LEGAL ISSUES WITH SECTION 56 OF THE PROTECTION OF A CHILD BORN BY MEDICALLY ASSISTED REPRODUCTIVE TECHNOLOGY ACT B.E. 2558 (2015)

BY

MRS. APAPOHN PINSAKOL SAENG SIN

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS PROGRAM IN BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2017

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THESIS

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MEDICALLY ASSISTED REPRODUCTIVE TECHNOLOGY ACT B.E. 2558 (2015)

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PROTECTION OF A CHILD BORN BY MEDICALLY
ASSISTED REPRODUCTIVE TECHNOLOGY ACT
B.E. 2558 (2015)

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ABSTRACT

Parental recognition of surrogate children born of unqualified intended parents or non-compliant surrogacy falls right in the gap of both public and private laws. Section 56 of the Protection of a Child born by Medically Assisted Reproductive Technology Act (ART Act) was incorporated with an aim to protect the rights of surrogate children born prior to the enactment of the law. Due to its rigid wordings, it limits the rights of some intended parents to file for the child legitimation and jeopardizes the rights of the child to have proper parentage.

By viewing the child’s right as paramount, true and honest intent of the intended parents together with the principle of the best interests of the child should be jointly applied when determining parentage of surrogate children. To prevent the children from exploitation, intended parents must prove their parental capability to be entitled to sole parental power and inspection by government authorities should take place after the court has issued the order.

Birth registration must be made available to surrogate children who deserve the right to know their birth history through proper birth registration process. Recognition of Thai citizenship under the principle of jus soli must be made available.
for surrogate children who may be exposed to risks of becoming stateless. Most importantly, government authorities must admit that the children, whether they are born naturally or by surrogacy, must be entitled to have a family and receive protection from the government under Article 16 of the Universal Declaration of Human Rights. The dignity of surrogate children as human beings must be upheld and they must be treated equally like all other children.

**Keywords:** surrogacy, parentage, parental power, citizenship, parental recognition, birth registration, statelessness, nationality, children, human rights
ACKNOWLEDGEMENTS

To my daughter so that she will know that hard work pays off.

I would like to express my appreciation to the most important people in my life, my parents, my husband and my daughter, who have provided long-standing support and their incessant faith in me. My appreciation also extends to my supervisors, Miss Linda Osathaworanan and Mr. Chatchavej Chitvarakorn and all of my colleagues at Siam Premier International Law Office for their understanding and generous encouragement.

In shaping my thoughts and advising on important issues to target for this thesis, my deepest gratitude is extended to my thesis advisor and all my thesis committee including Dr. Aimpaga Techa-apikun, who is a hardworking mother, and thanks to her for believing in me; Professor Jaran Pukditanakul whom I personally admired since I was a little girl watching him in the news with my father; Associate Professor Dr. Phunthip Kanchanachitra Saisoonthorn, who demonstrated her passion in human rights and encouraged me to think and act beyond my expectation; and Assistant Professor Dr. Niramai Phitkhae Manjit, who structured my thoughts and shaped up this work. Their valuable advice and practical insights have challenged the way I tackled legal issues and broadened my analytical skills to view an issue in a more thorough and comprehensive perspective.

In light of this work, I hope that this thesis will serve as a beacon of hope for the surrogate children whose fate is still unknown and that their rights and dignity will be fully protected by the law.

Mrs. Apapohn Pinsakol Saengsin
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## DEFINITIONS

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<td>ART / assisted reproductive technology</td>
<td>The medical technology that is used for fertility treatments to help achieve pregnancy. The process may involve artificial insemination, in vitro fertilization, surrogacy, etc.</td>
</tr>
<tr>
<td>Artificial Insemination</td>
<td>One of the ART procedures that involves the injection of a male’s sperm to the woman’s uterus and the fertilization process will take place inside the uterus of the said woman.</td>
</tr>
<tr>
<td>Biological mother / donor</td>
<td>A female individual who supplies her egg in the process of fertilization, which results in the pregnancy of a child.</td>
</tr>
<tr>
<td>Biological father / donor</td>
<td>A male individual who supplies his sperm in the process of fertilization, which results in the pregnancy of a child.</td>
</tr>
<tr>
<td>Fertility</td>
<td>The ability to conceive children.</td>
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<tr>
<td>Words</td>
<td>Definitions</td>
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<tr>
<td>Gestational / full surrogacy</td>
<td>One type of surrogacy arrangements that involves in vitro fertilization and a third-party woman who agrees to carry an embryo or a fetus that has no genetic relationship to her. Her uterus is used as a place to carry a child for the intended parents and she agrees to surrender the child to them.</td>
</tr>
<tr>
<td>Infertility</td>
<td>Inability to conceive children.</td>
</tr>
<tr>
<td>Intended Parent(s)</td>
<td>Any person wishes to have children but they are unable to have no desire to carry pregnancy. They may use their egg or sperm in the fertilization process, but they may seek an alternative to use genetic materials from donors.</td>
</tr>
<tr>
<td>Pre-commencement surrogacy</td>
<td>Surrogacy arrangement occurs prior to the enactment of the ART Act.</td>
</tr>
<tr>
<td>Surrogate or gestational / birth mother</td>
<td>A female individual who agrees with the intended parent(s) to carry pregnancy for them. She does not have any genetic relationship to the child.</td>
</tr>
<tr>
<td>Words</td>
<td>Definitions</td>
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<tr>
<td>Surrogacy</td>
<td>One type of the medically assisted reproductive technologies that involves intended parent(s) and a surrogate to carry pregnancy and surrender the child to them once the baby is born. Surrogacy arrangement may or may not have a written agreement.</td>
</tr>
<tr>
<td>Surrogate children</td>
<td>Children born through surrogacy.</td>
</tr>
<tr>
<td>Traditional / genetic surrogacy</td>
<td>One type of surrogacy that is arranged by one or two intended parents and the sperm of a man is used in the artificial insemination process. This woman who was injected the sperm has genetic relationship with the child.</td>
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## LIST OF ABBREVIATIONS

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<thead>
<tr>
<th>Words</th>
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<tr>
<td>CCC</td>
<td>Civil and Commercial Code</td>
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<td>CRA</td>
<td>Civil Registration Act, B.E. 2534 (1991), as amended</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>New South Wales</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UPA</td>
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CHAPTER 1
INTRODUCTION

1.1 Background and Problems

The National Legislative Assembly of Thailand passed the Protection of a Child Born by Medically Assisted Reproductive Technology Act (ART Act) on 19 February 2015. The ART Act was published in the Royal Thai Gazette on 1 May 2015 and has been in effect since 30 July 2015. Prior to the enactment, Thailand was considered as one of the most popular destinations for surrogacy, as some called ‘the womb of Asia’.

Access to surrogacy was made available to anyone who wished to have children to achieve their dreams by using Assisted Reproductive Technologies (ART) methods. Surrogacy, a form of ART process involving an agreement between intended parent and a surrogate, who agrees to carry a child throughout the term of the pregnancy and return the child to the intended parent, is one of the commonly sought methods by intended parents from all over the world. Associate Professor Dr. Kamthorn Pruksananonda, a former chairman of the Royal Thai College of Obstetricians and Gynecologists said that in 2014, there were approximately 7,000 couples who received ART services in Thailand and the success rate was 35%.

The Permanent Bureau of The Hague estimates that the surrogacy

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2 เอมผกา เตชะอภัยคุณ บุญมี, การเรียกค่าเสียหายจากการใช้วิธีผสมเทียมที่ผิดพลาดในประเทศสิงคโปร์ คดี ACB V Thomson Medical Pte Ltd And Others, รพี, พิมพ์ครั้งที่ 1, คณะนิติศาสตร์, มหาวิทยาลัยธรรมศาสตร์ 2560. (Aimpaga Techa-apikun Boonmee, Karn Riek Khasiahai Chak Karn Chai Withi Pasomthiam Tii Pidplad Nai Prathet Singapore Khadi ACB V Thomson Medical Pte Ltd and Others [Claiming for Damages from Error in IVF in Singapore, ACB v Thomson Medical Pte Ltd and Others] (1st edn, Faculty of Law, Thammasat University 2017)).
industry itself grew by 1000 percent internationally between 2006 to 2010. Globally, there are over 256,668 babies born through ART services per year. 

Due to the fact that Thailand did not have any legislation governing any kinds of surrogacy arrangement, previous arrangements had involved paid, commercial surrogacy. Several controversial cases relating to surrogacy have occurred in Thailand. First, in 2011, fourteen Vietnamese women were deceived and forced to work as surrogate mothers in Thailand by international agencies located in Myanmar, China and Taiwan. The second renowned case involved surrogacy arrangement between an Australian couple and a Thai surrogate mother, who agreed to carry a pregnancy and gave birth to a set of twins; however, one of the children was diagnosed with Down syndrome and abandoned by the Australian couple. Soon after this incident, another incidents relating to a dispute between the intended couple and the surrogate mother over the parentage of a child born through surrogacy arrangement and a same-sex couple in Chiang Mai who commissioned surrogacy but later separated and disputed over the parentage and parental power

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5 Ibid.
over the child. Due to the absence of concrete laws in determining parentage of the child born through surrogacy arrangement, the surrogate mother as the birth mother claimed that she is the only person who has the right over the child as a lawful mother and she has full parental power over the child. Then, there is another case relating to a single Japanese business man commissioned surrogacy arrangement and 13 children were discovered by the Government authorities, and the children were taken into the Thai Government’s custody without consent of the intended parent due to the Government’s invented fear of human trafficking.

These controversial cases caught the attention of the Thai authorities as Thailand did not have any legislation governing any surrogacy arrangement, except for the regulations of the Medical Council of Thailand that only control medical practitioners. The available source to determine parentage of the child before the


10 Puttasiri (n 4).
ART Act, was the Civil and Commercial Code (CCC), which dictates that ‘a child who is born to an unmarried woman is presumed to be a legitimate child of such woman, unless the laws said otherwise.’\(^{11}\) Such presumption would have resulted in the surrogate becoming the lawful mother of the child. Further, in determining the lawful father of the child, the CCC gives the presumption that ‘the child who is born of a woman out of wedlock or within 310 days after the dissolution of marriage is presumed to be the legitimate child of the husband or the ex-husband, as the case may be.’\(^{12}\) As a result, without proper legislation on surrogacy arrangement, the surrogate and her husband or ex-husband (if any) are deemed to be lawful parents of the child even though they have no intention or proper means to raise the child or in many cases they do not have any genetic relation with the child while the rights of those intended parents who commissioned surrogacy and have the intention to raise the child, and perhaps have genetic relationship with the child were still in question.

In order to prevent exploitations and keep up with the ART advancement, the ART Act was enacted to regulate surrogacy practice in Thailand. The ART Act itself does not prohibit surrogacy arrangement, but instead it explains the requirements and qualifications of the intended parents, the surrogate and the medical practitioner before entering into surrogacy agreement and before providing services in using ART as well as determines the rights to children’s parentage of the intended parents and the parentage of the child born through surrogacy arrangement. In addition, Section 56 has been incorporated as a transitory provision to ART Act in order to resolve the issues of legal parentage of the surrogate children who were born before the ART Act.

According to the continuous practice of unregulated surrogacy in Thailand prior to the implementation of the ART Act, a number of children were born through surrogacy arrangement in the past decades. Legal and moral issues relating to commercial surrogacy and how to determine legal parentage of children

\(^{11}\) CCC, s 1546.
\(^{12}\) CCC, s 1536.
have been raised domestically and internationally. Section 56 of the ART Act has been incorporated to supposedly serve as the transitory clause in granting the rights to intended parents who commissioned surrogacy and protecting the rights of surrogate children born before the ART Act, which states:

A person born by the surrogacy prior to the entry into force of this Act whether there is a written arrangement, husband or wife undertaking the surrogacy or a public prosecutor shall have rights to submit a petition to the court to issue an order stating that the person born by the surrogacy prior to the entry into force of this Act is a legitimate child of the husband and the wife undertaking the surrogacy as from the date when such person was born; provided that whether the husband and the wife undertaking the surrogacy are lawful husband and wife. However, that it may not be referred to the prejudice of the rights of third persons acting in good faith during the time when the child was born until the time when the court issue orders of filiation.

This Section gives hope for the intended parents who commissioned surrogacy during the time of legal absence to find possible legal means to legitimize their child who was born through surrogacy arrangement. Before the enactment of the ART Act, it was reported that there was a total of 431 known cases including 400 Australian children, 13 Japanese children, 1 American child and children from other nationalities who were born through surrogacy arrangement and their fate was still unknown. With this provision, the legislature aims to protect the best interests of these children, but it seems that this provision has raised many doubts in terms of its practicality and implementation.

13 Tungkananurak (n 8).
Firstly, as stipulated in Section 56, the terms used in referring to the persons who are eligible to file a petition to the Juvenile and Family Court to issue parentage order for surrogate children are limited to four persons, which are the person born through surrogacy arrangement, a husband undertaking surrogacy, a wife undertaking surrogacy or a public prosecutor. Due to the prior absence of surrogacy laws, qualifications of the intended parent were not defined and many intended parents who commissioned surrogacy in Thailand before the ART Act were not a husband or a wife as described under this Section. In fact, the intended parent could have been a single man or woman, a man and a woman or a same-sex couple in a married or a de facto relationship or they may have already been divorced or separated after surrogacy arrangement has taken place. In response to these circumstances, on 26 August 2015, the Director-General of the Central Juvenile and Family Court issued guidelines for judges to dismiss any petition to establish legal parentage of the child that has been filed by any persons who are not a husband or a wife as described in Section 56 of the ART Act including a petition filed by a same-sex couple or a single person. Even though the guidelines of the Director-General of the Central Juvenile and Family Court have been circulated among the judges, the Central Juvenile and Family Court later rendered judgment granting legal parentage and sole parental power to an intended parent, who is a member of the same-sex couple, given the rationale to protect the child’s welfare and for the best interest of the child. It is still questionable whether such specific terms of a husband or a wife still reflects the intention of the legislature in drafting this Section.


15 ศาลเยาวชนและครอบครัวกลาง, ศาลเยาวชนและครอบครัวกลางอ่านค าสั่งคดี "อุ้มบุญ", 2559 เข้าถึงเมื่อวันที่ 4 ตุลาคม 2560 (Sarn Yaowachon Lae Krobkrua Klang, Sarn Yaowachon
Secondly, the factors or guidelines in determining legal parentage of the child born through surrogacy arrangement are not defined as to whether legal parentage of the child rests upon genetic relationship, the intention of the intended parent(s) to have a child, or best interests of the child. The ART Act, as included in the remarks of the ART Act, was to determine appropriate parentage of the child born through surrogacy arrangement due to the fact that the CCC is unable reflect parentage of the child based on his or her genetic relation. Considering such rationale, one would assume that the legislature intends to determine appropriate parentage based on genetic relationship between the child and the parents. In contrary, Section 56 specifically determines that a child born through surrogacy arrangement would become a legitimate child of the husband and the wife who commissioned surrogacy. If interpreted narrowly, this provision seems to focus more on the intention of the intended parents who commissioned surrogacy, which may or may not reflect on the genetic relation between the intended parents and the child. However, it is a concern how genetic relationship, the intention of the intended parent(s) and the best interest of the child intertwined when determining legal parentage for the child while applying Section 56 of the ART Act. The result on legal parentage of the child would eventually have an impact on how to determine citizenship of the child and procedure for parental recognition in civil registration.

Thirdly, Section 56 of the ART Act raises an issue in terms of the effect of the court’s order to determine legal parentage of the child that the child would become the legitimate child of the said husband and wife as intended parents from the child’s date of birth. As a result of the parentage order, it is a concern on the extent of the court order whether the parental power over the child would have automatically been established to the intended parents as soon as the legal parentage has been granted, whether the court has the right to terminate the

Lae Kroekrua Klang Aan Khadi Kumsang Khadi “Oumoon” [The Central Juvenile and Family Court Reads Court Order In "Surrogacy" Case]
parental power of the intended parents if they are not suitable parents for the best interests of the child while their legal status remains as lawful parents, and whether the surrogate mother has any legal right over the child in the event that the intended parent is a single man or woman or a member of a same-sex couple.

At present, the ART Act is in effect and the qualifications and conditions for any interested persons to pursue surrogacy arrangement are enforced; however, many still continue surrogacy practice that does not comply with the conditions under the ART Act. For instance, some intended parents choose to engage in the ART process in a foreign country that is not in line with the conditions set out in the ART Act and crossed the border to give birth in a reputable hospital in Thailand. It still raises certain concerns on how the court would interpret legal parentage and parental power over children born through surrogacy arrangement even if the ART Act remains active.

1.2 Hypothesis

The rights to file petition for child legitimation under Section 56 of the ART Act should not be limited only to ‘husband and wife’ but be amended to include every status of intended parent whether or not they are single or a member of same-sex couple to protect the right of the children to have legal parentage. Legal parentage of the child born through surrogacy arrangement should be determined by the true and honest intent of the intended parent while parental power should be separately determined under the principle of best interests of the child. Appropriate measures should be in place before and after the court grants parental power to the intended parent. The right to birth registration and Thai citizenship should be guaranteed for all surrogate children born in Thailand.

1.3 Objectives of Study

This research intends to identify and propose solutions to legal problems faced by intended parents when applying legal parentage and parental power under
Section 56 of the ART Act, to define appropriate factors in determining legal parentage of the child born through surrogacy arrangement, to propose appropriate measures in reviewing the suitability and readiness of the intended parents to raise the child and exercise parental power to protect the welfare and best interests of the child, to ensure that surrogate children have receive proper birth registration, and to analyze citizenship of the children born through surrogacy arrangement before and after the enactment of the ART Act.

1.4 Scope of Study

The scope of the study is mainly the practicality of applying Section 56 of the ART Act to reflect the principles on the best interests of the child, the current interpretation of the Central Juvenile and Family Court in applying this section when issuing a parentage order for surrogate children, the legal effect of parentage order granted thereunder in relation to birth registration and citizenship of the children, the rights of the intended parents to exercise parental power after the parentage order has been granted, and possible actions if parental power is not granted to the intended parents. This study will touch upon on how to determine legal parentage of the surrogate children born under incompatibility surrogacy with the ART Act.

1.5 Methodology

This thesis will employ comparative approach which includes qualitative research method in order to analyze the rationale and factors in determining legal parentage of the child born through surrogacy arrangement in the United States and Australia in comparison with the current legislations in Thailand.

1.6 Expected Results

The author aims to find proper solutions for the court to resolve issues in relation to legal parentage and parental power over surrogate children born before
the ART Act or through non-compliant surrogacy while mitigating the risks of children’s exploitation and the parentage order is issued in conformity under proper directions and guidelines for the best interests of the child. Further, the author hopes that government authorities acknowledge the fundamental human rights of the surrogate children for birth registration and to ensure that Thai citizenship is made available for any surrogate children born with a connecting point with Thailand in order to avoid the situation of becoming stateless. Considering the best interests of the child at paramount, the current laws should be amended to facilitate the court and the government authorities to achieve such results.
CHAPTER 2
OVERVIEW OF ASSISTED REPRODUCTIVE TECHNOLOGY

2.1 Introduction

Before entering into the chapter of assisted reproduction, it is essential to understand the process of natural conception. Natural conception happens when the semen that contains the sperm is released from a man and enters into the vagina of a woman right at the ovulation period whereby an egg is released from the ovary.\textsuperscript{16} The fertilization process normally occurs inside the fallopian tube that picks up the egg and welcomes the sperm after passing through the vagina, the cervical canal and the uterus of the woman.\textsuperscript{17} After the egg is fertilized, it becomes known as an embryo and it implants itself into the uterus to develop and grow.\textsuperscript{18} However, not every man and woman can fulfill every step in order to achieve natural conception.

One out of six couples worldwide have experienced infertility problems.\textsuperscript{19} Twenty-five million European Union citizens have high prevalence of infertility.\textsuperscript{20} In the past, infertile couples would have to seek adoption or foster care so that they can serve their roles as parents; however, these options would not


\textsuperscript{17} Ibid.

\textsuperscript{18} Ibid.


make it possible for them to have children with the same genetic relation.\textsuperscript{21} The number of children available for adoption has plunged due to higher income and the increase in the number of single parents being more acceptable in the society.\textsuperscript{22}

2.2 Development of Assisted Reproductive Technology

It became known that human started thinking about the ideas of unnatural conception since the third century.\textsuperscript{23} It first began with the practice of artificial insemination (AI) in animals. In the Arabs practice, AI was used in horses since the 14\textsuperscript{th} century.\textsuperscript{24} Development of AI has continued through the success in reptiles and dogs in 1777 and 1780, respectively.\textsuperscript{25} Reports have shown that AI have been used in human in England, Germany, France between 1850 and 1900\textsuperscript{26} and it became successful by using sperm from the donor (donor insemination) in Philadelphia, United States in 1909.\textsuperscript{27} Later in 1954, the use of frozen sperm in the process of AI has become a success.

The definition of AI is referred to as the procedure of artificially injecting the male’s semen to the woman’s uterus in order to achieve pregnancy.\textsuperscript{28} In the United States, approximately 30,000 children are born through donor insemination on a yearly basis.\textsuperscript{29} Throughout the AI process, fertilization takes place inside the uterus of the woman. However, AI does not entirely solve the problems of infertility

\textsuperscript{22} Rachel Simpson, \textit{Assisted Reproductive Technology} (NSW Parliamentary Library Research Service 1998).
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
as in many cases fertilization cannot take place inside the uterus of the woman. For decades, scientists were prone to seeking alternatives to solve this problem. The ART has been under public interest after the success on the birth of the first in vitro fertilization (IVF) baby, Louise Brown, in the United Kingdom in 1978 and more advanced technologies have become available for the treatment of infertility.

Assisted reproductive technology (ART) refers to as ‘all technology where gametes are manipulated outside the body’. At present, there are several ART procedures such as gamete intrafallopian transfer, zygote intrafallopian transfer but the most common ART is in vitro fertilization (IVF). This paper will not go into details of each of the procedure except for IVF that is particularly relevant to this research.

IVF is the first technology ever developed under ART and is considered the most common treatment for infertility problems today. IVF stands for ‘in vitro fertilization’ where the word ‘in vitro’ means ‘in glass’. IVF refers to a procedure that causes fertilization to occur ‘outside the body in an artificial environment’. IVF has been used as treatment for many common infertility problems such as damage or blockage of bilateral tube or poor-quality sperm.

31 Simpson (n 22).
33 Ibid.
34 Ibid.
35 Ibid.
36 Simpson (n 22).
37 Begum (n 32)
2.3 Surrogacy

The practice of surrogacy does not have any definitions to describe patterns of behavior for surrogate arrangement. In general terms, surrogacy is known as a process that a woman agrees to carry a baby for intended parents who are unable to conceive or carry a child themselves for medical, physical or social reasons. The practice of surrogacy dates back since 18th century BC as described in the Hammurabi Code that sets out guidelines for the wife and the surrogate woman to pursue surrogacy. The surrogacy practice was acceptable in some society and religious beliefs. For example, surrogacy through natural conception was discussed in the relationship between Abraham, Sarah and Hagar in Genesis, the first book in the Old Testament, where Sarah could not bear a child and she asked Hagar to carry and surrender the child to Sarah and let her raise the child born of Abraham and Hagar as her own. Not only surrogacy was described under religious perspective, surrogacy was acceptable in some cultures such as the ‘Kgatla’ people of Bechuanaland in Southern Africa, some traditional Hawaiian groups, traditional Torres Strait Islander.

Surrogacy practice has become more acceptable in the society while it faces many critics and debates in terms of its moral and ethical issues. According to the Council for Responsible Genetics, it is estimated that there were 1,400 children born through surrogacy arrangement in 2008, which doubles the number from the previous four years. In 2011, a surrogate agency informed that the number of children born through surrogacy is estimated to be 35,000 children in the United States alone.

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39 Ibid.
40 Ibid.
42 Ibid.
2.3.1 Types of Surrogacy

Surrogacy practice always involves a surrogate. Often times, surrogates are a friend or a family member who is related to the intended parents. In the surrogacy industry today, two types of surrogacy that are most common are traditional surrogacy and gestational surrogacy.

2.3.1.1 Traditional Surrogacy

Traditional surrogacy is often referred to as partial surrogacy or genetic surrogacy. The process of traditional surrogacy mainly involves artificial insemination process, which involves the injection of the intended father’s sperm (or the third-party donor’s sperm) to the egg of the surrogate. The surrogate agrees to carry pregnancy and surrender the baby to the intended parents. Surrogates in traditional surrogacy is the biological mother of the child as part of the genetic materials in the child came from the surrogate mother\(^\text{[43]}\) and is also the birth mother of the child.

2.3.1.2 Gestational Surrogacy

Gestational surrogacy is also known as full surrogacy or host surrogacy, which is a surrogacy method that has evolved from traditional surrogacy. The surrogate serves as a gestational carrier and her genetic material is not used in the fertilization procedure. The genetic materials including the egg and sperm used in the IVF process come from the intended parents or a third-party donor. Under gestational surrogacy, the surrogate is not a biological mother as her genetic material

has not been used in the process. Currently, it is recommended that intended parents pursue gestational surrogacy over traditional surrogacy.\footnote{Morrissey (n 41).}

### 2.3.2 Surrogacy Process

In any surrogacy arrangement, the procedure normally involves intended parents and a surrogate. Before taking any medical action for surrogacy, the intended parents would enter into an agreement with the surrogate to carry the baby and agree on surrendering the child back to the intended parents after birth. If the process involves egg or sperm donation, the intended parents would enter into an agreement with the donor in order to dismiss any legal rights of the donor after birth.

Prior to engaging with the donor, the intended parents would normally engage the agency to help arrange the donor and assist with other procedures relating to surrogacy. The IVF process needs to be performed at an authorized clinic and the intended parents would need to enter into an agreement with the IVF clinic to set out the responsibilities and liabilities of the intended parents and the clinic.

Subject to statutory requirements in each jurisdiction, the legal process may require all parties to undertake legal advice in order to understand legal rights and responsibilities as a result of surrogacy arrangement. Surrogacy process begins with the intended parent or parents. In gestational surrogacy, several decisions need to be made by the intended parents. First, the intended parents need to decide on the egg that is donated from the egg donor, who will eventually contribute and take a role as biological mother of the child. The intended parents need to select the clinic to perform IVF process and embryo transfer. Once the pregnancy has begun, the intended parents had to decide on the right hospital and an OB/GYN doctor for antenatal care. As mentioned earlier, the intended parents may need to find a proper lawyer to draft relevant contracts to be entered into by the agency, the clinic, the surrogate, the donor, or the advisor.
CHAPTER 3
SURROGACY UNDER THAI LAWS

3.1 Introduction

The Protection of a Child Born by Medically Assisted Reproductive Technology Act (ART Act) has been enacted and developed based on the needs to identify legal parentage of children born through ART process to be in line with their biological heritage and regulate the process to mitigate any improper means and exploitation. Prior to the enactment of the ART Act, the Civil and Commercial Code (CCC) was the only source to verify legal parentage and parental power which relies upon the principle of natural conception. Citizenship of children also reflects from citizenship of their parents and/or the children’s place of birth according to the provisions under the Nationality Act. Therefore, it is essential to verify the legal parents of the children who are born through surrogacy arrangement as it may impact on how to proceed with birth registration and citizenship of the children.

3.2 Surrogacy Law in Thailand

The development of the ART Act dates back to the cabinet under the terms of General Surayud Chulanont, who served as a Prime Minister of Thailand in

45 สำนักกฎหมาย สำนักงานเลขานุการวุฒิสภา, พระราชบัญญัติคุ้มครองเด็กที่เกิดโดยอาศัยเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ พ.ศ. 2558 พร้อมทั้งสรุปสาระสัคัญ ประวัติ ความเป็นมา กระบวนการ และขั้นตอนในการตราพระราชบัญญัติดังกล่าวของสภาติบัญญัติแห่งชาติ (ก.ป. 170/2558), สำนักงานเลขานุการวุฒิสภา 2558 (Samnak Khodmai Sammaknag Lekhathikarn Wudhisapa, Phraratchabunyut Khoomkrongdek Tii Kerd Doy Asai Technology Chuay Karncharoenphan Tang Karnphaet B.E. 2558 Phrom Tung Saroob Sara Samkhan Prawat Khwampenma Krabuankarn Lae Khanton Nai Karn Tra Phraratchabunyut Dung Klao Kong Sapanitibunyuthaengchat (Kor. Por. 170/2558) [The
2007. In response to the proposal of the Ministry of Social Development and Human Security, the first draft of the Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. ... (Draft Act) was reviewed by the Council of State and approved in principle on 30 October 2007. The Draft Act was approved by the cabinet under the terms of Mr. Abhisit Vejjajiva on 11 May 2010 and was forwarded for review of the legislation committee before being sent for review and approval by the House of Representatives. Due to the Decree of Dissolution of the Parliament on 10 May 2011, the Vejjajiva’s cabinet was dissolved. The Draft Act was never proposed to the House of Representatives by the new cabinet and was eventually dismissed according to the second paragraph of section 153 of the Constitution of Thailand B.E. 2550 (2007). On 27 September 2012, the Ministry of the Social Development and Human Security again proposed the Draft Act to the cabinet under the terms of Ms. Yingluck Shinawatra as a Prime Minister. This matter was originally included in the agenda in a mobile cabinet meeting on 22 October 2012, but the Ministry of Public Health needed additional time for review, which caused the Draft Act to be dismissed from the agenda.

Eventually, the Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015) (ART Act) was approved by the cabinet under the terms of General Prayut Chan-o-cha serving as a Prime Minister and published on page one, section 38 Kor under Book 132 in the Royal Gazette on 1 May 2015. As section 2 of the ART Act indicates that it would take effect 90 days after its publication in the Royal Gazette, the ART Act has then taken effect since 30 July 2015.

3.2.1 Surrogacy Process

Surrogacy, under the definition of the ART Act, means:

‘pregnancy by the medically assisted reproductive technology provided that a surrogate mother enters into a written arrangement with lawful husband and wife prior to the pregnancy that a fetus is a child of such lawful husband and wife.’

The ART Act permits the arrangement of gestational surrogacy whereas the surrogate’s genetic material must not be used in the surrogacy process meaning that (i) sperm and egg of the intended parents are used to form an embryo and inject the embryo into the surrogate; (ii) sperm of the intended parent and egg from an egg donor are used to form an embryo and inject the embryo into the surrogate; or (iii) egg of the intended parent and sperm of a sperm donor are used to form an embryo and inject the embryo into the surrogate.

In order for surrogacy arrangement to be legal, the procedures must meet the conditions set out in the ART Act, including that the intended couple must be lawful husband and wife and they must have Thai citizenship. In case where a husband or a wife does not possess Thai nationality, they must have been legally married for at least three years. By using the terms ‘husband and wife’, the ART Act implicitly requires that the commissioning couple must be heterosexual, who have registered their marriage. The ART Act does not specifically require that the marriage registration must take place in Thailand; therefore, a couple who registered their marriage abroad is permitted to commission surrogacy in Thailand. A de facto couple is not considered as a lawful husband and wife according to Thai law.

The pregnancy must be the result from the use ART process, involving a surrogate and relinquish the child to the intended parents. If the pregnancy occurs due to natural conception, it would not be considered as surrogacy. The female member of the intended couple is unable to carry

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46 ART Act, s 22.
47 ART Act, s 21(1).
48 Ibid.
pregnancy,\textsuperscript{49} which implies that there is a medical need to acquire surrogacy to achieve pregnancy.

The ART Act does not indicate the minimum age of the surrogate; however, surrogacy agreement is one form of juristic act. To enter into any juristic act, such person must be \textit{sui juris},\textsuperscript{50} and the act would be voidable if entered into by a minor.\textsuperscript{51} Provided that, pregnancy through surrogacy arrangement must not be the surrogate’s first pregnancy as the Act requires that the surrogate must have previously given birth to a child.\textsuperscript{52} In the event that the surrogate is married or have a \textit{de facto} partner, her partner or her husband must have given prior consent.\textsuperscript{53} The surrogate must not be an ascendant or a descendant of the intended parents but must be genetically related to either member of the intended parents.\textsuperscript{54} In case there are no relatives who are genetically related to either member of the intended parents, other woman may become a surrogate if she meets the qualifications set out by the regulations of the Minister of Public Health.\textsuperscript{55}

The surrogacy agreement between the surrogate and the commissioning couple must be altruistic\textsuperscript{56} and made in writing prior to the pregnancy.\textsuperscript{57} By permitting that surrogacy arrangement must be made in writing, it is deemed that surrogacy agreement is enforceable so far as it does not contradict to the laws. It is important to emphasize that in order for the surrogacy arrangement to be enforceable, it must be executed prior to the pregnancy. Even though the Act stipulates that surrogacy arrangement must be altruistic, intended parents must be

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{49} Ibid.
\item\textsuperscript{50} CCC, s 19.
\item\textsuperscript{51} CCC, s 21.
\item\textsuperscript{52} ART Act, s 21(4).
\item\textsuperscript{53} Ibid.
\item\textsuperscript{54} CCC, s 21.
\item\textsuperscript{55} CCC, s 21.
\item\textsuperscript{56} ART Act, s 24.
\item\textsuperscript{57} ART Act, s 3.
\end{enumerate}
\end{footnotesize}
responsible for any expenses relating to the health of the surrogate during pregnancy, termination of pregnancy, labor and after-labor expenses as well as expenses relating to the child’s health for a period of at least 30 days, which are determined by the Committee.\textsuperscript{58} As a result, the surrogate has the right to claim the commissioning couple if the payment has not been made.

The medical practitioner must be qualified to meet the standards of the Medical Council.\textsuperscript{59} Before performing ART method, the medical practitioner must conduct examination and evaluation on the readiness of the physical, psychological and environment of the commissioning couple, the surrogate and gamete donors and prevent any diseases that may impact the child\textsuperscript{60} and receive permission from the Committee prior to commissioning surrogacy procedures and comply with the procedures stipulated by the Committee.\textsuperscript{61}

In addition, the ART Act prohibits any activities relating to agency that requests, receives or agrees to receive property or any other benefits in return for the arrangement or soliciting to undertake surrogacy.\textsuperscript{62} Any advertisement or announcement for or on behalf of the surrogates or commissioning couple is strictly prohibited whether such activities are intended for commercial or non-commercial purpose.\textsuperscript{63} It is worth noted that to what extent the surrogacy arrangement would be considered commercial, given that the commissioning couple must make payment to the surrogate in relation to the expenses relating to pregnancy. In the author’s point of view, in order for surrogacy to be commercial, the commissioning couple would have to pay the surrogate more than the expenses stipulated in the ART Act. Those who perform any surrogacy arrangements that are not in compliance with the Act are subject to criminal penalty.

\textsuperscript{58} ART Act, s 25.
\textsuperscript{59} ART Act, s 15.
\textsuperscript{60} ART Act, s 16.
\textsuperscript{61} ART Act, s 23.
\textsuperscript{62} ART Act, s 27.
\textsuperscript{63} ART Act, s 28.
3.2.2 Transitory Provision

Section 56 states that:

A person born by surrogacy prior to the entry into force of this Act whether there is a written arrangement, husband or wife undertaking the surrogacy or a public prosecutor shall have the right to submit a petition to the court to issue an order stating that the person born by surrogacy prior to the entry into force of this Act is a legitimate child of the husband and the wife undertaking the surrogacy as from the date when such person was born; provided that whether the husband and the wife undertaking the surrogacy are lawful husband and wife. However, that it may not be referred to the prejudice of the rights of third persons acting in good faith during the time when the child was born until the time when the court issues orders of filiation.

If this section has been dissected into parts, one can comprehend that section 56 concerns (i) the qualifications of the petitioner to file a petition to the court, (ii) the time relevance when surrogacy arrangement occurred, (iii) the effect of the court order, (iv) the protection of the third party acting in bona fide.

In terms of the qualifications of the petitioner, section 56 explicitly grants the right to file a petition requesting for child legitimation to four persons, including

(i) the person who was born through pre-commencement surrogacy.

(ii) a husband who commissioned surrogacy arrangement,

(iii) a wife who commissioned surrogacy arrangement, and

(iv) a public prosecutor.

To interpret the right of the intended parents in submitting an application under section 56 of the ART Act, on 26 August 2015 the Director-General of the Central Juvenile and Family Court has issued a guideline to the judges in the
Juvenile and Family Court all over Thailand by explicitly indicating that a single person or a same-sex couple do not have the right to file the petition according to section 56.  

After this guideline has been circulated, it appeared to be no alternative for the same-sex couple or a single parent to request a parentage order for their child until the Juvenile and Family Court has accepted to review an application filed by the intended parent of a same-sex couple. By way of accepting to review this application, the court has implied that there is the need to recognize the right of the intended parents. Further in the judgment of the court of first instant that has been released to the public, the court expressly interpreted that “the intention of section 56 is to permit the court to exercise his discretion to issue a (parentage) order regarding the child born through surrogacy arrangement as appropriate on a case-by-case basis in order to protect the welfare and the best interests of the child.” The Central Juvenile and Family Court further explained that “the petitioner does not necessarily have to be lawful husband and wife according to Book V of the CCC.” Therefore, this court judgment would allow the same-sex couple, who are not husband and wife as described under section 56 to submit a petition for the court in issuing a parentage order. The same interpretation of section 56 should also be applied in case that the petitioner is a single person commissioning surrogacy as the court may exercise discretion to issue a parentage order on a case-by-case basis. It is understood from the court judgment that the right to file a petition for making parentage order, as described under section 56, should not be limited as previously described in the guideline dated 26 August 2015.

64 Central Juvenile and Family Court (n 14).
65 Black Case No. Por. 1239/2558 Red Case No. Por. 716/2559
66 Central Juvenile and Family Court (n 15).
67 Ibid.
3.2.3 Court Filing Procedures

The petition for child legitimation must be filed to the Juvenile and Family Court and the proceedings must follow the Juvenile and Family Court and Juvenile and Family Case Procedure Act.\textsuperscript{68} The result of the court order for registration of child legitimation and applies to the children who were born before the commencement of this Act; however, it does not mention how this section can be applied in the event that the commissioning couple, the surrogates, or any relevant persons involved in commercial surrogacy. This provision only mentions that it applies to the children born prior to the enforcement of the law, whether or not the surrogacy agreement has been made in writing. Under this circumstance, the commissioning couple, the surrogates or the agents may or may not have agreed in writing before or after commissioning surrogacy arrangement. Therefore, the commissioning couple, the surrogates, the agents or any persons relating to commercial surrogacy would not be liable for their prior activities due to the fact that there was no law regulating any forms of surrogacy during the time of their performance of such act.

The provision does not require that the husband and the wife to register their marriage or be lawful husband and wife. In the event that the husband or the wife who commissioned surrogacy wishes to register for child legitimation, he or she can proceed by submitting a petition, applying section 56 of the ART Act, to the competent Juvenile and Family Court. The court procedures must comply with the Juvenile and Family Court and Juvenile and Family Case Procedure Act.

The hearing procedures relating to the interests of the child would fall under Chapter 14 of the Juvenile and Family Court and Juvenile and Family Case Procedure Act. As such, the competent Juvenile and Family Court, after receiving the plaint or petitions relating to child legitimation, must inform the Director of the Department of Juvenile Observation and Protection to proceed with the preparation of a report on the family condition, welfare, intention or best interest of the child.

\textsuperscript{68} ART Act, s 4.
and other relevant fact together with the opinion to the court. In practice, the husband or the wife as the petitioner in the case must submit a copy of the said petition together with supporting documents to competent the Department of Juvenile Observation and Protection within 15 days from the submission date of the petition to make an appointment with the probationary officer. The Juvenile and Family Court will then make an appointment for the hearing date(s) so that the petitioner can present evidence and testify to the court. Once the court grants the order to legitimize the child, the petitioner can request for the certificate of final judgment and register the child as the legitimate child of the commissioning couple. According to section 56, the Juvenile and Family Court must issue an order stating that the surrogate child born prior to the Act came into effect is a legitimate child of the husband and the wife who commissioned surrogacy from the child’s date of birth.

Section 56 of the ART Act provides an alternative for the petition to be filed by a public prosecutor for the purpose of legitimating the child; however, this provision did not specify the qualifications of persons who can request the public prosecutor to submit the petition to the Juvenile and Family Court on his or her behalf. Without addressing the qualifications, it was deemed that any interested persons may submit a request to the competent officer in order to submit a petition for child legitimation on his or her behalf.

69 The Juvenile and Family Court and Juvenile and Family Case Procedure Act, s 166.
3.3 Legal Parentage

The term ‘parent’ is not expressly defined under the Civil and Commercial Code (CCC), but its intrinsic meaning has been embedded and implied that ‘parent’ is someone who naturally conceived a child by having sexual relationship as husband and wife\(^1\) and it is understood by nature that the child is the biological child who has the genetic materials of the parent.\(^2\)

3.3.1 Legal Presumptions under Civil and Commercial Code

The Civil and Commercial Code (CCC) stipulates several presumptions on parentage of a child. For example, a child born to an unmarried woman is presumed to be her legitimate child.\(^3\) A child born to a woman during wedlock is presumed to be the legitimate child of the woman and her husband.\(^4\) A child born to a woman within 310 days after the dissolution of the marriage is presumed to be the legitimate child of the ex-husband.\(^5\) A child born to a woman who re-marries within 310 days from the date of the dissolution of marriage is presumed to be the legitimate child of the new husband.\(^6\) A child born to a woman in an extramarital affair during her marriage is presumed to be the legitimate child of the latest husband who registered marriage to the said woman.\(^7\)

These presumptions are based on the principle of genetic relation. Such presumptions are rebuttable unless it has been proven otherwise. However, some presumptions are irrefutable by statute or by statutory period or by court order. For instance, the husband or the ex-husband who presumed to be the father of the

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\(^1\) CCC, ss 1536, 1537, 1538, 1539.  
\(^2\) CCC, s 1545.  
\(^3\) CCC, s 1546.  
\(^4\) CCC, s 1536.  
\(^5\) Ibid.  
\(^6\) CCC, s 1537.  
\(^7\) CCC, s 1538.
child is not permitted to take action for repudiation after 10 years from the child’s date of birth.\textsuperscript{78} The husband or the ex-husband cannot take any action for child’s repudiation if he registered himself as the father in the child’s birth register.\textsuperscript{79} A presumed father would become a lawful father of a child by section 1547 of the CCC. Section 1547 provides that a presumed father can become a lawful father of a child once (i) he registers marriage to the woman who gives birth, or (ii) he submits a child legitimation application and the application is granted by the local registrar, or (iii) he obtains the court judgment indicating that the child is his legitimate child. In case that the father does not wish to register marriage to the birth mother, the second alternative is a simpler way to legitimize the child; however, the process of child legitimation by application requires consent from the birth mother and the child. If the child is too young or the birth mother dies, this alternative would not be possible and the father would need to seek the court order for child legitimation.

3.3.2 Parentage under ART Act

Legal parentage of surrogate children would not fall under the presumptions under the CCC as the ART Act specifies that the surrogate children would become legitimate children of the intended parents. In case that the artificial insemination process requires the use of gametes from donors, the commissioning parent must give prior consent in writing in accordance with the regulations of the Medical Council.\textsuperscript{80} The child must be the legitimate child of the intended parents whilst the donors of the genetic materials shall have no rights or responsibilities over the child.\textsuperscript{81} It may be presumed that intent of the intended parents is the factor used to determine parentage of surrogate children under the ART Act.

\begin{itemize}
\item \textsuperscript{78} CCC, s 1542.
\item \textsuperscript{79} CCC, s 1541.
\item \textsuperscript{80} ART Act, s 20.
\item \textsuperscript{81} ART Act, s 29.
\end{itemize}
3.4 Parental Power

The definition of parental power, as described by Thierry Garé, is ‘the center of rights and duties legally granted to the parents to protect the child’. The parents and the child both have the rights to demand the other party to act or refrain from certain action. Generally, parental power is attached to the parents of the child based on biological relationship that extends from the parents to the child. Parental power is established by the government as a tool to ensure that the person who is not at the maturity age is protected; therefore, parental power is related to good morals and public order and it cannot be surrendered, limited, transferred, terminated or otherwise agreed beyond the law. Due to the objective of the parental power to protect the child, parental power has its effect until the child reaches 20 years of age or marriage.

3.4.1 Parental Power under Civil and Commercial Code

Legal parentage is relevant in determining the rights and responsibilities of the child and the parents. Under the CCC, parental power is jointly exercised by the parents as the parents can make decisions on the child’s place of residence, discipline the child, require the child to work to suit his ability and condition, and demand the child to be returned from a person who unlawfully detains him. However, parental power can be partially or wholly deprived by court order if the person exercising parental power becomes incompetent or quasi-incompetent, abuses the parental power regarding the child, or is guilty of gross misconduct, provided that the court may issue an order of deprivation if he sees
appropriate or the order is made in response to the petition submitted by relatives of the child or the public prosecutor.

3.4.2 Transfer of Parental Power through Adoption

Adoption is an alternative for a third party to gain full parental power over a child. The CCC requires that the adopter must be at least 25 years of age and older than the adoptee at least 15 years. There is no specific age requirements for the adoptee. Consent is an important factor for adoption. Consent is required from (i) parents of the adoptee, (ii) the person to be adopted if he or she is older than 15 years of age, and (iii) spouse of the adopter and the adoptee (if any). However, such consent does not inevitably cause the spouse to become the adopter unless both the adopter and the spouse register the child as their adopted child.

To perfect adoption, registration is required. If the adoptee is a minor, the adoption procedures must comply with the Adoption Act B.E. 2522 (1979), particularly section 19 of the Act which requires the adopter to have at least 6-month trial period to care for the adopted child. During this period, the adopted family will be inspected by an officer of the Ministry of Social Development and Human Security to examine the living condition, the physical and psychological health of the child. Once found that the adopter is suitable in raising the child, the officer may approve for the registration of the child as the adopted child of the adopter. In the event that the officer views that the adopter is not suitable to raise

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84 CCC, s 1582.
85 CCC, s 1598/19.
86 Kampusiri (n 82) 478.
87 CCC, s 1598/21.
88 CCC, s 1598/20.
89 CCC, s 1598/25.
90 Kampusiri (n 82) 479-480.
91 CCC, s 1598/27.
the child, the adopter must surrender the child. This trial period is waived if the adopter is a relative of the child.

After the registration for adoption, the adopter would replace the parents of the child, meaning that the adopter would have the rights and responsibilities as parents of the child. As a result, the natural parents would no longer have the right to exercise parental power over the child. At the same time, the adopted child would have the same rights and responsibilities as if he or she is the legitimate child of the adopter.\(^92\) The adopted child has the right as the 1\(^{st}\) descendent of the adopter in equivalent to the legitimate child of the adopter for inheritance. In contrary, the adopter is not entitled to receive inheritance of the adopted child\(^93\) as such right would rest solely on the natural parents of the child.

### 3.5 Birth Registration

‘Everyone has the right to recognition everywhere as a person before the law’, a statement indicates in Article 6 of the Universal Declaration of Human Rights (UDHR). The UDHR was adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) on 10 December 1948 and it compiles all the key milestones of human rights that must be protected by the rule of law and respected by all nations. In addition, this same statement was again mentioned in Article 16 of the International Covenant on Civil and Political Rights (ICCPR) that was adopted by the General Assembly of the United Nations on 19 December 1966. Further, Article 7 of the Convention on the Rights of the Child (CRC), which focuses more on children’s right, indicates that every child has the right to have a name registered and officially recognized by the government. It can be understood that the UDHR, the ICCPR and the CRC stress the importance of the right to recognition as a person (or as a human being) that it is not only the due process but it is the duty and the requirement that

\(^{92}\) CCC, s 1563.

\(^{93}\) CCC, s 1598/29.
the government must abide to ensure that an identity of a person is recognized by law.

In Thailand, the process of civil recognition begins in the process of birth registration as stipulated under the Civil Registration Act, B.E. 2534 (1991) (CRA). Effective birth registration process involves three main steps\(^94\), which are (i) certificate of delivery by using the form Tor. Ror. 1/1, (ii) certificate of birth by using any one of the forms, Tor.Ror. 1, Tor.Ror. 2, Tor.Ror. 3, or Tor.Ror. 03 subject to the qualifications indicated in the CRA and (iii) residence registration. Certificate of delivery is generally prepared by the hospital.\(^95\) If there is a birth of a child at home, the head of the household or the father or the mother must inform the competent birth registrar where the house is located within 15 days from the date of birth.\(^96\) If the child is born outside of the house, the father or the mother must inform the competent birth registrar of the birth place or any possible location within 15 days from the date of birth, and if there is any necessary reason that causes the parent not being able to inform the register, the period may be extended but no later than 30 days from the date of birth.\(^97\) After the birth of the child has been informed, the birth registrar must acknowledge the birth and issue the birth certificate as an evidence to the informant by providing the fact as much as possible.\(^98\) Effective birth registration must link the information relating to the birth of a child to residence registration.

Residence registration can be mainly categorized into two groups, namely registration for persons with right to habitation and registration for persons without rights to habitation.\(^99\) Residence registration for persons who have the right to habitation in Thailand can be recorded in the (i) house registration or Tabian-Baan

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\(^94\) Phunthip Kanchanachittra Saisoonthorn, Discussion on the Civil Registration and Citizenship of Surrogate Children (2018).

\(^95\) CRA, s 23.

\(^96\) CRA, s 18(1).

\(^97\) CRA, s 18(2).

\(^98\) CRA, s 20.

\(^99\) Saisoonthorn (n 94).
(Tor. Ror. 14) for Thai citizens or foreigners who have permanent residency status according to Thai immigration law, or (ii) temporary residence registration or Tabian-Khon-Yoo (Tor.Ror. 13) for foreign citizens who entered and resided in Thailand lawfully but only temporarily,\textsuperscript{100} foreign citizens who entered Thailand illegally but temporarily resided in Thailand lawfully,\textsuperscript{101} or children of the foreign citizens who entered Thailand illegally but temporarily resided in Thailand lawfully according to the third paragraph of Section 7bis of the Nationality Act. Residence registration for persons who do not have the right to habitation in Thailand would be recorded in Tabian-Prawat, including Tor. Ror. 38 Kor for foreigners who do not have any records or Tor. Ror. 38/1 for migrant workers from Myanmar, Cambodia and Lao PDR.

3.5.1 Guidelines before Commencement of ART Act

In regard to birth registration for children born through surrogacy arrangement, the guidelines to register parents of the surrogate children in the birth certificate have been challenging but improving gradually. In the past, government agencies have sought for guidance from the Council of State on the matter relating to recognition of lawful parents of the surrogate children.

In the ruling of the Council of State under Ref. 100/2543 (2000) in response to the request by the Comptroller General’s Department concerning the right to reimburse health and education benefits of a child born through surrogacy arrangement, the Council of State viewed that the surrogate who is the birth mother is the lawful mother of the child.\textsuperscript{102} As a result, the intended father who is not a lawful father of the child would not be able to claim for reimbursement from the government for health and education benefits. The rationale of the Council of State is based on the interpretation of Section 15 of the CCC that human being begins

\textsuperscript{100} Immigration Act, B.E. 2522 (1979), s 34.

\textsuperscript{101} Immigration Act, B.E. 2522 (1979), s 17.

\textsuperscript{102} Department of Provincial Administration (www.dopa.go.th) accessed 29 May 2018.
from birth and survives to become a baby.\textsuperscript{103} The element of ‘birth’ is determined by the condition after the child is out from the womb of the mother.

In 2007, the Council of State issued another ruling in \textit{Ref. 209/2550 (2007)} in response to the request by the Department of Provincial Administration under the supervision of the Ministry of Interior according to the letter ref. Mor Tor 0309.1/1257 dated 23 January 2007 concerning the guidelines to fill out parentage information in the birth certificate of surrogate children. The Council of State gave the consistent view that the surrogate is the lawful mother of the child and her name should be addressed in the birth certificate.\textsuperscript{104} The biological parents of the child would have no right to enter their names as parents of the child unless the CCC has been amended or they have obtained the court judgment that said otherwise.

In 2010, the Department of Provincial Administration issued a letter ref. Mor Tor 0309.1/Wor 1208 dated 25 June 2010 in response to the query made by the Local Registration Office of Chedi Mae Krua Sub-district Municipality, San Sai District, Chiang Mai Province according to the letter ref. Chor Mor 64901/Tor. Ror. 35 dated 3 May 2010 concerning the amendment to the parentage of the surrogate child in the house register (Tabian-baan) and birth certificate to be in line with the order of the Chiang Mai Juvenile and Family Court \textit{(Black Case No. 223/2552 Red Case No. 370/2552)}. The court ordered that the intended father who arranged to have a child through surrogacy arrangement is the lawful father of the surrogate child and he has the sole parental power over the child. In this regard, the court has not issued any order with respect to legal status as a mother of the surrogate; therefore, it would be deemed that the surrogate is still the lawful mother of the child. The Department of Provincial Administration therefore may affect the change on the name of the father from the surrogate’s spouse to the intended father; however, the change on the name of the mother from the surrogate to the intended mother

\begin{footnotesize}
\textsuperscript{103} CCC, s 15.
\textsuperscript{104} Department of Provincial Administration (n 102).
\end{footnotesize}
cannot take effect because the court has not ordered the intended mother as the lawful mother of the child.

According to the above rulings and practice, the Department of Provincial Administration applies the context of the CCC and considered the surrogate as the lawful mother of the child and was entitled to have her name registered as the mother of the child in the birth certificate.\textsuperscript{105} The name of the father first addressed in the birth certificate was the surrogate’s spouse under the presumption of the CCC. To effect any change on the names of the parents in the birth certificate, the intended parents must obtain the court judgment in doing so.

3.5.2 Guidelines after Commencement of ART Act

In July 2015, the Department of Provincial Administration issued a Notification of the Central Registration Office Re: Criteria, Procedures and Conditions to Inform on the Birth of a Child born through Surrogacy Arrangement under the Use of Medically Assisted Reproductive Technology dated 27 July 2015, which takes effect on 30 July 2015 by exercising their authority granted under the third paragraph of Section 32 of the ART Act and Section 8/2(1) of the Civil Registration Act. The Guidelines for Birth Registration of Children born through Surrogacy Arrangement under the Use of Medically Assisted Reproductive Technology was also issued in conjunction with the Notification.

In order to register the birth of the surrogate children, the Department of Provincial Administration requires the registrar to comply with the following procedures:

(1) The registrar examines whether the informant is eligible to inform on the birth of a child in the following order:

a. The lawful husband or a wife as intended parent according to the surrogacy agreement or the attorney-in-fact;

\textsuperscript{105} Apapohn Saengsin, Interview with Venus Seesuk and Phunthip Kanchanachittra Saisoonthorn, ‘Discussion on Birth Registration and Citizenship Of Surrogate Children’ (2018).

Ref. code: 25605701040031RQB
b. The surrogate (the person giving birth to a child) according to the surrogacy agreement in the event that the lawful husband and wife have died before the birth of the child or they are not in Thailand or they are not present for more than 15 days from the child’s date of birth;

c. The head of the hospital that provided laboring service in the event that the persons according to (a) and (b) cannot inform of the birth.

(2) The informant submits an application form Tor. Ror. 31 together with an identification card of the informant, the husband and the wife as intended parents or the surrogate; a copy of house registration where the children will move in; evidence of marriage of the intended parents (if marriage is registered abroad, an evidence recording the family records must be present); passport of the husband or the wife as intended parents; surrogacy agreement that was made in accordance with the requirements of the Minister of Public Health; and the certificate of delivery (Tor.Ror. 1/1) of the hospital.

(3) The registrar examines accuracy ad completion of the evidence. The registrar may inform the informant in case of missing documents or amendment is needed.

(4) The registrar investigates the husband and the wife as intended parents on the reason of arranging surrogacy, history of the surrogate, relationship between the husband and the wife and the surrogate, how to raise the child, the intention on how to determine parentage of the child, intention to record and disclose surrogacy information in the birth certificate and civil registration records, etc.

(5) If the surrogate is the informant of the birth, the registrar must investigate the surrogate and her husband whether they register their marriage or not, the fact on blood relation (or else) with the husband or the wife as intended parents, the reason on agreeing to be a surrogate, cause and time of death or not being presence in Thailand, how to raise the child, and the intention on how to determine parentage of the child.

(6) The registrar would consider whether or not to approve the information. If the registrar does not approve the birth registration, the registrar must
inform the informant in writing by indicating the legal grounds, disputes and appeal and timeframe for appeal in the letter.

(7) If the registrar approves of the birth registration, the registrar must issue a birth certificate by indicating the certificate of delivery in form Tor. Ror. 1/1, except for the parents’ information to be in accordance with surrogacy agreement. Details of the hospital, the reference number of the Birth Verification Document and its issuing date should be indicated in the birth certificate and birth registrar.

(8) The certificate of delivery in form Tor. Ror. 1/1, surrogacy agreement and passport of the foreigner must be scanned for records.

(9) The relationship between the husband and the wife as intended parents and the surrogate (if any) according to the surrogacy agreement must be recorded in the civil registration of the child as well as the condition to disclose the information.

(10) The registrar hand over the birth certificate to the informant and the informant accepted the birth certificate by signing the document with the date thereof.

According to the above guidelines, birth registration for surrogate children can be completed at the district office if surrogacy procedures comply with the requirements under the ART Act. Otherwise, the person who seeks to obtain birth certificate would need to obtain the court judgment in order to register for the birth of the child.

3.6 Citizenship

Thailand, as a ratified member of the Convention on the Rights of the Child (CRC) since 1992, has adopted and guaranteed the fundamental human rights of the child including the rights for survival, development, protection and participation. Particularly, Article 7 of the CRC indicates that ‘children have the right to a nationality (to belong to a country)’ and that ‘children also have the right to know and, as far as possible, to be cared for by their parents’. Under this
commitment, Thailand must comply with an obligation to guarantee the rights to citizenship of the child. With respect to Thai laws on nationality, the Nationality Act, B.E. 2508 (1965) and the Civil Registration Act, B.E. 2534 (1991) play a significant role in determining a child’s nationality whereas a nationality is recognized through the information provided in the birth certificate of a child.

According to the Nationality Act, Thailand recognizes citizenship of a child both by blood and by soil. If any of the child’s parents as indicated under the birth certificate has Thai citizenship, the child would automatically obtain Thai citizenship regardless of their birth country. Further, the rights to Thai citizenship is available to the children born in Thailand; however, such rights are subject to certain conditions before being capable to enjoy full privileges as Thai citizens. The children born in Thailand would have the right to Thai citizenship unless the parents of the children are of foreign citizens, who (i) have been given leniency for temporary residence as a special case, (ii) have been permitted to stay temporarily in Thailand, or (iii) have entered and resided in Thailand without permission under immigration laws. Children of non-eligible foreign parents may be recognized as Thai citizens if they obtained approval from the Minister of Interior according to the second paragraph of Section 7bis of the Nationality Act.

3.7 Case Study

In this research, three cases for legitimation of children born prior to the enforcement of the ART Act have been selected in order to demonstrate how the Thai court interprets the context of section 56 of the ART Act in relation to the right to file petition, legal parentage and parental power of intended parents and surrogate over the child. Details of the cases are addressed below.

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106 Nationality Act 1965, s 7(1).
107 Nationality Act 1965, s 7(2).
108 Nationality Act 1965, s 7bis para 2.
3.7.1 Pre-commencement Surrogacy by Same-sex Couple

The Black Case No. Por. 1239/2558 Red Case No. Por. 716/2559 marks as a landmark case in relation to surrogacy arrangement in Thailand as it is considered as one of the very first cases that the Central Juvenile and Family Court has ruled soon after the enactment of the ART Act. The facts and background of the case made it case more interesting as the intended couple in this case are a same-sex couple and Thailand currently does not have any statutory laws recognizing same-sex marriage.

3.7.1.1 Background

Mr. Gordon Lake and Mr. Manuel Santos, a same-sex couple of foreign nationalities wished to have children through surrogacy arrangement. They contacted an international surrogacy agency to help them pursue their dream. During the time when they entered into surrogacy agreement and all the surrogacy procedures were performed, Thailand did not have any legislation regulating surrogacy. A Thai surrogate, Ms. Patidta Kusolsang, agreed to carry pregnancy for the couple. The said couple agreed to use the sperm from Lake and the egg from the egg donor. The procedure followed the in vitro fertilization and the embryo was injected to the surrogate where the surrogate has no genetic relation to the child.

Eventually, the surrogate gave birth to a baby girl, Baby C (pseudonym used to refer to the surrogate child). After her birth, she has been staying with Lake and Santos in Thailand; however, the issue arose as the surrogate refused to sign any documents to help the child obtain the passport. The intended parents filed a petition to the Central Juvenile and Family Court to issue an order requesting the child become the legitimate child of Lake and claim for sole parental power. This case became an international focus and the case of Baby C came under the media attention.

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109 Central Juvenile and Family Court (n 15).
3.7.1.2 Court Judgment

On 26 April 2016, the Central Juvenile and Family Court read the court judgment of the Black Case No. Por. 1239/2558 Red Case No. Por. 716/2559, which Lake filed a petition requesting Baby C become his legitimate child according to Section 56 of ART Act. The Central Juvenile and Family Court interpreted Section 56 of the ART Act that such provision allows the Court to exercise his discretion as appropriate on a case-by-case basis in order to protect the welfare and best interests of the child.

Although the petitioner is not a husband or a wife as prescribed under Section 56 of the ART Act, the Court concluded that the petitioner is the intended parent who commissioned surrogacy by transferring the embryo conceived from the sperm of the petitioner and the egg from the egg donor to the uterus of the surrogate. The surrogate then gave birth to Baby C and the petitioner took Baby C and raised her since the day she was born. The Court further reviewed the petitioner’s evidence and found that the petitioner provided love and care to Baby C. During the hearing, the surrogate did not raise any objection if the Court would order Baby C to be a legitimate child of the petitioner. Based on the rationale above, the Court rendered his order that Baby C is the legitimate child of the petitioner.

In terms of parental power over the child, the Court contemplated whether the petitioner and the surrogate should have joint parental power over the child or whether the Court should allow only one party to have sole power. The Court opined that the petitioner has raised Baby C since she was born. During the time of the proceedings, the child was already 1.3 years old and she was at the age to know and feel connected to her caretaker. By changing the caretaker, it would detriment the child’s feeling and emotional well-being. Even though the petitioner is homosexual, the court viewed that being homosexual is not an obstacle to raise a child and to allow the child to gain happiness and love as other children. The surrogate, being the objector in this case, is neither the lawful wife of the petitioner nor a de facto partner of the petitioner and the surrogate has the place of residence in a different country from the petitioner. Had the Court granted joint
custody for the petitioner and the surrogate, there would arise the difficulties on the exercising of parental power and it would not benefit the child. Therefore, the Court ruled in favor of the petitioner by granting sole parental power to the petitioner based on best interest of Baby C. The Appeal Court held the judgment of the Central Juvenile and Family Court. The case is under review by the Supreme Court.

Section 56 of the ART Act explicitly indicates the qualifications of those who can submit a petition for child legitimation to the Juvenile and Family Court, which are (i) the person who was born through surrogacy arrangement before the commencement of the Act, (ii) a husband who commissioned surrogacy, (iii) a wife who commissioned surrogacy, and (iv) a public prosecutor. The petitioner, in this case, is not a husband, a wife or a public prosecutor as described under Section 56; however, the petitioner is one of the intended parents and the owner of the sperm. The question is whether the intended parents who are not recognized as husband and wife under the CCC is eligible for submitting a petition for child legitimation to the Juvenile and Family Court. Based on the fact, the petitioner is a member of the commissioning couple and is genetically related to the child.

As published in the press release issued by the Central Juvenile and Family Court\textsuperscript{110}, the Court interprets Section 56 of the ART Act by way that allowing the Court to exercise his discretion to order the child born through surrogacy arrangement as appropriate on a case-by-case basis in order to protect the child’s welfare and best interests.

Section 56 of the ART Act grants the full parental power to the commissioning couple who are married as husband and wife. However, the rights of the commissioning couple whose status is not recognized by the law are still doubtful as Section 56 does not specifically indicate how they can proceed in the child legitimation procedure. More importantly, Section 56 does not address any issue relating to child’s parental power. Certainly, if the commissioning couple are husband and wife as specified under the ART Act, they would inevitably have

\textsuperscript{110} Ibid.
parental power over the child, unless there are appropriate reasons for the court to temporarily revoke the parental power of the lawful parents. However, in cases where the intended parents are not husband and wife, the matter relating to parental power would be reviewed under the CCC.

Section 1566 of the CCC indicates that a child is subject to parental power of a father and a mother during minority. The surrogate as a lawful mother and the petitioner as the lawful father should have had joint parental power over the child. However, the situation in this case is unlike other natural mothers. In case of Baby C, the court exercises his discretion, for best interests of the child, to grant sole parental power to the father. It is noted that the Court does not mention that the parental power of the surrogate has been removed according to Section 1582 of the CCC, which relies upon the fact that the surrogate is not practically and legally married to the petitioner and suitability of the intended parents. If joint parental power was granted to the petitioner and the surrogate, there would be problems in exercising the parental power and that would not benefit the child. Similar to the Supreme Court Judgment 2668/2556, the Juvenile and Family Court applies Section 1566(5) of the CCC to grant sole parental power to a parent stating that the court may exercise his discretion to order a father or a mother to exercise sole parental power over the child for the interests and benefits of the child without removing the parental power of the other parent under Section 1582 of the CCC.

3.7.2 Pre-commencement Surrogacy by a Single Person

According to the Black Case No. Por2031/2559, Red Case No. Por296/2561, the judgment rendered by the Central Juvenile and Family Court has been unprecedented and worth for further analysis in order to understand the court’s interpretation of Section 56 of the ART Act.

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111 CCC, s 1569/1.
112 https://www.thairath.co.th/content/1209648 accessed on 8 July 2018.
3.7.2.1 Background

The Petitioner is a single foreign national, who was desirous of having several children without the need of getting married. He was raised in a normal family and came from a very wealthy background. He engaged an international surrogate agency to help him arrange surrogacy procedures in Thailand. During the time, there was no law governing surrogacy practice, except for the regulations issued by the Medical Council of Thailand. Due to the number of children born under surrogacy arrangement, the Ministry of Social Development and Human Security and the police misunderstood that the Petitioner was involved in human trafficking and took the children to be under government custody.

3.7.2.2 Court Judgment

The Central Juvenile and Family Court set out the issue whether the Petitioner has the right to submit the petition requesting the Court to issue an order to the effect that the children are the Petitioner’s legitimate children. The court opined that the ART Act which came into force since 30 July 2015 provided in its transitory provision, section 56 that “a person born by the surrogacy prior to the entry into force of this Act whether there is a written arrangement, husband or wife undertaking the surrogacy...shall have rights to submit a petition to the court to issue an order stating that the person born by the surrogacy prior to the entry into force of this Act is a legitimate child of the husband and the wife undertaking the surrogacy as from the date when such person was born; provided that whether the husband and the wife undertaking the surrogacy are lawful husband and wife...”. The Court stated that it is clear that the intention of the provision is to protect the welfare and prioritize best interest of those born as a result of surrogacy. In this case, despite the fact that the Petitioner does not have a spouse, the court findings reveal that the children were born prior to the date such Act came into force. The Petitioner is therefore entitled to submit the petition to the Court requesting it to issue an order that the children are his legitimate children under such provision without the need to consider whether the surrogacy complied fully with one of the conditions under Section 21 of the ART Act. Also, the report on
the Petitioner and the children have the same genetic materials. It is hence reasonable to conclude that the Petitioner is the father of the children by blood. Furthermore, when considering the behavior of the Petitioner after the children’s birth, the Petitioner has also raised the children well until the official from the Ministry of Social Development and Human Security took the children to custody. The Petitioner’s action indicates that the Petitioner intends to rear the children as opposed to abandoning them. In addition, when the facts reveal that the surrogate women have no blood relationship with the children in any way and that they have executed a memorandum waiving their parental power, it is appropriate to allow the Petitioner to exercise sole parental power over the children. Therefore, the Court has ordered that the children are the Petitioner’s legitimate children since the date of their birth pursuant to Section 56 of the ART Act and that the Petitioner shall have sole parental power over the children.

3.7.3 Surrogate’s Claim for Parental Power

This case, under the reference Black Case No. Por. 580/2559 Red Case No. 691/2559, Black Case No. Yor. Shor. Por. 77/2559, Red Case No. 1711/2560, has been unprecedented and worth for further analysis in order to understand the court’s interpretation of Section 56 of the ART Act.

3.7.3.1 Background

The Plaintiff agreed to be the surrogate for the Defendant. They entered into a surrogacy agreement prior to the commencement of the ART Act. The surrogacy procedure began by the Plaintiff having been implanting an embryo, which originates from IVF process between the egg from the egg donor and the sperm of the Defendant, to her uterus. In 2014, the Plaintiff gave birth to a set of twins. The Defendant intended to raise the children by himself but he was not able to do so due to certain incident. In order to raise the children, the Plaintiff would need continuous financial support from the Defendant for she has low income and does not have sufficient financial means to care for the twins. The Plaintiff on behalf of the twins then filed the case against the Defendant to request the court for child...
legitimation as the lawful father and request him to pay for financial support for the children under the CCC.

3.7.3.2 Court Judgment

The Central Juvenile and Family Court ordered that the Plaintiff does not have the power to file a case to enforce the Defendant to register the children to be his legitimate children under Section 1539 of the CCC. Once the children are not lawful children of the Defendant, the Defendant does not have the responsibility to pay for financial support for the children. The Court dismissed the surrogate’s petition due to the following reasons:

First, the first paragraph of section 1539 of the CCC states “In case where the child is presumed to be the legitimate child of the husband or the man who used to be the husband under Section 1536, Section 1537 or Section 1538, the husband or the man who used to be the husband may repudiate the child by entering an action in Court against the child and the mother jointly, and providing that he did not cohabit with the mother of the child during the period of conception, that is to say, the period extending from the one hundred and eightieth day to the three hundred and ten day inclusive, prior to the birth of the child, or that he could not have been the father of the child on other grounds of impossibility.” The Court interprets that the first paragraph of section 1539 of the CCC deems that a man who will be a lawful father of a child must have had sexual intercourse with the mother of the child. According to the background of the case, the child was born through surrogacy arrangement and therefore the plaintiff did not have sexual intercourse with the Defendant. The Plaintiff does not have the power to submit a plaint enforcing the Defendant to register the children as his legitimate children under the CCC.

Second, section 56 of the ART Act must be applied in cases relating to the surrogate children that are born prior to the enactment of the Act. The Plaintiff only agreed with the Defendant to carry pregnancy for the Defendant and such agreement is not considered as the agreement between husband and wife (family) or the agreement with a husband or a wife (of the family). The Plaintiff did
not request the Court to order that the surrogate children become legitimate children of the husband and the wife (family) who commissioned surrogacy under Section 56 of ART Act. As the children are not legitimate children of the Defendant, the Defendant does not have the responsibility to care for the children. The Plaintiff, therefore, does not have the power to claim for the children’s financial support from the Defendant.

The plaintiff appealed the decision at the Appeal Court based on the following rationale:

Firstly, the first paragraph of Section 1539 of the CCC is not the basic principle to determine whether a person is a father of the child, but it gives the opportunity for the person who has been presumed of being a father of the child to take evidence or other facts to rebut the presumption of the law, including Sections 1536, 1537 and 1538 of the CCC. However, this case, the Plaintiff has not been married to the Defendant and no other facts in this case would make the Defendant meet the conditions of Sections 1536, 1537 and 1538 of the CCC. In addition, the first paragraph of section 1539 of the CCC is the guideline for such person to rebut the said legal presumption by filing a case against the child and the child’s mother as defendants. To determine whether a person is a father of the child is the next process that the parties would have to testify and present evidence in the hearings. Therefore, Section 1539 of the CCC is not applicable in this case.

Section 1539 of the CCC does not include any statement that the father must have had sexual intercourse with the mother of the child, instead the said provision uses the word ‘cohabit’, not ‘to have sexual intercourse’. If Section 1539 of the CCC means to refer to sexual intercourse, the said provision should have indicated likewise. For example, Section 1555(6) of the CCC indicates that “an action for legitimation may be entered only in where the father had sexual intercourse with the mother during the period when conception could have been taken, and there are grounds to believe that he or she is not the child of another man.” These two provisions are totally separated as Section 1539 of the CCC addressed the condition that such person must cohabit with the mother of the child during the time of pregnancy only. In addition, the second paragraph of Section 1540
of the CCC that previously indicated the presumption for such person to have sexual intercourse with the mother of the child has been repealed by the Civil and Commercial Code (No. 10) B.E. 2533 (1990), which demonstrates that the CCC does not intend to apply ‘sexual intercourse’ as substantial context to determine that the child is a legitimate child of a person. Even though the Plaintiff and the Defendant do not have sexual intercourse, it did not deter the power of the plaintiff to file a lawsuit against the Defendant in this case.

Section 1541 of the CCC provides an exception for a person who is or was a husband to file a lawsuit not to accept the child as his own according to Section 1539 of the CCC. The lawsuit cannot be entered by such person if it appears that he registered the birth of the child in the birth certificate as his legitimate child. The Plaintiff has already addressed the fact that the Defendant has registered himself as a father; therefore, Section 1541 of the CCC is not applicable and the Defendant himself cannot raise Section 1539 of the CCC to refuse accepting the child as his own.

The Plaintiff as the legal representative of the children filed this case for the defendant’s child legitimation under Sections 1555 and 1556 of the CCC. Section 1555 of the CCC set legal presumptions, which are (i) the reason that the mother and the person who presumes to be a father had sexual relationship during the time that she can be pregnant, (ii) the reason that relies upon the document demonstrating father-child relationship, and (iii) the reason that other circumstances that the father shows by way of accepting that the child is his own child. In the case relating to filing for child legitimation, the laws do not specifically limit the scope for child legitimation for only from sexual relationship, otherwise Section 1555 of the CCC would not have mentioned other causes. Due to the fact that the Defendant has assisted in all medical and pre- and post-natal expenses under the name of the defendant together with informing of the child’s birth and naming the child by using his last name, indicating his name as the father of the child, these behaviors fall under the legal presumption that the child is a legitimate child of the person according to Section 1555(4)(7) of the CCC. Further, Section 1556 of the CCC identifies that a legal representative of the child, who is a minor, can file...
a case for child legitimation on the child’s behalf. The Plaintiff, who is a lawful mother of the children, is therefore their legal representative and has the power to file this case on the children’s behalf.

The Plaintiff did not file the case by applying the ART Act. The implication of the ART Act by the Court in this case is not within the scope of the plaint and is unlawful.

Lastly, the Plaintiff has the right to claim for financial support for the children under Section 1564 of the CCC. If the Plaintiff has the power to file this case, the Plaintiff would have the power to claim the defendant for financial support for the children.

On 10 February 2017, the Appeal Court affirmed the judgment of the Central Juvenile and Family Court by giving the rationale that the surrogate was impregnated by using artificial reproductive technology whereas the pregnancy was not a result of husband-wife relationship as stated in the CCC on Family in the Black Case No. Yor. Shor. Por. 77/2559, Red Case No. 1711/2560. Section 34 of the ART Act indicates that the Civil and Commercial Could would apply mutatis mutandis as long as it does not conflict with the ART Act. Therefore, the ART Act is applicable in order to determine legal parentage of children born by ART in order to create consistency with the genetic material according to the objective of this Act.

Even though the Plaintiff did not file the case under the ART Act, Section 2 of the Act indicates that the ART Act comes to effect 90 days from the publication date in the Royal Gazette on 1 May 2015. The Plaintiff gave birth to the children prior to the enforceability of the ART Act, Section 56 of the Act must be applied.

The first paragraph of Section 29 of the ART Act indicates that “…shall be a legitimate child of lawful husband and wife intending to have a child...” Therefore, The Appeal Court held the judgment of the Central Juvenile and Family Court and concluded that the Plaintiff is not the mother who can act as a legal representative of the children and does not have the power to file this case on
their behalf in order to enforce the Defendant for child legitimation and claim for financial support. The Plaintiff appealed and was later withdrawn.

According to the current interpretation of the Court in the above three cases, it can be concluded that the court has applied the principle on the best interests of the child and extended the rights of the intended parent to file a petition for child legitimation beyond the context of Section 56 of the ART Act. However, the court has not completely ruled out the parental right of the surrogate over the child except for the Black Case No. Por. 580/2559 Red Case No. 691/2559, Black Case No. Yor. Shor. Por. 77/2559, Red Case No. 1711/2560 where the Court dismissed the petition filed by the surrogate to request financial support from the intended parent. One may only assume that the surrogate has no legal right as a mother over the child.

The enactment of the ART Act is considered as a promising first step to regulate illegal surrogacy and prevent commercial surrogacy in Thailand. It has set out the rights of the intended parents over the surrogate children and to the certain extent mitigate the risks of potential claims by the surrogate. Principle on the best interests of the child has been applied by the court, but other laws in relation to the basic rights of the child such as right to register for birth or right to obtain a citizenship have not yet fully reflected such principle.
CHAPTER 4
SURROGACY UNDER FOREIGN JURISDICTIONS

4.1 Introduction

Surrogacy practice has been considered as one of the most common means for infertile couple to have children. In the United States, medically assisted reproductive technology has been rapidly developed. The right and freedom of its citizens are guaranteed in the Constitution. The legislative body of each state has the duty to ensure that the laws are enacted to facilitate the procreative rights and liberty, which is the right guaranteed under the Constitution. Therefore, the United States is considered as the country where there are the most surrogacy arrangement in the world. In another continent, Australia is another country that the laws on surrogacy are considered advanced and the development history and legal implication would be worth studying.

4.2 Surrogacy Laws in the United States

Dating back to the history of the surrogacy laws in the United States, there had been several attempts made by the legislative body to propose certain

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113 ยกศักดิ์ โกไศยกานนท์, ความรู้เบื้องต้นเกี่ยวกับกฎหมายวิธีการเจริญพันธุ์ทางการแพทย์ พ.ศ. 2558, วิญญูชน, 2558 (Yotsak Kosaiyakanon, Khwamroo Beung Ton Kiewkub Khodmai Oumboon Taam Phraratchabanyat Khoomkrongdek Tii Kerd Doy Asai Technology Chuay Karncharoenphan Tang Kamphaet B.E. 2558 [Fundamental Knowledge on Medically Assisted Reproductive Technology B.E. 2558] (1st edn, Winyuchon 2015)).

114  Skinner v Oklahoma [1942] The United States Supreme Court, 782 (The United States Supreme Court).

115 Kosaiyakanon (n 113).
laws to prohibit surrogacy arrangement at the federal level. In 1989, two draft legislations have been proposed, including Surrogacy Arrangement Act of 1989, which incorporated criminal penalty for any parties involved in commercial surrogacy and Anti-Surrogate Mother Act of 1989, which included criminal penalty for any arrangements relating to surrogacy including the arrangement to find surrogate, advertisement or medical assistance whether or not it involves in commercial surrogacy. However, these two legislations were dismissed by the House of Representatives.\(^{116}\)

Today, federal laws relating to parent and child relationship are stipulated in the Uniform Parentage Act (UPA), which was first promulgated in 1973 with the contribution from each representative of every state in the United States. The UPA was developed with the objective to serve as a model for each state when enacting any laws to establish parent and child relationship.\(^{117}\) Several amendments have been made to the UPA since its first promulgation. Article 8 on surrogacy agreement has been initially incorporated in the UPA (2002) as statutory provisions to allow surrogacy practice. The recent amendment of the UPA (2017) has made legal outlook on surrogacy practice become more updated.

Due to each state has its own right and duty to enact its own state law, each state is not required to adopt Article 8 of the UPA to its own domestic legislation due to the controversial nature of its practice. In fact, each state may adopt certain part of the UPA and amend its own state law to govern its residents. Therefore, the law on surrogacy in the United States varies from state to state and each state grants different scale on the enforceability of the surrogacy contract from allowing commercial surrogacy to prohibiting surrogacy entirely.\(^{118}\) The domestic laws in New York, Indiana, and Michigan ban surrogacy completely and surrogacy contracts are considered void and unenforceable while New Jersey follows the controversial

\(^{116}\) Ibid.
\(^{117}\) Ibid.
\(^{118}\) Columbia Law School Sexuality & Gender Law Clinic (n 43).
Baby M case to ban surrogacy.\textsuperscript{119} Besides the four states, there are fourteen states that regulate and permit some form of surrogacy by statute; however, each state has its own determining factors of whether or not consideration is allowed in the surrogacy contract, whether or not the intended parents must be married, whether the surrogate must meet certain qualifications in order to carry pregnancy for someone else under the surrogacy contract.\textsuperscript{120} In fact, some states only govern gestational surrogacy or traditional surrogacy and some states has become vague about the enforceability of commissioning of surrogacy as surrogacy arrangement has not been mentioned in the statutes.

For example, the state of California expressly states that surrogacy contract is allowed for gestational surrogacy and a facilitator to the surrogate agreement can charge a fee or valuable consideration for services rendered relating to ART or oocyte donation or make an advertisement. To regulate surrogacy contract, section 7962(a) of the California Code, Family Code indicates that the contract must contain all of the following information, including (i) the execution date of the contract, (ii) the owner of the genetic materials, except for the case of egg or sperm donor, (iii) information of the intended parent(s), and (iv) details of medical responsibilities for surrogacy arrangement and the child after birth. If the intended parent(s) plans to use health insurance to pay for the said expenses, information on the insurance policy should be informed. It is essential to review the scope of liabilities against the surrogate or any third persons. If the policy cannot be determined or uncertain, factual statement must be made to meet the requirements. Besides the required substances in the surrogacy contract as described above, Section 7962(a)(c) of the California Code, Family Code also required that the surrogate and the intended parents must be represented by separate independent licensed attorneys and the signatures must be notarized or witnessed by an equivalent method of affirmation as required in the jurisdiction where the contract is executed. The California State extends the concept of surrogacy beyond the

\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
surrogacy contract as the state allows the intended parents to apply for the parentage order before the child is born, provided, however, that the said order will take effect once upon the birth of the child.\textsuperscript{121}

On the other hand, the implication of surrogacy contract in the State of Massachusetts is the combination of statutory law and case laws. Under the statute, the law indicates that any child born to a surrogate (if obtained consent by her husband) as a result of artificial insemination is considered the legitimate child of the surrogate and her husband.\textsuperscript{122} However, the case laws held that for full surrogacy where the embryo of the child is fully conceived by genetic parents but implanted in the surrogate’s womb, genetic parents can seek a pre-birth order for the competent Court when the child is born through a surrogate and the names of the genetic parents should be stated in the birth certificate of the child to establish the rights and responsibilities of the parents.\textsuperscript{123} In contrary, adoption would be applicable in case of partial surrogacy arrangement where the surrogate has the right to give up the child within a period of four days upon the date of birth. In this scenario, the surrogacy contract may be enforceable in the claim for child custody; however, commercial surrogacy arrangement or other kind of compensation must not be associated during the pregnancy, except for the pregnancy-related expenses.\textsuperscript{124}

4.2.1 Surrogacy Practice under Uniform Parentage Act

The Uniform Parentage Act 2017 (UPA) acknowledges the practice of gestational surrogacy and genetic surrogacy. The definition of genetic surrogacy under the UPA is a surrogacy arrangement which involves ‘a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using her own gamete’ while gestational surrogacy is a surrogacy arrangement which

\textsuperscript{121} Ibid.
\textsuperscript{122} Mass. G.L. c. 46, § 4B.
\textsuperscript{123} Culliton v Beth Israel Deaconess Medical Center [2001] The Supreme Judicial Court of Massachusetts (The Supreme Judicial Court of Massachusetts).
\textsuperscript{124} Columbia Law School Sexuality & Gender Law Clinic (n 43).
involves ‘a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not her own’.  

The UPA set out general requirements for the surrogate and the intended parents who desire to utilize surrogacy as a means for having children that any one of the relevant parties must be a resident of the state or otherwise the health check or mental-health consultation is done in the state.  

The intended parent and the surrogate must be at least 21 years old, must have received a health check by a licensed medical practitioner, a mental-health evaluation by a licensed mental health professional, and they must be represented by independent legal counsellors in the whole process of surrogacy arrangement. The legal counsellors must be addressed in the agreement and paid by the intended parent(s). The surrogate must have given birth to a child before. The surrogacy agreement must entered into by each intended parent, the surrogate and her spouse (if any) and the signatures of all parties must be notarized or witnessed. An acknowledgement by the surrogate and each intended parent must be made to the copy of the agreement. The surrogacy agreement must be executed prior to the performance of surrogacy procedures.

125 UPA, s 801(1), (2).
126 UPA, s 803(1).
127 UPA, ss 802(a)(1), 802(b)(1).
128 UPA, ss 802(a)(3), 802(b)(2).
129 UPA, ss 802(a)(4), 802(b)(3).
130 UPA (n 122).
131 UPA, s 803(7).
132 UPA, s 803(8).
133 UPA, s 802(a)(2).
134 UPA, s 803(3).
135 UPA, s 803(6).
136 UPA, s 803(5).
137 UPA, s 803(9).
The UPA further recognizes the possible change of marital status of the surrogate and the intended parent. After the surrogacy agreement has been executed, neither the marriage nor the divorce of the surrogate or the intended parent would affect the validity of the surrogacy agreement and spousal consent is not required. The law also rebutted the presumption of the spouse of the surrogate that he would not be the presumed parent of a child.

4.2.1.1 Gestational Surrogacy

Specific requirements on gestational surrogacy are addressed in Part 2 under Article 8 of the UPA. Prior to the amendment of the UPA in 2017, the UPA (2002) required all surrogacy agreements to be validated by the competent court; however, it appeared that such requirements were not adopted by the states and it is not in line with the current surrogacy arrangement. The UPA (2017) therefore changed its stand not to require any court validation before proceeding with surrogacy procedure.

Under gestational surrogacy, the intended parent or the surrogate may terminate surrogacy agreement at any time before the embryo transfer and any time after the embryo transfer if there is no pregnancy. After termination, the remaining responsibilities are the pending expenses that each party must be liable. Otherwise, they are released from other responsibilities related to the surrogacy arrangement.

4.2.1.2 Genetic Surrogacy

Genetic surrogacy has not been widely accepted in the United States. Only four states currently acknowledge genetic surrogacy practice.

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139 Ibid.
140 UPA, s 805(a)(1).
141 UPA, s 808(a).
142 Ibid.
including Florida, Maine (close relatives only), Virginia, and the District of Columbia. Some of these states allow the surrogate to withdraw her consent, given specific timeframe in doing so. Under the genetic surrogacy, the UPA allows the intended parent to terminate the surrogacy agreement any time before a gamete or embryo transfer and after a gamete or embryo transfer if there is no pregnancy.\(^{143}\) A surrogate, however, may ‘withdraw consent’ to the surrogacy agreement ‘any time before 72 hours’ after giving birth.\(^{144}\) After termination, the remaining responsibilities are the pending expenses that each party must be liable. Otherwise, they are released from other responsibilities related to the surrogacy arrangement.\(^{145}\)

In addition, the UPA requires that all genetic surrogacy agreements must be validated by the competent court before commencing any ART procedures.\(^{146}\) The validating order of the court is subject to whether the parties meet all the statutory requirements and whether the parties executed the agreement ‘voluntarily and understand its terms.’\(^{147}\)

### 4.2.2 Legal Parentage

Under the UPA (2017), there are several presumptions set out in relation to parent and child relationship. For example, an individual who gives birth to a child is presumed to be the child’s parent.\(^{148}\) An individual is presumed to be a parent of a child if the said individual and the woman who gave birth to a child are married and the child is born during the marriage, regardless to the validity of the marriage\(^{149}\) or the child is born no later than 300 days after the marriage is

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\(^{143}\) UPA, s 814(a)(1).
\(^{144}\) UPA, s 814(a)(2).
\(^{145}\) UPA, s 814(b).
\(^{146}\) UPA, s 813(a).
\(^{147}\) UPA, s 813(b)(1)(2).
\(^{148}\) UPA, s 201.
\(^{149}\) UPA, s 204(a)(1)(A).
An individual marries the woman who gives birth to a child and agrees to be named as a parent of the child is presumed to be the child’s parent or the said individual has lived in the same residence with the child for two years after the child is born. These presumptions are based upon the situation of natural conception, which varies from the child born through surrogacy process.

Article 8 of the UPA (2017) stipulates how to determine parentage over surrogate children. The principle to determine parentage for both gestational surrogacy and genetic surrogacy is that each of the intended parents is the parent of the child where the law made it clear that neither the surrogate nor her spouse is the child’s parent.

4.2.2.1 Gestational Surrogacy

Under gestational surrogacy, the UPA (2017) recognizes that the intended parent is the lawful parent of the surrogate child. The surrogate and her spouse have no right as parents over the child even though the surrogate is the woman who gives birth to the child. In the event that the child has genetic link to the surrogate, it may require that relevant parties conduct genetic testing and procedures to determine parentage over the surrogate child as described in Article 8 of the UPA (2017) would not apply. The intended parent would still be considered as lawful parent of the surrogate child even if there occurs any clinical error and the

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150 UPA, s 204(a)(1)(B).
151 UPA, s 204(a)(1)(C)(ii).
152 UPA, s 204(a)(2).
153 UPA, s. 809.
154 UPA, s 809(a).
155 UPA, s 809(b).
156 UPA, s 809(c).
intended parent has no genetic link to the child.\textsuperscript{157} The surrogate or her spouse would not be considered as parents of the child.\textsuperscript{158}

Any surrogacy arrangement that complies with the laws is enforceable.\textsuperscript{159} In the event that the parties pursue gestational surrogacy but its process does not confirm with the requirements under the UPA (2017), the law allows the court to issue an order to designate the rights and responsibilities by considering the ‘intent’ of the parties when they entered into the surrogacy agreement.\textsuperscript{160}

4.2.2.2 Genetic Surrogacy

Under genetic surrogacy, the UPA (2017) recognizes the intended parent as the lawful parent of the surrogate child.\textsuperscript{161} Due to the statutory requirements under the UPA (2017) that all genetic surrogacy needs to be validated by the court, if the surrogate does not exercise her right to terminate the surrogacy agreement within 72 hours after the birth of the child, the court must issue an order to validate the agreement to declare that the intended parent is the parent of the child; to declare that the surrogate and her spouse are not parents of the child; to designate the intended parent as the parent of the child in the child’s birth certificate; to order for non-disclosure of documents; and to order the return of the child to the intended parent.\textsuperscript{162} If the surrogate terminates the surrogacy agreement within the given statutory timeframe or the child born by the surrogate is not born through the ART process, Article 8 of the UPA (2017) would not apply when determining parentage of the child.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{157} UPA, s 809(d).
  \item \textsuperscript{158} Ibid.
  \item \textsuperscript{159} UPA, s 812(a).
  \item \textsuperscript{160} UPA, s 812(b).
  \item \textsuperscript{161} UPA, s 815(a).
  \item \textsuperscript{162} UPA, s 815(b).
  \item \textsuperscript{163} UPA, s 815(c).
\end{itemize}
In the event that the genetic surrogacy arrangement has not been validated by the court prior to conducting the ART procedure and the child has been born, the court must determine parentage of the child by considering the ‘intent’ of the parties during the time of execution and the principle of ‘best interests of the child’ by considering the following questions:

1. How old is the child?
2. How long has any person involved taken the parental role of the child?
3. How can they explain their relationship with the child?
4. Will it be harmful if the relationship no longer exists?
5. Does each of the person involved have the right over the child and on what ground?
6. Are there any other similar factors that may affect the child whether it is harmful or benefit the child which are caused by cessation of relationship with the child?

However, if the surrogate decided to exercise her right to withdraw her consent to the surrogacy agreement within statutory period, Article 8 of the UPA (2017) would not apply and parentage of the child would be determined by natural parent and child relationship as stipulated under Articles 1 through 6.  

4.2.3 Custody and Visitation Rights

In the United States, parental power often times referred to as custody, visitation right or guardianship and is attached to the parents of the child to give appropriate education and to have custody, care and nature the child. Generally, this topic would generally be discussed in divorce cases. Several standards

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164 UPA, s 816(c)
165 *Meyer v State of Nebraska*, 262 US 390 [1923] The United States Supreme Court (The United States Supreme Court).
166 *Prince v Massachusetts*, 321 US 158 [1944] The United States Supreme Court (The United States Supreme Court).
have been applied when the Court makes decisions over parental power of the child and the principle to determine the custodial parent has adapted over time. At present, the Court relies on the principle of the ‘best interests of the child’ but the application of such principle may be quite challenging as one factor may favor one party while another factor favors the other.\textsuperscript{167} As a result, each state has developed state laws, which comprise factors to determine which party should have custody over the child, which eventually fulfill the child’s best interest.\textsuperscript{168}

The utmost importance when considering the best interests of the child is to weigh on which parent ‘to place a child with the parent who will be better able to provide him [the child] with the love, guidance, support, and discipline necessary to help him grow into a happy, well-adjusted person and a productive member of society.’\textsuperscript{169} Several factors have been addressed for the court to decide on parental power as follows:

\begin{enumerate}
\item \textbf{Gender and Primary caretaker} – In the past, the court was more favorable in granting the father as the custodial parent but the decision has been shifted to the mother under the ‘tender years presumption’.\textsuperscript{170} The likelihood that the court would grant custody awards to the mother was higher, particularly if the children are under seven years old.\textsuperscript{171} Even though the Constitution has barred sexual discrimination and some states have adopted such ideas to avoid granting favor over one party based on her gender; however, a few states still indirectly favor the mother and apply the tender year presumption in making the final decision when both parties seem equally fit.\textsuperscript{172} In addition, most mothers normally preserve the role as the primary caretaker and this factor has been given a lot of weight by
\end{enumerate}

\textsuperscript{168} Forman (n 21).
\textsuperscript{169} Ibid.
\textsuperscript{170} Friedman (n 167).
\textsuperscript{171} Forman (n 21).
\textsuperscript{172} Ibid.
many states.\textsuperscript{173} The responsibilities considered to be performed by the primary caretaker include preparing the meals, taking a bath and dressing the child, providing medical care, taking the child to children’s activities, disciplining the child and teaching some necessary and basic skills.\textsuperscript{174}

(2) \textit{Economic Superiority} – The court takes into consideration of the financial status of the relevant party even though this factor does not play a larger role when making decision.\textsuperscript{175}

(3) \textit{Employment Stability} – This factor has been taking into account when the court grants a custody award. Even though the court gives differing view on the employment status of each party on a case-by-case basis,\textsuperscript{176} but it appears that the party that demonstrates a position to be more stable and give guidance to nurture the child would be more favorable to the court.\textsuperscript{177}

(4) \textit{Sexual Conduct} – This is another factor to be considered by the court. Sexual immorality may be directly regard as a ‘determinative factor’ but some courts may look at this issue as a supporting factor for the ‘parent’s ability to care for the child.’\textsuperscript{178}

(5) \textit{Religion} – This factor was significantly recognized by the Alaska Supreme Court as the court recognizes the child’s need for his religious affiliation without concerning the religion of the parents.\textsuperscript{179}

(6) \textit{Sexual Orientation} – Those who are gays or lesbians had disadvantage when it comes to deciding on custody awards.\textsuperscript{180} Even though today’s
standard has rested upon best interests of the child, some courts are still having difficult times granting custody awards to the parent who is a member of same-sex group.  

However, this factor has begun to fade and this factor would only contribute to the court’s decision if the child would be impacted by his or her parent’s sexual orientation or whether it makes the child feel uncomfortable.  

(7) Physical and Mental Health – The court would take into consideration of the physical and mental health of each of the parent whether they are contracted with contagious diseases or with AIDS and the HIV virus. The court would also have to consider this factor when granting custody award if either of the parent suffers from a chronic or life-threatening illness like cancer.  

(8) Preference of the Child – The older the child gets the more consideration would be placed upon the child’s preference. The child’s maturity and intelligence would have an impact on the court’s decision. Children who are older than fourteen years old would be able to express their thoughts or feelings.  

(9) Unwed fathers – A father may be considered for custody as the law does not prohibit him from doing so.  

(10) Child Abuse History – Any parent with the history of child abuse would not be granted custody award. If the parent has a new boyfriend or girlfriend, and such child abuse was caused by them, it may jeopardize the right of the parent to have custody over the child.  

_______________________________  
181 Forman (n 21).  
182 Ibid.  
183 Friedman (n 167).  
184 Forman (n 21).  
185 Friedman (n 167).  
186 Forman (n 21).  
187 Ibid.  
188 Friedman (n 167).  
189 Forman (n 21).  
190 Ibid.
(11) **Substance Abuse and Smoking** – Any parent who uses additive or illegal drugs may be in a disadvantage position and may not be granted custody award.\(^{191}\) This same result may apply similarly to any parent who has alcohol addiction or other types of drug addiction.\(^{192}\)

(12) **Relationship Quality** - One important factor is the quality of relationship that the child has with the parent and how that relationship will be maintained in the future.\(^{193}\)

In addition to custody over the child, the United States has recognized visitation rights that may be applied and rendered to the surrogates in some cases. For example, the court issued a parentage order and custody awards in favor of the intended parents based on the principle of best interests of the child but also granted visitation right to the surrogate who gave birth to a child in *In re Baby M* due to her strong emotional ties to the child after child’s birth.\(^{194}\)

### 4.2.4 Court Filing Procedures

Court proceedings may be subject to the state level. As for the federal laws level, the proceeding to adjudicate parentage is addressed in Article 6 of the UPA (2017), which applies to parents and children born of natural conception and ART process. However, proceeding to adjudicate parentage for surrogate children is specifically addressed in Article 8 of the UPA (2017).

Any of the relevant parties in gestational surrogacy arrangement may request for a parentage order to (i) declare that each intended parent is the child’s parent and order that each intended parent has the rights and duties over the child, (ii) declare that the surrogate and her spouse are not parents of the child, (iii) identify each intended parent as a parent in the child’s birth registration, (iv) protect

\(^{191}\) Ibid.
\(^{192}\) Ibid.
\(^{193}\) Ibid.
\(^{194}\) *In re Baby M*, 537 A2d 1227, 109 NJ 396 [1988] New Jersey Supreme Court (New Jersey Supreme Court).

Ref. code: 25605701040031RQB
the child’s and all parties’ privacy and keep the records confidential, (v) return the child to the intended parent, and (vi) process any other reliefs as appropriate. A pre-birth order may be made available and remain fully enforced until the child is born.

Similar to the gestational surrogacy, any parties to the genetic surrogacy agreement has the right to file a case requesting the court to issue a parentage order over the child.

4.2.5 Birth Registration

In the United States, the duty to register the children at birth rests upon the hospital and the official registrar will arrange for the necessary forms to be filled out ‘within 24 hours’ after child’s birth. In the state of California, the laws allow the submission of the pre-birth order, which affect the intended parent to become lawful parents of surrogate children and avoid the risks of having the surrogate or her spouse being named as parents in the child’s birth certificate. Once the pre-birth order has been issued, the said order should be sent to the hospital and be carried by the intended parents to mitigate any risks of misplacement.

In the event that the intended parents are heterosexual couple, the female intended parent would be named as the mother while the male intended parent would be named as the father of the child. If the intended parents are members of a same-sex couple, the birth certificate may address that the

195 UPA, s 811(a).
196 UPA, s 811(b).
197 UPA, s 816(e).
199 Ibid.
200 Ibid.
children have two mothers or two fathers, as the case may be. In 1999, the very first case has been filed to the United Supreme Court by a UK gay couple, Barrie and Tony Drewitt-Barlow and the Supreme Court of California has render an order to name the two men as ‘fathers’ of the twins. In 2005, the Supreme Court of California has recognized that two women of same-sex couple can both be named as ‘mothers’ of the surrogate children. Due to the fact that the laws vary on state by state, many states have begun to adopt a similar concept but some states like Arkansas still do not acknowledge the registration of two same-sex parents in the child’s birth certificate.

In the event that the surrogacy arrangement is done by a single man, he has two alternatives as he may list the surrogate as the mother and his name as the father, or he may put his name as the mother and leave the father’s name blank. The intended parent would then need to request the court to reissue the birth certificate so that his name will be recorded correctly as the father and the name of the mother is left blank.

4.2.6 Citizenship

Any person born in the United States is immediately entitled to U.S. citizenship as such right is stipulated in the 14th Amendment of the U.S. Constitution whether they are born through natural conception or surrogacy arrangement. In the event that the child is born under the use of ART process outside the United States, the child would have U.S. citizenship at birth so long as there is a biological connection between the parent and the child. To recognize

201 Pavan v Smith [2017] Arkansas Supreme Court (Arkansas Supreme Court).
202 Surrogacy Law (n 198).
the U.S. citizenship of the child at birth, the father of the child must be a U.S. citizen and genetically related to the child, or the mother of the child must be a U.S. citizen and genetically related and/or gestational and legal mother of the child when and where the child is born.\textsuperscript{205} Citizenship recognition for a child born through surrogacy arrangement by the Department of State can be made only after the child is born.\textsuperscript{206}

4.2.7 Case Study

The United States have wide variation in the rules to determine parentage and parental power in each state. Some states recognize parentage of surrogate children through the person giving birth (gestational motherhood). Some states acknowledge the intent of the intended parents. Some states recognize genetic link between the parents and the child. Often times, disputes relating to parentage and parental power need to be decided by the Supreme Courts, which eventually laid out the legal principles in surrogacy matters. There are three principles that have been recognized in the United States to determine parentage and parental power including the gestational motherhood principle, the genetic-based parenthood principle and the intent-based parenthood principle according to the examples of the Supreme Court Judgments below.

In addition to the factors that the United States courts have applied in granting parentage order, the author hereby selected a case where the court decides that custody and parentage should be separately considered and the rationale how the court reviews the best interests of the child in granting custody awards.

\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid.
4.2.7.1 Gestational Motherhood

In A.H.W v. G.H.B., the Superior Court of New Jersey has rendered judgment in with respect to gestational surrogacy that the person giving birth should be lawful mother of the child.\(^{207}\)

(1) Background

Andrea (A.H.W) and Peter (P.W.), who are the Plaintiffs in this case, are a married couple and they executed a gestational surrogacy agreement with Gina (G.H.B.), who is a sister of Andrea and is not married. Andrea and Peter used their own gametes in the fertilization process and Gina agreed to have the embryo transfer to her uterus. Before the birth of the child, Andrea and Peter filed a petition to the court requesting to issue a pre-birth order in order to identify them as legal parents of the child in the birth certificate. In this case, all parties including the intended parents and the surrogate have no objection towards the request; however, the Attorney General’s Office views that the surrogate has the right as the birth mother to withdraw her consent within 72 hours after child birth. As a result, the pre-birth order would not be applicable in this case.

(2) Court Judgment

The Superior Court of New Jersey has rendered judgment by denying the request of the plaintiffs and the surrogate to issue a pre-birth order; however, the court allows the names of the plaintiffs, who are biological parents of the child, to be registered in the birth certificate. This would apply after the lapse of 72 hours after birth as required by law.

The underlying rationale of the court in relation to surrogacy practice is that the surrogate who carries the child for 9 months during her pregnancy would have intimate relationship with the fetus inside the womb. Such pregnancy is essential for the fetus to grow and finally be born to become independent. According to the state laws, the mother may waive her birth mother’s right after 72

hours upon child’s birth. If the court allows the amendment on the parent’s names, it would breach the public policy of the State of New Jersey. In addition, if the court rendered a pre-birth order to change the status of the surrogate from a mother during her pregnancy, it would indirectly force her to waive her right as the mother. As a result, it can be concluded that the court respects the right of the surrogate as a gestational carrier to be the mother of the child whether or not she has any genetic relation with the child.

4.2.7.2 Genetic-based Parenthood

In *Belisto v. Clark*, the Ohio Court has rendered judgment that genetic relationship is the natural factor that would decide on the child parentage unless they have waived their right to parentage of the child.

(1) Background

Anthony and Shelly Belsito intended to have a lot of children during their marriage, but Shelly suffered cancer before her marriage and her uterus had to be removed during surgery. Her ovaries, however, were not removed so Shelley was able to produce eggs. Understanding this circumstance, Carol Clark who is Shelly’s sister agreed to be a gestational carrier for the couple without any compensation. The parties signed the consent for to acknowledge Carl as the ‘carrier’, Shelley as the ‘mother’ and Anthony as the ‘father’ of the child. The doctor who performed IVF process in the hospital testified that the ‘unborn child carried by Carol Clark was genetically the child of Anthony and Shelly Belsito.’ In fact, the surrogate does not have any genetic relation to the child. The baby was born approximately one month before the due date.

After the birth of the child, Anthony and Shelly discussed with the registrar on how to register their names as parents of the child in the birth certificate; however, the law only recognizes the birth mother as the lawful

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mother of the child. Because Carol and Anthony are not legally married, the child born to Carol would be an ‘illegitimate child’ of Anthony. As a result, Anthony and Shelly filed a case to the court requesting for adoption of the child and register them as lawful parents in the child’s birth certificate.

(2) Court Judgment

The Court reviewed whether the adoption law applies in this case. Due to the fact that Anthony and Shelly claimed that they are ‘natural parent’ of the child, the adoption law would not take effect. The Court defines ‘natural parent’ as ‘the child and parent being of the same blood or related by blood.’ The court recognizes that ‘blood relation’ is the most important factor to determine ‘legal status of a natural parent’ by citing the Commentaries on the Laws of English together with comparing to the modern-day interpretation of parentage. The basic principle in recognizing the woman giving birth to a child to be a natural parent was the presumption that such woman has the same genetic relation with the child. The Court viewed that in order to identify parents of a child, two factors to be considered are by blood (genetics) and by birth.

The Court ordered that Anthony and Shelly are lawful parents of the child based on their genetic relationship. The Court reviewed the judgment of Johnson v. Calvert, which facts are similar to this case whereby intent was used as the main factor in determining parentage of a child, but the Court does not apply the same rationale given the reason that the difficulty in proving intent of the intended parents. Intent to procreate may arise from the genetic parent and from the surrogate. Another reason is that intent principle violates public policy based on the surrender of parental rights by agreement and the concept of the adoption law that allows the natural mother to have ‘unpressured opportunity’ to think whether she wants to surrender her right as a mother to someone else. Giving intent as a principle to determine parentage, it would jeopardize the right of the mother and it is not in line with the principle on the best interests of the child. In addition, genetic parents would understand the DNA history of the child and recognizes the DNA flaws or diseases from genetic traits. The court concluded that
based on the Ohio law, the natural parents of the child are those who contributed genetic materials to the child.

4.2.7.3 Intent-based Parenthood

_In re Marriage of Buzzanca_209 is one of the United States landmark cases that took place in California. Its significance involves how the Court interprets the legal relationship between a child and their intended parents given the absence of genetic relationship among them and how the Court correlates the intention of the parents to the child’s best interest.

(1) Background

In August 1994, Luanne and John Buzzanca, a married couple, agreed to implant an embryo, whose genetic materials are not related to them, in the uterus of a surrogate, who agreed to carry the baby throughout the term of pregnancy. In March 1995, before the baby was born, John filed for a dissolution of marriage from Luanne and claimed that there were no children of the marriage. Luanne, on the other hand, argued that they were expecting a child that was arranged under a surrogacy agreement. After the child, Jaycee, was born, Luanne filed another petition requesting the Court to establish herself as Jaycee’s legal mother in September 1996. Her petition on the establishment of legal motherhood and the marriage dissolution case between Luanne and John were consolidated.

(2) Court Judgment

During the hearing of the Trail Court, the oral argument between Luanne and John took place and it was evidenced that neither Luanne, John nor the surrogate had any genetic relationship to the child. The Trial Court ruled that Luanne was not the lawful mother of the child and therefore the Court refuses in applying “any estoppel proposition to the issue of John’s responsibility for child support.” Based on the Trial Court’s judgment, Jaycee would become a legal orphan as she would have no lawful parents and therefore John’s financial support

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to Jaycee would be terminated. As a result of the judgment, Luanne submitted an appeal to the California Court of Appeal. The Appeal Court overturned the judgment made by the Trail Court and concluded that Luanne and John are lawful parents of Jaycee, given the rationale that Jaycee would not have been born without the consent of Luanne and John to implant the embryo in a surrogate in the first place.

Section 7610 of Family Code under the UPA stipulates grounds for establishment of parentage that

‘the parent and child relationship may be established as follows: (a) Between a child and the natural parent, it may be established by proof of having given birth to the child, or under this part, (b) Between a child and an adoptive parent, it may be established by proof of adoption.’

By way of interpreting this section, John argues, during his appeal, that Jaycee has no genetic relationship to him or Luanne, and neither he or Luanne could become legal parents of Jaycee. He further argued, under his interpretation of this section, that the surrogate would become the legal mother as she is the person who gives birth to Jaycee, and the surrogate’s husband would become the legal father.

The Appeal Court, however, interprets Section 7610 differently as the content of the law employs the word “may” instead of “shall” when it comes to the establishment of relationship between the parent and the child. In fact, the said section does not indicate that the legal relationship between the parent and the child must be established only two ways i.e. giving birth or genetic relationship as claimed by John. The law specifically uses the words “under this part” which genetic testing is treated as a subset of the such words when applied for proof of paternity or it could mean something else. Section 7610 gives light to the possible scenarios where two women could establish motherhood (Johnson v. Calvert, supra, 5 Cal.4th at p.93), namely one being the woman who gives birth to the child and the other being the woman under this part, which in this case would be by virtue of consent. The Appeal Court views that Luanne was the
intended mother and the surrogate has not made any attempt to become the lawful mother of Jaycee while the egg donor has not made any claim to motherhood.

The Appeal Court explains the grounds to establish paternity that it could be established by the following:

(a) The presumed father and the mother of the child are or have been married and the child is born during their marriage or within 30 days after the marriage is terminated\(^{210}\);

(b) The presumed father and the mother have attempted to marry\(^{211}\);

(c) The presumed father, in the event of artificial insemination of his wife, may be deemed as a lawful father according to section 7613 of the Family Code\(^ {212}\), prior to the amendment, which states “If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.” The interpretation of section 7613 applies that the husband, who gives consent to proceed with artificial insemination on his wife by using semen from a donor, would be treated as the lawful father.

### 4.2.7.4 Best interests of the Child in Custody Battle

The *In re Baby M* Case is the case occurred in New Jersey and is considered as the first surrogacy case that has been ruled by the Court in the United States in relation to the custody of the child and the validity of the surrogacy contract. In this case, the Court uses Baby M as the pseudonym in referring to the baby born through surrogacy arrangement in this case.

\(^{210}\) Family Code, s 7601.

\(^{211}\) Family Code, s 7601.

\(^{212}\) Family Code, s 7613.
(1) Background

According to the facts of the case, William Stern and Elizabeth Stern (the intended parents) were married in July 1974 as they met at the University of Michigan and both were Ph.D. candidates. Elizabeth faced the risk of having multiple sclerosis, which she feared that it may cause serious health risk if she became pregnant. Both William and Elizabeth had strong desire to have children and they first considered adoption as one of the options; however, the adoption process is substantially long and several problems have been raised due to their age and religious backgrounds. They then decided to pursue artificial insemination by posting an advertisement at the Infertility Center of New York (ICNY) in search for a suitable woman to help them have children. In response to this advertisement, Mary Beth Whitehead, having felt sympathy with the couple, agreed to be the surrogate.

In February 1985, William Stern and Mary Beth Whitehead together with her husband entered into a surrogacy contract due to the fact that Stern’s wife, Elizabeth, was infertile. The surrogacy contract between Stern and Whitehead indicated that artificial insemination will be used to result in pregnancy. The sperm from Stern is used to inject to Mary Beth’s uterus. Once the child is born, Mary Beth agrees to give the child to the said couple and waive her material rights. The contract, however, was not executed by Elizabeth but it indicated that Elizabeth would have the sole custody of the child in case William passed away. Substantially in the surrogacy contract, William agreed to compensate Mary Beth for 10,000 U.S. Dollars. During the time of contract execution, both parties were willingly entering into the surrogacy contract without concerning on the potential risks whether the Sterns would be suitable parents or whether Mary Beth would have emotional attachment to the child.

After the baby was born, the Sterns were very happy and thrilled for the birth of their intended child while Mary Beth suffered through emotional crisis as she felt she was unable to give up the child to the Sterns. However, Mary Beth did give the child to the Sterns family according to the surrogacy contract. After the child returned to the Sterns’ house, Mary Beth went there the next day and told the Sterns about her emotional sufferings that she would commit
suicide if she could not be with the baby. Mary Beth asked to be with the baby only for one week and then she would return the child to the Sterns, but she eventually refused. The Sterns filed a complaint seeking enforcement of the surrogacy contract and the initial Court awarded custody to the Sterns. Right after, the Whiteheads fled to Florida with the baby and the police had to forcibly remove the child from the Whiteheads’ parents’ home and return the child to the Sterns.

In this case, the Sterns filed a complaint against the Whiteheads to honor the terms and conditions of the surrogacy contract that they must return the child to them. The Whiteheads disputed that the surrogacy contract was invalid due to the fact that (i) it conflicted with the public policy because the child would not be raised by her genetic parents; (ii) it was detrimental to the mother’s constitutional right to accompany the child; and (iii) it conflicted with the law of parental rights and adoption. Mary Beth claimed primary custody with visitation rights for William on the best-interest basis as the child should be placed with the mother unless the mother shows the sign of unfitness. The Sterns, however, argued that the surrogacy contract was executed under the right to privacy and that adults would have the right to give consent on how to deal with reproduction issues as appropriate.

(2) Court Judgment

The Court ruled that the surrogacy contract between William Stern and Mary Beth Whitehead was void and unenforceable, given the rationale that (i) the law prohibits any compensation that takes part in adoptions while the monetary arrangement between the Sterns and the Whiteheads seems to relate to adoption; (ii) the law requires the proof of parental unfitness or abandonment before termination of parental rights for the adoption to be granted while Mary Beth did not show any sign of parental unfitness or abandonment of the child; (iii) the surrogacy contract was in conflict with the law that makes surrender of custody and consent to adoption revocable in private placement adoptions as the surrogacy contract did not allow any opportunity for Mary Beth to rescind her agreement as it was deemed an irrevocable consent. It appeared that the surrogacy contract was planned to bypass the statutory laws. Another rationale for the
invalidity of the surrogacy contract is based on the public policy. The public policy considers that the child should be raised by both genetic parents. The Court also viewed that surrogacy contract is much different from adoption because of the following reasons:

(i) Money plays an important role in surrogacy as it would be the motivation of surrogates to bear the child. Without payment, there would be limited number of surrogates. Adoption would involve certain amount of money because money would facilitate the mother to raise the child;

(ii) Money involved in adoption process does not initiate the problem on the birth because monetary offer arises after the birth of the child while surrogacy involves money from the beginning;

(iii) The law prohibits monetary connection in adoptions as the adoption process is not dependent upon the wealthiest adoptive parents but to the authorized agency; however, surrogacy process would surrender the child to the person with the most money so long as payment of money is permitted; and

(iv) The mother’s consent in order to surrender the child for adoption is revocable while the consent of the surrogate as appeared in the surrogacy contract is irrevocable.

Therefore, the Court opined that surrogacy contract is void and it cannot be enforceable between the two parties as it clearly contradicts the laws by ensuring that the child will be separated from the mother, applying adoption practice without concerning the parent’s suitability, disregarding the best interest of the child, disrespecting the natural mother’s concern and emotional welfare and using of the money in the process of engaging surrogacy arrangement.

**Legal Parentage**

Based on the New Jersey laws, parental right cannot be revoked based on the contractual agreement between the parties. In order to revoke Mary Beth’s maternal right, statutory requirements must be met. Mary Beth did not show that Mary Beth has no intention to leave or abandon the child and it does not appear that she will do so in the future. In fact, the Court did not find that Mary Beth was an unfit mother and that she seemed to be a good mother of her other
children. Even though the Sterns tried to prove that Baby M would be better off with one set of parents, the Court found that such rationale remained insufficient to terminate the right of the mother. As a result, the Court found that there was no ground to terminate the paternal right of Mary Beth.

Both parties, further in dispute over the case, asserted their constitutional rights into arguments in the case including the right of privacy, the right to procreate, and the right to the companionship of one’s child. The Sterns claimed that they exercised the right of procreation while Mary Beth argued with her right to the companionship of her child. The Court viewed that the right to procreate is the right to have natural children, whether through sexual intercourse or artificial insemination; however, the right of procreation does not extend beyond the creation of the life itself where other rights including custody, care, companionship and nurturing are not the same as the right to procreation. The Court considered the claim made by Mary Beth on this matter that she wished to exercise her right to the companionship of her child that this is the fundamental right that is protected by the Constitution and, therefore, granted parental right to Mary Beth.

**Custody**

In deciding on the issue relating to the custody of Baby M, the Court considered the basis principal under the Parentage Act that ‘the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.’ To determine the child’s custody, the Court also applied the child’s best interests based on the assumption that both parents are well suitable to care for the child and which primary custody, either to the Whiteheads or to the Sterns, would be better off for the child. The Court made comparison between the Whiteheads and the Sterns, giving pros and cons on both side and granted custody to the Sterns based on their more promising personalities, proven track records of the baby that has lived with them for 1.5 year, the strong relationship between the child and the Sterns, their financial well-being, and their happy marriage. On the other hand, the Whiteheads seem to face financial difficulties and Mary Beth’s personality seems to be in control to the point where some expert witnesses mentioned that she would need professional psychological help.
Therefore, in considering for the child’s future, her future is more promising if the primary custody is awarded to the Sterns. Provided the primary custody was granted to the Sterns, the Court granted visitation right to Mary Beth.

4.3 Surrogacy Laws in Australia

Surrogacy is regulated in Australia at the state and territory level. Australia has separated its government into state government and territory government. There are six states in Australia including New South Wales (NSW), Queensland (QLD), South Australia (SA), Tasmania (TAS), Victoria (VIC) and Western Australia (WA) and each state is governed by its own constitution, which means that each state has its own three branches—legislature, executive and judiciary branches in order to form its own federal government. Australia also comprises of ten territories, having two territories located on the mainland, which are Australian Capital Territory (ACT) and the Northern Territory (NT) being granted the right for self-government and the remaining territories are under the Commonwealth law. Each of the six states and the Australian Capital Territory has implemented its own surrogacy law while the Northern Territory remains unregulated. Every state in Australia and the Australian Capital Territory entirely ban commercial surrogacy; however, altruistic surrogacy is permitted. The substantial consequences of the surrogacy laws in the states and the Australian Capital Territory are (i) the laws grant the rights to the intended parents in requesting the court to transfer parentage from the surrogate

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215 Columbia Law School Sexuality & Gender Law Clinic (n 43).
216 Ibid.
mother and her husband or partner to the intended parents, \(^{217}\) (ii) the laws specifically signify the responsibility of the intended parents to reimburse the costs of surrogacy arrangement that incurred by the surrogate. \(^{218}\)

### 4.3.1 Surrogacy Practice under Surrogacy Act 2010 (NSW)

With respect to the six states and the Australian Capital Territory, the common qualifications for valid surrogacy arrangements are (i) that such surrogacy must not be commercial, \(^{219}\) (ii) that the consent from the surrogate mother to transfer parentage from her to the intended parent(s) is acknowledged, \(^{220}\) (iii) that the best interest of the child is the utmost purpose for the transfer of parentage, \(^{221}\) (iv) that the intended parent(s) must be resident(s) of the jurisdiction where the application to transfer parentage is submitted, \(^{222}\) (v) that the application to transfer parentage must be submitted to the competent court no later than six months after the child’s birth, \(^{223}\) (vi) that the relevant parties to the surrogacy arrangement have to receive counselling \(^{224}\), and (vii) that the parties must meet age requirements but the relevant age and application on the surrogate and the intended parents are inconsistent on each state. For example, New South Wales requires that the surrogate must be at least 25 years of age \(^{225}\) and the intended parent(s) must be at

\(^{217}\) Parentage Act 2004 (ACT), s 29; Surrogacy Act 2010 (NSW), s 39; Surrogacy Act 2010 (Qld), s 39(2); Family Relationships Act 1975 (SA), s 10HB(13); Surrogacy Act 2012 (Tas), s26(1); Status of Children Act 1974 (Vic), s 19; Surrogacy Act 2008 (WA), s 26(1).


\(^{219}\) Ibid.

\(^{220}\) Ibid.

\(^{221}\) Ibid.

\(^{222}\) Ibid.

\(^{223}\) Ibid.

\(^{224}\) Ibid.

\(^{225}\) Surrogacy Act 2010 (NSW), s 27(1)
least 18 years of age during the time of entering surrogacy agreement.\textsuperscript{226} In Tasmania, however, the surrogate mother must be at least 25 years of age\textsuperscript{227} and the intended parent(s) must be at least 21 years old.\textsuperscript{228} Besides the age requirements, there are other requirements that are varied in each state and territory. In the event that the requirements or pre-conditions under the laws are not met, the provisions under the laws in New South Wales, Queensland and Tasmania permit the court to exercise his discretion to dismiss some of the requirements for the best interest of the child; however, the remaining four jurisdictions do not permit the court in doing so.\textsuperscript{229}

Due to the diverse qualifications and requirements on surrogacy arrangement in each state, the author hereby selects to analyze the Surrogacy Act 2010 (NSW). Under the Act, surrogacy arrangement is categorized into two types, which are pre-conception surrogacy arrangement and post-conception surrogacy arrangement. Pre-conception surrogacy arrangement is an agreement between a woman who agrees to become or try to become pregnant with a child and the parentage of the child is agreed to be transferred to another person(s) while post-conception surrogacy is an agreement that a woman who is already pregnant agrees to transfer parentage to another person(s).\textsuperscript{230} Only pre-conception surrogacy arrangement is entitled to the parentage order under this Act.\textsuperscript{231} To further elaborate on the transfer of parentage under the surrogacy arrangement, it means expressly that:

(a) Surrogacy arrangement is an agreement to consent a parentage order in order to transfer parentage of the child to another person,

(b) Surrogacy arrangement is an agreement that the child will be treated as the child of another person, not the woman who gives birth to the child,

\textsuperscript{226} Surrogacy Act 2010 (NSW), s 28(1)
\textsuperscript{227} Surrogacy Act 2012 (Tas), s 16(2)(c)
\textsuperscript{228} Surrogacy Act 2012 (Tas), s 16(2)(b)
\textsuperscript{229} Keyes (n 217).
\textsuperscript{230} Surrogacy Act 2010 (NSW), s 5(1).
\textsuperscript{231} Surrogacy Act 2010 (NSW), s 5(4).
(c) Surrogacy arrangement is an agreement that the custody and responsibility over the child is transferred to another person,

(d) Surrogacy arrangement is an agreement that the right to care for a child is to be permanently surrendered to another person.

4.3.2 Legal Parentage

In Australia, the surrogacy laws presume that the surrogate and her husband or partner are lawful parents of the child who has been born through surrogacy arrangement. In most surrogacy arrangement, it involves the procedure of artificial insemination or in vitro fertilization and implant the embryo into the surrogate. The surrogate mother once gives birth to the child would be recognized as the child’s lawful mother while the biological mother who is genetically related to the child is presumed not to be the parent of the child. The surrogate’s husband or partner, if granted consent to the said procedure, would also be deemed as the parent of the child. The intended parents who may have the same genetic relationship with the child are presumed not to be the legal parents of the child unless such intended parent registers himself or herself in a birth register or acknowledges parental status. The intended parent(s) and the surrogacy arrangement itself must satisfy the conditions set out under the legislation of their applicable jurisdiction in order to request the court to grant the transfer of parentage from the surrogate parents to them, otherwise the parental status would be determined by the general law.

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232 Keyes (n 218).
233 Ibid.
234 Ibid.
235 Ibid.
236 Ibid.
4.3.3 Custody

In Australia, the Family Law Act 1975 (as amended) has governed matters relating to child custody. In all court proceedings, it is emphasized that the principle of the best interests of the child is utmost importance. Section 60CC of the Family Law Act set out factors for the court to determine best interests of the child, which include:

(1) The right of the child to enjoy a meaningful relationship with both parents;

(2) The safety of the child with respect to any possible physical or psychological harm from experiencing any abuse, neglect or family violence;

(3) The child’s point of view with respect to his or her maturity and level of understanding;

(4) The relationship between the child and each of the parents as well as other relatives or third persons;

(5) How each parent engages in decision making for the future of the child and how each parent spends time and communicates with the child;

(6) The effect of the change in circumstances or possibility that the child may be separated from each of the parent or other relatives;

(7) The expense or difficulty of a child to spend time or communicate with his or her parent, which may affect the ability to maintain personal relations with the parents;

(8) The ability to provide for the child’s needs including emotional and intellectual needs;

(9) Maturity, gender, lifestyle, background, culture and tradition of the child or any other relevant characteristics;

(10) The parent’s attitude in taking responsibility over the child and being a parent;

(11) Degree or history of family violence;

(12) Any other relevant factors.

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237 Family Law Act 1975, s 60CA.
4.3.4 Court Filing Procedures

According to Section 12 of the Surrogacy Act 2010 (NSW), the court is entitled to make a parentage order in order to transfer the parentage of a child born through surrogacy arrangement\(^{238}\) from their birth parents to the intended parent(s), provided, however, that the application for parentage order must meet the requirements under the laws.

The application for parentage order must be filed not less than 30 days and not more than six months after the child’s date of birth.\(^{239}\) The court may exercise his discretion to review and issue a parentage order on the application that is submitted after the statutory period under the court’s justification on exceptional circumstances.\(^{240}\)

The application for parentage order may be filed by the following person(s): (i) one or two intended parents\(^{241}\), which means a single person or a couple—either spouse or de facto partner\(^{242}\), (ii) in the event that the surrogacy arrangement was commissioned by both intended parents, the application must be filed by both intended parents unless the court grants leave to an intended parent to file a sole application. The rationale for the court in granting leave to submit a sole application are as follows:

(i) the other intended parent has died or lost capacity to make decisions,\(^{243}\) or

(ii) the other intended parent cannot be located after reasonable endeavors have been made to locate him or her,\(^{244}\) or

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\(^{238}\) Surrogacy Act 2010 (NSW), s 12.
\(^{239}\) Surrogacy Act 2010 (NSW), s 16(1).
\(^{240}\) Surrogacy Act 2010 (NSW), s 16(3).
\(^{241}\) Surrogacy Act 2010 (NSW), s 14(1).
\(^{242}\) Surrogacy Act 2010 (NSW), s 25(1), (2).
\(^{243}\) Surrogacy Act 2010 (NSW), s 14(3)(a).
\(^{244}\) Surrogacy Act 2010 (NSW), s 14(3)(b).
(iii) the intended parents have separated; however, they can make a joint application if both of the intended parents wish to do so, or

(iv) other exceptional circumstances justify that action, or

(v) the notice of the application has been given to the intended parent and he or she does not wish to participate in the application for parentage order, given that the evidence is required in order to satisfy the court to proceed with sole application.

The court may issue the parentage order only if the preconditions are satisfied. However, in the event that the applicants cannot satisfy the preconditions, the court may dispense such conditions if the said precondition is not mandatory and there occurs exceptional circumstance that could justify the inability to satisfy such precondition. The law also gives flexibility to the court in reviewing other matter that might be of relevance in making the parentage order. Preconditions to the issuance of parentage order are stated below.

(1) The parentage order must be for the best interests of the child. This is a mandatory precondition that cannot be waived by the court.

(2) The surrogacy arrangement must be altruistic, which means that it is not a commercial surrogacy arrangement. This is a mandatory precondition that cannot be waived by the court.

(3) The surrogacy arrangement must be pre-conception surrogacy arrangement, which means that the woman who agrees to be the surrogate must not

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245 Surrogacy Act 2010 (NSW), s 14(3)(c).
246 Surrogacy Act 2010 (NSW), s 14(5).
247 Surrogacy Act 2010 (NSW), s 14(3)(d).
248 Surrogacy Act 2010 (NSW), s 14(4)(a), (b).
249 Surrogacy Act 2010 (NSW), s 18(1), (2).
250 Surrogacy Act 2010 (NSW), s 18(3).
251 Surrogacy Act 2010 (NSW), s 22(1), (2).
252 Surrogacy Act 2010 (NSW), s 23(1), (2).
be pregnant during the time of the agreement. This is a mandatory precondition that cannot be waived by the court.\(^{253}\)

(4) The intended parent must be a single person or member of a couple, which consists of a person and his or her spouse or de facto partner. This is a mandatory precondition that cannot be waived by the court.\(^{254}\)

(5) The child born under surrogacy arrangement must be under 18 years old during the time that the application for parentage order is submitted. However, if the child is able to express his or her needs, the court may take the child’s expression into account. This is a mandatory precondition that cannot be waived by the court.\(^{255}\)

(6) The surrogate must be at least 25 years of age when entering into surrogacy arrangement. In the event of pre-commencement surrogacy, the surrogate must be at least 18 years old when entering into surrogacy arrangement. It is a mandatory precondition that the surrogate must be at least 18 years old when entering into surrogacy arrangement.\(^{256}\)

(7) The intended parent(s) must be at least 18 years old when entering into surrogacy arrangement. This is a mandatory precondition that cannot be waived by the court.\(^{257}\)

(8) In the event that the intended parent is under 25 years old when entering into surrogacy arrangement, the intended parent must prove to the court that he or she is mature enough to understand social and psychological implications of the parentage order by providing the following evidence:

a. The intended parent, who is under 25 years old, has been counseled by qualified counsellors about the potential impact on the life of the

\(^{253}\) Surrogacy Act 2010 (NSW), s 24(1), (2).
\(^{254}\) Surrogacy Act 2010 (NSW), s 25(1), (2), (3).
\(^{255}\) Surrogacy Act 2010 (NSW), s 26(1), (2), (3).
\(^{256}\) Surrogacy Act 2010 (NSW), s 27(1), (2), (3).
\(^{257}\) Surrogacy Act 2010 (NSW), s 28(1), (2).
intended parent in terms of their social and psychological conditions prior to proceeding with surrogacy, and

b. The counsellor views that the intended parent’s maturity level was sufficient and that he or she has good understanding on the effect of surrogacy arrangement that may have on them.

This is a mandatory precondition that cannot be waived by the court, but the above condition does not apply to pre-commencement surrogacy arrangement.\(^{258}\)

(9) There must be a social or medical need for surrogacy arrangement, which are: (a) There is only one person who wishes to be the intended parent and the said intended parent is a man or an eligible woman, who (i) is unlikely to conceive a child on medical grounds, or (ii) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or (iii) is unlikely to survive a pregnancy or birth, or (iv) is likely to have her health significantly affected by a pregnancy or birth, or (v) if she were to conceive a child is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth; (b) There are two intended parents, who are (i) a man and an eligible woman, (ii) two men, or (iii) two eligible women. This precondition does not apply to pre-commencement surrogacy arrangement.\(^{259}\)

(10) Each of the affected parties must give freely and voluntary consent to the issuance of the parentage order. The consent of the surrogate mother is a mandatory precondition unless the surrogate has died or lost capacity to give consent or cannot be located after reasonable endeavors have been made.\(^{260}\)

\(^{258}\) Surrogacy Act 2010 (NSW), s 29(1), (2), (3), (4).

\(^{259}\) Surrogacy Act 2010 (NSW), s 30(1), (2), (3), (4).

\(^{260}\) Surrogacy Act 2010 (NSW), s 31(1), (2).
(11) The applicant(s) must be resident of New South Wales during hearing of the application.261

(12) The child born under surrogacy arrangement must be living with the intended parent when the application is submitted.262

(13) The surrogate and her spouse (or partner) must sign the surrogacy contract and the intended parent is the counter party. This precondition does not apply for pre-commencement surrogacy arrangement.263

(14) Counselling on social and psychological impact from surrogacy must be provided to all relevant parties. This precondition does not apply to a pre-commencement surrogacy arrangement.264

(15) Legal advice from an Australian lawyer must be provided to all relevant parties. This precondition does not apply to a pre-commencement surrogacy arrangement.265

(16) The central registrar must keep all birth information about the surrogacy arrangement, but the court may waive this if it has no impact on the party.266

After the parentage order has been issued by the court, an application for discharge of parentage order maybe filed by an interested person, including “(a) a child whose parentage was transferred by the order, if 18 years of age or older, or (b) each of the child’s birth parents and intended parents, or (c) the Attorney General.” The discharge of parentage order may be made by the court only if “(a) the parentage order was obtained by fraud, duress or other improper means, (b) a consent the Court making the parentage order considered had been

261 Surrogacy Act 2010 (NSW), s 32.
262 Surrogacy Act 2010 (NSW), s 33.
263 Surrogacy Act 2010 (NSW), s 34(1), (2)
264 Surrogacy Act 2010 (NSW), s 35(1), (2), (3).
265 Surrogacy Act 2010 (NSW), s 36(1), (2), (3).
266 Surrogacy Act 2010 (NSW), s 37(1), (2).
267 Surrogacy Act 2010 (NSW), s 43(1), (2).
given to the making of the parentage order was, in fact, not given or was given for payment, reward or other material benefit or advantage (other than the birth mother’s surrogacy costs), (c) there is an exceptional reason why the parentage order should be discharged.”

In the event that the court renders the discharge of parentage order, “the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the parentage order had not been made.”

4.3.5 Birth Registration

Upon the birth of the child, the child must be registered. If the child was born outside of Australia, the birth registration must be made according to the child’s birth country.

Information in relation to the child’s birth history on surrogacy must be recorded by the central registrar.

Once the court issues a parentage order, the child would become the child of the intended parent(s) and the intended parent(s) become the lawful parent(s) of the child while the surrogate and her partner would cease in being the parents of the child and vice versa. The child born under surrogacy arrangement would have the same rights as if the child is born to the parent(s) and the intended parent(s) have the same parental responsibilities as the birth parent(s). The given name and the surname of the child may be approved as stated in the application of the intended parent(s); however, the court may take into consideration the child’s wishes in regard to the name and surname of the child if the child is mature enough to make his own wishes.

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268 Surrogacy Act 2010 (NSW), s 44(1), (2)(a)(b)(c).
269 Surrogacy Act 2010 (NSW), s 45(1).
270 Births, Deaths and Marriages Registration Act 1995.
271 Surrogacy Act 2010 (NSW), s 38(1), (2).
272 Surrogacy Act 2010 (NSW), s 37(1), (2).
273 Surrogacy Act 2010 (NSW), s 39(1).
274 Surrogacy Act 2010 (NSW), s 39(2).
275 Surrogacy Act 2010 (NSW), s 42(1), (2).
4.3.6 Citizenship

Any child born in Australia would be granted an Australian citizen if either parent is an Australian citizen or a permanent resident during the time of birth, or the child has lived in Australia for 10 years since the child’s date of birth.\textsuperscript{276} The child may also gain an Australian citizen if he or she has been adopted by law of any State of Territory or by an Australian citizen or permanent resident.\textsuperscript{277} In the event that a child is born through surrogacy arrangement outside of Australia, a written consent of all concerned parents including the surrogate mother is required in order to request for an issuance of an Australian passport.\textsuperscript{278} It is noted that if the intended parents already obtained a court order granting legal parentage and parental power over the child, such court order, to be presented and attached to the passport application, does not supersede the statutory requirement of the parental consent.\textsuperscript{279} Therefore, under the Australian Passports Act, a written consent of the surrogate is one of the most important documents to be obtained to process passport application for a child.\textsuperscript{280}

4.3.7 Case Study

Two cases in relation to the determination of legal parentage and parental power over surrogacy arrangement occurred prior to the enactment of the Surrogacy Act 2010 are discussed below.

\begin{itemize}
  \item\textsuperscript{276} Australian Citizenship Act 2007, s 12.
  \item\textsuperscript{277} Australian Citizenship Act 2007, s 13.
  \item\textsuperscript{279} Ibid.
  \item\textsuperscript{280} Ibid.
\end{itemize}
4.3.7.1 Pre-commencement Surrogacy

The application in *AP & anor v RD & anor [2011] NSWSC 1389* to request for the transfer of parentage of the child filed by AP and JP in respect of the child LP is the first application that has been submitted to the court under the Surrogacy Act 2010. The significance of this case in relation to this research is that the intended parents commissioned surrogacy arrangement prior to the commencement of the Surrogacy Act 2010, i.e. 1 March 2011 and it is worthwhile in studying how the court interprets the legislation and the rationale on a particular requirement related thereto.

(1) Background

Based on the background of the case, JP was unable to carry a pregnancy due to her medical procedure and her brother’s wife, PD, offered to carry the child for her. The fetus containing the genetic materials from AP and JP were implanted to PD. The child born under surrogacy arrangement was born on 3 July 2007. As soon as the child was born, the child was placed under the care of AP and JP, who are the intended parents and the plaintiffs in this case.

(2) Judgment

The court explains the importance of preconditions that are mandatory as such preconditions cannot be waived by the court while other preconditions that are not mandatory can be waived by the court under exceptional circumstances. In compliance with the preconditions, the court outlined each of the preconditions as follows:

1. Considering the surrogacy arrangement and the care arrangements of the child since birth, the parentage order would be for the best interests of the child as described under section 22 of the Surrogacy Act 2010. (Mandatory)

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282 Ibid.
(2) The surrogacy arrangement is altruistic and the court notes that “there is nothing to suggest that this was a commercial arrangement” as described under section 23 of the Surrogacy Act 2010. (Mandatory)

(3) The surrogacy arrangement was a pre-conception surrogacy arrangement as described under section 24 of the Surrogacy Act 2010. (Mandatory)

(4) The intended parents were a couple when entering into surrogacy agreement as described under section 25 of the Surrogacy Act 2010. (Mandatory)

(5) The child born under surrogacy arrangement is younger than 18 years old as to which the child is “not of sufficient maturity” to express the child’s own wish as described under section 26 of the Surrogacy Act 2010. (Mandatory)

(6) The surrogate mother, or the birth mother of the child, that she was 33 years old, which was at least 25 years old when entering into surrogacy agreement as described under section 27 of the Surrogacy Act 2010.

(7) Both of the intended parents were 38 and 30 years old, which age is at least 18 years old when entering into surrogacy agreement as described under section 28 of the Surrogacy Act 2010. The court further notes that both intended parents were older than 25 years old, then section 29 of the Surrogacy Act 2010 is not applicable and it was not a precondition applicable for pre-commencement surrogacy arrangement. (Mandatory)

(8) There existed the medical or social need of the intended parents that they were a couple and the woman was unable to carry a pregnancy on medical reasons; however, this precondition is not applicable for pre-commencement surrogacy arrangement as described under section 30 of the Surrogacy Act 2010.

(9) The affected parties including the intended parents and the surrogate mother (or the birth mother) must consent freely and voluntarily to the issuance of the parentage order as described under section 31 of the Surrogacy Act 2010. However, based on the review of the counsellor’s report, the
surrogate mother and her partner (who the court refers to as the birth parents) were mentioned to be “quite comfortable with their names being removed from the birth certificate and they were quite informed as to the consent they were given and its consequences.” The court views that these statements do not satisfy the court as informed consent, freely and voluntarily given by the parties. The court refers to the usual practice when the matter requires consent that the consent can be given in person in court or it could be a written consent, which must be verified by the affidavit of an attesting witness, preferably a lawyer. Particularly, in submitting application for the parentage order, the court specifically indicates that the expression should be “consent to the making of a parentage order under the Surrogacy Act in respect of the child [name]”. The attesting witness should be able to explain to the affected parties regarding the “legal and practical effect of the consent” and that such person “appeared to understand the explanation and to give the consent freely and voluntarily, and to have the capacity to do so. Informed consent can only be established by proving what information the recipient had. Free and voluntary consent, and capacity can be established only by evidence that the consenting party appears to be acting freely and voluntarily, and to have capacity.” However, the court views that there exists no evidence present to satisfy this precondition

(10) The applicants, who are the intended parents, are resident of New South Wales during the time of hearing of the application as described under section 32 of the Surrogacy Act 2010.

(11) The child is living with the intended parents during the time of hearing of the application as described under section 33 of the Surrogacy Act 2010.

(12) The precondition for parentage order requires that the surrogacy arrangement must be made in writing. The court notes that “there is no evidence of compliance with this requirement.” Due to the nature of this case being pre-commencement surrogacy arrangement, this precondition is not applicable as described under section 34 of the Surrogacy Act 2010.
(13) The precondition for parentage order requires the counselling from a qualified counsellor regarding “surrogacy arrangement and its social and psychological implications” must be made before entering into surrogacy arrangement and “the surrogate and her partner” (or who the laws and the court so called the birth mother and the birth mother’s partner) “must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order.” Due to the nature of this case being pre-commencement surrogacy arrangement, this precondition is not applicable as described under section 35 of the Surrogacy Act 2010.

(14) The precondition on the legal advice to be obtained before entering into surrogacy arrangement is not applicable for the pre-commencement surrogacy arrangement as described under section 36 of the Surrogacy Act 2010.

(15) As described under section 37 of the Surrogacy Act 2010, “all information about the surrogacy arrangement that is registerable information under Division 3 of Part 3 of the (NSW) Assisted Reproductive Technology Act 2007 must have been provided to the Director-General of the Department of Health, for entry in the central register kept under the Act. However, the Court may waive compliance with this precondition in relation to any information that is not known to an affected party and cannot reasonably be ascertained by the affected party.” The court reviews that no evidence has been presented, as such the court is unable to grant the waiver on this matter.

(16) The birth of the child must have been registered in accordance with the requirements of the Births, Deaths and Marriages Registration Act 1995 according to section 38 of the Surrogacy Act 2010. The birth of the child was registered on 20 July 2007 and such registration has satisfied the court on this precondition.

By way of making the parentage order, the court views that the parentage order can be made if the two remaining preconditions are met, which are (i) the informed consent that meets the qualifications as above described
has been provided to the court, and (ii) the evidence of the all registrable information about surrogacy arrangement has been provided to the Director-General of the Department of Health.

4.3.7.2 Pre-commencement Surrogacy by Same-sex Couple

The application of MM & KF re FM [2012] NSWSC 445\(^{283}\) to request for the transfer of parentage of the child filed by MM and KF, a male same-sex couple who shall be further referred to as the intended parents under this section, was reviewed by the Supreme Court of New South Wales and the judgment was rendered on 4 May 2012. This case marks the first time that the Supreme Court of New South Wales has ever reviewed an application made for the purpose of transfer of the parentage of the child when the intended parents are a same-sex couple.

(1) Background

Based on the factual background of this case, the intended parents and the surrogate agreed verbally to commission surrogacy around March 2009. Such agreement was made prior to the commencement of the Surrogacy Act 2010 and similar to AP & anor v RD & anor [2011] NSWSC 1389, this case is also the pre-commencement surrogacy arrangement. The child who was commissioned through surrogacy arrangement was born on 26 April 2010. The intended parents submitted an application for parentage order on 1 March 2012, which was submitted within the statutory period of two years after the commencement of the Act.

(2) Judgment

In compliance with the preconditions as described in Division 4 of the Surrogacy Act 2010, the Court has reviewed each of the preconditions applicable to the pre-commencement surrogacy arrangement and outlined the principles and procedures under the Surrogacy Act 2010 by referring to AP & anor v RD & anor [2011] NSWSC 1389. The Court outlined that he is satisfied:

(1) That “the care arrangements for the child since birth”, the parentage order would be for the best interests of the child as described under section 22 of the Surrogacy Act 2010.

(2) That the surrogacy arrangement is altruistic as described under section 23 of the Surrogacy Act 2010.

(3) That the surrogacy arrangement was a pre-conception surrogacy arrangement as described under section 24 of the Surrogacy Act 2010.

(4) That the intended parents were a couple of de facto partner when entering into surrogacy agreement as described under section 25 of the Surrogacy Act 2010.

(5) That the child born under surrogacy arrangement is younger than 18 years old as to which the child is too young to make the child’s own wish as described under section 26 of the Surrogacy Act 2010.

(6) That the age of the surrogate mother, or the birth mother of the child, that she was at least 25 years old when entering into surrogacy agreement as described under section 27 of the Surrogacy Act 2010.

(7) That the age of both of the intended parents that they were at least 18 years old when entering into surrogacy agreement as described under section 28 of the Surrogacy Act 2010. The court further notes that both intended parents were older than 25 years old, then section 29 of the Surrogacy Act 2010 is not applicable and it was not a precondition applicable for pre-commencement surrogacy arrangement.

(8) That the medical or social need of the intended parents that both intended parents are men; however, this precondition is not applicable for pre-commencement surrogacy arrangement as described under section 30 of the Surrogacy Act 2010.

(9) That the affected parties including the intended parents and the surrogate mother consented to the issuance of the parentage order as described under section 31 of the Surrogacy Act 2010.
(10) That the applicants, who are the intended parents, are resident of New South Wales as described under section 32 of the Surrogacy Act 2010.

(11) That the child is living with the intended parents as described under section 33 of the Surrogacy Act 2010.

(12) That the precondition for the surrogacy arrangement must be made in writing is applicable for the pre-commencement surrogacy arrangement as described under section 34 of the Surrogacy Act 2010; therefore, the oral agreement on surrogacy arrangement made by the intended parents and the surrogate would not affect the parentage order.

(13) That the precondition on the counselling to be made before entering into surrogacy arrangement is not applicable for the pre-commencement surrogacy arrangement as described under section 35 of the Surrogacy Act 2010; however, it was made known that the affected parties have been assessed by an independent counsellor that they “understand the social and psychological implications of the making of parentage order (both in relation to the child and the affected parties)”.

(14) That the precondition on the legal advice to be obtained before entering into surrogacy arrangement is not applicable for the pre-commencement surrogacy arrangement as described under section 36 of the Surrogacy Act 2010.

(15) That “all information about surrogacy arrangement that is registerable has been provided to the Director-General of the Department of Health as described under section 37 of the Surrogacy Act 2010.

(16) That “the birth of the child has been registered in accordance with the requirements of the Births, Deaths and Marriages Registration Act 1995.”

Once all the preconditions have been reviewed, the court then issued an order to transfer the parentage of the child from the surrogate as the birth mother of the child to MM as father and KF as father, granting that both
intended parents are fathers and approved the surname and given name of the child.

The United States and Australia have recognized that surrogacy is one of the most complicated issues and several parentage disputes have been raised long before the law being enacted. Due to the fact that the two countries apply precedent under the common law approach, the legislations such as the UPA and the Surrogacy Act 2010 (NSW) have been reflected from the actual situations and claims raised by both surrogates and the intended parents. The state of New South Wales in Australia has first determined that the surrogate and her spouse (if any) are lawful parents of the child at birth, which guarantees that the child will have parents and the right of the child to be registered is rest assured. Procedures for intended parents to become legal parents are clearly addressed in the law with respect to the right of the surrogate to give consent to terminate her right as the child’s mother and transfer parentage to the intended parents. In the United States, the laws set out requirements for gestational surrogacy and genetic surrogacy as well as the approach when surrogacy arrangement does not comply with the law. Citizenship of the child is guaranteed so far as the child is born in the United State territory.

Each state in both Australia and United States may take different view when it comes to surrogacy. Any person who desires to have children under surrogacy arrangement should study and discuss with an attorney in the intended state before proceeding.
CHAPTER 5
LEGAL ANALYSIS

5.1 Introduction

The advancement in medically assisted reproductive technology in the United States has been gradually developed and practiced for a long time. The United States Supreme Court has reviewed a significant number of cases, which set out precedents for the amendment of the Uniform Parentage Act. In a similar notion, Australia is another country where its citizens have used surrogacy as means for having children and many states have developed surrogacy laws to apply for residents of their states. Thailand has also developed the Protection of a Child Born by Medically Assisted Reproductive Technology Act (ART Act) to regulate surrogacy practice. Such regulations, however, do not indicate any rights to legal parentage of the children born through surrogacy arrangement that is not compliant with the law. In fact, the right to parentage of the surrogate children born prior to the ART Act came to force are more limited. Under this legal analysis, certain laws and practice from the United States and Australia may be applied in Thailand to serve and protect the best interests of the child.

5.2 Eligibility of Petitioner

Section 56 of the ART Act indicates the rights to file a petition for child legitimation to four persons, which are (i) the person who was born through surrogacy arrangement prior to the commencement of the Act, (ii) the husband undertaking surrogacy, (iii) the wife undertaking the surrogacy, and (iv) a public prosecutor. However, this provision does not recognize the intended parents who may have been a single parent or members of same-sex couple who wished to have children but they do not have the ability to bear the children by themselves. Whilst setting these limitations in the legislation right at the very first stage of legal process,
it hardly concerns the best interests of the child as it increases the probability of the child becoming a legal orphan. According to Section 56, if the court does not accept the petition filed by the intended parent who is unqualified under section 56, the child must wait to file the case by himself when the child turns 15 years old. The child’s livelihood during the period from birth until 15 years of age would be up in the air.

Another possible solution to legitimize the child is to have the child and the surrogate express consent to the registrar that the intended father is the lawful father of the child; however, this solution could be performed if the child is old enough to give consent. The downside of this solution is that the surrogate would still be considered as the lawful mother of the child.

On another perspective, Section 56 does not indicate that a surrogate can file a petition to request for child legitimation for such right has only been granted by the intended parents, who are lawful husband and wife. Based on the ART Act, it appears that the surrogate has no parental right over the child if the surrogacy procedures are fully complied with the law. However, in the event that the intended parent is not qualified under Section 56, or the intended parent abandons the children and neglects to file such petition, or the intended parent dies, disappears or becomes incompetent or quasi-competent or whatsoever that makes them unsuitable to care for the child, the responsibilities for raising the children would fall upon the surrogate, or else the children would be abandoned and left without parents. Section 56 of the ART Act does not offer any legal means to grant the surrogates to pursue any legal action to file a case by herself. Similar to the incident of Baby Gammy, the surrogate would be responsible to care for the child, if the intended parents do not take any legal action, as the child is considered as the legitimate child of the surrogate under Section 1546 of the CCC.

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284 CRC, Art 3(1).
285 CCC, s 1556.
286 CCC, s 1548.
In comparison with the Uniform Parentage Act (UPA), the right to file petition for child legitimation is indicated to be ‘a party to the agreement’\(^\text{287}\) in order to request the court to issue an order establishing legal parentage of each of the intended parent over the child and terminating all rights and responsibilities of the surrogate as the birth mother and record it accordingly.

The UPA has taken into account all parties involved in the surrogacy agreement in order to mitigate certain risks that may occur after the birth of the child. For example, the surrogate may refuse to surrender the child to the intended parents. The intended parent may refuse to file the petition to perfect the child as their legitimate child. As such risks may incur to the intended parent or the surrogate, the right to file petition for child legitimation should not be limited to ‘husband or wife undertaking surrogacy’ but such right should be expanded to include ‘anyone involved in surrogacy’ in order to include a wider range of people and protect the best interests of the child to have proper legal parentage.

5.3 Legal Parentage

Determining legal parentage of the children born through surrogacy arrangement is not as simple when comparing to parentage of children born under natural conception whilst genetic relation has been regarded as the main factor in determining parentage of a child. If implying the underlying concept of genetic relations to determine parentage as described under the CCC in case of children born through surrogacy arrangement, parentage would be recognized simply by conducting a DNA test. A lawful father of a surrogate child would be determined by the biological relationship between the child and the intended parent and this biological relationship could have applied to the case of the intended parent being a married heterosexual couple, a same-sex couple or a single person. However, if the sperm has been donated or does not belong to the intended parent, he then is not

\(^{287}\) UPA, s 811(a).
recognized as a lawful father of the child. In contrary, in determining a lawful mother in case of traditional surrogacy, if the same genetic principle is implied, the surrogate would become the lawful mother of the child while the female intended parent would not. On the other hand, if the surrogacy arrangement is a gestational surrogacy, determining a lawful mother would not be as straightforward. The female intended parent who planned to be the lawful mother of the child but has no genetic relation with the child would not be recognized as the lawful mother of the child under the CCC.

The factors to determine the lawful mother of the child born through surrogacy arrangement are debatable upon genetics, intent or the fact that the legal mother should be the person giving birth to the child. In gestational surrogacy, these factors are not conformed in one person as the egg donor is not the person giving birth to the child while the person who gives birth to the child does not have any genetic relation with the child. If adding another factor of intent, the woman giving birth to the child and the egg donor do not have the intention to raise the child while another woman who neither has genetic relation with nor gives birth to the child has the intention to be a lawful mother and raise the child as her own. Once the ART Act was enacted, the provision on determining legal parentage of the child neither recognizes the egg donor who is the biological mother nor the surrogate who is the birth mother to be the lawful mother of the child.

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289 Gestational surrogacy, also commonly known as full surrogacy, is a surrogacy method that is evolved from traditional surrogacy, which serves only as a gestational carrier and her genetic material is not used in the procedure. The genetic materials including egg and sperm used in the process of in vitro fertilization comes from the intended parents or a third-party donor. Under the gestational surrogacy, the surrogate is not genetically related to the child.
290 Keyes (n 288).
291 ART Act, s 29.
Parentage of children born through surrogacy arrangement is governed by Sections 29, 33, 34 and 56 of the ART Act. Section 29 discusses about the status of the child whose genetic relation may have come from an egg donor, a sperm donor or a donated embryo as a result of an ART method and recognizes the child as the legitimate child of the intended parents who are husband and wife even if any of the intended parents dies before the child is born, and dismisses the rights and responsibilities of the egg donor or the sperm donor or embryo donor as lawful parents under the CCC (but this section does not dismiss the rights and responsibilities of the surrogate mother entirely, which details would be further explained when discussed about parental power). Section 33 expresses that the intended parents, who are lawful husband and wife, are prohibited from refusing to accept the child born through their surrogacy arrangement. Section 34 allows the CCC on family and succession to be applied mutatis mutandis to the extent that is not contrary or inconsistent with this Act. Section 56 serves as a transitory provision which discusses about the status of the children born through surrogacy arrangement prior to the commencement of the Act and the right of the intended parents to submit a petition to the court in making parentage order, resulting in the child being recognized as the legitimate child of the intended parents from the child’s date of birth. These provisions entail that parentage of the child born through surrogacy arrangement is solely determined by the intent of the intended parents.

5.3.1 Parentage for Pre-commencement Surrogacy

In regard to the surrogacy arrangements that took place prior to the commencement of the ART Act, section 56 would be applied in a broad range of scenarios and interpreted beyond the currently worded provision in order to reflect the intention of the legislature. As currently stated in section 56, parentage order issued by the court is only to be granted to ‘husband and wife’ who commissioned surrogacy, which may not be applicable in all surrogacy situations. The exit strategy that has been taken by the court appears in the Black Case No. Por. 1239/2558 Red Case No. Por. 716/2559, and Black Case No. Por2031/2559 Red Case No. Por296/2561 which recognizes a surrogate child as a legitimate child of the male.
intended parent, who is one of the commissioning same-sex couple. Despite the stiff wording of this provision, the court justified his reasoning upon his review on the relevant facts of the case that (i) the petitioner commissioned surrogacy by transfer the embryo that has been fertilized by the sperm of the petition and the egg from the egg donor, (ii) the petitioner took the child to be under his care since birth until today (as of the hearing date), (iii) it was evidenced that the child has been raised with love and care, and (iv) the surrogate mother does not have any objection if the court orders that the child becomes the legitimate child of the petitioner. The court also broadly interpreted the intention of section 56 that the court can exercise his discretion regarding parentage of a surrogate child on a case-by-case basis. 292 This interpretation of exercising of the court discretion addresses the needs in resolving the scenarios that the legislature may not have expected while drafting this section; however, the extent of the court’s discretion should reflect the intention of the legislature and there is apparently a need to amend section 56 of the Act to justify the court in making proper parentage order.

In comparison with other jurisdiction, New South Wales acknowledges that the child’s lawful parents are presumed to be the child of the woman who gives birth and her husband or de facto partner. 293 The Surrogacy Act 2010 (NSW) takes into account of the parentage of the child since birth and reflects into the effect of the parentage order that it ‘transfer’ the parentage of the child from the birth mother to the intended parents. 294 When enacting the Surrogacy Act 2010, the legislature recognized a need in making parentage order for surrogacy cases that were commissioned prior to the commencement of the law, as referred to as ‘pre-commencement surrogacy arrangement’. Sections 22 to 38 serve as a checklist for the court in making parentage order and the applicants who are generally the intended parents who commissioned surrogacy need to fulfill. Some of these sections are marked as mandatory and some can be waived by the court. Some

292 Central Juvenile and Family Court (n 15).
294 Surrogacy Act 2010 (NSW), s 4.
mandatory sections exclude pre-commencement surrogacy arrangement, which makes it possible, to a certain extent, for the intended parents to apply for parentage order. If the intended parents cannot meet the conditions set out under the Surrogacy Act, the court would not be able to grant the transfer of parentage from the surrogate to the intended parents.

5.3.2 Parentage for Non-compliant Surrogacy

None of the provisions in the ART Act explains how to determine parentage of a child in the event that the surrogacy arrangement is not conformed with the requirements under the Act. The ART Act requires that the intended parents must be married. The surrogacy arrangement must be altruistic and made in writing prior to the pregnancy. Before performing the ART method, the medical practitioner must conduct examination and evaluation on the readiness of the physical, psychological and environment of the commissioning couple, the surrogate and gamete donors and prevent any diseases that may impact the child and receive permission from the Committee prior to commissioning surrogacy procedures and comply with the procedures stipulated by the Committee. In the event that surrogacy arrangement occurs after the ART Act has taken effect and such arrangement does not comply with the ART Act, the CCC would govern.

If the CCC is to be applied, it is a concern whether the surrogate would fall under the presumption of the law and is deemed to be the lawful mother of the child and the lawful father would be determined based on the presumptions described under the CCC unless proven otherwise. However, if the surrogate mother is not married, was never married and has no intention to be married, presumptions on the lawful father would not apply, then the lawful father could not be determined and the child would be left fatherless. With the interplay of the CCC in

295 ART Act, s 24.
296 ART Act, s 3.
297 ART Act, s 16.
298 ART Act, s 23.
surrogacy arrangement, it is important that Thailand has set out specific rules or guidelines for the court on how to resolve the matter of parentage and amend the existing laws to determine the rights of the surrogate in surrogacy arrangement.

In comparison with the Uniform Parentage Act, the court may determine the ‘rights and duties’ of the relevant parties to the gestational surrogacy agreement to reflect on their ‘intent’ at the time of the parties entering into the agreement even though the surrogacy process does not confirm with the requirements under the Act.\(^{299}\) In terms of genetic surrogacy that require the genetic surrogacy agreement to be validated before proceeding, the party to the agreement may request the court to validate the agreement after the ART process has been completed but before the birth of the child.\(^{300}\) For non-validated surrogacy agreement, the surrogate has the right to withdraw her consent within 72 hours after the birth of the child and such withdrawal would result in the surrogate being the lawful mother of the child.\(^{301}\) On the other hand, if the surrogate is firm on her consent to surrender the child to the intended couples, the court may issue the parentage order based on the principle of best interests of the child and the intent of the parties to the surrogacy agreement.\(^{302}\) The UPA stipulates the factors to determine best interests of the child according to (i) the child’s age, (ii) the duration that any person has acted as parent, (iii) the bond between the child and the said person, (iv) the detrimental effect on the child if the relationship no longer exists, (v) the legal grounds for the person to file for parentage; and (vi) any other reasons that may cause adverse effect on the child.\(^{303}\) Australia, on the other hand, recognizes the status of the surrogate as lawful mother since the child’s birth.\(^{304}\) Therefore, the intended parents have the duty to file a petition to the court requesting for the

\(^{299}\) UPA, s 812(b).

\(^{300}\) UPA, s 816(b).

\(^{301}\) UPA, s 816(c).

\(^{302}\) UPA, s 816(d).

\(^{303}\) UPA, s 613(a).

\(^{304}\) Keyes (n 218).
transfer of parentage order. However, the laws in Australia have set out several requirements for surrogacy process to be legal. In the event that the surrogacy process does not comply with the laws, the intended parents may have to take an alternative route through adoption process.

5.3.3 Parentage based on Intent for Best Interests of the Child

Unlike the Uniform Parentage Act or the Surrogacy Act 2010 (NSW), the ART Act neither indicates any checklist for the intended parents for pre-commencement surrogacy to fulfil in order to claim for legal parentage nor gives a leeway for any children born through non-compliant surrogacy performed by their intended parents to have legal parentage. When combining the legal concepts from the Uniform Parentage Act or the Surrogacy Act 2010 (NSW), the children born through pre-commencement surrogacy or non-compliant surrogacy should have the right to have parents who have the intention and ability to raise and care for them, given the best interest of the child as paramount.

Based on the above analysis, the surrogate should be considered as the lawful mother of the child upon the birth of the child according to the presumption under the CCC, but her right as the mother is rebuttable once the court has rendered an order otherwise. The author, however, views that it is not necessary for the surrogate mother to force the intended parents of pre-commencement surrogacy or non-compliant surrogacy arrangements to accept the child as their legitimate child because the intended parents would possibly abandon the child after they take the child back under their care. Given the best interests of the child, in the event that the child is abandoned by the intended parents and the surrogate does not have the means to raise the child, the surrogate would have the right as a lawful parent to surrender the child for adoption.

Concerning the child’s best interest to know and have legal parentage, section 56 of the ART Act should be amended to reflect the true and honest intent of the intended parents and the principle on best interests of the child should be recognized, given the appropriate factors for the court to issue a parentage order in conformity.
5.4 Parental Power

Establishment of parentage is relevant in determining the rights and responsibilities of the child and the parents. Under the CCC, parental power is jointly exercised by the parents as the parents can make decisions on the child’s place of residence, punish the child for discipline, require the child to work to suit his ability and condition, and demand the child to be returned from a person who unlawfully detains him. However, section 1582 stipulates that parental power can be partially or wholly deprived by court order if the person exercising parental power, becomes incompetent or quasi-incompetent, abuses the parental power regarding the child, or is guilty of gross misconduct, provided that court may issue an order of deprivation if he sees appropriate or the order is made in response to the petition submitted by relatives of the child or the public prosecutor.

In terms of parental power under the ART Act, the Act itself does not stipulate any provisions on the establishment of parental power, except for the death of the intended parents before child’s birth, and the surrogate mother would become a temporary guardian of the child until the new guardian has been appointed by the court. The provision emphasizes that in making the decision on the guardian who can exercise parental power over the child, best interests of the child is the utmost importance. Therefore, the provisions relating to parental power as stipulated in the CCC on Family would be applied to the extent that is not contrary to the ART Act.

However, the procedure to obtain parental power for children born through pre-commencement surrogacy or non-compliant surrogacy should be treated in a more cautious manner. After the court has considered parentage of the surrogate child based on true and honest intent and best interests of the child, it is essential to set out factors to review the readiness of the intended parent before

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305 CCC, s 1567.
306 CCC, s 34.
307 ART Act, s 34.
granting a sole parental power as well as conducting post-monitoring procedures as a trial period (in consistent with the procedures required for child adoption) to ensure that the intended parents have the ability to raise them and the child is not their motivation for exploitation.

5.5 Birth Registration

The issue on how to register the birth of a surrogate child has been in question for a decade. The Department of Provincial Administration under the Ministry of Interior has been responsible for any civil records including birth registration of a child. Prior to the enactment of ART Act, the Department of Provincial Administration has sought guidance from the Council of State of Thailand regarding the question on who should be listed as parents of the surrogate child in the birth certificate. In this regard, the Council of State of Thailand issued the opinion that the surrogate is considered as the lawful mother of the child and her name should be addressed in the birth certificate. The biological parents of the child would have no right to enter their names as parents of the child unless the CCC has been amended or they have obtained the court judgment that said otherwise.

Due to the inexistence of the laws relating to surrogacy, the surrogate was presumed to be a lawful mother of the child under Section 1546 of the CCC. The process for birth registration generally involves the surrogate mother registers herself as a mother while the male intended parent would register himself as a father in the birth register. Even if the birth register indicates that the male intended parent is the father, Thai law still does not recognize him as the lawful father of the child until following by a subsequent marriage, or by registration made on application by the father, or by the court judgment.

After the ART Act has been promulgated, the Department of Provincial Administration has set out guidelines for registrars to comply with the birth

308 Department of Provincial Administration, (www.dopa.go.th) accessed 29 May 2018.
309 CCC, s 1547.
registration process for surrogate children; however, such guidelines strictly apply the context of the ART Act and require that informant of the birth must be the intended parents who are husband and wife. If the husband and wife died before the birth of the child or they are not in Thailand or they are not present for more than 15 days from the child’s date of birth or the head of the hospital that provided laboring service may inform on the birth of the child if the intended parents or the surrogate are unable to do so. However, such guidelines did not mention how to register the birth of the child in the event that the intended parents are not qualified as husband and wife such as the situation that the intended parent is a member of same-sex couple or a single parent. In case that the intended parents are unable to register themselves as parents of the child in the birth certificate, the official may refuse to recognize the birth of the child or may register the surrogate as the mother and her husband as a father (if any). In such case, the birth registration process would not reflect on the actual information relating to the birth of the child.

In the United States, due to the inconsistent policy in each state, it is difficult to conclude on the central policy in terms of birth registration. However, some states (particularly those recognizing same-sex marriages) take a more liberal stand when it comes to identifying same-sex couple as lawful parents; some states still employ the surrogate as the lawful mother who may not have the right to fully exercise parental power over the child.

According to the Surrogacy Act 2010 (NSW), the law acknowledges that the birth mother is first recognized as the lawful mother of the child and her spouse is the presumed lawful father. In this regard, the intended parent is required to submit an application to the court for the transfer of parentage order. One of the requirements for the application of the transfer of parentage is that the child must be registered according to the Births, Deaths and Marriages Registration Act 1995 and other relevant laws. Once the parentage order is issued, the notice to transfer or discharge of parentage will be sent from the court to the registrar to proceed with

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310 Surrogacy Act 2010 (NSW), s 38.
the birth registration and to the Department of Health to centralize the records on the birth in relation to ART process. The laws in the states of New South Wales and Victoria have allowed the registration of parents who are same-sex couple or a single parent in the birth certificate, given that the surrogate has given consent for not willing to be the lawful mother of the child.

In applying for the birth registration for cases relating to pre-commencement surrogacy or non-compliant surrogacy in Thailand, it is very important to respect the fundamental right of the child to register for birth. When the law cannot fully determine the lawful parents of the child, the presumption under the CCC that the birth mother is the lawful mother of the child should apply. Once the intended parent obtains the court order legitimizing them as lawful parents, the change should reflect on the birth certificate accordingly. However, an interesting and useful practice from the Surrogacy Act 2010 (NSW) should be applied in the sense that the court may issue a notice to the competent registrar as an evidence for verification on the change of the lawful parents of a child that would affect the amendment of the birth records of the child even though the intended parents could have taken the court order to affect the amendment by themselves.

Another issue to be considered is whether the birth certificate of surrogate children could identify two same-sex parents or a single parent in the birth certificate. If the intended parent is a single parent regardless of gender, once obtained the court order, the certificate should reflect on the court order. If the court order recognizes the single intended parent as the lawful parent and revoke the right of the surrogate, then the birth records of the child should reflect on it. In Black Case No. Por2031/2559, Red Case No. Por296/2561, which is a case filed by a single person as the intended parent, the court issued an order that the child is the legitimate child of the intended parent and granted full parental power to him. However, the court did not mention whether the surrogate still has the right as the

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311 Surrogacy Act 2010 (NSW), s 49.
312 Surrogacy Act 2010 (NSW), s 51.
mother. In this regard, without revocation by the court, the surrogate would still be considered as the lawful mother of the child.

On the other hand, if the intended parents are same-sex couple, it is still a concern whether to identify both of them as lawful parents of the child as Thailand still does not recognize same-sex marriage and relationship. In Black Case No. Por. 1239/2558 Red Case No. Por. 716/2559, the case was filed by a member of the male same-sex couple claiming for child legitimation. The court rendered judgment that the child is the legitimate child of the male intended parent, who submitted the petition to legitimize the child and the court did not revoke the right of the surrogate as the lawful mother of the child even though the intended parent was granted full parental power of the child. In this regard, the surrogate’s name would still appear in the birth certificate of the child and the other male intended parent would have no right to be registered as parent in the birth certificate or any legal relationship over the child.

The author opines that in both situations whether the intended parent is a single individual or the intended parents are same-sex couple, the surrogate’s name should be removed from the birth certificate once the court concludes that the child has been born through surrogacy arrangement and the surrogate has no intention in raising the child. The history on surrogacy agreement and heritage of the birth of the child should remain in the central registrar’s records so that the surrogate children will have the opportunity to obtain accurate birth history. Without such removal, the children would still have the duty to care for the surrogate as if she is the child’s lawful mother even though they have no relationship with each other. In such case, the surrogate would also have the right on the inheritance of the children as a lawful parent, and that would not be just and fair for the children who were born without knowing any of their birth history.

\[313\] Saengsin (n 105).
\[314\] Ibid.
5.6 Citizenship

According to the Nationality Act, if the father or the mother of the child has Thai citizenship, the child would automatically obtain Thai citizenship regardless of their birth country. In addition, the children born in Thailand would have the right to Thai citizenship unless the parents of the children are of foreign citizens, who (i) have been given leniency for temporary residence as a special case, (ii) have been permitted to stay temporarily in Thailand, or (iii) have entered and resided in Thailand without permission under immigration laws. However, the children would be recognized as Thai citizens if they obtained approval from the Minister of Interior according to the second paragraph of Section 7bis of the Nationality Act. However, the Minister’s approval is granted on a case by case basis and it needs to be approved from the cabinet.

In case of surrogacy arrangement that complies with the ART Act, the intended parents would have the right to become lawful parents since the birth of the child or at least upon completion of birth registration. Citizenship of a child would reflect upon the lawful parents of the child. If any of the intended parents has Thai citizenship, the child would have Thai citizenship according to Section 7(1) of the Nationality Act. However, in the event that the intended parents are foreign nationals, citizenship of the child would be based on the nationality law of the countries where the intended parents are citizens.

5.6.1 Thai Surrogates

In the event of pre-commencement surrogacy or non-compliant surrogacy, the lawful parent upon the birth of the child is the surrogate. However, the right of the surrogate as the mother of the child can still be changed in response to the court order. Thai citizenship would be granted to the child upon birth if the surrogate is a Thai citizen based on Section 7(1) of the Nationality Act. If any of the intended parents are Thai, there is no need to reapply for Thai citizenship for the

315 Nationality Act 1965, s 7(1).
child. However, if the intended parents are of foreign nationals, the intended parents would need to apply for the child’s citizenship with respect to the nationality law of their countries. If there appears to be an issue in the citizenship application for the foreign intended parents as some countries do not recognize the parental status of intended parents over surrogate children, the child would at least have Thai citizenship based on the surrogate and would not be left stateless.

5.6.2 Foreign Surrogates

The complexity arises when it comes to citizenship of surrogate children who were born of foreign surrogates and foreign intended parents who may not comply with the surrogacy process under the ART Act. Upon the birth of the child, the child would not be able to obtain Thai citizenship at birth if the surrogate is a foreign national unless obtained approval from the Minister of Interior. If, however, the intended parents are Thai nationals and the court issues an order that the child is the legitimate child of the intended parents, the amendment to the birth registration records can be made to reflect the citizenship of the child and Thai citizenship would be recognized in relation to the intended parents. However, if the intended parents are also foreign nationals, the intended parents would need to apply for the child’s citizenship from their countries after the court issues a parentage order. It would be an issue if the countries of the intended parents deny citizenship for the child and the child would have been left stateless. Given the Constitution of the United States, any person born in the United States jurisdiction would automatically receive American citizenship. This principle has applied in Thailand, provided that the right to enjoy privileges as Thai citizens is subject to certain conditions. In accordance with Article 15 of UDHR, the recognition of Thai citizenship as the state with a connecting point to the child should be made available to these surrogate children who may be exposed to potential statelessness.
6.1 Conclusion

The Protection of a Child Born by Medically Assisted Reproductive Technology Act 2015 (ART Act) was enacted to regulate surrogacy practice and identify proper parentage over surrogate children. However, the principal to verify legal parentage of the children was still uncertain whether it rests upon genetics, intent or the fact that the legal mother should be the person giving birth to the child. In much of surrogacy practice, these factors are not conformed in one person. It is important that the factors to determine legal parentage are addressed and applied in the same direction. The matter of parental power should be separately determined due to the fact that after the parental power has been fully granted to the intended parents, the surrogate children would be under entire responsibility and power of the intended parents. The government has the duty to ensure that the surrogate children will not be the subject for exploitation and that they are in good hands.

6.2 Recommendation

For the best interests of the child, it is recommended that Section 56 of the ART Act should be amended in order to incorporate non-compliant surrogacy so that the children would have the right to know and have their legal parentage. Due to the nature of surrogacy arrangement which was unregulated during the time and surrogacy arrangement that was not conformed with the existing law, the court and relevant authorities must ensure that the intended parents have the true and honest intention to raise the children and the order of parentage is based on best interests of the child, and the children have access to accurate information about their birth. Details of each of the recommendation are addressed below.
6.2.1 Amendment to Section 56 of the ART Act

Section 56 of the ART Act, which serves as a transitory provision for any pre-commencement surrogacy should be amended to include situations for non-compliant surrogacy and view the rights and interests of the surrogate child as paramount. The proposed amendment to Section 56 of the ART Act is underlined as follows:

“A person born by surrogacy prior to the entry into force of this Act or surrogacy that is non-compliant with this Act whether there is a written arrangement, any persons undertaking the surrogacy or a public prosecutor or any relevant person in relation to the person born by surrogacy shall have rights to submit a petition to the court to issue an order stating that the person born by the surrogacy is a legitimate child of the person undertaking the surrogacy, as from the date when such person was born. The court shall determine the rights and duties of the parties based on the best interest of the child, taking into account the intent of the parties at the time of the surrogacy arrangement. However, that it may not be referred to the prejudice of the rights of third persons acting in good faith during the time when the child was born until the time when the court issue orders of filiation.”

According to the above amendment, the right to file petition for child legitimation would not be limited to the initial four groups of people, which includes a person born by the surrogacy, husband or wife undertaking the surrogacy or a public prosecutor but the above amendment is drafted in a broader perspective, which allows anyone involved in the surrogacy process to file a petition for child legitimation to the court. In addition, it incorporates an exit strategy for surrogacy arrangement that may have taken place in non-conformity with the requirements under the ART Act so that the right of the child born through non-compliant surrogacy would be recognized.

6.2.2 Guidelines for Parentage Order

In order to determine legal parentage of children born through pre-commencement surrogacy or children born through non-compliant surrogacy under the ART ACT, the intended parent must be able to demonstrate their true and
honest intent and each of the intended parents should be able to provide appropriate reasons to the court to understand their situations and circumstances as follows:

(1) Motives of the intended parents when using surrogacy as means to conceive the child (together with reasons for not complying with the requirements under the ART Act for non-compliant surrogacy);

(2) Information on the ART process such as where the ART was performed, how the intended parent came in contact with the surrogate, etc.;

(3) Proof that the intended parent’s genetic materials were used during ART process. If the genetic materials of the intended parent were not used in the ART process, the intended parent must provide appropriate reasons to the court;

(4) Criminal records of each of the intended parent;

(5) Marital status and history of each of the intended parent;

(6) Employment history and proof of annual income for the past 5 years of each of the intended parent;

(7) Sexual orientation of the intended parent;

(8) Physical and mental health evaluation by licensed physicians;

(9) Two reference letters or two witnesses to testify the intention of the intended parent to have children through surrogacy; and

(10) Any other reasons that the intended parent may inform the court to prove their true and honest intent in having the child.

It is noted, however, that intent should not override the right of the surrogate who has the same genetic relationship with the child (as in traditional surrogacy). The surrogate should have the right to give consent whether or not to keep or waive her right over the child.

In addition to the intent of the intended parent, best interests of the child must be considered and the court may weigh on the following factors to decide whether the parentage order would benefit or endanger the child:

(1) The age of the child;
(2) The length of time that the intended parent or the surrogate or any other person assumes the role of parent of the child;

(3) Quality of relationship and emotional ties between the child and the intended parents, the surrogate, or any other person who assumes the role of parent of the child;

(4) The possible impact to the child in terms of their physical, emotional, intellectual well-being if the current relationship is no longer available;

(5) Any other reasons that the court views that it would be for the best interests of the child.

6.2.3 Provisional Measures on Parental Power

For the reviewing process before the court grants sole parental power to the intended parents, the court may request the intended parents to submit a plan to raise the children, which comprises the information on the intended residence of the child, number of total family members, neighborhood, surrounding environment, education plan, and information about the main caretaker of the child. In case of doubt, the court may by himself visit or request the officer of the Ministry of Social Development and Human Security (MSDHS) to visit the potential residence of the child under the expense of the intended parents.

Once the court is satisfied with the plan to raise the child, the court may issue a parental power to the intended parents, given six-month to two-year trial period to raise the child. The MSDHS would have the duty to inspect the living condition of the child and report the court on the following dimensions:

(1) Environment – The residence where the child resides should meet safety standards and equipped with children’s basic needs to care for them.

(2) Caretaker – The intended parents should be able to identify the main caretaker of the child. If the child will be watched and supervised by any person other than each of the intended parents, the result of the physical and psychological test should be submitted to the officer together with her employment history, a copy of identification card, and a copy of a house registration.
(3) Medical care – The intended parents must submit vaccination records of the child and be able to provide information about physical and mental health of the child.

(4) Nutrition – The intended parents must be able to explain meal plans of the child on a daily basis and ensure that the child receives appropriate nutrition.

(5) Development – The intended parents must provide necessary development programs or activities to improve mental, physical and intellectual ability of the child to meet the age standards.

(6) Family relation – The intended parents must live with the child in the same residence. In case that the intended parents are unable to live with the child, the intended parents must state the reasons and arrange suitable persons to care for the child.

(7) Education – The intended parents must provide proper education for the child. Information about school and school reports should be made available to the officer if asked for inspection.

In the event that the officer of the MSDHS views that the living condition is poor or below standard, the officer has the duty to inform the court to consider whether or not such parental power should be revoked according to section 1582 of the CCC.

6.2.4 Birth Registration

According to the UDHR, ICCPR and the CRC, everyone including children everywhere must have the right to recognition as a person before the law. Birth registration is a fundamental step to ensure that the recognition of a person is duly completed. The legislature and authorities have the duty to protect the basic human rights and dignity of a person, particularly children who are unable to speak for themselves. The children born through surrogacy arrangement are no different from any other children born through natural conception.

By viewing the rights of the children as paramount, the children born through surrogacy arrangements in Thailand even if their legal parentage has
not been confirmed by the Court must have the right for birth registration as the basis of human rights. For surrogate children born of non-compliant surrogacy or pre-commencement surrogacy, the birth mother could be considered as the lawful mother of the child and her name should be registered as a mother upon the birth of the child. Once the intended parent obtains the Court order legitimizing them as lawful parents, the amendment of the correct information of parentage should reflect on the birth certificate and the surrogate mother’s name should be removed. In addition, the surrogate children deserve the rights to have their origins known and documented accurately to preserve their identity.

6.2.5 Citizenship

Surrogate children born through Thai surrogates would already have Thai citizenship at birth based on the legal presumptions that the surrogate is considered as the lawful mother of the child unless proven otherwise. When the surrogate children are born of a foreign surrogate and foreign intended parents, they are exposed to the risk of becoming stateless as the countries of the intended parents may not acknowledge the parental status of the intended parents over the child and does not recognize the child as a citizen of the intended parent’s country. In such case, the surrogate children who may be exposed to potential statelessness should be recognized as Thai citizens as a connecting point by birth country under the basis of human rights according to Article 7 of the Convention on the Rights of the Child and Article 15 of the Universal Declarations of Human Rights.

In light of this matter, the Minister of Interior may consider issuing the Cabinet Resolution under the second paragraph of Section 7bis of the Nationality Act to determine conditions and guidelines for the recognition of Thai citizenship for the surrogate children who were born in Thailand but of foreign surrogates and foreign intended parents, who may be exposed to potential statelessness in orders to enjoy privileges as Thai citizens.

Another alternative to secure the right of these children, an additional clause may be inserted in the ART Act that ‘a person born by surrogacy or any medically assisted reproductive technology under this Act or prior to the entry
into force of this Act or surrogacy that is non-compliant after the entry into force of
this Act, who may be exposed to potential statelessness shall be recognized of legal
personality and have the right to Thai citizenship upon birth if it is known that such
person has a connecting point to the Kingdom of Thailand including such person was
born in the Kingdom of Thailand, the surrogate or her husband has Thai nationality
or any of the intended parent has Thai nationality.'
REFERENCES

Books and Book Articles


Keyes M, 'Australia', *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013)


Ten Have H, *Global Bioethics* (Taylor and Francis 2016)

ประสพสุข บุญเดช, หลักกฎหมายครอบครัว (พิมพ์ครั้งที่ 9, วิญญูชน, 2550) (Prasobsook Boondech, Lak Khodmai Krodkrua [The Principle of Family Law] (9th edn, Winyuchon 2007))

ประสพสุข บุญเดช, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ว่าด้วยครอบครัว (พิมพ์ครั้งที่ 19, สานักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา, 2554) (Prasobsook Boondech, Kham Athibai Pramuan Khodmai Phaeng Lae Panich Bab 5 Waduay Krodkrua [Explanation of Book V of the Civil and Commercial Code Regarding Family] (19th edn, The Thai Bar under the Royal Patronage 2011))

พินัย ณ นคร, คำอธิบายกฎหมายลักษณะมรดก (พิมพ์ครั้งที่ 2, วิญญูชน, 2561) (Pinai Na Nakorn, Kham Athibai Khodmai Laksana Moradok [Explanation of Inheritance Laws] (2nd edn, Winyuchon 2018))

ไพโรจน์ กัมพูสิริ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ครอบครัว (พิมพ์ครั้งที่ 9, มหาวิทยาลัยธรรมศาสตร์, 2554) (Pairoj Kampusiri, Kham Athibai Pramuan Khodmai Paeng...
Articles


Ref. code: 25605701040031RQB


<https://pdfs.semanticscholar.org/3d0f/df7af22f2a68ab2e48e7029703c07dccc4ad3.pdf> accessed 11 May 2018

เอมผกา เตชะอภัยคุณ บุญมี, การเรียกค่าเสียหายจากการใช้วิธีผสมเทียมที่ผิดพลาดในประเทศสิงคโปร์ คดี ACB v Thomson Medical Pte Ltd And Others, รก: (พิมพ์ครั้งที่ 1, คณะนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 2560) (Aimpaga Techa-apikun Boonmee, Karn Riek Khasiahai Chak Karn Chai Withi Pasomthiam Tii Pidplad Nai Prathet Singapore Khadi ACB v Thomson Medical Pte Ltd and Others [Claiming for Damages from Error in IVF in Singapore, ACB v Thomson Medical Pte Ltd and Others] (1st edn, Faculty of Law, Thammasat University 2017))

Electronic Media


ศาลเยาวชนและครอบครัวกลาง, ศาลเยาวชนและครอบครัวกลางอ่านคำสั่งคดี “อุ้มบุญ”, 2559 เข้าถึงเมื่อวันที่ 4 ตุลาคม 2560 (Sarn Yaowachon Lae Krobkrua Klang, Sarn Yaowachon Lae Krobkrua Klang Aan Khadi Kumsang Khadi “Oumboon” [The Central Juvenile and Family Court Reads Court Order In "Surrogacy" Case]
คำแนะนำเบื้องต้นในการติดต่อสถานพินิจฯ จ. เชียงใหม่, 2560 เข้าถึงเมื่อวันที่ 6 ตุลาคม 2560 (Kham Naenam Beungton Nai Karntidtor Sathanpinit Changwat Chiangmai [Initial Instructions to Contact Chiang Mai Department of Juvenile Observation And Protection]
Interviews

Aapohn Saengsin, Interview with Venus Seesuk and Phunthip Kanchanachittra Saisoonthorn, 'Discussion on Birth Registration and Citizenship of Surrogate Children' (2018)

Phunthip Kanchanachittra Saisoonthorn, Discussion on the Civil Registration and Citizenship of Surrogate Children (2018)

Cases

_AHW v GHB 772 A 2d 948_ [2000] Superior Court of New Jersey (Superior Court of New Jersey)

_Belsito v Clark No CJ94-09-05_ [1994] Court of Common Pleas of Ohio (Court of Common Pleas of Ohio)

_Cook v Harding_ [2016] United States District Court, CD California (United States District Court, CD California)

_Culliton v Beth Israel Deaconess Medical Center_ [2001] The Supreme Judicial Court of Massachusetts (The Supreme Judicial Court of Massachusetts)

_Hodas v Morin_ [2004] The Probate Court of Massachusetts (The Probate Court of Massachusetts)

_In re Baby M_ [1998] New Jersey Supreme Court, In re Baby M, 537 A2d 1227, 109 NJ 396 (New Jersey Supreme Court)

In re Marriage of Moschetta [2014] Superior Court of Orange County (Superior Court of Orange County)

In Re: Baby S [2015] The Superior Court of Pennsylvania, 2015 PA Super 244 (The Superior Court of Pennsylvania)

Meyer v State of Nebraska, 262 US 390 [1923] The United States Supreme Court (The United States Supreme Court)

Odegard v Odegard, 259 NW2d 484 [1977] North Dakota Supreme Court (North Dakota Supreme Court)

Pavan v Smith 582 US _ [2017] Arkansas Supreme Court (Arkansas Supreme Court)

Prince v Massachusetts, 321 US 158 [1944] The United States Supreme Court (The United States Supreme Court)

'Removal of Mother's Custody'

Skinner v Oklahoma [1942] The United States Supreme Court, 782 (The United States Supreme Court)


Other Materials

จิราวัฒน์ แช่มชัยพร, การคุ้มครองสิทธิเด็กโดยหลักผลประโยชน์สูงสุดของเด็กตามมาตรา 3(1) แห่งอนุสัญญาว่าด้วยสิทธิเด็ก ค.ศ. 1989, 2551 (Jirawat Chamchaiyaporn, Karnkhoomkorng
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APPENDIX A

Article 8 Surrogacy Agreement of the Uniform Parentage Act (2017)

Legislative Note: A state should include Article 8 if the state wishes to recognize in statute surrogacy agreements.

[PART] 1

GENERAL REQUIREMENTS

SECTION 801. DEFINITIONS. In this [article]:

(1) “Genetic surrogate” means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using her own gamete, under a genetic surrogacy agreement as provided in this [article].

(2) “Gestational surrogate” means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not her own, under a gestational surrogacy agreement as provided in this [article].

(3) “Surrogacy agreement” means an agreement between one or more intended parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived under the agreement. Unless otherwise specified, the term refers to both a gestational surrogacy agreement and a genetic surrogacy agreement.

SECTION 802. ELIGIBILITY TO ENTER GESTATIONAL OR GENETIC SURROGACY AGREEMENT.

(a) To execute an agreement to act as a gestational or genetic surrogate, a woman must:

(1) have attained 21 years of age;

(2) previously have given birth to at least one child;
(3) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;
(4) complete a mental-health consultation by a licensed mental-health professional; and
(5) have independent legal representation of her choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

(b) To execute a surrogacy agreement, each intended parent, whether or not genetically related to the child, must:
(1) have attained 21 years of age;
(2) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;
(3) complete a mental-health consultation by a licensed mental health professional; and
(4) have independent legal representation of the intended parent’s choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

SECTION 803. REQUIREMENTS OF GESTATIONAL OR GENETIC SURROGACY AGREEMENT: PROCESS. A surrogacy agreement must be executed in compliance with the following rules:

(1) At least one party must be a resident of this state or, if no party is a resident of this state, at least one medical evaluation or procedure or mental-health consultation under the agreement must occur in this state.

(2) A surrogate and each intended parent must meet the requirements of Section 802.

(3) Each intended parent, the surrogate, and the surrogate’s spouse, if any, must be parties to the agreement.

(4) The agreement must be in a record signed by each party listed in paragraph (3).
(5) The surrogate and each intended parent must acknowledge in a record receipt of a copy of the agreement.

(6) The signature of each party to the agreement must be attested by a notarial officer or witnessed.

(7) The surrogate and the intended parent or parents must have independent legal representation throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement, and each counsel must be identified in the surrogacy agreement.

(8) The intended parent or parents must pay for independent legal representation for the surrogate.

(9) The agreement must be executed before a medical procedure occurs related to the surrogacy agreement, other than the medical evaluation and mental health consultation required by Section 802.

SECTION 804. REQUIREMENTS OF GESTATIONAL OR GENETIC SURROGACY AGREEMENT: CONTENT.

(a) A surrogacy agreement must comply with the following requirements:

(1) A surrogate agrees to attempt to become pregnant by means of assisted reproduction.

(2) Except as otherwise provided in Sections 811, 814, and 815, the surrogate and the surrogate’s spouse or former spouse, if any, have no claim to parentage of a child conceived by assisted reproduction under the agreement.

(3) The surrogate’s spouse, if any, must acknowledge and agree to comply with the obligations imposed on the surrogate by the agreement.

(4) Except as otherwise provided in Sections 811, 814, and 815, the intended parent or, if there are two intended parents, each one jointly and severally, immediately on birth will be the exclusive parent or parents of the child, regardless of number of children born or gender or mental or physical condition of each child.

(5) Except as otherwise provided in Sections 811, 814, and 815, the intended parent or, if there are two intended parents, each parent jointly and severally, immediately on birth will assume responsibility for the financial support of
the child, regardless of number of children born or gender or mental or physical condition of each child.

(6) The agreement must include information disclosing how each intended parent will cover the surrogacy-related expenses of the surrogate and the medical expenses of the child. If health-care coverage is used to cover the medical expenses, the disclosure must include a summary of the health-care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the surrogate, third-party-liability liens, other insurance coverage, and any notice requirement that could affect coverage or liability of the surrogate. Unless the agreement expressly provides otherwise, the review and disclosure do not constitute legal advice. If the extent of coverage is uncertain, a statement of that fact is sufficient to comply with this paragraph.

(7) The agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy. This [act] does not enlarge or diminish the surrogate’s right to terminate her pregnancy. (8) The agreement must include information about each party’s right under this [article] to terminate the surrogacy agreement.

(b) A surrogacy agreement may provide for:

(1) payment of consideration and reasonable expenses; and

(2) reimbursement of specific expenses if the agreement is terminated under this [article].

(c) A right created under a surrogacy agreement is not assignable and there is no third-party beneficiary of the agreement other than the child.

SECTION 805. SURROGACY AGREEMENT: EFFECT OF SUBSEQUENT CHANGE OF MARITAL STATUS.

(a) Unless a surrogacy agreement expressly provides otherwise:

(1) the marriage of a surrogate after the agreement is signed by all parties does not affect the validity of the agreement, her spouse’s consent to the agreement is not required, and her spouse is not a presumed parent of a child conceived by assisted reproduction under the agreement; and
(2) the [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance] of the surrogate after the agreement is signed by all parties does not affect the validity of the agreement.

(b) Unless a surrogacy agreement expressly provides otherwise:

(1) the marriage of an intended parent after the agreement is signed by all parties does not affect the validity of a surrogacy agreement, the consent of the spouse of the intended parent is not required, and the spouse of the intended parent is not, based on the agreement, a parent of a child conceived by assisted reproduction under the agreement; and

(2) the [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance] of an intended parent after the agreement is signed by all parties does not affect the validity of the agreement and, except as otherwise provided in Section 814, the intended parents are the parents of the child.

SECTION 806. INSPECTION OF DOCUMENTS. Unless the court orders otherwise, a petition and any other document related to a surrogacy agreement filed with the court under this [part] are not open to inspection by any individual other than the parties to the proceeding, a child conceived by assisted reproduction under the agreement, their attorneys, and [the relevant state agency]. A court may not authorize an individual to inspect a document related to the agreement, unless required by exigent circumstances. The individual seeking to inspect the document may be required to pay the expense of preparing a copy of the document to be inspected.

SECTION 807. EXCLUSIVE, CONTINUING JURISDICTION. During the period after the execution of a surrogacy agreement until 90 days after the birth of a child conceived by assisted reproduction under the agreement, a court of this state conducting a proceeding under this [act] has exclusive, continuing jurisdiction over all matters arising out of the agreement. This section does not give the court jurisdiction over a child-custody or child-support proceeding if jurisdiction is not otherwise authorized by law of this state other than this [act].
SECTION 808. TERMINATION OF GESTATIONAL SURROGACY AGREEMENT.

(a) 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. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.

(b) Unless a gestational surrogacy agreement provides otherwise, on termination of the agreement under subsection (a), the parties are released from the agreement, except that each intended parent remains responsible for expenses that are reimbursable under the agreement and incurred by the gestational surrogate through the date of termination.

(c) Except in a case involving fraud, neither a gestational surrogate nor the surrogate’s spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a gestational surrogacy agreement under this section.

SECTION 809. PARENTAGE UNDER GESTATIONAL SURROGACY AGREEMENT.

(a) Except as otherwise provided in subsection (c) or Section 810(b) or 812, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.

(b) Except as otherwise provided in subsection (c) or Section 812, neither a gestational surrogate nor the surrogate’s spouse or former spouse, if any, is a parent of the child.

(c) If a child is alleged to be a genetic child of the woman who agreed to be a gestational surrogate, the court shall order genetic testing of the child. If the child is a genetic child of the woman who agreed to be a gestational surrogate, parentage must be determined based on [Articles] 1 through 6.
(d) Except as otherwise provided in subsection (c) or Section 810(b) or 812, if, due to a clinical or laboratory error, a child conceived by assisted reproduction under a gestational surrogacy agreement is not genetically related to an intended parent or a donor who donated to the intended parent or parents, each intended parent, and not the gestational surrogate and the surrogate’s spouse or former spouse, if any, is a parent of the child, subject to any other claim of parentage.

SECTION 810. GESTATIONAL SURROGACY AGREEMENT: PARENTOAGE 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.

SECTION 811. GESTATIONAL SURROGACY AGREEMENT: ORDER OF PARENTOAGE.

(a) Except as otherwise provided in Sections 809(c) or 812, before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, a party to the agreement may commence a proceeding in the [appropriate court] for an order or judgment:

(1) declaring that each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent;

(2) declaring that the gestational surrogate and the surrogate’s spouse or former spouse, if any, are not the parents of the child;
(3) designating the content of the birth record in accordance with applicable law of this state other than this act] and directing the [state agency maintaining birth records] to designate each intended parent as a parent of the child;

(4) to protect the privacy of the child and the parties, declaring that the court record is not open to inspection [except as authorized under Section 806];

(5) if necessary, that the child be surrendered to the intended parent or parents; and

(6) for other relief the court determines necessary and proper.

(b) The court may issue an order or judgment under subsection (a) before the birth of the child. The court shall stay enforcement of the order or judgment until the birth of the child.

(c) Neither this state nor the [state agency maintaining birth records] is a necessary party to a proceeding under subsection (a).

SECTION 812. EFFECT OF GESTATIONAL SURROGACY AGREEMENT.

(a) A gestational surrogacy agreement that complies with Sections 802, 803, and 804 is enforceable.

(b) If a child was conceived by assisted reproduction under a gestational surrogacy agreement that does not comply with Sections 802, 803, and 804, the court shall determine the rights and duties of the parties to the agreement consistent with the intent of the parties at the time of execution of the agreement. Each party to the agreement and any individual who at the time of the execution of the agreement was a spouse of a party to the agreement has standing to maintain a proceeding to adjudicate an issue related to the enforcement of the agreement.

(c) Except as expressly provided in a gestational surrogacy agreement or subsection (d) or (e), if the agreement is breached by the gestational surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(d) Specific performance is not a remedy available for breach by a gestational surrogate of a provision in the agreement that the gestational surrogate be
impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.

(e) Except as otherwise provided in subsection (d), if an intended parent is determined to be a parent of the child, specific performance is a remedy available for:

1. breach of the agreement by a gestational surrogate which prevents the intended parent from exercising immediately on birth of the child the full rights of parentage; or

2. breach by the intended parent which prevents the intended parent’s acceptance, immediately on birth of the child conceived by assisted reproduction under the agreement, of the duties of parentage.

[PART] 3

SPECIAL RULES FOR GENETIC SURROGACY AGREEMENT

SECTION 813. REQUIREMENTS TO VALIDATE GENETIC SURROGACY AGREEMENT.

(a) Except as otherwise provided in Section 816, to be enforceable, a genetic surrogacy agreement must be validated by the [designate court]. A proceeding to validate the agreement must be commenced before assisted reproduction related to the surrogacy agreement.

(b) The court shall issue an order validating a genetic surrogacy agreement if the court finds that:

1. Sections 802, 803, and 804 are satisfied; and

2. all parties entered into the agreement voluntarily and understand its terms.

(c) An individual who terminates under Section 814 a genetic surrogacy agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate any order issued under subsection (b). An individual who does not notify the court of the termination of the agreement is subject to sanctions.
SECTION 814. TERMINATION OF GENETIC SURROGACY AGREEMENT.

(a) A party to a genetic surrogacy agreement may terminate the agreement as follows:

(1) An intended parent who is a party to the agreement may terminate the agreement at any time before a gamete or embryo transfer by giving notice of termination in a record to all other parties. If a gamete or embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent gamete or embryo transfer. The notice of termination must be attested by a notarial officer or witnessed.

(2) A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before 72 hours after the birth of a child conceived by assisted reproduction under the agreement. To withdraw consent, the genetic surrogate must execute a notice of termination in a record stating the surrogate’s intent to terminate the agreement. The notice of termination must be attested by a notarial officer or witnessed and be delivered to each intended parent any time before 72 hours after the birth of the child.

(b) On termination of the genetic surrogacy agreement under subsection (a), the parties are released from all obligations under the agreement except that each intended parent remains responsible for all expenses incurred by the surrogate through the date of termination which are reimbursable under the agreement. Unless the agreement provides otherwise, the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.

(c) Except in a case involving fraud, neither a genetic surrogate nor the surrogate’s spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a genetic surrogacy agreement under this section.

SECTION 815. PARENTAGE UNDER VALIDATED GENETIC SURROGACY AGREEMENT.

(a) Unless a genetic surrogate exercises the right under Section 814 to terminate a genetic surrogacy agreement, each intended parent is a parent of a child
conceived by assisted reproduction under an agreement validated under Section 813.

(b) Unless a genetic surrogate exercises the right under Section 814 to terminate the genetic surrogacy agreement, on proof of a court order issued under Section 813 validating the agreement, the court shall make an order:

1. declaring that each intended parent is a parent of a child conceived by assisted reproduction under the agreement and ordering that parental rights and duties vest exclusively in each intended parent;
2. declaring that the gestational surrogate and the surrogate’s spouse or former spouse, if any, are not parents of the child;
3. designating the contents of the birth certificate in accordance with [cite to applicable law of the state other than this [act]] and directing the [state agency maintaining birth records] to designate each intended parent as a parent of the child;
4. to protect the privacy of the child and the parties, declaring that the court record is not open to inspection [except as authorized under Section 806];
5. if necessary, that the child be surrendered to the intended parent or parents; and
6. for other relief the court determines necessary and proper.

(c) If a genetic surrogate terminates under Section 814(a)(2) a genetic surrogacy agreement, parentage of the child conceived by assisted reproduction under the agreement must be determined under [Articles] 1 through 6.

(d) If a child born to a genetic surrogate is alleged not to have been conceived by assisted reproduction, the court shall order genetic testing to determine the genetic parentage of the child. If the child was not conceived by assisted reproduction, parentage must be determined under [Articles] 1 through 6. Unless the genetic surrogacy agreement provides otherwise, if the child was not conceived by assisted reproduction the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.

(e) Unless a genetic surrogate exercises the right under Section 814 to terminate the genetic surrogacy agreement, if an intended parent fails to file notice
required under Section 814(a), the genetic surrogate or [the appropriate state agency] may file with the court, not later than 60 days after the birth of a child conceived by assisted reproduction under the agreement, notice that the child has been born to the genetic surrogate. Unless the genetic surrogate has properly exercised the right under Section 814 to withdraw consent to the agreement, on proof of a court order issued under Section 813 validating the agreement, the court shall order that each intended parent is a parent of the child.

SECTION 816. EFFECT OF NONVALIDATED GENETIC SURROGACY AGREEMENT.

(a) A genetic surrogacy agreement, whether or not in a record, that is not validated under Section 813 is enforceable only to the extent provided in this section and Section 818.

(b) If all parties agree, a court may validate a genetic surrogacy agreement after assisted reproduction has occurred but before the birth of a child conceived by assisted reproduction under the agreement.

(c) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under Section 813 is born and the genetic surrogate, consistent with Section 814(a)(2), withdraws her consent to the agreement before 72 hours after the birth of the child, the court shall adjudicate the parentage of the child under [Articles] 1 through 6.

(d) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under Section 813 is born and a genetic surrogate does not withdraw her consent to the agreement, consistent with Section 814(a)(2), before 72 hours after the birth of the child, the genetic surrogate is not automatically a parent and the court shall adjudicate parentage of the child based on the best interest of the child, taking into account the factors in Section 613(a) and the intent of the parties at the time of the execution of the agreement.

(e) The parties to a genetic surrogacy agreement have standing to maintain a proceeding to adjudicate parentage under this section.
SECTION 817. GENETIC SURROGACY AGREEMENT: PARENTAGE OF DECEASED INTENDED PARENT.

(a) Except as otherwise provided in Section 815 or 816, on birth of a child conceived by assisted reproduction under a genetic surrogacy agreement, each intended parent is, by operation of law, a parent of the child, notwithstanding the death of an intended parent during the period between the transfer of a gamete or embryo and the birth of the child.

(b) Except as otherwise provided in Section 815 or 816, an intended parent is not a parent of a child conceived by assisted reproduction under a genetic 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 the 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.

SECTION 818. BREACH OF GENETIC SURROGACY AGREEMENT.

(a) Subject to Section 814(b), if a genetic surrogacy agreement is breached by a genetic surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(b) Specific performance is not a remedy available for breach by a genetic surrogate of a requirement of a validated or non-validated genetic surrogacy agreement that the surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.

(c) Except as otherwise provided in subsection (b), specific performance is a remedy available for:

1. breach of a validated genetic surrogacy agreement by a genetic surrogate of a requirement which prevents an intended parent from exercising the full rights of parentage 72 hours after the birth of the child; or
2. breach by an intended parent which prevents the intended parent’s acceptance of duties of parentage 72 hours after the birth of the child.]
Part 3 Parentage orders

Division 1 Parentage orders

12 Parentage order

(1) The Court may, on application under this Part, make a parentage order in relation to a child of a surrogacy arrangement.

(2) The purpose of a parentage order is to transfer the parentage of a child of a surrogacy arrangement.

13 References to “child”

In this Part, a reference to a child is a reference to a child of a surrogacy arrangement.

Division 2 Application for parentage order

14 Application for parentage order

(1) An application for a parentage order may be made by one intended parent or by 2 intended parents jointly.

(2) If there are 2 intended parents under the surrogacy arrangement, the application must be made jointly by the intended parents, unless the Court grants leave to an intended parent to make a sole application for a parentage order.

(3) The Court may grant leave to an intended parent to make a sole application for a parentage order if: (a) the other intended parent has died or lost capacity to make decisions, or (b) the other intended parent cannot be located after reasonable endeavours have been made to locate him or her, or (c) the intended parents have separated, or (d) other exceptional circumstances justify that action.

(4) The Court may, before giving leave to an intended parent to make a sole application, require the intended parent to provide evidence to the satisfaction of the Court that: (a) the other intended parent has been given notice of the
application, and (b) the other intended parent does not wish to join the application for a parentage order.

(5) The fact that intended parents have separated does not prevent them from making a joint application for a parentage order.

15 Date of surrogacy arrangement

(1) An application for a parentage order may be made in relation to a surrogacy arrangement whether it was entered into before or after the commencement of this Part.

(2) A surrogacy arrangement entered into before the commencement of this Part is a pre-commencement surrogacy arrangement.

(3) A parentage order may be made in respect of a pre-commencement surrogacy arrangement even if it was rendered void by a law in force before the commencement of this section (as if it had not been rendered void).

16 Time within which application must be made

(1) An application for a parentage order in relation to a child may be made not less than 30 days and not more than 6 months after the child’s birth, subject to this section.

(2) For a pre-commencement surrogacy arrangement, an application for a parentage order may be made not more than 2 years after the commencement of this section.

(3) The Court may hear and determine an application for a parentage order that is made after the time limit for making an application under this section if the Court is satisfied that exceptional circumstances justify that action.

17 Independent counsellor’s report

(1) An application for a parentage order must be supported by a report about the application prepared by an independent counsellor.

(2) The report must contain the independent counsellor’s opinion as to whether the proposed parentage order is in the best interests of the child and the reasons for that opinion.

(3) The report is to include the counsellor’s assessment of the following matters:
(a) each affected party’s understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties),

(b) each affected party’s understanding of the principle that openness and honesty about a child’s birth parentage is in the best interests of the child,

(c) the care arrangements proposed by the applicant or applicants in relation to the child,

(d) any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents,

(e) the parenting capacity of the applicant or applicants,

(f) whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given,

(g) the wishes of the child, if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes.

(4) The report may address any other relevant matters.

(5) The report must:

(a) indicate the persons who were interviewed for the purposes of the report, and the date or dates on which the interviews were conducted, and

(b) set out the basis on which the person making the report claims to be an independent counsellor.

(6) The provisions of any law or rules of court relating to the adducing of opinion evidence apply in relation to the independent counsellor’s report, unless inconsistent with this section.

(7) For the purposes of this section, an independent counsellor is a qualified counsellor who:

(a) is not the counsellor who counselled the birth mother, the birth mother’s partner (if any) or an intended parent about the surrogacy arrangement, to meet a precondition to the making of a parentage order, and

(b) is not, and is not connected with, a medical practitioner who carried out a procedure that resulted in the conception or birth of the child.
Division 3 Making of parentage order

18 Making of parentage order by Court

(1) The Court may make a parentage order only if satisfied that the preconditions to the making of a parentage order have been met.

(2) However, the Court may make a parentage order, despite not being satisfied that a precondition to the making of the order has been met, if:

(a) the precondition is not a mandatory precondition to the making of a parentage order, and

(b) the Court is satisfied that exceptional circumstances justify the making of the parentage order, despite the precondition not having been met.

(3) In deciding whether to make the parentage order, the Court may also have regard to any other matter it considers relevant.

19 Ancillary orders

On making a parentage order, the Court may make such other orders in relation to the child as it considers appropriate.

20 Birth siblings must be kept together

(1) If a child has any living birth siblings, the Court is to make a parentage order in relation to the child only if the Court also makes or proposes to make a parentage order in relation to each birth sibling, so that the child and all his or her living birth siblings become children of the same applicant or applicants.

(2) A birth sibling of a child is any brother or sister of the child who is born as a result of the same pregnancy as the child.

(3) However, the Court may make a parentage order, despite non-compliance with subsection (1), if the Court considers it in the best interests of the child to make an order even if the parentage of his or her birth sibling is not transferred to the same applicant or applicants.

Division 4 Preconditions to making of parentage order

21 Preconditions to making of parentage order

This Division sets out the preconditions to the making of a parentage order.
Note. Mandatory preconditions to the making of a parentage order cannot be waived by the Court. Other preconditions can only be waived in exceptional circumstances. See section 18.

22 Best interests of child are paramount

(1) The Court must be satisfied that the making of the parentage order is in the best interests of the child.

(2) This precondition is a mandatory precondition to the making of a parentage order.

23 Surrogacy arrangement must be altruistic

(1) The surrogacy arrangement must not be a commercial surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

24 Surrogacy arrangement must be a pre-conception surrogacy arrangement

(1) The surrogacy arrangement must be a pre-conception surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

25 Intended parent must be single person or member of a couple

(1) The surrogacy arrangement must be an arrangement under which:

(a) there are 2 intended parents who, at the time of entering into the arrangement, are a couple, or

(b) there is only one intended parent.

(2) A couple consists of a person and the person’s spouse or de facto partner.

(3) This precondition is a mandatory precondition to the making of a parentage order.

26 Age and wishes of child must be considered

(1) The child must be under 18 years of age at the time the application is made.
(2) The Court must have regard to the wishes of the child, if the child is of sufficient maturity to express his or her wishes and the Court considers it appropriate to take those wishes into account.

(3) These preconditions are mandatory preconditions to the making of a parentage order.

Note. The above preconditions will generally be of relevance only to pre-commencement surrogacy arrangements, which may have been entered into some years before the commencement of this Act.

27 Age of birth mother

(1) The birth mother must have been at least 25 years old when she entered into the surrogacy arrangement.

(2) For a pre-commencement surrogacy arrangement, it is sufficient that the birth mother was at least 18 years old when she entered into the surrogacy arrangement.

(3) In all cases, it is a mandatory precondition to the making of a parentage order that the birth mother was at least 18 years old when she entered into the surrogacy arrangement.

28 Age of intended parents

(1) Each intended parent must have been at least 18 years old when he or she entered into the surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

29 Maturity of younger intended parent must be demonstrated

(1) If an intended parent was under 25 years of age when the surrogacy arrangement was entered into, the Court must be satisfied that the intended parent is of sufficient maturity to understand the social and psychological implications of the making of a parentage order.

(2) An intended parent who was under 25 years of age when the surrogacy arrangement was entered into must provide evidence to the satisfaction of the Court:
(a) that he or she received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement, and

(b) that the counsellor was satisfied that he or she was of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.

(3) This precondition is a mandatory precondition to the making of a parentage order.

(4) This precondition does not apply to a pre-commencement surrogacy arrangement.

(5) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application meets this precondition.

30 Medical or social need for surrogacy arrangement must be demonstrated

(1) The Court must be satisfied that there is a medical or social need for the surrogacy arrangement.

(2) There is a medical or social need for a surrogacy arrangement if:

(a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or

(b) there are 2 intended parents under the surrogacy arrangement and the intended parents are:

(i) a man and an eligible woman, or

(ii) 2 men, or

(iii) 2 eligible women.

(3) An eligible woman is a woman who:

(a) is unable to conceive a child on medical grounds, or

(b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or

(c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or
(d) if she were to conceive a child:

(i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or

(ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.

(4) This precondition does not apply to a pre-commencement surrogacy arrangement.

31 Affected parties must consent to order

(1) Each of the affected parties must consent to the making of the parentage order. Note. Consent is defined to mean informed consent freely and voluntarily given by a person with capacity to give the consent.

(2) The consent of a birth parent to the making of the parentage order is a mandatory precondition to the making of a parentage order unless the Court is satisfied that:

(a) the birth parent has died or lost capacity to give consent, or

(b) the birth parent cannot be located after reasonable endeavours have been made to locate him or her.

(3) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application consents to the making of the parentage order.

32 Applicant or applicants must be resident in NSW

The applicant or applicants must be resident in New South Wales at the time of the hearing of the application.

33 Child must be living with applicant or applicants

The child must be living with the applicant or applicants at the time of the hearing of the application.
34 Surrogacy arrangement must be in writing

(1) The surrogacy arrangement must be in the form of an agreement in writing, signed by the birth mother, the birth mother’s partner (if any) and the applicant or applicants.

(2) This precondition does not apply to a pre-commencement surrogacy arrangement.

35 Counselling must have been obtained

(1) Each of the affected parties must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement.

(2) The birth mother and the birth mother’s partner (if any) must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order.

(3) This precondition does not apply to a pre-commencement surrogacy arrangement.

(4) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application received counselling about the surrogacy arrangement.

36 Legal advice must have been obtained

(1) Each of the affected parties must have received legal advice from an Australian legal practitioner about the surrogacy arrangement and its implications before entering into the surrogacy arrangement.

(2) The legal advice obtained by the birth mother and the birth mother’s partner (if any) must have been obtained from an Australian legal practitioner who is independent of the Australian legal practitioner who provided legal advice about the surrogacy arrangement to the applicant or applicants.

(3) This precondition does not apply to a pre-commencement surrogacy arrangement.
(4) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application received legal advice about the surrogacy arrangement.

### 37 Information must be provided for inclusion in central register

(1) All information about the surrogacy arrangement that is registrable information under Division 3 of Part 3 of the Assisted Reproductive Technology Act 2007 must have been provided to the Director-General of the Department of Health, for entry in the central register kept under that Act.

(2) The Court may waive compliance with this precondition in relation to any information that is not known to an affected party and cannot reasonably be ascertained by the affected party.

### 38 Birth of child must be registered

(1) The birth of the child must have been notified or registered in accordance with the requirements of the Births, Deaths and Marriages Registration Act 1995 or a corresponding interstate law.

(2) If the child was born outside the Commonwealth and registration of the birth is not permitted under the Births, Deaths and Marriages Registration Act 1995 or a corresponding interstate law, the birth of the child must have been notified or registered in accordance with the requirements (if any) of the law of the jurisdiction in which the child was born.

(3) In this section, a corresponding interstate law means a law of another State, or of a Territory, that provides for the registration of births, deaths and marriages.

### Division 5 Effect of parentage order

#### 39 General effect of order

(1) On the making of the parentage order in relation to a child:

(a) the child becomes a child of the intended parent or parents named in the order and they become the parents of the child, and
(b) the child stops being a child of a birth parent and a birth parent stops being a parent of the child.

(2) Accordingly:

(a) the child of the surrogacy arrangement has the same rights in relation to the intended parent or parents named in the order as a child born to the parent or parents, and

(b) the intended parent or parents named in the order have the same parental responsibility as the birth parent had before the making of the order.

**Note.** For example, for the purposes of a distribution on intestacy, a child of a surrogacy arrangement is regarded as a child of the intended parent or parents named in the order and the child’s family relationships are determined accordingly. See section 109A of the Succession Act 2006.

(3) Other relationships are determined in accordance with subsection (1).

(4) However, for the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if a parentage order had not been made continues to exist for the purposes of that law in addition to any relationship that exists under this section by virtue of the order.
BIOGRAPHY

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