However, the Special Commission concluded that in order to carry out such a Convention, an international surrogacy study must be completed.

Currently, preliminary research for the Convention is being conducted and two Preliminary Documents have already been executed. Since international surrogacy is rapidly spreading, the members of the Convention requested a final report to be available for review in the spring of 2014. This meeting will be vital for the surrogacy community for

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200 Id.
201 Id.
202 UKRAINIAN SURROGACY SOLUTIONS, supra note 82.
203 See Mortazavi, supra note 132, at 2254-55.
205 Id.
207 Id.
209 Id.

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the future direction of international surrogacy. At this meeting, the members will decide if “the development of a new treaty (i.e., a new Hague Convention) might be desirable and feasible, or whether any other work should be undertaken...” The Permanent Bureau is gathering information before this meeting will take place. They are circulating questionnaires to member of the Hague Conference, interested states, surrogacy agencies, health professional and legal practitioners. An example of the questionnaire circulated to the Surrogacy Agency consists of four basic parts:

Part I asked for information about the surrogacy agency on whose behalf you are completing this Questionnaire; Part II requests basic information concerning State regulation of surrogacy agencies; Part III seeks information concerning the surrogacy agency’s experience of ISAs; Part IV looks into possible future global work in this area by asking for the surrogacy agency’s thoughts on this issue.

The answers in this report will be the deciding factor on which way the report will be written.

C. Potential Issues with the Proposed Surrogacy Convention

As with any convention, there are bound to be various obstacles. Although there are various ideas that can be taken from the Intercountry Adoption Convention, there are some ideas that should not be adopted. For example, the Adoption Convention discourages any type of payment to the biological parent because they don’t want “the consents [to have been] induced by payment or compensation of any kind.” However, a surrogate carrying a baby to full term requires compensation. By not allowing the surrogate to get paid, it might “invalidate a commercial surrogacy arrangements, preventing the intended parents from taking custody of their child.

Although many commentators believe that such reform will be unsuccessful because of the “lack of consensus regarding substantive legal approaches to surrogacy,” there are many commenters who had the same belief regarding international adoptions. Presently, there are many families, legislatures, and scholars who are opposed to the idea of surrogacy. Many believe that surrogacy should be completely banned, and agree with

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210 Id.
211 See id.
212 Id. The questionnaire process is fairly simple. It is provided in both English and French. Id. After starting the questionnaire, they can stop at any time and press the “resume later” button. Additionally, the questionnaire provides an e-mail address if anyone ensues a technical problem. Id.
213 Id.
214 Id.
216 Mortazavi, supra note 132, at 2256.
217 Brugger, supra note 145, at 680.
218 N.Y. DOM. REL. § 122. (New York is opposed to the idea of surrogacy).
countries such as Australia, which currently ban surrogacy. Overall, it is impossible to merely assume whether such reform will be successful without the implementation of a convention as the Proposed Convention outlined within this Note.

CONCLUSION

In recent years, surrogacy has increased in popularity and it is estimated that this progression will continue. Regardless how a couple decides to expand their family, several factors must be thoroughly researched and considered generally and prior to choosing surrogacy. Unfortunately the path many couples once envisioned as a journey to “primrose path [may become] more akin to a trek through a thorn forest.” As international surrogacy is a recently novel concept, lacking international regulation, numerous issues often present themselves. This holds true in jurisdictions where surrogacy is legal, such as Ukraine, resulting in the possibility of stateless children.

Regarding surrogacy, risks are inherent throughout every step of the process. Therefore the implementation of an International Surrogacy Convention is paramount to overcome these obstacles and create a uniform system where a child’s legal status is no longer an uncertainty. Is it truly within the “best interest” of the child to be thrown into a foster home or orphanage awaiting legal status instead of being home with loving parents? Is it advantageous for “new” parents to risk incarceration in an attempt to smuggle their own child to their home state? Undoubtedly, this would not fulfill the underlying purpose of surrogacy. Therefore, an international consensus would avoid the aforementioned issues while benefitting all involved parties. Further, an International Convention will “minimize the threat of surrogate coercion and any perception of a child commodification.” It is uncontested that surrogacy is continually expanding and therefore, the implementation of an International Convention will take the affirmative approach in addressing and solving the aforementioned issues.

This Note advocates for the adoption of various aspects established within the Hague Convention of Protection of Children and Co-Operation In Respect of Intercountry Adoption. This Convention while proven successful has also encountered various issues throughout its development. Likewise, the Proposed Convention will also experience such obstacles and therefore, it is necessary that a system is developed to promptly rectify such issues. Nation States must work in unison, creating a detailed protocol, to ensure efficiency and protect all individuals. Overall, this will provide protection for all parties; leaving no ambiguity.

220 X & Y, supra note 7.
221 Id.
222 Id.
223 Id.
224 Mortazavi, supra note 132, at 2284.
225 Convention on Protection of Children, supra note 146.
226 See id.
The two children that once played “house” dreaming of marriage and children have grown into a young couple. This young couple who walked down the aisle and envisioned having children of their own, must not, due to unforeseen circumstances, have their dreams come to a complete halt; especially not due to the lack of regulations provided by Nation States. While surrogacy through international borders may not always result in a miracle; the implementation of an International Surrogacy Convention will make this dream within reach.