

REPORT OF THE EXPERTS' GROUP ON THE PARENTAGE / SURROGACY PROJECT (MEETING OF 31 JANUARY - 3 FEBRUARY 2017)

INTRODUCTION

1. From 31 January to 3 February 2017, the Experts' Group on Parentage / Surrogacy ("the Group") met in The Hague. The meeting was attended by 19 experts, two observers and members of the Permanent Bureau of the Hague Conference on Private International Law ("Hague Conference"). The experts represented 19 States from various regions, including States which have different approaches to surrogacy and international surrogacy arrangements ("ISAs"). The composition of the Group is included as an annex.

2. In March 2016,¹ the Council on General Affairs and Policy ("Council") of the Hague Conference requested that the Group continue its work in accordance with the mandate given by it in March 2015 ("to explore the feasibility of advancing work in this area. The Expert's Group should first consider the private international law ("PIL") rules regarding the legal status of children in cross-border situations, including those born of international surrogacy arrangements").² The Council requested that the Group consider at this stage the feasibility of such work focusing primarily on recognition.³ Once more it is important to recall that the mandate focuses on issues of legal parentage and the status of children generally, of which ISAs are a subset.⁴

3. The meeting took place against the background of existing regional and international treaties and obligations, such as, for example, the *United Nations Convention on the Rights of the Child*.

REPORT ON THE DISCUSSION AT THE MEETING

4. The Group recognised that the establishment of, and cross-border continuity in, children's legal parentage are matters of international concern. The Group acknowledged that as a result of a combination of changing family patterns and advances in medical science, there have been a number of legal developments in some States, including with regard to the law on parentage.

5. The Group noted that the issue of legal parentage is relevant to all persons, and is not limited to persons under the age of majority.

¹ See Conclusions and Recommendations of the Council of 15-17 March 2016, para. 15.

² See Conclusions and Recommendations of the Council of 24-26 March 2015, para. 5.

³ *Ibid*: "The Council welcomed the Report of the Experts' Group on Parentage / Surrogacy. Noting the progress made at the Group's first meeting, the Council invited the Group to continue its work in accordance with its mandate of 2015, and requested the Permanent Bureau to convene a second meeting of the Group before the next meeting of the Council. The consideration of the feasibility should focus primarily on recognition. The Group will report to the Council in 2017."

⁴ See "The desirability and feasibility of further work on the Parentage / Surrogacy Project" (Prel. Doc. No 3B of March 2014), paras 68-70.

LEGAL PARENTAGE IN GENERAL

Recognition of judicial decisions on legal parentage

6. The majority of the Group expressed the view that the recognition, by operation of law, of foreign judicial decisions on legal parentage in a multilateral instrument would be feasible.

7. Indirect grounds of jurisdiction (or “jurisdictional filters”) were considered necessary to support recognition by operation of law. The Group generally favoured having a broad list of alternative grounds of jurisdiction and, where appropriate, having sufficient proximity between the State where the decision was rendered and the parties. The Group agreed that further consideration should be given to specific connecting factors.

8. Regarding temporal requirements, it was suggested that any mutable connecting factor(s) for indirect grounds of jurisdiction should, for example, be satisfied at the time of the initiation of the proceedings that led to the judicial decision.

9. The Group agreed that, in order to be recognised, the foreign judicial decision must be final and must have legal effect in the State where it was delivered.

Conditions for recognition / grounds for non-recognition

10. The Group considered whether specific conditions would need to be satisfied for recognition of a judicial decision on parentage. It was suggested that limited conditions may be required.

11. The Group believed that it would be desirable to identify limited grounds for non-recognition, which, in cases of contestation of parentage, also serve to protect the interests of the respondent. Examples provided included aspects of procedural fairness (*e.g.*, notice of the proceedings and the opportunity to be heard), fraud in connection with a matter of procedure, and parallel proceedings in another forum. It was agreed that further consideration and discussion are needed in this area.

12. The Group agreed that any public policy exception should be framed in the same way as in existing Hague Conventions, *i.e.*, “manifestly contrary to public policy”. It was agreed that public policy should take into consideration the best interests of the child.

Contestation of parentage

13. The Group noted that, in practice, judicial decisions on legal parentage can result from proceedings concerning both the establishment and contestation of legal parentage. There was a general consensus that, with regard to indirect rules of jurisdiction, conditions for recognition and 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. The Group noted, however, that States have different rules on the limitation periods during which contestation actions may be brought.

Foreign public documents

14. The Group recognised that there is an important distinction between the recognition of the legal parentage status and the recognition of the formal validity of a public document, such as a birth certificate. The Group underlined that its mandate is to identify solutions for the former.

15. The Group acknowledged the challenge in drafting rules on the “recognition” of, or on giving effect to, foreign public documents owing to the diversity of such documents and the differing legal effects that such documents may have. In many cases a foreign public document may not necessarily record legal parentage. It was also noted that the issuance of a public document is an administrative matter without proceedings comparable to those which precede a judicial decision. Many members of the Group felt that, for these reasons, recognition of foreign public documents could not be equated with recognition of foreign judicial decisions.

16. The Group discussed an applicable law approach to the determination of legal parentage but doubts were expressed whether it would be possible to agree on a uniform applicable law. Some members of the Group felt that an applicable law approach could be considered further.

17. Some members of the Group raised the possibility of having an optional new document (an international certificate on parentage) or a “stamp” (or some other form of validation or appropriate indication) to confirm legal parentage placed by the State of issuance on birth certificates, perhaps to be furnished only on request. For States in which legal parentage is already recorded in a public document an alternative approach could be envisaged. A possible role was seen here for a designated authority.

18. The Group considered that a recognition approach for foreign public documents could establish a presumption of a parent-child relationship which could be rebutted by contrary evidence. The extent to which such an approach would facilitate the continuity of legal parentage was debated.

19. The Group was generally of the view that, in respect of either an “applicable law approach” or a “recognition approach”, it would be helpful for States to have a more complete understanding of the extent to which a foreign public document establishes legal parentage in the State that issued it.

Direct grounds of jurisdiction

20. Some members of the Group saw benefits in having direct grounds of jurisdiction for the determination of parentage, to facilitate cross-border recognition, if agreement could be reached on such grounds, perhaps with different categories in the context of legal parentage being established by, or arising from: (1) operation of law; (2) voluntary acknowledgment of legal parentage; or (3) judicial proceedings.

Incidental question

21. There were mixed views on whether the rules proposed should also apply where the recognition of legal parentage is to be dealt with as an incidental question in the context of other matters (*e.g.*, a determination of nationality, succession, maintenance). Some members of the Group believed that it should be considered further.

Legal effects

22. The Group generally believed that the legal effects flowing from legal parentage should be left to State law, including States’ PIL rules.

Scope

23. The Group agreed that matters covered in other Hague Conference Conventions, such as parental responsibility, intercountry adoption, child abduction and family maintenance, should be excluded.

ISAs AND ASSISTED REPRODUCTIVE TECHNOLOGY (“ART”)

24. Noting that legal parentage, particularly in the context of ISAs, was a complex and evolving topic, the Group emphasised the importance of concentrating on the PIL aspects, and on the need for practical solutions, with one of the key aims being to secure continuity in the parent-child legal status.

25. The Group agreed that all children, irrespective of the circumstances of their birth, should be treated the same. The Group also acknowledged the different approaches of States to surrogacy. The Group recognised continued concerns at the international level and the consequent public policy considerations relating to surrogacy arrangements including, for example, the potential for exploitation. Several members of the Group noted the importance of children knowing their origins, which some characterised as a right, and the preservation of records.

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

27. There was broad support for exploring the possible application of future agreed general PIL rules on legal parentage to cases of ISAs. Many members of the Group called for additional rules and safeguards in these cases.

28. Left open for discussion was the question of whether the same or a differentiated approach was needed in cases of ART involving a third-party donor.

29. The Group discussed the possibility of minimum standards and conditions for recognition.

Grounds of jurisdiction

30. For ISAs, some members of the Group considered that a sole ground of direct jurisdiction for the determination of legal parentage had the benefit of simplicity. However, the majority of the Group considered that alternative or cascading grounds would be more feasible. The Group discussed the advantages and disadvantages of several possible connecting factors including, *e.g.*, the State of birth, the State of habitual residence of the surrogate mother, the State of nationality or habitual residence of the child, and the State of nationality or habitual residence of one or both of the intending parents.

31. The Group agreed that in the absence of grounds of direct jurisdiction, and with a view to promoting the continuity of status, a more flexible approach concerning possible grounds of indirect jurisdiction as a condition for recognition could be considered.

Recognition of judicial decisions

32. The Group discussed whether the recognition of judicial decisions in cases of ISAs required a differentiated approach to other decisions on legal parentage. The Group noted that the recognition of judicial decisions raised fewer challenges than the recognition of foreign public documents in ISA cases.

33. The Group considered the content and potential application of a public policy exception as formulated in existing Hague Children's Conventions. It was suggested that public policy in the context of ISAs and ART should take into consideration the best interests of the child. The Group agreed that further consideration and discussion are needed as to how such a clause could operate in conjunction with possible minimum standards.

CO-OPERATION MECHANISMS

34. Many members of the Group believed that mechanisms of co-operation would be useful. Discussion focused in particular on administrative tools of co-operation, *e.g.*, possibly through designated competent or central authorities.

35. It was noted that channels of communication between States with differing national approaches to ISAs and ART might be helpful.

APPROACHES

36. The Group agreed that a binding instrument is preferable as it would meet real, practical needs which are not met by existing instruments and national frameworks. The Group recommended that work on the feasibility of such an instrument continue.

37. Consideration remains open at this stage of the possible approaches to ISAs and ART in any PIL instrument on legal parentage in general, although the Group agreed that the issue is urgent. The Group discussed various options.

CONCLUSIONS AND RECOMMENDATIONS AS TO FUTURE WORK

38. In light of the above, the Group agreed:

- a) in principle, on the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage. Further consideration and discussion are needed on how such an instrument could operate;
- b) that owing to the diversity of approaches with respect to the determination of legal parentage and the recognition of the legal parentage when recorded in a public document, further consideration and discussion are needed in relation to this issue;
- c) that owing to the complexity of the subject and the diversity of approaches by States in cases of ISAs, definitive conclusions could not be reached at this meeting as to the feasibility of the possible application of future agreed general PIL rules on legal parentage to ISAs and the possible need for additional rules and safeguards in these cases and in cases of ART. The Group concluded that further consideration and discussion of these matters are needed.

39. The Group therefore recommends to Council that its mandate be continued to work on these matters, noting the urgency already identified. In this regard, the Group also recommends that Council direct the Permanent Bureau to undertake the necessary work with a view to preparing a next meeting of the Group and to allocate resources accordingly.



**List of participants
Experts' Group on the Parentage / Surrogacy Project**

31 January – 3 February 2017

List of participants

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