LABOR-ONLY CONTRACTING: EXAMINING THE LEGAL COMPLEXITIES OF SURROGACY IN THE PHILIPPINE CONTEXT*

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ABSTRACT

The world has seen a rise in surrogate births owing to rapid advancements in the fields of medicine and technology. Surrogacy has become an increasingly popular option for parents-to-be. The same is not without its pitfalls, however, as the practice remains largely unregulated. While some States have passed legislation on the matter, there are no internationally-recognized standards governing surrogacy. This paper examines the various legal issues that may arise as a consequence of contracting surrogacy. It discussed judicial and legislative approaches utilized by States in dealing with such issues. This work likewise evaluates surrogacy in the Philippine context by addressing the legal status of surrogacy within the framework of existing laws. It concludes by proposing a legislative measure to govern surrogacy arrangements in the Philippines.

> *"Surrogacy contracts touch upon one of the most, if not the most, sensitive subjects of human endeavor. Not only does the birth of a new generation perpetuate our species, it allows every parent to contribute, both genetically and socially, to our collective understanding of what it means to be human."*
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> —Justice Armand Arabian, California Supreme Court[1]

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[1] Johnson v. Calvert, 5 Cal.4th 84 (1993) (Arabian, *J.*, *concurring*).

INTRODUCTION

Thai surrogate mother Pattaramon Chanbua was struggling to make ends meet. Chanbua, then 21, entered into a surrogacy arrangement with an Australian couple. She gave birth to twins, one of which was a baby boy diagnosed with Down syndrome. The couple took only the healthy twin back to Australia leaving the other, later named *Baby Gammy*, with Chanbua. They also demanded a refund from the Thai surrogacy agency.[2] When news of Gammy's predicament hit social media, kind strangers from all over the world donated to his cause. The Australian couple caught wind of Gammy's newfound wealth and have since attempted to gain access to the funds.[3]

Surrogacy arrangements are fraught with great risks, especially for the children born of such arrangements. In light of the various issues—legal, medical, and bioethical—that may arise, it is imperative that such matters be clarified. Accordingly, this paper seeks to highlight the *legal* concerns involved in surrogacy cases. It examines various approaches to dealing with these issues in light of the absence of internationally-recognized standards governing surrogacy. As there is yet no statute specifically addressing surrogacy arrangements in the Philippines, this paper suggests a legal regime to govern such cases. This work will proceed in six parts.

Part I defines and explains the different kinds of surrogacy. This section explains why persons resort to surrogacy and other forms of Assisted Reproductive Technologies (ARTs).[4] It likewise discusses landmark surrogacy cases decided by foreign courts, as well as ongoing efforts being undertaken by the Hague Conference on Private International Law. This section then

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[2] Paul Farrell, *Baby Gammy, born into Thai surrogacy scandal, granted Australian citizenship*, THE GUARDIAN, Jan. 19, 2015, *at* http://www.theguardian.com/australia-news/2015/jan/20/baby-gammy-born-into-thai-surrogacy-scandal-granted-australian-citizenship.

[3] Jonathan Pearlman, *Australian Couple Make 'Insane' Claim for Money Raised to Support Baby Left in Thailand*, THE TELEGRAPH, May 19, 2015, *at* http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11614485/Australian-couple-make-insane-claim-for-money-raised-to-support-baby-left-in-Thailand.html.

[4] The World Health Organization (WHO) defines ARTs as "all treatments or procedures that include the *in vitro* handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy. This includes, but is not limited to, *in vitro* fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor," F. Zegers-Hochschild et al., *The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009*, 24 HUMAN REPRODUCTION 2683, 2685 (2009).

addresses the status of surrogacy in foreign jurisdictions by discussing the laws and guidelines followed in those countries.

Part II focuses on the legal problems arising from surrogacy in general, covering both domestic and inter-country surrogacy. Among these issues are the status of the contract, the constitutional rights of the parties, and legal parentage.

Part III discusses legal issues specific to inter-country surrogacy, including conflict-of-laws and citizenship. This section explores recent accounts of surrogacy in the international scene by highlighting the problems often encountered by parties contracting surrogacy. It identifies court decisions of various countries which resolved—or at least attempted to resolve—legal disputes arising from or related to inter-country surrogacy.

Part IV evaluates surrogacy in the Philippine context. It includes a discussion on current laws on ARTs as well as bills introduced in Congress. While surrogacy is not yet widely practiced in the Philippines, this section analyzes the legality of a surrogacy contract under current Philippine law.

Part V explores the possibility of limited recognition of surrogacy contracts in the Philippines. This section attempts to determine liability for infractions or breaches of surrogacy contracts. Moreover, this part discusses the liabilities of the intended parents and the surrogate mother *independent of the surrogacy contract*, bearing in mind the obligation to uphold the best interest of the child.

Finally, Part VI identifies problem areas in international surrogacy that must be addressed by the Hague Convention.[5] Moreover, as the Philippines currently has no legislation dealing specifically with surrogacy cases, this section proposes a legislative measure to govern such arrangements.

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[5] The Hague Conference on Private International Law (HCCH) has convened an experts' group tasked with evaluating the feasibility of establishing an international convention on surrogacy. The specific efforts of the Hague Conference will be discussed in *infra* Part I.C.

I. THE CONCEPT OF SURROGACY

The concept of surrogacy is not as novel as one might think. In fact, it has been around since before recorded history.[6] The Greek god Zeus served as gestational surrogate for Dionysus, the god of wine. When Semele, Dionysus' mother, died, Zeus took the developing fetus and sewed it into his thigh. He later gave birth to Dionysus.[7] Another oft-cited example of surrogacy is that found in the book of Genesis. It tells the story of Sarah, wife of Abraham, who was unable to conceive a child for him. Sarah told her husband, "[t]he Lord has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her."[8]

A. Definitions

Surrogacy is defined broadly as "the process of carrying and delivering a child for another person."[9] There are generally two contracting parties to a surrogacy agreement: the "intended parent(s)" (sometimes also referred to as "intending parent(s)" or "commissioning couple or individual")[10] and the "surrogate mother." The intended parents are those "who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own."[11] The surrogate mother is the woman who carries the child to term for the commissioning couple with the understanding that she must relinquish her parental rights over the child after birth. If the surrogate mother is not related to the child, she may also be called the "gestational carrier."[12] For clarity, this paper will refer to the infant born out of a surrogacy arrangement as the "surrogate baby" or "surrogate child."

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[6] Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, If Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 799 (2012).

[7] *Id.*

[8] Genesis 16:2 (New International Version).

[9] BLACK'S LAW DICTIONARY 1674 (10th ed. 2014).

[10] The Hague Conference Preliminary Report primarily uses the term intending parent(s), although terms such as intended parent(s) and commissioning couple or individual were also used. See Hague Conference on Private International Law, A preliminary report on the issues arising from international surrogacy arrangements, Glossary [hereinafter "Hague, Preliminary Report"], Prel. Doc. No. 10 (March 2012), *at* https://www.assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074c9b17fe.pdf.

[11] *Id.*

[12] *Id.*

As to genetic relation, there are two types of surrogacy: traditional and gestational. The biblical account of Abraham, Sarah, and her handmaiden, Hagar, could be described as a "traditional surrogacy arrangement," that is, one "where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate."[13] It may involve natural conception or artificial insemination procedures. On the other hand, Zeus' and Dionysus' situation involves a "gestational surrogacy arrangement," or one "in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate."[14] Parties often resort to *in vitro* fertilization when practicing gestational surrogacy.

Surrogacy arrangements may also be either "altruistic" or "commercial." The former is defined as a surrogacy arrangement in which "the intending parent(s) pay the surrogate nothing or, more usually, only for her 'reasonable expenses' associated with the surrogacy."[15] In contrast, financial compensation beyond such "reasonable expenses" is paid to a surrogate where the arrangement is a commercial one.[16]

A surrogacy contract may likewise be "entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State."[17] Such agreement is termed an "international or inter-country surrogacy arrangement." One may also enter into a surrogacy agreement with another person from the same state. For purposes of this paper, such an agreement is referred to as a "domestic surrogacy arrangement."

B. Why Choose Surrogacy?

Single persons and couples alike may have different reasons for utilizing ARTs, but more often than not, it is because they are unable to conceive. With respect to surrogacy in particular, Reyes and See observed that "the method is resorted to when the problem lies in the infertility of the wife who is unable to carry to term."[18] However, although total fertility rates have

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Genevieve H. Reyes & Hazel Rose B. See, Contracts to Make Babies: *An Examination of Artificial Reproductive Technology from a Philippine Contract Law Perspective*, 76 PHIL. L.J. 194, 202 (2001).

been on the decline in recent years not only in the Philippines,[19] but worldwide,[20] couples resort to surrogacy and other forms of ARTs for reasons other than biological infertility.

A couple desiring to have a child and biologically capable of doing so may choose to enter into a surrogacy arrangement because of personal reasons. Among such reasons are timing, personal convenience, selection of characteristics of offspring, avoidance of genetic defects, and protection against changed circumstances such as death and divorce.[21] Shultz also identified "social infertility" as a possible justification for resorting to ARTs. According to her, "the ability to separate procreation from sex also provides new choices to those who want to reproduce but are unwilling or unable to change important and stable aspects of their intimate lives in order to accomplish that goal."[22] "Socially infertile" individuals include single persons of either gender desiring to procreate as well as homosexual couples looking to start a family.

Parties may also view surrogacy as an alternative to the lengthy process of adoption. Philippine adoption law mandates that the adopters undergo supervised trial custody for a period of at least six months to establish a "bonding relationship" with the prospective adoptee.[23] The adoption decree will not be granted until the entire judicial procedure is completed. The process takes even longer for inter-country adoption—the waiting period for child referral ranges from 24-36 months from receipt of the prospective adoptive parents' dossier.[24]

Kerian noted that adoption is no longer the preferable option it once was. Aside from the long waiting period associated with adoption proceedings, she observed that as more women seek abortion for unwanted

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[19] *Philippines National Demographic and Health Survey 2013*, PHILIPPINE STATISTICS AUTHORITY AND ICF INTERNATIONAL (2014).

[20] *Fertility rate, total (births per woman)*, THE WORLD BANK, *at* http://data.worldbank.org/indicator/SP.DYN. TFRT.IN (last visited May 7, 2016).

[21] Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 313 (1990).

[22] *Id.* at 314.

[23] Rep. Act No. 8552, § 12 (1998). Domestic Adoption Act of 1998.

[24] *Overview of Inter-Country Adoption Process Involving a Non-Relative*, INTER-COUNTRY ADOPTION BOARD, *available at* http://www.icab.gov.ph/download/OVERVIEW%20(regular).pdf (last visited Dec. 12, 2015).

pregnancies, fewer babies become available for adoption.[25] Moreover, she found that "an increased societal awareness of genetic relatedness has resulted in the desirability of children biologically related to a couple."[26]

C. The Hague Conference

At present, there are no internationally binding standards to govern international surrogacy arrangements. Unlike adoption, which is regulated by the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption [27] (hereinafter "Hague Adoption Convention"), laws and standards pertaining to surrogacy vary greatly from state to state.[28]

The Hague Conference on Private International Law (HCCH)[29] was established in 1893 to "work for the progressive unification of the rules of private international law."[30] To this end, it has drafted and implemented several multilateral conventions dealing with conflict-of-laws. Within the area of Persons and Family Relations, the Hague Conference has adopted conventions on marriage, divorce and legal separation, property regimes, child support, protection of children, enforcement of parental obligations, and adoption.[31]

In 2011, the HCCH began to explore the possibility of drafting a convention on surrogacy. The following year, it released a Preliminary Report on international surrogacy arrangements, where it acknowledged that "international surrogacy arrangements are growing at a rapid pace and, unfortunately, so too appear to be the difficulties arising from them."[32]

More recently, in March 2015, the HCCH decided to convene an Experts' Group to evaluate the feasibility of advancing work in respect of regulating surrogacy. In the said meeting, which took place in February 2016,

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[25] Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 113. (1997). Note, however, that abortion is a criminal offense in the Philippines, REV. PEN. CODE, arts. 256-9.

[26] *Id.*

[27] Entered into force on 1 May 1995.

[28] *See infra* Part I.E.

[29] HCCH stands for Hague Conference/Conférence de La Haye.

[30] STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW art. 1, July 15, 1955, 220 U.N.T.S 121.

[31] Conventions adopted by the Hague Conference may be found on the HCCH website at https://www.hcch.net/en/instruments/conventions (last visited Dec. 12, 2015).

[32] Hague, Preliminary Report, *supra* note 10, at 5.

the group was unable to arrive at definitive findings, "owing to the complexity of the subject and the diversity of approaches by States."[33] Nevertheless, it was agreed upon that the mandate of the Experts' Group should be continued and a later meeting with a focus on recognition be conducted.[34]

D. Leading Cases

Because of the absence of an international convention (and in the case of the United States, a federal law) regulating surrogacy, legal disputes concerning the enforcement of surrogacy contracts are often brought before the courts. The following are some of the leading cases[35] in the area of surrogacy. However, jurisprudence on the matter is still in flux, depending on the jurisdiction in question.

1. Baby M

One of the first commercial surrogacy contracts that drew public attention in the United States was the case of *In re Baby M*.[36] In this case, the Stern couple responded to advertising by the Infertility Clinic of New York. Through this clinic, the Sterns met Mary Beth Whitehead who agreed to be their surrogate. The contract was executed in 1985 between Mr. Stern and Mrs. Whitehead, which provided that the latter would be artificially inseminated with the former's sperm. She would then carry the baby to term and upon giving birth, relinquish all parental rights in favor of the Sterns. Under the terms of the contract, Mrs. Whitehead was to receive USD 10,000.

On March 27, 1986, Sara Elizabeth Whitehead was born. Mrs. Whitehead delivered the child to the Sterns as per their agreement, but later realized that she could not give up Baby M. She took the day-old infant with her and refused to surrender the baby to the Sterns. The latter filed a complaint before the New Jersey Superior Court seeking custody of Baby M and the enforcement of the surrogacy contract.

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[33] Hague Conf. on Private Int'l Law, Conclusions and Recommendations Adopted by the Council 2 (2015), *at* https://assets.hcch.net/docs/8c756bba-54cd-4d3e-8081-1e777d6950dc.pdf.

[34] *Id.* at 3.

[35] A leading case or landmark decision is an opinion of unusual significance because over time it influences a great number of later decisions. A landmark decision usually creates or refines a doctrine that is often applied in the later cases, which may refer to the landmark case for authority to apply the doctrine in later disputes, BOUVIER'S LAW DICTIONARY 839 (Compact ed. 2011).

[36] *In re* Baby M, 109 N.J. 396 (1988).

The trial court upheld the validity of the agreement, but on appeal, the Supreme Court of New Jersey declared it invalid for being contrary to law and public policy. Absent a law sanctioning the execution of the surrogacy agreement, the Court had no choice but to invalidate the latter.

On the issue of custody, the Court ruled that the "best interests of the child" standard would be satisfied by granting custody to the Sterns. Despite the declaration that the surrogacy contract was illegal, the Court acknowledged that the State Legislature remained "free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints."[37]

The Supreme Court's decision in *Baby M* resulted in a boom in legal scholarship, with legal scholars either criticizing or defending the court's decision. Allen commented that the court, in deciding the case, should have focused more on the rights of the surrogate mother than those of the intended parents.[38] Schuck took a different view—he argued that "the law should uphold surrogacy contracts, not categorically condemn them as the Supreme Court of New Jersey did."[39]

2. Johnson v. Calvert

Unlike the *Baby M* case which involved traditional surrogacy, *Johnson v. Calvert*[40] concerned a gestational surrogacy arrangement. To recall the discussion in Part I.A., in gestational surrogacy, the child bears no genetic relation to the surrogate mother.

In 1984, Crispina Calvert underwent a hysterectomy. As a result, she and her husband, Mark, could not conceive. Hearing about their plight, Anna Johnson offered to act as their surrogate. The contract between the parties, entered into in 1990, provided that an embryo created by Mark's sperm and Crispina's egg would be implanted in Anna and the child born would be taken into Mark and Crispina's home as their child. Anna likewise agreed to relinquish all parental rights over the child. The Calverts agreed to pay Anna USD 10,000 in several installments.

Shortly after Anna found out she was pregnant, the parties' relationship began to turn sour. Anna demanded payment of the balance from

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[37] *Id.* at 469.

[38] Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759 (1988).

[39] Peter H. Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1793-4 (1988).

[40] Johnson v. Calvert, 5 Cal.4th 84 (1993).

the Calverts and threatened to keep the child if they would not pay up. In response, the Calverts filed a lawsuit seeking a declaration that they were the unborn child's lawful parents. By way of defense, Anna argued that the surrogacy agreement was void. The trial court ruled in favor of the Calverts and upheld the validity of the surrogacy contract.

On appeal to the California Supreme Court, the trial court's decision was affirmed. Interestingly, the Court ruled that both Anna and Crispina had valid claims to maternity under California law. However, it ultimately held in favor of Crispina upon a showing that she *intended* to be a mother, while Anna did not.

Anent the validity and enforceability of the surrogacy contract, the Court held that the agreement did not run afoul of any law or public policy. It discarded Anna's argument that gestational surrogacy was akin to adoption and that receiving compensation under the agreement would be illegal. The high court stated that since Anna made a knowing and intelligent decision to enter into the contract, it was not in a position to invalidate her choice, especially upon flimsy grounds.

3. Baby Manji

More than two decades after *Baby M* and *Johnson v. Calvert* came the case of *Baby Manji Yamada.*[41] This was one of the first internationally publicized accounts of international surrogacy, although the use of ART was already gaining traction in India.[42] Today, the case is cited as authority for the position that commercial surrogacy arrangements are legal in India.

In 2008, Ikufumi and Yuki Yamada, Japanese citizens, traveled to India to meet with Dr. Nayna Patel, the medical director of an infertility clinic. They were paired with an Indian surrogate who agreed to be implanted with an embryo created from Ikufumi's sperm and a donor's egg. Complications arose when the Yamadas decided to obtain a divorce. A month later, the surrogate gave birth to a healthy baby girl named Manji. Ikufumi still wanted to raise the baby, but Yuki disagreed and wanted nothing to do with her.

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[41] Baby Manji Yamada v. Union of India and Another, 13 S.C.C. 518 (2008).

[42] As of 2013, there were around 3,000 ART clinics in India. *See Foreigners are Flocking to India to Rent Wombs And Grow Surrogate Babies*, BUSINESS INSIDER, Sept. 30, 2013, *at* http://www.businessinsider.com/india-surrogate-mother-industry-2013-9.

Suddenly, from having three potential mothers—the surrogate, the egg donor, and the intended mother—Manji had none.[43]

Under the terms of the surrogacy arrangement, the egg donor's responsibility ceased after she gave up her eggs, while the surrogate was no longer responsible for the baby after giving birth. Ikufumi wanted to bring Manji back to Japan, but he had to act quickly as his visa was about to expire. Both Indian and Japanese authorities refused to grant Manji a passport. It was clear that neither the Indian nor the Japanese legal systems were equipped to handle a case such as Manji's. As Ikufumi's visa had already expired, his mother (Manji's grandmother) Emiko flew to India to care for the baby. She then filed a case before an Indian court for the issuance of travel documents for Manji.[44]

The case reached the Indian Supreme Court, which upheld the legality of the surrogacy agreement and recognized Ikufumi as Manji's father. As a consequence, Indian authorities provided Manji with a passport.[45] Eventually, she was also granted a Japanese visa on "humanitarian grounds."[46]

E. The Status of Surrogacy in Foreign Jurisdictions

A primary factor contributing to disputes arising from surrogacy contracts is the application of conflicting laws of different jurisdictions. While some have already passed legislation on surrogacy, others have left it to the courts to determine the validity and enforceability of surrogacy agreements. Among the jurisdictions with specific laws on surrogacy are California,[47]

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[43] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, KENAN INST. FOR ETHICS, DUKE U., (2009), *available at* http://kenan.ethics.duke.edu/wp-content/uploads/2012/08/BabyManji_TN2015.pdf.

[44] *See* Anil Malhotra and Ranjit Malhotra, *Commercial Surrogacy in India: Bane or Boon?*, LAW GAZETTE, *at* http://www.lawgazette.com.sg/2009-3/regnews.htm (last accessed Oct. 7 2016).

[45] Baby Manji Yamada v. Union of India and Another, 13 S.C.C. 518 (2008).

[46] *Baby Manji arrives to unite with Japanese dad,* DNA INDIA, Nov. 3, 2008, *at* https://www.dnaindia.com/world/report-baby-manji-arrives-to-unite-with-japanese-dad-1203013 (last accessed Oct. 7 2016).

[47] A.B. No. 1217 (2012), *amending* CAL. CIV. CODE § 7960. Surrogacy agreements.

Thailand,[48] Israel,[49] Hong Kong,[50] Russia,[51] and the Ukraine.[52] On the other hand, the following have no specific surrogacy laws: New Jersey,[53] India,[54] Cambodia,[55] and Ireland.[56]

1. United States of America

At present, no federal statute to regulate surrogacy exists in the United States. Some states have laws directly addressing the matter, while others rely on judicial precedent. Mortazavi expressed concern over the feasibility of a federal surrogacy law. She emphasized that the US federal government is "one of enumerated powers, and family law traditionally falls under the purview of the states, not the federal government."[57] Moreover, two prior federal anti-surrogacy bills had already failed to pass the scrutiny of the US Congress.[58]

i. New Jersey

New Jersey's stance on commercial surrogacy remains unchanged since the ruling in *Baby M*. However, in 2012 and 2014, the state legislature of New Jersey attempted to pass its own surrogacy legislation. Both times, Governor Chris Christie vetoed the bills.[59] Entitled the "New Jersey Gestational Carrier Agreement Act," Senate Bill No. 866 departed from the *Baby M* ruling and instead provided that "gestational carrier agreements

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[48] Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act) (2015).

[49] Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756-1996, SH No. 1577, 176.

[50] Cap. 561 (2000). Human Reproductive Technology Ordinance.

[51] SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] arts. 51-52.

[52] UKRAINE FAMILY CODE, art. 123.

[53] *In re* Baby M, 109 N.J. 396 (1988).

[54] *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India*, INDIAN COUNCIL OF MEDICAL RESEARCH, *at* http://icmr.nic.in/art/art_clinics.htm (last accessed Oct. 7, 2016).

[55] Vandy Muong & Will Jackson, The Billion Dollar Babies, THE PHNOM PENH POST, Jan. 2, 2016, *at* http://www.phnompenhpost.com/post-weekend/billion-dollar-babies.

[56] Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State, *available at* https://www.dfa.ie/media/dfa/alldfawebsitemedia/childrens-issues-surrogacy-guidance-document.pdf.

[57] Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2266-7 (2012).

[58] *Id.* at 2270.

[59] Susan K. Livio, *Christie Again Vetoes Bill Regulating Surrogate Parenting Pacts in N.J.*, NJ.COM, June 30, 2015, http://www.nj.com/politics/index.ssf/2015/06/christie_again_vetoes_bill_regulating_surrogate_pa.html.

executed pursuant to [the] act are in accord with the public policy of this State."[60] Proponents of surrogacy criticized the vetoes, claiming that the bill would have given LGBT couples the opportunity to have children with whom they share a genetic connection, and to prove parental rights over such children.[61]

ii. California

For nearly two decades following the State Supreme Court's ruling in *Johnson v. Calvert*, California remained legislatively silent on the matter of surrogacy. AB-1217 was passed in late 2012,[62] amending the California Family Code to include best practices relating to surrogacy agreements and other forms of ARTs. This law reinforced the status of California as a surrogacy-friendly jurisdiction. Under the law, the intended parents may establish parentage by filing a petition in court even before the child is born.

2. Asia

Surrogacy in Asia is an attractive option to westerners primarily because of the lower cost. In the United States, the costs associated with surrogacy may reach up to USD 100,000 per pregnancy.[63] This amount is halved when an Asian surrogate is used.[64] Moreover, couples may wish to travel to other countries (for example, India) for surrogacy in order to avoid the strict laws of their own countries.[65]

i. India

India is at the forefront of international surrogacy, with over 3,000 ART clinics[66] drawing in an estimated USD 400 million a year.[67] According to official estimates, over 5,000 surrogate babies are born in India annually.[68]

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[60] S. No. 866, § 2 (a) (N.J.) (2014).

[61] Abigail Wilkinson, *Gov. Christie Vetoes Gestational Surrogacy Bill in New Jersey*, CNS NEWS, July 10, 2015, *at* http://cnsnews.com/news/article/abigail-wilkinson/gov-christie-vetoes-gestational-surrogacy-bill-new-jersey.

[62] The Governor signed the bill into law on Sept. 23, 2012.

[63] Helier Cheung, *Surrogate Babies: Where Can You Have Them, and Is It Legal?*, BBC, Aug. 6, 2014, *at* http://www.bbc.com/news/world-28679020.

[64] *See id.*

[65] Ashley Hope Elder, *Wombs to Rent: Examining the Jurisdiction of International Surrogacy*, 16 OR. REV. INT'L. L. 347, 370 (2014).

[66] BUSINESS INSIDER, *supra* note 42.

[67] Elder, *supra* note 65, at 370.

[68] *Despair over Ban in India's Surrogacy Hub*, BBC, Nov. 22, 2015, *at* http://www.bbc.co

The country presently has no legislation governing surrogacy. What it does have are guidelines, drawn up by the Indian Council of Medical Research (ICMR) in 2005.[69] The guidelines provide for registration by ART clinics as well as standards that must be observed. Commercial surrogacy is permitted under the guidelines.

Despite the issuance of these guidelines, cases such as *Baby Manji* have arisen, precisely because the guidelines are non-binding and are not enforceable in court. To respond to this lacuna in the law, Indian legislators introduced the "Assisted Reproductive Technology (Regulation) Bill, 2014." The bill sought to regulate surrogacy arrangements in India by providing for certain requisites, rights, and obligations to be observed by the parties to such arrangements. The Indian Parliament failed to pass the law, reportedly due to lack of time.[70] An amended version of the bill was introduced in late September 2015, with one major change—foreigners were prohibited from contracting surrogacy in India.[71]

In accordance with the draft bill, the ICMR issued a circular dated September 28, 2015 advising clinics "not to entertain any foreigners for availing surrogacy services in India."[72] The Mumbai High Court temporarily lifted the ban in November, if only to accommodate foreign couples who had already begun the surrogacy process.[73]

ii. Thailand

In 2002, the Thailand Medical Council issued guidelines expressly prohibiting commercial surrogacy in the country.[74] Despite this ban, Thailand

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m/news/world-asia-india-34876458.

[69] *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India*, INDIAN COUNCIL OF MEDICAL RESEARCH, *at* http://icmr.nic.in/art/art_clinics.htm (last accessed Oct. 7, 2016).

[70] *Tough Question*, THE KATHMANDU POST, Sept. 23, 2015, *at* http://kathmandupost.ekantipur.com/news/2015-09-23/tough-question.html.

[71] Tariq Ahmad, *India: Draft Legislation Regulating Assisted Reproductive Technology Published*, LIBRARY OF CONGRESS, Nov. 2, 2015, *at* http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/ (last accessed Oct. 12, 2016).

[72] Joanna Sugden, *Mumbai Court Lifts Ban on Surrogacy for Foreigners—In Some Cases*, THE WALL STREET JOURNAL, Nov. 4, 2015, *at* http://blogs.wsj.com/indiarealtime/2015/11/04/mumbai-court-lifts-ban-on-surrogacy-for-foreigners-in-some-cases/.

[73] *Id.*

[74] Thailand Med. Council Notification No. 21/2544, On Service Standards for Assisted Reproductive Technologies (No. 2), June 20, 2002.

became a hotbed for foreigners seeking surrogates due to lax enforcement of the prohibition. Australia's Department of Foreign Affairs and Trade estimated that some 150 Australian couples were expecting children by Thai surrogates in the year 2015 alone.[75]

The negative publicity generated by the 2014 incident involving *Baby Gammy* forced Thai authorities to reconsider their position on surrogacy. Thus, in early 2015, the National Legislative Assembly passed the "Protection for Children Born Through Assisted Reproductive Technologies Act."[76] Under the new law, only married heterosexual couples may enter into a surrogacy contract in Thailand. They must be married for at least three years, and at least one spouse must be a Thai national. The surrogate mother must be related to the married couple by blood. Paid surrogacy is expressly prohibited.

3. Europe

While several countries in Western Europe prohibit all forms of surrogacy (France, Germany, Italy, Spain, Portugal and Bulgaria), and others expressly prohibit only commercial surrogacy (the United Kingdom, Ireland, Denmark and Belgium), persons residing in these countries may opt to travel to their Eastern neighbors (Ukraine and Russia) where such arrangements are permitted.[77]

i. The United Kingdom

Commercial surrogacy is contrary to the public policy of the United Kingdom.[78] Section 2 of the Surrogacy Arrangements Act 1985 explicitly provides for this prohibition. The law does not penalize the commissioning couple or the surrogate if payment is made, but the court will not grant a parental order unless it is convinced that the surrogacy was altruistic in character.[79] British courts, however, have retroactively approved payments to surrogates, taking into account the best interest of the child.[80] Under UK law,

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[75] *Thailand Bans Commercial Surrogacy for Foreigners*, BBC, Feb. 20, 2015, *at* http://www.bbc.com/news/world-asia-31546717.

[76] Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBRARY OF CONGRESS, Apr. 6, 2015, *at* http://www.loc.gov/ law/foreign-news/article/thailand-new-surrogacy-law/.

[77] Cheung, *supra* note 63.

[78] *Re* X and Y (Foreign Surrogacy), EWHC 3030 (2008).

[79] Human Fertilisation and Embryology Act 2008, § 54.8.

[80] *Re* X (Children) (Parental Order: Retrospective Authorisation of Payments), EWHC 3147 (2011); J v. G, EWHC 1432 (2013).

regardless of where the surrogacy contract is entered into, the woman who carries the child is to be treated as the child's mother.[81]

ii. Ukraine

The Ukrainian Family Code expressly recognizes gestational surrogacy. Article 123 thereof provides that "[i]f the embryo conceived by the spouses using Assisted Reproductive Technology is transferred into the body of another woman, the spouses shall be the parents of the child." Thus, the gestational carrier will have no rights over the child.

Despite the relatively favorable treatment afforded by Ukrainian legislation to surrogacy contracts, there is one major obstacle to persons seeking surrogacy: a couple may only contract surrogacy if either spouse suffers from a medical condition making conception difficult or impossible.[82]

4. Summary of Foreign Regimes on Adoption

In sum, States' regimes on the validity of a surrogacy contract may be grouped into four categories. *First*, a certain jurisdiction, such as the State of California, may regard all kinds of surrogacy contracts as valid, whether altruistic or commercial. *Second*, it may limit recognition and validity only to certain surrogacy contracts. For example, the United Kingdom, Ireland, Denmark and Belgium do not prohibit altruistic surrogacy contracts. Meanwhile, Thailand permits surrogacy contracts only where at least one of the intended parents is a Thai citizen, and India's administrative circular prevents foreigners from prospectively availing of surrogacy services. Likewise, the Ukraine's issuance limits surrogacy to spouses for whom conception is difficult or impossible, with Russia having a similar rule.[83] *Third*, a government may ban all kinds of surrogacy arrangements by prohibiting them, such as in France, Germany, Italy, Spain, Portugal and Bulgaria, or by declaring such contracts void, as in Québec.[84] And *fourth*, a law may be passed criminalizing the practice of surrogacy, as in Hong Kong.[85]

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[81] Human Fertilisation and Embryology Act 2008, § 33.1.

[82] Ukraine Ministry of Health Order No. 771 (2008).

[83] Cheung, *supra* note 63.

[84] QUEBEC CIVIL CODE, art. 541. "Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null."

[85] Cap. 561 (2000). Human Reproductive Technology Ordinance.

II. LEGAL ISSUES COMMON TO DOMESTIC AND INTER-COUNTRY SURROGACY

The cases of *Baby M*, *Johnson v. Calvert*, and *Baby Manji*, as earlier discussed, provide a glimpse of the possible issues that one might encounter as a result of opting for surrogacy. As more parties become involved in the process, the number of potential problems increases exponentially. The problems discussed below may confront *all* situations of surrogacy, whether it be traditional or gestational, altruistic or commercial, and domestic or inter-country.

A. Voluntariness and Informed Consent

A surrogacy arrangement by its very nature implies an agreement between the parties involved. As it is a contract, to be considered valid it must possess certain essential requisites.

In *Some Reflections on Baby M*, Schuck observed that one of the most common objections to surrogacy is that it cannot really be voluntary.[86] Surrogacy opponents argue that women are impelled more by economic need than altruism in making the decision to become surrogates. This line of thinking led to the development of terms such as "baby selling," "reproductive supermarket,"[87] and "wombs for hire."[88]

In defense of a woman's choice to become a surrogate, Schuck argued that "a surrogate's decision does not become involuntary in any meaningful sense simply because she regrets the decision."[89] Thus, subsequent feelings of regret or remorse will not invalidate a contract which, at its inception, was a valid agreement. The California Supreme Court's decision in *Johnson v. Calvert* reinforces this view, thus:

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[86] Schuck, *supra* note 39, at 1799.

[87] DEBORA SPAR, THE BABY BUSINESS 77 (2006), *cited by* Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303 (2007).

[88] *See* Elder, *supra* note 65; *Wombs for Hire: Aussie Couples Flock to Thailand to Find Surrogates*, SBS AUSTRALIA, Oct. 30, 2013, *at* http://www.sbs.com.au/news/article/2013/10/29/wombs-hire-aussie-couples-flock-thailand-find-surrogates; *Exclusive: Rise in Number of Couples Seeking "Wombs for Hire" Abroad*, THE INDEPENDENT, Dec. 29, 2012, *at* http://www.independent.co.uk/life-style/health-and-families/health-news/exclusive-rise-in-number-of-couples-seeking-wombs-for-hire-abroad-8432820.html; *Wombs for Hire to British Couples at India Baby Farms*, THE TIMES UK, Sept. 19, 2013, *at* http://www.thetimes.co.uk/tto/news/world/asia/article3872832.ece.

[89] Schuck, *supra* note 39, at 1799.

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.[90]

A second argument against the consensual and voluntary character of surrogacy agreements is that the woman "doesn't know what she is getting into."[91] Contrary to this, applying law and economics theory,[92] Judge Posner argued in favor of the enforceability of surrogacy agreements. According to this theory, parties will only enter into surrogacy contracts if they believe that it would be mutually beneficial.[93] Thus, he concluded that women must know the repercussions of entering into surrogacy agreements, for if they do not, such agreements cannot be depended on to "maximize welfare." He stressed, moreover, that there is no convincing evidence to believe that on average, women who agree to become surrogates underestimate the distress they would feel at having to give up the baby.[94] On the contrary, studies on the matter show that most surrogate mothers have given birth before and/or have children of their own.[95]

Other surrogacy opponents raised a third point of contention: that surrogacy is much like slavery. On the other hand, Allen noted only one similarity between them: that both surrogate mothers and slave mothers have no parental rights over the babies they carried to term.[96] Moreover, underlying

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[90] Johnson v. Calvert, 5 Cal.4th 84, 97 (1993).

[91] Richard A. Posner, *The Ethics and Economics of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 24 (1989).

[92] "The general theory is that law is best viewed as a social tool that promotes economic efficiency, that economic analysis and efficiency as an ideal can guide legal practice," Brian Edgar Butler, *Law and Economics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, *at* http://www.iep.utm.edu/law-econ/ (last visited Oct. 7, 2016).

[93] Kerian, *supra* note 25, at 150.

[94] Posner, *supra* note 91, at 25.

[95] *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 6 (1990), *cited in* Posner, *supra* note 91, at 25.

[96] Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139, 141-4 (1990).

this similarity is a very important distinction: control. Allen argued that slave owners exert an enormous scope of control over their slaves, a feature quite lacking in surrogacy arrangements.[97] Unlike present-day surrogacy contracts which are voluntarily entered into by the parties, under the American slave laws of the 1800s, all black mothers were *de facto* surrogates. Slave owners could buy and sell the children of slaves.[98]

B. Altruism or Commodification?

Closely related to the issue of voluntariness in surrogacy contracts is that of commodification. As early as *Baby M*, some courts already took the position that surrogacy is a form of baby selling that results in the exploitation of all parties involved.[99] Drabiak, et. al. expressed concern over how commercial surrogacy agencies attempt to reduce the financial bargaining power of potential surrogates by framing their acts as altruistic and rewarding in and of themselves.[100] They found that such agencies "attempt to advertise commercial surrogacy as an attractive means for women to achieve validation and self-worth by performing an altruistic act."[101] More often than not, the potential surrogate does not bargain on equal footing with the agency (or the intended parents) despite the outward appearance of consent. The authors observed that "if surrogates are relatively poor and unable to negotiate fees due to the stigma of identifying financial motivation, then they are left without the power to adequately negotiate a fair surrogacy contract."[102] Field added that "the divide between the intended parents and the birthmother is usually very wide, and the division is based on money, class, and often race."[103] In India, for example, a surrogate mother was paid a little over USD 8,000—more than twelve times her annual income as a garment worker—after delivering two infants for an American couple.[104] In contrast, the costs associated with surrogacy arrangements in the United States may reach up to USD 100,000.

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[97] *Id.* at 142.

[98] *Id.* at 144.

[99] Kerian, *supra* note 25, at 127.

[100] Drabiak et al., *supra* note 87, at 301 (2007).

[101] *Id.*

[102] *Id.* at 304-5.

[103] Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1173 (2014).

[104] *In India, a Rise of Surrogate Births for the West*, THE WASHINGTON POST, July 26, 2013, *at* https://www.washingtonpost.com/world/in-india-a-rise-in-surrogate-births-for-west/2013/07/26/920cb5f8-efde-11e2-8c36-0c868255a989_story.html.

It has also been suggested that the degrading treatment afforded to surrogate mothers is an indication of their unequal bargaining power. In the *Baby Gammy* case, Thai surrogate Chanbua claimed that she was not even informed that one of the surrogate twins was afflicted with Down syndrome. Allegedly, she only came to know of the baby's condition seven months into the pregnancy. At this point, the intended parents insisted Chanbua obtain an abortion, citing the surrogacy agreement.[105]

Field argued that surrogacy contracts should not be automatically enforced in favor of the intended parents. To do so, according to her, would be to "[belittle] the role of the birthmother, her importance to the baby's development, and the relationship that grows between birthmother and infant during the course of pregnancy."[106] A bigger problem arises when a surrogacy contract is entered into in a state which treats such agreements as unenforceable. Ordinarily, when one enters into a contract for compensation, he may avail of legal remedies to enforce payment. However, in the case of unenforceable surrogacy agreements, "surrogates have no legal avenue to ensure adequate compensation for their services in the case of a dispute involving the contract."[107]

In arguing that surrogacy amounts to commodification, surrogacy critics focused on the underlying motivations of surrogate mothers in entering into surrogacy contracts. Proceeding from the finding that most surrogate mothers are impoverished,[108] they concluded that these women are motivated primarily by economic need in agreeing to become surrogates.

In contrast, Drabiak, et al. observed that in various studies,[109] a general sentiment of altruism was noted among surrogate mothers. Still, they cautioned against the possibility that the surrogates who were interviewed felt pressured to provide a socially acceptable justification for their activity. "The surrogates' responses reinforce the traditional belief that children are priceless gifts, and it is somehow distasteful to place a specific monetary value on

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[105] *Baby Gammy: Surrogate Mum Says Australian Parents Saw Baby in Hospital, Disputes Claim They Didn't Know He Existed*, ABC NEWS AUSTRALIA, Aug. 4, 2014, *at* http://www.abc.net.au/news/2014-08-04/baby-gammy-surrogate-mum-says-parents-saw-baby-in hospital/5647440.

[106] Field, *supra* note 103, at 1175.

[107] Drabiak et al., *supra* note 87, at 303.

[108] *Id.* at 304.

[109] *Id.* at 305.

them."[110] Thus, they concluded that it is difficult to determine the actual role of financial motivation in surrogacy arrangements.

Kerian took the view that surrogacy is not commodification. Instead, she claimed that it is "about mature, independent, rational human beings seeking to benefit one another."[111] Although she acknowledged that uniform regulation is required in order to prevent possible exploitation, she argued that "the fears of potential harm and exploitation [in surrogacy arrangements] are greatly outweighed by the benefit, the birth of a truly wanted child."[112] As to the notion that the fees paid to surrogates are exploitative, she posited that "if surrogacy exploits women, it is because they are not getting paid enough for the nine months of gestation."[113]

Then there is the argument that babies cannot be considered commodities at all, therefore, surrogacy is not baby selling.[114] McLachlan and Swales compared the process of surrogate contracting to the use of a dating agency. Through such an agency, one may meet his or her future spouse. But this is not the same as *buying* a spouse, just as using a surrogate does not involve buying a baby. "Rather, one might be thought to buy the *services* of the surrogate mother in carrying the baby, which is the genetic child of the buyers of the service in the case of gestational surrogate motherhood."[115] But this analogy is inapplicable to traditional surrogacy as the surrogate is genetically related to the child.

Larkey, on the other hand, opted to draw a line between traditional and gestational surrogacy arrangements. She reasoned that with regard to the former, the line between selling *services* and selling *babies* is arguably blurred.[116] In traditional surrogacy, the surrogate's own ovum is used; she is contributing more than just services. It is therefore "difficult to see how the exchange escapes the charge of baby-selling."[117] The same cannot be said for gestational surrogacy arrangements. In such cases, as the gestational carrier bears no

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[110] *Id.*

[111] Kerian, *supra* note 25, at 116.

[112] *Id.*

[113] *Id.* at 164.

[114] Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91, 97 (2009).

[115] *Id.* (Emphasis supplied.)

[116] Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 614 (2003).

[117] *Id.*, *citing* EXPECTING TROUBLE: SURROGACY, FETAL ABUSE AND NEW REPRODUCTIVE TECHNOLOGIES 161 (Patricia Boling ed., 1995).

genetic relation to the baby, she has no interest or "right" to sell the child birthed. Critics of this theory argue that "the surrogate *does* have parental rights to the child because of the intimate relationship that develops between the surrogate and child during the nine months of pregnancy."[118]

Proceeding from the premise that surrogacy is exploitative, some surrogacy critics contend that the practice is comparable to prostitution. Proponents of this view maintain that in both cases, the services of a woman's body are being bought and sold. Arshagouni challenged this argument by focusing on ends sought in each case. "Prostitution is used for the sexual gratification of the patron, nearly always with the fervent hope that a child *not* be the result. [S]urrogacy, on the other hand, involves no sexual gratification for anyone and carries the fervent hope that a child *will* result."[119] Moreover, he reasoned that in prostitution, the woman's body is itself the service, while in surrogacy the body is a mere vessel through which the service is rendered.[120]

It must be noted that the comparison between surrogacy and prostitution fails to take into account the possibility of an *altruistic* surrogacy arrangement, in which no compensation is given or received. In contrast, prostitution is inextricably linked to payment.[121]

Interestingly, some surrogacy advocates embraced the surrogacy-prostitution comparison by adopting pro-prostitution arguments to rally for the legalization of surrogacy. One such argument is that a woman should be permitted to use her body in any way she pleases.[122] Field posed the question: "When an intelligent woman consents to such a relationship, why should she be unable to bind herself by her promise because others feel that the arrangement exploits her?"[123]

C. The Right to Privacy and Procreative Liberty

The legal issues arising from surrogacy are not limited to the field of contract law. They also raise serious constitutional questions, from the point

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[118] *Id.* This argument formed the basis of the gestational mother-preference theory. *See* discussion in Part II.E, *infra*.

[119] Arshagouni, *supra* note 6, at 823.

[120] *Id.*

[121] REV. PEN. CODE, art. 202, ¶ 1, *amended by* Rep. Act No. 10158 (2012). "*Prostitutes; Penalty.* – For the purposes of this article, women who, *for money or profit*, habitually indulge in sexual intercourse or lascivious conduct, are deemed to be prostitutes." (Emphasis supplied.)

[122] Field, *supra* note 103, at 1172.

[123] *Id.*

of view of both the intended parents and the surrogate mother. One argument is that the intended parents' decision to contract with a surrogate mother is protected under the constitutional right to privacy.

1. Privacy, Marriage and Procreative Liberty in General

As early as 1942, the United States Supreme Court in *Skinner v. Oklahoma*[124] recognized the right to reproduce as one of the basic civil rights of man.[125] In ruling that Oklahoma's compulsory sterilization law was unconstitutional, the court held that "marriage and procreation are fundamental to the very existence and survival of the [human] race."[126] This Supreme Court ruling served as precedent for the belief that the right to procreate is "so basic, so fundamental, that government should not interfere with its exercise."[127]

The Supreme Court reached a similar conclusion twenty years later in *Griswold v. Connecticut*.[128] In this case, appellant Grisworld was the Director of the Planned Parenthood League of Connecticut. She was convicted under the Connecticut Comstock Act of 1879, which made it illegal to use "any drug, medicinal article, or instrument for the purpose of preventing conception."[129] The Supreme Court overturned her conviction and declared the law unconstitutional. It held:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by

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[124] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[125] It has been argued that this statement is mere *obiter*, as the case was decided on equal protection grounds. *See* Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 61 (2002).

[126] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[127] LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: A PERSONAL LOOK AT HOW REPRODUCTIVE TECHNOLOGY HAS AFFECTED THE LEGAL, MORAL, AND ETHICAL DECISIONS WE MAKE ABOUT LIFE (1998), *cited in* Scott A. Allen, *Patents Fettering Reproductive Rights*, 87 IND. L.J. 445, 447 (2012).

[128] Griswold v. Connecticut, 381 U.S. 479 (1965).

[129] CONN. GEN. STAT. §§ 53-32 (1958 rev.).

> means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[130]

The *Griswold* ruling was transplanted into Philippine jurisprudence through the case of *Morfe v. Mutuc*,[131] where the Supreme Court ruled that "the right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection."

Less than 10 years after *Griswold*, the US Supreme Court ruled in *Eisenstadt v. Baird*[132] that unmarried couples possess the right to use contraceptives on the same basis as married couples. In a six-to-one decision, the court ruled:

> If, under *Griswold*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[133]

Roe v. Wade[134] is one of the more controversial US Supreme Court decisions involving privacy claims. Voting seven-to-two, the Court considered the right to abort[135] as a fundamental right protected by the Constitution. In declaring the Texas criminal statute which penalized abortion unconstitutional, the Court held:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon

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[130] Griswold v. Connecticut, 381 U.S. 479, 485-6 (1965). (Citations omitted.)
[131] Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424, Jan. 31, 1968.
[132] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[133] *Id.* at 405. (Citations omitted.)
[134] Roe v. Wade, 410 U.S. 113 (1973).
[135] Only until fetal viability.

> state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[136]

The right to procreate can by no means be considered absolute. Indeed, US courts have imposed limitations on the rights of convicts[137] and probationers.[138] In defense of anti-procreative restrictions, it is said that such classes of persons do not enjoy absolute liberty.[139]

2. Surrogacy in Particular

As applied to surrogacy, the right to privacy has been invoked in favor of both the intended parents and the surrogate mother. In the New Jersey District Court's decision in *Baby M*, Judge Sorkow cited *Roe v. Wade* to support his conclusion that the Sterns had constitutional privacy rights which would be violated if the court were to invalidate the surrogacy contract.[140]

Criticizing this approach, Allen commented that "[Judge Sorkow's] argument proceeded as a long leap from the premise that pregnant women have a right to obtain a medical abortion to terminate fetal life to the conclusion that infertile or medically at-risk women and their spouses have a right to employ a third party to create a life."[141] According to her, *Roe v. Wade* could have been more appropriately cited to argue that it is the *surrogate mother* who possesses a right of procreative privacy, "entitling [her] not only to abort, but also to create new life for reasons and purposes of [her] own, including surrogate motherhood." She argued that since family and procreative rights are so fundamentally important, such rights are commercially inalienable. Therefore, a surrogate mother should be allowed to change her mind about whether or not to give up the baby.

In contrast to *Baby M*, the California Supreme Court in *Johnson v. Calvert* rejected the privacy claim of the surrogate mother. The Court ruled:

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[136] Roe v. Wade, 410 U.S. 113, 153 (1973).

[137] Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002).

[138] State v. Oakley, 629 N.W.2d 200 (2001).

[139] *See also* Evelyn Holmer, *How* Ohio v. Talty *Provided for Future Bans on Procreation and the Consequences that Action Brings: Ohio v. Talty: Hiding in the Shadow of the Supreme Court of Wisconsin*, 19 J.L. & HEALTH 141 (2004).

[140] Note, however, that the State Supreme Court ultimately held the surrogacy agreement to be unconstitutional.

[141] Allen, *supra* note 38, at 1776-7.

> A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without [...] any expectation that she will raise the resulting child as her own.[142]

In arguing for the privacy rights of persons who resort to surrogacy and other ARTs, Robertson emphasized the primacy of procreative liberty: "the freedom to decide whether or not to have offspring and to control the use of one's reproductive capacity."[143] Invoking equal protection, he argued that "[j]ust as fertile persons have strong interests in having offspring, so do infertile persons."[144] Moreover, if the right to beget children is fundamentally protected, then such right should be protected whether it is exercised coitally or non-coitally.[145] In Robertson's opinion, the exercise of procreative liberty is so presumptively favored that when applied to the use of ARTs, the burden is on the opponent to show that its use will produce harmful effects. Only upon a showing of such effects may the state restrict the exercise of one's rights.[146]

Massie adopted a more restrictive interpretation of procreative liberty. She argued that it is a mere incident to the right of marital privacy, rather than a right to have a child *per se*.[147] She evaluated the constitutional status of procreative liberty by turning to the pertinent decisions of the US Supreme Court.[148] Massie found that in identifying constitutionally protected *conduct*, the decisions invariably implicated *values* such as bodily integrity and marital privacy. These values, said Massie, were the central concern of privacy cases such as *Griswold* and *Michael H. v. Gerald D.*[149]

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[142] Johnson v. Calvert, 851 P.2d 776, 787 (1993).

[143] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 16 (1996) [hereinafter "ROBERTSON, CHILDREN OF CHOICE"].

[144] John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 20 (2004).

[145] Coleman, *supra* note 125, at 62.

[146] ROBERTSON, CHILDREN OF CHOICE, *supra* note 143, at 16.

[147] Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 162 (1995).

[148] These cases included *Skinner*, *Griswold*, *Eisenstadt*, and *Roe*.

[149] Michael H. v. Gerald D., 491 U.S. 110 (1989). In this case, the Supreme Court upheld the presumption of legitimacy accorded to a child born during a subsisting marriage, despite the natural father's claim to parental rights. The Court saw it necessary "to protect an ongoing marriage against the assault represented by the natural father's assertion of paternal rights to a child born during the marriage." *See* Massie, *supra* note 147, at 160.

Specifically with regard to marriage, Massie observed that "the marriage relationship, with its concomitant intimacy, thus lies at the heart of the constitutionally protected right of privacy."[150] Thus, she concluded that any behavior which might be "normally expected" within the context of marriage, such as coital reproduction, must be deemed to be protected by the right to privacy. Yet, citing *Eisenstadt*, Massie clarified that outside the context of the marital relationship, "protection of the right of access to contraception does not mean protection of the right to engage in the behavior that makes contraception necessary or desirable."[151]

D. The Equal Protection Argument

Apart from Robertson's thesis granting the right to privacy to infertile persons on the same basis as fertile persons, an equal protection claim may also be raised in connection with the rights of infertile *women* vis-à-vis infertile *men*. Field observed that while most states do not prohibit artificial insemination in case the husband is sterile, surrogacy contracts, which are frequently resorted to when the wife is infertile, are treated differently. In fact, some states have passed anti-surrogacy legislation, which has made more apparent the disparate treatment between infertile males and infertile females.[152] In the Philippines, for example, the Family Code explicitly recognizes children born out of artificial insemination as legitimate children, but is silent as to the status of those born as a result of other forms of ARTs such as *in vitro* fertilization or surrogacy.[153]

Critics of this equal protection argument point out that the actual burden experienced by a surrogate mother in donating her womb and/or genetic material is much greater than that experienced by sperm donors.[154] They claim that the "substantial distinction" prong of equal protection analysis is satisfied, thereby justifying the difference in treatment.

In *Baby M*, the Sterns invoked equal protection, albeit unsuccessfully, in support of their claim to parentage. The Court ruled:

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[150] Massie, *supra* note 147, at 161.

[151] *Id.*

[152] MARTHA A. FIELD, SURROGATE MOTHERHOOD 47 (1998) [hereinafter "FIELD, SURROGATE MOTHERHOOD"].

[153] FAM. CODE, art. 164, ¶ 2.

[154] FIELD, SURROGATE MOTHERHOOD, *supra* note 152, at 48.

> The alleged unequal protection is that the understanding[155] is honored in the statute when the husband is the infertile party, but no similar understanding is honored when it is the wife who is infertile.
>
> It is quite obvious that the situations are not parallel. A sperm donor simply cannot be equated with a surrogate mother. The State has more than a sufficient basis to distinguish the two situations—even if the only difference is between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy—so as to justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother.[156]

The *Baby M* court, however, conceded that an equal protection challenge might prosper if Mary Beth Whitehead was a mere egg donor for Mrs. Stern.[157] This, however, was not the case.

E. Determining Maternity

Law students and practitioners alike are often confronted with paternity cases. However, rarely do we read about disputes pertaining to maternity. This is likely because maternity is easily proven by the fact of giving birth. On the other hand, the law imposes more stringent requirements when it comes to proving paternity. For example, the Family Code of the Philippines requires the presentation of primary evidence (record of birth or a private handwritten instrument) or secondary evidence to prove paternity.[158] Philippine courts have also sanctioned the use of DNA testing[159] and comparison of facial features[160] to prove paternity. The Code, however, is silent as to the means of proving maternity.

Surrogacy presents a peculiar problem in that more often than not, it is maternity, not paternity, that is at issue. Recall, for example, *Johnson v. Calvert*, where both the intended mother and the surrogate made respective claims as the *legal* mother of the baby. Compare this with the *Baby Manji* case where,

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[155] This understanding refers to the agreement signed by the spouses such that the child born out of AI will be acknowledged as their legitimate child. Under N.J. STAT. ANN. § 9:17-44, the husband's consent shall be in writing and signed by him and his wife.

[156] *In re* Baby M, 1537 A.2d 1227, 1254 (1988).

[157] *Id.* at 1254-5.

[158] FAM. CODE, art. 172.

[159] A.M. No. 06-11-5-SC (2007), § 9. Rule on DNA Testing.

[160] Resemblance is a trial technique utilized in paternity proceedings. *See* Herrera v. Alba, G.R. No. 148220, 460 SCRA 197, 205, June 15, 2005.

from having three possible mothers, the child suddenly had none. The issue is more complicated in gestational surrogacy where an egg donor is involved. In such a case, the child will have three possible mothers—the egg donor, the gestational carrier, and the intended mother. To resolve the issue of maternity, four theories may be invoked, namely: (1) the intent-based theory, (2) the genetic contribution test, (3) gestational mother primacy, and (4) the best interest of the child.

1. Intent-based Theory

The Court in *Johnson v. Calvert* resolved the maternity dispute in favor of the intended mother, Crispina Calvert. Prior to making such determination, it applied the Uniform Parentage Act ("UPA") of California[161] and stated that under the statute, both Johnson (the surrogate) and Calvert (the intended parent) satisfied the UPA's definition of "natural mother." This, the Court said, was because Johnson gave birth, while Calvert was genetically related to the baby. The lower court ruled in favor of Calvert based on genetic relation. The Supreme Court affirmed in favor of the intended parent, but on different grounds:

> The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother[.]
>
> We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and 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 the birth of a child that she intended to raise as her own—is the natural mother under California law.[162]

In ruling for Crispina Calvert, the intended parent, the *Johnson* court utilized the intent-based theory in determining maternity. Under this theory, courts consider as the mother the woman who intended to rear the child, or the commissioning mother. [163] The principle is unambiguous and

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[161] CAL. FAM. CODE, §§ 7600-7606.

[162] Johnson v. Calvert, 5 Cal.4th 84, 93 (1993).

[163] Larkey, *supra* note 116, at 622.

straightforward—the intended mother, who originally wanted the child, is the one who gets the child.

The problem with the theory is its reliance on the validity of the surrogacy contract. For it would be incongruous to declare a contract void and in the same breath, look to such contract to determine the intent of the parties to the agreement. Therefore, the intent-based theory finds no application where a court refuses to acknowledge the validity of the surrogacy agreement.

An issue also arises as to the relevant point in time from which the the intent of the parties shall be determined. Their intent when the contract was entered into may not be the same as in the latter stages of pregnancy. Recall the *Baby Manji* case where the intended parents obtained a divorce after the surrogacy contract was entered into but before the child was born. In this case, it is apparent that when the child was born, the intent to have a child was no longer there insofar as the commissioning mother was concerned. Who then will be considered the mother? If courts consider the intent at the time the contract was entered into, the commissioning mother, Yuki, would be Manji's legal mother. On the other hand, if intent is to be ascertained at the point of the child's birth, Yuki would be excluded as the mother as she no longer wanted the baby.

The intent-based theory has also drawn criticism on the ground that it does not take into account the best interest of the child,[164] which is a fundamental tenet in family law and a treaty obligation for most nations. A court, applying the intent-based theory, will automatically rule in favor of the intended mother regardless of her ability to adequately care for the child. It is also feared that the intent-based theory can be invoked in order to relieve oneself from parental responsibilities. It would be possible to argue that one is, in legal contemplation, not a parent simply because parenthood was unintended.[165]

2. Genetic Contribution Test

The genetic contribution test may be applied to determine maternity as an alternative to the intent-based theory. Advocates of this test maintain that intent is not the determining factor when it comes to maternity. Rather,

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[164] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 169 (2000), *cited by* Larkey, *supra* note 116, at 625.

[165] Larkey, *supra* note 116, at 623-4.

it is the genetic bond between the mother and child. This test looks to the biological connection between the child and the woman whose ovum contributed to the conception of the child.[166] Thus, where a child is conceived using genetic material from the commissioning couple, the commissioning mother will always be termed the legal mother.[167]

The flaw in this theory is that if a child is conceived using a donated ovum, that is, neither that of the intended mother nor the surrogate mother, then it is the donor who will be considered the legal mother. Larkey opined that in order to rectify this defect, the application of the genetic contribution test should be limited to cases where the maternity dispute is between the intended mother and the surrogate mother.[168]

The genetic contribution test was applied by an Ohio court in the case of *Belsito v. Clark*.[169] The case concerned an altruistic surrogacy arrangement with the spouses Belsito as intended parents and Mrs. Belsito's sister, Carol Clark, as gestational surrogate. Carol was implanted with an embryo created from Mrs. Belsito's egg and Mr. Belsito's sperm. She gave birth to a baby boy.

The issue arose when hospital staff informed the Belsitos that Carol would be listed as the mother in the child's birth certificate, and that the child would be considered illegitimate. The Belsitos petitioned the court for a declaratory judgment recognizing them as the baby's legal parents. The court ruled in their favor, finding that the "individuals who provide the genes of [the] child are the natural parents."[170] It expressly rejected the intent-based test adopted in *Johnson v. Calvert* and instead looked at the biological connection between the child and the litigants. The court also found that since the Belsitos, as "genetic contributors" and natural parents, did not waive their rights to raise the baby boy, they should likewise be considered his legal parents.

3. Gestational Mother Primacy

A third theory utilized in resolving maternity disputes is gestational mother primacy. In line with the Roman law maxim *mater semper certa est* (the

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[166] Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 514 (1996), *cited by* Larkey, *supra* note 116, at 624.

[167] *Id.*

[168] Larkey, *supra* note 116, at 625.

[169] Belsito v. Clark, 67 Ohio Misc.2d 54 (1994).

[170] *Id.* at 65.

mother is always certain), the woman who gives birth to the child is presumed to be the mother. This theory acknowledges the critical role that the surrogate plays prior to a child's birth. Apart from the physically grueling task of carrying a child for forty weeks, the surrogate mother forms "a unique physical and emotional bond with the child during the nine months prior to birth, a bond that the commissioning couple simply cannot attain."[171] Commentators pointed out, however, that this test unduly favors the surrogate, affording no protection to the commissioning couple.[172] "A test that treats the contracting woman as an egg donor is just as demeaning as treating the surrogate as an incubator."[173]

Despite the apparent one-sidedness of this theory, a New Jersey court applied the same in resolving a maternity dispute in favor of the gestational mother in *A.H.W. v. G.H.B.*[174] In this case, all parties to the surrogate contract agreed that the commissioning couple should be the baby's parents. Nonetheless, the court ruled that they could not be listed as the child's parents on the birth certificate until after the gestational mother relinquished her parental rights. Under New Jersey law, the woman who gives birth must be listed in the child's birth certificate as the legal parent.[175] The court opined that in order to be consistent with the State Supreme Court's ruling in *Baby M*, legal maternity must be adjudicated in favor of the gestational mother, who may then relinquish her rights only after the lapse of 72 hours from giving birth.[176]

4. Best Interest of the Child

The fourth and final test applicable to determining maternity is the best interest of the child standard. This test generally finds relevance in custody disputes, but its use in maternity issues has likewise been suggested.[177] The United Nations Convention on the Rights of the Child provides that "in all actions concerning children, whether undertaken by public or private social

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[171] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 158-64 (2000), *cited by* Larkey, *supra* note 116, at 625.

[172] Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes* [hereinafter "Lewis, Three Lies"], 49 U. LOUISVILLE L. REV. 371, 399 (2011).

[173] *Id.*

[174] A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. App. Div. 2000).

[175] N.J. ADMIN. CODE, § 8:2–1.4(a).

[176] A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. App. Div. 2000).

[177] Lewis, *Three Lies*, *supra* note 172, at 400.

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[178]

The factors to be considered in determining the best interest of the child vary from state to state. The US case of *Price v. Price* laid down the following factors: "(1) parental fitness; (2) stability; (3) primary caretaker; (4) child's preference; (5) harmful parental misconduct; (6) separation of siblings; and (7) substantial change in circumstances."[179] Philippine case law also provides for additional factors for determining the best interest of the child: "the previous care and devotion shown by each of the parents; their religious background, moral uprightness, home environment and time availability; as well as the children's emotional and educational needs."[180]

The best interest standard is an attractive option in resolving maternity issues because it allows courts to decide a case on the basis of its particular facts. Not all couples are similarly situated. Courts must also consider that children have unique circumstances and needs.[181]

This test, however, is not without its disadvantages. Lewis commented since the test is too subjective, judges may be influenced by their own biases. Moreover, since the surrogate is usually of a lower socioeconomic class than the commissioning mother, the latter will be preferred if courts focus on the parents' financial capability.[182]

The use of the best interest of the child standard might also bring about constitutional difficulties. Larkey pointed out that mothers who do not resort to surrogacy are not subjected to the best interest standard in order to affirm their legal maternity. She is automatically deemed the legal mother, and her fitness comes into question only if a custody proceeding is initiated. In contrast, if the standard is applied to determine parentage questions arising from surrogacy arrangements, the intended parents must demonstrate their "qualifications" as such. This, according to Larkey, is to deny the commissioning couple the equal protection of the laws.[183]

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[178] United Nations Convention on the Rights of the Child art. 3 (1), Nov. 29, 1989, 1577 U.N.T.S. 3.

[179] Price v. Price, 611 N.W.2d 425, 430 (S.D. 2000).

[180] Pablo-Gualberto v. Gualberto V, G.R. No. 154994, 461 SCRA 450, June 28, 2005.

[181] Lewis, *Three Lies*, *supra* note 172, at 403.

[182] *Id.*

[183] Larkey, *supra* note 116, at 626.

III. LEGAL ISSUES SPECIFIC TO INTER-COUNTRY SURROGACY

In Part II, legal problems pertaining to surrogacy *in general* were discussed. This section will focus on particular issues arising from inter-country or international surrogacy contracts. To recall the discussion in Part I.A. of this paper, an international surrogacy arrangement is one in which the intended parents reside in one state while the surrogate mother resides or is located in another state. As if the multitude of problems discussed in Part II were not enough, one resorting to international surrogacy will have to deal with additional obstacles confronting inter-country transactions.

A. Which Law Applies?

Should disputes involving international surrogacy agreements ever arise, the litigation of issues before foreign courts might result in conflict-of-laws problems. But even where a surrogacy transaction is smooth-sailing for all parties involved, the application of varying state laws may put the child's legal status in jeopardy.

The case of Patrice and Aurélia Le Roch is an example. In 2010, the French couple travelled to the Ukraine to find a surrogate. With the help of an agency, they were able to enter into an agreement with a woman who later delivered twins for them. Since surrogacy is illegal in France, the spouses Le Roch were not recognized as the twins' parents and could not obtain French passports for them. On the other hand, Ukrainian law provides that the intended parents are the child's legal parents. As a result, the spouses Le Roch were unable to obtain any kind of travel documentation for the twins. Desperate to bring them home, Patrice sought the help of his father, Bernard. They hid the twins in a chest, loaded it into an RV, and attempted to cross the border to Hungary. The Le Roch men were convicted of attempting to illegally transport children without documentation. [184] The twins were legally parentless.[185]

The conflict-of-laws problem is demonstrated thus: if the spouses Le Roch were to file a case asking to be declared the legal parents of the twins, the Ukraine would rule in their favor while France would not. In the face of

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[184] *Mère Porteuse: Les Deux Français condamnés en Ukraine*, LE PARISIEN, May 18, 2011, *at* http://www.leparisien.fr/societe/mere-porteuse-les-deux-francais-condamnes-en-ukraine-18-05-2011-1455891.php.

[185] According to recent reports, however, they have been granted Ukrainian citizenship. *See Bébés « Français » Sortis d'Ukraine*, LE RÉPUBLICAIN LORRAIN, Oct. 5, 2011, *at* http://www.republicain-lorrain.fr/france-monde/2011/10/05/bebes-francais-d-ukraine.

these two potentially conflicting judgments, which one should prevail? Due to the lack of international consensus on the legal status of surrogacy, it is rather difficult to speculate.

Fortunately, a recent decision[186] of the European Court of Human Rights (ECtHR) shed light on the issue of filiation arising from international surrogacy. In this case, the ECtHR ruled that the French Civil Status Registry's refusal to recognize as French citizens the children born out of surrogacy agreements violated Article 8 of the European Convention on Human Rights.[187] Applying the best interest standard, the court opined that the children were entitled to filiation as a component of their identity protected by Article 8. The court did not directly rule on the implications of entering into an international surrogacy agreement where the country of the intended parents prohibits it. Thus, the position of the court on this issue remains uncertain.

In the absence of an international convention on surrogacy, the status of children born out of such arrangements will have to be determined under domestic law. In view of the differing judicial treatment accorded by each jurisdiction to surrogacy agreements, it is feared that parties might resort to forum shopping, that is, filing suit in a generally "surrogacy-friendly" jurisdiction.[188]

B. Characterization and the Public Policy Exception

In 2001, a British woman named Helen Beasley agreed to become a surrogate for an American couple. She underwent *in vitro* fertilization in California. Upon learning that she was pregnant with twins, the couple requested that she abort the second fetus. Helen refused. The couple stopped payment, as under the terms of the contract, they were allowed to request for an abortion in the event that the surrogate became pregnant with more than one child.[189] Supposing Helen filed suit for breach of contract against the California couple in the United Kingdom, how would the court rule?

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[186] Case of Mennesson v. France, App. No. 65192/11 (2014), *available at* http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4804617-5854908&filename=003-4804617-5854908.pdf.

[187] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

[188] Anastasia Grammaticaki-Alexiou, *Artificial Reproduction Technologies and Conflict of Laws: An Initial Approach*, 60 LA. L. REV. 1113, 1120 (2000).

[189] *New Parents Found for Surrogate Mother's Twins*, THE TELEGRAPH, Aug. 14, 2001, *at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1337422/New-parents-fo

The court was confronted with the issue of which law should govern. Note that the surrogacy contract was entered into in California and the contract was partially performed there as well. However, Beasley is a citizen of the UK and the case was filed before a British court. If under both UK and California law, surrogacy contracts are legal and enforceable, then there would be no issue. But this is not the case—UK law regards surrogacy contracts as unenforceable.[190] In contrast, such contracts have been upheld as valid in California.

In resolving the issue of the applicable law, the first step is to characterize the issue.[191] Here, the issue is one involving contract law. We then turn to the conflict-of-laws rule provided by UK law: the applicable law is the law of the place with which the contract is most connected.[192] In this case, then, the applicable law would be California law. The contract was perfected and performed there. Moreover, the commissioning couple intended that the child be raised in that state. The problem with such approach, however, is that even if the conflict-of-laws rule of the United Kingdom provides that the applicable law is California law, this does not foreclose the possibility that a British court will override the rule and instead apply its own domestic law, citing violations of the country's public policy. This is known as the *public policy exception.*

Public policy is defined as "a principle of law which holds that no subject or citizen can lawfully commit an act which has a tendency to be injurious to the public or against the public good."[193] If the public policy exception is invoked in a conflict-of-laws case, the court will uphold its own law as against foreign law on the ground that the enforcement of the latter would "violate a fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal."[194] Recall that in the *Baby M* case, the New Jersey Supreme Court declined to enforce the surrogacy contract, ruling as follows:

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und-for-surrogate-mothers-twins.html.

[190] *Legal Issues Around Surrogacy*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, Oct. 22, 2013, *at* http://www.hfea.gov.uk/1424.html.

[191] Grammaticaki-Alexiou, *supra* note 188, at 1118. Characterization is a "process by which a court at the beginning of the choice-of-law process assigns a disputed question to an area in substantive law, such as torts, contracts, family law, or property," JORGE R. COQUIA & ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS 83 (2000).

[192] Contracts (Applicable Law) Act 1990 is formally incorporated in the Convention on the Law Applicable to Contractual Obligations (1980).

[193] COQUIA & AGUILING-PANGALANGAN, CONFLICT OF LAWS, *supra* note 191, at 146.

[194] *Id.*

> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women[.][195]

A recent case[196] decided by the German Federal Court of Justice likewise dealt with public policy considerations. But unlike the New Jersey court in *Baby M*, it adopted a more restrictive approach with regard to the applicability of the public policy exception. Despite the unenforceability of surrogacy contracts in Germany, the court held that "German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child."[197] Thus, it ordered the civil registry to record the names of the intended parents as the child's legal parents on his birth certificate. The German tribunal stated that in order to achieve international harmony of decisions, the public policy exception must be invoked with caution—a foreign judgment must be denied recognition only where to do so would be "manifestly incompatible" with principles of German law. [198]

C. A Change of Heart

Consider Gordon Lake's dilemma: He and his husband sought the services of a surrogate in Thailand. Everything went according to plan, and a baby girl, Carmen, was born in January 2015. A day before Lake was to arrange Carmen's American passport, he received a text message from the surrogate's translator—she wanted to keep the baby. Genetically, Lake was Carmen's father. But under Thai law, he had no rights.[199]

The situation is not all that uncommon—during the nine months of gestation, mothers form bonds with the babies they are carrying. More than a being a mere vessel, the gestational carrier is the person that "cultivates the

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[195] *In re* Baby M, 109 N.J. 396, 411 (1988).

[196] Decision XII ZB 463/13 (2014).

[197] Jan Von Hein, *German Federal Court of Justice on Surrogacy and German Public Policy*, CONFLICTOFLAWS.NET: NEWS AND VIEWS ON PRIVATE INTERNATIONAL LAW, Mar. 4, 2015, *at* http://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/.

[198] *Id.*

[199] Pamela Boykoff & Kocha Olarn, *Gay Couple in Legal Fight with Thai Surrogate over Baby*, CABLE NEWS NETWORK, July 22, 2015, http://www.edition.cnn.com/2015/07/22/asia/thailand-surrogacy-gay-couple/.

embryo so that it develops into a child."[200] This bond cannot be ignored, and consequently, it becomes easier to sympathize with the surrogate than with the couple who procured her services.

In Lake's case, he took legal action before Thai courts to be declared Carmen's father. He vowed to stay in Bangkok until he could leave with her. To further complicate things, Thailand in the meantime imposed a ban on commercial surrogacy.[201] Ultimately, the question to be resolved is whether or not the contract prevails over the rights of a mother.

The issue can be approached in a number of ways. Although Thai law is clear that the woman who gives birth to the child is the mother, it can be argued that the surrogate in this case bears no genetic relation to the child. Moreover, Lake and his husband intended to be the parents, and without their participation, Carmen would not have been born. Finally, using the best interest standard, Lake and his husband might prove to be more capable of providing for the child.

The important thing to note, however, is that since legal and judicial systems vary across states, it is difficult to anticipate how a particular jurisdiction's court will rule on an issue. This is more so true when it comes to surrogacy, because surrogacy regulations are not always found in statutes; they might be in judicial decisions or even administrative issuances and guidelines.

Of course, it may be said that when one contracts in another country, he assumes the risk that it may be invalidated under the laws of that country. But how much diligence is required of a prospective intended parent? Must they retain foreign counsel first? Must they always initiate legal action in anticipation of parentage problems? The uncertainties and complications that intended parents could potentially face in a foreign land might dissuade them from choosing surrogacy. This is rather unfortunate, as surrogacy is meant to be a more affordable and convenient alternative to adoption.

D. Citizenship and Statelessness

With the advancement of technology and the development of new and more convenient means of transportation, more and more persons travel and reside in states other than their home countries. As a result, a situation might arise in which a child is born in a country other than the parents' home

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[200] Lewis, *Three Lies*, *supra* note 172, at 300.

[201] Boykoff & Olarn, *supra* note 199.

state. If a child is born of parents whose country follows *jus sanguinis* in a state that follows *jus soli*, he or she will have two nationalities. On the other hand, if the child is born in a *jus sanguinis* jurisdiction to parents whose personal law provides for *jus soli*, he or she will be stateless.[202] This is a problem that may be encountered by *any* couple, whether they conceive naturally or resort to ARTs.

In the case of inter-country surrogacy, however, the issue of citizenship is far more complex. Whenever *jus sanguinis* is involved, an initial determination of parentage must be made. As demonstrated by the cases previously discussed, the application of conflicting laws may result in a child having more than one set of parents or no parents at all. Consequently, an infant born out of a surrogacy agreement may have more than one nationality or none at all.

Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right of every child "to acquire a nationality."[203] This right is reiterated in the United Nations Convention on the Rights of the Child.[204] But the conflict between *jus sanguinis* and *jus soli* laws has nevertheless resulted in problems of statelessness.

Even prior to the ICCPR, the United Nations, acknowledging the plight of stateless persons, drafted the Convention on the Reduction of Statelessness in 1961.[205] It provides that "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."[206] On its face, this treaty seems to aptly resolve citizenship issues arising from inter-country surrogacy. However, the treaty was acceded to by only 65 countries.[207] More importantly, countries characterized as surrogacy hubs such as India and Thailand did not ratify the convention. For this reason,

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[202] COQUIA & AGUILING-PANGALANGAN, CONFLICT OF LAWS, *supra* note 191, at 201.

[203] International Covenant on Civil and Political Rights art. 24(3), Mar. 23, 1976, 999 U.N.T.S. 171.

[204] United Nations Convention on the Rights of the Child art. 7(1), Nov. 29, 1989, 1577 U.N.T.S. 3.

[205] United Nations Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

[206] Art. 1(1).

[207] United Nations Convention on the Reduction of Statelessness, UN TREATY COLLECTION, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V4&chapter=5&clang=_en (last visited Jan. 27, 2016).

it has been criticized as inadequate to meet the issue of stateless surrogate children.[208]

The issue of citizenship was addressed by a British court in the case of *Re: X and Y (Foreign Surrogacy)*. This case involved a British couple who sought surrogacy in the Ukraine. Under the laws of that country, the commissioning parents were to be recognized as the legal parents of the child. However, UK law recognized the surrogate mother and her husband as the child's parents. As a result of the application of the conflicting laws, the twins born out of the surrogacy arrangement were "effectively legal orphans and, more seriously, stateless."[209] Ultimately, Mr. Justice Hadley ruled that the surrogacy contract could not be enforced because it violated public policy. However, he acknowledged that a mechanical application of the public policy exception would disregard the consequences that the contract may have already had on the parties, and more importantly, the child. Taking into account the welfare of the twins, he issued a parental order in favor of the intended parents to allow them to obtain British passports for the children.

The case of *Balaz v. Municipality of Anand*[210] best illustrates the difficulties encountered by parties to a surrogacy agreement with regard to citizenship. After an Indian surrogate gave birth to twins for a German couple, the latter were unable to take the babies home as German authorities refused to issue the requisite travel documentation. German law does not recognize surrogacy as a means of acquiring parentage. The intended parents petitioned the Indian Supreme Court to declare the twins as *Indian* citizens. In its decision, the Court ruled that "[b]oth the egg donor as well as the gestational surrogate are Indian nationals, and hence the babies are born to an Indian national."[211] This judgment alone was insufficient to allow the Balaz couple to return to Germany with the twins. Thus, they had to resort to inter-country adoption.[212] Though it seems all ended well for the Balaz family, it is ironic that adoption was resorted to, when precisely, surrogacy is meant to dispense with the time and expense associated with adoption.

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[208] Mortazavi, *supra* note 57, at 2256.

[209] *Re* X and Y (Foreign Surrogacy), EWHC 3030 (2008).

[210] Balaz v. Municipality of Anand, A.I.R. 2010 Guj. 21.

[211] *Id.*

[212] Dhananjay Mahapatra, *German Surrogate Twins to Go Home*, THE TIMES OF INDIA, May 27, 2010, *at* http://timesofindia.indiatimes.com/india/German-surrogate-twins-to-go-home/articleshow/5978925.cms.

E. Applying the Adoption Convention

In the *Balaz* case discussed above, the parties underwent the inter-country adoption procedure despite having entered into a surrogacy agreement. This was resorted to because the Balaz couple's home country would not allow them to prove parentage by surrogacy. Hence, adoption was sought as a last resort alternative to the surrogacy process.

It has been suggested that in the absence of surrogacy laws, adoption statutes should be applied by courts in determining the enforceability of surrogacy contracts, as well as the rights and obligations of the parties arising therefrom. This was exactly what the court did in *Baby M*, where it invalidated the surrogacy agreement by drawing a parallel between the disputed contract and an adoption contract. It opined that under the state's adoption statutes, the payment of money to obtain an adoption was "illegal and perhaps criminal."[213] The court thereafter concluded that the money paid to Mrs. Whitehead was for an adoption, and not for personal services.

In a contrary ruling, the California Supreme Court rejected the application of adoption statutes in *In Re Marriage of Buzzanca*.[214] It was in this case that the court enunciated the "adoption-default model," i.e. "that by not specifically addressing some permutation of artificial reproduction, the Legislature has, in effect, set the default switch on adoption."[215] In simple terms, this model assumes that in the absence of a law governing ARTs, adoption statutes are applicable. The court ruled in this case that the adoption-default model was contrary to both law and precedent. In rejecting the claim that the children born out of surrogacy must be adopted, it held:

> [T]he adoption default model ignores the role of our dependency statutes in protecting children. Parents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children [...] The adoption default model is essentially an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning.[216]

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[213] *In re* Baby M, 109 N.J. 396, 442 (1988).

[214] *In re* Marriage of Buzzanca, 61 Cal.App.4th 1410 (4th Cir. 1998).

[215] *Id.* at 1423.

[216] *Id.* at 1425.

As discussed in Part I, inter-country adoption is governed by the Hague Adoption Convention. On the other hand, there is yet no international convention regulating surrogacy. Given that adoption is often the last resort alternative for surrogacy, and that jurisprudence has drawn parallels between them,[217] it may be proposed that the provisions of the Hague Adoption Convention should be made applicable to international surrogacy agreements. With over 90 countries ratifying or otherwise acceding to the treaty, courts of such contracting states may seek guidance from Convention stipulations in deciding questions of surrogacy.

This approach has been criticized by courts and scholars alike. *First*, applying the Hague Adoption Convention would result in the invalidity of commercial surrogacy contracts,[218] as the treaty provides that consent must not have been induced by payment or compensation of any kind.[219] *Second*, the Convention requires that the consent of the birth mother to the adoption be given only after the birth of the child.[220] In contrast, surrogacy contracts are entered into before the child is born. In fact, it is often pointed out that the child would not have been born if not for the surrogacy agreement.[221] *Finally*, the application of the adoption treaty fails to address the issue of statelessness. Since in adoption, the birth mother relinquishes her parental rights only after the child is born, such child is still entitled to the citizenship of the mother at the time of birth. The same cannot be said for surrogacy since the relinquishment is made prior to birth of the child. Thus, a baby born out of a surrogacy agreement will not follow the birth mother's citizenship. The child may be without legal parents at birth, and consequently, stateless.

F. Recognition and Enforcement of Foreign Judgments

Recall the case of Gordon Lake discussed earlier in Part III.C. Assuming he obtains a judgment from the Thai court declaring him as Carmen's father, will such decision carry any weight in his home country, the United States? The resolution of this issue turns on whether the US courts agree to recognize or enforce the foreign judgment.

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[217] *See In re* Baby M, 109 N.J. 396 (1988).

[218] Mortazavi, *supra* note 57, at 2256.

[219] Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption [hereinafter "Hague Adoption Convention"] art. 4(c), May 29, 1993, 32 I.L.M. 1134.

[220] Art. 4(c)(4).

[221] *See* Johnson v. Calvert, 5 Cal.4th 84 (1993).

As a general rule, the judgment of one state, by itself, will have no force in another state.[222] This is but an attribute of sovereignty. As a result, parties would have to file suit in one state in order for their rights to be recognized, although they had already prevailed in an earlier suit filed in another state. The filing of another case will involve more time and expense. To remedy this inconvenience, states have adopted recognition and enforcement procedures.

Recognition and enforcement share a common goal—to give effect to one state's judgment in another state. In Lake's case, the purpose of recognition or enforcement proceedings would be to render the Thai judgment effective in the United States. The difference between recognition and enforcement lies in the procedure: recognition is a passive act of giving effect to a foreign judgment without need of filing suit anew, while enforcement requires the institution of a separate legal action.[223]

The procedure for recognition and enforcement varies across states. Some regulate it as a matter of domestic law, while others are parties to unilateral or multilateral conventions on enforcement. An enforcement convention typically provides for the procedure to be followed by all states-parties. One such treaty on enforcement is the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[224] Despite its apparent comprehensiveness and possible applicability to surrogacy cases, it failed to gain traction in the international community. To date, only five countries have acceded to the convention: Albania, Cyprus, Kuwait, the Netherlands, and Portugal.[225] As such, the treaty is insufficient to address enforcement issues relating to international surrogacy.

Due to the absence of a widely accepted convention on enforcement, countries often turn to their own domestic law in deciding whether to grant or deny enforcement. More often than not, a state's recognition or

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[222] Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 2009, *at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.

[223] COQUIA & AGUILING-PANGALANGAN, *supra* note 191, at 539.

[224] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249.

[225] *Status Table, Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW WEBSITE, *at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=78 (last visited Feb. 23, 2017).

enforcement statute will provide for exceptions. Among these exceptions is, again, the public policy exception,[226] as discussed in Part III.B. of this work.

As applied to surrogacy cases, France's Court of Cassation invoked the public policy exception in a 2011 case. The said court denied recognition to a Minnesota court's decision that the French intended parents should be listed as the legal parents of a surrogate baby.[227] Under French law, the grant of recognition is determined in an *exequatur* proceeding.[228] A French court will not grant *exequatur* if "the foreign judgment is perceived as offensive to French law."[229] The court held in this case that since gestational surrogacy is contrary to French public policy, the foreign judgment could not be given effect.

IV. THE LEGAL LANDSCAPE OF SURROGACY IN THE PHILIPPINES

At present, there are only several recorded instances of surrogacy arrangements contracted by Filipinos, either as surrogates or as intended parents. The practice has yet to attain widespread popularity in the Philippines. But owing to the stricter regulations imposed by neighboring Asian countries such as India and Thailand, couples desiring to have children could possibly consider the Philippines as a venue for surrogacy in the future. It is thus necessary to evaluate the status of a surrogacy contract under the Philippine Constitution and relevant statutes, particularly because there is no law or regulation specifically governing such agreements.

A. Accounts of Surrogacy Involving Filipinos

The first ever commercially transacted surrogacy arrangement in the Philippines was said to have taken place in October 2008. A Filipina surrogate contracted with a Malay-Danish homosexual couple through a Singaporean company, *Asian Surrogates*. The transaction, according to an article authored by Raissa Robles, went unnoticed.[230] She reached out to Department of Social Welfare and Development (DSWD) Secretary Cabral, who disclaimed

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[226] Art. 5 (1). *See* CAL. CIV. PROC. CODE §1716 (c) (3).

[227] Cour de cassation 1e civ., Apr. 6, 2011, Bull. civ. I, No. 371 (Fr.), *available at* https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/369_6_19630.html.

[228] Under French law, *exequatur* refers to both the procedure for enforcement and the writ of execution. *See* James C. Regan, *The Enforcement of Foreign Judgments in France under the Nouveau Code de Procédure Civile*, 4 B.C. INT'L. & COMP. L. REV. 149, 150 (1981).

[229] *Id.*

[230] Raissa Robles, *Wombs for Hire*, NEWSBREAK, June 16, 2009, *at* http://www.geneticsandsociety.org/ article.php? id=4726.

knowledge of the practice of surrogacy in the country. According to her, even if it were being practiced, there was no law to ban it. Legal Services Chief Escutin added: "Technically, it's allowed. But ethically, shouldn't this be outside the commerce of man?"

Michael Ho, the owner of Asian Surrogates, reportedly said: "I have to say, the Filipinas, they are all very helpful, very enthusiastic. I find the Filipina excellent as a surrogate mother." Robles was unable to get feedback from the Filipina surrogates as they all allegedly refused to be interviewed.

To date, the Asian Surrogates website is still active. It advertises the cost of surrogacy in the United States as amounting to USD 68,000.[231] The information on their surrogate mothers does not include the nationality or ethnicity of the women employed by the company.[232]

Interestingly, the surrogacy agreement subject of Robles' article is one of only four recorded instances practiced by Filipinos. Two other cases, involving perfume tycoon Joel Cruz, were transacted abroad. Cruz is the father to two sets of twins, born to the same Russian surrogate mother. He initially tried to find a surrogate in the Ukraine but was barred from doing so because he wished to be a single father.[233] He reportedly spent PHP 7 million for the entire process, including payments to a Russian law firm and surrogacy agency.[234] The Cruz twins presently carry both Russian and Philippine passports.[235]

It appears that Cruz encountered no legal difficulties in obtaining Philippine citizenship for his four children. He is, after all, their biological father. Pursuant to Article IV, Section 1 of the 1987 Constitution, Filipino citizens include "[t]hose whose fathers or mothers are citizens of the Philippines."

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[231] *Fees for USA and Cyprus*, ASIAN SURROGATES, *at* http://asiansurrogates.com/Fees.php (last visited Dec. 27, 2015).

[232] *Surrogate Mothers*, ASIAN SURROGATES, *at* http://asiansurrogates.com/Surrogates-Mother.php (last visited Dec. 27, 2015).

[233] Ricky Lo, *How Joel Cruz Got Twin Joys*, THE PHILIPPINE STAR, Feb. 15, 2013, *at* http://www.philstar.com/entertainment/2013/02/15/908891/how-joel-cruz-got-twin-joys.

[234] Marge C. Enriquez, *How Joel Cruz Planned His Fatherhood*, PHILIPPINE DAILY INQUIRER, Apr. 24, 2013, *at* http://lifestyle.inquirer.net/100265/how-joel-cruz-planned-his-fatherhood.

[235] Lo, *supra* note 233.

More recently in May 2015, Dr. Vicki Belo and Hayden Kho revealed that they successfully contracted surrogacy with a Mexican-American mother. The baby, now 14 months old, was said to have been conceived by artificial insemination.[236]

B. Current Philippine Law on Assisted Reproductive Technologies

As of this writing, only one Philippine law explicitly relates to Assisted Reproductive Technologies (ARTs): the Family Code. In this case, the only form of ART acknowledged is artificial insemination. Article 164 of the Code provides:

> Children conceived as a result of *artificial insemination of the wife* with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.[237]

The statute proceeds from the premise that it is the *wife* who is artificially inseminated. Therefore, the application of the provision cannot be extended to cases of traditional surrogacy, in which a *third party* undergoes artificial insemination. The law likewise fails to address the status of children born as a result of *in vitro* fertilization procedures.

C. Proposed Legislation on ARTs

The 13th and 14th Congress of the Philippines saw the introduction of two bills relating to ARTs. One attempted to criminalize the practice of surrogacy while the other promoted it as an incident to the right to health protected by the Constitution. Both bills failed to become law.

1. Penalizing Surrogacy in All Forms

In 2006, Senator Manny Villar attempted to outlaw surrogacy in the Philippines by introducing Senate Bill No. 2344 (S. No. 2344), entitled "An Act Prohibiting Surrogate Motherhood Including Infant Selling and Providing

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[236] Thelma Sioson San Juan, *Why Vicki and Hayden Decided to Have a Baby*, PHILIPPINE DAILY INQUIRER, May 17, 2016, *at* http://lifestyle.inquirer.net/228942/why-vicki-and-hayden-decided-to-have-a-baby.

[237] FAM. CODE, art. 164. (Emphasis supplied.)

Penalties Therefor." From the outset, surrogacy was equated to baby selling. In the explanatory note, Sen. Villar stated that "[b]abies are not products like microwave ovens and automobiles. Pregnancy should never be reduced to a commercial service." The bill sought to prevent foreigners from "luring our Filipino women to become surrogate mothers."

S. No. 2344 is comprised of four sections. Section 1 makes it unlawful for any woman to enter into a surrogacy agreement. This provision renders illegal *all* surrogacy contracts, with or without consideration.[238]

Section 2 defines a surrogate. The first clause states that a woman becomes a surrogate "when she agrees to conceive a child naturally or artificially, by her own lawful husband or otherwise, for the purpose of giving that child away after birth." The second clause provides that "[a] woman is said to have agreed to become a surrogate mother when she [...] while *already conceiving* shall agree to give the child away after birth, to another person with the intention of giving up permanently all her paternal [sic] rights, love and affection over the child."[239] This provision requires that the woman must already be pregnant when she agrees to "give the child away." It appears to be more similar to an informal adoption than a case of surrogacy.

In the matter of penalties, Section 3 of S. No. 2344 provides for both a fine and imprisonment. The penalty of five years' imprisonment and a fine of PHP 10,000 is imposed on the contracting parties to the surrogacy contract. In the case of physicians, nurses, medical technologists, agents, brokers, representatives or middlemen, the penalty is less strict at two years of imprisonment and a PHP 5,000 fine. Foreigners shall be deported after service of sentence.

The 13th Congress adjourned without the bill having been passed. To date, it has not been re-filed.

2. Including ARTs in Mandatory Health Insurance Coverage

On July 24, 2007, Senator Miriam Defensor-Santiago introduced Senate Bill No. 1342 (S. No. 1342), or the "Family Building Act of 2007." In her explanatory note, Sen. Santiago acknowledged the plight of millions of Filipinos who suffer from infertility. Citing the people's right to health,[240] she

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[238] S. No. 2344, 13th Cong., 2nd Sess. (2006). (Emphasis supplied.)

[239] S. No. 2344, 13th Cong., 2nd Sess. (2006). (Emphasis supplied.)

[240] CONST. art. II, § 15.

concluded that fertility treatments should be covered by any group health plan or individual life insurance. Section 2(C) of the bill provides:

> *Required Coverage.* — A group health plan and a health insurance issuer, offering health insurance coverage shall provide coverage for treatment of infertility deemed appropriate by a participant or beneficiary and the treating physician. Such treatment shall include ovulation induction, artificial insemination, *in vitro* fertilization (IVF), gamete interfallopian transfer (GIFT), zygote interfallopian transfer (ZIFT), intracytoplamsic sperm injection (ICSI), and any other treatment provided it has been deemed as 'non-experimental' by the Secretary of Health after consultation with appropriate professional and patient organizations such as the Philippine Association of Medical Technologists.

Although surrogacy is not mentioned in Section 2(C), it may still be included in the mandatory coverage as the enumeration is not exclusive. The Secretary of Health is given the discretion to include other infertility treatments. Moreover, Section 2(D)(2) of the bill explicitly recognizes "surrogate birth" as a type of ART.

S. No. 1342 remained pending in the committee level upon the adjournment of the 14th Congress in 2010.[241] Shortly after the 15th Congress began its session, on July 22, 2010, Sen. Santiago re-filed the bill as Senate Bill No. 1958 (S. No. 1958). Again, it failed to become law. The bill was introduced once more before the present Congress as Senate Bill No. 1616 (S. No. 1616). The 16th Congress adjourned without passing this bill yet again, as it remained pending in the committee level.[242]

D. Evaluating a Surrogacy Agreement Under Current Philippine Law

The terms and conditions of a surrogacy contract are often suited to the individual needs of the parties to the agreement. But in countries where surrogacy is regulated, authorities may provide for mandatory stipulations to be included in such contract. For example, the Indian Council of Medical Research (ICMR) has its own draft surrogacy agreement with minimum standards that must be observed by anyone wishing to contract surrogacy in

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[241] S. No. 1342, 14th Cong., 1st Sess. (2010).
[242] S. No. 1616, 16th Cong., 1st Sess. (2013).

India.[243] This section will consider such draft contract as one entered into in the Philippines and examine its status and incidents under pertinent Philippine statutes.

The primary provisions under scrutiny involve (1) the obligation of the surrogate to surrender the child to the intended parents, relinquishing all parental authority and (2) the payment of compensation.[244]

1. Status of the Contract

The New Civil Code provides for the following requisites of a valid contract:

1. Consent of the contracting parties;
2. Object certain, which is the subject matter of the contract;
3. Cause of the obligation which is established.[245]

Reyes and See questioned the validity of consent given in surrogacy contracts, as the mother may not know how she feels about childrearing until the baby is actually born.[246] To adopt this view, however, would be disadvantageous to both parties. The reasoning in *Johnson v. Calvert* is more sound: courts must not foreclose a "personal and economic" choice of the surrogate mother, and the intended parents must not be deprived of what could be their only option to have a child biologically related to them. Even if the surrogate mother later regrets her decision, such change of mind should not operate to invalidate consent that was freely given at the inception of the contract. After all, the Civil Code merely requires a "meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract."[247]

As a rule, the parties to a contract enjoy freedom to stipulate on their desired terms and conditions, provided these are not contrary to law, morals, good customs, public order, or public policy.[248] It is submitted, however, that current Philippine law will not permit a surrogacy contract as it is contrary to

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[243] *See FORM - J Agreement for Surrogacy*, INDIAN COUNCIL FOR MEDICAL RESEARCH, *available at* http://www.icmr.nic.in/icmrnews/art/Agreement%20for%20Surrogacy%20(%20Form%20J).pdf.

[244] *Id.*

[245] CIVIL CODE, art. 1318.

[246] Reyes & See, *supra* note 18, at 226.

[247] CIVIL CODE, art. 1319.

[248] Art. 1305.

law and public policy. Article 1409 of the Civil Code provides that a contract "whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy" is "inexistent and void from the beginning."

It is generally recognized that the human body and its parts are outside the commerce of man.[249] A surrogacy contract, involving as it does the body of the surrogate who is to perform the gestative function, will thus have no valid object. A further ground for nullity exists where the contract is commercial—Philippine law abhors the exchange of body parts and bodily functions for compensation.[250]

Another problematic provision in a surrogacy agreement is the relinquishment of parental rights in favor of the intended parents. Such a stipulation runs contrary to the Family Code which provides that "[p]arental authority and responsibility may not be renounced or transferred except in the cases authorized by law."[251] These cases are limited to adoption, appointment of a guardian, judicial declaration of abandonment, final judgment divesting a party of parental authority, and judicial declaration of absence or incapacity.[252] A contract that purports to abdicate parental authority is void.[253] If in a surrogacy contract the surrogate mother agrees to relinquish parental authority in favor of the intended parents, the contract will be void, absent a special law permitting the same.

Thus, a surrogacy contract is void under present Philippine law not because the parties thereto are incapable of giving consent, but because the human body is not the proper object of a contract. Moreover, certain aspects of the contract such as the payment of compensation and abdication of parental authority also run afoul of Philippine public policy. However, this does not foreclose the opportunity for future validation of surrogacy agreements. With the recognition of artificial insemination under our Family Code, which arguably involves the "donation" of sperm from a man, there

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[249] Valino v. Adriano, G.R. No. 182894, 723 SCRA 1, Apr. 22, 2014.

[250] In this regard, Republic Act No. 7719, or the National Blood Services Act of 1994, mandated the closure of all commercial, for-profit blood banks in favor of voluntary donations. Moreover, both the Organ Donation Act of 1991 and Department of Health Administrative Order No. 2008-0004 mandate that organ donation "must be done first and foremost out of selflessness and philanthropy to save and ensure the quality of life of the beneficiary."

[251] FAM. CODE, art. 210.

[252] Art. 229.

[253] I ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES [hereinafter "I TOLENTINO"] 604 (1992).

remains the possibility that Congress will adopt legislation permitting surrogacy.

2. Filiation of the Surrogate Child

Filiation is defined as the status of the child in relation to the father or mother.[254] Article 163 of the Family Code provides for only two kinds of filiation: by nature or by adoption. Natural filiation arises from the fact of the child's birth,[255] while filiation by adoption is acquired by fiction of law.[256]

A child conceived or born during a valid marriage is a legitimate child.[257] By way of exception, the Family Code in Article 164, paragraph 2 recognizes children conceived through artificial insemination procedures as legitimate children provided the husband consents thereto in writing. Since the provision does not contemplate the use of other ARTs, the presumption of legitimacy cannot be accorded to a surrogate child. In this regard, Justice Sempio-Diy commented that one condition for the application of Article 164, paragraph 2 is that "the artificial insemination is made on the wife, not on another woman."[258]

By providing the husband with grounds for impugning legitimacy to the exclusion of the wife,[259] the Family Code presumes that any dispute as to filiation will involve only paternity and not maternity. Notably, the law does not provide for the means of establishing legal maternity, nor grounds for disproving it. Who then would be considered the legal mother of a child born out of a surrogacy agreement?

It is submitted that the surrogate mother will be considered the legal mother. Philippine law abides by the Roman law principle of *mater semper certa est* (the mother is always certain) coupled with *mater is est quem gestatio demonstrant* (the mother is the woman whom the pregnancy points out). In one case, the Supreme Court, through Justice Isagani Cruz, rejected the petitioner's claim of legitimacy on the ground that the supposed mother denied giving birth to him, thus:

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[254] ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 267 (2nd ed. 2006).

[255] *Id.*

[256] I TOLENTINO, *supra* note 253, at 520.

[257] FAM. CODE, art. 164, ¶ 1.

[258] SEMPIO-DIY, *supra* note 254, at 271.

[259] FAM. CODE, art. 166.

> Who better than Sy Kao herself would know if Chua Keng Giap was really her son? More than any one else, it was Sy Kao who could say—as indeed she has said these many years—that *Chua Keng Giap was not begotten of her womb.*[260]

In another case,[261] the Supreme Court ruled that the plaintiff, Violeta, was not the compulsory heir of the decedent, Esperanza, for failure to prove filiation by nature. In arriving at its conclusion, the Court considered the fact that there were no records of Esperanza's admission to the hospital where Violeta was supposedly born. Violeta was not able to show that it was in fact Esperanza who gave birth to her.

In surrogacy cases, therefore, the dispute as to maternity must be resolved in favor of the surrogate mother. With regard to the child's legitimacy, the Family Code states:

> Art. 164. Children conceived or born during the marriage of the parents are legitimate.[262]
>
> Art. 165. Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code.[263]

Under these provisions, if a married surrogate mother gives birth to a child, such child will be considered her and her husband's legitimate child. The surrogate cannot introduce proof to the contrary, as the Family Code expressly provides that "[t]he child shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress" under Article 167.

The surrogate-wife's declaration against the legitimacy of the child is simply considered as not made.[264] Her husband, however, may impugn the legitimacy of the child by introducing contrary evidence.[265]

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[260] Chua Keng Giap v. Intermediate Appellate Court, G.R. No. L-75377, 158 SCRA 18, Feb. 17, 1988, *cited in* I TOLENTINO, *supra* note 253, at 542. (Emphasis supplied.)

[261] Cabatbat Lim v. Intermediate Appellate Court, G.R. No. 69679, 166 SCRA 451, Oct. 18, 1988.

[262] FAM. CODE, art. 164.

[263] Art. 165.

[264] ED VINCENT S. ALBANO, ET AL., PERSONS AND FAMILY RELATIONS 580 (3rd ed. 2006).

[265] FAM. CODE, art. 166.

On the other hand, if the surrogate is not married when the child is born, the child will be her illegitimate child. The surrogate-wife will then exercise sole parental authority.[266]

3. Citizenship of the Surrogate Child

The Philippines, being a state party to the UN Convention on the Rights of the Child, is bound to observe Article 7 thereof which gives every child the right to acquire a nationality. Although there is no Philippine law particularly applicable to cases of surrogacy, it is submitted that the 1987 Constitution permits the grant of Philippine citizenship to a child born of a Filipina surrogate. Section 1, Article IV of the Constitution states that "[t]hose whose fathers or mothers are citizens of the Philippines" are citizens of it.[267]

Since the surrogate mother is the surrogate child's legal mother under Philippine law, such child will follow her citizenship. The surrogate baby will likewise be Filipino. If the father is a foreigner, the child can obtain the father's citizenship *in addition to* Philippine citizenship, if so permitted by the laws of his country. Problems of statelessness will arise only if a foreign surrogate mother whose national laws provide for *jus soli* gives birth in the Philippines—the child will not be considered a Filipino citizen since our laws do not provide for *jus soli* citizenship. In such a case, the baby will be stateless, unless his or her biological father is a Filipino citizen.

4. Simulated Births

As a surrogacy contract is invalid under Philippine law, intended parents might consider listing themselves as legal parents in the surrogate child's birth certificate in order to circumvent the prohibition. Such a practice is referred to as "simulation of birth," a criminal act punished under the Revised Penal Code[268] and the Domestic Adoption Act ("R.A. 8552"). The latter defines simulation of birth as "the tampering of the civil registry making it appear in the birth records that a certain child was born to a person who is not his/her biological mother, causing such child to lose his/her true identity and status."[269] The law punishes "any person who shall cause the fictitious registration of the birth of a child under the name(s) of person(s) who is not

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[266] Art. 176.

[267] CONST. art. IV, § 1.

[268] REV. PEN. CODE, art. 347.

[269] Rep. Act No. 8552 (1998), § 3(j).

his/her biological parent(s)."[270] It also granted amnesty to those who simulated births prior to the enactment of the law provided they initiated legal adoption proceedings within five years from the law's effectivity.[271] The five-year period lapsed in 2003.

Under present law, intended parents who simulate the birth of the surrogate child will face imprisonment of six years and one day to 12 years (*prision mayor*) and a fine not exceeding PHP 1,000 as mandated by the Revised Penal Code. R.A. 8552 provides for an increased fine of PHP 50,000.[272]

Acknowledging that most simulated births are resorted to with good intentions, the House of Representatives approved House Bill No. 5729 (HB 5729) in June 2015. The bill amended the amnesty period under Section 22 of R.A. 8552 by increasing the same to 15 years.[273] According to HB 5729's counterpart bill, Senate Bill No. 130 (S. No. 130), only 364 applicants availed of the amnesty originally granted by R.A. 8552.[274] The Senate failed to pass S. No. 130 prior to the adjournment of the 16th Congress.

With regard to the extension of the amnesty, Professor Aguiling-Pangalangan opined that any new legislative measure should include even simulations of birth done even after R.A. 8552 had come into effect.[275] "This liberal measure is not intended to encourage simulations of birth but merely recognizes that unless these are corrected, the children are left without protection, bereft of legal rights to a name, support[,] and succession."[276]

5. The Child Abuse Law

It has been suggested that the practice of procuring surrogates constitutes the offense of "attempt to commit child trafficking," penalized by Republic Act No. 7610 or the Special Protection of Children Against Abuse, Exploitation and Discrimination Act. The offense is defined as follows:

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[270] § 21(b).

[271] § 22.

[272] § 21(b).

[273] Paolo Romero, *House OKs Bill Granting Amnesty to Simulated Birth Records*, THE PHILIPPINE STAR, June 11, 2015, *at* http://www.philstar.com/metro/2015/06/11/1464518/house-oks-bill-granting-amnesty-simulated-birth-records.

[274] S. No. 130, 16th Cong., 1st Sess. (2013).

[275] ELIZABETH AGUILING-PANGALANGAN, NOT BONE OF MY BONE BUT STILL MY OWN 245-6 (2013).

[276] *Id.* at 246.

> *Attempt to Commit Child Trafficking.* — There is an attempt to commit child trafficking under Section 7 of this Act:
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> * * *
>
> (c) When a person, agency, establishment or child-caring institution recruits women or couples to bear children for the purpose of child trafficking[.][277]

The crime of child trafficking includes, but is not limited to, "the act of buying and selling of a child for money, or for any other consideration, or barter."[278] If, indeed, we consider surrogacy as amounting to baby-selling, then such practice would be violative of Sections 7 and 8 of R.A. 7610. DSWD Legal Services Chief Escutin expressed reservations as to the applicability of Section 8: "[s]urrogacy [...] take[s] place before the child is born, so Section 8 of R.A. 7610 would not apply since it involves trafficking a *child*."[279]

6. The Need for Adoption

Given that a surrogacy contract is void under Philippine law, the intended parents will have no legal rights over the surrogate child. If the infant is deemed to be a legitimate child of the surrogate mother and her spouse, they shall jointly exercise parental authority over the child.[280] On the other hand, if the child is deemed an illegitimate child, the surrogate mother alone exercises parental authority.[281] In either case, should the intended parents wish to be adjudged the legal parents of the surrogate child, they must undergo adoption proceedings in the Philippines.

Foreign intended parents must abide by the requirements provided under Republic Act No. 8043 or the "Inter-Country Adoption Act of 1995." Section 9 of the law identifies who are eligible to adopt:

> *Who May Adopt.* — An alien or a Filipino citizen permanently residing abroad may file an application for inter-country adoption of a Filipino child if he/she:
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> (a) is at least twenty-seven (27) years of age and at least sixteen (16) years older than the child to be adopted, at the time of

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[277] Rep. Act No. 7610 (1992), § 8.
[278] § 7.
[279] Robles, *supra* note 230. (Emphasis supplied.)
[280] FAM. CODE, art. 211.
[281] Art. 176.

application unless the adopter is the parent by nature of the child to be adopted or the spouse of such parent;

(b) if married, his/her spouse must jointly file for the adoption;

(c) has the capacity to act and assume all rights and responsibilities of parental authority under his national laws, and has undergone the appropriate counseling from an accredited counselor in his/her country;

(d) has not been convicted of a crime involving moral turpitude;

(e) is eligible to adopt under his/her national law;

(f) is in a position to provide the proper care and support and to give the necessary moral values and example to all his children, including the child to be adopted;

(g) agrees to uphold the basic rights of the child as embodied under Philippine laws, the U.N. Convention on the Rights of the Child, and to abide by the rules and regulations issued to implement the provisions of this Act;

(h) comes from a country with whom the Philippines has diplomatic relations and whose government maintains a similarly authorized and accredited agency and that adoption is allowed under his/her national laws; and

(i) possesses all the qualifications and none of the disqualifications provided herein and in other applicable Philippine laws.[282]

Inter-country adoption involves a lengthy[283] and costly process as it requires the intended parents to bear all travel expenses of the prospective adoptee as well as charges for medical and psychological evaluations.[284] All fees collected by the Inter-Country Adoption Board are to be used solely to process applications and to fund the Board's activities.[285] This means that no part of the payments made by prospective adoptive parents redounds to the benefit of the biological surrogate mother. As a contracting state to the Hague Adoption Convention, Philippine law adheres to the requirement that the

[282] Rep. Act No. 8043 (1995), § 12. Inter-Country Adoption Act of 1995.
[283] *See supra* Part I.B.
[284] § 12.
[285] § 13.

biological mother's consent must "not have been induced by payment or compensation of any kind."[286]

Philippine adoption laws do not require, as a prerequisite to adoption, that the prospective adoptee be recognized as a citizen of the adopters' home country. Therefore, a Filipino surrogate child who is adopted by the intended parents may retain his or her Philippine citizenship unless the intended parents' laws provide otherwise. The case of *Therkelsen v. Republic* is instructive:

> The criterion adopted by the Court a quo would demand as a condition for the approval of the adoption that the process should result in the acquisition, by the person adopted, of the alien citizenship of the adopting parent. This finds no support in the law, for, as observed by this Court in *Ching Leng vs. Galang* [...] the citizenship of the adopter is a matter political, and not civil, in nature, and the ways in which it should be conferred lay outside the ambit of the Civil Code. It is not within the province of our civil law to determine how or when citizenship in a foreign state is to be acquired. The disapproval of the adoption of an alien child in order to forestall circumvention of our exclusion laws does not warrant, denial of the adoption of a Filipino minor by qualified alien adopting parents, since it is not shown that our public policy would be thereby subverted.[287]

It is well to note that Philippine adoption laws, namely the Domestic Adoption Act (R.A. 8552), and the Inter-Country Adoption Act (R.A. 8043), are applicable only when the surrogate child to be adopted is a Filipino citizen. R.A. 8552's full title is "An Act Establishing the Rules and Policies on the Domestic Adoption of *Filipino* Children, and for Other Purposes." On the other hand, R.A. 8043 defines inter-country adoption as "the socio-legal process of adopting a *Filipino* child by a foreigner or a Filipino citizen permanently residing abroad where the petition is filed, the supervised trial custody is undertaken, and the decree of adoption is issued outside the Philippines."[288]

Clearly, then, our adoption statutes contemplate only the adoption of Filipino, not foreign children. This conclusion is strengthened by the conflict-of-laws principle that matters affecting a person's status are governed by his

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[286] Hague Adoption Convention, art. 4(c)(3).

[287] Therkelsen v. Republic, G.R. No. L-21951, 12 SCRA 400, 402, Nov. 27, 1964.

[288] Rep. Act No. 8043 (1995), § 3(a). (Emphasis supplied.)

or her personal law.[289] In the recent case of *Poe-Llamanzares v. Commission on Elections*,[290] the Supreme Court categorically pronounced that "[a]doption deals with status, and a Philippine adoption court will have jurisdiction only if the adoptee is Filipino."[291]

V. A BABY UNWANTED: OPTING OUT AND ITS IMPLICATIONS

As discussed in the previous chapter, a surrogacy contract would be considered void under present Philippine law. Thus, our courts will afford no contractual remedies to parties entering into such contracts. In countless cases, the Philippine Supreme Court has ruled that a void contract "vests no rights and creates no obligations."[292] However, the mechanical application of such rulings to surrogacy contracts would open the floodgates to unscrupulous infractions of the surrogacy agreement by any of the parties thereto, given that they will incur no liability in view of the void nature of the contract.

The harshness of such a pronouncement must be tempered, considering the State's obligation to uphold the best interest of the child. If the law were to be strictly applied, then neither party to a surrogacy agreement would be entitled to relief under the *in pari delicto* doctrine.[293] Instead, the court will "leave the parties where it finds them."[294] This proves to be problematic when a breach of the surrogacy contract is alleged to have been committed, such as when the intended parents change their mind about taking the surrogate child. While it would be fair to argue that the law will not protect those who willfully violated its provisions, the same cannot be said of the child born of a void surrogacy agreement. On the contrary, it is imperative that these children be protected by our laws.

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[289] COQUIA & AGUILING-PANGALANGAN, *supra* note 191, at 239.

[290] Poe-Llamanzares v. Commission on Elections, G.R. No. 221697, Mar. 8, 2016.

[291] *Id.*

[292] Uy v. Chua, G.R. No. 183965, 600 SCRA 806, Sept. 18, 2009; Nunga, Jr. v. Nunga III, G.R. No. 178306, 574 SCRA 760, Dec. 18, 2008, *citing* Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 307 SCRA 394, May 19, 1999.

[293] "Latin for 'in equal fault,' in *pari delicto* connotes that two or more people are at fault or are guilty of a crime. Neither courts of law nor equity will interpose to grant relief to the parties, when an illegal agreement has been made, and both parties stand in *pari delicto*," Constantino v. Heirs of Constantino, Jr., G.R. No. 181508, 706 SCRA 580, 589, Oct. 2, 2013, *citing* BOUVIER'S LAW DICTIONARY (1856 ed.).

[294] Inco v. Enriquez, 107 Phil. 226, 230 (1960).

This chapter explores the possibility of providing remedies for breached surrogacy agreements in pursuance of the State's constitutional[295] and legal[296] mandate to uphold and protect the child's best interests. An *equitable measure* is thus proposed: where an outright declaration of nullity of the surrogacy contract would unduly prejudice the child, limited recognition of the agreement may be had.

A. Recalling Baby Gammy

As discussed in the Introduction, *Baby Gammy* constitutes a classic case of a surrogacy agreement gone wrong. Upon finding out one twin, Gammy, had Down syndrome, the intended parents left him behind and took only the healthy twin back to Australia. The parties to the surrogacy agreement had conflicting accounts as to why Gammy remained in Thailand. According to the intended parents, Chanbua, the surrogate mother, refused to turn over the baby to them. On the other hand, Chanbua claimed that Gammy was abandoned by the Australian couple.

Today, Chanbua and Gammy are able to get by thanks to the donations of strangers from all over the world. However, Gammy's case is only one of several instances of abandoned surrogate children.[297] If such a controversy were to take place on Philippine soil involving a Filipina surrogate, what protections would our laws afford her, and more importantly, the surrogate child?

B. Surrogacy as a Covenant

Before the idea of remedies may be entertained, the nature of a surrogacy agreement must first be established—it is first and foremost a contract. As such, the following provisions of the New Civil Code find relevance:

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[295] CONST. art. XV, § 3.

[296] FAM. CODE, arts. 102, 129.

[297] *See Australian Couple Abandons Surrogate Baby in India*, THE TIMES OF INDIA, Oct. 9, 2014, *at* http://timesofindia.indiatimes.com/india/Australian-couple-abandons-surrogate-baby-in-India/articleshow/44747623.cms; Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, THE NEW YORK TIMES, July 5, 2014, *at* http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?_r=1.

> Article 1159. Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.[298]
>
> Article 1305. A contract is a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service.[299]

The relevance of considering a surrogacy agreement as a contract manifests itself, ironically, when courts decline to enforce such agreement. This is because the contract, despite its unenforceability (or as submitted, under Philippine law, its nullity), may serve to provide evidence of the parties' intentions upon entering into their relationship.[300] Parenthetically, the New Civil Code provides that the parties' contemporaneous and subsequent acts may be looked into to determine their intent.[301]

A surrogacy contract gives rise to reciprocal obligations. The intended parents' prestation consists of the payment of the fees attendant to the pregnancy of the surrogate mother and the obligation to assume parental authority and custody of the surrogate child. On the part of the intended parents, therefore, their duties consist both of obligations to give and obligations to do. This distinction becomes relevant when it comes to enforcement, as certain remedies are available for one type of obligation but not for the other.

On the other hand, the surrogate mother undertakes to carry the infant to term and, upon giving birth, to turn over custody of the child to the intended parents. In this regard, Reyes and See characterized a surrogacy contract as a "personal service contract for gestation."[302]

C. Remedies for Breach

The obligations of the parties to a surrogacy agreement being reciprocal in character, the power to rescind, or more properly, to resolve, the contract is implied pursuant to Article 1191 of the New Civil Code. In case of

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[298] CIVIL CODE, art. 1159.

[299] Art. 1305.

[300] Cynthia Fruchtman, *Considerations in Surrogacy Contracts*, 21 WHITTIER L. REV. 429, 431 (1999).

[301] CIVIL CODE, art. 1371.

[302] Reyes & See, *supra* note 18, at 226.

breach, the injured party is given two alternatives—specific performance or rescission (resolution).[303]

1. Specific Performance

An action for specific performance lies when, despite breach, the injured party nonetheless elects to demand performance of the contract according to the precise terms agreed upon.[304] It is well to note, however, that specific performance is not a proper remedy in case of breach of an obligation *to do*. Tolentino opined that "the law does not authorize the imposition of personal force or coercion upon the debtor to comply with his obligation."[305] If an obligation to do is breached, "the ultimate sanction [...] is indemnification of damages."[306]

The availability of specific performance in surrogacy contracts therefore rests on what particular obligation of the party was breached—whether it was an obligation to give, or an obligation to do. If the surrogate mother seeks to receive payment lawfully due under the contract, then specific performance may be availed of, as the obligation consists merely of the delivery of a sum of money. On the other hand, if the intended parents refuse to take the child after it is born or to assume custody over such child, compliance with their obligations cannot be exacted by specific performance as such would constitute involuntary servitude.[307] For the same reason, the surrogate mother cannot be compelled to turn over the child to the intended parents. In such a case, the intended parents would only be able to recover damages for non-performance. While such damages may offer some solace to the contracting parents, "it is no substitute for the child they hoped to raise."[308]

On the issue of personal liberty, Lewis wrote that specific performance of the surrogate's obligation to turn over the child to the intended parents does not amount to involuntary servitude. He argued, albeit rather simplistically, that "by enforcing the contract, the court will not be

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[303] CIVIL CODE, art. 1191.

[304] San Miguel Properties, Inc. v. Perez, G.R. No. 166836, 705 SCRA 38, Sept. 4, 2013.

[305] IV ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES [hereinafter "IV TOLENTINO"] 99 (2002).

[306] *Id.*

[307] IV TOLENTINO, *supra* note 305, at 100.

[308] Browne C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child* [hereinafter "Lewis, *Due Date*"], 87 ST. JOHN'S L. REV. 899, 929 (2013).

helping to place the surrogate in bondage because, once the child is born, the surrogate's services end."[309]

The argument is flawed. If one were to make the birth of the child the reckoning point for the termination of the surrogacy agreement, then there would be no need for specific performance as the surrogate's obligation had already been fully and completely complied with. But precisely, in a surrogacy contract, the act of turning over the child to the intended parents is part and parcel of the surrogate mother's obligation. In a successful action for specific performance, she would be *compelled* to deliver the child to the intended parents against her will, thus interfering with her personal liberty.

2. Rescission (Resolution)

A second remedy available in cases of contractual breach is rescission, or more appropriately, resolution.[310] If a contract is rescinded or resolved, the relation between the contracting parties is extinguished—the contract is abrogated in all its parts.[311] Rescission results in mutual restitution, such that the parties are returned to their status prior to the celebration of the contract.[312] Consequently, an action for rescission will prosper only when he who demands rescission can return whatever he may be obliged to restore.[313]

Bearing in mind the consequences of rescission, the extent of contractual performance by the party seeking rescission is determinative of the availability of such remedy. This factor is especially relevant in cases where the party seeking to rescind is the surrogate mother. For if she is already pregnant, she can no longer return the embryo with which she was implanted. Mutual restitution is not possible. Moreover, given the financially disadvantaged positions of many surrogate mothers, they may no longer be able to return the money received by way of compensation. At this point, the parties cannot be restored to their original positions.[314]

Rescission appears to be a remedy with a "cut-off" date, that is, after a certain event occurs, it will no longer be available. The reckoning point for

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[309] *Id.* at 937.

[310] "Article 1191 speaks of the remedy of rescission in reciprocal obligations within the context of Article 1124 of the former Civil Code which used the term resolution." San Miguel Properties, Inc. v. Perez, G.R. No. 166836, 705 SCRA 38, 57-8, Sept. 4, 2013.

[311] IV TOLENTINO, *supra* note 305, at 181.

[312] *Id.*

[313] CIVIL CODE, art. 1385.

[314] Lewis, *Due Date*, *supra* note 308, at 939.

availability of rescission, according to the American Bar Association (ABA), is the time the surrogate mother becomes pregnant. The ABA Model Act Governing Assisted Reproductive Technology provides that "before the prospective gestational carrier becomes pregnant by means of assisted reproduction, the prospective gestational carrier, her legal spouse, or either of the intended parents may terminate the gestational agreement by giving notice of termination in a record to all other parties."[315]

There is wisdom to this rule because, as earlier discussed, no mutual restitution can take place once the surrogate mother becomes pregnant. It is only before such pregnancy that the parties are still capable of returning to each other what they may have received under the contract.[316]

D. Specific Liabilities of the Intended Parents

Independent of the consequences of the intended parents' breach of a surrogacy contract, they may also incur liability under statute. These liabilities may be either civil or criminal in nature.

1. Under the Family Code

The nullity of the surrogacy contract notwithstanding, intended parents may be held liable for support under the provisions of the Family Code if filiation is duly proven. To recall, filiation is the status of the child in relation to the father or mother.[317] Under the Family Code, parents and children are obliged to support each other.[318] As to what is included in the term "support," Article 194 of the Code is instructive:

> Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family.

The Family Code provides that a person obliged to give support may fulfill his obligation in two ways: by paying the allowance fixed, or by receiving and maintaining in the family dwelling the person who has a right to receive

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[315] American Bar Association Model Act Governing Assisted Reproductive Technology (2008), § 706 (1) Alternative A.

[316] IV TOLENTINO, *supra* note 305, at 180-81.

[317] SEMPIO-DIY, *supra* note 254, at 267.

[318] FAM. CODE, art. 195.

support.[319] However, the second option may not be availed of "in case there is a moral or legal obstacle thereto."[320]

In the case of a surrogacy arrangement where the intended parents refused to take custody of the child, it is submitted that they cannot exercise the option to maintain the surrogate child in their family dwelling. Since they repudiated the contract to take the child, such repudiation constitutes a moral obstacle within the contemplation of the Family Code provision. Moreover, maintaining the surrogate child in the home of parents who manifested their unwillingness to care for him may be detrimental to his welfare. In one case where the father disowned his children and denied having any familial relationship with them, the Supreme Court declared that he could not opt to comply with his obligation to give support by maintaining the children in his home.[321]

Should the intended parents abandon the surrogate child, they may likewise lose their parental authority over such child. The Family Code provides: "Unless subsequently revived by a final judgment, parental authority also terminates: [...] (3) [u]pon judicial declaration of abandonment of the child in a case filed for the purpose[.]"[322]

At any rate, the intended parents shall remain liable for support, notwithstanding the loss of parental authority.

2. Criminal Liability

Apart from a civil action for support, a criminal case may be filed against the intended parents for violation of pertinent provisions of the Revised Penal Code, particularly the section on "Abandonment of helpless persons and exploitation of minors." In particular, the law provides that "[t]he penalty of *arresto mayor* and a fine not exceeding 500 pesos shall be imposed upon any one who shall abandon a child under seven years of age, the custody of which is incumbent upon him."[323]

In addition, the Code penalizes indifference of parents by imposing the same penalty on "parents who shall neglect their children by not giving

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[319] Art. 204.

[320] Art. 204.

[321] Mangondon v. CA, G.R. No. 125041, 494 SCRA 1, June 30, 2006.

[322] FAM. CODE, art. 229.

[323] REV. PEN. CODE, art. 276.

them the education which their station in life require and financial conditions permit."[324]

E. Specific Liabilities of the Surrogate Mother

Just as the intended parents may be held civilly or criminally liable for their acts and omissions in respect of a surrogacy contract, the surrogate mother may also incur liability, particularly for acts which may be committed in the course of her pregnancy.

1. Conduct During Pregnancy

In a surrogacy contract, parties may stipulate on certain norms of conduct to be observed by the surrogate mother while she is pregnant. For example, they may agree that the mother should submit to periodic medical checkups and tests. Intended parents may also require the surrogate mother to not smoke cigarettes or consume alcohol and illegal drugs. If these stipulations are not complied with, a case for breach of contract may arise. But independent of the contractual infraction, a surrogate mother's wrongful conduct may bring about harmful effects on the surrogate child. May such child bring suit against the mother for her prenatal negligence?

In *Dobson (Litigation Guardian of) v. Dobson*,[325] the Canadian Supreme Court ruled in the negative. This case involved a child's tort claim against his mother for her negligent conduct during pregnancy. The mother was 27 weeks pregnant when the car she was driving collided with another vehicle, causing prenatal injuries to her child. In ruling for the mother, the Court cited public policy considerations, stating that it was not prepared to impinge upon the decisional rights of the mother. It characterized the mother-fetus relationship as a unique one. Moreover, the Court acknowledged the difficulty in imposing a standard of diligence to be observed by pregnant women, considering the disparity in educational attainment, financial capability, access to health services, and ethnic backgrounds of women.

The Supreme Court of New Hampshire ruled differently. In *Bonte v. Bonte*[326] the defendant, then seven months pregnant, crossed the street without using the designated crosswalk. She was hit by a car, and her daughter suffered serious brain damage. The Court in this case declared that there

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[324] Art. 277.

[325] Dobson (Litigation Guardian of) v. Dobson, 2 S.C.R. 753 (1999).

[326] Bonte v. Bonte, 136 N.H. 286 (1992).

should be a standard of care imposed upon pregnant woman for prenatal conduct. It ruled that "[t]he mother will be held to the same standard of care as that required of her once the child is born."[327] The facts and circumstances of the particular case must be considered in determining whether a mother's prenatal conduct amounts to negligence.

It is submitted that the New Hampshire Supreme Court's decision in *Bonte* is applicable in the Philippine setting. Our Constitution, which mandates the protection of the life of the unborn,[328] supports this proposition. If in *Dobson*, the Court cited public policy considerations to discard the injured child's cause of action, Philippine public policy commands the opposite—our laws dictate that the best interest of the child must be the primary consideration, coupled with the State's "unwavering resolve to penalize abortion at all stages."[329]

2. Termination of Pregnancy

There may be instances in which parties to a surrogacy arrangement wish to terminate the pregnancy. Depending on the parties' agreement, their contract might include a clause giving the intended parents the prerogative to request for an abortion. Such option is commonly exercised by the intended parents when the surrogate mother becomes pregnant with twins or triplets (multiple pregnancies). [330] In the Philippine jurisdiction however, such stipulation would be void for being contrary to law.

Considering the criminal nature of abortion in the Philippines, if the surrogate mother consents to the requested abortion, she will be liable under the Revised Penal Code for the felony of "Abortion practiced by the woman herself or by her parents."[331] In addition to what its title states, the provision also penalizes the woman's act of consenting to an abortion practiced by any other person.[332] The intended parents may also be criminally charged as principals by inducement[333] in the same crime.

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[327] *Id.* at 290.

[328] CONST. art. II, § 12.

[329] Reyes & See, *supra* note 18, at 250.

[330] Katie O'Reilly, *When Parents and Surrogates Disagree on Abortion*, THE ATLANTIC, Feb. 18, 2016, *at* http://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/.

[331] REV. PEN. CODE, art. 258.

[332] LUIS B. REYES, THE REVISED PENAL CODE CRIMINAL LAW BOOK TWO 527 (18th ed. 2012).

[333] REV. PEN. CODE, art. 17(1).

VI. RECOMMENDATIONS

Contracting surrogacy may give rise to various legal concerns, many of which have yet to be addressed by legislation, regulation, or treaty. Among the most pervasive issues involving surrogacy are parentage, citizenship, and the liabilities of parties for breach of the surrogacy contract. In light of these difficulties, the enactment of an international convention on the matter is a step in the right direction. A multilateral treaty will result in the existence and uniformity of regulation among states. Conflict-of-laws problems will be reduced, and the status of children born out of surrogacy arrangements will no longer remain uncertain. And with respect to the Philippine setting, it is imperative that Congress enact a law on the matter in anticipation of a rise in surrogate births in the country.

A. Prospects for the Hague Convention

The Hague Experts Group meeting in February 2016 was unable to arrive at "definitive conclusions [...] as to the feasibility of a possible work product in this area and its type or scope."[334] This was due to their acknowledgment of "the complexity of the subject and the diversity of approaches by States."[335] On a positive note, it was agreed upon that the mandate of the Experts' Group be continued and the preparation for a subsequent meeting with a focus on recognition be undertaken.[336]

It is submitted that at the very least, the Hague Convention, through the Experts Group, should publish its own draft agreement with mandatory stipulations to be observed by States parties. Next, the treaty must clarify whether commercial surrogacy is permissible or not so as to properly alert prospective parties to a surrogacy contract. Moreover, the convention must address the problem of citizenship and statelessness. Taking a cue from the Convention on the Reduction of Statelessness, the treaty may provide that "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."[337] Such a provision will forestall problems arising from the application of conflicting nationality laws. Finally, the convention must mandate that the best interest of the child standard be observed in resolving disputes pertaining to international surrogacy.

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[334] Hague Conf. on Private Int'l Law, Conclusions and Recommendations Adopted by the Council 3 (2015), *at* https://assets.hcch.net/docs/8c756bba-54ed-4d3e-8081-1e777d6950dc.pdf.

[335] *Id.*

[336] *Id.*

[337] United Nations Convention on the Reduction of Statelessness art. 1, Aug. 30, 1961, 989 U.N.T.S. 175.

B. The Case for Regulation

Turning now to the surrogacy situation in the Philippines, it remains to be seen whether Congress will enact legislation on the matter.

Applying current laws will prove unfavorable to the intended parents, as the surrogacy contract is void and they must turn to adoption as a last resort. It will, however, promote certainty and stability as to the status of the child, albeit with a tradeoff with expediency and convenience. As noted in Part V, an infant born of a Filipina surrogate will be a Philippine citizen. Such child will likewise be recognized as a child of the surrogate.

The enactment of a surrogacy law might only serve to render the child's status uncertain especially when applied alongside foreign law, resulting to a case of conflict-of-laws. For example, when seemingly favorable Ukrainian surrogacy laws are applied concurrently with French or UK law, the result is that the surrogate child is legally parentless and stateless. This problem will not occur if only one law is applied, which in our case is Philippine law.

However, before Congress initiates legislation on surrogacy, it must take a step back and assess the current situation and whether there is really a need for a law on surrogacy. Perhaps it may be argued that it is too early to consider legislation given that surrogacy has yet to gain popularity in the country. It has only been practiced "sometimes" in informal settings.[338] It may be argued that in any case, present Philippine laws amply protect the rights of the child although they do not relate to surrogacy in particular.

While there are very few publicized accounts of surrogacy practiced by Filipinos, the possibility remains that it exists or will exist as a black market industry. In a nation where people from depressed areas sell their kidneys due to financial need,[339] it is not too far-fetched to conclude that the same persons would agree to carry and deliver a child in exchange for money. In China, where surrogacy is banned, a booming black market for surrogacy has emerged with an estimated 10,000 births per year.[340] Closer to home, there have been several hundred thousand cases of Filipinos whose births were

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[338] Robles, *supra* note 230.

[339] Mayen Jaymalin, *Kidney Selling Now Being Done Online in RP*, THE PHILIPPINE STAR, Dec. 13, 2008, *at* http://www.philstar.com/headlines/423226/kidney-selling-now-being-done-online-rp.

[340] Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, THE NEW YORK TIMES, Aug. 2, 2014, *at* http://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?_r=0.

simulated.[341] If, indeed, there is demand for surrogates in the Philippines, Congress must address it.

A prospective surrogacy law should effectively regulate—not ban—the practice. Prohibiting surrogacy will only drive the industry underground, as in the case of the organ trade.[342] At present, Filipina women are already advertising surrogacy services online through websites like *Surrogate Finder* and *Find Surrogate Mother*.[343] Some of these women are upfront about their intentions: they expressly mentioned financial motivation as their primary reason for advertising their services.[344] The Legislature must not close its eyes to the reality that people desperate for money are willing to do whatever it takes to earn; instead, it must ensure that the rights of such persons are protected. Considering the rapid rate at which technology and medicine is advancing, sound policy dictates that our laws be updated to keep up with these changing times.

Schuck identified four areas which must be addressed by a future surrogacy statute. *First*, there must be authoritative norms to govern the agreements. He suggested that the contract provisions to implement these norms should be standardized. *Second*, it must address contingencies. A common problem in surrogacy arrangements arises when either or both parties changes his or her mind. The law must be equipped with provisions to enable the parties to deal with such a situation. *Third*, premium must be given to informed consent. The law should provide safeguards in order to ensure that the parties are as "fully informed as is reasonably possible about their contractual obligations and about how these obligations will be enforced."[345] And *fourth*, it must safeguard the best interest of the child. Schuck opined that custody should, if possible, be awarded to at least one biologically-related parent. Provisions for support obligations are also desirable.

Proposed provisions for a Philippine surrogacy law are discussed below.

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[341] Explanatory note of Sen. Francis N. Pangilinan, S. No. 1409, 13th Cong. 1st Sess. (2004).

[342] Gemma Bagayaua, *Organ Trade Continues Despite Ban on Transplantation to Foreigners*, ABS-CBN NEWS, Mar. 8, 2009, *at* http://news.abs-cbn.com/special-report/03/08/09/organ-trade-continues-despite-ban-transplantation-foreigners.

[343] *Surrogate Mother, Egg Donors, and Sperm Donors in Manila*, SURROGATE FINDER, *at* http://www.surrogatefinder.com/surrogate_mothers/Philippines/Manila/ (last visited Mar. 11, 2016); *Find Surrogate Mothers in Philippines*, FIND SURROGATE MOTHER, *at* http://www.findsurrogatemother.com/surrogate-mothers/philippines (last visited Mar. 11, 2016).

[344] *Id.*

[345] Schuck, *supra* note 39, at 1805.

1. Standard Contract Provisions

To eliminate uncertainty and ambiguity as to the interpretation of surrogacy agreements, the law must provide for certain mandatory stipulations to be included in the parties' contract, thus:

> *Surrogacy contract; mandatory stipulations.* All surrogacy contracts to be valid must contain substantially the following matters:
>
> 1. The surrogate mother, and her spouse, if any, agrees to pregnancy by means of artificial insemination or in vitro fertilization;
>
> 2. The surrogate mother, her spouse, if any, and the donors agree to relinquish all parental authority and rights over the child in favor of the intended parents;
>
> 3. The intended parents shall be recognized as the legal parents of the child; and
>
> 4. Nothing in the contract shall be interpreted to limit the right of the surrogate mother to make decisions to safeguard her health or that of the embryo(s) or fetus.

The first stipulation is consistent with the Family Code which requires the consent or ratification of both spouses to the artificial insemination of the wife.[346] The second stipulation, though requiring the waiver of parental rights, is permissible under Philippine law. If passed, this proposed Philippine surrogacy statute will constitute the legislative authorization needed to effect a renunciation of parental authority in accordance with the Family Code.[347] As to the third stipulation, the same is a necessary consequence of the renunciation of parental authority. The surrogate child's Certificate of Live Birth should attest to the fact that he or she is the child of the intended parents, similar to what is done in cases of adoption.[348] Finally, the fourth stipulation is intended as a safeguard against exploitation and coercion of the surrogate mother. Cases like *Baby Gammy*—where the intended parents insisted that the surrogate obtain an abortion—will be avoided. This provision guarantees the surrogate mother and child's constitutional right to health.[349]

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[346] FAM. CODE, art. 164, ¶ 2.

[347] Art. 210.

[348] *See* Rep. Act No. 8552 (1998), § 14.

[349] CONST. art. II, § 15.

2. Noncompliance and Termination

With regard to voluntary termination, the ABA proposed that it is permissible only if notice of termination is given by any party to the surrogacy contract *before* the surrogate mother becomes pregnant by means of assisted reproduction.[350] It is submitted that such provision should likewise be applicable in our jurisdiction to protect the legitimate expectations of the parties. Moreover, no action for damages shall lie in consequence of a voluntary termination, as the contract has yet to be performed by either party.

Should either party breach the surrogacy contract, the injured party may bring an action for specific performance before a court of competent jurisdiction, subject to certain exceptions. As earlier discussed, some contractual stipulations may not be enforced by specific performance. A provision requiring the surrogate to be impregnated is an example—this is but a consequence of the right to voluntary termination. Another instance where specific performance will not lie is where a stipulation on abortion is sought to be enforced. Such a provision is contrary to Philippine law, which penalizes abortion.[351] In contrast, other contractual stipulations which are "central to the integrity of the arrangement"[352] may be enforced, such as a provision requiring the surrogate mother to undergo medical testing.

3. Accreditation and Testing

A prospective Philippine surrogacy law must likewise provide for accreditation of ART clinics to protect the health and well-being of Filipina surrogates and children. Taking a cue from India's Draft Assisted Reproductive Technology Bill, the law must establish a government agency under the Department of Health specifically mandated to regulate the practice of surrogacy. Such agency will then be tasked with the following:

1. Identifying and ensuring compliance with minimum requirements related to staff and physical infrastructure of ART clinics;

2. Regulating the impregnation procedures (artificial insemination, *in vitro* fertilization);

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[350] American Bar Association Model Act Governing Assisted Reproductive Technology (2008), § 706(1) Alternative A.

[351] REV. PEN. CODE, arts. 256-259.

[352] Schuck, *supra* note 39, at 1807.

3. Providing guidelines for selection of patients and requiring prior physical and psychological examinations; and

4. Framing standards for post-partum care of surrogate mothers.

It is submitted that government regulation of surrogacy procedures will prove favorable to *all* the contracting parties. The standards to be imposed on ART clinics guarantee that the entire process will be performed by qualified persons and under the most sanitary conditions. Intended parents can remain secure in the fact that the selected surrogate mother has been pre-screened for any diseases that may be transmitted to the child. Psychological counseling for the surrogate mother will likewise ensure her readiness to face the consequences of the surrogacy arrangement, i.e. giving up the baby. In turn, the conduct of psychological evaluations and tests on the commissioning couple will determine their fitness to become parents.

4. Foreign Contracting Parties

As a further safeguard, foreigners wishing to use a Filipina surrogate must show that they are permitted to do so by their national laws.[353] Similar to adoption requirements, the Philippine surrogacy law must require an alien intended parent to prove that the laws of his country will recognize the surrogate child as his own.[354] By providing for such requirement, uncertainty as to the parentage and citizenship of the child will be eliminated. Moreover, only aliens who come from countries with which the Philippines has diplomatic relations should be allowed to contract surrogacy in the Philippines.[355]

Finally, a prospective Philippine surrogacy law must require the foreign intended parents to bear the following costs, in addition to general medical expenses:

1. The cost of bringing the child from the Philippines to the residence of the intended parents abroad, including all travel expenses within the Philippines and abroad; and

2. The cost of passports, visas and other travel documentation.[356]

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[353] *See* Rep. Act No. 8043 (1995), § 9(e).
[354] *See* § 9(g).
[355] *See* § 9(h).
[356] *See* §12.

CONCLUSION

The rise in cases of surrogacy can be attributed to rapid advancements in technology. New developments in the field of medicine make it possible for infertile couples to have children biologically related to them, while the accessibility of the internet and social media allows prospective intended parents to seek options outside their home country.

However, contracting surrogacy is not without its pitfalls. One who wishes to consider it must assess all the possible risks involved. From the moment the contract is negotiated up until the child is to be taken back to the intended parents' home country, various issues—legal, medical, and bioethical—may arise. Among these issues are the enforceability of the contract, legal parentage, citizenship and statelessness, and liability for a breach of the agreement. What happens when one of the parties changes his or her mind? The disparity among laws and judicial decisions of different countries makes it impossible to provide a categorical and uniform resolution of this issue. While some countries have already passed legislation pertaining to surrogacy, the practice remains unregulated in other jurisdictions. This lack of regulation results in uncertainty as to the effects and consequences of contracting surrogacy. Thus, prospective parties must tread with caution when entering into such arrangements.

The passage of comprehensive and effective surrogacy legislation in the Philippines is critical for the protection of all parties involved. A special law will ensure the well-being of the surrogate and the child while upholding the legitimate expectations of the parties. Such legislation will thwart the possibility of abuse and exploitation. Considering that current Philippine law considers surrogacy contracts as void, it is critical for the legislature to take steps to regulate the practice. While one can understand the plight of hopeful parents longing to have children, their sincere intentions cannot override the dictates of the law. Nevertheless, in the event that Congress decides to pass surrogacy legislation, government agencies and courts must not be too quick to mechanically apply it—for the best interest of the child must be the primary consideration.

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