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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.¹ 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.”² This influx in surrogacy can be attributed to a majority of factors, including a decrease in the number of babies available for adoption,³ an increase in the number of women discovering that they are infertile, and thus unable to bear children,⁴ and men learning they cannot produce sperm or have a low sperm count, and couples desiring to have a genetic link to their children.⁵ 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).

² J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 354 (2011).

³ INT’L SOC. SERV. (ISS), EVALUATION OF THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTY ADOPTION 3, <http://www.iss-ssi.org/2009/assets/files/practices/evaluation%20hague%20convention> (stating that adoption applications are far exceeding the number of available adoptable healthy 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).

⁵ DiFonzo & Stern, *supra* note 2, at 350-51; see also Angie Godwin McEwen, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT’L L. 271, 273 (1999).

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the prevalence of AIDS and child-support payments.⁶ 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.⁷

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.⁸ Therefore, at birth, the surrogate mother relinquishes all rights to the child.⁹ For many surrogates, this practice has become a necessary means of income.¹⁰

Several international options are available for Americans seeking surrogacy.¹¹ Due to the ample options available, surrogacy often leads to “rampant forum shopping by couples seeking the best surrogacy prices and conditions.”¹² 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.¹³

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.¹⁴ Today, the international surrogacy market is both widely discoverable and accessible due to the Internet.¹⁵ For example, if you simply search the term “Ukraine surrogacy agencies” dozens of websites regarding such resources are readily available.¹⁶ Recently, the use of the

⁶ *Buying Babies, Bit by Bit*, THE ECONOMIST (Dec. 19, 2006), <http://www.economist.com/node/8345513>.

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. LAW. 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.

⁹ KATRINA TRIMMINGS & PAUL BEAUMONT, *General Report on Surrogacy*, in INTERNATIONAL SURROGACY ARRANGEMENT, LEGAL REGULATION AT THE INTERNATIONAL LEVEL 440, 441 (KATRINA TRIMMINGS & PAUL BEAUMONT eds., 2013).

¹⁰ J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL’Y 241, 248 (2011); see also Margot Cohen, *A Search for a Surrogate Leads to India*, WALL ST. J., <http://online.wsj.com/news/articles/SB10001424052748704252004574459003279407832> (last updated Oct. 9, 2009, 12:01 AM) (reporting that a female in India would rather carry a baby than sell an organ for money).

¹¹ Margaret Ryznar, *International Commercial Surrogacy*, 43 J. MARSHALL L. REV. 1009, 1009-10 (2009).

¹² *Id.*; see also *Fertility Friends, Topic: Is this a genuine company? Successful Parents.com Surrogacy Clinic* (Mar. 31, 2011, 2:13), <http://www.fertilityfriends.co.uk/forum/index.php?topic=260385.0> (surrogacy threads regarding the pros and cons of different clinics throughout Ukraine).

¹³ See Ryznar, *supra* note 11, at 1016.

¹⁴ *Ukraine Surrogacy: Questions and Answers*, IRTSA (June 6, 2011), <http://www.irtsa.com.ua/en/news/363.html>.

¹⁵ See Reich & Swink, *supra* note 10, at 242-43.

¹⁶ See *Ukraine Surrogacy Agencies*, GOOGLE, <https://www.google.com/search?client=safari&rls=en&q=Ukraine+surrogacy+agencies&ie=UTF-8&oe=UTF-8> (last visited Nov. 19, 2014). Even websites, such as Craigslist, have advertisements within the “job” section offering surrogates anywhere from \$35,000 to \$60,000 for their services. See *Fresno Surrogate Jobs*, CRAIGSLIST, <http://fresno.craigslist.org/search/etc?query=surrogate> (last visited Nov. 19, 2014).

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Internet has drastically increased.¹⁷ In June 2012, there were approximately 2,405,518, 376 Internet users opposed to approximately 1,966,514,816 Internet users in June 2010.¹⁸ Notably, around eighty percent of said users were adults seeking health information.¹⁹ Further, majority of said inquires regarded reproductive health.²⁰ As such, the Internet may be partly responsible, at least to a degree, in the recent influx in surrogacy.²¹

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.”²² 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.²³

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.²⁴ Despite the belief that surrogacy was first emerged in the 1980s, surrogacy actually dates back to as early as Biblical times.²⁵ However, the practice of surrogate motherhood became particularly well-known in the 1980s following a case entitled *In re Baby M*.²⁶ 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.²⁷ Therefore, the Sterns contracted with Mary Beth Whitehead.²⁸ 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.

¹⁸ *Id.*; *Internet Usage Statistics: World Internet Users and Population Statics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats2.htm> (last visited Nov. 22, 2014).

¹⁹ Reich & Swink, *supra* note 10, at 254.

²⁰ *Id.*

²¹ *Id.* at 243.

²² Claire Bigg & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE (June 4, 2011), http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html.

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.*

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child to the Sterns after birth.²⁹ However, when Ms. Whitehead gave birth, she felt the child was hers and refused to give the baby to the Sterns, contrary to what the parties had originally agreed to.³⁰ This case is noteworthy because it introduced the concept of third-party reproduction to many families in the United States for the first time.³¹

Two types of surrogacy exist, traditional surrogacy³² and gestational surrogacy.³³ In traditional surrogacy, the surrogate's eggs are first fertilized with the intended father's sperm and are then implanted in the surrogate.³⁴ In gestational surrogacy, the intended mother generally is incapable of physically carrying the fetus, but she is capable of producing healthy eggs.³⁵ Therefore, the surrogate is implanted with the couple's embryos, and, thus has no genetic relation to the child.³⁶ Simply put, gestational surrogacy involves a woman's own eggs, fertilized with a male's sperm and implanted in a third-party's uterus, who then carries the child to term for the couple.³⁷ In many gestational surrogacy cases, the surrogate agrees to the surrogacy as a business transaction, purely for monetary compensation.³⁸

Additionally, gestational surrogacy typically involves a contract.³⁹ Most importantly, these contracts relinquish the surrogate's parental rights after she delivers the baby.⁴⁰ 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.⁴¹ Overall, all surrogacy contracts vary as they are uniquely tailored to fit the parties needs and concerns.⁴²

²⁹ See *id.* at 1235-37.

³⁰ *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).

³¹ DiFonzo & Stern, *supra* note 2.

³² 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.

³³ 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.

³⁴ McEwen, *supra* note 5.

³⁵ *Id.* at 275.

³⁶ *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.

³⁷ *Id.* at 275.

³⁸ *Id.* at 292-93.

³⁹ *Id.* at 276.

⁴⁰ *Id.* at 276-77.

⁴¹ *Id.* at 276.

⁴² *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.⁴³ This decrease can be partly attributed to the recent decline in babies put up for adoption.⁴⁴ In 2004, 22,884 international adoptions involved adoptive parents from the United States; yet in 2012 that number decreased to a mere 8,668.⁴⁵ However, while the amount of adoptions has significantly decreased, the instances of surrogacy have done just the opposite.⁴⁶ 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.”⁴⁷

Several other factors can be attributed to the influx in surrogacy in addition to the decrease in adoptable babies.⁴⁸ One such reason being that many individuals “have been barred [from international adoption] because of their sexual orientation, age or marital status.”⁴⁹ 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.”⁵⁰ As a result, various countries have outright banned surrogacy.⁵¹

II. CROSS-BORDER SURROGACY

Countries and societies have different views on how to approach the ethical questions regarding surrogacy.⁵² 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.”⁵³ Many women living in poverty are enticed by the monetary benefits or pressured into becoming surrogates.⁵⁴ 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.*

⁴³ *Id.*

⁴⁴ 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/>

⁴⁵ *Id.* (regarding statistics of American families adopting from other countries).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. LAW NEWS NOW, Mar. 1, 2011 http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/.

⁵¹ *See id.*

⁵² *X & Y, supra* note 7.

⁵³ YASIME ERGAS, *Legal Regulation at the International Level, Thinking ‘Through’ Human Right: The Need for a Human Rights Perspective with Respect to the Regulation of Cross-border Reproductive Surrogacy*, in INTERNATIONAL SURROGACY ARRANGEMENT, LEGAL REGULATION AT THE INTERNATIONAL LEVEL 429 (Katarina Trimmings & Paul Beaumont eds., Hart Publishing, May 17, 2013).

⁵⁴ *Id.*

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occur and forced to enter into contracts.⁵⁵ As a result, many countries resorted to developing their own legal approach to surrogacy, or alternatively, banning surrogacy entirely.⁵⁶ 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.⁵⁷ Prior to the 1980s, no laws existed governing any aspect of surrogacy.⁵⁸ This lack of regulation was primarily due to the fact that surrogacy was a relatively new procedure, which many believed unreliable.⁵⁹ However, during this time, traditional surrogacy still occurred.⁶⁰ Finally, in 1988, the United States decided its first famous case, *In re Matter of Baby M*, involving surrogacy.⁶¹ This case is paramount regarding United States surrogacy.⁶² Ultimately, the case resulted in individual state legislatures recognition of the existence and prevalence of surrogacy.⁶³ This recognition resulted in approximately ten states passing either prohibitive or restrictive legislation regarding the practice of surrogacy.⁶⁴

The United States has no overarching federal law regarding surrogacy; as the power to regulate parentage has always been a state, not federal, function.⁶⁵ Furthermore, most surrogacy agreements are contractual and each individual state holds the authority to deem contracts void or enforceable.⁶⁶ Some states, through legislation and the imposition of criminal penalties for violations, ban surrogacy entirely.⁶⁷ For instance, Michigan imposes

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.*

⁶⁷ N.Y. DOM. REL. LAW § 122 (McKinney 2014); SNYDER, *supra* note 54, at 388; Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412 (2012) [hereinafter *Stateless Babies & Adoption Scams*] (listing states where surrogacy remains illegal: Delaware, Indiana, Louisiana, Michigan, and Nebraska); *see also* Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. Rev. 507 (2010-2011) (providing segments of Michigan's statute which states, "A surrogate parentage contract is void and unenforceable as contrary to private policy." Additionally, "any person who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor").

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harsh penalties on parties that enter into surrogacy agreements.⁶⁸ Such penalties impose monetary fines up to \$50,000, as well as incarceration.⁶⁹ Other states, such as New York, have declared surrogate contracts void as against public policy, and therefore unenforceable.⁷⁰ 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.”⁷¹

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”).⁷² This Act provided states with two options regarding surrogate agreements.⁷³ Notably, only two states, North Dakota and Virginia, adopted the restrictive position.⁷⁴ 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.”⁷⁵ 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.⁷⁶ Additionally, in 2002, the Uniform Parentage Act [“UPA”] was amended to further address the issue of surrogacy.⁷⁷ The UPA stipulates that agreements between the surrogate and the couple, which lack court approval, are unenforceable but not void.⁷⁸ Additionally, the surrogate may be paid “reasonable compensation” for her services.⁷⁹ However, to date, merely nine states have adopted the UPA, forcing many American families to venture abroad to attain a surrogate.⁸⁰ Further, to date, numerous states have yet to address the issue of surrogacy agreements in any case law.⁸¹

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.⁸² However, the United States requires the existence of a

⁶⁸ See MICH. COMP. LAWS § 722.859 (2014).

⁶⁹ *Id.*

⁷⁰ N.Y. DOM. REL. § 122.

⁷¹ McEwen, *supra* note 5, at 290.

⁷² Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 444 (2004).

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ *Id.* at 445.

⁷⁶ See A.B.A. 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>.

⁷⁷ Browne-Barbour, *supra* note 72, at 446 (providing changes and additional information regarding surrogacy compared to the 2000 UPA).

⁷⁸ *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).

⁷⁹ *Id.* at 446.

⁸⁰ 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).

⁸¹ See *id.*

⁸² Q&A, UKRAINIAN SURROGACY SOLUTIONS, <http://ukrainiansurrogacy.com/index.php/en/q-a> (last visited Nov. 19, 2014).

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genetic link between the parents and the child.⁸³ Overall, it is common for Americans to resort to Ukraine for surrogacy purposes.⁸⁴ 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.⁸⁵

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.⁸⁶ The process in the United States costs anywhere from \$40,000 to \$100,000.⁸⁷ However, in 2012, the median household income in the United States stands at approximately \$51,017.⁸⁸ 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.⁸⁹ Therefore, many couples are left with no other option than to go overseas to engage in the surrogacy process.⁹⁰

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."⁹¹

In 1995, Ukraine had their first successful surrogacy, and since then, the country has progressed immensely regarding the practice of surrogacy.⁹² In 2013, there were approximately "one hundred and twenty successful surrogate pregnancies in Ukraine ... many of them resulting in multiple births."⁹³ Further, the number of surrogates in Ukraine is quickly rising.⁹⁴ 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.

⁸⁸ Steve Hargreaves, *15% of Americans Living in Poverty*, CNN MONEY (Sept. 17, 2013, 3:33 PM), <http://money.cnn.com/2013/09/17/news/economy/poverty-income/>.

⁸⁹ *Id.*; see Cohen, *supra* note 10.

⁹⁰ See Cohen, *supra* note 10.

⁹¹ GENNADIY DRUZENKO, *Ukraine, in INTERNATIONAL SURROGACY ARRANGEMENT, LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 440 (KATARINA TRIMMINGS & 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.⁹⁵ Additionally, Ukraine offers various regarding surrogacy.⁹⁶ For instance, in Ukraine, the intended parents are permitted to determine the gender of their baby.⁹⁷

1) Legal Aspects

The Ukrainian Family Code does not contain the terms “surrogate mother” or “surrogacy.”⁹⁸ However, the current law does protect the intended parents.⁹⁹ The Parent Registration in Ukraine is rigorously imposed to protect the intended parents.¹⁰⁰ 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.¹⁰¹ This process consists of filing various documents in the register’s office.¹⁰² This is one of Ukraine’s most stringent policies, which all genetic parents must adhere.¹⁰³

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.”¹⁰⁴ Therefore, Ukraine does not cover traditional surrogacy, because, the surrogate would then be the genetic mother.¹⁰⁵ According to the law, the embryo must be implanted in another women in order for the legal right of the intended parents to attach.¹⁰⁶

While surrogacy is legal in Ukraine, surrogates are not provided with any legal standing.¹⁰⁷ 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.¹⁰⁸ Therefore, typically the contract, the “services agreement,” details the obligations of the contracting parents.¹⁰⁹

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ UKRAINIAN SURROGACY SOLUTIONS, *supra* note 82 (process occurs by implanting an embryo of intended parent’s chose of gender).

⁹⁸ Olha Zhyla, *More Women in Ukraine Want to be Surrogate Mothers*, KIEV.UA (Dec. 15, 2009), http://www.day.kiev.ua/en/article/close/more-women-ukraine-want-be-surrogate-mothers_

“The Family Code does not even use the notion of a surrogate mother, just the implantation of human embryos produced by married couples using auxiliary reproductive technologies.” *Id.*

⁹⁹ FAMILY LAW OF UKR., cl. 123 (Jan. 2003). Under the Ukrainian Law Clause 21, the intended parents must be married. The term “parents” refer to heterosexual couples only. Therefore, Ukraine might refuse a same sex couple or a single person from finding a surrogate in the Ukraine. Additionally, Art. 21(1) states that marriage is the “matrimony of a man and a woman.” *Id.*

¹⁰⁰ *See Legislation of Ukraine*, IRTSA, <http://www.irtsa.com.ua/en/legislation/ukraine.html> (last visited Nov. 22, 2014).

¹⁰¹ DRUZENKO, *supra* note 91, at 360.

¹⁰² *See Legal Issues*, IRSTA, <http://www.irtsa.com.ua/en/questions-and-answers/legal-questions.html> (last visited Nov. 22, 2014).

¹⁰³ *Id.*

¹⁰⁴ *Legislation of Ukraine*, *supra* note 100.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ Zhyla, *supra* note 98.

¹⁰⁸ DRUZENKO, *supra* note 91, at 358; *see* Zhyla, *supra* note 86; Family Law of Ukr., cl. 123(1)-(3), 139(2) (2003).

¹⁰⁹ Zhyla, *supra* note 98.

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However, Ukraine does not address a surrogate's ability to such a contract.¹¹⁰ Attempts have been made through proposed legislation in Ukraine with the goal of aiding surrogate mothers in this respect.¹¹¹ Ultimately, the proposed bill failed, due to the lack of Ukrainian governmental support.¹¹²

Many couples that partake in international surrogacy receive little to no legal advice prior to engaging in the arrangement.¹¹³ Therefore, many couples are left uninformed of the burdens they will likely encounter when attempting to bring their surrogate-born child home, to their own country.¹¹⁴ 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."¹¹⁵

Additionally, requirements for potential surrogates exist.¹¹⁶ For a woman to be capable of being a surrogate, she must be over the age of eighteen,¹¹⁷ 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."¹¹⁸ Additionally, the woman must not engage in any harmful habits, such as smoking or drinking, and cannot have a criminal record.¹¹⁹

2) Economic Aspects

Many couples decide on Ukraine for surrogacy due to its low tariffs and lenient legislation,¹²⁰ Compared to other countries, Ukraine offers one of the least expensive commercial surrogacy programs.¹²¹ As a result, between 2005 and 2007, there was a tremendous influx in the amount of couples venturing overseas to attempt surrogate pregnancy.¹²² Currently, there are thirty licensed clinics in Ukraine that specialize in infertility with approximately ten percent of patients being foreigners.¹²³

¹¹⁰ *Stateless Babies & Adoption Scams*, *supra* note 67, at 432.

¹¹¹ Zhyla, *supra* note 98.

¹¹² *Id.*

¹¹³ Richard F. Storrow, "The Phantom Children of the Republic": International Surrogacy and the New Illegitimacy, 20 AM. U. J. GENDER SOC. POL'Y & L. 561, 606 (2012).

¹¹⁴ *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).

¹¹⁵ *Id.*

¹¹⁶ DRUZENKO, *supra* note 91, at 361.

¹¹⁷ *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.").

¹¹⁸ *Id.*

¹¹⁹ *For Surrogates*, IRSTA, <http://www.irtsa.com.ua/en/for-surrogates/> (last visited Dec. 22, 2014).

¹²⁰ Bigg & Brooks, *supra* note 22.

¹²¹ *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).

¹²² *See* Cohen, *supra* note 10.

¹²³ DRUZENKO, *supra* note 91, at 357

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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.¹²⁴ Therefore, the cost is approximately half of what surrogacy costs in the United States.¹²⁵ Further, this cost is estimated to decrease due to the surplus of Ukrainian women in Ukraine who desire to become surrogates.¹²⁶

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.¹²⁷ 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.”¹²⁸ This has resulted in several jurisdictions around the world becoming “anti-surrogacy jurisdictions.”¹²⁹

Those against surrogacy consider the monetary payment to the surrogate as money in exchange for her services of carrying the baby.¹³⁰ These commentators argue that a baby is a commodity that should not be sold.¹³¹ Further, many commentators argue that surrogacy deals are “degrading because [they] exploit[] poor or ignorant women for the benefit of rich men and women.”¹³² They further argue that the exploitation arises as a result of a fee being paid to surrogates that is far too low.¹³³ 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.¹³⁴ 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.¹³⁵

Various studies have shown that many women become surrogates as a last resort in an attempt to feed and financially support their own families.¹³⁶ In fact, many foreign surrogates will attest that the reason they go through the grueling, nine-month, period of

¹²⁴ Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 195 (2012) [hereinafter *Achieving Reproductive Justice*].

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.*

¹³² Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2282 (2012).

¹³³ McEwen, *supra* note 5, at 292.

¹³⁴ *Id.*

¹³⁵ See Adrienna Vogt, *The Rent-a-Womb Boom*, WOMEN IN THE WORLD (Mar. 1, 2014, 10:01 AM), <http://www.thedailybeast.com/witw/articles/2014/03/01/the-rent-a-womb-boom-is-india-s-surrogacy-industry-empowering-or-exploitative.html>.

¹³⁶ See McEwen, *supra* note 5, at 293.

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carrying a couple's baby is solely due to their poverty status.¹³⁷ This is precisely why critics criticize the practice of surrogacy. Further, many fail to realize that, in addition to concerns of coercion, the surrogate's life is forever changed.¹³⁸ 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.¹³⁹ 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."¹⁴⁰ Yet, on the other hand, a great amount of surrogates report back that the surrogacy arrangement was satisfactory for them.¹⁴¹

Conversely, other commentators view these arrangements as a mere contract that benefits both the surrogate and the intended parents.¹⁴² 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.¹⁴³

IV. PROPOSAL: INTERNATIONAL SURROGACY CONVENTION 2014

International surrogacy is a phenomenon that is taking place primarily across Eastern Europe, Asia, and North America.¹⁴⁴ However, despite the prevalence, there is currently no law that directly pertains to international surrogacy.¹⁴⁵ 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 of Protection of Children and Co-Operation In Respect of Intercountry Adoption.¹⁴⁶ With regard to international adoption, the international community has recognized the necessity of an international convention due to the vast amount of families involved.¹⁴⁷

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

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.*

¹⁴⁴ PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS 8 (Mar. 2011), available at <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>.

¹⁴⁵ Kristiana Brugger, *International Law In The Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665 (2012).

¹⁴⁶ Hague Conference on Private International Law, Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 (hereinafter *Convention on Protection of Children*).

¹⁴⁷ *See id.*

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must be implemented.¹⁴⁸ Furthermore, there are no international conventions, or reciprocal arrangements, for the recognition of the legal parentage of a child born through surrogacy.¹⁴⁹ 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.”¹⁵⁰ 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.¹⁵¹ 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.”¹⁵² This Convention occurred as a result of various countries common desire to provide adopting families with protection.¹⁵³

The Convention established many guidelines that parties must adhere to.¹⁵⁴ Most importantly, the Convention sets forth a “system of co-operation amongst contracting states to ensure that those safeguards are respected.”¹⁵⁵ 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

¹⁴⁹ *International Surrogacy Laws*, UKR. FAMILY L., http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69&Itemid=98&lang=en (last visited Dec. 22, 2014).

¹⁵⁰ DRUZENKO, *supra* note 91, at 365.

¹⁵¹ *Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, (June 17-25, 2010), HAGUE CONF. ON PRIVATE INT’L L. (MAY 29, 1993), Conclusions and Recommendations Adopted by the Special Commission, ¶ 25-26.

¹⁵² *Convention on Protection of Children*, *supra* note 146; *Outline of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (May 29, 1993) <http://www.hcch.net/upload/outline33e.pdf>; *Convention Countries*, INTERCOUNTRY ADOPTION BUREAU OF CONSULAR AFFAIRS (Aug. 2013) http://adoption.state.gov/hague_convention/countries.php (stating the eighty-nine countries that have adopted the Convention).

¹⁵³ *Understanding the Hague Convention*, INTERCOUNTRY ADOPTION BUREAU OF CONSULAR AFFAIRS, http://adoption.state.gov/hague_convention/overview.php (last visited Nov. 19, 2014).

¹⁵⁴ *Convention on Protection of Children*, *supra* note 146, at 171.

¹⁵⁵ *Id.*

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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

¹⁵⁶ INTERCOUNTRY ADOPTION BUREAU OF CONSULAR AFFAIRS, *supra* note 138.

¹⁵⁷ *Convention on Protection of Children*, *supra* note 146, at 171.

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.

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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.¹⁶⁷ Currently, when surrogate babies are born, some are restricted from joining their biological parents in their country of residence.¹⁶⁸ 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.¹⁶⁹ The reasoning for this being, Belgian Foreign Ministry refused to issue a passport to him.¹⁷⁰ 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.¹⁷¹ 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.”¹⁷² Although, this proved futile; and the parents then resorted to attempting to smuggle the baby across the country’s borders.¹⁷³ However, again to no avail and ultimately the baby was prohibited from leaving Ukraine.¹⁷⁴

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.”¹⁷⁵ However, as is common with numerous countries, the Belgian Foreign Minister 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.¹⁷⁶ However, thankfully, after two years and three months, the Ministry finally rendered a favorable decision, and, issued the essentially homeless boy a Belgian passport.¹⁷⁷

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.”¹⁷⁸ 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.¹⁷⁹ The Proposed Convention must address the amount of visits and duration the intended parents must travel to

¹⁶⁷ *Convention on Protection of Children*, *supra* note 146.

¹⁶⁸ Mortazavi, *supra* note 132, at 2285

¹⁶⁹ 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/>.

¹⁷⁰ *Id.* (forcing the child to reside in an orphanage).

¹⁷¹ See *id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ UKRAINIAN SURROGACY SOLUTIONS, *supra* note 82.

¹⁷⁹ *Id.*

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the country; however, each state should have the discretion to impose different requirements based on the child's health, passport regulations, etc...¹⁸⁰

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?"¹⁸¹ This standard is defined to be the place where the child is most likely to flourish.¹⁸² 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?¹⁸³ 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.¹⁸⁴ 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."¹⁸⁵ Various reasons support the adoption of such a standard.¹⁸⁶ First, such standard protects the rights of the intended parents.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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.

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 case defines the intent rule. In the case the wife was unable to have 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 analogous 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.¹⁹⁰ 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.¹⁹¹ The surrogate refused to terminate the pregnancy, which raised a legal issue.¹⁹² Some argued that terminating the pregnancy is like “stopping the production line: ‘Oh, oh, there’s a flaw.’”¹⁹³ 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.¹⁹⁴ In this case, the surrogate decided to terminate the pregnancy because of her familial obligations.¹⁹⁵ However, this is just one example of the many important decisions concerning the pregnancy that must be determined by the intended parents with certain limitations and with doctor recommendations that must be addressed during the Proposed Convention and be put in writing.¹⁹⁶

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.¹⁹⁷ 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?¹⁹⁸

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.¹⁹⁹ 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.

¹⁹¹ Tom Blackwell, *Couple Urged Surrogate Mother to Abort Fetus Because of Defect*, NAT’L POST (Oct. 6, 2010, 11:16 AM), <http://life.nationalpost.com/2010/10/06/couple-urged-surrogate-mother-to-abort-fetus-because-of-defect/>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *Convention on Protection of Children*, *supra* note 146.

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).

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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.”²⁰⁰ The surrogate should be compensated for the physical and psychological process of carrying a child, rather than for producing a healthy baby.²⁰¹ 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.²⁰²

4. A 2014 Convention: A possible International Surrogacy Treaty?

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.²⁰³ 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 2013.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ 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.²⁰⁷

Currently, preliminary research for the Convention is being conducted and two Preliminary Documents have already been executed.²⁰⁸ Since international surrogacy is rapidly spreading, the members of the Convention requested a final report to be available for review in the spring of 2014.²⁰⁹ This meeting will be vital for the surrogacy community for

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² UKRAINIAN SURROGACY SOLUTIONS, *supra* note 82.

²⁰³ See Mortazavi, *supra* note 132, at 2254-55.

²⁰⁴ *Private International Law*, U.S DEP’T ST. DIPL. ACTION, <http://www.state.gov/s/l/c3452.htm> (last visited Nov. 19, 2014); *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements - 2011-2014*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=183_ (last visited Nov. 19, 2014).

²⁰⁵ *Id.*

²⁰⁶ *The Private International Law issues surrounding the status of the children, including issues arising from international surrogacy arrangements – 2010 and prior*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=182.

²⁰⁷ *Id.*

²⁰⁸ *Questionnaire on parentage/ Surrogacy Addressed to Surrogacy Agencies (Questionnaire No. 4)*, HCCH, http://www.hcch.net/limesurvey/index.php/252811/lang-en#_ftn2.

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...”²¹⁰ The Permanent Bureau is gathering information before this meeting will take place.²¹¹ They are circulating questionnaires to member of the Hague Conference, interested states, surrogacy agencies, health professional and legal practitioners.²¹² 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.²¹³

The answers in this report will be the deciding factor on which way the report will be written.²¹⁴

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.”²¹⁵ 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.”²¹⁶

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.²¹⁷ Presently, there are many families, legislatures, and scholars who are opposed to the idea of surrogacy.²¹⁸ Many believe that surrogacy should be completely banned, and agree with

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.*

²¹⁵ *Convention on Protection of Children*, *supra* note 146.

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).

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countries such as Australia, which currently ban surrogacy.²¹⁹ 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.”²²⁰ As international surrogacy is a recently novel concept, lacking international regulation, numerous issues often present themselves.²²¹ This holds true in jurisdictions where surrogacy is legal, such as Ukraine, resulting in the possibility of stateless children.²²²

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?²²³ 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.”²²⁴ 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.²²⁵ This Convention while proven successful has also encountered various issues throughout its development.²²⁶ 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.

²¹⁹ MARY KEYES, *Australia*, in INTERNATIONAL SURROGACY ARRANGEMENT, LEGAL REGULATION AT THE INTERNATIONAL LEVEL 440 (KATARINA TRIMMINGS & PAUL BEAUMONT eds., Hart Publishing, Oxford May 17, 2013).

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.*

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The two children that once played “house” dreaming of marriage and children have grown into a young a 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.

