EVERY SPERM IS SACRED[1]

(Second emission)

A discussion of how to address concerns raised by commercial surrogacy cases through a combination of the application of the (American) 2017 Uniform Parentage Act and private contract.

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The medical process of Surrogacy can be gestational or traditional. In traditional surrogacy, the surrogate either undergoes artificial insemination or IVF with sperm from the male or from a sperm donor. The surrogate herself provides the egg and is therefore genetically related to the child. In gestational surrogacy, the surrogate carries and delivers a child created from the egg and the sperm of the commissioning parents, or some combination of donor egg, donor sperm, or donated embryo.

Financially, surrogacy arrangements can be altruistic or commercial. In altruistic surrogacy, the surrogate may be reimbursed for her expenses, but nothing more. In commercial surrogacy, the surrogate is compensated for her services in addition to being reimbursed for her expenses. Victoria regulates altruistic surrogacy through the

[1] Every Sperm is Sacred - Monty Python's The Meaning of Life, https://www.youtube.com/watch?v=fUspLVStPbk

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Patient Review Panel.[4] "The role of the Patient Review Panel (the Panel) is to determine applications by individuals and couples who wish to access assisted reproductive treatment where permission to do so is required under the Assisted Reproductive Treatment Act 2008 (the ART Act)."[5] Commercial surrogacy is banned in Australia. Nevertheless, Australian children are being born to surrogates as a result of commercial arrangements, which can result in litigation and unintended, often heart-breaking, consequences for the families and the children born of these arrangements. As in Australia, various jurisdictions in the United States, including North Carolina are grappling with the issues raised by surrogacy and other forms of Assisted Reproductive Technology.

Assisted Reproductive Technology (hereinafter ART) gives rise to four major legal issues: (1) the definitions of the word "parent" and the establishment of parentage (2) how those definitions affect the citizenship of children of ART, (3) the legal status and ownership of embryos, and (4) the remedies and effects if the contracts executed pursuant to ART are breached or found to be invalid. This paper will touch on all four issues but is focused on the determination of parentage of children resulting from gestational surrogacy.

Specifically, this paper looks at a sampling of surrogacy cases[6] in which circumstances did not go as planned to determine how those cases might have been

[4] https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/perinatal-reproductive/assisted-reproduction/patient-review-panel/

[5] http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/3ADFC9FBA2C0F526CA25751C0020E494/$FILE/08-076a.pdf

[6] Including some of the cases described in Mark Hanna's paper "Every Sperm Is Sacred: the torrid tale of international commercial surrogacy is there a solution?" (2018) (unpublished)

addressed under the 2017 edition of the Uniform Parentage Act (hereinafter UPA) [7], and/or how the issues in those cases could be addressed in the commercial surrogacy contract. The issues in the cases discussed herein include situations in which the commissioning parents divorced, the commissioning parents rejected at least one of the children born pursuant to the contract, the commissioning parents died, the citizenship of the child was uncertain, the surrogate died because of issues related to the pregnancy, and situations in which the commissioning parent was a pedophile or an unfit parent.

What is the UPA? Each state and territory in the United States has its own set of laws addressing family law issues.[8] In 1892, the Uniform Law Commission (ULC) was established in California to provide "states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." [9]

One set of proposed legislation created by the ULC was the Uniform Parentage Act. In July 2017, the ULC updated the Uniform Parentage Act (UPA) for the first time since 2002.

> The ULC adopted the Uniform Parentage Act (UPA) in 2000, which was a complete revision of a 1973 uniform act. In 2002, further changes to the UPA were promulgated, extending the act to also provide balanced coverage to questions of parentage arising in nonmarital circumstances. The UPA (as revised in 2000 and amended in 2002) has been adopted in

[7] Uniform Parentage Act, 2017. Available at http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017)

[8] For a list of state laws on surrogacy as of May, 2016, see Finkelstein, MacDougall, Kintominas, and Olsen, Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking Report of the Columbia Law School Sexuality & Gender Law Clinic (May 2016). Available at: https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf

[9] http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC Accessed in June 2018.

> 11 states. The UPA covers a number of topics, including: the parent-child relationship, voluntary acknowledgements of paternity, a registry of paternity, genetic testing, proceedings to adjudicate parentage, and children of assisted reproduction. As a result of the recent Supreme Court decision in Obergefell v. Hodges, as well as other developments in the states since the last revision of the UPA, the committee drafted amendments to the Uniform Parentage Act. The scope of the proposed amendments is limited to issues related to same sex couples, surrogacy, and the right of a child to genetic information. [10]

This version has ten sections and is 98 pages long and deals with unmarried parents, same sex parents, adoption, de facto parents, and children born through assisted reproduction. The Family Law Council of the state bar in my state of North Carolina is considering whether or not to introduce legislation adopting all, part, or an edited version of the UPA.

Who's Your Daddy?

Baby Manji: A Japanese couple went to India where they hired a surrogate to give birth to a child whose embryo was created with the commissioning father's sperm and a donor egg. [11] The commissioning parents divorced before the birth and commissioning mother rejected the child.[12] The commissioning father was not able to obtain a passport for the child in India because the Guardians and Wards Act of 1890, India "does not recognize a single man adopting a female child . . ."[13] Since the surrogate mother's parental rights were terminated when the child was born, she had no Indian parent and therefore was not considered an Indian citizen.[14] Japan, however, refused to issue the child a passport because it said that the child's nationality came from that of the

[10] http://www.uniformlaws.org/Committee.aspx?title=Parentage Act (2017)
[11] Trisha A. Wolf, "Why Japan Should Legalize Surrogacy" (2014) 23 Pacific Rim Law and Policy Journal 461 at 473-474
[12] *Id*. at 473.
[13] *Id*.
[14] *Id*.

biological mother.[15] It took about three months for the commissioning father to obtain a visa, so that he could bring the child back home with him to Japan.[16]

The case of Baby Manji involved two issues (1) the divorce of the commissioning parents, which resulted in the commissioning mother rejecting the child and (2) the citizenship and parentage of that child.

Indian citizenship can be acquired by birth, descent, registration and naturalization.[17] Specifically, the child in this case would only be a citizen of India if India recognized the commissioning parents as the legal parents of the child and at least one parent was a citizen. In Japan, nationality is based on parentage,[18] giving birth establishes maternity, and marriage to the birth mother establishes paternity.[19] Since the commissioning father was not married to the woman who gave birth to the child, Japan did not recognize him as the father and considered the child to be a citizen of India (even though India did not grant the child citizenship either).[20]

A child born in Australia is only a citizen of Australia if one of the parents is a citizen of Australia.[21] If neither parent is a citizen, then the baby is a temporary resident and has the same status as the visa held by the parent(s).[22] So if the commissioning parents are from a country that does not recognize either of them as parents, then the resulting child, born in Australia to foreign parents, is without a country.

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[15] *Id*.
[16] *Id.* at 474.
[17] https://indiancitizenshiponline.nic.in/acquisition1.htm accessed June 27, 2018.
[18] MIZUNO Noriko, "PARENT-CHILD RELATIONSHIP IN THE JAPANESE CIVIL CODE: Regarding Medical Technology for Reproductive Treatment," GEMC Journal, University of Tokyo. Accessed June 27, 2018. http://www.moj.go.jp/ENGLISH/information/tnl-01.html
[19] http://www.law.tohoku.ac.jp/gcoe/wp-content/uploads/2010/03/gemc_02_cate3_2.pdf
[20] Balazo, Patrick, "Cross-border Gestational Surrogacy in Japan and the Specter of Statelessness" Statelessness Working Paper Series, No. 2017/5, Institute on Statelessness and Inclusion, http://www.institutesi.org/WP2017_05.pdf
[21] Australian government, Department of Home affairs, https://www.homeaffairs.gov.au/trav/citi
[22] Id.

Section 805 of 2017 UPA states that a change in the marital status of the commissioning parents (or the surrogate) has no effect on a surrogacy contract. [23] Therefore, under the UPA, the commissioning mother would still be the child's legal mother. Furthermore, under the UPA, the commissioning father would not need to adopt the child because he would already be the child's father because the UPA defines him as a parent.

In North Carolina, there is exactly one statute, obviously outdated, regarding ART. It states:

> Status of child born as a result of artificial insemination. Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique. [24]

You Can't Take It With You

Shen Jie and his wife, Liu Xi (Laos/China case): This case involved the embryos of a Chinese couple who both died days before the embryos were to be implanted in the wife.[25] The couple's parents (both sets)[26] wanted the embryos in order to hire a surrogate and have a grandchild.[27] Eventually the grandparents succeeded in getting access to the embryos and having the child born with the use of a Laotian surrogate approximately four years after the death of the couple. [28]

[23] http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC
[24] N.C.G.S. §49A-1 (2018)
[25] Hanna
[26] https://secondnexus.com/science/health/china-fertilized-embryos-grandparent-custody/
[27] Hanna at 4
[28] *Id.*

The UPA, which is intended to define parentage, does not address the legal status of embryos. Section 708 of the 2017 UPA addresses children born of ART. It states that if the commissioning parent (or parents) had a written agreement for assisted reproduction, but die before a transfer of embryos, then the deceased individual(s) are NOT considered the parent(s) of the child conceived by ART unless: 1. the individual(s) consented in a record that if ART were to occur after the death of the individual, the individual(s) would be a parent of the child; or the individual's intent to be a parent of a child conceived by ART after the individual's death is established by clear-and-convincing evidence; AND 2. the embryo is *in utero* not later than [36] months after the individual's death; or the child is born not later than [45] months after the individual's death.[29]

Of course, in this case, there is no indication that Shen Jie or Liu Xi left instructions as to what should happen to the embryos in the event of the death of both parents, so pursuant to the 2017 UPA they would not be considered parents.

[29] SECTION 708. PARENTAL STATUS OF DECEASED INDIVIDUAL.
(a) If an individual who intends to be a parent of a child conceived by assisted reproduction dies during the period between the transfer of a gamete or embryo and the birth of the child, the individual's death does not preclude the establishment of the individual's parentage of the child if the individual otherwise would be a parent of the child under this [act].
(b) If an individual who consented in a record to assisted reproduction by a woman who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if:
(1) either:
(A) the individual consented in a record that if assisted reproduction were to occur after the death of the individual, the individual would be a parent of the child; or
(B) the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and
(2) either:
(A) the embryo is in utero not later than [36] months after the individual's death; or
(B) the child is born not later than [45] months after the individual's death.

While not applicable in the case of Shen Jie or Liu Xi, (since their parents hired the surrogate as opposed to the deceased couple), in the chapter on surrogacy, Section 810 of the 2017 UPA addresses the situation in which the commissioning parents of a child born of surrogacy die before the child is born. The act provides that the commissioning parents are the legal parents of the child unless the agreement states otherwise so long as the transfer of an embryo occurs before the death of a commissioning parent or not later than [36] months after the death of the commissioning parent(s), or birth of the child occurs not later than [45] months after the death of the commissioning parent(s).[30]

The deadlines are, in part, designed to prevent the birth of children from the embryos many years, perhaps even decades, after the estate of the commissioning parent has been settled.[31] The longest time a human embryo has been stored is around 30 years, but once embryos have been frozen, they can be stored indefinitely. [32]Those who have left embryos in storage for more than a decade typically do not use them, however frozen embryos have been thawed nearly 20 years and produced healthy babies. [33]

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[30] SECTION 810. GESTATIONAL SURROGACY AGREEMENT: PARENTAGE OF DECEASED INTENDED PARENT.
(a) Section 809 applies to an intended parent even if the intended parent died during the period between the transfer of a gamete or embryo and the birth of the child.
(b) Except as otherwise provided in Section 812, an intended parent is not a parent of a child conceived by assisted reproduction under a gestational surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:
(1) the agreement provides otherwise; and
(2) the transfer of a gamete or embryo occurs not later than [36] months after the death of the intended parent or birth of the child occurs not later than [45] months after the death of the intended parent.

[31] Compare with the ART Act of 2008, part 3, section 33, which limited the period of time an embryo can be stored to 5 years unless the Patient Review panel approves a longer period of time.

[32] https://www.reprotech.com/services/embryo-storage/

[33] *Id.*

In a similar case in London, a 60 year old British woman ("the grandmother") fought and won the right to carry her own grandchild using the frozen eggs of her deceased daughter.[34] In that case, the daughter, who died at age 27 from cancer, had arranged to have her eggs frozen in the hope that she would recover, but if not, that her mother could use the eggs to produce a grandchild.[35] Unfortunately, the daughter did not complete the required paperwork correctly. In the United Kingdom, ART is regulated by an independent commission.[36] The commission has the ability to overlook any irregularities with the paperwork if there is sufficient evidence of informed consent. [37] The commission found that there was not sufficient evidence.[38] The grandmother appealed and the United Kingdom's Court of Appeal ruled that there was sufficient evidence of consent and ordered that the frozen eggs be released to the grandmother. [39] The daughter died in 2011 and the grandmother did not win her case until June of 2016.[40] Therefore, based on the deadlines in the UPA, if the frozen eggs of the deceased daughter were successfully brought to term, the resulting child would not be the daughter's child, but would be the daughter's sibling.

Again, the UPA, being an act that defines parentage and not an act that regulates ART in general, does not address legal status or ownership of embryos

[34] Bever, Lindsey, "60 year old's battle to give birth to her own grandchild," Washington Post, July 5, 2016. https://www.washingtonpost.com/news/morning-mix/wp/2016/07/05/a-60-year-olds-brave-battle-carry-her-own-grandchild-to-fulfill-her-daughters-dying-wish/?utm_term=.992d3d454e8d
[35] Lindsey
[36] U.K.'s Human Fertilisation and Embryology Authority, https://www.hfea.gov.uk/
[37] Mr. and Mrs. M v. HFEA, [2016] EWCA Civ 611. https://www.judiciary.uk/wp-content/uploads/2016/06/mr-mrs-m-v-hfea.pdf
[38] *Id.*
[39] *Id.*
[40] *Id.*

An important factor in the effect of the deadlines in the UPA is the legal status of the embryos.[41] If access and control of the embryos is not addressed elsewhere, by law or by contract, then the deadlines in the UPA have the unintended consequence of frustrating the intent to produce children of the commissioning, but now deceased, parents given the time it would take to litigate the status of the embryos.[42]

In the United States, a contract for ART services typically specifies that the embryos will be destroyed if either commissioning parent objects to the implanting of the embryos. If the ART contract is silent on that issue, courts in the U.S. have upheld the right of the party who does not want to become a parent.[43] The appendix to this manuscript contains a sample contract for ART services that includes options for the disposition of embryos upon the death or divorce of the commissioning parents.

Buy One Get One Free, no coupon required

As in the case of an Australian couple who, wanting a girl, abandoned the twin brother, to the surrogate, regulation is needed when one child is commissioned but more than one is born. [44] Section 804(5) of the 2017 UPA states that "the intended[45] parent or, if there are two intended parents, each one jointly and severally, immediately

[41] Compare with ART Act 2008, Part 5, section 46, which limits the posthumous use of gametes or an embryo to the deceased person's partner or a surrogate commissioned by the deceased person's male partner in an altruistic arrangement, if the deceased person provided written consent and the procedure is approved by the Patient Review Panel

[42] One possible improvement to the UPA might be a provision that tolls the deadlines if litigation is initiated regarding access and control of the embryos.

[43] Davis v. Davis, 842 S.W.2d 588, 1992 Tenn. LEXIS 400 (Tenn. June 1, 1992), For further discussion, see Persky, Anna Stolley, "Deep Freeze, Contentious battles between couples over preserved embryos raise legal and ethical dilemmas," ABA Journal, June 2016. http://www.abajournal.com/magazine/article/contentious_battles_between_couples_over_frozen_embryos_raise_legal_and_eth/

[44] http://www.thehindu.com/news/national/australian-couple-abandons-child-from-indian-surrogate-mother-bolsters-campaignfor-strict-laws/article6487751.ece).

[45] The UPA refers to any commissioning parent as an "intended" parent

on birth will assume responsibility for the financial support of the child regardless of number, gender, or mental or physical condition of the child."[46]

The ART Act of 2008, requires that all of the embryos implanted in a surrogate be formed from the same two people, i.e. two men in a same sex relationship cannot both contribute sperm, two women in a relationship cannot both contribute ova. [47] The UPA allows the use of more than one sperm donor or more than one egg donor to produce embryos. The embryos may then implanted in a single surrogate, which can result in a set of twins (or more) where one twin is biologically linked to one commissioning parent and the other twin is biologically linked to the other commissioning parent.[48] This result may create a quagmire in determining the child's citizenship.

If a child is born in the U.S., or has a legal parent who is a U.S. citizen, then the child is a U.S. citizen. So a child born of surrogacy either in the U.S. or to a U.S. citizen cannot be "stateless', depending on the definition of the word "parent."

Unfortunately, the U.S. State department appears to be limiting the word "parent" to biological parents when dealing with a same sex couple. For example, Elad and Andrew Dvash-Banks are a same sex male couple who married in Canada.[49] They had twin sons born via egg donation and surrogacy in 2016.[50] Both fathers contributed sperm and one son, Aiden, was the genetic offspring of one father, namely Andrew, and

[46] UPA 804(5)
[47] Assisted Reproductive Treatment Act 2008, Part 3, Section 27(1)
[48] The UPA also allows for situations with more than two parents, so multiple births could produce children of multiple genetic heritage, all born of one surrogate a few minutes apart. See 2017 UPA, Section 613, Alternative B.
[49] Vaughn, Rich, "Same-Sex parents Sue State Department over Genetics-based Denial of Citizenship, January 25, 2016. https://www.iflg.net/art-siblings-denied-citizenship-genetics/cite
[50] *Id.*

the other son, Ethan, was the genetic offspring of the other father, Elan. When they moved to the U.S., the U.S. consulate forced them to undergo DNA testing to pursue citizenship for the twins. Andrew was an American citizen and Elan was an Israeli citizen. The US State Department granted Aiden citizenship but denied citizenship to his brother Ethan, despite the boys being born of the same egg donor, the same surrogate, and only one minute apart. [51]

A married female couple who were living in London found themselves in the same situation.[52] One was a U.S. citizen and the other was Italian. Each woman had a daughter born during the marriage. Each used her own egg and an anonymous sperm donor.[53] Both women were listed on the birth certificates for both daughters.[54] However, when they came to the U.S., they were forced to undergo DNA testing, and the daughter born to the Italian mother was denied citizenship, while her sister, born of the American mom, was granted citizenship. [55] The U.S. State department does not require DNA testing for heterosexual couples seeking citizenship of their child born abroad,[56] nor would a biological relationship be required since, for example, the children might be adopted. [57]

Let's Make a Deal

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] U.S. Department of State, Bureau of Consular Affairs. https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html

The provisions and the enforcement of the surrogacy contract is another avenue, in addition to regulation, in creating protections for the parties and the resulting children. For example, in the case of Vagehela, the surrogate died when 8 months pregnant.[58] In the contract, the surrogate and her husband had waived all rights to sue the commissioning parents.[59]

The UPA does not address injury to the surrogate and the surrogacy contracts that I have reviewed uniformly included provisions that the surrogate, and her husband if any, assume all risks related to the pregnancy. Likewise in those contracts, with a few exceptions related situations in which the surrogate's behavior puts the fetus at risk, the commissioning parent(s) assume all risks with regards to the results of the pregnancy, i.e. the gender, health and number of children, as well as the surrogate terminating the pregnancy. However, Section 803(7) of the 2017 UPA does require that the surrogate be represented by an independent attorney paid for by the commissioning parents. That attorney would have the opportunity to negotiate further protections. One such protection for the surrogate's family would be the purchase of a term life insurance policy for the benefit of the surrogate paid for by the commissioning parents. In the appendix to this manuscript, I have provided you with a sample surrogacy contract which contains such a provision. Another option could be the purchase of a disability or umbrella insurance policy as well.

[58] Hanna at 4
[59] *Id.*

More lessons about drafting contracts in surrogacy cases can be learned from the from the Stiver case which occurred in Michigan in 1992. [60] In the Stiver case, the child was born with severe birth defects. The surrogate believed the defects were the result of the commissioning father's sperm having a sexually transmitted disease, which was not tested by the clinic prior to the artificial insemination.[61] Upon learning of the child's condition, the commissioning father abandoned the child. [62] Additionally, the surrogate was pregnant by her husband at the time of the procedure, and the resulting child was not the biological child of the commissioning father.[63] The surrogate, having been exposed to the infected sperm, passed the disease to the child, and the child was born with hearing loss, mental retardation, and severe neuro-muscular disorders. [64]The surrogate sued the clinic for negligence.[65] The 6th Circuit Court of Appeals, in a case of first impression, held that the clinic had an affirmative duty based on having a "special relationship" with the parties and the child, and therefore could be sued for damages for a breach of that duty. [66] A special relationship resulting in an affirmative duty, arises "because the person upon whom the duty to act is imposed has assumed some special task or role and expects a benefit or profit"[67] and the injured party is particularly vulnerable or has placed themselves in the care of the other party.[68] In the Stiver case, there were no statutory laws in effect in the jurisdiction at the time, and the contract for

[60] Stiver v. Parker, 975 F.2d 261 (1992), available at https://law.justia.com/cases/federal/appellate-courts/F2/975/261/163461/
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Steve Jasper, Congratulations It's a Tort: Expanding the Scope of Duty in the Surrogacy Setting, 67 Mo. L. Rev. (2002) at p. 427. Available at: http://scholarship.law.missouri.edu/mlr/vol67/iss2/10

the arrangement did not have any provisions for testing either party for disease, or even a provision to give the surrogate a pregnancy test.[69] The surrogate was not provided any counseling and the attorney who advised her was provided by the clinic. [70]

Section 812 of the 2017 UPA allows the parties to sue for damages for breach of the surrogacy agreement as well as any other remedy allowed by law or equity. [71] The only exception is specific performance in some instances, specifically, that while she can be sued for damages, the surrogate cannot be forced to become pregnant, undergo an abortion, not have an abortion, or undergo any medical procedure. [72]

At least in California, statutes regulating commercial surrogacy survived a constitutional challenge. In the case of C.M. vs M.C., the Court of Appeals in California held that the gestational surrogate did not have a claim against commissioning father for custody of the three children born of the arrangement, despite the commissioning father having requested that she have an abortion, his statements that he did not want the children, and his alleged inability to care for them. [73] The 50 year old commissioning father was deaf, mute, living in the basement of his elderly parents, and his sister signed an affidavit claiming the children were neglected.[74] The father denied the allegations, and moved to dismiss the case because the gestational surrogate had no parental rights under California law.[75] Commercial surrogacy is allowed in California[76],

[69] Stiver.
[70] *Id.*
[71] UPA, Section 812 (2017)
[72] UPA Section 812 (d) (2017)
[73] C.M. v. M.C., Cal. App. 2nd (2017) available at https://caselaw.findlaw.com/ca-court-of-appeal/1768722.html
[74] *Id.*
[75] *Id.*
[76] Cal. Family Code, §7960, et seq.

and the case turned on whether the relevant statutes were constitutional [77] and whether the gestational surrogate had the right to try to invalidate the surrogacy arrangements.[78] The court held that the best interest of the children was not an issue before the court, and that the contract, and the relevant statutes allowing commercial surrogacy, were valid and enforceable. [79] The surrogate appealed to the U.S. Supreme Court, but her petition for the case to be heard was denied. [80]

Not Every Sperm is Actually Sacred

The most horrifying surrogacy cases involve pedophiles hiring surrogates to have children to be sold or abused by the commissioning parent. Despite documented cases of abuse, [81] the 2017 UPA does not address the problem. For example, the man from Victoria, AU, who, in 2016 was sentenced to 22 years for sexually abusing his twin daughters born of surrogacy, as well as convictions for sexually abusing his nieces and possession of child pornography.[82] The married man had gone overseas and became a father using a donor egg from the Ukraine, a surrogate from Asia, and his own sperm.[83] While, 2017 UPA Section 802(b)(3) requires that each commissioning parents complete a mental health consultation by a licensed mental health professional; the act is silent on what that mental health consultation (not evaluation) is intended to do, or whether it

[77] *See also*, Johnson v. Calvert, 5 Cal. 4th 84 (1993) and In re marriage of Buzzanca 61 Cal. App. 4th 1410 (1998) both finding that the California statutes allowing commercial surrogacy are constitutional.
[78] C.M. v. M.C.
[79] *Id.* at p. 32
[80] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-129.html
[81] Hanna. See also https://www.sundayguardianlive.com/lifestyle/case-exposing-double-standards-norways-cps in which a Norwegian child psychiatrist who is the father of two children born through surrogacy was charged with possession of child pornography.
[82] https://caselaw.findlaw.com/pa-superior-court/1190217.html
[83] *Id.*

includes a sex offender risk assessment. There is no requirement that the parties provide a criminal background check, to include domestic violence reports or that the parties have conducted a search of the relevant Sex Offender Registries, which are available on the internet. [84] There is no requirement that a valid surrogacy contract must contain prohibitions against any of the parties being listed on a sex offender registry or having a criminal history of domestic violence or child abuse offenses.[85] Given that 2017 UPA §808 (a) states that "a party to a gestational surrogacy agreement may terminate the agreement at any time before an embryo transfer by giving notice of termination in a record to all other parties" [86]then at a minimum, the UPA should provide the surrogate and both commissioning parents with the obligation to discover that information and then decide whether or not to opt out of the arrangement.[87] In the attached sample contract I have included just such a provision for requiring the disclosure of any conviction for domestic violence, child abuse, or any crime that would cause one of the parties to be listed on a state sex offender registry.

At least in Pennsylvania, some minimal protection against parents with a history of abuse using surrogacy results from the holding in Huddleston v. Infertility Clinic of America, in 1997.[88] In the Huddleston case, the surrogate sued the fertility clinic for wrongful death alleging negligence and breach of fiduciary duty. [89] The surrogate

[84] For example, in North Carolina, see http://sexoffender.ncsbi.gov/disclaimer.aspx
[85] Compare with ART Act of 2008, part 2, division 2 requiring the ART agency to confirm there are no child protection orders against the commissioning parents, and section 14 which creates a presumption against providing ART for commission parents with a criminal history of child abuse or violent offenses.
[86] UPA § 808 (a) (2017)
[87] Compare with the ART Act of 2008, Part 3, division 4, which criminalizes giving false information
[88] 700 A.2d 453 (Pa. Super. Ct. 1997); available at https://caselaw.findlaw.com/pa-superior-court/1190217.html
[89] Huddleston.

argued, based on the same arguments made in the Stiver v. Parker case,[90] that the clinic had a duty to run a criminal background check on the commissioning father and/or conduct a psychological evaluation "in order to prevent foreseeable risks of the surrogacy undertaking, including that which occurred here, to wit, unspeakable acts of physical abuse resulting in a child's death." [91] The lower court had dismissed the case, but the Superior Court of Pennsylvania disagreed and found that the surrogate did have a cause of action against the clinic "for the harm caused by ICA's failure to exercise reasonable care in designing and implementing its surrogacy program."[92]

CONCLUSION

The need for regulation is clear.[93] Unlike a contract for a hitman, or a contract to sell illegal drugs or guns, the mere unenforceability of the document is insufficient when the result of the contract is a baby. In this situation, rendering the contract as unenforceable or the arrangement illegal only means that the parentage (and therefore in some cases the citizenship), custody, and financial responsibility of that child is undetermined. That means the child could end up as a ward of the government. The 2017 version of the Uniform Parentage Act in combination with the ART Act of 2008 are excellent places to start the discussion regarding what such regulation should

[90] Stiver.
[91] Huddleston.
[92] *Id.*
[93] Ireland, Judith, Overseas surrogacies at risk of 'no secure legal' standing, report warns," Sydney Morning Herald, August 14, 2014 reporting on the December 2013 Family Law Council Report on Parentage and the Family Law Act, Chapter 3. https://www.smh.com.au/politics/federal/overseas-surrogacies-at-risk-of-no-secure-legal-standing-report-warns-20140814-3dpfd.html

address,[94] but perhaps the UPA does not go far enough to address the specifics of the mental health consultation, (should the act include a requirement of a mental health evaluation?), or any unintended consequences of the deadlines contained in act if there is a dispute over access and control of the embryos. It completely ignores the established risk of pedophiles and violent offenders using ART for the human trafficking and abuse of children. There are a number of protections in the ART Act of 2008 that should be considered by jurisdictions considering the 2017 UPA, including the provisions of the use of gametes produced by children and criminal sanctions for providing false or misleading information, amongst others. In the words of California Court of Appeals Judge J. Arabian,

> Surrogacy contracts touch upon one of the most, if not the most, sensitive subjects of human endeavor. Not only does the birth of a new generation perpetuate our species, it allows every parent to contribute, both genetically and socially, to our collective understanding of what it means to be human. Every child also offers the opportunity of a unique lifetime relationship, potentially more satisfying and fulfilling than any other pursuit. (See Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 837 [4 Cal. Rptr. 2d 615, 823 P.2d 1216].) [95]

But only by passing legislation to regulate commercial surrogacy can the attention-grabbing headlines and heartbreak for families and children be addressed, in both Australia and in the United States.

[94] For additional suggestions and best practices, see http://www.menhavingbabies.org/advocacy/ethical-surrogacy/

[95] Johnson v. Calvert, 5 Cal. 4th 102 (1993) *concurring opinion*