A Study on the Private International Law Aspects of International Surrogacy Agreements

A message from Paul Beaumont and Katarina Trimmings:

In July 2010, the Nuffield Foundation awarded a grant of £112.000 to Professor Paul Beaumont and Katarina Trimmings to conduct a study into private international law aspects of international surrogacy arrangements. The work on the project commenced on 1 August and the award is tenable for two years. The ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that would serve as a basis for a future international Convention on aspects of surrogacy arrangements. The project is carried out in collaboration with the Hague Conference. A website detailing the project will be set up in the near future, and a note with the link to the website will then be posted. The research team is very much interested in getting input from interested parties. Therefore, if you have any relevant information about international surrogacy, please do not hesitate to contact the research team (see contact details below). Your assistance will be very much appreciated!

Summary

Recent developments and research in the area of reproductive medicine have resulted in various treatment options becoming available to infertile couples. One of them is the use of a surrogate mother in cases where the female partner of a couple is unable to carry a child. National laws governing surrogacy differ widely between jurisdictions. The variety of domestic responses to surrogacy has led to a situation where infertile couples seeking to have a child through surrogacy travel from one country to another, purposely choosing "surrogacy – friendly" jurisdictions as their destinations. In doing so, they effectively avoid restrictions imposed on surrogacy in their jurisdiction. Cross-border travel for the purpose of hiring a surrogate mother has been termed as "procreative tourism". By and

large, the majority of “procreative tourists” are childless Western couples attracted by “low-cost” surrogacy services and a ready availability of surrogate mothers in places like India, Eastern Europe and South America.

It is usually the case that the law lags behind medical advances and corresponding social developments. Unfortunately, international surrogacy is not an exception. Indeed, there is a complete void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law. In the absence of a global legislative response, highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood and the nationality of the child. Classic practical examples are cases such as in re X and another (Children) (Parental Order:Foreign Surrogacy) [2009] Fam. 71; CA Paris, 25 October 2007 (France); and RDGRN 2575/2008, 18 February 2009 (Spain).

Another great worry springing from the unregulated character of “procreative tourism” is the potential for a “black market” preying on peoples’ emotional or economic needs.

It has been widely recognised that there is an urgent need for legal regulation of surrogacy agreements at the international level. The problem was identified as an emerging international family law issue that requires further study and discussion in August 2009 at the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions. Thus far, however, no study has been conducted to assess the practical aspects of legal regulation of international surrogacy arrangements but this project will do so. ((It is recognised that some commentators have questioned whether, given ethical questions surrounding surrogacy, regulation is the right way forward, as it might have the unintended consequence of encouraging more international surrogacy arrangements. It is, however, submitted that in the increasingly globalised world, all attempts to impose a complete prohibition on cross-border surrogacy arrangements are doomed to failure. The only way forward is to regulate international surrogacy, especially for the sake of children born through these arrangements.))

The research will take the form of a combined empirical and library-based study. The empirical part will involve a statistical survey of international surrogacy arrangements. The aim of the survey is to map the magnitude of the problem and

current patterns in international surrogacy. The empirical element of the research will also include personal interviews with surrogacy specialists from selected jurisdictions. ((Jurisdictions selected for the purposes of the empirical part of the project are India, Ukraine and the US state of California. The main reason for choosing these particular jurisdictions is their liberal approach to surrogacy. As a result of this approach, these jurisdictions have become highly popular destinations of "procreative tourists". This in turn guarantees availability of large amounts of empirical data.)) The interviews will examine practical private international law problems arising in cases of international surrogacy arrangements.

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