

Baby Got Back? Enforcing Guardianship in International Surrogacy Agreements When Tragedy Strikes

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I. INTRODUCTION

R.H. and her husband M.H., Italian citizens, have tried for eight years to conceive a child—utilizing every avenue of fertility services available to them in Italy, to no avail. Her doctor advises R.H. that it is unlikely she will ever be able to carry a child of her own and that adoption is the only option in Italy for the couple to expand their family. Not ready to give up yet, R.H. contacts a surrogacy agency located in the United States.¹ After timely consultations, the couple is matched with surrogate mother C.E., who lives in Chicago. R.H. and M.H. fly to Chicago several times to complete a cycle of In Vitro Fertilization (“IVF”), creating several viable embryos.² To the couples’ long-awaited success, surrogate mother C.E. becomes pregnant after the embryo transfer.³ Nine months go by swiftly and R.H.

1. Present-day surrogacy is an agreement by which a woman agrees to carry and deliver a child for another individual or couple. See Steven H. Snyder, *What Every Estate Planning Attorney NEEDS to Know About Assisted Reproduction: Avoiding Malpractice by Learning About Reproduction*, AM. B. ASS’N (on file with author) [hereinafter Snyder, *Avoiding Malpractice by Learning About Reproduction*]. Surrogacy agencies are a popular and preferred route for those who wish to pursue surrogacy. Essentially, they are a one-stop shop and manage the entire surrogacy case, coordinating between fertility clinics, surrogacy attorneys, matching a surrogate with an intended parent, travel planning, etc. See *About Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-professionals/surrogacy-agencies/> (last visited Jan. 29, 2019).

2. Intended parents must go through IVF to create the embryos needed for surrogacy. IVF is the fertilization of a retrieved egg by sperm, outside of the womb, in a petri dish, to create an embryo that can then be transferred to the potential birth mother’s reproductive organs or stored by cryopreservation for future use. Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 24.

3. Since the couple is using their own genetic material, C.E. is a gestational surrogate, meaning she has no genetic connection to the fetus but is carrying the fetus on behalf of R.H. and M.H., the intended parents. *Id.* at 23. The other form of surrogacy is traditional surrogacy, whereby a surrogate conceives and carries a child

and M.H. board a flight to Chicago for the birth of their son, S. Unfortunately, their plane crashes, leaving no survivors. The couple indicated in their International Surrogacy Agreement (“ISA”)⁴ with surrogate mother C.E. that R.H.’s sister in Italy would be the appointed guardian should something happen to them. However, that agreement was drafted and completed in the United States. Italy does not recognize such contracts and, in fact, forbids them.⁵ What happens to stateless baby S?⁶

International parents, like R.H. and M.H., come to the United States from foreign destinations where surrogacy is illegal or against public policy in their country of origin; they contract with surrogates in the United States to carry out their pregnancies, fulfilling their dreams of parentage to have a child of their own.⁷ The surrogacy agreement, however, is often the easiest part in this situation—international intended parent(s) (“international intended parents”)⁸ must circumvent their countries’ laws not only to carry out the surrogacy agreement but also to successfully establish legal parentage and

for another individual or couple that is genetically her own but uses the sperm of a man other than her husband or partner. *Id.* at 25. The “embryo transfer” is the process by which an embryo is placed inside the womb of the potential birth mother. *Id.* at 23.

4. An ISA is the surrogacy contract between the surrogate and the intended parents, who are citizens of different countries. Typically, the surrogacy contract outlines the entire surrogacy process, delineating each “party’s rights, roles and responsibilities before, during and after the pregnancy.” *Intended Parents: Understanding Surrogacy Contracts*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/> (last visited Jan. 29, 2019).

5. *See infra* Section III.C.

6. *See infra* Part VI.

7. *See* Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT’L L. REV. 527, 530–31 (2013).

8. An “intended parent” is defined as “an individual, married or unmarried, who manifests the intent . . . to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.” MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(a)(19) (AM. BAR ASS’N, Proposed Act 2008). In this context, an “international intended parent” essentially adopts the same meaning but is refined to those who are not American citizens. For reference, international intended parents includes the possibility of an intended parent as either an individual or a couple.

desired citizenship of the child in their country of origin once the child is born.⁹

Within this delicate situation comes the need for intended parents to address estate planning, specifically considering the possibility of a tragedy befalling them while their child is in utero with a surrogate in the United States.¹⁰ Currently, there is a disconnect in the estate planning realm,¹¹ even domestically between American intended parents and American surrogates; most patients rely on inadequate consent forms provided by fertility clinics.¹² The legal issues are more complex when considering cross-border surrogacy arrangements and international intended parents who face restrictive and conflicting laws regarding surrogacy.

With rapid medical advances in the Assisted Reproductive Technology (“ART”) field and progressive hesitancy in foreign countries toward surrogacy, complexities resulting from prevalent cross-border surrogacy arrangements are sure to only increase,¹³ which is this Note’s broad focus. Part II of this Note provides a brief introduction to international surrogacy: tracing the history of surrogacy’s prevalence beginning in the United States to its expansion across

9. Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL’Y 41, 54–55 (2015).

10. Estate planning in the surrogacy context is necessary because so much of the common law trusts and estates doctrines are premised on the biological connection or common law adoptions regarding testators and heirs. Advances in fertility medicine have tested the concepts of transfer of property and survivor’s rights within the estate planning realm. These considerations point back to the essence of this Note—incorporating and enforcing these important concerns in planning for the event of a tragedy occurring during an ISA.

11. The disconnect appears in practice; statutory law; and doctrinal, conceptual, and jurisdictional frameworks. This disconnect has the potential of creating high-stakes disputes, which is this Note’s very point.

12. These consent forms are also known as a “clinic directive.” Steven H. Snyder, Past Chair, Assisted Reprod. Tech. Comm. of the ABA Family Law Section, Address at the Academy of Adoption & Assisted Reproduction Attorneys (“AAARTA”) Mid-year Conference, Assisted Reproductive Technology: Challenges in Personal, Family and Estate Planning Issues (Sept. 18, 2017) [hereinafter Snyder, Challenges in Personal, Family and Estate Planning Issues].

13. Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 L. & INEQ. 277, 278 (2009). “As this practice spreads all over the globe, its consequential challenges and drawbacks are almost inevitable.” Margalit, *supra* note 9, at 48.

borders and how estate planning is significant in this area. Part III delves further into surrogacy in an international context, offering a comparative view of surrogacy laws in different countries and some resulting, notable but common examples of challenges international intended parents face to establish parentage and citizenship in their country of origin. Thereafter, Part IV circles back to the main issue of estate planning for guardianship purposes and analyzes possible protections and future outlooks on existing international conventions: the Washington Convention and the Hague Convention.¹⁴ Finally, Part V presents a proposed standard of international comity, and Part VI concludes. Taken together, this Note hopes to bring greater clarity to the doctrinal tensions one finds in the contemporary law of international surrogacy.

II. A PRIMER ON INTERNATIONAL SURROGACY

To appreciate the scope of the issues within an ISA, it is important to understand the concepts behind surrogacy and ART as well as its role abroad. Additionally, a fundamental understanding of the significance estate planning has within this field regarding the characterization of genetic material and best practice considerations with ART clients is also helpful in fully understanding the issue.

A. Surrogacy 101

Present-day surrogacy is an agreement by which a woman agrees to carry and deliver a child for another individual or couple.¹⁵ Two types of surrogacy exist: traditional surrogacy and gestational surrogacy.¹⁶ Traditional surrogacy occurs when a surrogate conceives and carries a child for another individual or couple that is genetically

14. See *infra* Part IV. There are several different Hague Conventions. This Note focuses on the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Adoption Convention”) and the possibility of a new Hague Convention regarding surrogacy.

15. Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 2–3.

16. Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 426 (2014); see also Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245, 247 (2012).

her own but uses the sperm of a man other than her husband or partner.¹⁷ In other words, the surrogate provides both the maternal genetic material of the child and the gestational support.¹⁸ Gestational surrogacy is when an embryo with no genetic connection to the surrogate is placed in her reproductive organs, and she carries any resulting child to term on behalf of the intended parents.¹⁹ Gestational surrogates only provide gestational support to the pregnancy; there is no biological link connecting the surrogate to the resulting child.²⁰ Surrogacy agreements require the surrogate to surrender custody and her parental rights to the child after it is born,²¹ and either form of surrogacy can be compensable or altruistic in nature.²²

While traditional surrogacy has been commonplace since biblical times, it wasn't until the mid-1980s that gestational surrogacy became an option for infertile individuals or couples to grow their family.²³ Within the United States, the *In re Baby M*²⁴ case sparked jurisdictions nationwide to pass laws that "prohibited surrogacy altogether, criminalized participation and/or imposed civil penalties in surrogacy arrangements, otherwise restricted its practice (usually to situations where the surrogate was not compensated), or made any

17. Ladomato, *supra* note 16.

18. *Id.*

19. *What Is Gestational Surrogacy?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-professionals/surrogacy-agencies/> (last visited Jan. 30, 2019).

20. Ladomato, *supra* note 16, at 247–48; Margalit, *supra* note 9, at 44–45.

21. Snyder, Challenges in Personal, Family and Estate Planning Issues, *supra* note 12.

22. Ladomato, *supra* note 16, at 246; *see also* Margalit, *supra* note 9, at 45.

23. Margaret E. Swain, *Surrogacy and Gestational Carrier Arrangements: Legal Aspects*, in *THIRD-PARTY REPRODUCTION: A COMPREHENSIVE GUIDE* 71, 71–77 (James M. Goldfarb ed., 2014).

24. 537 A.2d 1227 (1988). The traditional surrogate in *In re Baby M* had a change of heart during the pregnancy and refused to relinquish custody of the baby upon birth. The intended father sued for custody, and the New Jersey Supreme Court ruled that the surrogacy contract was unenforceable and void as against public policy. The Court, in applying the "best interest of the child" standard, granted the intended father and his wife custody and granted the surrogate visitation rights. *Id.* at 1264–65. *In re Baby M* still carries precedential value in New Jersey, even as applied to gestational surrogacy. *See* A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Ct. LEXIS 3250, at *5–8 (N.J. Super. Ct. Dec. 23, 2009).

surrogacy agreement unenforceable.”²⁵ Luckily, a majority of states have changed their views to permit surrogacy, but uniformity between the states is still lacking, and surrogacy must be analyzed on a state-by-state basis.²⁶ In fact, this current legal disorder also traversing international lines emphasizes the very reason for this Note—to bring clarity to international surrogacy laws.

B. Reproductive Tourism

Cross-border reproductive care has become a popular choice for many prospective intended parents seeking fertility treatment for a variety of reasons.²⁷ For instance, another country may have access to more advanced and innovative fertility care; the prospective parents’ home country may have legal, ethical, or religious restrictions regarding surrogacy; the cost may be lower in another country compared to the prospective intended parents’ home country; or the prospective intended parents may simply desire privacy²⁸ or seek genetic engineering by using a genetic material or ethnicity that a specific country offers.²⁹

Even though states regulate surrogacy differently,³⁰ the United States is a leading country for potential international intended parents seeking a surrogate.³¹ India and Ukraine are also popular nations within the surrogacy market.³² While the presumed motivation for cross-border surrogacy arrangements in countries such as India and

25. Swain, *supra* note 23, at 71.

26. *Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS, LLC, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Jan. 30, 2019).

27. Ikemoto, *supra* note 13, at 278.

28. *Cross-Border Reproductive Care*, AM. SOC’Y FOR REPROD. MED., <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/cross-border-reproductive-care/> (last visited Jan. 30, 2019).

29. Ikemoto, *supra* note 13, at 278.

30. *Gestational Surrogacy Law Across the United States*, *supra* note 26.

31. See Kindregan & White, *supra* note 7, at 532–37.

32. *Id.* This Note will strictly analyze international intended parents using a surrogate within the United States.

Ukraine is the overall lower cost,³³ the United States offers not only state-of-the-art fertility care but also quality legal advice to foreign prospective intended parents.³⁴ In addition, and because of the Fourteenth Amendment, the United States ensures that the resulting child will, at the least, automatically have American citizenship upon birth in the United States;³⁵ whereas other countries do not necessarily guarantee this privilege of automatic citizenship within their borders.³⁶

33. See Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT'L L. 1, 4–5 (2015) (discussing the high costs of surrogacy and reproductive health care in the United States, particularly for those patients without insurance coverage, as compared to India, which offers similar care at a fraction of the cost).

34. Kindregan & White, *supra* note 7, at 528 (discussing how good legal advice is available to children born within the United States and that the “American bar has developed competent legal services in the field of assisted reproducti[ve] technologies . . . which are often not available in other countries”).

35. *Id.*

36. Kari Volden, a Norwegian woman, employed an Indian surrogate but Norway refused the citizenship, claiming the Indian surrogate was the legal parent, and yet India refused citizenship to the child, due to a claim that Volden was the legal parent. This scenario highlights that:

Problems arise when the country of the intended parents and the country of the surrogate mother both refuse to grant the baby nationality

. . . .

Stateless people have no nationality and are not accepted as citizens by any country. Without citizenship, stateless children are deprived of basic rights most people take for granted and cannot access healthcare and education.

Emma Batha, *International Surrogacy Traps Babies in Stateless Limbo*, REUTERS (Sept. 18, 2014), <https://www.reuters.com/article/us-foundation-statelessness-surrogacy/international-surrogacy-traps-babies-in-stateless-limbo-idUSKBN0HD19T20140918>.

C. The Need for Proper Estate Planning

The legal world has not kept up to speed with the rapid medical advances in ART.³⁷ Proper estate planning has fallen by the wayside, even domestically; attorneys who specialize in ART are unfamiliar with how to properly address these issues with estate planning.³⁸ Additionally, attorneys who specialize in estate planning are generally unfamiliar with ART and the issues that arise in ART arrangements.³⁹

Typically, the only attempted estate planning completed by standard ART patients is a consent form provided by their fertility clinic, requiring the patients to direct the disposition of stored genetic material in the event of death or divorce and drafted to protect the clinic rather than the patients themselves.⁴⁰ As such, patients should seek the advice of an ART attorney for further consideration of potential issues.⁴¹ Fortunately, and at the least, most surrogacy arrangements recommend patients and surrogates retain counsel in drafting their surrogacy agreement.⁴² While this is a step in the right direction,

37. Snyder, Challenges in Personal, Family and Estate Planning Issues, *supra* note 12.

38. *Id.* ART issues that can be addressed by proper estate planning include inheritance rights of resulting posthumously conceived children; whether stored or frozen genetic material can be used for procreation after the client's death; who will have authority or control of the client's stored genetic material after the client's death; whether the client's estate should be kept open for any future resulting children born from stored genetic materials, and if so, how long; whether a client's estate should pay for fertility treatments and storage of their genetic material; and if fertility treatments fit within the "health, education, maintenance and support" standard of a trust and balancing that with interests of any possible competing beneficiaries.

39. Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 1.

40. Snyder, Challenges in Personal, Family and Estate Planning Issues, *supra* note 12.

41. Enforceability of fertility clinic consent forms remains unsettled. In a dispute, it is likely that the forms will control. *Id.*; see *Findley v. Lee*, No. FDI-13-780539, 2016 WL 270083, at *2 (Cal. Super. Ct. Jan. 11, 2016) (holding that the "[c]onsent [form that the parties] signed prior to their divorce controls, and the intent of the parties at the time—as evidenced by that document—must be given conclusive effect").

42. The American Society for Reproductive Medicine advocates that "it is extremely important that the attorney . . . being used has experience with [third-party

there are still estate planning considerations ART attorneys are not addressing.⁴³ The need for proper estate planning underlines the very basis of this Note. An understanding of some rudimentary ART principles highlights the need for awareness in this area of law within the context of estate planning.

1. Embryos as Property

Prior to a successful surrogacy, genetic material is collected, formed, and often frozen⁴⁴ in the form of zygotes, embryos, or gametes.⁴⁵ Thus far, United States case law has categorized genetic material as “property”⁴⁶ and “quasi-property” entitled to “special respect” but subject to disposition by the source of the genetic material.⁴⁷

reproduction] contract[s] and is licensed to do such.” AM. SOC’Y FOR REPROD. MED., AVOIDING CONFLICT IN THIRD-PARTY REPRODUCTION (2014), http://www.reproductivefacts.org/globalassets/rtf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Avoiding_conflict_in_third-party_reproduction.pdf.

43. Snyder, Challenges in Personal, Family and Estate Planning Issues, *supra* note 12.

44. The American Society for Reproductive Medicine defines cryopreservation as “freezing at a very low temperature, such as in liquid nitrogen (-196° C) to keep embryos, eggs, or sperm viable.” *Cryopreservation and Storage*, AM. SOC’Y FOR REPROD. MED., <http://www.reproductivefacts.org/topics/topics-index/cryopreservation-and-storage/> (last visited Jan. 31, 2019).

45. A “gamete” is defined as a haploid male or female cell, which when combined with another gamete of the opposite sex can become an embryo; gametes are more commonly known as an “egg,” “ovum,” or “sperm.” Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 24. A “zygote” is defined as the embryo’s early state of development or the first few days following the fertilization of the egg. *Id.* at 25. An “embryo” is defined as a diploid cell that has the potential of becoming a live human being or a fertilized egg either in the female uterus or stored for cryopreservation for future transfer to a uterus. *Id.* at 23.

46. *Hall v. Fertility Inst.*, 94-1135 (La. App. 4 Cir. 12/15/94); 647 So. 2d 1348, 1351 (holding that the decedent’s frozen sperm is “property” and that it could be gifted to his girlfriend before his death, stating “the frozen semen is . . . property, and she has full rights to its disposition”); *see also* *York v. Jones*, 717 F. Supp. 421, 426–27 (E.D. Va. 1989) (“The Court finds that the inference to be drawn from these provisions of the Cryopreservation Agreement is that the defendants fully recognize plaintiffs’ property rights in the pre-zygote . . .”).

47. In *Davis v. Davis*, the Tennessee Supreme Court stated:

Stored genetic material, such as sperm, may also be bequeathed to another for posthumous reproduction.⁴⁸ Regardless of what categorization applies between jurisdictions, courts have uniformly held that genetic material may be “subject, within certain limitations, to the ownership, control, and disposition of its contributors,” deeming ART an area of practice that should strive for more awareness in the estate planning realm.⁴⁹

2. Cross-Border Surrogacy: If Tragedy Strikes

Recall the hypothetical scenario of the couple R.H. and M.H. who died in a plane crash right before their son S was born by a surrogate.⁵⁰ One concern, which can be addressed by estate planning within domestic surrogacy agreements, is planning for a possible tragedy befalling the prospective intended parents while the child is in utero with the surrogate. Directing who will acquire legal authority over the resulting child if the prospective intended parents die prior to the child’s birth is a crucial concern that must be addressed. Successful transfer of legal authority is different from state to state; certain routes are authorized by each state’s respective statutes.⁵¹ For example, to transfer legal authority in Minnesota, a state that remains am-

We conclude that preembryos are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that [the parties] have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.

Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); *see also* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1263 (Ariz. Ct. App. 2005) (holding that a frozen embryo outside the womb is not a person).

48. *See generally* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) (holding that a decedent’s sperm was property for purposes of probate court and did not have to be destroyed after the decedent’s death). For the most part, stored sperm has been categorized as “property.” *Id.*

49. Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 21.

50. *See supra* Part I (discussing the hypothetical).

51. Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 21.

biguous regarding whether it recognizes gestational agreements,⁵² guardianship must be set forth and clearly stated in a statutorily-authorized document or valid will, whereas other states may not require this specificity.⁵³ Even though some states remain unsettled, surrogacy is generally accepted in the United States, with no ruling that it is illegal. Thus, a properly drafted estate plan addressing these issues would most likely be enforced, subject to each state's limitations.⁵⁴ Yet this may not be the case in cross-border surrogacy arrangements where international intended parents contract with a surrogate from another country, especially given the already existing challenges international intended parents face to establish *their own* parentage of the child, where in a significant number of cases, at least one parent has a biological link to the child.⁵⁵

III. THE LEGAL LANDSCAPE OF INTERNATIONAL SURROGACY

Foreign, prospective intended parents come to the United States because ART services or surrogacy may be restricted or illegal in their own country.⁵⁶ This section is not a comprehensive country survey, as that is outside this Note's scope; however, Table 1 below does offer a glimpse into different countries' approaches to surrogacy. This Note also discusses a few prominent but characteristic examples of challenges foreign intended parents face in establishing parentage and citizenship in their countries of origin. Furthermore, delineating the policy concerns behind these widespread surrogacy restrictions sheds light on the reasons these countries forbid it.

52. *Id.* at 21–22.

53. Snyder, Challenges in Personal, Family and Estate Planning Issues, *supra* note 12.

54. See Snyder, *Avoiding Malpractice by Learning About Reproduction*, *supra* note 1, at 5–10.

55. Margalit, *supra* note 9, at 54–55.

56. Kindregan & White, *supra* note 7, at 531.

TABLE 1. COMPARISON OF INTERNATIONAL APPROACHES TO SURROGACY	
COUNTRIES THAT ALLOW SURROGACY	Georgia, Greece, India, Iran, Israel, Nigeria, Portugal, Russia, Ukraine, and the United States
COUNTRIES THAT PROHIBIT COMMERCIAL SURROGACY	Australia, Belgium, Brazil, Canada, Hong Kong, Hungary, the Netherlands, New Zealand, South Africa, Thailand, and the United Kingdom
COUNTRIES WHERE SURROGACY IS UNREGULATED	Argentina, Columbia, Czech Republic, Guatemala, Ireland, Japan, Kenya, Laos, Mexico, Sweden, and Venezuela
COUNTRIES WHERE SURROGACY IS ILLEGAL	Finland, France, Germany, Iceland, Italy, Pakistan, People's Republic of China, Serbia, Spain, and Switzerland

A. A Comparative Look

Most countries, even those that liberally embrace surrogacy, lack clear guidance and are presented with their own unique challenges facing surrogacy and establishing parentage.⁵⁷ Countries approach surrogacy in numerous ways.⁵⁸ Some countries liberally embrace surrogacy, making the process legal, providing protections, and enforcing surrogacy contracts, while others only do so under certain re-

57. See Richard B. Vaughn, *Advising "Non-Traditional" Families Considering or Involved in Multi-Jurisdictional Surrogacy Arrangements*, AM. J. FAM. L. (2011), <https://www.iflg.net/wp-content/uploads/American-Journal-of-Family-Law-article.Draft-dated-2010-11.17.pdf> (discussing in depth the wide jurisdictional variety of restrictive and lenient approaches to establishing parentage within the United States). See generally INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter INTERNATIONAL SURROGACY ARRANGEMENTS] (discussing the ways in which international surrogacy arrangements are affected by different countries' laws).

58. INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 1.

strictions.⁵⁹ Other countries prohibit commercial surrogacy, while allowing or not specifically regulating altruistic surrogacy.⁶⁰ Some countries lack any regulation regarding surrogacy, resulting in some that frequently carry out surrogacy arrangements under the lack of regulation and some that do not.⁶¹ In other countries, surrogacy is strictly banned and illegal.⁶²

1. Countries that Embrace Surrogacy

Countries such as Georgia,⁶³ Iran,⁶⁴ Nigeria,⁶⁵ Portugal,⁶⁶ Russia, and Ukraine liberally embrace surrogacy, considering it legal and enforcing surrogacy agreements.⁶⁷ Two of the most popular countries for reproductive tourism are the United States and India.⁶⁸ While surrogacy in the United States varies by each state's jurisdiction, surrogacy-friendly states and medical advances in ART make the United States a popular option for foreign prospective intended parents.⁶⁹ In-

59. See *infra* Section III.A.1.

60. See *infra* Section III.A.2.

61. See *infra* Section III.A.3.

62. See *infra* Section III.A.4.

63. Ia Khurtsidze, *Legal Regulation of Surrogacy in Georgia*, EUR. SCI. J., Dec. 2016, at 165, 166 (discussing surrogacy law according to the Legislation of Georgia and Article 143 of the Law of Georgia, which permits surrogacy).

64. See Amir Samavati Pirouz & Nassrin Mehra, *Legal Issues of a Surrogacy Contract Based on Iranian Acts Continuation*, 5 J. FAM. & REPROD. HEALTH 41, 43 (2011) (explaining that in the "Iranian legal system a surrogacy contract can be accepted in the framework of article 10 of Iranian Civil Act 1928 which holds: 'Private contracts will be effective to those who conclude them if they are not in contrast with the law.'").

65. Olusesan Ayodeji Makinde et al., Commentary, *Baby Factories Taint Surrogacy in Nigeria*, 32 REPROD. BIOMED. ONLINE 6 (2016) (discussing "the proliferation of baby factories" and trafficking in the Nigerian ART market, and noting that the lack of regulation has led to unwanted ethical concerns).

66. See Vera Lúcia Raposo, *The New Portuguese Law on Surrogacy—The Story of How a Promising Law Does Not Really Regulate Surrogacy Arrangements*, 21 JBRA ASSISTED REPROD. 230, 231 (2017).

67. Olga Khazova, *Russia*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 311, 311.

68. Kindregan & White, *supra* note 7, at 533–37.

69. *Id.* at 533–36.

dia has no law prohibiting surrogacy.⁷⁰ Other countries permit surrogacy for the most part but under certain restrictions. For example, Greece forbids homosexual couples from using a surrogate and only allows the gestational form of surrogacy, while Israel limits surrogacy to only Israeli citizens and forbids any homosexual or single person to use a surrogate.⁷¹

2. Countries that Prohibit Commercial Surrogacy

Countries such as Australia, Belgium, Brazil,⁷² Canada,⁷³ the Netherlands, New Zealand, South Africa,⁷⁴ Thailand,⁷⁵ and the United Kingdom prohibit commercial surrogacy but permit altruistic surrogacy.⁷⁶ Altruistic surrogates conceive and carry the intended parent's child without compensation.⁷⁷ While altruistic surrogates are not

70. Usha Rengachary Smerdon, *India*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 187, 187.

71. Konstantinos A. Rokas, *Greece*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 143, 145. Israel permits male and female couples whether married or not to partake in surrogacy agreements. Sharon Shakargy, *Israel*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 231, 235.

72. Mary Keyes, *Australia*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 25, 25–26; Gerd Verschelden & Jinske Verhellen, *Belgium*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 49, 49–50; Nadia de Araujo, Daniela Vargas & Leticia de Campos Velho Martel, *Brazil*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 85, 85.

73. Assisted Human Reproduction Act, S.C. 2004, c 2 (Can.).

74. Ian Curry-Sumner & Machteld Vonk, *The Netherlands*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 273, 273; Claire Achmad, *New Zealand*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 295, 295; Melodie Slabbert & Christa Roodt, *South Africa*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 325, 325.

75. Sayuri Umeda, *Thailand: New Surrogacy Law*, LIB. OF CONG.: GLOBAL LEGAL MONITOR (Apr. 6, 2015), <http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/>.

76. Michael Wells-Greco, *United Kingdom*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 367, 377.

77. Ailis L. Burpee, Note, *Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305, 309 (2009). For example, "the surrogate mother can be reimbursed for medical expenses associated with the pregnancy, living expenses, and in some instances even telephone and internet expenses for the purpose of keeping in contact with the intended parents." *Id.*

compensated, they are typically allowed to be reimbursed for actual expenses.⁷⁸ Hong Kong⁷⁹ and Hungary⁸⁰ prohibit commercial surrogacy, but whether altruistic surrogacy is expressly permitted remains unclear.

3. Countries Where Surrogacy Is Unregulated

Countries such as Argentina,⁸¹ Columbia,⁸² Czech Republic, Guatemala, Ireland, Japan,⁸³ Kenya,⁸⁴ Laos,⁸⁵ Mexico,⁸⁶ Sweden,⁸⁷

78. *Id.*

79. Human Reproductive Technology Ordinance, (2000) Cap. 561, §§ 16–17 (H.K.).

80. Csongor István Nagy, *Hungary*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 175, 175–76.

81. Eleonora Lamm, *Argentina*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 5, 5.

82. José Antonio García Pereañez & Astrid Elena Lince Echavarría, *Surrogacy in Reproductive Medicine: Ethical and Legal Analysis of the Procedure*, 4 J. BIOSCIENCES. & MEDS. 46, 50 (2016) (“Columbia lacks regulation regarding surrogacy.”).

83. Monika Pauknerova, *Czech Republic*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 105, 105; Jaime Tecú & Eleonora Lamm, *Guatemala*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 167, 167; Maebh Harding, *Ireland*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 219, 219; Marcelo De Alcantara, *Japan*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 247, 247.

84. Daniel Wesangula, *Will Key Ruling on Surrogacy Shed More Light?*, STANDARD DIGITAL (Mar. 20, 2016), <https://www.standardmedia.co.ke/health/article/2000195477/will-key-ruling-on-surrogacy-shed-more-light> (calling for legislators in Kenya to “agitate for further legislation regarding . . . surrogacy”).

85. Amy Sawitta Lefevre, *‘Wombs for Rent’ Business Flourishes in Communist Laos*, REUTERS (June 7, 2017, 6:09 PM), <https://www.reuters.com/article/us-laos-surrogacy/wombs-for-rent-business-flourishes-in-communist-laos-idUSKBN18Y39R>.

86. Eleonora Lamm, *Mexico*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 255, 255.

87. Sam Everingham, *Surrogacy in the Nordics: Understanding Options and Expectations*, THE LOCAL (June 5, 2017), <https://www.thelocal.no/20170605/creating-families-through-surrogacy-familiesthroughsurrogacy-tlccu>.

and Venezuela have no clear regulations regarding surrogacy.⁸⁸ Surrogacy agreements still occur in Argentina, Kenya, Laos, Mexico, and Venezuela, despite the lack of regulation.⁸⁹ In these countries, even though surrogacy is unregulated, surrogacy contracts generally remain unenforceable under each country's respective laws.⁹⁰

4. Countries Where Surrogacy Is Illegal

Surrogacy remains illegal and is strictly banned in countries such as the People's Republic of China,⁹¹ Finland,⁹² France,⁹³ Germany,⁹⁴ Iceland,⁹⁵ Italy,⁹⁶ Pakistan,⁹⁷ Serbia,⁹⁸ Spain,⁹⁹ and Switzerland.¹⁰⁰

88. Eleonora Lamm, *Venezuela*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 397.

89. Eleonora Lamm, *Mexico*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 255; Eleonora Lamm, *Venezuela*, *supra* note 88, at 397; Lefevre, *supra* note 85; Wesangula, *supra* note 84.

90. Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 439, 460.

91. Zhengxin Huo, *The People's Republic of China*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 93, 93.

92. Hilka Salmenkylä & Asianajotoimisto Juhani Salmenkylä Ky, *Family Law in Finland: Overview*, THOMSON REUTERS PRACTICAL LAW (Sept. 1, 2017), [https://uk.practicallaw.thomsonreuters.com/8-576-1745?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-576-1745?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

Despite Finland's comprehensive ban on surrogacy, the country does permit surrogacy in certain special circumstances, for instance, if the woman does not have a womb. *Id.*

93. Louis Perreau-Saussine & Nicolas Sauvage, *France*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 119, 119.

94. Susanne L. Gössl, *Germany*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 131, 131.

95. Sigurður Kristinnsson, *Legalizing Altruistic Surrogacy in Response to Evasive Travel? An Icelandic Proposal*, 3 REPROD. BIOMEDICINE & SOC'Y ONLINE 109, 109 (2016).

96. Under article 12, paragraph 6 of Italian law no. 49/2004, "whoever, in any form, produces, organizes or advertises the sale of gametes, embryos, or surrogacy, shall be punished with imprisonment from three months to two years and a fine ranging from 600,000 to one million euro." Ida Parisi, Int'l Assoc. Member of the Am. Bar Assoc. Assisted Reprod. Comm., Member of the Am. Soc'y for Reprod. Med. Legal Prof. Grp., Address at the AAARTA Mid-year Conference, It's a Small

B. Destination: United States

The United States remains a preferred destination for foreign prospective intended parents faced with challenges within their own country who need a surrogate.¹⁰¹ Both high-quality medical care and legal protections make the United States a leader in the foreign surrogacy market.¹⁰² Babies carried by an American surrogate are eventually born in the United States and as such, the 14th Amendment provides the baby with automatic citizenship and entitlement to a United States passport.¹⁰³ But despite the conveniences the United States offers, most international intended parents will nevertheless face challenges once they return to their home country.¹⁰⁴ These difficulties international intended parents face are highlighted next in this Note.

C. Challenges in Establishing Legal Parentage

A key issue international intended parents face is establishing legal parentage and citizenship for the child in their respective country of origin once the child is born.¹⁰⁵ Usually, foreign intended parents must circumvent their countries' laws to do this, many times

World: Cross-Border Surrogacy and Dual Citizenship: How to Advise International Parents Returning Home from the U.S. (Sept. 19, 2017).

97. Muhammad Zubair Abbasi, *Federal Shariat Court of Pakistan on Surrogacy: From Judicial Islamization of Laws to Judicial Legislation*, SHARIA SOURCE, HARV. L. SCH. (Aug. 9, 2017), <https://beta.shariasource.com/documents/2937>.

98. Gordana Stanić, *State Regulation of Surrogate Motherhood: Liberal or Restrictive Approach*, 4 INT'L J. JURIS. FAM. 35 (2013) (explaining that Serbia does not permit surrogacy, but the Civil Code of Serbia is in the drafting process to define "surrogate motherhood").

99. Patricia Orejudo Prieto de los Mozos, *Spain*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 347, 347.

100. *A Child Is Not a Commodity, Says Top Swiss Court*, SWISSINFO.CH (July 30, 2015), https://www.swissinfo.ch/eng/surrogate-law_a-child-is-not-a-commodity—says-top-swiss-court/41575816.

101. See Kindregan & White, *supra* note 7.

102. *Id.* at 535–36.

103. Steven H. Snyder, *United States of America*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 387, 396.

104. See generally Margalit, *supra* note 9.

105. *Id.*

treating the surrogacy as an adoption once the child arrives.¹⁰⁶ Even in countries where surrogacy is unregulated, this problem persists.¹⁰⁷

As an example, according to the German district court Berlin Schöneberg, a single father cannot be the sole parent registered to a child.¹⁰⁸ The surrogate remains the mother of the child if the only intended parent is a single father.¹⁰⁹ Germany views having two parents, rather than one, to be in the best interest of the child.¹¹⁰ In addition, one of the intended parents must share a biological link with the child; this is where the adoption process takes effect.¹¹¹ In the case of two intended parents, the intended parent who shares the biological link has parental rights.¹¹² The one who does not then “adopts” the child from the surrogate, dissolving the surrogate’s legal rights to the child.¹¹³ This presents substantial obstacles to German intended parents who need both egg and sperm donors in a surrogacy, as neither intended parent would be biologically related to the child.

France also considers surrogacy contracts null and void.¹¹⁴ Furthermore, according to Article 227-13 of the French Penal Code, surrogacy is punished in France by imprisonment for up to three years and a fine not exceeding €45,000.¹¹⁵ But, similar to Germany, if French intended parents have a baby through a successful surrogacy outside the country, the baby can obtain French citizenship, have a French passport and a birth certificate with its *biological* parent, and

106. Fabien Joly, Int’l Assoc. Member of the Am. Bar Ass’n Assisted Reprod. Comm., Address at the AAARTA Mid-year Conference, It’s a Small World: Cross-Border Surrogacy and Dual Citizenship: How to Advise International Parents Returning Home from the U.S. (Sept. 19, 2017).

107. *Id.*

108. AG Schöneberg 71 a III 354 /15.

109. *Id.*

110. *Id.*

111. BGH XII YB 463 /13.

112. *Id.*

113. *Id.* In the case BGH XII YB 463 /13, the German Supreme Court determined that the best interest of the child is paramount, and public policy is not violated if one of the intended parents is genetically related to the child and the surrogate does not want to care for the child nor considers the child to be her own, but the intended parents do want to care for the child. *Id.*

114. Louis Perreau-Saussine & Nicolas Sauvage, *France*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 119, 121.

115. *Id.*

proceed with an adoption with its non-biological parent, usually the mother.¹¹⁶ The birth certificate must only mention the biological father, and the father must obtain an apostille adoption judgment delivered by an American state court or a French court.¹¹⁷ Paternity is easily established through DNA testing, while maternity is resolved by a principle known as “*mater semper certa est*,”¹¹⁸ which favors “the birth mother over the genetic mother.”¹¹⁹ In an American state court, the judge must find: (1) that the adoptive parent is the spouse of the biological father; (2) the father has given consent to the adoption of his child; (3) the adoption is in the best interest of the child; (4) the two parents will share all rights pertaining to the child; and (5) the family name of the child shall be changed to a name chosen by the couple.¹²⁰ A U.S. attorney must also sign an affidavit of law explaining that the judgment is irrevocable.¹²¹ A new birth certificate mentioning the biological father and the adopted parent will be issued if the adoption is granted.¹²² While France does recognize both straight and same-sex couples, the intended parents must be married, and one of them must be the biological father.¹²³ Thus, it is very complicated for a single woman or a lesbian couple to obtain a French birth certificate because they cannot be recognized as the biological parent of the child born by surrogacy.¹²⁴

Italian law is also ambiguous on these issues.¹²⁵ Italy has some of the strictest laws regarding surrogacy and ART, with punishments “from three months to two years [of imprisonment] and a fine ranging

116. Joly, *supra* note 106.

117. *Id.*

118. The principle “*mater semper certa est*” traces its roots back to Roman law and translates in English to “the mother is always certain.” Many countries adopt this principle interpreting the legal mother to be the birth mother. This principle, however, of the mother always being known, is outdated with the rise of assisted reproductive technology and surrogacy because of the likely possibility of a child having both a natural (or “birth”) and genetic mother. Rita D’Alton-Harrison, *Mater Semper Incertus Est: Who’s Your Mummy?*, 22 MED. L. REV. 357, 357 (2014).

119. Perreau-Saussine & Sauvage, *supra* note 93, at 125–26.

120. Joly, *supra* note 106.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Parisi, *supra* note 96.

from 600,000 to one million euros.”¹²⁶ Ironically, Italy has no laws prohibiting its citizens from contracting surrogacy agreements abroad and is left with only a few steady but inconsistent principles from case law and known best practices.¹²⁷ While Italy does not recognize same-sex marriage and historically children of same-sex couples could not be legally recognized as children of both parents, two recent landmark decisions have sparked a positive change that has become known in Italy as “The Spring of Rainbow Rights.”¹²⁸ The Italian Corte di Cassazione no. 19599/2016¹²⁹ held that recognizing a lesbian couple as legal parents from a foreign birth certificate is not contrary to public policy and that the best interest of the child prevails.¹³⁰ Following that decision, the Court of Appeal of Trento, through a foreign-issued parentage order, recognized two men, a same-sex couple, as legal parents where only one of them was the biological father.¹³¹ Currently, three appellate courts—the Court of Appeal of Rome, the Court of Appeal of Venice, and the previously mentioned Court of Appeal of Trento—recognize two fathers on a foreign parentage or-

126. Under article 12, paragraph 6 of Italian law no. 49/2004 “[w]hoever, in any form, produces, arranges or advertises the sale of gametes or embryos or subrogation of motherhood is punished with imprisonment from three months to two years and a fine ranging from 600,000 to one million euros.”

127. Parisi, *supra* note 96.

128. *Episode 19: Italy Is Famous for Art, But What About ART?—Ida Parisi, I WANT TO PUT A BABY IN YOU* (June 26, 2018), <https://soundcloud.com/iwtpabiy/episode-19-italy-is-famous-for-art-but-what-about-art-ida-parisi> (discussing how the perspective on surrogacy is changing for the better in Italy but advising that practitioners must still assess each situation on a case-by-case basis).

129. Cass., sez. un., 21 giugno 2016, n. 19599. The Supreme Court of Cassation based their holding on analyzing the issue from an international perspective, giving deference to comity between the individual States and the international community, rather than limiting their analysis to internal norms of their own culture. Angelo Schillaci, *The Ways of Love Are Endless. The Court of Cassation and the Transcription of the Foreign Birth Certificate with Two Parents of the Same Sex*, ARTICOLO29 (Oct. 3, 2016), <http://www.articolo29.it/2016/le-vie-dellamore-sono-infinite-la-corte-di-cassazione-e-la-trascrizione-dellatto-di-nascita-straniero-con-due-genitori-dello-stesso-sesso/>.

130. Cass., sez. un., 21 giugno 2016, n. 19599.

131. Parisi, *supra* note 96.

der.¹³² Italy awaits a confirming decision on this matter from a November 2018 hearing before the Supreme Court.¹³³ But these positive changes are not without limits: Italy is also bound by European Court of Human Rights (“ECHR”) judgments.¹³⁴ Concurrent with the decision in Trento, in the *Paradiso* and *Campanelli* case, the Grand Chamber of the ECHR reversed its original ruling that despite the Italian government having the ability to refuse recognition of parental relationships established under foreign law, taking the child away from the intended parents infringed on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms: rights to privacy and family life.¹³⁵ This ruling was overturned by the ECHR, which held that there would be no infringement of rights because “no family life existed.”¹³⁶ In this case, the ECHR considered that neither intended parent had a biological connection with their child and also had a short relationship with their child.¹³⁷ For countries like Italy, France, Germany, and beyond, their restrictive views on surrogacy are strongly rooted in misguided foreign public policy concerns.

132. Posting of Alexander Schuster, avv@schuster.pro, to FLSGenetics@mail.americanbar.org (Aug. 23, 2018) (on file with author).

133. *Id.*

134. *Id.* Established by the European Convention on Human Rights, the European Court of Human Rights is a multinational court consisting of forty-seven member states that hears matters concerning human rights and political rights. EUROPEAN COURT OF HUMAN RIGHTS, *The Court in Brief*, https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf. If the ECHR finds that an applicant’s rights have been violated, the corresponding country must adhere to the judgment and “provide justice to the individual.” *The European Convention on Human Rights—How Does it Work?*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works> (last visited Feb. 3, 2019).

135. EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 134; *see* DICTIONARY OF STATUSES WITHIN EU LAW: THE INDIVIDUAL STATUSES AS PILLAR OF EUROPEAN UNION INTEGRATION 67–68 (Antonio Bartolini et al. eds.) [hereinafter DICTIONARY OF STATUSES WITHIN EU LAW].

136. DICTIONARY OF STATUSES WITHIN EU LAW, *supra* note 135.

137. *Id.*

D. Foreign Policy: What's Wrong with Surrogacy, Anyway?

Most countries with restrictive surrogacy laws perceive surrogacy as a potential threat in the human rights realm.¹³⁸ Most are concerned with the misconceived notions that surrogacy largely conduces human trafficking and exploitation of surrogates¹³⁹ and that surrogacy essentially constitutes the “sale of children.”¹⁴⁰ Commercial ISAs aggravate this concept even more.¹⁴¹ While it is unfortunately true that violations of human rights have occurred in the surrogacy context, surrogacy is not the only area in which human rights abuses occur.¹⁴² Human rights abuses should be addressed on a broad scale, rather than by restricting the entire ART field.¹⁴³ Most countries fail to realize that more restriction can instead exacerbate surrogacy trafficking, forcing citizens to outsource to another country or a black market.¹⁴⁴ The United States does not ignore ethical concerns either and wants to eradicate the “wombs for commodities” perspective.¹⁴⁵ The rather recent emergence of the nonprofit organization Society for Ethics in

138. Yasmine Ergas, *Thinking ‘Through’ Human Rights: The Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy*, in INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 57, at 427, 428.

139. HANNAH BAKER, PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, THE PARENTAGE/SURROGACY PROJECT: AN UPDATING NOTE 3 n.15; i n.6 (2015), <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>; Ergas, *supra* note 138, at 428.

140. David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 PEPP. L. REV. 265, 267 (2016).

141. Ergas, *supra* note 138, at 428.

142. AM. BAR ASS’N SECTION OF FAMILY LAW, REPORT TO THE HOUSE OF DELEGATES: ABA POSITION PAPER REGARDING A POSSIBLE HAGUE CONVENTION ON PRIVATE INTERNATIONAL CONCERNING CHILDREN, INCLUDING INTERNATIONAL SURROGACY ARRANGEMENTS 7, https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf [hereinafter “REPORT TO THE HOUSE OF DELEGATES”].

143. *Id.*

144. *Id.*

145. THE SOCIETY FOR ETHICS IN EGG DONATION AND SURROGACY, <http://www.seedsethics.org> (last visited Feb. 3, 2019); Posting of Emily Ossmann McArthur, emily@ossmannlaw.com, to FLSGenetics@mail.americanbar.org (Nov. 9, 2017) (on file with author).

Egg Donation and Surrogacy (“SEEDS”) seeks to address ART ethical concerns within the United States.¹⁴⁶ SEEDS strives to promote ethical behavior in third-party reproduction with a goal to incorporate an interprofessional ART network to devise industry-wide ethical standards.¹⁴⁷ But regardless of these differing laws and public policy concerns among countries, international intended parents may still find protection under existing international conventions.

IV. EXISTING CONVENTIONS

It is only logical to assume that similar to the challenges foreign intended parents face in establishing parentage and citizenship for their child in their country of origin once the child is born, enforcing a will in their country of origin directing legal guardianship of the child will likely be just as, if not more, challenging. Generally, foreign jurisdictions will only recognize a will from the United States if it is valid under that foreign jurisdiction’s laws as well.¹⁴⁸ In theory, this prevents the possibility of international intended parents putting an estate plan in place in the United States, where their surrogate resides. But possible protection may fall under an already existing Convention between different countries, such as the Washington and Hague Conventions.

A. The Washington Convention

The Washington Convention provides a uniform law on international wills.¹⁴⁹ Historically, a will’s enforcement was dependent

146. THE SOCIETY FOR ETHICS IN EGG DONATION AND SURROGACY, *supra* note 145. A recent case whereby Chinese intended parents were simultaneously using five surrogates in the United States has drawn much attention. Angela Lawson, Steve Snyder, Wendie Wilson-Miller & Nora Zuckerman, Address at the 5th Annual SEEDS Conference: Should IP’s Be Limited to One Surrogate Match at a Time? (Feb. 3, 2018).

147. THE SOCIETY FOR ETHICS IN EGG DONATION AND SURROGACY, *supra* note 145.

148. Vicki Levy Eskin & Bryan John Driscoll, *Estate Planning with Foreign Property*, GPSOLO, Apr.–May 2011, at 43, 43–44.

149. The Uniform International Wills Act was established at the Convention of October 26, 1973, (the “Washington Convention”) and provided a uniform law on

upon the choice of law rules where the will was to be executed.¹⁵⁰ Given the doubt of whether wills executed in one country would be valid in another, several countries adopted the Washington Convention, which formally recognizes an “international will.”¹⁵¹ Put simply, the international will escapes the risk of being governed by another jurisdiction’s law.¹⁵² A significant group of countries have either ratified the Washington Convention or signed without further ratification, meaning that an international will is valid in those countries.¹⁵³ The United States drafted the Washington Convention; however, it is enforced on a state-by-state basis.¹⁵⁴ Even though ISAs were not on the drafters’ radar in 1973, the minimal requirements for a valid international will provide no glaring reason that ISAs could not be included:

The will may not be a disposition of more than one person; the will shall be in writing (may actually be handwritten or typed), need not actually be written by the testator, and may be in any language; the will must be signed in the presence of and signed by two witnesses and an authorized person (in the United States, the only authorized persons are attorneys—a notary is not sufficient); all signatures must be at the end of the will; if the will is more than one page, each page must be numbered and the testator must sign each page; and if the testator is unable to sign the will, the reason shall be

the form of an international will. UNIF. INT’L WILLS ACT, UNIF. PROB. CODE, ART. II AMENDS. (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, Proposed Draft 1977).

150. M. Read Moore, *Foreign Affairs 101: Tax and Estate Planning Issues for U.S. Clients Who Own Foreign Property*, 2007 ALI-ABA COURSE OF STUDY 1727, 1747.

151. *Id.*

152. *Id.*

153. *Id.* Belgium, Bosnia-Herzegovina, Canada, Cyprus, Ecuador, France, Italy, Libya, Niger, Portugal, and Slovenia recognize the Washington Convention. Holy See, Iran, Laos, Russian Federation, Sierra Leone, and the United Kingdom have signed the treaty but have not fully recognized the Washington Convention. *Id.*

154. *Id.* The American states and territories that recognize the Washington Convention are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, U.S. Virgin Islands, Virginia, Vermont, and Wisconsin. *See generally id.*

noted on the will. In addition, a certificate must be attached to the end of the international will, signed by an authorized person, attesting that the requirements and procedures for drafting and execution of an international will have been satisfied.¹⁵⁵

Surprisingly, these requirements set a very low bar for a will to automatically be deemed valid in a jurisdiction that has enacted the Washington Convention. The Convention doesn't aim to override other nation's laws but to ease estate planning for those with international interest.¹⁵⁶

B. The Hague Conventions

While most prominently known for its protections of international child abduction and inter-country adoption, the Hague Conference on Private International Law ("HCCH") has a history of implementing many facets of international Hague Conventions ranging from child protection and family and property relations to legal cooperation and litigation and commercial and finance law,¹⁵⁷ including 150 countries as parties to various conventions.¹⁵⁸ Preceding the Washington Convention, in 1961, is the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.¹⁵⁹ Like the Washington Convention, this Convention attempts to standardize the acceptance of wills among countries; however, the United States has not adopted it.¹⁶⁰ The United States is, however, a party to the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption ("Hague Adoption

155. Eskin & Driscoll, *supra* note 148, at 44.

156. *Id.*

157. Christophe Bernasconi, *The HCCH: The Legislative Pillar*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (Sept. 9, 2014), <https://assets.hcch.net/docs/8293026a-93bd-4cd0-9ad0-3fb342ae84fb.pdf>.

158. *About HCCH*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/about> (last visited Feb. 4, 2019).

159. *Id.*

160. Ian Holzhauser, *Estate Planning for the International Family*, DCBA BRIEF, Nov. 2016, at 8, 11.

Convention”).¹⁶¹ Currently, ISAs are not covered under this convention, although conversations have transpired for quite some time to either include surrogacy under this convention or use it as a close model for a separate Hague Convention to regulate international surrogacy.¹⁶² In 2011, the Permanent Bureau of the HCCH issued a Preliminary Report on International Surrogacy Arrangements,¹⁶³ following with a mandate from the Council on General Affairs and Policy of the Hague Conference that an Experts’ Group on parentage and surrogacy should be convened.¹⁶⁴ Even if these international treaties at-

161. *HCCH Members: United States of America*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/states/hcch-members/details1/?sid=76> (last visited Feb. 4, 2019).

162. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, A PRELIMINARY REPORT ON THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS 1 (2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>. The Permanent Bureau is coined the secretariat of the HCCH and coordinates Hague Conference activities, prepares the Plenary Sessions and Special Commissions, conducts research required by any subject covered by the Conference, and is in liaison with experts, delegates of the members, and international governmental and non-governmental organizations. *About HCCH*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/about> (last visited Feb. 4, 2019).

163. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, *supra* note 162, at 4.

164. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, BACKGROUND NOTE FOR THE MEETING OF THE EXPERTS’ GROUP ON THE PARENTAGE/SURROGACY PROJECT 4 (2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>. The Council on General Affairs and Policy, or “the Council,” consists of all members of the Hague and oversees operation of the Hague Conference. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT’L LAW, STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ART. 4 (1955), <https://assets.hcch.net/docs/d7d051ae-6dd1-4881-a3b5-f7dbcaad02ea.pdf>. The Council meets annually. *Id.* The Experts’ Group on parentage and surrogacy held meetings in February 2016, 2017, and 2018. The Council determined that the Experts’ Group should hold two further meetings, focusing on:

General private international law rules on legal parentage, namely:
 a) deepening the discussion regarding uniform applicable law rules for parentage; b) further analysing the possibility of recognising or accepting foreign public documents which record legal parentage;
 c) refining possible provisions on the recognition of foreign judicial decisions[,] . . . [and] ISAs.

tempt to address these issues, there are still many other treaties, customs, and other sources of law that inevitably will shed light on these issues.¹⁶⁵

V. THE BATTLE OF REFORMS

An international estate plan drafted in accordance with the Washington Convention pertaining to an ISA may possibly be enforceable but is at best uncertain. Accordingly, any certainty to come from the enforceability of such an estate plan and addressing the issues within this Note falls on the shoulders of an international reform regarding surrogacy. An appointed guardian(s) in the will, assuming she is a citizen of the same foreign country as the intended parents,¹⁶⁶ would not only need to succeed in establishing herself as the appointed guardian(s) but would also need to succeed in establishing parentage and citizenship for the child, the same difficulties intended parents would have had to overcome. More so, the appointed guardian(s) is much less likely to have a genetic link to the child, presenting even more challenges. Until some sort of a reform is established, uncertainty is the best guess.

The Parentage/Surrogacy Project, PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Feb. 5, 2019).

165. For example, the New York Convention, also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, attempts to enforce foreign arbitral awards and arbitration agreements with a goal of settling international commercial disputes. *The New York Convention*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org> (last visited Feb. 5, 2019). But the New York Convention, like the Hague Convention, “expressly affirms in six of its articles the concept of the ‘child’s best interests.’” Olivier P. Hance & Alexandra Becheikh, *Gestational Surrogacy in the Grand Duchy of Luxembourg*, in *HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES* 195 n.13 (E. Scott Sills ed., 2016).

166. See REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 6 (discussing challenges to expatriate intended parents who are non-resident citizens of country A but who reside in country B and engage in surrogacy in country C. This issue may also arise with appointed guardians in the same situation or when the appointed guardians simply live in a separate country from both the surrogate and the intended parents).

A. *A Convention Misguided by Regulation*

Negotiations are alive for a Hague Convention to regulate international surrogacy.¹⁶⁷ While an international convention to include surrogacy is not opposed by the majority, the inclination of its focus is.¹⁶⁸ Nations that oppose surrogacy have the desire to restrict and regulate international surrogacy as a whole, promoting its likeness to adoption, that it too would fare best guided by a set of restrictive uniform rules recognized by all countries.¹⁶⁹ These nations believe that regulations such as: requiring a genetic link, considering the best interest of the child, determining whether the intended parents are “fit” to procreate, more administrative oversight, and setting compensation boundaries would resolve the parentage and citizenship problems and subside human rights abuses.¹⁷⁰ But these regulations, as discussed below, would not provide a workable resolution and would even exacerbate the issues.

While surrogacy and adoption *are* both ways to achieve parenthood, it must be understood that surrogacy is a form of *procreation* whereby intended parents contract with a gestational carrier to have their own child by using ART services and is distinct from adoption, which is essentially a transfer of legal parental rights from one party to another.¹⁷¹ This distinction is important because conflating surrogacy to be essentially the same as adoption means that the “best interest of the child” should be considered.¹⁷² Normally, this is thought of as a positive principle but not in the context of surrogacy.¹⁷³ The court presumably considered the best interests of the child in the landmark *Baby M* surrogacy case to determine custody, taking into account the father’s economic status and the actions of the surrogate during the custody proceedings.¹⁷⁴ But in effect, this approach

167. *Id.* at 1.

168. *Id.*

169. Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT’L L. 627, 635–40 (2011).

170. *See* REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 16–21.

171. *Id.* at 3.

172. *Id.* at 16.

173. *Id.*

174. *In re Baby M*, 537 A.2d 1227, 1256 (N.J. 1988).

has little to do with the baby's best interests and more to do with weighing "societal conceptions of the parents' fitness."¹⁷⁵ In the international surrogacy context, this approach becomes even more complicated because nations define what's in a child's best interest in many different ways.¹⁷⁶ Discrimination against intended parents who are single, homosexual, disabled, or older is not uncommon in other countries' adoption practices and would be problematic to the intent of the parties to a surrogacy agreement.¹⁷⁷ Moreover, at the beginning of the surrogacy journey, the only interest the child has is whether it will come into existence or not; thus, there is not yet a child to attach the "best interests of" to.¹⁷⁸ So, not only would a potential intended parent have to go through the already grueling and emotional process of surrogacy, but they would also need to be deemed suitable to have *their own child* by a Convention's set standard. Countries recognize that persons who procreate naturally do so without interference from a regulatory scheme; surrogacy is no different because the upshot is the same—a genetic child of the intended parents.¹⁷⁹

The proposal for mandating a biological link between a child born through surrogacy and the intended parents will not only go against the parties' intent but will also eliminate surrogacy as an option for some intended parents.¹⁸⁰ Surrogacy is often a last resort for couples facing infertility, and while it is most often the case that in-

175. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 16; *In re Baby M*, 537 A.2d at 1256.

176. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 5, 16.

177. *Id.* at 17.

178. *Id.* at 7.

179. *Id.* at 17. Of course, if the intended parents used both an egg and sperm donor, then the child would not be genetically related to either of the intended parents, or the surrogate in the case of gestational surrogacy. But as discussed below, infertile intended parents frequently use egg and sperm donors to essentially have a *surrogate* genetic child of their own. Not to be confused with the meaning of "surrogate" within this Note, the word *surrogate* used in this context refers to a genetic child that is "appointed to act in place of another," i.e., the actual, genetic child. *Surrogate*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/surrogate> (last visited Feb. 6, 2019). Donated genetic material—donated egg and donated sperm—is different from the adoption process because it allows the intended parents to participate in the procreation of their baby. See discussion *infra* Section V.A.

180. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 17.

tended parents *do* desire to have a biological child of their own, sometimes unfortunate bad genetics prevail, forcing one or even both intended parents to resort to donated genetic material.¹⁸¹ Donated genetic material is already a standard infertility practice for those who need it and do not need a surrogate, whereby the intended parents conceive but are not genetically related to their child. Essentially, surrogacy is no different—only that the surrogate is the individual conceiving, rather than the intended mother.¹⁸² Requiring a biological connection between one intended parent and the child completely excludes surrogacy as an option for intended parents who *both* need donated genetic material.¹⁸³

Other proposals such as administrative oversight and caps on surrogate compensation would only heighten barriers for intended parents.¹⁸⁴ Creating a regulatory agency that monitors and approves ISAs, and presumably even domestic surrogacy agreements, would not only add unnecessary cost and inconvenience but would undoubtedly slow down the surrogacy process.¹⁸⁵ Likewise, caps on surrogate compensation would only increase the potential for exploitation.¹⁸⁶ Each market operates differently, and the perception that surrogates are paid six figures is nothing more than a myth.¹⁸⁷ It is important to remain flexible regarding surrogacy compensation to strike the proper balance in the prospective market—to alleviate the contrasting concerns that surrogates are not paid too little for their services but also are not offered excessive sums.¹⁸⁸

Many foreign jurisdictions view surrogacy as a public policy issue.¹⁸⁹ The United States, in contrast, adopts more of a private

181. *Id.* at 5, 17.

182. *Id.* at 5.

183. *Id.*

184. *Id.* at 19–21.

185. *Id.* Any ethical standards of care could be addressed by a non-governmental ethical organization. *Id.*

186. *Id.* at 20–21.

187. *Id.* at 21.

188. *Id.* at 20–21.

189. *See supra* Section III.D.

rights approach.¹⁹⁰ The private rights approach makes more sense in the international surrogacy context. A multi-country convention would regulate the process rather than give deference to the surrogacy contract intentionally drafted by the parties. For example, Italy should not have the opportunity to determine the fate of a child whose rights are drafted to be governed by a surrogacy agreement between individuals of France and the United States. The same logic applies to dispute resolution. Thus, it seems logical that courts in the United States should have the power to affirm international surrogacy agreements but nevertheless should still be careful about making broad determinations that are rooted in public policy. When determining fundamental principles important to establishing parentage in international surrogacy, policymakers should more heavily consider the intentions of the parties to the surrogacy contract, rather than their own misconceived public policy concerns.

B. Comity As a Cornerstone

The principle of international comity would simply and efficiently solve the issues surrounding ISAs. *Black's Law Dictionary* defines comity as "a willingness to grant a privilege, not as a matter of right, but out of deference and good will."¹⁹¹ Under this principle, a foreign court gives effect to another jurisdiction's judicial decisions out of respect.¹⁹² Applied to ISAs, international comity would ensure the intended parents' country of origin gives full force to a judicial decision issued in the United States that terminates the parental rights of the surrogate and establishes legal rights in the intended parents.¹⁹³ This recognition of cross-border parental judgments would safeguard the citizenship of all children and their parents' legal rights, regardless of their birth circumstance.¹⁹⁴

Regulation and uniform rules governing international surrogacy are bound to affront other countries' cultures, political and social

190. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that the Fourteenth Amendment includes the right to "bring up children"); see also REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 3.

191. *Comity*, BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

192. *Id.*

193. Snyder, *United States of America*, *supra* note 103, at 387, 387-88.

194. *Id.*

policies and concerns, as well as the private parties involved.¹⁹⁵ Focusing instead on reducing conflicts of law issues and encouraging international comity avoids these concerns.¹⁹⁶ Ultimately, pinpointing surrogacy as the problem is nothing more than a fallacy; it comes down to nations' conflicts of family and immigration laws and their societal view of what is an appropriate and accepted family structure.¹⁹⁷ It's not that surrogate babies are *born*, but it's the inconsistent methods of assigning parentage and citizenship solely because, to some countries, they are born in an unconventional way.¹⁹⁸ We must be reminded that these parentage and citizenship challenges international intended parents face are not contests between the intended parents and the surrogate—but between nations.¹⁹⁹ Said better:

The direct conflict between the private contract between the parties and the national laws of their respective home countries creates the issue of “statelessness.”

. . . .

It is not that there is no existing regulation for international surrogacy; rather, the issue is that each state manages the legal infrastructure underpinning these arrangements differently. It is precisely this legal infrastructure that structures the arrangements. The problem is that the legal infrastructure in one country may not be compatible with that in another country. What is needed, therefore, is a framework of cooperation to resolve issues as they arise from incompatible laws. In fact, the notable cases where the legal complexities were improperly navigated forced nations to work together to solve the problems created by the conflicts of law.²⁰⁰

195. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 2.

196. *Id.*

197. *Id.* at 23; *see also* Snyder, *United States of America*, *supra* note 103, at 387, 388 (pointing out that some countries' refusal to honor foreign court orders may be due to moral opposition to surrogacy).

198. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 12–13.

199. *See id.*

200. *Id.*

What is obvious is that this comes down to a battle of reforms: international regulation of surrogacy (drafted favorably to those nations where surrogacy is against public policy) versus comity of no regulation, or a “just accept and enforce what we decide, even if you don’t agree with it” method (favorable to surrogacy friendly nations). From a broad perspective, neither reform compromises. And in reality, comity does not have to. A Convention regulating the surrogacy industry is useless without the accession of surrogacy friendly nations, such as the United States and India, who dominate the surrogacy market.²⁰¹ Even though nations may never universally accept surrogacy as a means of reproduction, the desire of their infertile citizens to reproduce by a now achievable means will not waiver.²⁰² Thus, a restrictive regulatory scheme will not only fail but is counterintuitive; people will go outside the regulation to “grey” or “black” markets, escalating the dangers of exploitation and trafficking even more, which are most nations’ principal concerns with surrogacy in the first place.²⁰³

Fitting hand in hand with the principle of comity is the intent-based parentage approach.²⁰⁴ Not only at the root of ISAs but also at the root of the international intended parents’ plan for guardianship is the parties’ *intent*.²⁰⁵ This approach takes the view that “but for” the actions and desires of the intended parents, a child born through surrogacy would not exist; in other words, without the initiative of the intended parents, the surrogacy process would not be set in motion.²⁰⁶ Reflecting on the parties’ intent can be helpful with any legal issues that arise within ISAs.²⁰⁷ One key similarity of this approach with those who strive for a regulation aligning with adoption is the emphasis on the “nationality of the child [which] should be guided by the

201. *Id.* at 6–7.

202. *See id.* at 11 (detailing some of the burdens adoptions place on parents and benefits surrogacy could achieve).

203. *See id.* at 11–12 (“Significant barriers to international surrogacy arrangements will, by necessity, force some market participants to other means of achieving parenthood - means which carry, perhaps, more risk and less legitimacy.”).

204. *See id.* at 22 (arguing that “the examination of the intention of all of the parties can be helpful in the analysis of legal issues that arise”).

205. *Id.*

206. *Id.*

207. *See id.*

overriding importance of avoiding a situation in which an adopted child is stateless.”²⁰⁸ Applying this standard to ISAs and guardianship, the simple solution is delivering the child to the country that all the parties intended, and thereby establishing a system of international comity with regard to ISAs with the practice of recognizing foreign parental judgments.²⁰⁹

VI. CONCLUSION

Based upon the foregoing, countries should adopt an international surrogacy reform of comity that gives deference to the parties’ intent, thereby eliminating the problem of stateless children. Logically flowing from this reform, there is no evident reason why an estate plan that appoints guardians would also not be given the same deference because it too reflects the parties’ intent. Recall the hypothetical scenario of R.H. and M.H. with baby S born by surrogacy.²¹⁰ Their appointed guardian, and themselves had they not died in a plane crash, now needs to circumvent the legal system in Italy to establish parentage. Should Italy recognize international comity, it would only need to recognize and enforce the parental judgment from the United States and give custody to their appointed guardian, or R.H. and M.H., thus making it an easy process to establish parentage of baby S. Intended parents could be reassured that should something happen to them while their child is in utero with a surrogate, their selected appointed guardians would be honored. Unfortunately, until this happens, there is no easy resolution available. For the time being, following a best practice for guardianship in ISAs is the safest alternative. If the state in which the surrogate resides and the international intended parents’ country of origin recognize the Washington Convention, drafting an international, uniform will could do no harm, and although not definitive, it has a likelihood of being honored. In addition, guardianship should be addressed conformably within the ISA *and* within a will of the international intended parents put in

208. Trimmings & Beaumont, *General Report on Surrogacy*, *supra* note 90, at 439, 548 (footnote omitted).

209. REPORT TO THE HOUSE OF DELEGATES, *supra* note 142, at 22.

210. *See* discussion *supra* Part I.

place in their country of origin.²¹¹ The United States offers one more protective measure—the international intended parents can also sign a guardianship document to designate guardianship to be formally appointed by a judge.²¹² Hopefully, aligning these best practices will serve to alleviate the issue of a stateless child, especially a child left in a country and with persons not intended for them. But until countries embrace a comity-based reform to the issues presented within cross-border surrogacy agreements, these problems are far from gone.

211. See E-mail from Ida Parisi, Int’l Assoc. Member of the Am. Bar Ass’n. Assisted Reprod. Comm., Member of the Am. Soc’y for Reprod. Med. Legal Professional Grp. (Dec. 28, 2017, 10:18 CST) (on file with author).

212. *Id.*