

Surrogacy World’s Perspective – A Review

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ABSTRACT

Nowadays surrogacy is a process practiced in many countries of the world and spark a deep interest in many couples that consider it as the only way to realize their dream to have a family. This article focuses on the increasing conclusion of international surrogacy agreements as a consequence of the different countries’ approaches, and aims to provide analysis of the different attitudes shown, specifically, by the Italian, Californian, Indian and English legal system. The article highlights the importance of the protection of human rights of people involved in surrogacy process underlining that, in particular with regard to the unborn child, it will be the best interest of the child to represent the guiding principle.

Keywords: Surrogacy, international surrogacy agreements, Italy, California, India, United Kingdom, protection of human rights, best interest of the child

INTRODUCTION

It is now a simple fact that surrogacy is a booming, global business¹. As a form of hetero-integration of the biological or physical inability of the woman to procreate, surrogacy is nowadays sparking a deep interest in many couples because it is often their only way to procreate. It is, in fact, with the help of a volunteer, the surrogate mother who “loans” her womb, that the intended parents have the possibility to realize their dream of having a child.

Therefore, the dissociation of sexuality and procreation and the reproductive self – determination right, to be included among the main effects arising from a surrogacy arrangement, represent the two aspects of the surrogacy process, having as a result a new culture of procreative love.

The entering into such arrangements is on the increase and the response of the States in the world to the question of surrogacy is disparate. There is a wide variety of approaches to surrogacy between States, and this is the reason why the so-called “reproductive tourism” phenomenon seems to be enhanced and strengthened.

It often results in a breach of territorial boundaries into countries where laws concerning assisted reproduction are more flexible.

Among the effects of the abovementioned variety there is, in particular, the proliferation of international surrogacy arrangements that involve more than one State, as a result of the different residence, nationality or domicile of the intended parents, donors and the surrogate mother.²

With regard to international surrogacy arrangements, the Permanent Bureau of the Hague Conference on Private International Law published, in 2011, a note entitled “Private International law issues surrounding the status of children, including issues arising from international surrogacy arrangements”. It enlightened problems that often flow from international surrogacy cases, concerning the establishment and recognition of the child’s legal parentage and the legal consequences, which arise from such a determination (e.g., the child’s nationality, immigration status, the attribution of parental responsibilities for the child)

The most worrying aspects are related to the legal status of the child born from a surrogacy agreement. Often the problem is resulting in children frequently being left with uncertain legal parentage, established according to the laws of different States, or in the worst cases, they are left stateless, trapped in the State of birth, unable to leave and sometimes, with no permission to stay.

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At this point, analyzing the different attitudes that some countries show toward surrogacy phenomenon, appears extremely important.

If there are some States where surrogacy is illegal, as Italy for instance, there are other countries where surrogacy is clearly regulated and totally accepted as a process. Moreover, if in some States both commercial and altruistic surrogacy is legal, in other countries, as the United Kingdom, just the latter can be practiced.

ITALY

In Italy, surrogacy is illegal. Pursuant to article 4, paragraph 6 of law no. 40/2004, *“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”*.³

The negative attitude shown by Italian legal system toward the conclusion of such agreements, which can be deduced from the regulatory level and from case law as well⁴, arises because the surrogate mother often ends up being seen merely as an “incubator” that will carry a child belonging to someone else in her womb for nine months.

Italian case law has always shown an ambiguous approach to surrogacy process. In fact, from the early 1989s⁵ the Italian judges held that these arrangements were void, pursuant to article 1418 of the Civil Code in conjunction with article 1346, due to the unlawfulness of the object that was both illegal and impossible.

Such agreements were considered unacceptable also from the moral and social point of view, because the commercialization of a function so high and delicate as motherhood brought the latter to be, inevitably, in sharp contrast with the concepts of morality and public order, resulting in a disruption of the sharpness of social relations⁶.

A different approach was shown in 2000 by the Court of Rome that granted an emergency measure pursuant to article 700 of the Civil Procedure Code, authorized a doctor to perform the implantation of the embryo, belonging to the intended parents, in the uterus of another woman who voluntarily had offered to carry the embryo on her own. Therefore, the Court held that surrogacy agreement was valid and legitimate, identifying it with a atypical contract, that, pursuant to article 1322 of the Civil Code, can be concluded by the parties only if it is directed to realize interests worthy of protection, according to the Italian law system. In that case, the interest worthy of protection was the desire of the intended parents to become parents, considered as an expression of the right to procreate, and

the necessity to protect life of the fertilized embryo, with respect of the principle that human life must be protected from the outset.

In addition, entering into a surrogacy agreement means breaking Italian criminal law, and specifically, article 567 of the Penal Code and article 269 of the Civil Code. In particular, it happens if surrogacy agreements are concluded in countries where it is the intended mother to be recognized and indicated as the legal mother of the newborn on the birth certificate.

Article 567 punishes whoever, through the replacement of a newborn, alters the civil status of the latter, or alters, in the formation of a birth certificate, the civil status of a newborn through false certifications, false statements or other falsities. Article 269 recognizes maternity in favor of the woman who gave birth to the child, who is, in the surrogacy process, the surrogate mother. Therefore, the allocation of maternity to a woman other (the intended mother) than the woman who has given birth to the child, through the indication of her name on the foreign birth certificate, and the consequent request of transcription of such indication in the Italian registrars, constitutes a break of the two abovementioned articles.

Nowadays, case law’s attitude is changing and Italian judges are showing a more favorable approach toward the transcription of foreign birth certificate issued after a surrogacy process.

CALIFORNIA

California is one of those States where surrogacy process is entirely accepted. Its surrogacy legal system is very different from Italian legal system, since it shows a very positive attitude toward the surrogacy process.

Gestational surrogacy represent the most widespread surrogacy process because of the total absence of a biological link between the surrogate (gestational carrier) and the newborn, which, where it does exist, would create a deep bond between them that could be very difficult to break.

A professional network of clinics, agencies and law firms help heterosexual and same sex couples, as well as singles, to realize their dream to create a family.

If Californian agencies, that recruit egg donors and surrogate mothers, support the intended parents in finding an egg donor and a surrogate, help them get in touch with them and, if necessary, also with a sperm bank; law firms draft the contracts between all the parties involved in the process.

From a legal point of view, it has essentially been a Californian well-written case law, to favors the completion of a number of surrogacy agreements that appear to increase and to establish, over the years, some key principles in the surrogacy field through an extensive interpretation of the concepts of motherhood and fatherhood under the Uniform Parentage Act.

In *Johnson v. Calvert* (1993), the Supreme Court of California⁷, addressed the issue of whether the genetic mother or the gestational mother of a child born from an in vitro fertilization procedure is the “natural” mother of the child, with all of the rights such status guarantees⁸. The Court held that the contract was valid, also in relation to the public order, and stated that if natural mother, pursuant to section 7000 of the Civil Code, is the woman genetically linked to the baby and that gave birth to him, when genetic consanguinity and giving birth do not coincide in one woman, to be considered as the natural mother is the woman who intended to bring about the birth of a child and to raise him as her own.

Therefore, it is the intention⁹ to become parents demonstrated by the signing of the contract and the consent given to access all of the necessary medical procedures that prevail on the biological relationship between the woman who gave birth to the baby and the child.

Subsequently, the Court of Appeal of California ruled the same principle of law in the case *In Re Marriage of Buzzanca* (1998)¹⁰ allocating paternity and maternity rights¹¹ to the intended parents who were not genetically related to the child. The Court decided to connect its decision to an extensive reading of the section 7613 of the Family Code, according to which a man who consented to the artificial insemination of his wife using a donated sperm is considered as the legal and natural father of the child¹².

In this case, the Court focused on the original intention of the couple, showed by the consent to procreate and to have access to all of the necessary medical procedures realized through a gamete’s donation.

In 2012, the Assembly of the State of California introduced a regulation to codify for the first time the best legal practices in relation to surrogacy agreements, which were already followed in practice by surrogacy lawyers, despite the absence of a specific law about surrogacy. So, the so-called AB 1217 (Assembly Bill No. 1217) represented the first milestone in the field of assisted reproductive law.

The aforementioned regulation confirms the need for the surrogate and the intended parents to be represented by separate independent licensed attorneys of their choosing

before entering into a surrogacy agreement which should contain some detailed information (date of execution of the contract, the egg donor’s or sperm donor’s identity, if not anonymous, and the intended parents’ identity). In addition, according to the AB 1217, the intended parents can file an action to establish the parent-child relationship with the child, before his birth, which permits them to obtain a judgment that recognize them as the legal parents of the baby, deleting any parental responsibility with regard to the surrogate mother and her husband. Consequently, it is the intended mother and the intended father to be indicated as the legal parents of the newborn on the birth certificate after the birth of the child.

To conclude, if we compare Italian and Californian legal systems, it is easy to notice that if from a practical point of view, a process like surrogacy could be carried out under the same evolutionary line, at a theoretical level, it is disciplined and faced in a completely different way.

INDIA

India is emerging as a leader in international surrogacy and is becoming increasingly popular with couples from all over the world because of the relatively low cost of surrogates¹³ and the growing number of women who want to act as surrogates, in return of payment.

In addition, Indian clinics are at the same time becoming more competitive, not just in the pricing, but also in the hiring and retention of Indian women as surrogates. Clinics charge patients between \$10.000 and \$28.000 for the complete package, including fertilization, the surrogate’s fee, and delivery of the baby at a hospital.

In India, where commercial surrogacy is practiced since 2002¹⁴, although regulation of surrogacy has always been considered necessary, it has not yet been formalized. At the federal level, several versions of surrogacy bills have been proposed but legislation has not yet been enacted. In 2010 the Assisted Reproductive Technologies (Regulation) Bill was issued by the Ministry of Health & Family Welfare of the Government of India, but it is still pending with the Parliament of India. This Bill intends to regulate the growing industry and protect the rights and interests of all parties concerned, including surrogates, intended parents, and the child to be born.

Moreover, currently in place are non-binding National Guidelines for Accreditation, Supervision & Regulation of surrogacy and assisted reproduction Indian clinics, promulgated by the Ministry of Health & Family Welfare, Government of India, the Indian Council of Medical Research and the National Academy of Medical Sciences

in 2005, and most provisions of the Guidelines mirror the provisions of the Draft Bill abovementioned.

The Draft defines surrogacy as “an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate”. A surrogate mother is “a woman who is a citizen of India and is resident in India who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocytes from another woman implanted in her to carry the pregnancy to viability and deliver the child to the couple/individual that had asked for surrogacy.

After having provided the definition of “surrogacy” and “surrogate mother”, it is the section 34 of the Bill that, indicating the right and duties of patients, surrogates and children, establishes that only gestational surrogacy is allowed and so it is banned to the surrogate donating her oocytes to the intended parents.

In addition, it is required that assisted reproductive technologies, including surrogacy, shall be available to married and unmarried couples as well as single persons for whom it would normally be possible to carry a baby to term, and that¹⁵ only Indian citizens between twenty one years and thirty five years of age shall be eligible to act as surrogates. If they are married, also the consent of her spouse shall be required¹⁶.

No woman shall act as a surrogate for more than five successful live births in her life, including her own children¹⁷ and shall not be allowed to undergo embryo transfer more than three times for the same commissioning couple or individual.

Surrogacy agreements would become legally enforceable and a surrogate mother shall relinquish all parental rights over the child. It is, therefore, the couple of intended parents or the single intended parent that shall be legally bound to accept the custody of the child irrespective of any abnormality that he may have, and the refusal to do so shall constitute an offence under the Bill.

All expenses related to pregnancy shall be borne by the intended parents that could also decide to give an additional monetary compensation for having her agreed to act such a surrogate.

At this point, it is important to focus on the legal status of the intended parents. The abovementioned Bill states that it is impossible for foreign intended parents from

countries where surrogacy is illegal, to arrange for their reproductive program in India¹⁸. The foreigners who want to enter into a surrogacy agreement must ensure and provide to the assisted reproductive technology clinic proper documentation.

To be required is a letter from either the embassy of the intended parents’ residence country in India, or from the foreign ministry of the country, stating that surrogacy is legal and that the newborn child will be able to return in the country as a biological child of the commissioning couple.

The newborn shall be considered as the legitimate child of the intended parents, either married or unmarried or of a single intended mother or father, and on the birth certificate the intended parents or the individual who commissioned the surrogacy, shall be indicated as legal parents.

At this point, to conclude, it is important to focus on the guidelines issued by the India’s Ministry of Home Affairs in 2013 that partially modified Indian surrogacy law in relation to the access to surrogacy process for foreigners. Pursuant to these guidelines, unmarried couples, single people and same-sex couples will no longer be eligible to have an Indian surrogate bear their child, as only “a foreign man and woman who have been married for a period of two years will be granted visas”.

UNITED KINGDOM

Surrogacy in the UK is regulated since the Surrogacy Arrangements Act was passed in 1985.

It is a very restrictive text, which prohibits the entering into a surrogacy arrangement on a commercial basis, allowing only surrogacy agreements that are informal and non-commercial, and this is called altruistic surrogacy¹⁹ that occurs when surrogate mother does not receive more than reasonable expenses, which are different depending on each case.

So, surrogacy is not illegal in the United Kingdom, but it is restricted by various legal rules. This is why many UK – based intended parents go overseas where surrogacy is more accessible.

It is a criminal offence in the UK to advertise that you are looking for a surrogate mother, you are willing to act as a surrogate mother, or you are a third party willing to facilitate the making of a surrogacy arrangement.

Moreover, commercial brokering is illegal. A third party, such a fertility clinic, cannot provide matching services for profit; this is why in the UK there are no professional

surrogacy agencies except some voluntary organizations, non-profit making, which operate fully within the law. By the way, this offence only apply to third parties brokering surrogacy arrangements and not those entering into the arrangement: surrogate mother or intended parents.

In addition, the law also establishes the unenforceability of surrogacy agreements. Such agreements are not legally binding, and this means the surrogate has the legal right to keep the child, even if is not genetically related to her.

In fact, according to the English law, the Human Fertilization and Embryology Act 2008, the woman who gives birth to the baby is considered as the legal mother of the child. So, the surrogate mother and if she has a spouse (either a husband, wife or civil partner), then the surrogate's spouse, will be recognized as the child's first and second legal parent²⁰ unless parenthood is transferred through a parental order or adoption after the child's birth²¹.

A parental order permanently transfers parental responsibility to the applicants, if the conditions required by the section 54 of Human Fertilization and Embryology Act 2008 are respected. In particular it is necessary that the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo (created using the gametes of at least one of the applicants), or sperm and eggs or her artificial insemination.

The applicants, that must be husband and wife, civil partners or two persons who are living as partners in an enduring family relationship, must apply for the order within six months of the date of the birth. It is required that, at the time of the application, the child lives with the applicants, either applicant (or both) are domiciled in the United Kingdom or in the Channel Islands or the Isle of Man and that both of them are at least 18 years old.

In conclusion, according to Human Fertilization and Embryology Act 2008, the court must be satisfied that the woman who carried the child, and any other person who is a parent of the child but is not one of the applicants, have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

The court must also be satisfied that no money or other benefit, other than "expenses reasonably incurred", has been given or received by either of the applicants for the making of the order, for any agreement related to the making of the order, for the handing over of the child to the applicants, or in the end, for the making of any arrangements with a view to the making of the order, unless authorized by the court.

CONCLUSION

From the above discussion, it appears that the different attitudes shown by the legal systems in the world toward the surrogacy process let the "reproductive tourism" phenomenon, initially mentioned, to increase. Consequently, it is necessary to ensure that the rights of all people involved in the procreative process are protected, including the unborn child, the intended parents and the surrogate.

In relation to the unborn child, international surrogacy arrangements raise obvious and very international child protection concerns from the uncertainty of the legal parental status, to the possible child abuse and trafficking of children born as a result of the arrangements. And, the principle in respect of which all the decisions regarding the children born from such agreements must be taken, and that international case law have focused on over the years, is the principle of the best interest of the child²².

According to this principle, a paramount consideration has to be given to the full exercise of the rights of the child or children born from a surrogacy agreement, and to the development of such rights with respect to the rights of any other person.²³

In relation to surrogate mothers, safety and well-being of these women are the most important elements to consider and to protect in relation to the conclusion of surrogacy agreements, above all if the surrogate mother lives in conditions of poverty. In these circumstances, concerns have arisen over the possibility that women may be coerced, or even forced, into becoming surrogate mothers.

At this point, it is interesting to understand which are the reasons and motivations that usually lead a woman to become a surrogate. From an interview conducted with surrogate mothers from California, India, South Africa and UK, it resulted that Californian, South African and English surrogates want to help people with infertility problems to create a family, since they struggled with their personal infertility. Differently, Indian surrogates decide to give birth to babies for third people for financial reasons and, specifically, to pay for their children's education.

To conclude, if on one hand a surrogacy agreement appears as an innovative reproductive agreement which help people with infertility problems to scientifically extend their natural human ability to reproduce, and let them realize their desire for procreation. On the other hand, it raises problems and concerns related to the necessity of guaranteeing a strong protection of all the people involved.

Therefore, it is recommendable, the creation of channels of communication between States that could be useful also in order to have an effective and a uniform international regulation of such arrangements in order to avoid any kind of discrimination that could arise from applying the different laws of the world.

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