

**The private international law issues surrounding the states of children, including issues arising from international surrogacy arrangements.**

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The Hague conference project on this issue has proceeded to its third meeting of experts at the Hague on 6-9 February 2018.

The project has arisen because of changes in family patterns and advances in medical science which can lead to uncertainty in some situations as to the identity of a child's legal parents both as a matter of domestic law and internationally.

In recognition of the advances, the globalisation of the issues, and the centrality of a child's fundamental human rights (right to identity for example) there is an urgency to the issues under discussion.

The project is in no way limited to international surrogacy arrangements however it is clear that those are a primary driver due to the concerns that have arisen as to exploitation and because of the diverse international approaches that exist in respect of such arrangements (ISAs).

In 2015 the Council of General Affairs and Policy of the Hague Conference (the Council) convened an expert group to explore the feasibility of advancing work in this area.

The experts met in February 2016, 2017 and 2018. The latest report of the Experts Group is available on the Hague Conference website at <https://www.hcch.net/fr/projects/legislative-projects/parentage-surrogacy/>.

A synopsis of the main issues arising from that report are as follows:-

- a. The possible provisions with respect to the recognition, by operation of law, of foreign judicial decisions on legal parentage;
- b. The feasibility of and the possible ways forward when considering the recognition of legal parentage when recorded in a public document (such as birth certificates);
- c. Whether legal parentage which arises by means of ISA or ART requires a particular or differentiated approach.

**A. Recognition of foreign judicial decisions on legal parentage – possible provisions for an international instrument.**

The experts agreed that legal parentage and status from which children derive rights is central to the work of the group. The group should explore the way that such provision

would provide predictability, certainty and continuity of legal parentage in international situations for children. The group also recognised that any such future instrument should not be limited to children under the age of majority, as status is a lifelong matter. The objects of such an instrument would be to provide for recognition of judgments concerning legal parentage given in one state in another state and facilitate co-operation between authorities in contracting states in order to achieve the purposes of the instrument. It was recognised by the group that judicial decisions as they relate to legal parentage are status decisions and are not directly enforceable as such.

As with other conventions it was agreed that certain matters should be excluded from any such future instrument including the name and forenames of a child, maintenance obligations, parental responsibilities and measures relating to the personal property of the child, trusts and succession, nationality and additionally matters already covered by existing Hague Conventions.

However in respect of the area of adoption the group noted that it might be appropriate in respect of decisions such as second adoptions (in ISA type cases) for those to be recognised under a future instrument. The group however acknowledged that it needs to be carefully constructed so as not to undermine in any way the 1993 Hague inter-country adoption

convention. It was agreed that recognition of judicial decisions should occur by operation of law subject to the satisfaction of certain indirect grounds of jurisdiction. Those might include the place of habitual resident of the respondent or the place for habitual resident of the person whose parentage is the subject of the proceedings. The proximity test should apply. There was less support for nationality as a connecting factor for recognition.

Grounds for refusal of recognition were discussed by the group. It was agreed that there should be limited non-recognition grounds such as public policy taking into account the best interest of a child, procedural fairness, the right to be heard in such proceedings and parallel proceedings involving the parentage of the same person. Further consideration in respect of grounds including for fraud is needed.

The group considered that some co-operation mechanisms are in principle valuable but the issue of cost and bureaucracy of providing the same would have to be carefully considered.

The group found that there was no reason to differentiate between establishment of legal parentage and contestation of legal parentage and they should be treated under the same provisions.

**b. Legal parentage and public documents.**

There is significant diversity in types of birth certificates and other public documents that record legal parentage. In many jurisdictions birth certificates only are only of evidential weight as to legal parentage. Legal parentage usually arises by operation of law and therefore further consideration needs to be given as to how parental status could be recognised where there is no judicial decision on parentage. Concerns were raised in respect of applicable law rules as to the practicality of applying foreign law given the diverse policy and divergent choices of law. Some experts raised the benefit of having common law rules on formal validity of documents and the possible use of multilingual forms to increase the recognition of birth certificates however that of itself would not guarantee continuity of legal parentage. No approach should be adopted that would create confusion or complexities or undermine the evidential weight currently given to birth certificates.

**Legal Parentage in the context of international surrogacy arrangements and Assisted**

**Reproductive Technologies**

This discussion proved the most lively and raised the most difficult and complex issues. The question in essence is whether general private international law rules on legal parentage could apply to cases involving ISA's. Some experts believe it would be preferable to have only one set of rules which are broad enough to accommodate ISAs and ART. Other experts however believed it would be necessary to create a separate set of rules and provisions for ISAs. The group noted the continued concerns at international level and the public policy considerations that arise including the potential for exploitation in such arrangements. The group identified that public policy and the best interest of the child are the key issues and which warrant further discussion as project drivers.

A discussion took place as to the possibility of having an optional protocol to a general instrument into which states could opt in or opt out in respect of ISAs. There was also a general discussion about whether the wider instrument should create a co-operative mechanism in order to safeguard the best interests and rights of children conceived and born of ISAs. Other experts had a concern with this approach and it is a matter that requires further discussion. In this regard some experts favoured a convention not dis-similar to the 1993 Inter-country Adoption Convention whereas others were firmly of the view that it was not an appropriate approach to ISAs. This is likely to produce an area of continued debate.

ART – the group agreed that cases of ART not involving a third part donor do not require a different approach to legal parentage in general.

### **Conclusions and recommendations**

The group recommended that the councils should be requested to provide for the continuation of the work of the group and the next year's experts group should focus on :-

- a) a next meeting of the Experts' Group should focus on: – deepening the discussion regarding uniform applicable law rules for parentage, including how such rules might operate together with public documents which record legal parentage; – further analysing the possibility of recognising or accepting foreign public documents which record legal parentage; – refining possible provisions regarding the recognition of foreign judicial decisions, taking into account the conclusions of the Group contained in this report;
- b) another meeting of the Experts' Group should focus specifically on ISAs. In particular, the meeting would consider the feasibility of the possible application of agreed general private international law rules on legal parentage to ISAs and the possible need for additional rules and safeguards in these cases, including the possibility of a Protocol for ISAs cases.

The list of experts and observers is annexed to the report on the HCCH website. The group has had the benefit of a general consistency in the identity of the experts with the majority of experts and observers (including that of the IAFL) having attended all meetings since the inception of the project. The issue of the form of any instrument will be controversial and will 'draw lines'. The central question is what is it about ISAs that would cause them to be treated differently in terms of pre-arrangement and pre-conception requirements/assessments from conventional family formation and the attribution of legal parentage? The issue of 'compensated' or 'commercial' arrangements will have to be grappled with and raises public law issues. In the meantime this is not the only project focusing on ISAs. A UN report from the perspective of the sale of children and child trafficking is expected to be released this spring and a number of states are considering legislation or changes to legislation in respect of ISAs. What is clear is that these issues are firmly within the remit and interest of the IAFL both on a policy and practitioner level and it is to our credit that we are part of the process.