

THE PARENTAGE/SURROGACY PROJECT OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

Realities of Non-Biological Parentage (Parenthood; Filiation)

Patchwork Families & Adoption

ART (egg/sperm/mitochondria donor) or Surrogacy

Same-sex Couples

- No longer biological/genetic “father” and “mother”
- Parent(s) without genetic links
- 2 fathers; 2 mothers; multiple parents



Stability of Legal Status → Recognition by PIL?



II. HISTORY OF THE HCCH PARENTAGE/ SURROGACY PROJECT

- ◆ **2010 HCCH Council on General Affairs and Policy (CGAP)**: Preliminary Work
- ◆ **2015 HCCH CGAP**: Experts' Group(EG) to explore the “feasibility” of advancing work on the PIL issues surrounding the status of children, including issues arising from international surrogacy arrangements (ISAs)
- ◆ **EG**: 11 Meetings (since 2016) + Oct. 2022 Meeting → **Final Report for the 2023 CGAP**

Convention: Legal Parentage (LP) in general

Protocol: Legal Parentage (LP) established as a result of ISAs



Objective: Certainty, Predictability & Continuity of LP + Human Rights (UNCRC)
“Neither Supporting Nor Opposing Surrogacy” (neutral)



III. RECOGNITION OF LEGAL PARENTAGE

Methods of Establishing Legal Parentage (LP)

- (1) By Operation of Law (birth; legal presumption of paternity; possession d'état etc.)
- (2) Following a Legal Act of a (putative) parent (acknowledgement etc.)
- (3) By Decision of an Authority (usually judicial)
- (4) By Adoption



Recognition by Private International Law (PIL)

◆ Conventional PIL Approach for Recognition

(1)(2) Applicable Law; (3) Judgments' Recognition (*(2) or (3) also for adoption)

◆ Other Possible Avenues

Recognition of Public Documents (PD)

Recognition Approach? (for names in the EU)

IV. DRAFT CONVENTION



◆ Scope: Legal Parentage (LP) of All Persons → Feasibility Issue

Children Born from ART (details to be discussed)

Domestic Adoption? (not undermine the 1993 Intercountry Adoption Convention)

Domestic Surrogacy Arrangements?



◆ Recognition of Judgments (in addition to Recognition under national law)

Automatic Recognition

Indirect Jurisdiction (HR of the child or respondent etc.) + Final & Conclusive Decision

Grounds for Refusal (public policy; service of process; fraud etc.)

◆ Direct Jurisdiction/Uniform Applicable Law Rules?

◆ Rules for LP established without a Judicial Decision?

- Uniform Applicable Law Rules → [*Challenges for “Common Law” Jurisdictions \(lex fori\)*](#)

(Law of the Place of Birth + [subsequently] Law of the Child’s HR if beneficial)

- Recognition of Status (“Recognition Approach” as in the EU)? Not feasible.

◆ Rules of Public Documents (PD)



Evidentiary effects vs. Constitutive effects

(**Option 1**) Uniform Rule: only “Evidentiary Effects” (rebuttable presumption)
→ Added Value?

(**Option 2**) “Same Effects” as in the State of Origin (establishing the parentage)
→ Give More Effects to Foreign PD?

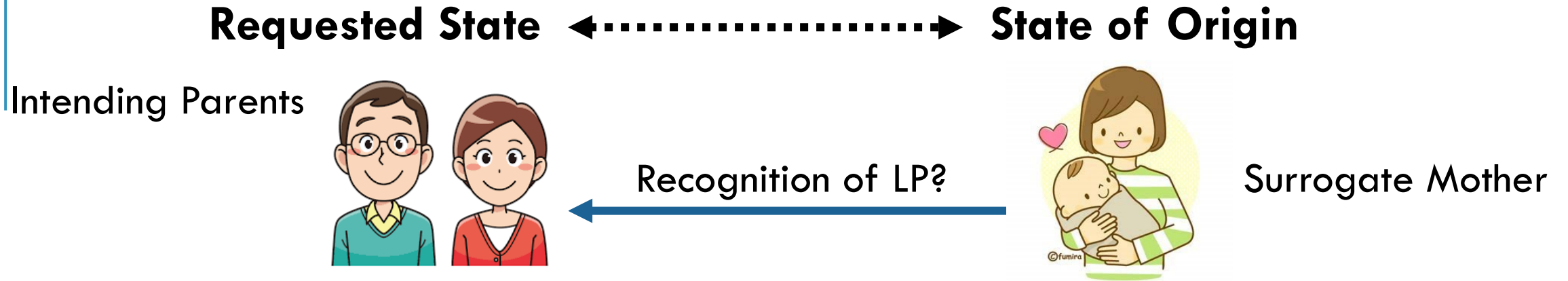
- Useful if combined with Uniform Applicable Rules
- Acceptance of PD: “Content” of PD (NL; some Latin American states)
- Recognition of Judgments (Germany) vs Transcription of PD (France)

◆ Multilingual Model Form/International Certificate

→ Facultative; Facilitate the Acceptance of PD
(Indicate: Content & Effects of the Domestic PD)



V. DRAFT PROTOCOL



Overarching Aims:

- Greater Predictability, Continuity and Certainty of LP
- Fundamental Rights of the Child, the Surrogate Mother, and the Intending Parents (UN-CRC)
 - Uniform Minimum Safeguards vs. Regulating Surrogacy (left to domestic substantive law)

Methods of Establishing LP:

Often by Operation of Law; Sometimes by Judgment

- First discuss Judgments Recognition; possibly extend to other methods of LP
(also “Recognition Approach” considered)

(1) “A priori” Approach: Ideal Cooperation, but Difficult to Achieve

(2) “A posteriori” Approach:

Recognition of Judgments (→ *Possibly extend to other methods of LP later*)

➤ **Common Rules**: Indirect Jurisdiction: Exclusively HR of the Surrogate Mother? Flexibility?
Grounds for Refusal: public policy; lack of notice etc.

➤ **Diverging Points**: Uniform Safeguards or Not

(Option 1) Traditional PIL Approach: Uniform Minimum Standards (SM’s consent, eligibility of IP, genetic connection, financial aspects etc.)

(Option 2) “Bilateralization” Approach: Country Profile; Asymmetric Choice of States

➤ **Remaining Issues**: Definition of ISAs (SM’s consent, in writing etc.); Certification;
Child’s Origin



Challenges: Approval of the HCCH Member States (CGAP)

- Divergent Domestic Legal Systems +Rapidly Developing Area
- Rights & Best Interests of Children
- Advantages of the “Recognition”
 - Stability of LP
 - Different from “Adoption”
 - Deter Arbitrariness of Intending Parents (divorce, handicapped child etc.)

VI. FUTURE PERSPECTIVES

Accommodating the Interests of Modern Families

- **Multi-parental Model**
(e.g., California, Ontario, British Columbia)
- **Bi-parental Model, but Multiple Persons with Parental Responsibility**
(e.g., England & Wales, Norway, Netherlands)
- **Re-introduction of “Simple Adoption”** (⇔ “Full Adoption”)



- **Parental Responsibility**: Brussels IIbis Regulation & 1996 Child Protection Convention
- **Intercountry Adoption**: 1993 Intercountry Adoption Convention

→ **New HCCH Instruments on Legal Parentage**

Ensure Stability of Legal Parentage (possibly incl. domestic adoption)
Clarify the Effects of Public Documents

