AAARTA Position Paper on
the Regulation of International Surrogacy Arrangements

January 20, 2014

Statement of Interest

The American Academy of Assisted Reproductive Technology Attorneys ("AAARTA") is an organization of credentialed attorneys who practice in the law related to assisted reproductive technology ("ART"). As a specialty group of the American Academy of Adoption Attorneys, an organization that has advocated for the rights of children and families for 25 years, AAARTA is deeply committed to the protection of all participants involved in surrogacy arrangements, including the intended parents, the gestational surrogates ("surrogates"), and the children born as a result of these arrangements. With a background focused in adoption as well as in ART, AAARTA's interest in a potential treaty on international surrogacy by the Hague Conference on Private International Law ("Hague Conference") stems from a desire to ensure that the arrangements are conducted ethically and morally for all participants, that the children born have secure parentage, and that their citizenship is recognized in their parent(s)' home country and abroad.

Executive Summary

With the explosion of cross-border surrogacy arrangements over the past decade, myriad issues have arisen for children born of these arrangements. While in some instances, children have been left stateless, parentless or both, and as concerns over the potential exploitation of impoverished women abound, the number of these arrangements continues to increase. As The Permanent Bureau of the Hague Conference on Private International Law continues to study the desirability, feasibility, and framework of cooperation of regulating these arrangements, AAARTA supports efforts to regulate these arrangements in a manner that respects the similarities and differences between this method of family building and adoption.[1]

The goal of this position paper is to offer a feasible framework to resolve conflicts of law, to encourage comity among nations, to protect both the women who act as surrogates and the intended parents, and to provide certainty for citizenship and parentage of the children born of these arrangements. To that end, AAARTA supports a treaty that establishes fundamental minimum substantive safeguards that must be adhered to and enforced by Member States, combined with a formal process for determining whether the arrangement is compliant with those safeguards and the resulting family is secure, prior to the commencement of any medical procedures. Such a treaty would ensure that once the legal procesbe completed, the surrogacy arrangement could move forward, and the receiving state would recognize both the legal parentage and the citizenship of the child.

[1] For purposes of this paper, we address only gestational surrogacy arrangements and adopt the definitions as set forth in the glossary in the Hague Conference's March 2012 report, entitled "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements," Prel. Doc. No. 10.

AAARTA's proposed process focuses on identifying and resolving the key issues prior to the child's conception.

Discussion

A. Introduction: A Two-Pronged Approach

Any consideration of a treaty must begin with the recognition that different countries have their own deeply held beliefs regarding the morality of surrogacy. It is likely that many countries as a matter of principle will not sign such a treaty. Hopefully, however, with the safeguards in place, some of those countries will have their concerns alleviated and will feel comfortable recognizing this method of family building.

This proposal seeks to address the following key concerns of international surrogacy arrangements:

1. Exploitation of women
2. Child trafficking
3. Procreative autonomy for intended parents
4. Security for the children born of these arrangements
5. Cooperation that respects the autonomy of the Member States

To that end, AAARTA proposes a two-pronged approach. First, all Member States would agree to adopt and enforce minimum substantive safeguards in any surrogacy arrangement to which the treaty applied. These safeguards are designed to protect the integrity of the process, the participants, and the child. Second, Member States would implement the 10-step process set forth below. This process allows participants to determine parentage and citizenship of the potential child in advance of conception, and to have that parentage and citizenship formally determined and declared in a timely and efficient manner after birth. This two-pronged approach addresses the key concerns described above, thereby providing the needed protections for all involved.

B. Prong #1: Minimum Substantive Safeguards

The Member States to the treaty agree to the following standards to protect the child and ensure that neither intended parents nor surrogates are exploited. These standards would in no way limit any additional requirements a Member State might impose on a surrogacy occurring in its territory (except as otherwise stated in the safeguard):

1. Prior to conception or any ART procedures, the parties must execute a legal agreement outlining each party's intent, rights and responsibilities.
2. The surrogate and the intended parents must have separate legal representation, paid for by the intended parent(s) either directly or indirectly through a program fee. The parties would be required to have counsel in at least the sending country. (The intended parent(s) would also be prudent in retaining counsel in the receiving country, but the treaty would not require it.)

3. The surrogate and the intended parents must have translation, interpretation and other support that is adequate to ensure meaningful understanding of the agreement and the medical and legal processes. If a party is not literate, the agreement must be read aloud to her or him, as well as translated into her or his native or preferred language.
4. Prior to the commencement of any ART procedures, all parties must be counseled by a mental health and a medical professional to discuss the process and the risks and benefits of the proposed procedures.[2]
5. The intended parent(s) must undergo criminal and child abuse background checks in their country of habitual residence, in addition to the psychological and medical counseling discussed above.
6. Any compensation or reimbursement to the surrogate must be set forth in the agreement, must be paid in accordance with the agreement, and must be tied to the surrogate's time, effort and risk and not to the outcome of the pregnancy.
7. Once an agreement is entered into and the parentage predetermination is issued (see below), the intended parents must be recognized as the child's legal parents upon the child's birth and must be responsible for the child in all circumstances, including but not limited to whether a child has any physiological abnormalities or there is an error by the clinic providing medical services (for example, the wrong gamete is used during *in vitro* fertilization or the wrong embryo is transferred into the surrogate's uterus).
8. The agreement must not require or contain provisions that unduly coerce the surrogate to terminate or reduce a pregnancy.
9. The surrogate must be at least 21 and must have previously given birth to a child.
10. The number of embryos transferred into the surrogate's uterus must be a number consistent with the legal and medical ethics and best practices in force in the Member State where the ART procedures take place. This number must be agreed upon in advance by the parties and set forth in the agreement.

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Potential Exploitation of Women as Surrogates

A number of the minimum substantive safeguards listed above would restrict the potential for exploitation of surrogates in international surrogacies. As this industry has grown, countries in which many women live in extreme poverty have become the destinations of choice for these arrangements. The central premise of these safeguards is that protection is needed, but if the safeguards are in place and a woman is fully and meaningfully informed of the risks and benefits, then her decision to help build a family should be celebrated, not feared. The safeguards listed above help to ensure that the surrogates understand the process, that they are not being coerced or defrauded, and that their lives and health are not put in jeopardy.

[2] This counseling requirement is not intended as screening for intended parents, but counseling to educate the parties about the process of gestational surrogacy.

To that end, AAARTA's proposal would require that there be medical and mental health consultation, as well as legal representation and meaningful translation. Additionally, surrogates would be assured that they will not be responsible for any child born of these arrangements regardless of the outcome of the arrangement or any laboratory error.

Each Member State would also identify its parameters for surrogate compensation based on the guidelines set forth above in the compensation safeguard, but in no event could compensation be tied to the outcome of the pregnancy. Compliance with the treaty would also require that the surrogate actually be paid what is due to her under the agreement.

Potential for Child Trafficking

As illustrated by a recent scandal in the United States, ART carries the potential for creating a "baby market" in which donor eggs are fertilized with donor sperm and implanted in a gestational surrogate with no identified intended parent(s).[3] The safeguards listed above would require every surrogacy arrangement to involve identified intended parent(s) and a contract prior to conception, and would prohibit any sort of arrangement in which the surrogate would be implanted without identified and initiating intended parent(s).

Each Member State would identify its parameters for compensation, but in no event would compensation to a surrogate be tied to the outcome of the pregnancy.

Procreative Autonomy for Intended Parents

For individuals and couples for whom personal procreation is not an option for their family building, surrogacy presents an opportunity to build a family. As recognized in the March 2012 Preliminary Report by the Hague Conference, intended parents are often "desperate in their search for a way to have a child,"[4] and in their desperation to achieve their goal, they can be easily exploited. The compensation safeguard would protect not just the surrogate, but also the intended parent(s).

AAARTA's proposal seeks to find the right balance between respecting the procreative autonomy of the intended parents and protecting the women and children involved in the process. With this balance in mind, requiring psychological and medical counseling and criminal and child abuse background checks, versus a home study or something similar, respects a fundamental distinction between adoption and surrogacy. In adoption, a government entity is sanctioning the placement of an already existing child in a new parental home; in surrogacy, the intended parents are initiating the conception of their own child and a government entity is not being asked to sanction the arrangement, but rather to help protect the integrity of the process and to ensure the security of the resulting child. Therefore, AAARTA's position is that intended parent(s) should not be

[3] *See* http://www.huffingtonpost.com/fred-silberberg/theresa-erickson-surrogacy-scandal_b_1310732.html.
[4] The Hague Conference's March 2012 report, entitled "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements," Prel. Doc. No. 10, at p. 27.

required to undergo a screening process beyond that described herein, and should not be required to complete a home study for their child.

Security for the Children Born of These Arrangements

Protecting and creating certainty for the children born of these arrangements should be the treaty's paramount goal. If Member States adopt the minimum substantive safeguards set forth above and follow the path outlined below, children born subject to the treaty would be assured citizenship and parentage, and recognition of both in all Member States.

Cooperation that Respects the Autonomy of the Member States

As is reflected in the March 2012 Hague Preliminary Report, it is critical to respect the autonomy of the Member States and recognize that each State will bring its cultural sensitivities and belief systems to ART practice. For this reason, AAARTA has chosen not to propose a treaty-based intended parentage doctrine mandate. While AAARTA strongly believes that an intent-based doctrine is best suited to handle ART matters, AAARTA proposes deference to each country's doctrine, so long as that doctrine is clear, allows for timely administration of pre- and post-birth matters, and incorporates the minimum safeguards agreed upon by the Member States.[5]

In addition, as has been true with other treaties, there are a number of States that will choose not to ratify the treaty, even with this more flexible and deferential approach. The hope would be, as with the Hague Convention on Intercountry Adoption, that over time the non-original signatories would recognize the treaty's value, or at least the value of some of its concepts, and acknowledge that it provides a workable framework within which they can support these arrangements.

C. Prong #2: Proposed 10-Step Treaty Process

To address the concerns described above and implement the safeguards listed above, AAARTA proposes the following treaty process. What follows is an overview of the 10 steps, and then detailed explanations of each step.

Overview of Process

- The parties undergo counseling and enter into an agreement outlining each party's rights, responsibilities, and risks ("Surrogacy Agreement").
- The Central Authority of the surrogate's country of habitual residence (also referred to as "the sending country") issues a predetermination of the child's parentage, based on the content of the Surrogacy Agreement..

[5] AAARTA wholeheartedly believes in an intent based approach to parentage as it is the only consistent way to recognize parentage resulting from ART; AAARTA supports any proposal to incorporate that concept into the treaty.

- The Central Authority of the intended parent(s) country of citizenship (also referred to as "the receiving country") issues a predetermination of the child's citizenship, based on the Surrogacy Agreement and the predetermination of parentage by the sending country.
- The ART procedures commence, according to the provisions of the Surrogacy Agreement, resulting in conception and pregnancy.
- The intended parent(s) travel(s) to the surrogate's country of habitual residence on a specific "Hague surrogacy" entry visa, to be present at any time throughout the arrangement including at the child's birth.
- The child is born in the sending country.
- The Central Authority of the surrogate's country of habitual residence issues a final determination of the child's parentage, based on the actual facts of conception and the Surrogacy Agreement.
- The appropriate vital records office in the surrogate's country of habitual residence issues a birth certificate for the child that is based on the final determination of parentage.
- The Central Authority of the intended parent(s)' country of citizenship issues a final determination of the child's citizenship, based on the final determination of parentage by the sending country.
- No Member State will require an exit visa for the child or the intended parent(s) after the steps above have been completed.
- The intended parent(s) travel(s) home with the child.
- Another parentage/citizenship process is not required of the intended parent(s) upon the family's return home.

Step 1: Surrogacy Agreement

Member States would agree to enforce Surrogacy Agreements that are entered into prior to any medical procedures and that conform to the treaty's minimum substantive safeguards. As is explained above, the treaty would require that all parties to the Surrogacy Agreement be represented by independent counsel.

The treaty process for international surrogacy should not include an accreditation or other licensing requirement for surrogacy service providers, as is required for adoption agencies under the Hague Convention on Intercountry Adoption. The substantive safeguards and process described below would adequately address the common areas of concern in international surrogacy, without the need for the additional layer of regulation. AAARTA is very concerned about the accreditation requirement for adoption agencies and how its implementation in the United States has affected intercountry adoption. The prohibitive cost and burdensome process of accreditation has caused many smaller, but competent and well-intentioned adoption agencies and persons, to go out of business. This has left prospective adoptive parents with fewer choices and higher agency costs. This, in turn, has reduced the number of prospective adoptive parents. AAARTA seeks to avoid the same thing happening in international surrogacy, especially because reproductive autonomy is at stake.

A new treaty should establish its safeguards through its parentage and citizenship process, and through its minimum substantive safeguards, not through a second parallel structure of regulation. If the process is structured properly, accreditation is unnecessary. The treaty should not include any unnecessary roadblocks to the ability to build a family.

Step 2: Predetermination of the Child's Parentage

The Central Authority of the surrogate's country of habitual residence would issue the predetermination of parentage. This rule would prevent forum shopping and relocating the surrogate to avoid a country's laws. Unlike other Hague treaties, the concept of "habitual residence" for purposes of this treaty should be defined in a basic way: as historical domicile. Citizenship and physical presence of the surrogate at the time of the child's birth would not control. It is important for the treaty to provide this basic definitional principle for habitual residency, so that the concept is uniformly defined by the Member States. Habitual residency was not defined at all by the Hague Convention on Intercountry Adoption, leaving the definition completely to the Member States. Inconsistent implementation of the definition has become problematic for some Member States, especially for sending countries in adoptions with the United States as the receiving country. For this treaty on international surrogacy, habitual residency would be the key jurisdictional concept; it should have a basic definition agreed upon by the Member States.

The Central Authority of the surrogate's country of habitual residence would make its predetermination of parentage by examining the contents of the Surrogacy Agreement, the intent of the parties as memorialized therein, and whether the arrangement meets the minimum substantive safeguards of the treaty.

Each Member State would agree to establish a clear doctrine and an expeditious process for determining the parentage of children born through international surrogacy in its territory. The treaty could even require determinations within a certain period of time. The treaty would not, however, mandate a particular doctrine for determining parentage, *e.g.*, the intended parentage doctrine or a pure best interests of the child standard, but rather each Member State would agree to establish its own doctrine, to set it forth clearly in its internal laws, and to create a defined and expeditious process for determining parentage. Each Member State would agree to build into its parentage doctrine and process the minimum substantive safeguards set forth in the treaty. The predetermination of parentage (and later, the final determination of parentage) would therefore establish parentage based on compliance with the treaty and its substantive safeguards. In these ways, this predetermination of parentage by the sending country would be similar to the Article 16 letter issued under the Hague Convention on Intercountry Adoption.

Having Central Authorities make the predetermination of parentage (and later, the final determination of parentage) would ensure uniform and expeditious application of parentage law and procedure in each Member State. Local courts in the surrogate's country of habitual residence, which may be unfamiliar with surrogacy, much less the treaty, or judges hostile to assisted reproductive technology, would not have the

opportunity unnecessarily to slow or complicate the parentage and citizenship process. A more centralized and formal structure would also serve to protect intended parents from corruption. The Central Authorities would handle the determinations, and they would be familiar not only with the internal laws and processes for parentage, but also with the treaty and its minimum substantive safeguards.

This predetermination of parentage would be the basis for the final determination of parentage and binding on the Member State, so long as the facts of the child's conception are consistent with what was submitted to the Central Authority during this step (except in the case of laboratory error that would not affect the child's right to parentage).

Step 3: Predetermination of the Child's Citizenship

This predetermination would be made by the Central Authority of the intended parent(s)' country of citizenship. This step in the process should not be controlled by the habitual residence of the intended parent(s). The goal in most international surrogacies is for the child to have the same citizenship as the intended parent(s). In fact, that is usually how the child has access to any citizenship at all.

The Central Authority of the intended parent(s)' citizenship would make its predetermination of the child's citizenship by reviewing the Surrogacy Agreement and the predetermination of parentage.

The Member States would agree to confer citizenship at birth on children determined to be the legal children of their citizens in the above-described process. This citizenship for the child would be by acquisition at birth, versus derivation or naturalization later. The treaty should specifically provide that a genetic connection between intended parent and child should not be required by a Member State for the child to acquire the citizenship of the intended parent(s). As with parentage, this predetermination should also be made expeditiously.

This predetermination would also be binding on the declarant Member State, so long as the circumstances of the child's birth adhere to what was submitted to the Central Authority during this step (except in the case of laboratory error which would not affect the child's right to citizenship). The predetermination of citizenship by the receiving country would be similar to the Article 5 letter issued under the Hague Convention on Intercountry Adoption.

Step 4: ART Procedures Commence Resulting in Conception and Pregnancy

The parties to and participants in the surrogacy arrangement would be cautioned not to proceed with any medical procedures until the above-described predeterminations are made to their satisfaction. If the intended parent(s) are not satisfied with the sending country's view on the parentage of their proposed child, they would know that in advance and be able to choose not to proceed in that country. The same would be true for the

citizenship predetermination. The critical component here is that the parties could identify any legal problems in advance of the child's conception.

Step 5: Intended Parent(s) Travel to the Surrogate's Country of Habitual Residence

The Member States would each agree to create a specific temporary entry visa under the treaty for intended parent(s) to travel back and forth freely between the two countries. The visa would be valid from the beginning of the process in which a clinic is selected and there has been a match with the surrogate, until approximately three weeks after the child's parentage determination, birth certificate, and passport are issued. The visa would be similar to a visitor or medical visa.

The entry visa process would provide a convenient point of access for the country of the surrogate's habitual residence to ensure that the potential intended parent(s) do not have a criminal or child abuse background. Most countries' immigration systems already have such requirements in their visitor visa programs.

As discussed above, this step would not include a home study and therefore would not resemble the Article 15 letter process under the Hague Convention on Intercountry Adoption. AAARTA takes the position that intended parents have the right to procreate. So long as the minimum substantive safeguards set forth above are met, the treaty should not include an extensive screening requirement for intended parents. This is where the difference between family building through ART versus adoption demand a difference in treaty procedure and content. Again, AAARTA strongly believes that intended parent(s) should not be screened by a government entity beyond normal entry requirements and criminal and child abuse background checks. Medical clinics and surrogacy programs may impose additional screening requirements, but the treaty and the laws of the Member States should not.

Step 6: Final Determination of the Child's Parentage

The final determination of parentage by the Central Authority of the surrogate's country of habitual residence, (which at this point in the process should also be the child's country of birth), would be made pre-birth or shortly after the child's birth depending on internal law of the specific member state. Like the predetermination, the final determination would address not only legal parentage, but also whether or not the surrogacy arrangement complied with the treaty's safeguards. Absent a change in facts, a final determination should be the same as the predetermination.

Member States would agree that final determinations of parentage would be conclusive proof of legal parentage and treaty compliance and entitled to full comity in all Member States (and full recognition within each Member State).

In these ways, the final determination of parentage by the sending country would be similar to the Article 23 certificate under the Hague Convention on Intercountry Adoption.

Step 7: Issuance of the Child's Post-Parentage Determination Birth Certificate

The Member States would agree to implement an internal process to require the appropriate vital record office(s) in their countries to issue birth certificates for children born in their territories under this treaty, in conformity with the parentage determinations and on an expedited basis.

Member States would agree that, like the parentage determinations, birth certificates issued in this way would be conclusive proof of legal parentage and treaty compliance and entitled to full comity in all Member States (and full recognition within each Member State).

Step 8: Final Determination of the Child's Citizenship

The final determination of citizenship by the Central Authority of the intended parent(s)' country of citizenship should be the same as the predetermination, so long as the facts have remained the same. As with all determinations in this process, the final determination of citizenship should be made swiftly most likely by the embassy or consulate in the country of the surrogate's habitual residence/the child's country of birth.

After the determination is made, the country of citizenship would issue the child's passport and Consular Report of Birth Abroad (or whatever comparable vital record a Member State uses).

Step 9: Intended Parent(s) Travel Home with Their Child

The treaty should include a prohibition on a Member State against requiring an exit visa for the child or the intended parent(s). Exit visas could be misused to prevent a family from travelling home. Therefore, the Member States should agree that all the family would need to leave the sending country is the child's Hague-compliant parentage determination, the Hague-sanctioned birth certificate, and the child's passport.

Step 10: Another Process Should Not Be Required of the Intended Parent(s) at Home

The receiving country should not require any additional parentage or citizenship procedures when the intended parent(s) and the child return home.. A primary goal of the treaty would be to ensure recognition of the determinations already made, not just by federal authorities, but also by local municipalities, agencies, and courts in each Member State.

D. Conclusion

AAARTA wholeheartedly supports a treaty that protects the rights of all the parties in the surrogacy process, while respecting the fundamental differences between surrogacy and adoption. AAARTA believes it is critical that a process like that set forth herein is designed to identify any legal issues in a surrogacy arrangement prior to the child's conception. The regulation created by a new treaty would establish protections through its minimum substantive safeguards, parentage, and citizenship process.

With these processes and procedures in place, the treaty would give sending and receiving countries confidence that their citizens are protected and that the resulting children and families are secure. AAARTA offers its continued support, expertise, and insight to the Hague Conference on this issue. Further, AAARTA offers ongoing collaboration as the Hague Conference continues its deliberations on the desirability, feasibility, and framework for cooperation of any treaty on international surrogacy.

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