

REPORT OF THE EXPERTS' GROUP ON THE PARENTAGE / SURROGACY PROJECT

(MEETING OF 6-9 FEBRUARY 2018)

INTRODUCTION

1. From 6 to 9 February 2018, the Experts' Group on Parentage / Surrogacy ("the Group") met in The Hague. The meeting was attended by 23 experts, 3 observers and members of the Permanent Bureau of the Hague Conference on Private International Law ("Hague Conference"). The experts represented 21 States from various regions, including States which have different approaches to surrogacy and international surrogacy arrangements ("ISAs"). The list of participants is included as an annex.

2. This third meeting of the Experts' Group took place in accordance with the Conclusions and Recommendations reached by the Council on General Affairs and Policy of the Hague Conference ("Council") at its last meeting in March 2017. At this meeting, the Council "noted the progress made at ... [the second] meeting [of the Experts' Group], including the Group's agreement in principle on the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage".¹

3. In line with the 2017 mandate from Council, the Group considered the following matters during its third meeting:

- a) possible provisions with respect to the recognition, by operation of law, of foreign judicial decisions on legal parentage;
- b) the feasibility of, and the possible ways forward when considering, the recognition of legal parentage when recorded in a public document; and
- c) whether specific scenarios (*e.g.*, legal parentage in the context of children born by means of ISAs or assisted reproductive technology (ART)) warrant a particular focus or differentiated approach.

4. The Group discussed the above matters in light of the recent legal developments at the national, regional and international levels with respect to legal parentage and ISAs.

A. THE RECOGNITION OF FOREIGN JUDICIAL DECISIONS ON LEGAL PARENTAGE: POSSIBLE PROVISIONS FOR AN INTERNATIONAL INSTRUMENT²

Overarching aims

5. The Group recognised the importance of legal parentage as a status from which children derive many important rights. The Group generally agreed with the following overarching aims of its work, which should be reflected in a possible future international instrument:

¹ See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (14-16 March 2017)", C&R Nos 8 to 10, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy".

² It should be noted that the issue as to whether these provisions would also apply to the recognition of judicial decisions on legal parentage following ISAs and cases of ART involving a third-party donor is to be further discussed by the Group – see further Section C of this Report *infra*. The outcome of that discussion may affect the framing of some provisions in this Section.

- provide predictability, certainty and continuity of legal parentage in international situations for all persons involved;
- resolve conflicts between legal systems in respect of the establishment and contestation of legal parentage; and
- take into account in the context of legal parentage, the fundamental rights of all persons involved, and in particular the best interests of children as a primary consideration.

6. The Group noted, however, that this list would need to be kept under review as the final scope of an instrument becomes clearer.

7. The Group agreed that any future instrument should not be limited to persons under the age of majority.

Objects

8. In relation to the recognition of judicial decisions on legal parentage, the Group identified two possible objects, namely:

- to provide for the recognition of judgments concerning legal parentage given in one State in another State; and
- to facilitate co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of any future instrument.³

9. The majority of the Group was of the view that judicial decisions as they relate to legal parentage, like other status decisions, are not enforceable. The Group noted that a determination of costs or expenses in the context of a decision on legal parentage might be subject to enforcement.

10. There were mixed views on whether an instrument should provide for the recognition of judicial decisions on legal parentage emanating from *non*-Contracting States. The experts discussed the benefits and disadvantages of including decisions from non-Contracting States, but ultimately agreed that this question would have to be discussed further at a later stage, in light of the other provisions of any future instrument.

Material scope

11. The Group agreed that an instrument should be cast in broad terms in that it should provide for the recognition of any judicial decision concerning a person's legal parentage, whatever the name given to that decision – *i.e.*, whether the decision is constitutive or declaratory in nature, and whether it has been rendered following an establishment or contestation proceeding. The Group noted that the definition of court should also be understood as including authorities fulfilling a judicial function regardless of their denomination.

12. The Group concluded that it would be beneficial for an instrument to include a definition of "legal parentage". The Group was of the view that the following definition would be helpful: "legal parentage" means the parent-child relationship established in law.

13. The Group agreed that the scope of matters to be *included* would be very specific, *i.e.*, limited to recognition of any decision given by an authority *concerning a person's legal parentage*.

14. The Group considered that, for example, the following matters should be excluded from the scope of any future instrument:

- name and forenames of the child;
- maintenance obligations;
- parental responsibilities and measures relating to the person and property of the child;

³ This co-operation should be understood as described in paras 30 and 31 *infra*.

- trusts or succession;
- nationality; and
- additional matters covered by other existing Hague Conventions.

15. The Group discussed that these exclusions were also important from the point of view of ensuring that any new instrument did not interfere with – but rather complemented – the operation of existing Hague Conventions.

16. The Group considered that it may be appropriate for some adoption decisions (such as second parent adoptions) to be recognised under any future instrument. The Group acknowledged, however, that this issue would need to be very carefully thought through including, but not limited to, consideration of the 1993 Hague Intercountry Adoption Convention. The Group considered it essential that this Convention is not undermined in any way by a new instrument. Whilst the 1993 Hague Intercountry Adoption Convention has a very specific scope (Art. 2) – applying only to *intercountry* (and not domestic) adoptions – it would be crucial that the new instrument could not be used as a tool to avoid the obligations pertaining to intercountry adoptions established by the 1993 Hague Intercountry Adoption Convention.

17. There were mixed views as to whether to include provisions on preliminary or incidental questions arising in the course of judicial proceedings. Noting that this topic raises complex questions, the Group determined that further consideration of the matter would be needed. In particular, the Group felt that there was a need to further clarify the implications of incidental questions in practice and that case studies would be helpful in that regard.

Recognition by operation of law of judicial decisions on legal parentage

18. There was general agreement that recognition of judicial decisions on legal parentage should occur by operation of law, subject to the satisfaction of certain indirect grounds of jurisdiction (or “jurisdictional filters”) in the State where the decision was issued. The Group generally favoured having a list of alternative grounds of jurisdiction, so long as the grounds provide sufficient proximity between the State where the decision was rendered and the parties. Such connecting factors might include, for example:

- the place of habitual residence of the respondent;⁴ or
- the place of habitual residence of the person whose parentage is the subject of the proceedings.

19. There was less support for nationality as a connecting factor for an indirect ground of jurisdiction. The Group considered that parentage may be a precursor to a determination of nationality. Furthermore, such a connecting factor may not be sufficiently proximate to the child.

20. Some experts proposed a “real and substantial connection” as a possible connecting factor. However, there was some discussion as to whether such a connecting factor contributes to the predictability of the outcome.

21. Some experts considered that a broad list of indirect jurisdiction grounds may increase the potential for forum shopping and lead to a limping relationship. However, other experts thought that there might be advantages in terms of ensuring that a child has at least one legal parent.

22. The Group revisited the issue of whether it would be beneficial and feasible to have unified direct grounds of jurisdiction instead of indirect grounds. The Group was generally of the view that, at least at this stage, the focus should be on formulating indirect rules of jurisdiction, and then consider if those connecting factors could be used for direct rules of jurisdiction.

⁴ Depending on the procedure there might not be a respondent.

Grounds for refusal of recognition

23. The Group discussed limited grounds for non-recognition such as:

- public policy, taking into account the best interests of the child;
- procedural fairness (in particular, in some cases, the right to be notified of the proceedings and have an opportunity to be heard in accordance with the law of the requested State); and
- parallel proceedings involving parentage of the same person.

24. It was agreed that the limited grounds identified so far seemed generally acceptable but that further consideration with respect to other grounds (such as fraud) was needed, including how such grounds might be formulated in the specific context of legal parentage.

25. Some experts considered that the public policy exception should not apply if refusal of recognition would render the child parentless.

Conditions concerning the nature of the judgment

26. The Group agreed that a judgment should be recognised only if it has effect in the State in which it was rendered and is no longer subject to ordinary review in that State.

Procedure for recognition in case of doubt or dispute

27. The Group noted that recognition “by operation of law” means that it is not necessary to commence specific proceedings in the requested State in order to have a foreign judgment on legal parentage recognised. This said, the Group agreed that it would be beneficial to have a mechanism whereby, in cases of doubt or dispute, an interested person or State could apply to the competent authority of a Contracting State for a decision regarding the recognition of the judgment in question. The procedure should be kept simple, be governed by the law of the requested State and avoid duplication with existing processes.

28. It was also agreed that, apart from any review necessary in order to apply the provisions of the instrument, the requested State shall not engage in any review of the merits of the judgment for which recognition is being sought (or contested).

Effects of recognition

29. The Group discussed whether any recognition by operation of law should also extend to recognising the effects (*i.e.*, the consequences) of legal parentage. The Group was of the view that the instrument should not address effects involving areas outside the instrument’s scope such as nationality, maintenance or parental responsibility.

Co-operation provisions

30. The Group considered that co-operation mechanisms are in principle valuable and discussed whether and if so which specific types of co-operation would be useful or necessary in the context of recognition of judicial decisions on legal parentage.

31. The Group had mixed views as to the need for establishing a system of Central Authorities in this context. Concerns were raised about the costs and increased bureaucracy of such a system. Some experts suggested relying on existing co-operation mechanisms (for example, direct judicial communications). Other experts proposed using Country Profiles in order to provide information about the law and procedures of a State.

Contestation of legal parentage

32. The Group reaffirmed its earlier view that, with regard to indirect rules of jurisdiction and conditions for recognition or grounds for non-recognition, judicial decisions on contestation of legal parentage do not require a differentiated approach from the approach taken with respect to the establishment of legal parentage.

33. Some experts proposed that direct jurisdiction rules might be particularly useful in relation to contestation of parentage.

B. LEGAL PARENTAGE AND PUBLIC DOCUMENTS

34. The Group noted the significant diversity in types of birth certificates and other public documents that record legal parentage. The Group acknowledged the reality that the majority of States give domestic and foreign public documents, birth certificates in particular, only evidential weight. The Group noted that parentage usually arises by operation of law. Therefore, further consideration needs to be given as to whether, and if so how, a parent-child status could be recognised where there is no judicial decision on parentage.

35. To facilitate the cross-border predictability, certainty and continuity of legal parentage where there is no judicial decision on parentage, the Group considered three possibilities: uniform applicable law rules, acceptance of foreign birth certificates as rebuttable evidence of legal parentage and a recognition by "operation of law" approach.

Applicable law

36. The Group discussed the benefits of having uniform applicable law rules that would provide predictability in determining legal parentage. The experts discussed what connecting factors might be relevant for applicable law rules in this context and how they should be formulated and structured.

37. Concerns were expressed about the practicality of applying foreign law and about the fact that divergent policy choices reflected in substantive law might create difficulties. In this context some experts were generally in favour of applying the *lex fori*. It was remarked that this would require direct jurisdiction rules.

38. The Group noted that uniform applicable law rules could also apply in judicial determinations. The Group agreed that further consideration should be given to this topic.

Acceptance of foreign birth certificates as rebuttable evidence of legal parentage

39. The Group acknowledged that in the majority of States, birth certificates do not establish legal parentage but simply operate as rebuttable evidence of legal parentage, unless and until they are successfully contested.

40. Some experts raised the benefit of having common rules on formal validity and the possible use of multilingual forms to improve the circulation of birth certificates. However, the Group accepted that this would not, of itself, guarantee the continuity of legal parentage.

Recognition by "operation of law"

41. Some experts proposed that birth certificates recording legal parentage could be recognised by operation of law in other States. There was discussion as to whether this requires a birth certificate to be constitutive of legal parentage. In addition, such birth certificates would need to be identified. One possibility would be to establish a list of those States which already issue such birth certificates, which could be done by way of Country Profiles. Another possibility would be to use some additional form of documentation, *e.g.*, a document (or stamp or other validation) issued by a competent authority; an international birth certificate; or an international certificate of parentage. The Group recognised the value of exchanging information with respect to the effect of a birth certificate regarding legal parentage under domestic law. The practicalities and implications of any such approach would need to be considered further.

42. The Group was of the view that no approach should be adopted if it would create confusion and complexities or undermine the "weight" currently given to birth certificates.

C. LEGAL PARENTAGE IN THE CONTEXT OF INTERNATIONAL SURROGACY ARRANGEMENTS AND ASSISTED REPRODUCTIVE TECHNOLOGIES

International Surrogacy Arrangements

43. The majority of the Group highlighted the importance of addressing ISAs in the work product of the Experts' Group, since many of the international problems relating to legal parentage currently arise in the context of ISAs. In addition, it was questioned whether a general instrument on legal parentage not covering ISAs, and thus not addressing the most pressing cases, would attract sufficient interest internationally.

44. Following the Group's preliminary discussions, mixed views were expressed on the question of whether general private international law rules on legal parentage could apply also to cases involving ISAs. Some experts believed that it would be preferable to have only one set of rules, and favoured having broad general rules to accommodate this. Other experts, however, believed that it would be necessary to have a separate set of rules for ISAs.

45. The Group acknowledged the different approaches of States to ISAs. The Group recognised the continued concerns at international level and the public policy considerations relating to ISAs, including, for example, limping parentage and the potential for exploitation. The Group identified that public policy and the best interests of the child are key issues which warrant further discussion.

46. If a differentiated approach is followed, some experts supported the idea of an Optional Protocol specific to ISAs. The experts also considered opt-in and opt-out mechanisms that would allow individual States to include (or exclude) ISAs from the scope of the instrument as it applies to them.

47. Some experts suggested developing a special co-operation mechanism in order to safeguard the best interests and rights of children and other concerned parties. Other experts expressed concerns with this approach but agreed that further thoughts and discussion on this would be helpful.

48. With respect to the next steps for ISAs, and without prejudice to the still open question of where cases involving ISAs might ultimately be addressed, the Group recommended that:

- work continue on the development of a general private international law instrument; and
- discussions continue as to whether ISAs warrant a particular focus or differentiated approach.

Assisted Reproductive Technologies

49. The Group acknowledged the diverse approaches in substantive laws that States have in the context of ART and legal parentage. Some members of the Group noted the importance of children knowing their origins, which some characterised as a right, and the preservation of records.

50. The Group agreed that cases of ART not involving a third-party donor did not require a differentiated approach to legal parentage in general.

51. The Group discussed whether the same or a differentiated approach was needed in cases of ART involving a third-party donor. The Group did not, at this stage, consider that a differentiated approach was necessary. However, once work has developed on a general instrument, further consideration and discussion may be required and case examples would be helpful in this regard.

CONCLUSIONS AND RECOMMENDATIONS AS TO FUTURE WORK

52. In light of the above, the Group agreed on the following:

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

53. The Group therefore recommends to Council that its mandate be continued to work on these matters, noting the urgency previously identified. In this regard, the Group recommends that Council direct the Permanent Bureau to undertake the necessary work with a view to preparing, in principle two meetings of the Group, to be held prior to the 2019 meeting of the Council, and to allocate the necessary resources accordingly.

PARENTAGE / SURROGACY



February / février 2018

**THIRD MEETING OF THE EXPERTS' GROUP
ON THE PARENTAGE / SURROGACY PROJECT**

From 6 to 9 February 2018

Final List of Participants

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