Chapter 37

Reproductive Surrogacy in the United States of America

Trajectories and Trends

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Introduction

The evolution of reproductive surrogacy in the United States of America must be viewed against the backdrop of various legal and societal policies and principles somewhat peculiar to the United States. How the concept of surrogacy as a reproductive option was planted, took root, and grew in the United States occurred in concert with and because of these legal and social realities, many of which differ widely from the perspectives of the rest of the world on similar issues. The first step in assessing the trajectories and trends in surrogacy in the United States is to briefly highlight the particular and often unique factors that facilitated its growth. While it is beyond the scope of this chapter to deal with each factor in depth, at least passing general acknowledgment of each factor and its role in shaping the US perspective on surrogacy is necessary.

Fundamental Beliefs Affecting the US Perspective

The US Constitution

The US Constitution is a distinguishing factor that influences the societal perception and evolution of surrogacy in the United States. It grants and protects the numerous basic civil and personal liberties of every US citizen. It does so by the content and terms of the Bill of Rights and Amendments Fourteen, Fifteen, Nineteen, and Twenty-six. The individual liberties established by those provisions include, among others, the deeply ingrained concepts of economic liberty and freedom of contract. Each citizen's personal awareness of the importance and scope of US society's individual and collective liberties colors the sense of entitlement to make personal choices, particularly when it comes to the private arena of each individual family unit. None of these individual liberties may be arbitrarily limited, infringed, or taken away by the government without sufficient or compelling state interests.

In general, this broad concept of personal liberty as balanced against limited governmental intrusion militates in favor of allowing an individual's right to access and have children through surrogacy. In particular, contractual freedom has been given persistent deference and high standing over the course of American history, and judicial decisions upholding freedom of contract have deep intellectual roots in our society. There is ongoing and continuing vitality of the classical freedom-of-contract doctrine, and this extends, at least philosophically, to contracts for surrogacy.

The general validity of economic liberty and the free-market system in the United States also minimizes the negative perception of the commercialization of certain reproductive services, including the gestational services of a surrogate. This creates a much more conducive environment for the implementation of commercialized surrogacy arrangements in the United States.

The Right to Have a Child

Many global scholars and professionals, including those who generally oppose the process of surrogacy

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on religious or moral grounds, often state that no one has the right to have a child. This initial philosophical starting point for discussion of surrogacy participants' rights to initiate and participate in the surrogacy process is often simply stated without further foundation as a social reality that is beyond refutation. The United States does not necessarily share this same fundamental belief, and this profoundly affects the perception of surrogacy in the United States.

As stated earlier, the US Constitution grants broad individual liberties and rights to all citizens. These individual liberties can only be restricted or infringed by the federal or state government if sufficient state interests exist to justify the proposed restrictions. State infringement on fundamental individual liberties must pass strict scrutiny before any government intrusion is permitted.

The right to procreate is a fundamental liberty granted to all US citizens. In voiding a criminal sterilization statute enacted by Oklahoma as violating the equal protection clause of the Fourteenth Amendment of the US Constitution, the US Supreme Court stated, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" [1]. The *Skinner* case remains the only express US Supreme Court precedent to directly address the fundamental right to procreate, but a diverse group of subsequent cases has touched back to that basic principle in protecting a panoply of other Constitutional liberty interests [2].

The extension of the fundamental right to procreate to include the right to parent via assisted reproduction and surrogacy has only been addressed in one other federal case. The Federal District Court evaluated the constitutionality of a Utah statute that mandated that the surrogate birth mother would be the resulting child's legal parent for all legal purposes without judicial inquiry [3]. The statute thereby deprived a genetic intended parent of the right to assert any parental rights to the child based on her genetic relationship to the child. The court determined that the statute placed a substantial obstacle in the path of a woman who could not gestate her own child and who was seeking to make procreative choices to bear and raise her own children. This, the court held, unduly burdened the woman's exercise of her fundamental right to procreate. As such, the statute was deemed unconstitutional.

Thus, according to the US perspective of the Constitutional right to procreate and its intersection with surrogacy, it can be persuasively argued that every individual does, indeed, have the fundamental right to have a child. As a result, national or international private and/or governmental intervention into or restrictions on an individual's access to surrogacy as a procreative choice will be strictly scrutinized and met with inherent resistance.

The Birth Mother's Rights as the Child's Parent

Much of the world outside the United States adheres to the Roman-law principles of "*Mater semper certa est*" ("The mother is always certain") and "*Pater est, quem nuptiae demonstrant*" ("The father is he to whom marriage points"). Thus, under still-existing rules of parental determination around the world, the woman who gives birth and her husband, if any, remain a child's legal parents for all purposes, even if the woman was acting as a surrogate. In many countries, there is no way to legally preempt this maternal determination. This is not the case in the United States, and this additional difference in legal approach to parentage further facilitates the viability of surrogacy in the United States.

The birth mother is not generally considered to be the unassailable sole legal mother of a child in most US states. In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act (UPA). The purpose of the act was to establish consistent mechanisms for establishing parentage over all the states. The 1973 act was revised and updated in 2000–2002. Nearly 40 US states have adopted some version of either act.

The UPA provides that both paternity and maternity can be established under the provisions of the act. This allows determinations of both paternity and maternity based on birth, marriage, or genetic relationship. Thus the United States does not concur that the mere biological fact of giving birth presumptively or necessarily determines a child's legal parents. This is at odds with the remnants of Roman law still at the core of many other countries' parentage determinations. (See also *J.R., M.R. and W.K.J.* v. *Utah, supra.*) This ability to separate biological birth from genetic or legal parentage grants further viability to surrogacy in the United States.

The Intersection of Government, Reproduction, and Medicine

It has evolved around the globe that access to high-quality health care is also a fundamental right to which all individuals feel entitled. The result of this expectation has been to bring socialized medicine to most of the developed world. In the United States, however, we remain a hybrid exception. We have achieved a high level of medical services and care with the participation but not the complete control of government. The government has developed rules, regulations, and licensing requirements for medical professionals on the one hand, but it has taken a more laissez-faire approach to inserting itself into the direct doctor–patient relationship and doctors' determinations of the most appropriate medical treatment and outcomes for their patients, on the other hand.

Thus doctors in the United States have more latitude and discretion in determining the nature and scope of treatment, and the provision of reproductive treatments falls thus far largely within this zone of governmental deference to the physician–patient relationship. The fertility physicians of the United States gauge the propriety of various reproductive options by their voluntary compliance with the ethics opinions and practice guidelines of the American Society of Reproductive Medicine (ASRM) and the Society of Assisted Reproductive Technology (SART) rather than any direct governmental regulations. Because third-party reproduction, including surrogacy, falls directly under the auspices of those entities and their recommendations, there remains a strong opposition by US fertility physicians to direct legislative regulation and an ongoing reluctance by government to become directly involved in either allowing or prohibiting surrogacy as a reproductive alternative. This supports the ongoing protection of surrogacy as a reproductive option in the United States.

"Baby Selling" and the Nature of and Control over Embryos

A common condemnation of surrogacy around the globe has been that surrogacy is "baby selling." The perception is that the surrogate, by virtue of giving birth, has inherent rights to parent the child should she choose to do so (see "Roman law," discussed earlier). As a result, when she transfers legal parentage of her child and receives money in the process, she is "selling" her own baby. The US legal perception of the creation, ownership, and control of embryos does not share or support this view. In truth, however, no person can sell that which she doesn't own, and surrogates are not gestating, giving up, or selling their own children.

In the United States, it has become axiomatic that embryos are neither persons nor property, but they occupy an intermediate category deserving of special respect [4]. That being said, the persons who create embryos for transfer and gestation have a proprietary interest in those embryos from the time of their formation that includes ownership, control, and decision-making authority over the use and/or disposition of the embryos [5]. Thus, from the US perspective, intended parents [6] who create embryos for gestation by a surrogate are actually delivering their own child into the temporary care of the surrogate for gestation and safekeeping; they are not creating any parental rights in the surrogate. When the intended parents receive their own child back from the surrogate, any monetary consideration they may pay to the surrogate is for her gestational services only, not payment for a child, or "baby selling."

By analogy, if a child was already born to two working legal parents, the legal parents may place their child in the care of a day-care provider for the majority of the child's waking hours during the work week. The day-care provider would substitute her provision of parental duties for the parents' (i.e. providing the child with socialization, manners, discipline, security, affection, etc.). Over time, the day-care provider may very well develop a close, emotional, "parent-like" attachment to the child. Nevertheless, no one would argue that the day-care provider accrues the right to claim legal parental rights by providing those substitute parental services by prior agreement with the legal parents. The legal parents' payment to the day-care provider is clearly simply payment for services rendered, though they are, indeed, rendered in connection with the care of a child. Surrogacy creates much the same substitution of parental duties (gestation) in the form of services rendered, simply at an earlier stage of the child's existence. Consequently, payment for those services does not seem to constitute baby selling under the US view of embryo ownership and control.

The US viewpoint of embryo ownership and control also does not seem consistent with any allegation that the intended parents receiving their own genetic

child back from their selected surrogate constitutes human trafficking. Again, they are simply receiving the custody of their own child back from someone who provided temporary care for their child. In essence, the parties are restoring, not changing, the parental status quo.

The Child's Best Interests

There are many voices commenting on surrogacy urging greater consideration of the child's best interests in evaluating whether the surrogacy process should even be permitted or commenced. This seems to be a non sequitur from the US perspective because there is no provision under US law that applies a best interests analysis to an unborn child.

At the time that intended parents are considering and choosing to initiate a surrogacy process, no child exists. As discussed earlier, the intended parents do exist, and under US Constitutional law, they have an existing fundamental right to procreate that also may encompass the use of surrogacy. Thus we are balancing the prospective best interests of a child who does not yet exist against the actual existing rights of intended parents who do. On any scale, the procreative rights of the commissioning parents outweigh the as-yet-nonexistent best interests of a child who has not even been conceived.

Following a best interests analysis to its logical conclusion in surrogacy, we would be trying to determine whether it is in a child's best interests to be born or to not be born. There is no US precedence for such a determination. There does not seem to be any judicial, political, or practical way to accurately evaluate or make that determination.

In the United States, and around the world, there are social systems well in place to support and assist children who are born into adverse family circumstances under the auspices of governmental social service agencies and postbirth termination of parental rights proceedings. Rather than preventing a child from being born, we should simply continue to assess what should be done if the child is ultimately born to unfit parents. If that is the case, the child will simply be identified as in need of protection and taken away from the unfit parents. Such already-existing postbirth child protective services seem much better suited to and aligned with the overall evaluation of the best interests of both the procreating parents and the child to be born.

Furthermore, there is no legal precedent in US jurisprudence that any analysis of a child's best interests attaches to anyone other than a child who has already been born. In fact, under *Roe* v. *Wade*, 410 U.S. 113 (1973) and its progeny, a gestating mother's right to manage and even terminate her pregnancy via abortion exists without consideration of the prospective child's best interests at least until the point of viability. Even *in utero*, the existing mother's procreative liberty trumps any best interests the gestating child may have. Therefore, any discussion of a child's best interests at the formulative stages of surrogacy does not comport with any existing best interests analysis under US law.

Coercion and Commodification of Women Who Act as Surrogates

There are clear indications that women in some surrogacy destinations are participating in the surrogacy process without full disclosure, adequate representation, or free will. In India, there are remnants of a caste system in which higher castes have greater power and privilege than lower castes, a paternal authority hierarchy in which husbands can dictate their wives' choices and behavior, and a parental authority system that supports arranged marriages. The social environments in other, comparable international surrogacy destinations encompass similar gender-based disparities. Women in this environment are clearly at more risk than elsewhere for coercion and human rights violations.

This is not, however, the social reality or risk in the United States. Women in the United States have gone through not one but three waves of feminism and liberation since the women's suffrage convention in Seneca Falls, New York, in 1848. That convention was a milestone of women's civil rights, addressing then-existing legal and educational disadvantages experienced by women in the United States.

During the 1960s, the second wave of feminism had women burning their bras, claiming basic rights in reproduction (birth control, etc.), and aspiring to affordable child care and the right to hold traditionally "male" jobs. Women no longer wished to be defined or limited by their ability to reproduce or care for their children. These feminists generally reject surrogacy, in part, as the subjugation of poor women to reproduce for rich women.

From the 1970s to the present, there exists a new generation of women who believe that the inequalities no longer exist and that they are empowered to freely make their own choices and determine their own fates. They assert the freedom to embrace or reject any aspect of their lives, including reproductive capacity and childrearing. These "feminists" believe that every woman is self-determinative and can choose any path, including the path to act as a surrogate for another woman.

With this strong history and evolution of women's rights in the United States, the environment that risks the violation of women's human rights in many undeveloped surrogacy destinations simply does not exist. Surrogates network online and through social media. They educate themselves on the process of surrogacy and both the risks and benefits of the process. In this environment, the issue of coercion is not prevalent. As the California Supreme Court stated on the feminist arguments against surrogacy:

> Finally, Anna [the gestational surrogate] and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.
>
> We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.
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> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract. [7]

As evidenced by this judicial analysis, the strong perception in the United States is that women in the United States are not as susceptible to financial or social coercion as women in many undeveloped surrogacy destinations. For this reason, the same issues militating in favor of reconsideration of or restrictions on the process of surrogacy do not as readily arise. This has further promoted the development of surrogacy in the United States.

The Interplay of US Federal and State Law Regarding Surrogacy

The Tenth Amendment to the US Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Under this provision and the concept of "state sovereignty" that it creates, the power to establish and regulate parentage has always been historically a state, not a federal, function. Surrogacy falls under the broad penumbra of parentage law because it is regulated individually and distinctly by each US state.

Thus there is no US federal statute or regulation that affects surrogacy and the parentage of the resulting children either positively or negatively. It is up to each state individually to determine whether and how its respective laws will treat surrogacy arrangements and the parentage of the resulting children. In some US states, surrogacy is permitted and reasonably regulated, and in others, it is prohibited and criminalized. As a result, it is a challenge for any US department or agency to bind all states with differing laws to one, consistent national or international policy governing surrogacy. This allows the ongoing development of surrogacy in each individual state without federal oversight.

The Evolution of US Surrogacy Law

The social and legal perception of surrogacy has evolved significantly over the last 35 years. In the

early 1980s, there was no established law of any kind in the United States that governed surrogacy, and *in vitro* fertilization (IVF) [8] was a new medical procedure that was relatively unreliable. Therefore, the vast majority of surrogacy arrangements during this time were traditional surrogacies, meaning that the surrogate was artificially inseminated with the sperm of the intended father (or sperm donor) and then gestated and subsequently delivered to the intended parent(s) a child that was her own genetic offspring. This was an unprecedented and ethically uncertain concept for many, and public attention across the United States was irresistibly focused on the issue when the first dispute over custody between a surrogate and the intended parents was litigated and decided in New Jersey [9].

The New Jersey Supreme Court publicly wrestled for the first time with the social ramifications of surrogacy as a new family-building procedure, the dearth of any previous legal context for determining parentage in surrogacies, and the inadequacy of existing law to resolve the ethical quandary of intent versus genetic relationship in determining such parentage. The court's dilemma was highly publicized and sensationalized by every newspaper and in every state in the United States. Ultimately, the court decided that existing parentage law (namely, the parental presumptions and procedures of the 1973 Uniform Parentage Act) could not be used to deprive a genetically related birth mother of parental rights to her child without her consent. In the five years following that judicial decision, there was a clear legislative response to traditional surrogacy as it was presented in that case. Ten states passed prohibitive or restrictive legislation regarding surrogacy, most of which did not distinguish between traditional surrogacy and gestational surrogacy [10].

While various state legislatures were passing this restrictive legislation in response to traditional surrogacy, surrogacy evolved with the advent of more reliable and successful IVF procedures. By the early 1990s, most surrogacies were no longer traditional surrogacies; they were gestational surrogacies resulting from IVF using either the intended mother's or an egg donor's egg, so the surrogate was not genetically related to the resulting child. This meaningfully eased the ethical dilemma surrounding surrogacy for many and created better circumstances to apply existing state parentage law. As a result, surrogacy became more common and socially accepted.

In 1993, the California Supreme Court adopted the first phase of California's intent analysis (stating that the person(s) who initiate a surrogate pregnancy with the intent of becoming the resulting child's legal parents are entitled to become the child's legal parents if there is a parentage dispute between the genetic mother and the gestational surrogate, with the intended parents' intent being the tie-breaker between a genetic and biological relationship) and judicially ratified the enforceability of gestational surrogacy arrangements in California [11]. In 1998, the California courts extended the intent test to include cases in which neither intended parent is genetically related to the child [12], and thereafter 10 other states passed permissive or facilitative legislation regarding gestational surrogacy over the next 10 years. In the last five years, six more states have affirmed surrogacy either judicially or statutorily. There are numerous other states currently considering permissive surrogacy legislation. The tide has turned, and the strong trend in US state surrogacy legislation is now to permit and effectively regulate surrogacy, not prohibit it.

State-to-State Variations in US Surrogacy Law

As discussed and developed further in subsequent chapters, state law in the United States concerning surrogacy varies widely. Nevertheless, it generally falls into one of three categories. The first category includes states whose legislatures have been proactive in passing specific legislation, whether permissive or prohibitory, that specifically applies to and/or governs surrogacy [13]. The second category includes states that have no statutes that apply to surrogacy but whose appellate courts have affirmatively decided contested and litigated surrogacy cases to create case-law precedent that applies to and/or governs surrogacy [14]. The third category includes states that have neither statutes nor case law that apply to and/or govern surrogacy [15]. In states that fall into this last category, surrogacy rises or falls on the application of and options available under existing parentage, termination of parental rights, and adoption law as it existed before surrogacy became a viable family-building option. The preexisting law of parentage, termination of parental rights, and adoption are applied to create the parental relationships originally intended by the parties to a surrogacy arrangement.

In all states that fall into each of these three categories (including those with prohibitory legislation), surrogacy is being successfully carried on and concluded with the blessing of the relevant courts of law in *uncontested* cases in which parentage orders can be entered with the cooperation and approval of all the parties. This is the case in virtually all surrogacies in the United States [16]. Even in New York and Michigan, where compensated surrogacy is criminalized, there are existing court orders affirming the parentage of intended parents under existing law as long as the parties are all in agreement [17].

Effect of Court-Ordered Parentage in US Surrogacy Proceedings

What Is Different among the Various States?

The primary difference among the states is the procedure with which parentage is finally established following the birth of a child under a surrogacy agreement. As discussed earlier, there are numerous states that allow surrogacy by statute and establish clear procedures as to how parentage of the child is established. Examples are Texas and Utah, which have adopted the surrogacy provisions of the Uniform Parentage Act of 2000, as amended in 2002, and that require court preapproval of a written surrogacy agreement in order to establish the intended parents' legal parentage and notification to the court following the child's birth to amend the birth certificate; Virginia, in which a similar procedure is used under the Uniform Status of Children of Assisted Conception Act (1988); Florida, in which a similar procedure is used under Florida's independent surrogacy laws; and Illinois, in which parentage is automatically administratively established without court involvement prior to birth by attorney "letters of compliance" with all the provisions of the governing surrogacy law.

There are other states in which parentage following surrogacy is established pursuant to appellate law developed by decisions in litigated court cases. Examples are Massachusetts, in which prebirth establishment of parentage in surrogacies has been formally ratified [18]; California, in which prebirth orders are also permitted in surrogacies by both case law and statute [19]; and Ohio, in which intended parents may establish parentage after birth [20].

Finally, there are some states with statutes that expressly limit or prohibit surrogacy and a much larger majority of states with no legislation or case law that either affirm or prohibit surrogacy. In states such as Michigan and New York, where surrogacy is purportedly illegal, as stated earlier, there are still numerous examples of cases in which the courts have signed and entered court orders establishing the intended parentage of children born to surrogate mothers pursuant to written surrogacy agreements [21]. In the larger majority of states with no statutes or case law regarding surrogacy, parentage is established according to preexisting statutes regarding paternity, maternity, termination of parental rights, and adoption.

Thus, depending on the law of each particular state and the manner in which it addresses (or does not address) surrogacy, surrogacy still may be accomplished, but the procedure in each such state will vary.

What Is Similar among the Various States?

What is identical from state to state is that there is some formal legislative or judicial procedure that is followed to establish the proper legal parentage of the child in the intended parents. This ensures the judicial and/or legislative due process of all parties. Once a court does approve and ratify the intended parentage in a surrogacy matter, the intended parent(s) obtain a judgment of the court that confirms their parentage and establishes their right(s) to be named on the child's birth certificate. It does not matter whether the state in which such a judgment is obtained is one with positive law supporting surrogacy, negative law restricting or prohibiting surrogacy, or no law. If, under the circumstances of the particular case, a court has considered the parties' request for a parentage order and determined that it is in the child's best interests that the intended parent(s) received legal parentage, a judgment is entered, and it is enforceable against all necessary parties who received notice of and participated in the proceeding. This is true in any state in the United States for all purposes once the judgment becomes final.

It is important to emphasize that a judgment is only effective against necessary parties who receive notice of and participate in the proceeding. In a surrogacy case, this would obviously include the

surrogate, her spouse, if any, and the intended parent(s). These parties always appear in surrogacy parentage cases either by actual appearance or by signed pleadings.

Therefore, subject to the foregoing discussion, an intended parent will obtain a judgment evidencing his or her parentage of the child following a surrogate birth whether that judgment is for parentage, termination of parental rights, or second-parent adoption. The same judgment will issue in any state where parentage proceedings are initiated. Once an intended parent obtains such a judgment, that judgment generally will become final, subject to only rare and limited exceptions not usually present in surrogacy cases, within a period from 30 to 60 days following the date on which it is entered. It would be a very rare occasion on which a judgment entered based on the mutual consent of all parties as in a surrogacy proceeding ever were appealed, and it is highly unlikely that any such appeal would succeed. The judgment will become final to the same degree in all cases whether the surrogate appeared personally at a court hearing or appeared only through her signed consents or other pleadings.

Once the judgment becomes final, it goes without saying that all the surrogate's actual or presumptive parental rights disappear, and the surrogate no longer has any legal standing or basis to claim any legal relationship to or authority over the resulting child. The surrogate has absolutely no further legal rights to exert any control over the child or the child's subsequent parentage. As a result, it is unnecessary to have the surrogate appear in any subsequent step/second-parent adoption or other proceeding, and her legal consent thereto is no longer necessary. Asking the surrogate for any consent after such a judgment in order to establish legal parentage in either the United States or in the child's home country would be contrary to logic and the established legal relationships at that point in time.

Why Are Such State Judgments Effective in All US States?

A judgment of parentage/termination of parental rights/adoption in any US state is effective in all US states under the Full Faith and Credit Clause. The Full Faith and Credit Clause provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" [22]. The statute that implements the clause further specifies that "a state's preclusion rules should control matters originally litigated in that state" [23]. The Full Faith and Credit Clause ensures that judicial decisions rendered by the courts in one state are recognized and honored in every other state.

In drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states. The US Supreme Court reiterated the Framers' intent when it held that the Full Faith and Credit Clause precluded any further litigation of a question previously decided by an Illinois court. The Court held that by including the clause in the Constitution, the Framers intended to make the states "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin" [24].

The Full Faith and Credit Clause is invoked primarily to enforce judgments. When a valid judgment is rendered by a court that has jurisdiction over the parties and the parties receive proper notice of the action and a reasonable opportunity to be heard, the Full Faith and Credit Clause requires that the judgment receive the same effect in other states as in the state where it is entered. A party who obtains a judgment in one state may petition the court in another state to enforce the judgment. When this is done, the parties do not relitigate the issues, and the court in the second state is obliged to fully recognize and honor the judgment of the first court in determining the enforceability of the judgment and the procedure for its execution.

This principle has even recently been invoked to establish the recognition of a prebirth order establishing parentage in a surrogate birth in California (a state that formally recognizes surrogacy via appellate court authority) for the intended parents who reside in New York (a state that criminalizes compensated surrogacy arrangements) [25].

What Is the Citizenship Status of Children Born in the United States to Parents of Other Home Countries?

The Fourteenth Amendment to the US Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Because the children born as the result of surrogate arrangements between US resident surrogates and intended parents from countries outside the United States are eventually born in the United States, each of them is a citizen of the United States without further legal action under the Fourteenth Amendment. Each such child is entitled to a US passport. The issuance of such passports and the child's citizenship status and are in keeping with applicable US federal immigration and constitutional law. This is unique to the US surrogacy process and facilitates the return of international intended parents using surrogacy in the United States to their home countries with their resulting child, unlike cases in which such parents have been stranded in India and other surrogacy destinations because of their inability to obtain citizenship and a passport for their child from their own foreign embassy.

In addition, such children are subject to the citizenship rules of the countries of their parents' origin. Thus whether each such "home country" recognizes the citizenship of the children of surrogacy depends on each such country's individual rules and, very likely, on the genetic relationship of the child to a current citizen of that country. It will also depend directly on the public policy of the home country regarding surrogacy in general. If a country has made surrogacy illegal, will it accept and establish legal citizenship of the resulting child when it is born in another country where surrogacy is legal? This is a subject The Hague is currently studying. The preferable approach, rather than developing rules and regulations of surrogacy itself, may be to encourage all foreign states to recognize judgments of parentage from other countries according to international comity as long as the judgments were obtained with adequate due process and the participation of all parties.

Conclusion: Looking to the Future

Although the United States remains a stable and relatively predictable platform for successful and ethical surrogacy proceedings, the current national and international situation regarding surrogacy is unsettled. Unusual religious, political, and social alliances have formed in an effort to ban surrogacy globally. The Catholic Church opposes surrogacy and any other form of assisted reproduction on doctrinal grounds; the second-wave feminists oppose surrogacy because it ties into the reproductive capacity of women and the possible subjugation of poor women to rich women as a breeding class; human rights activists (who misunderstand that the children of surrogacy are actually the children of the intended parents who created the gestated embryos in the first instance) fear child trafficking and financial coercion of women; and anti-LGBT forces oppose any means by which gay and lesbian parents can have children, with surrogacy being at the forefront of those options. The next 10 years will be very telling in how the world as a whole views and deals with surrogacy as a reproductive option.

Surrogacy is an expensive and daunting reproductive option for aspiring parents. Among the medical and legal costs, travel expenses, and cost of the expenses and fees of prospective surrogates, surrogacy costs tens, if not hundreds, of thousands of dollars. There are numerous countries that have entered – and exited – the realm of surrogacy. India, Ukraine, Russia, Thailand, Nepal, Cambodia, and Mexico have each appeared to be the next "affordable" surrogacy destination. Unlike the United States, each of these has proven to have inherent flaws in its social and/or legal system that have adversely affected either the surrogates, the intended parents, or the resulting children. These same ills, as noted in *Johnson* v. *Calvert, supra*, have not appeared in the US surrogacy process. The medical and legal entities implementing and monitoring the process have effectively created happy endings for virtually all aspiring parents, surrogates, and children. The rare few that have not ended well have generally gone without the recommended and necessary professional guidance and support they need. The United States is, perhaps, the most expensive surrogacy destination, but it is also the most ethical and reliable.

Nevertheless, because of bad outcomes in the international surrogacy community as a whole, there is clamor for international regulation of surrogacy on some level. It arises because there are such disparate societal beliefs about surrogacy around the world. It is

illegal and/or criminal in most developed countries. The United States stands virtually alone in allowing nearly unfettered access to commercial surrogacy for all the constitutional, legal, and societal reasons discussed earlier. Whether it is a new Hague Convention for surrogacy or some other form, there is a strong perception that access to surrogacy must be somehow monitored, controlled, and restricted.

An expert group has been assembled by The Hague to meet, discuss, and study the prospect of an international surrogacy convention. The United States stands in a unique position because of all the distinguishing factors that separate it in both belief systems and legal principles from the rest of the global community on the subject. The daunting task ahead is how to properly address two very different kinds of surrogacy – that in the United States and that in the rest of the world – each with very different levels of human and social risks. Can we gain consensus to allow reliable surrogacy among most nations that do not believe the process, itself, is moral? Can we avert the banning of surrogacy and keep it from going into black or gray markets to the further risk and detriment of the participants and resulting children? Can we agree to disagree and simply respect the outcomes of surrogacy when achieved in other countries pursuant to international comity?

The biggest current risk of surrogacy is the possibility of stateless children. When intended parents leave their home country where surrogacy is illegal to conduct surrogacy in another country where surrogacy is legal, there is no certainty that the child will have the intended parents' parentage or citizenship once the child returns to the parents' home country. It is certainly not in any child's best interests to be born not having any certainty as to whether the child has legal parents, knows who they will be, or has a home country. Whatever solution we find, we must protect the stability and safety of the resulting children. The solution is likely not to prevent those children from being born, and it is not to leave them without legal parents or a home country. What the solution actually is remains to be seen.

References

1. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).
2. See *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989); *Cruzan* v. *Director*, Missouri Department of Health, 497 U.S. 261 (1990); *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992); *Washington* v. *Glucksberg*, 521 U.S. 702 (1997).
3. *J.R., M.R. and W.K.J.* v. *Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).
4. *Davis* v. *Davis*, 842 S.W.2d 588 (Tenn. 1992).
5. *Id.; York* v. *Jones*, 717 F. Supp. 421 (E.D.Va. 1989).
6. The persons who create the embryos with the intent to become the resulting child's legal parents.
7. *Johnson* v. *Calvert*, 851 P.2d 776, 784, 785 (Cal. 1993).
8. Removal of an egg from a woman's ovary and fertilization of the egg outside the womb in a Petri dish.
9. *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).
10. Gestational surrogacy is the process in which an ovum or ova are retrieved via *in vitro* fertilization from the ovaries of the intended mother or an egg donor and fertilized in a Petri dish, typically with the intended father's sperm, to create an embryo for transfer to a gestational surrogate, who then gestates the child but is not genetically related to the child.
11. *Johnson* v. *Calvert,* 851 P.2d 776 (cert. denied 510 U.S. 874) (Cal. 1993).
12. *Buzzanca* v. *Buzzanca,* 72 Cal.Rptr.2d 280 (Cal. Ct. App. 1998).
13. *Vernon's Texas Code Annotated*, Family Code, § 160.750 *et seq.*
14. California Family Code, § 7570 *et seq.; Johnson* v. *Calvert*, 5 Cal. 4th 84, 19 Cal. Rptr.2d 494, 851 P.2d 776 (cert. denied 510 U.S. 874, 114 S. Ct. 206, 126 L. Ed.2d 163) (Cal. 1993); *Buzzanca* v. *Buzzanca,* 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
15. *Minnesota Statutes Annotated*, Chapter 257.
16. Based on an anecdotal study of surrogacies as referenced in 2002 of an estimated 14,000 to 16,000 reported surrogate births through that date, only 88 had resulted in any dispute between the surrogate and the intended parents, most of which never reached the courts. Debra Morgenstern Katz, Why more and more infertile women are turning to others to bear their babies. *Parenting Magazine* December–January 2002; 88. Of those 88, only 23 were surrogates who threatened to keep the baby (usually to leverage some contractual benefit to themselves, not because they really wanted the child), and 65 were parents who did not want the resulting children (because of divorce, bankruptcy, health condition, number, etc.). If true, this evidences an uncontested success rate of greater than 99.5 percent. The cases that are contested in court get the most publicity, but they are definitely in the very vast minority. This conforms to my professional experience as well, in which I have handled over 300 surrogacy parentage proceedings without any disputes over parentage.
17. *In D.P.* v. *T.R.*, F-04079-10 (2010), a New York State court upheld a California prebirth order and judgment of paternity for twins conceived through gestational surrogacy. The court ruled that the US Constitution's

Full Faith and Credit Clause trumps New York's public policy barring surrogacy. In fact, the court stated that both federal and state law hold that a state's policy is not a valid basis to deny full faith and credit to another state's properly adjudicated judgment. In the case at hand, a gay couple had twins through gestational surrogacy in California and obtained a prebirth order of dual paternity in 2001. In 2010, the couple became involved in a child support proceeding where one of the men sought to escape support obligations by challenging the validity of the California parentage ruling in light of the New York state antisurrogacy policy. As noted by attorney Steven J. Weissman, "This decision gives a good deal of surety, especially to the non-biological father, that his parentage cannot later be challenged because of New York's public policy against surrogacy."

18. *Culliton* v. *Beth Israel Deaconess Medical Center,* 435 Mass. 285 (2001); and *Hodas* v. *Morin,* 442 Mass. 544 (2004).
19. *Johnson* v. *Calvert,* 851 P.2d 776 (cert. denied 510 U.S. 874) (Cal. 1993); and *Buzzanca* v. *Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
20. *Belsito* v. *Clark,* 644 N.E. 2d 760 (1994); and *J.F.* v. *D.B.,* 879 N.E. 2d 740 (2007).
21. *Arredondo* v. *Nodelman,* 622 N.Y. S. 2d 181 (1994).
22. Article IV, Section 1, of the U.S. Constitution.
23. 28 USCA, § 1738.
24. *Milwaukee County* v. *M. E. White Co.,* 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935).
25. *D.P.* v. *T.R.,* F-04079-10.