

Legal and ethical issues in cross-border gestational surrogacy

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This article aims to identify the main legal and ethical issues around international surrogacy. Owing to the legal diversity and ethical background of such a globalized practice, a review of the key existing literature on these two matters has been identified and analyzed. The article also identifies and analyzes the most significant legal solutions provided by supranational jurisdictions when dealing with cases of international surrogacy. The scope of the article includes the efforts to reach a minimum legal framework at the international level, with the aim not to standardize but to provide common legal solutions to those travelling abroad to have a child by means of surrogacy. (Fertil Steril® 2020;113:916–9. ©2020 by American Society for Reproductive Medicine.)

Key Words: international surrogacy, ethics, law, cross-border gestational surrogacy

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This article aims to identify the main legal and ethical issues around international surrogacy. The intended parents may face legal problems before returning to their countries of origin or when trying to have their children legally recognized in their countries. The greatest legal obstacles are the recognition of these children's nationality and filiation. Due to the legal diversity and ethical background of a globalized practice, a review of the key existing literature on these two matters has been identified and analyzed here. The scope of the article includes the legal solutions available at the national level, based on the prevailing interest of the children, and the legal responses by some supranational jurisdictions when dealing with international surrogacy cases. It also includes the efforts to reach a minimum legal framework at the international level with the aim not to standardize but to provide com-

mon legal solutions to those people traveling abroad to have a child through surrogacy.

THE STATE OF THE ART ON INTERNATIONAL SURROGACY

Surrogacy is subject to diverse legal treatments around the world. Since the broader application of assisted reproductive technologies in the 1980s and 1990s, surrogacy has emerged as a way for individuals or couples to have a child with the use of their own gametes or those provided by a donor (1). The increasingly limited opportunities for international adoption has also contributed to the generalization of international surrogacy (2). In parallel with this increased use of surrogacy, different countries around the world decided to allow surrogacy only in certain cases: Some countries, such as the United Kingdom (Surrogacy Arrangements Act, 1985), Canada (Assis-

ted Human Reproduction Act, S.C. 2004), Greece (Act 3089/2002 on Medically Assisted Human Reproduction¹), Portugal (Act 25/2016, August 22, which regulates access to surrogate motherhood, introducing the 3rd modification of Act 32/2006), Israel (Embryo Carrying Agreement Act, 1996), Thailand (Protection of Children Born Through Assisted Reproduction Technologies Act, B.E. 2558, 2014), and South Africa (South Africa Children's Act of 2005) accept only the altruistic model; other countries (e.g., some states in the United States, some states in Mexico, Ukraine) permit both commercial and altruistic models; and other countries have decided to expressly forbid it (e.g., Germany and Spain [Act 14/2006, May 26, on human assisted reproduction techniques]) or even consider it a crime (e.g., France [Article 227–13 French Penal Code] and the Australian states of New South Wales [Surrogacy Act, 2010], Queensland [Surrogacy Act, 2010], and the Australian Capital Territory [Parentage Act, 2004] when commercial surrogacy takes place with extraterritorial effect in those states) (3, 4).

Countries that allow surrogacy might consider it an assisted reproductive technique (e.g., Portugal) or they might recognize surrogacy as a new form of filiation, unlike natural

Received February 17, 2020; accepted March 3, 2020.

N.I.G. has nothing to disclose.

Supported by the project GESSUS Surrogacy, financed by the Spanish Ministry of Economy and Competitiveness National Programme for Research, Development, and Innovation Orientated to Social Challenges (DER2015-74308-JIN; 2016–2019).

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Fertility and Sterility® Vol. 113, No. 5, May 2020 0015-0282/\$36.00

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<https://doi.org/10.1016/j.fertnstert.2020.03.003>

filiation or adoption (this is the case in Greece by virtue of article 179 of the Greek Civil Code). In countries where surrogacy is allowed, there might be a specific piece of legislation regulating it (e.g., the British Surrogacy Arrangements Act, 1985) or surrogacy is permitted without any particular law by applying the principle whereby “whatever is not prohibited is allowed” (e.g., Belgium and the Netherlands). When surrogacy is legal (whether altruistic or commercial) it can be limited to nationals or legal residents (e.g., in the United Kingdom, Israel, Portugal, India, and Thailand [Protection of Children Born from Assisted Reproductive Technologies Act, 2015]) or open to anyone (e.g., in those US states where surrogacy is permitted, Canada, Ukraine, Greece) (5, 6).

Despite this legal diversity, we live in a globalized world. Citizens from a country where surrogacy is not allowed can easily travel to another country where it is legal and obtain access to this practice to have their own child (4, 7). Nevertheless, even if surrogacy is legal in their country of origin, other citizens may travel abroad for different reasons: to have access to surrogacy with more advanced and innovative fertility care, lower costs, the possibility of using genetic engineering with the use of specific genetic material (1), seeking legislation where contracts can be enforced, donor gametes being more easily found or anonymous (8). This cross-border gestational surrogacy may cause some legal issues when those citizens return to their home country with children who have been “illegally” or “fraudulently” conceived. Surrogacy also poses important ethical issues that render the solution of these legal problems more difficult when international surrogacy takes place. This constitutes an important obstacle to achieving a common approach and a minimum international legal framework.

MAJOR LEGAL PROBLEMS ARISING FROM INTERNATIONAL SURROGACY

The diverse legal approaches to surrogacy facilitate cross-border gestational surrogacy. In other words, citizens living in a country where surrogacy is not permitted can travel to a country where surrogacy is legal to have their own child by means of this process. Apart from the differences between countries of origin where surrogacy is not permitted or not regulated, we may find different forms of granting parenthood and nationality in the country where surrogacy occurs. Some countries (e.g., the United Kingdom) apply the birth test in cases of surrogacy, i.e., the woman who gives birth is considered to be the child’s legal mother. Other countries apply the genetic test, whereby the child’s parents are determined on the basis of genetics—this has been the case in some controversial cases, such as *Johnson v. Calvert*, No. X633190, California Superior Court, 1990. Others apply the intention test, where legal parenthood is recognized with the intended parents, e.g., in Greece (2).

The legal problems usually begin when the individual or couple returns to their country with the surrogate-conceived child and try to be recognized as the child’s parent(s). Issues can also start before travelling back to their country. For instance, a passport needs to be obtained for the infant, and their own embassy may not issue the needed

documents because they may have evidence that the child was born from an arguably legal fraud. In other situations, the child can be a national of the country of birth (*ius soli*; e.g., in the United States, the 14th Amendment ensures automatic citizenship upon birth in the United States) or their nationality depends on their parents’ nationality (*ius sanguinis*; e.g., in Spain, the first point in article 17 of the Civil Code establishes that a child is Spanish if at least one of its parents is a Spanish national). In both cases, the passport can be denied because the child has not acquired a nationality yet or, because the parenthood is not recognized, the child cannot acquire its parents’ nationality (4, 8).

Further problems might arise when the child arrives in the country of origin of parents who might want the child to be legally recognized and registered as their own child. Depending on the national legislation, the child may need to be legally recognized as a person along with its filiation; in some cases, this may happen when the child needs to be enrolled at school, given vaccines, or covered by the national public health system. The national authorities of the parents’ country of origin may interpose a wide range of legal problems to recognize that child as the couple’s, although sooner or later, the superior interest of the child prevails and public authorities or national judges will concede the nationality and filiation of that child as long as the surrogacy arrangements were in accordance with the law of the jurisdiction in which it took place (4, 9).

Sometimes same-sex couples or single persons try international surrogacy as the ultimate option to create their own family, not because their own national legislation prohibits it but because same-sex couples and single persons might find it impossible to internationally adopt a child and there are low numbers of national children to be adopted (10, 11). Problems may arise when the intended parents are a same-sex couple or a single parent. Surrogacy may seem to be the only way to have their own child, but their national legal frameworks may not allow a same-sex couple or a single parent to have children. On returning home, they may encounter particular legal difficulties in being recognized as parents.

Issues may arise when the intended parents travel to another country to have a child by means of surrogacy arrangements despite surrogacy being legal in their country of origin. This may be the case for couples or single persons who do not fulfil the legal requirements stipulated by their national legislation (e.g., securing a genetic link with at least one of the intended parents [as required by British legislation], being a couple, being a heterosexual couple [as required by Portugal and Greece], etc.). When returning home, these parents will face the same legal problems when trying to be recognized as the legal parents of the child (11, 12).

Finally, problems may occur when international surrogacy has taken place in a country with no specific legislation on the matter. Consequently, if any issues arise, such as complications during pregnancy, lack of agreement between the intended parents and the surrogate, refusal by the surrogate to hand over the baby after its birth, divorce or separation of the intended parents during the process, or the intended parents’ change of heart once the pregnancy has started, there might be no legal provisions to cover these eventualities.

Although a judge can always provide a legal solution to these potentially problematic situations by applying the existing national norms on filiation and contracts, they cause significant levels of legal uncertainty and contribute to a negativity surrounding surrogacy (2).

KEY ETHICAL ISSUES ABOUT INTERNATIONAL SURROGACY

As well as the aforementioned legal problems, some key ethical issues exist around surrogacy and particularly international surrogacy. These ethical issues can be grouped as exploitation and child trafficking.

Regarding presumed exploitation, surrogacy is seen by some as an attack on human dignity, because the surrogate is used as an instrument and not as an end in herself (13). Moreover, it could be argued that only poor or vulnerable women would accept such an arrangement, making international surrogacy another form of exploitation of women. In Western countries where surrogacy has been accepted and regulated, there is no evidence that surrogates are exploited (14–17). In addition, the surrogate freely accepts the surrogacy arrangement and expresses her free will. Doubts regarding the surrogate's free consent to enter a surrogacy agreement and relinquish the baby to the intended parents after the birth reinforce gender stereotypes about women's changeable decisions and women's biological destiny (6, 18, 19).

Child trafficking presents the fear that surrogacy may endanger the children's well-being in the sense that they are portrayed as an object of a sale because economic transactions are involved. Nevertheless, different studies show that children conceived through surrogacy are emotionally similar or even better-adjusted than children who were conceived traditionally (20–23).

International surrogacy postures itself as a negative form of cross-border reproductive care, so-called reproductive tourism, reproductive exile, or procreative tourism (2, 7, 24–27). This form of cross-border reproductive care appears as a threat because there is no way of monitoring the medical procedures, professional practices, ethical standards, the free consent of the surrogate, or the independent counselling involved in the international surrogacy arrangement (9). Similarly, some have portrayed cross-reproductive care as an example of moral pluralism that allows the peaceful coexistence of different and even opposite ethical points of view (28).

These ethical doubts, however, are not manifested when people travel to other countries to have access to other types of health care. In fact, these cross-border health movements are a significant source of financial income and, in some cases, medical prestige for the receiving countries. With that said, the existence of profit or any type of intermediaries automatically makes international surrogacy arrangements ethically debatable. Interestingly, this does not happen in other forms of assisted reproductive techniques, e.g., egg or sperm donations, where private reproductive clinics, gamete banks, and intermediating agencies legally obtain an impor-

tant financial profit from reproductive materials obtained through donation (6).

Some have argued that surrogacy is an example of “first-world” countries taking advantage of “third-world” countries. Women from poorer countries are being used to satisfy the desires of Western couples, as questioned in India and Thailand (29–31). In fact, those countries have passed laws to limit surrogacy to their nationals or to use only the altruistic model: Thailand limited access to nationals in its Protection of Children Born from Assisted Reproductive Technologies Act, 2015, and India limited access to nationals and only altruistic surrogacy in its Surrogacy (Regulation) Bill, 2019.

In summary, these ethical quandaries explain in part why it is so difficult in some countries to reach a minimum consensus to legislate on the matter, to provide a legal solution to what already constitutes a social demand and reality. They also explain to some extent, countries' reluctance to admit and legislate on surrogacy, even if their nationals continue to travel abroad to have a child by means of surrogacy.

INTERNATIONAL EFFORTS TO SOLVE THE LEGAL AND ETHICAL PROBLEMS

Countries can legislate assisted human reproductive techniques, matters dealing with filiation, and children's rights. However, these national competences are challenged by transnational practices such as surrogacy. International surrogacy constitutes part of cross-border reproductive care, which is generally portrayed negatively as reproductive tourism (26, 32).

Some supranational entities have had to deal with some of the legal problems arising from international surrogacy, even though they have not provided a standardized or unique response to them. For example, the European Court of Human Rights (ECHR), under the Council of Europe, has repeatedly ruled in cases of international surrogacy. In those cases, as in other dealings with assisted reproductive techniques, the ECHR has developed the concept of national margin of appreciation to balance the freedom of movement of people and national moral options (33, 34). Eventually, the ECHR ruled in favor of the legal recognition of the nationality and filiation of the child conceived through international surrogacy according to the intended parents, on the grounds of the child's right to respect for private and family life (4, 19, 33).

Nevertheless, there is a lack of international regulation of surrogacy, because the existing legal instruments do not contain any provisions that could be applied to the potential legal problems of international surrogacy (2). A good model could be the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the “Adoption Convention”). This Convention establishes a minimum standard of procedure and guarantee among participating countries while respecting the different national legal approaches to international adoption (2). Some authors, however, highlight the difference between surrogacy as a means of procreation and adoption, which is essentially a transfer of legal parents' rights (1).

In 2011, the Permanent Bureau of the Hague Conference on Private International Law issued a Preliminary Report on International Surrogacy Arrangements. Negotiations are still in process to adopt a Hague Convention to regulate international surrogacy, but it seems unlikely that a minimum consensus will be reached in the near future.

CONCLUSION

International surrogacy represents an important legal and ethical challenge in a globalized world. National legislations are necessary where international surrogacy is omitted or ignored. International efforts to guarantee common procedures and basic fundamental children's rights must continue to advance in cases of international surrogacy.

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