Surrogacy Arrangements and Legal Parenthood
Jane Stoll

Surrogacy Arrangements and Legal Parenthood
Swedish Law in a Comparative Context

UPPSALA UNIVERSITY

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Abstract

Surrogacy arrangements have become an increasingly popular way for childless people to build a family. Yet many jurisdictions do not regulate surrogacy. Even in the absence of surrogacy regulation, if a jurisdiction has no specific legal rules that clarify parenthood following surrogacy, the result is often uncertainty in relation to the legal parental status of the surrogate mother, her spouse or cohabitant, any possible donors, and the commissioning parents. This, in turn, leaves the surrogate-born child’s family law status uncertain.

This thesis examines the legal aspects of parenthood and how it is, or could be, determined in Sweden following surrogacy arrangements. Important aims are to establish whether the current national laws regulating family law can sufficiently protect the interests of the surrogate-born child and the parties to surrogacy arrangements, with an emphasis on interests connected to family law status; to examine the ways in which other jurisdictions (England and Wales, and Israel) have responded to similar issues; and to identify problems and propose alternative solutions in relation to the specific issue of establishing legal parenthood following surrogacy at a domestic level, either with or without State regulation of surrogacy agreements.

Consideration is given to whether it might be appropriate to re-evaluate or qualify the existing presumptions of parenthood, in particular the unwritten presumption of maternity. Several alternatives for the transfer of legal parenthood from the surrogate mother, and her spouse or cohabitant as the case may be, to the commissioning parent or parents are also examined. In addition, the ethical implications of surrogacy arrangements are explored in order to provide an insight into the way in which subconscious or hidden values might make it difficult for a State to regulate certain areas of private life such as parenthood.

The starting point for the thesis is that it is in the best interests of the child to have parents at birth and that this interest must be prioritised over an intended parent’s interest in becoming a parent. This view is based on and is consistent with existing Swedish law and policy.

Keywords: surrogacy, surrogate motherhood, surrogacy arrangements, surrogacy and parenthood, parentage, legal parenthood, legal parentage, establishing paternity, establishing maternity, parental order, parentage order, Sweden, England and Wales, Israel

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For Daphne
Acknowledgements

This thesis is the culmination of my doctoral studies. For me it was intended to be a two-year project since I had already completed a Licentiate of Laws degree which corresponds to the first two years of the degree of Doctor of Laws. The thesis has taken a little over two and a half years (working time) to complete. During this time, surrogacy has been firmly placed on the public agenda in Sweden and the legal issues surrounding surrogacy arrangements – after being static, or side-stepped, for almost 30 years – are now receiving a great deal of attention. This has made the project even more interesting than it would have otherwise been and I feel privileged to have had the opportunity to immerse myself in a research area at a time when it is receiving so much interest in the public domain. There is a downside, however. The fact that change is underway highlights the reality that a legal researcher’s work is never really done. Specifically, the legal situation in Sweden concerning parentage following surrogacy agreements is now in a state of flux. To this end, I have found it difficult to let this project go. It makes me feel as though I am in an unfamiliar place, hunting a dangerous, constantly-moving target with a rifle containing only one bullet. But I know that unless I stop procrastinating and pull the trigger, I will never get home. Before I take my last remaining shot, however, I would like to extend my sincere thanks to all of those who have supported me throughout this project.

First and foremost, I wish to acknowledge the support and guidance I have received from my supervisors Professor Anna Singer, and Justice of the Supreme Administrative Court Elisabeth Rynning (former Professor of Medical Law). For me, it has been a privilege to have had both Anna and Elisabeth by my side not only while I completed my Licentiate of Laws thesis in 2007/2008 but also for the duration of my doctoral project. Throughout this time, they have provided me with inspiration and motivation, freely shared their wisdom and experience, and challenged me so that I could improve as a researcher. Something
I have really appreciated is that, as supervisors, Anna and Elisabeth work extremely well together. And they always seem to have the same goals, even though they do use different methods to meet their pedagogical objectives (a bit like the regulatory methods used by Israel, and England & Wales where it concerns the regulation of surrogacy arrangements). It is difficult for me to express the extent of my appreciation and gratitude. Thank you both so much!

I am indebted to Professor Michael Freeman and Kajsa Walleng for taking the time to read my text. Thank you both for you valuable comments!

Special thanks also to my incredibly talented daughter Alexis Winter who designed and illustrated the book cover.

This thesis project has been financed by the Faculty of Law at Uppsala University and the Sigrid and Anna Åbergssons Stipendium. For this I would like to express my thanks. I am also grateful to the Faculty for providing me with a great working place, a rich research environment and wonderful colleagues.

Sincere thanks is also extended to Smålands Nation and the Anna Maria Lundin Scholarship Committee for funding my research visit to Israel in June 2012. Since all of the Israeli primary legal sources are written in Hebrew, this visit was very important, making it possible for me to clarify information about certain aspects of Israeli law that were central to my project including the status of the child born following surrogacy contracts; parenthood and its transfer; birth registration; and the monitoring process of surrogacy contracts. I also gained valuable insight into how religious factors play a large role in influencing overall attitudes and policy in relation to surrogacy arrangements.

Finally, I would like to acknowledge the support, love and encouragement I have received from my wonderful family: my husband Bengt Lindell and our beautiful daughters Alexis, Gabriel, Tove and Ida.

Jane Stoll
Uppsala, September 2013
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<td><strong>ART</strong></td>
<td>Assisterad befruktning</td>
</tr>
<tr>
<td>Bet</td>
<td>Betänkande</td>
</tr>
<tr>
<td>BO</td>
<td>Barnombudsmannen</td>
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<tr>
<td>Cafcass</td>
<td></td>
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<tr>
<td>CRC</td>
<td>FN:s konventionen om barnets rättigheter; Barnkonventionen</td>
</tr>
<tr>
<td>CF</td>
<td>Bestållande far</td>
</tr>
<tr>
<td>CM</td>
<td>Bestållande mor</td>
</tr>
<tr>
<td>CP</td>
<td>Bestållande förälder (samkönade blivande förälder i parförhållande med CF eller CM)</td>
</tr>
<tr>
<td>DI</td>
<td>Givarinsemination</td>
</tr>
<tr>
<td>DIY</td>
<td>Gör-det-själv</td>
</tr>
<tr>
<td>Dir</td>
<td>Direktiv</td>
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<tr>
<td>Ds</td>
<td>Departementsserien</td>
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<tr>
<td>ECHR</td>
<td>Europakonventionen för mänskliga rättigheter och grundläggande friheter</td>
</tr>
<tr>
<td>ECtHR</td>
<td>Europeiska domstolen för de mänskliga rättigheterna; Europadomstolen</td>
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<tr>
<td>ED</td>
<td>Åggedonator</td>
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<tr>
<td>EU</td>
<td>Europeiska unionen</td>
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<tr>
<td>FB</td>
<td>Föräldrabalk (SFS 1949:381)</td>
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<tr>
<td>FN</td>
<td>Förenta Nationerna</td>
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<tr>
<td>GIA</td>
<td>Lag (SFS 2006:351) om genetisk integritet mm</td>
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<tr>
<td>HFEA</td>
<td>Myndigheten för assisterad befruktning i Storbritannien</td>
</tr>
<tr>
<td>HFE Act 1990</td>
<td>Human Fertilisation and Embryology Act 1990 (UK)</td>
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<tr>
<td>HFE Act 2008</td>
<td>Human Fertilisation and Embryology Act 2008 (UK)</td>
</tr>
<tr>
<td>IVF</td>
<td>Provrörsbefruktning</td>
</tr>
<tr>
<td>MIA</td>
<td>Myndigheten för internationella adoptionsfrågor</td>
</tr>
<tr>
<td>NJA</td>
<td>Nytt juridiskt arkiv (Rättsfall från Högsta domstolen)</td>
</tr>
<tr>
<td>Prop</td>
<td>Proposition</td>
</tr>
<tr>
<td>RB</td>
<td>Rättegångsbalk (SFS 1942:740)</td>
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<tr>
<td>RF</td>
<td>Regeringsformen</td>
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<tr>
<td>RFSL</td>
<td>Riksförbundet för homosexuellas, bisexuellas och transpersons rättigheter</td>
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<td>SAA</td>
<td>Surrogatmor</td>
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<tr>
<td>SD</td>
<td>Spermadonator</td>
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<td>SFS</td>
<td>Svensk författningssamling</td>
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<td>SM</td>
<td>Surrogatmor</td>
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<tr>
<td>SMA Act</td>
<td>Statens medicinsk-etiska råd</td>
</tr>
<tr>
<td>SMER</td>
<td>Statens medicinsk-etiska råd</td>
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<tr>
<td>SOSFS</td>
<td>Socialstyrelsens författningssamling</td>
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<tr>
<td>Acronym</td>
<td>Swedish</td>
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<tr>
<td>SOU</td>
<td>Statens offentliga utredningar</td>
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<tr>
<td>SoU</td>
<td>Socialutskottet</td>
</tr>
<tr>
<td>UD</td>
<td>Utrikesdepartementet</td>
</tr>
<tr>
<td>UK</td>
<td>Förenade konungariket Storbritannien och Nordirland</td>
</tr>
<tr>
<td>UN</td>
<td>Förenta Nationerna</td>
</tr>
<tr>
<td>♂</td>
<td>Man</td>
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<td>♀</td>
<td>Kvinna</td>
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# Glossary

<table>
<thead>
<tr>
<th>Term</th>
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<tbody>
<tr>
<td>ART – Assisted Reproductive Technology (or Treatment)</td>
<td>A process through which a pregnancy may be achieved through the use and assistance of reproductive technology as opposed to sexual intercourse. For the purposes of this thesis ART refers to treatments such as IVF or hospital-based insemination that require medical intervention. It is thus distinguished from DIY insemination or DIY surrogacy (which does not require the assistance of medical treatment by a third party).</td>
</tr>
<tr>
<td>Cohabitant</td>
<td>A person living in an enduring relationship with an adult of the opposite sex or same sex without being married to, or in a registered partnership with, the other person. Can also be referred to as a cohabitee.</td>
</tr>
<tr>
<td>Commissioning mother (CM)</td>
<td>An intended mother who commissions a surrogate to bear a child by entering into a surrogacy agreement with a SM.</td>
</tr>
<tr>
<td>Commissioning father (CF)</td>
<td>An intended father who commissions a surrogate to bear a child by entering into a surrogacy agreement with a SM.</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
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<td>-----------------------------------------------------------</td>
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<tr>
<td>Commissioning parent (CP) (1)</td>
<td>An intended parent, mother or father, above; or</td>
</tr>
<tr>
<td>(CP) (2)</td>
<td>A male or female CP who is in a same-sex relationship with a CM or CF who commissions a surrogate to bear a child by entering into a surrogacy agreement with a SM.</td>
</tr>
<tr>
<td>Confirmation of paternity or parenthood</td>
<td>Process through which a male or female cohabitant, or female spouse, of the mother of a child have their legal parenthood established after a child is born. This involves a confirmation of parentage by the intended parent and the approval of the confirmation by the mother and the Social Welfare Committee (Sweden). Previously referred to as an acknowledgement of parentage.</td>
</tr>
<tr>
<td>Egg donation</td>
<td>Process through which a woman provides her eggs for the purposes of the pregnancy of another woman.</td>
</tr>
<tr>
<td>Full surrogacy</td>
<td>Gestational surrogacy, below. cf partial or traditional surrogacy.</td>
</tr>
<tr>
<td>DIY insemination or surrogacy</td>
<td>An insemination or surrogacy arrangement which is organised and carried out privately between individuals without the assistance or involvement of the national health system. Also referred to as private insemination or surrogacy arrangement.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Donor, egg or sperm</td>
<td>A person who donates his or her genetic materials for the purposes of ART treatment – or in the case of sperm, for a DIY insemination or surrogacy – without intending to become the intended child’s parent.</td>
</tr>
<tr>
<td>Gamete (sv könscell)</td>
<td>A mature sexual cell ie egg/ova or sperm.</td>
</tr>
<tr>
<td>Genetic father</td>
<td>A man who has provided the genetic materials for a pregnancy that has resulted in the birth of a child.</td>
</tr>
<tr>
<td>Genetic mother</td>
<td>A woman who has provided the genetic materials for a pregnancy that has resulted in the birth of a child.</td>
</tr>
<tr>
<td>Gestational mother</td>
<td>A woman who has carried and given birth to a child following a pregnancy irrespective of whether or not her own genetic materials were used for the conception.</td>
</tr>
<tr>
<td>Gestational surrogacy</td>
<td>A surrogacy arrangement in which the surrogate mother has no genetic connection to the surrogate-born child. Also known as <em>full surrogacy</em>; cf <em>traditional</em> or <em>partial surrogacy</em>.</td>
</tr>
<tr>
<td>Intended parent</td>
<td><em>Commissioning parent.</em></td>
</tr>
<tr>
<td>Partial surrogacy</td>
<td>Traditional surrogacy, below <em>cf gestational</em> or <em>full surrogacy</em>.</td>
</tr>
<tr>
<td>Private insemination or surro-gacy arrangement</td>
<td>See DIY insemination or surrogacy.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Spouse</td>
<td>Husband, wife or registered partner.</td>
</tr>
<tr>
<td>Surrogacy agreement</td>
<td>An agreement made between a surrogate mother – and as the case may be her husband or partner – and the commissioning parent or parents which clarifies and confirms the conditions of a surrogacy arrangement; in particular, that the surrogate mother will bear a child for the commissioning parent/s and surrender the child to them when the child is born.</td>
</tr>
<tr>
<td>Surrogate arrangement</td>
<td>The process of a surrogacy pregnancy and birth and the organisation of the process between the parties to the surrogacy agreement. The arrangement commences with the planning and entering into of the surrogacy agreement and concludes with the delivery of the surrogate-born child to the commissioning parents.</td>
</tr>
<tr>
<td>Surrogate-born child</td>
<td>A child who has been born to a surrogate mother following a surrogacy arrangement.</td>
</tr>
<tr>
<td>Surrogate mother</td>
<td>A woman who, after agreeing to become pregnant for another person or persons (the commissioning parent/s), bears a child with the intention of giving the child to the person/s in question.</td>
</tr>
<tr>
<td>Traditional surrogacy</td>
<td>A surrogacy arrangement in which the surrogate mother is also the genetic mother of the surrogate-born child. Also known as <em>partial surrogacy</em>; cf <em>gestational or full surrogacy</em>.</td>
</tr>
</tbody>
</table>
In 2002, a surrogacy arrangement made between a married Swedish commissioning couple and the commissioning father’s sister (the surrogate), resulted in the birth of a child after the surrogate mother underwent ART in Finland. The child, who was the genetic child of both the commissioning mother and father, was born in Sweden. Although the commissioning parents cared for the child from birth and the father had sole custody of the child, the surrogate-born child’s legal parents were the commissioning father and the surrogate mother. When the child was one year old, the commissioning mother applied to adopt the child in order to acquire legal parentage. The application for adoption was approved by the District Court in 2004. Subsequently, both the commissioning father and the surrogate mother withdrew their consent to the adoption. The commissioning father then appealed to the Court of Appeal to have his wife’s application for adoption rejected on the basis that he had withdrawn his consent and that permission for the adoption could not legally be given without his consent. The Court of Appeal rejected the adoption application and the commissioning mother appealed to the Supreme Court which confirmed the judgment of the Court of Appeal and held (3/2) that the withdrawal of consent was valid i.e. it was not possible to confirm an adoption unless both legal parents consented to the adoption. The fact that the applicant was the child’s genetic parent did not change the fact that valid consent was required.¹

¹ Supreme Court Case Ö 5151-04 reported in NJA 2006 s 505. Decision 7 July 2006. This case is discussed further in Chapter 3, Surrogacy, parenthood and Swedish law.
1 Introduction

1.1 Description of problem

1.1.1 Background

Surrogacy arrangements have become an increasingly popular alternative for childless couples, and singles, seeking to fulfil their dream of becoming parents. Yet while more jurisdictions are now regulating the practice of surrogacy this is by no means the rule. Some jurisdictions, such as Sweden, have no legislation expressly permitting or prohibiting surrogacy arrangements; others have expressly banned the practice, making (certain aspects of) it a criminal offence. Yet prohibiting surrogacy – or, as Sweden has done, making it impossible in conjunction with assisted reproductive treatment (ART)\(^2\) – does not appear to be an effective way to prevent such arrangements from occurring. Those who wish to enter into a private surrogacy arrangement in order to create a family may attempt to do so through “do it yourself” (DIY) surrogacy\(^3\). Moreover, if intended parents have the financial means, it is possible for them to enter into surrogacy arrangements in countries where medically assisted surrogacy is available. Where this occurs, the effects of surrogacy may even be felt in jurisdictions where the practice is not supported by law. One such effect is the uncertainty which may arise in relation to the family law status of the commissioning parents, the surrogate and her partner, and – most importantly – the child.

It is not possible to obtain accurate statistics on the true extent of the surrogacy industry, even in jurisdictions where it is permitted. However, in the USA, where surrogacy is part of a multi-million dollar industry, surrogate mothers as a group are reported to be paid over

\(^2\) See the Abbreviations and Glossary sections in the front of the thesis for a clarification of the meaning of special terms used.

\(^3\) Above.
$22 million each year. In a report published in 2010 by the Council for Responsible Genetics, it was pointed out that the only two available sources of statistics on gestational surrogacy in the USA are very tentative. Moreover, there are no statistics available at all on the use of traditional surrogacy. Nor does the existing data include any demographic description about surrogate workers. Even so, what the statistics do reveal is an exploding surrogacy market that almost doubled between 2004 and 2008, resulting in 5,238 babies in four years. There are no indications that this growth rate is slowing.

India is another jurisdiction where medically assisted surrogacy is rapidly growing. There, the commercial surrogacy industry has been reported to be worth an estimated US$445 million and profits are expected to reach $6 billion in the coming years.

These figures are relevant because Swedish couples are using the surrogacy services in these countries and because – even though they are an underestimation – they show that the industry is rife. The absence of surrogacy regulation in Sweden does not make surrogacy arrangements irrelevant for Swedish families. Moreover, the problem of uncertain legal parental status in this connection cannot be resolved unless there is Swedish legislation that clarifies parenthood following surrogacy arrangements.

The issue at the heart of the case presented in the prologue, above, was whether a commissioning genetic mother’s application to adopt the surrogate-born child she had commissioned with her husband

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4 See Morgan Holcomb and Mary Patricia Byrn, ‘When your body is your business’ (2010) 85 Washington Law Review 647 p 647. Holcomb and Byrn report that a typical surrogacy costs between $75,000–150,000 of which the surrogate receives roughly $20,000 plus expenses (p 649). Based on conservative estimates from the US government there are more than 1,000 births following surrogacy each year indicating that surrogacy agencies ‘are at the center of a $75–150 million-per-year industry.’ (p 651.)


6 It is emphasised in the report that such demographic information is highly relevant to questions of medical, financial and racial exploitation. Above, p 7.

7 Council for Responsible Genetics, above pp 6–7.


9 See <http://www.thewip.net/contributors/2008/10/reproductive_tourism_soars_in.html> accessed 1 July 2013.

10 NJA 2006 s 505.
could still be confirmed after both legal parents, having first consented to the adoption, later withdrew their consent. Thus, while the case concerned the transfer of parental rights after birth following non-commercial surrogacy, the legal issues addressed in the case were about adoption, not surrogacy. Even so, this case – which comprises the only Swedish case law authority regarding surrogacy – serves to highlight some of the problems that may arise in relation to establishing parenthood following surrogacy arrangements. These include potential uncertainty in relation to legal maternal status where the commissioning mother is also the genetic mother; discrimination against commissioning genetic mothers (when compared to fathers) where it concerns establishing their legal parental status following surrogacy; and uncertainty for the surrogate-born child regarding who his or her legal parents are at birth. Such problems are arguably exacerbated because there is no regulation that clarifies the legal parental status of the various parties to the surrogacy agreement.

1.1.2 Purposes and objectives

The overarching purpose of this thesis is to examine the legal aspects of parenthood following surrogacy arrangements and to explore options for its regulation. The main focus is on how parenthood following surrogacy is, or could be, determined under Swedish law.

To this end, the aims are to establish whether the current national laws regulating family law can sufficiently protect the interests of the surrogate-born child and the parties to surrogacy arrangements, with an emphasis on interests connected to family law status; to examine the ways in which other jurisdictions have responded to similar issues; and to identify problems and propose alternative solutions in relation to the specific issue of establishing legal parenthood following surrogacy at a domestic level, either with or without State regulation of surrogacy agreements.

Important questions explored in this connection are whether existing national family law rules need to be clarified in relation to legal parental status following surrogacy arrangements; whether it might be appropriate to re-evaluate or qualify the presumption of maternity in order to remove any doubt as to who the legal mother is following surrogacy; and whether there could be an alternative to adoption for the transfer of legal parenthood from the surrogate mother and where
relevant her spouse or cohabitant, to the commissioning parents, and if so, must or should such a transfer be contingent upon the consent of the surrogate mother after the birth?

The starting point for the thesis is that it is in the best interests of the child to have parents at birth and that this interest must be prioritised over an intended parent’s interest in becoming a parent. This view is based on and consistent with international law and existing Swedish law and policy.

In light of the controversial nature of surrogacy, the ethical implications of surrogacy arrangements are explored. The objective is to gain insight into the way in which values that are subconscious or concealed – values which we all carry – might make it difficult for a State to regulate surrogacy and parenthood, or for its citizens to change the way in which ARTs requiring the assistance of third parties are perceived.

Since Sweden has no regulation in relation to surrogacy, and no statute law for resolving parenthood following surrogacy arrangements, another aim is to explore the surrogacy regulation and associated parenthood rules in England and Wales, and Israel. How these jurisdictions have dealt with the issues of legal parental status following surrogacy could provide inspiration for, inter alia, the clarification of parenthood following surrogacy arrangements in Sweden. Both England and Wales, and Israel have well-established laws on the determination of parenthood following surrogacy arrangements even though each jurisdiction applies somewhat different solutions for establishing and/or transferring parenthood in such situations. Some insight is also taken from related aspects of the Greek law.11

The legal problems and issues addressed in this thesis are by no means unique to Sweden. Thus, even though the main focus is on Swedish law and on how the various solutions could be applied in Sweden, the solutions may also be relevant to other legal systems where similar problems are experienced. The discussion could, therefore, be adapted and applied to other jurisdictions.

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11 This jurisdiction, however, was not considered in depth, first, due to difficulties in obtaining relevant primary and secondary legal sources and other sources written in English; and secondly, because it was not possible to examine the laws of an additional jurisdiction in the two-year period allocated for this project.
1.2 Materials and method

This thesis is, predominantly, a legal dogmatic analysis of the laws of parenthood as applied to surrogacy arrangements in Sweden, England and Wales, and Israel. The objectives of the thesis are achieved largely through the use of primary legal sources. The primary legal sources relied on comprise statute law and regulations, case law and various international instruments. In addition, where it concerns Sweden, preparatory legislative materials have also been consulted and relied on heavily.\(^{12}\)

In relation to Israel, since all of the primary legal documents are written in Hebrew, it has been necessary to rely on secondary sources where it concerns the background to the legislation, connected legislation where mentioned, and certain guidelines. In addition, face-to-face interviews were conducted in Israel in June 2012 in order to confirm the interpretation of the legal questions raised in the chapter on Israeli law and to verify non-legal information where necessary. The English translation of the Surrogate Motherhood Agreements Act 1996, published by A G (Aryeh Greenfield) Publications,\(^{13}\) forms the basis for the included analysis of the Israeli Act’s provisions.

Other (non-primary) sources of law examined include government publications and reports, guidelines, and documents such as information sheets issued from public authorities, in addition to journal articles and doctrine.

Non legal sources include books, international journal articles, medical and other studies, and information from various government departments.

All references to Swedish primary and secondary sources referred to and cited in this thesis have been translated by the author, unless otherwise specified.

Where possible, legal and other sources available as of 1 April 2013 have been taken into account. Materials published after this date have been observed only in exceptional circumstances.


\(^{13}\) See Part 5.1, below, regarding information about this translation.
1.3 Limitations

This thesis examines the legal aspects of parenthood and how it is determined following surrogacy arrangements in the jurisdictions above, in order to find solutions to connected legal problems. To this end, the scope and focus of the research is limited to the application of law at a domestic level and does not extend to the private international law implications of surrogacy arrangements, even though some of these are mentioned.\(^{14}\)

Regarding the studies on the laws of England and Wales, and Israel it is emphasised that the purpose is to see how these jurisdictions have addressed and attempted to solve the problem of how to establish parenthood following surrogacy arrangements, through regulation, at a domestic level. The intention is not to undertake a deep or critical analysis of the connected statute law or case law in these jurisdictions. It is, rather, to use the available material to form the basis for generating options to help solve similar problems in Sweden, or other jurisdictions, as the case may be.

Moreover, while it is recognised that issues concerning surrogacy and surrogacy arrangements are multi-disciplinary in nature, it is not feasible to touch upon all of them in a legal thesis that focuses on parenthood. Even in limiting the broader scope to legal questions, and further reducing this to issues of parenthood, many important questions connected to parenthood are unable to be addressed and must remain unanswered.\(^{15}\)


The difficulties that can arise as a result of cross-border surrogacy arrangements are well known and recent work in this area shows that there are many problems, evident at an international level, that require urgent solutions. These include not only the parenthood-connected issues of legal status and citizenship following surrogacy, but also more general and ethical concerns about the surrogacy industry and its impact on surrogates and surrogate-born children.

Equally important within Europe are the consequences of inconsistent regulation in relation to surrogacy, particularly since there are...
significant differences in the way in which the connected individual rights are interpreted and protected.\textsuperscript{18}

These issues are important and deserve attention. However, it is beyond the scope of this thesis to consider them more than fleetingly. Where issues are directly relevant to the domestic questions discussed, an attempt has been made to highlight possible international law implications but this can in no way reflect the complexity of the problems introduced by surrogacy at the global level.

1.4 A child’s right to parents or a parent’s right to a child?

In spite of the express limitation in relation to the many international aspects of surrogacy, above, a few words must be mentioned about the international and domestic source of a child’s right to parents.

As mentioned in Part 1.1.2, the starting point of this thesis is that the surrogate-born child has a right to parents and that it is in the best interests of the child to have responsible parents already at birth. It follows that a primary goal of this thesis (and arguably any subsequent policy) should be on finding a way to secure parents for the child, rather than to provide commissioning parents with a right to obtain a child of their own through surrogacy. Moreover, the child’s right in this context should be afforded greater weight than any right the commissioning parents might have in becoming legal parents. This in no way implies that protecting the welfare of the surrogate-born child

\textsuperscript{18} Regarding the harmonisation of family law in Europe from a private international law and comparative law perspective see Maarit Jänterä-Jareborg, ‘En harmoniserad familjerätt för Europa?’ (2009) Tidsskrift for Rettsvitenskap 323. Jänterä-Jareborg points out that debates on the harmonisation of family law must take place on at least two levels: issues concerning the harmonisation of substantive family law ie civil (private) law rules concerning the family; and issues concerning the harmonisation of international family law ie the private international law rules concerning the family (pp 324–325). For arguments against harmonisation see p 340 ff; and arguments for harmonisation p 350 ff. See also Nigel Lowe, ‘Working towards a European concept of legal parenthood’ in A Buchler and M Muller-Chen (eds) \textit{Private law: National, Global, Comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag}, Vol 2 1105 pp 1105–1124. On the harmonisation of family law in Europe and the Nordic countries see Eva Ryrstedt, ‘Ett strategiskt förhållningssätt till harmonisering’ (2005) SvJT 851 pp 851–858.
cannot co-exist with the commissioning parents’ right to become parents. However, if there is a conflict of interests, the interest of the surrogate-born child should take precedence over those of the commissioning parents. To prioritise the securing of parents for children over the securing of children for parents is consistent with longstanding Swedish policy and has strong support domestically. As for the support internationally, Article 3(1) of the United Nations Convention on the Rights of the Child (CRC)\(^\text{19}\) provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Having signed and ratified the CRC, even though it has not been incorporated or transformed into Swedish law at the time of writing, Swedish authorities and courts are required to interpret Swedish law against the background of the Convention’s purpose and provisions.\(^\text{20}\) Moreover, regarding the specific issue of prioritising the interests of children over parents, Sweden’s domestic position is already clear.

An example of Sweden’s position in this regard is its ART policy. An important objective of ART law and policy has always been to ensure that prospective children are protected. Policies prioritising child interests were firmly grounded already before the implementation of the CRC.\(^\text{21}\) Evidence that the intention to protect the interests of children in fact extends to prioritising their interests over the interests of prospective parents is reflected, inter alia, in law, regulations and other official publications.

This is explicit, for example, in the Government Bill on IVF where it was emphasised that:

> [h]owever important it might feel to assist an infertile couple, this may never occur at the expense of the prospective child’s best interest. Even if the right to build a family is a human right this does not mean the right, at any price, to be able to give birth to one’s own child.\(^\text{22}\)

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20 See Stoll (n 12) p 25 including additional references contained therein.
21 Above p 47.
22 Prop 1987/88:160 om befruktning utanför kroppen [trans: Government Bill on IVF] p 8. Here, the Government was responding to the proposal of the Insemination Inves-
In addition to the view that ART may not be used at the expense of protecting the child’s interest, and that it is not a human right to have one’s own child, Swedish law is a pioneer where it concerns promoting the child’s right to information about genetic origins. Also in these situations, Swedish law and policy unequivocally prioritises the child’s interest in knowing about its origins over any possible interest the parents or donor might have in keeping this information secret.23

The importance of applying a precautionary approach in relation to introducing new methods of ART has also been justified in terms of the child’s best interest. In the 2001/02 Government Bill on the treatment of infertility it was considered ‘reasonable and proper’ to apply such an approach due to the possible medical and psycho-social risks the prospective child might be exposed to.24 Thus, it would be difficult to argue that the interests of commissioning parents, or any other person, should be prioritised over the interests of a surrogate-born child in a given situation.

The international law source of the child’s right to parents is derived inter alia from Article 7 of the CRC and Article 8 of the European Convention of Human Rights (ECHR).25 The child’s right under Article 7 of the CRC to know and be cared for by his or her parents presupposes that it is possible to establish who the child’s parents are and where it concerns surrogacy, there is no lack of potential contenders for the parental role.26 This right is further supported by the right to respect for private and family life found in Article 8 of the ECHR – which in Sweden is also a part of the national law – and the European
Council’s Charter of Fundamental Rights (EU Charter). In addition, a number of other international instruments which Sweden has ratified contain similar or mirror articles to those found in the CRC and the ECHR, above. These further reinforce the child’s right to parents and Sweden’s obligation to ensure that this right is guaranteed also for children born following surrogacy arrangements.

Clearly, a child’s right in this context is independent of the way in which he or she has been conceived or born. It must follow that, irrespective of whether a child is found on a doorstep or born with the assistance of a surrogate mother, a contracting state has an obligation to ensure that the rights of the child are protected. This includes, inter alia, and foremost, making sure that the child has parents. The child’s status should not be uncertain following surrogacy arrangements any more than it should be following a natural birth or an ART procedure. In this situation, the uncertainty in respect of the child flows from the uncertain status of the adult parties to the surrogacy agreement i.e. the group of possible contenders for parenthood.

27 See, for example, the International Covenant on Civil and Political Rights (ICCPR), UNGA Res. 2200 (XXI), 21 UN GAOR, Supp (No 16) 52, UN Doc A16316 (1966) and note that Art 7 of the CRC reflects the text of 24(2) and 24(3) of the Covenant. On this see S Besson, ‘Enforcing the child’s right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights’ (2007) 21 International Journal of Law, Policy and the Family 137 p 141. See also Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, UNICEF (2007) p 97. See further Stoll (n 12) pp 28–29 (see also fn 46 on p 29 in relation to Arts 17 and 24 ICCPR). In this connection, the EU Charter is also of particular interest since it contains several mirror provisions to both the CRC and the ECHR. For example, Article 7 of the EU Charter (inter alia) mirrors Article 8 of the ECHR. In addition, the EU Charter makes specific reference to the rights of the child (Article 24) and, in line with Article 3 of the CRC, provides that ‘In all actions relating to children … the child’s best interests must be a primary consideration.’ (Article 24(2).) Moreover, Article 52 of the EU Charter provides that where the Charter’s rights correspond to those guaranteed by the ECHR, ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention.’

28 A discussion on Articles 7 and 8 of the CRC and Article 14 of the ECHR, and Sweden’s response in the context of the child’s right to know about genetic origins can be found in Stoll (n 12) pp 25–41; 64–71.

29 That is, the surrogate mother, her spouse or cohabitant, the commissioning parent or parents and where relevant, a sperm or egg donor.
1.5 Recent domestic developments 2013

Notwithstanding the long-standing anti-surrogacy policy in Sweden, based on ethical concerns for the child and the surrogate mother, three recent public initiatives have the potential to significantly influence future Swedish policy on surrogacy arrangements and the way in which surrogacy is regulated.

The first of these was the release in February 2013, of the report of the Swedish National Council on Medical Ethics (SMER) ‘Assisted Reproduction: Ethical Aspects’.30 In this report, a majority of the Council considered that ‘altruistic surrogacy – under special conditions – can constitute an ethically acceptable method of assisted reproduction.’31 This is significant, coming 18 years after the Council’s recommendation that surrogacy should not be permitted in Sweden,32 which had a major impact on ART legislation in Sweden at the time.33

The second initiative was the appointment by the Government in March 2013 of a special investigator to examine children’s rights under Swedish law.34 One of the tasks of the investigator is to review a selection of court and administrative decisions and to evaluate the extent to which the application of law and other regulations is in accordance with the CRC and the optional protocols that Sweden has entered into. The scope of this investigation includes the question of CRC incorporation.35

The third, which will most directly affect the law and policy concerning surrogacy, is the impending government investigation on ‘Increased possibilities for the treatment of infertility’. This was announced on 19 June 2013, when the Swedish Government appointed a special investigator to consider different ways to increase the possibilities through which unintentionally childless people could become

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31 See SMER 2013:1, 21 (Sammanfattning); 171 ff.
33 See SMER 2013:1 p 2.
34 Dir 2013:35 Översyn av barnets rättigheter i svensk rätt [trans: Survey of the rights of the child under Swedish law].
35 Dir 2013:35 pp 1, 9.
The Terms of Reference require, inter alia, that the investigator:

- take a position about whether surrogate motherhood shall be permitted in Sweden, with the starting point that it, in such a case, shall be altruistic;\(^{37}\)
- take a position about whether special rules are needed for those children who are born following surrogate motherhood arrangements abroad;\(^{38}\)
- take a position about whether there should be a genetic connection between the child and the [one or two] intended parents with ART,\(^{39}\) [and]
- propose resulting amendments to be made to the legal rules concerning parenthood and to other legislation as required.\(^{40}\)

This investigation is in response to a recommendation by the Parliamentary Standing Committee on Health and Welfare in March 2012, that a broad and unprejudiced investigation on surrogacy be undertaken comprising legal, ethical and economic perspectives; and having regard to international circumstances (especially children).\(^{41}\)

If the content of the Parliamentary Debates is anything to go by, this investigation does not presuppose that surrogacy will be permitted

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\(^{36}\) Dir 2013:70, Utökade möjligheter till behandling av ofrivillig barnlöshet, 19 juni 2013 [trans: Increased possibilities for the treatment of infertility].

\(^{37}\) Dir 2013:70 p 1 point 3.

\(^{38}\) Dir 2013:70 p 1 point 4.

\(^{39}\) Dir 2013:70 p 1 point 2.

\(^{40}\) Dir 2013:70 p 1 point 6. Other tasks of the investigator are to: leave a recommendation to the effect that gives single parents the same possibilities for ART as married couples and cohabitants have; take a position about whether the repealed requirement for sterilisation and the prohibition against the retention of the capacity for reproduction following gender reassignment can bring about problems with the application of, inter alia, the legal rules concerning parenthood. The investigator must give account for the assignment in two reports. The first, concerning single parents’ possibilities to access ART, is due for completion in May 2014. The remainder must be finalised by 24 June 2015. (Dir 2013:70 p 1.)

\(^{41}\) Bet 2011/12:SoU26 om assisterad befruktning [trans: Parliamentary Standing Committee on Health and Welfare Report on ART]. As regards the question of a ‘broad and unprejudiced investigation’, see pp 1; 3; and 14.
or regulated in Sweden in the future. Moreover, since the Government took almost 15 months to finalise the terms of reference after it was assigned the task by Parliament, and since the time-frame for the investigation is two years, it might be premature to expect that there will be a significant shift in policy in the near future. Another indication that the shift could be conservative is the Government’s exclusion of commercial surrogacy from the investigation. In light of its mandate to set up an ‘unprejudiced’ investigation the decision to have as a starting point that surrogacy, should it be regulated, ‘... shall in such a case be altruistic’ is noteworthy, since an unprejudiced investigation should be characterised by open-mindedness and impartiality. The limitation of this part of the investigation to issues concerning altruistic surrogacy indicates a pre-conceived notion that commercial surrogacy is not an acceptable alternative, without first exploring whether some forms of commercial surrogacy might in fact be suitable.

1.6 Some recent international developments

In addition to the recent domestic initiatives connected to surrogacy arrangements, above, several international bodies and scholars have been working on projects that are attempting to identify and solve the international problems connected to surrogacy. Three projects must be mentioned.

The first of these concerns the work being carried out by the Hague Conference on Private International Law in relation to the ‘Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements – 2011–2013’. By way of background, in 2010, at the 2010 Special Commission meeting on the practical operation of the 1993 Hague Intercountry Adoption Convention, it was noted by the Commission that international surrogacy arrangements were rapidly increasing. The Committee expressed concern regarding the uncertainty surrounding the

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43 The task was assigned to the Government by the Swedish Parliament on 29 March 2012.
44 Dir 2013:70 p 1 point 3.

The second project that must be highlighted is the recently-published study comprising the 2013 edition of Studies in Private International Law. The topic of this substantial volume is international surrogacy arrangements and their regulation at the international level. The study is extensive and comprises three parts: Part One contains 25 national reports on surrogacy; Part Two examines international perspectives of cross-border surrogacy; and in Part Three, the editors provide a general report on surrogacy.\footnote{Katarina Trimmings and Paul Beaumont (eds) *International surrogacy arrangements: Legal regulation at the international level* (2013).} In one chapter, the question of a possible future convention on international surrogacy arrangements is raised.\footnote{See Hannah Baker, ‘A possible future instrument on international surrogacy arrangements: Are there “lessons” to be learnt from the 1993 Hague Intercountry Adop-}
Finally, the third project on international surrogacy issues that requires special mention is the European Parliament’s comprehensive comparative study on surrogacy in the EU Member States, which was published in May 2013. In brief, this study includes an empirical analysis, in addition to legal analyses comprising national legislation and case law; European Union law; and private international law. It also contains country reports from 11 countries. An important conclusion made is that:

... it is impossible to indicate a particular legal trend across the EU, however all Member States appear to agree on the need for a child to have clearly defined legal parents and civil status.

The findings of all of these projects are highly relevant for any jurisdiction grappling not only with the private and public international law aspects of surrogacy, but also for jurisdictions wishing to implement their own national regulation.

1.7 The use of the term “parent”

Where it concerns the use of the term “parent”, the objective of this thesis is to identify who is treated by law as a legal parent at the time of a child’s birth and how legal parenthood, if necessary, can be transferred to reflect the intentions of the various parties following a surrogacy arrangement. To this end, unless otherwise mentioned, establishing legal parenthood as addressed in Chapters Three, Four and Five, below, refers to establishing who the child’s original – or first – legal parents are.

The concept “parenthood” is broad. Moreover, its scope continues to widen; constantly evolving due to social change and scientific development. While most of us might associate parenthood with legal

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parenthood and parental responsibility for the child, it is not uncommon for children to have a combination of parental figures in their lives. Legal parents, for example, are often—but not always—the biological or genetic parents of the child. And while it is usually the legal parents who also have parental responsibility, this is not always the case. Moreover, in addition to legal parents, a child might have a social parent such as a step-parent who lives with the biological parent of the child, or even a psychological parent. All of these parental roles can be important.

What makes a legal parent, however, cannot be broad or imprecise. Today—at least in Sweden, a child may only have a maximum of two legal parents at a given time. These parents are determined in accordance with well-established written and unwritten legal rules. While there is no single basis or determining factor for legal parentage in Sweden, the primary basis for such a determination at the time of a child’s birth is genetics (or presumed genetics).

1.8 Outline

This thesis contains eight chapters. Special terms requiring clarification have been defined in the Glossary at the beginning of the thesis.

Chapter One of the thesis comprises the introduction.

In Chapter Two, some of the more common ethical arguments against surrogacy arrangements are explored in order to gain some insight into why surrogacy and surrogacy agreements can be difficult to regulate. Counter arguments are also highlighted. In addition, a brief account is given of the basis for Sweden’s policy on surrogacy between the years 1985–2012, particularly in relation to the notion that surrogacy arrangements are ethically indefensible.

Chapter Three explores the Swedish legal rules for establishing and transferring legal parenthood with a view to seeing how they may be applied to surrogacy arrangements. The chapter commences by build-

53 On the concept of “parent” in general, see, for example, Michael Freeman, Understanding Family Law (2007) pp 163–164. And note that according to Goldstein, Freud and Solnit, the role of psychological parent can be filled by any caring adult “but never by an absent, inactive adult”. See J Goldstein, A Freud and A Solnit, Beyond the best interests of the child (1973) p 19, cited in Freeman, Understanding Family Law (2007) p 163. For an in-depth study of parenthood, in Swedish, see Anna Singer, Föräldraskap i rättslig belysning (2000) [trans: Parenthood in legal light].
ing on the background to Sweden’s current policy on surrogacy, and parenthood following surrogacy. The impact of the Genetic Integrity Act on surrogacy arrangements is touched upon before considering the question of parenthood under the Children and Parents Code and the unwritten law, both generally and in relation to assisted reproduction and surrogacy. A discussion on the effects of the law on parenthood today follows. Some issues concerning birth records are also raised.

In Chapter Four, the legal rules in place for the establishment and transfer of legal parenthood following surrogacy arrangements in England and Wales are explored. After a short summary of the relevant background to the current law and policy on surrogacy arrangements, the rules pertaining to determining legal parenthood without assisted reproduction are highlighted before exploring the rules applicable following ART and surrogacy. Two mechanisms for transferring parenthood following surrogacy arrangements – the parental order and adoption – are subsequently considered.

Chapter Five examines the regulation of surrogacy agreements in Israel. After taking into account the background to Israel’s current policy on ART and surrogacy, the Israeli surrogacy legislation is subsequently considered, particularly where it concerns the requirements necessary for the approval of the surrogacy contract. Legal parenthood following surrogacy arrangements is then considered. An account of the requirements for parentage orders is also given and in this connection the issue of birth records is raised.

In Chapter Six, alternative ways in which statutory rules and presumptions might be applied to determine legal parentage at the time of a child’s birth are explored. The main aim is to see whether new rules and presumptions – either general or specific – might be more suitable for resolving the question of legal parentage following surrogacy arrangements than the existing written and unwritten presumptions of maternity, paternity and parenthood. In this chapter, Swedish law and examples are used. A similar process could, however, be applied using the laws of other jurisdictions. The starting point for this chapter is that the primary basis for determining legal parentage must be either gestation, genetics or intention.

Whether or not a jurisdiction needs a special mechanism to transfer parentage following surrogacy arrangements will depend on the chosen basis or bases for parenthood. Chapter Seven explores three possible alternatives: adoption, the parental order and the pre-birth judicial
approval of surrogacy. The first two options presuppose that the commissioning parents are not the legal parents of the surrogate-born child when the child is born. Thus, parentage must be transferred from the first legal parents to the commissioning parents. Today in Sweden, adoption is the only way legal parentage can be transferred following surrogacy arrangements. Thus, all commissioning parents who cannot have their legal parental status established at the time of (or in connection with) the surrogate-born child’s birth must adopt the child, either through the traditional or step-child adoption process if they wish to become the child’s legal parents. The benefits and drawbacks of the parental order models used for the transfer of parentage in England and Wales, and Israel, are subsequently considered before turning briefly to the model selected by Greece: The pre-birth judicial approval of the surrogacy arrangement. The Greek model does not require a transfer of parenthood, since the approval of the surrogacy agreement by the Court gives rise to a presumption of maternity in favour of the commissioning mother when the child is born. The commissioning father’s status as legal father is attached to the status of the mother.

Finally, Chapter Eight forms the conclusion of the thesis. In addition to summarising the findings in relation to parenthood and surrogacy, several conclusions are made about connected issues that should be considered when a jurisdiction is contemplating surrogacy regulation.

A summary in Swedish follows.
Chapter 2
2 The problem with surrogacy arrangements: Some ethical arguments

2.1 Introduction and purpose

It is not surprising that there are no specific legislative provisions clarifying family law status following surrogacy arrangements. Swedish public policy on surrogacy has been conservative since it first appeared on the public agenda almost three decades ago. At that time it was one of the issues raised and explored by the Insemination Committee in its 1985 report on children conceived through IVF. Until March 2012, when the Parliamentary Standing Committee on Health and Welfare recommended that a broad and unprejudiced investigation on surrogacy be undertaken comprising legal, ethical and economic perspectives, the official response to surrogacy has been one of unequivocal rejection.

Since the results of the impending investigation will not be known until June 2015, existing policy regarding surrogacy arrangements in Sweden continues to be that such arrangements are ethically indefensible and should therefore not be permitted. This is the argument that was used by both social democratic and centre-right governments, and, in turn, accepted by the Swedish Parliament, for over a decade to justify the rejection of demands to launch an official investigation into surrogacy for the purpose of exploring the feasibility of permitting or

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54 SOU 1985:5.
55 Bet 2011/12:SoU26; and Motion 2011/12:C391. This task was assigned to the Government by the Swedish Parliament on March 29, 2012. The terms of reference were confirmed and the special examiner appointed on 19 June 2013 (Dir 2013:70).
56 The date on which the investigation in its entirety must be given account of is 24 June 2015 (Dir 2013:70 p 1).
regulating it.58 These grounds for rejection have been described by one Swedish scholar as ‘a textbook case of a moral view without reflection’.59 Even though the cycle has finally been broken, it is premature to speculate about the findings or about any resulting policy changes before the outcome of the impending investigation is known and the Government and Parliament have had the opportunity to reflect and react.

The main purpose of this chapter is, in the shadow of the Swedish policy on surrogacy, to explore some of the more common arguments against surrogacy arrangements in order to gain some insight into why surrogacy and surrogacy agreements can be so difficult to regulate; something which itself is exemplified not only by the dearth of surrogacy-specific legislation in Sweden but also from the conservative approach towards surrogacy in the Swedish preparatory works and the firm public view that surrogacy is ethically indefensible. Further, if any of these arguments are consistent with, or similar to, those used in the Swedish preparatory works, it might help to make sense of the likely driving forces behind Swedish policy. In addition to exploring arguments against surrogacy, another purpose of this chapter is to highlight some of the counter arguments in order to facilitate discussion on this issue. The view ‘if something is unethical should it be illegal?’ is also addressed.

Because there are so few Swedish scholarly works on surrogate motherhood, it has been necessary to rely largely on foreign sources for information where it concerns the ethical aspects of surrogacy.60 A couple of problems in this connection should be mentioned.

The first concerns the selection process. An enormous volume of scholarly material on surrogacy has been published since the beginning of the 1980s – not only in medical and legal contexts; perspectives also include but are not limited to the economic, sociological, psychological, and ethical/philosophical. To even summarise the available arguments for and against surrogacy would be impossible.

58 See, for example, the following Private Members’ Bills concerning demands to make surrogacy legal and related issues: Motions 2004/05:So439; 2005/06:So528; 2007/08:So543; 2008/09:So322; 2008/09:So222; 2008/09:So559; 2009/10:Sk533; 2009/10:So474; and 2009/10:So645.
60 In fact, Kutte Jönsson’s thesis, above, has until now been the only Swedish doctoral thesis devoted to surrogacy.
However, the general nature of the objections to surrogacy has remained relatively constant over time and I have broadly categorised the main arguments as follows: commodification arguments; exploitation arguments; harm to children arguments; legal arguments, and social and medical arguments. These are explored in turn, below. It must be emphasised that these categories and the arguments they contain are by no means exclusive and there is considerable overlap between the groups.

Another issue that should be borne in mind is that several high profile surrogacy cases, beginning in the 1980s, triggered off a strong public reaction to the practice, in addition to considerable fear. As a consequence, many of the articles in the 1980s and 1990s were written in response to these problematic cases, where the problems were very specific and not necessarily representative of surrogacy arrangements en masse – something which could only be seen over time. Even so, there remains a core of ‘moral’ concerns in relation to surrogacy even today, and the aim is to address these features, below. First, however, some words must be mentioned about the source of past and existing Swedish policy on surrogacy arrangements.

2.2 Basis for Swedish surrogacy policy 1985–2012

When consulting the Swedish preparatory works, which are the basis for Sweden’s political stance on surrogacy, one is often left to speculate as to why the Insemination Committee in 1985, and subsequent governments and committees since then, found surrogate motherhood to be ethically indefensible. The explanations are vague and there is

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61 Here, one could also add gender arguments. However, since gender issues are largely covered by the exploitation arguments and are also relevant in relation to the other categories (eg commodification) they are instead dealt with as they arise.

62 See for example In the Matter of Baby M, 537 A.2d 1227 (N.J. 1988); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (in which the surrogacy contract was enforced over the objection of the gestational mother); and Re Evelyn (1998) 23 Fam LR 53 (Australia). All of these cases involved traditional surrogacy ie no IVF was required and the surrogate was the genetic mother of the baby.

63 See Elisabeth Scott, ‘Surrogacy and the politics of commodification’ (2009) 72(1) Law & Contemporary Problems 109. Scott says that most arguments calling for the prohibition of surrogacy originate from the Baby M case (p 111).
little clarification about what it means. Rather, when reading through the background to the IVF Act and its subsequent amendments, one gets a feeling that this is something which was assumed as obvious. The expression ‘ethically indefensible’ appears to have been first used in the preparatory works in relation to surrogacy by the Insemination Committee in its report ‘Children conceived through IVF’ 64 – albeit only in the summary. Here, it is expressly stated that surrogacy ‘presumes that children become objects of financial bargaining which is ethically indefensible.’ 65 Yet nowhere in the text of the report is it stated that surrogacy is ethically indefensible.

This ambiguity can be further exemplified by an extract from the 2001 Government Bill on the treatment of infertility 66 where, it is stated, inter alia, that:

[...]he Government is of the opinion that surrogate motherhood is not ethically defensible and that it therefore shall not be permitted. It cannot be regarded as consistent with the principle of human dignity to use another woman as a means of solving the childless couple’s problem. 67

Here, it appears that the Government might have been relying on the Kantian argument, described in the ethical guidelines of the Swedish National Council on Medical Ethics (SMER), that people must never be regarded or treated only as a means. 68 While this is not made clear in the Bill, it is reasonable to assume. First, because the Government concurred with the views in SMER’s commissioned report regarding ethical views on certain questions in connection with IVF, 69 in which the Council specifically pointed to its own ethical guidelines; 70 and

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64 SOU 1985:5.
66 Prop 2001/02:89.
67 Prop 2001/02:89 p 55.
68 See Etiska vägmärken 1, Etik – en introduktion, Omärket upplaga (3), Statens medicinsk-etiska råd 2008 p 23.
69 See the report Assisterad befruktning – synpunkter på vissa frågor i samband med befruktning utanför kroppen, Statens medicinsk-etiska råd, 1995-04-05. The Government decision giving the Council the assignment for the report was dated 1995-06-23; For the Government’s response to the ethical basis see prop 2001/02:89 pp 21–23.
secondly, since the Government expressly accepted SMER’s recommend-

dation that surrogacy should be forbidden.\footnote{Assisterad befruktning – synpunkter på vissa frågor I samband med befruktning utanför kroppen, Statens medicinsk-etska råd, 1995-04-05. On surrogacy in particu-

lar, see pp 23–24. See also prop 2001/02:89 p 55.}

It should, however, be pointed out, that SMER did not suggest that ‘[i]t cannot be regarded as consistent with the principle of human dig-

nity to use another woman as a means of solving the childless couple’s problem’,\footnote{Prop 2001/02:89 p 55. Although it is likely that this is the Government’s interpreta-

tion of SMER’s view in light of its expressed reliance on SMER’s opinions and rec-

ommendations, above.} above. Rather, what was stated by SMER in the context of surrogate motherhood was that the surrogate

at least to begin with is used as a means to solve the childless couple’s problem, which \textit{can} conflict with the principle of human dignity.\footnote{Assisterad befruktning – synpunkter på vissa frågor I samband med befruktning utanför kroppen, Statens medicinsk-etska råd, 1995-04-05 p 24 (emphasis added).}

Thus, although SMER recommended in 1995 that surrogacy be pro-

hibited,\footnote{Assisterad befruktning – synpunkter på vissa frågor I samband med befruktning utanför kroppen, Statens medicinsk-etska råd, 1995-04-05 p 25.} it seems clear that its stated reason for doing so was, inter alia, because it \textit{can} conflict with human dignity, not because surroga-

cy’s very nature makes such a conflict inevitable. This is not an insig-

nificant difference.

Even if one accepts the position that it cannot be regarded as con-

sistent with human dignity to use a surrogate to solve the problem of a childless couple, there is no explanation or analysis in the preparatory works as to why the Government has believed that this is so. We simply must accept it. Nor is there an attempt to consider alternative possibilities such as, for example, Consequentialism,\footnote{That is, ‘the view that the rightness of an action depends on its consequences.’ See further Helga Kuhse and Peter Singer (eds) \textit{Bioethics: an anthology}, 2nd edn (2006) p 3.} also outlined in SMER’s guidelines.\footnote{See Etiska vägmärken 1, Etik – an introduktion, Omarbetad upplaga (3), Statens medicinsk-etska råd 2008 pp 35–36. SMER also addresses Consequentialism argu-

ments in the context of ART in its report Assisterad befruktning – etiska aspekter (SMER 2013:1). See, eg, in the context of access to information about genetic origins (p 123); the need (or not) for a genetic connection between the child and the parents (p 126); and in relation to surrogacy (p 169).} If we are to rely on the Government, then, an acceptance that using a surrogate in this way is not consistent with
human dignity, implies an inherent acceptance that surrogacy is therefore ethically indefensible, and thus, that it should not be permitted. Questions such as why it must be undignified to use a third party female as a means to solve childlessness, and whether there are perhaps some exceptions, were never explored. One is, thus, left with the assumption that the government of the day determined first, that surrogacy was ethically indefensible because it was against human dignity; and second, it was against human dignity because it uses a surrogate to solve the problems of a childless couple.\(^77\)

In a 2011 edition of *Läkartidningen*,\(^78\) Swedish ethicist Göran Hermerén suggested that, to get past an either-or way of thinking about surrogate motherhood, different objections to the practice should be identified. In this way, one would be able to investigate whether there are forms of surrogate motherhood which should be able to be permitted. Hermerén believes that a systematic comparison of the similarities and differences between that which is ethically acceptable and permitted (eg egg donation) and that which is not (eg surrogacy) is an obvious starting point in the ethical analysis. Problems arise, however, if the phenomena which are compared are not homogeneous. This, he points out, applies to surrogacy where there are several forms. Each of these forms should be compared separately with egg donation.\(^79\) He suggests beginning with an analysis of the question at issue:

What is problematic with surrogate motherhood?\(^80\)

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\(^{77}\) Main arguments put forward in preparatory works against surrogate motherhood include: Possibility for different kinds of genetic connections are possible with surrogate motherhood; both egg and sperm can originate from the childless couple or from one of the parties or from an outside donor; that ‘[s]urrogate motherhood implies … that the woman who undergoes the pregnancy … is used as a means to solve the childless couple’s problem. This can, according to the [Swedish National] Council on Medical Ethics, be seen to conflict with the principle of human dignity. Serious conflicts can arise if a woman, who at an early stage consents to “loan out” her uterus, later changes her mind and wants to keep the child.’ Ds 2000:51 Behandling av ofrivillig barnlöshet [trans: Treatment of infertility] pp 49–50; and that surrogate motherhood is not desirable from the perspective of the child, prop 2001/02:89 p 5 (what was meant by this point, however, was not further elaborated on here).

\(^{78}\) A weekly periodical for Swedish medical doctors established in 1904.


\(^{80}\) Above.
According to Hermerén, the persuasive force of the various arguments varies with respect to different forms of surrogate motherhood. He means that by identifying different kinds of objections, one is subsequently given the possibility to investigate whether there are types of surrogate motherhood which are not affected by such objections – and which could then be permitted.

Hermerén’s reasoning, above – which has since been applied and reinforced by SMER in its 2013 report on the ethical aspects of ART – appears to have been sufficiently persuasive to the Swedish Government to serve as an appropriate starting point for the forthcoming official investigation. This is evident from the fact that the shift in the view of the majority of SMER – that altruistic surrogacy, assuming certain conditions are met, could constitute an ethically acceptable form of ART – is reflected as the primary basis from which the current Government has directed the investigator to determine whether surrogacy should be permitted in Sweden.

An interesting observation of SMER’s evaluation of the different objections to surrogacy, above, is that more than a few of the concerns raised in the old Swedish reports and investigations remain. These include, for example, that surrogacy implies a risk that the child will be an object of sale; that the surrogate will be exploited; that the surrogate will be used as the means to satisfy another person’s wish to have a child; and that surrogacy involves medical risks for the surrogate and psychological risks for the surrogate mother and the child.

The specific arguments against surrogacy presented by SMER serve to support what was mentioned above: that the character of objections in relation to surrogacy has remained more or less unchanged over time. Arguments, comprising commodification of women and children and the exploitation of women (including the risks associated with reproductive tourism); harm to children; and legal, social and medical issues are now considered below.

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81 Above.
82 Hermerén gives the example of altruistic surrogacy, where a sister or female friend offers to bear the baby which, inter alia, eliminates the commodity argument. Above p 69.
84 SMER 2013:1 p 171.
85 Dir 2013:70 pp 1, 6.
86 See SMER 2013:1 p 166. A summary of all of the arguments that were put forward for, and against, surrogacy are set out at pp 166–167.
2.3 Commodification arguments

2.3.1 Introductory comments

Commodification arguments are connected to commercial surrogacy. Indeed, one of the strongest and most emotive arguments against permitting commercial surrogacy arrangements is that they create a market in children (result in child selling). According to this argument, the baby or child becomes a product to be bought and sold, reducing it to a commodity. Applying the argument to women, it is claimed that a surrogate’s reproductive labour becomes the commodity. While commodification and exploitation often go hand in hand, this is not necessarily always the case. Accordingly, it might be useful to first clarify the plain English meaning of the two terms.

According to the Oxford Dictionary, to commodify or commoditise something is to ‘turn [it] into or treat it as a mere commodity.’\(^{87}\) The word commodity is defined as ‘a raw material or primary agricultural product that can be bought and sold, such as copper or coffee’ or ‘a useful or valuable thing’.\(^ {88}\) It has also been referred to as a an ‘article of trade’.\(^{89}\) The word exploit, on the other hand, has two ordinary meanings. First, to exploit a resource means to ‘make full use of and derive benefit from [it]’. However, exploit can also mean to ‘make use of (a situation) in a way considered unfair or underhand’\(^ {90}\) or to ‘benefit unfairly from the work of (someone), typically by overworking or underpaying them.’\(^ {91}\) It is the second meaning of exploit which is relevant where it concerns surrogacy arrangements. Thus, in this context, exploitation is ‘the action or fact of treating someone unfairly in order to benefit from their work’\(^ {92}\)

If one accepts the definitions above, it is technically possible to commodify something without exploiting it since the commodification of something is connected to its use as an article of trade. If commodi-

\(^{87}\) <http://oxforddictionaries.com> accessed 13/5-11.
\(^{88}\) <http://oxforddictionaries.com> accessed 13/5-11. Water is given as an example of a precious commodity.
\(^{90}\) Such as, eg, a company exploiting a legal loophole, <http://oxforddictionaries.com> accessed 13/5-11.
\(^{91}\) For example, women exploited in the workplace, <http://oxforddictionaries.com> accessed 13/5-11.
\(^{92}\) <http://oxforddictionaries.com> accessed 13/5-11. Here, the example given is the exploitation of migrant workers.
 commodification is also to be regarded as exploitative, it must contain the element of unfair advantage.

2.3.2 Children as a commodity – Baby selling

The baby selling argument maintains that contracts for surrogacy turn children into objects of sale. This devalues the lives of the children and possibly human life itself. According to this argument, such commodification is an attack on the human dignity of the child, the surrogate, the contracting couple and everyone else. This view and the concerns expressed are not dissimilar to those expressed in the Swedish preparatory works, above.

Swedish journalist and author Kajsa Ekis Ekman describes the process of surrogacy as ‘the pregnancy market’. She also refers to it as a ‘child market’, and is emphatic that ‘the product in surrogate motherhood is extremely tangible – it is a new-born baby.’ This is difficult to argue against, if one sees the product or commodity as being the baby.

Arguments that surrogate arrangements amount to baby selling are certainly not new. In a 1981 article, Winslade mentions two USA rulings, one from the Attorney General of Kentucky and the other from a judge in Michigan, which determined that surrogate motherhood constituted illegal baby-selling and therefore violated criminal statutes. Winslade points out that ‘[b]aby selling statutes were intended to protect poor women from being coerced into selling their children and to prevent economic exploitation of such babies as well as of adoptive parents.’ He believes ‘the selling of babies already conceived or born is very different from entering into an agreement to have a baby for

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93 In this chapter, the terms baby selling and child selling are used interchangeably.
94 See, for example, Jennifer Damelio and Kelly Sorensen, ‘Enhancing autonomy in paid surrogacy’ (2010) 22(5) Bioethics 269 p 271. Here, the authors also liken the baby selling argument to the prostitution argument, which argues against the sale of women’s bodies. Note: the authors do not support the argument.
96 Above p 147 ff. (re “barnhandel” (trading in children); citation at p 148. Ekis Ekman’s view is that if pregnancy was like working in a factory, the child could then be compared with a mobile telephone or a car; the woman bears a child, gives birth and hands it over, at which time she also gets paid (p 148).
98 Above p 153.
the purpose of giving it up for adoption.'99 This view is not without support.

Damelio and Sorensen also argue that it is the purpose of surrogacy which is crucial: the contracting couple are not paying money to exploit the child or to profit from a resale; they want to be parents. While the authors acknowledge that there are genuine concerns in relation to exposing gestation to the norms of the market place and that the interests of children should be carefully guarded, they are not convinced by the baby selling argument.100

If, for example, the contract were to be formulated to describe the commercial transaction as selling a right to a baby or selling a service – such as renting a womb – how, then, is this seen as commodifying a child? The baby is not the object of sale; instead, the commodity is the womb, or the right itself. There are several possible alternatives to the idea that surrogacy turns children into a commodity because it is child selling. A number of these are briefly outlined below.

2.3.3 Counter-arguments to children as a commodity

One alternative view to surrogacy as baby selling is that the transaction involves selling a right to a baby, or alternatively, the selling of parental rights.101 An important question in this connection is whether it could even be considered baby selling if the object of sale is someone’s own baby?102 If the intended father is also the genetic father of the child, for example, having contributed to the pregnancy with his sperm, he would in most cases be considered the legal parent of the child. How can he buy his own child, or even a right to his own child? Taking this a step further, if we accept that a baby, or even a right to a baby, cannot be sold to its own father, how is this different if the intended mother is also the genetic mother, having contributed with her

99 Winslade (n 97) p 154. Winslade goes on to say that while ‘an economic incentive might influence a woman’s decision to become a surrogate mother, she would not be as susceptible to economic coercion as she would be under the prospective stress of the responsibility of rearing a child.’
100 Damelio and Sorensen (n 94) p 271.
101 See Debra Satz ‘Remaking families: A review essay (2007) 32(2) The University of Chicago Press 523 p 528. Satz, in referring to feminists who argue that enforcing commercial surrogacy agreements amount to the selling of a child, believes that this is incorrect. According to Satz, ‘[w]hat is sold in commercial surrogacy is not a child but parental rights.’
102 This was a concern addressed by Damelio and Sorensen (n 94) p 271.
own gametes? In this case, is it still a right which is sold? Because if it is, it would be logical to argue that the same right must be sold to the genetic father also.

Another argument that has been made against the claim that surrogacy is baby selling is that it is, rather, selling a service (above). To support this, it has also been argued that contracts containing a clause that makes sure that the surrogate can keep the baby if she changes her mind help maintain the sense that the surrogate is selling a service rather than a child.\textsuperscript{103}

In her book \textit{Birth Power},\textsuperscript{104} Carmel Shalev distinguishes transactions for the sale of reproductive services from the sale of a baby. Shalev argues that ‘[r]eproductive contracts are transactions in which custody of a child is transferred from one person to another, whereas the sale of a baby implies the transferal of property rights in a human being as a variation on slavery.’\textsuperscript{105} Thus, in Shalev’s view, a prior-to-conception agreement does not mean that transferable rights are purchased, or imply that there is a right to resell a child. Instead, it is the reproductive labour of the surrogate that is purchased in order ‘to acquire the privilege of being responsible for the long-term care of a child …’\textsuperscript{106} As Shalev so poignantly emphasises, however, even if the transaction is seen as ‘a contract for reproductive services rather than for the sale of a baby, the result is still the same – to put a monetary value on a life that is considered priceless.’\textsuperscript{107}

\section*{2.3.4 Closing reflections: Children as commodity}

Sarah Jones, who considers the idea of buying and selling in the contexts of surrogacy and intercountry adoption, believes that ‘if children are wrongly converted into commodities for commercial surrogacy, the same process must occur for intercountry adoption.’\textsuperscript{108} She is, however, firmly of the opinion that buying and selling does not auto-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{103} Above p 271.
\item \textsuperscript{104} Carmel Shalev, \textit{Birth power: The case for surrogacy} (1989).
\item \textsuperscript{105} Above p 157.
\item \textsuperscript{106} Above.
\item \textsuperscript{107} Above p 159.
\item \textsuperscript{108} Sarah Jones, ‘The ethics of intercountry adoption: why it matters to healthcare providers and bioethicists’ (2010) 24(7) Bioethics 358 p 361. In her article Jones compares the ethical concerns of intercountry adoption with medical alternatives (to build families).
\end{itemize}
\end{footnotesize}
matically make adoption and commercial surrogacy unethical.\textsuperscript{109} Jones means that, while someone working within a deontological framework might have this view,\textsuperscript{110} those advocating consequentialism might argue in support of surrogacy or intercountry adoption provided the children are happier and healthier with their new families than in the alternative situation.\textsuperscript{111}

Jones thus concludes that – irrespective of the different views of individual ethicists – surrogacy and intercountry adoption share at least one ethical problem: the concern that children are wrongly converted into commodities. According to Jones, this problem might lead to shared solutions. She gives the example of Canada’s surrogacy law, which permits surrogates to be reimbursed for medical costs and states that:

\begin{quote}
\textit{[t]his is equivalent to intercountry adoption, in that the Hague Convention (the only international treaty directly addressing intercountry adoption) restricts payment to adoption centres to what is necessary to carry out the adoption but profit is strongly discouraged. Moreover, birth parents cannot be paid for their children.\textsuperscript{112}}
\end{quote}

A possible disadvantage of this approach, however, is that it would rule out the alternative of commercial surrogacy – unless it could be firmly established that surrogacy involved selling a service and not a child.\textsuperscript{113}

In 1981, Winslade, above, was of the view that the law should neither play a reactionary nor revolutionary role in relation to surrogacy arrangements. ‘[T]he practice should be legally permitted but cautiously regulated, and morally tolerated but carefully scrutinized. The psychological ramifications must be studied in the most rigorous scientific manner possible.’\textsuperscript{114} He points to the fact that surrogacy has ‘both broad and deep moral and legal implications, few of which have been carefully analysed.’\textsuperscript{115}

\textsuperscript{109} Above p 361.
\textsuperscript{110} Here, Jones (above p 361) refers to Elizabeth Anderson in E S Anderson, ‘Is women’s labor a commodity?’ (1990) 19 Philosophy and Public Affairs 71.
\textsuperscript{111} Jones (n 108) p 361.
\textsuperscript{112} Above p 361.
\textsuperscript{113} Even if this were to happen, however, the surrogate would still be the subject of commodification.
\textsuperscript{114} Winslade (n 97) p 153.
\textsuperscript{115} Above p 154.
Clearly, depending on how the surrogacy transaction is carried out, it could mean that, in practice, the child is reduced to something one buys.\textsuperscript{116} If commercial surrogacy implies that the child is the object of a sale and purchase, the child would then be a commodity if one accepts the definition, above. On the other hand, a child would not be a commodity in a contract for altruistic surrogacy because no money is paid to the surrogate except to cover (relevant) expenses incurred. Without a sale or purchase it would be difficult to categorise such a contract as one which reduces the child to a commodity.\textsuperscript{117}

2.3.5 Surrogates as a commodity – body selling

As shown above, the intended child can be seen as a commodity in commercial surrogacy arrangements. But in what way or ways can the surrogate mother be seen as a commodity? One view is that, because the surrogate, in effect, sells her womb and hands over control of her body, surrogacy is a subtle form of prostitution.\textsuperscript{118}

The view that surrogate motherhood and the commodification of women goes hand in hand\textsuperscript{119} relies on the deontological argument that

\begin{footnotes}
\item[116] See Hermerén (n 79) p 68.
\item[117] For the same reason, the mother could not be regarded as a commodity either in this situation (although she might well be exploited).
\item[118] Damelio and Sorensen (n 94) p 270. On similarities between surrogacy and prostitution see also Anton van Niekerk and Liezl van Zyl, ‘The ethics of surrogacy: women’s reproductive labour’ (1995) 21 J Med Ethics 345-349. Van Niekerk and van Zyl consider whether surrogacy arrangements are intrinsically immoral from the perspective of the surrogate. In particular, they explore whether surrogacy is like prostitution in that it reduces a woman’s reproductive labour into what they call alienated or de-humanised labour. Regarding alienated labour, see Elizabeth S Anderson (n 110). In this article, written at a time when surrogacy arrangements were just beginning to receive public attention, Anderson discusses the objection that surrogacy is wrong because it involves the commodification of women’s reproductive labour. See also Ekis Ekman (n 95) p 124. Ekis Ekman, who describes surrogacy as the pregnancy market and a child market, above, also refers to surrogacy as ‘reproductive prostitution, where women are inseminated and made pregnant on order.’
\item[119] This view is strongly supported by Thomas Idergard, a political commentator and former member of the Swedish Moderate Party. See Idergard Thomas, ‘Surrogatemoderskap kan aldrig motiveras etiskt’, Läkartidningen 2011-02-18 nummer 8 (Debatt endast på webben) <http://www.lakartidningen.se/07engine.php?articleId=16023> accessed 30 April 2013. Idergard is concerned that, amongst other things, to accept surrogate motherhood can justify overstepping the boundaries in relation to other, even more obvious offensive areas eg the sale of organs or the creation of children for the purpose of organ donation and says that ‘[i]t opens up for a substantial downgrade in the value, and with that the handling, of human life.’
\end{footnotes}
it is not consistent with human nature to disengage the genetic-biological aspect of motherhood from pregnancy. Proponents of this view believe that we are always obliged to safeguard the dignity of human life. To this end, if the uterus becomes a commodity to be hired out to the highest bidder, a limit which we should not pass – in relation to life’s complicated and partially unknown creation process – has been passed. This view, then, holds that surrogate motherhood is not consistent with the respect for the surrogate mother’s integrity ie human dignity, which both she herself and those who contract with her violate. In addition, from an ethical standpoint, the surrogate mother can be seen as analogous to a prostitute in so far as both the surrogate and her “clients” bargain about physical integrity which is a morally wrong action. Moreover, even if the surrogate is acting altruistically, surrogacy is still unethical because the surrogate is seen and used as an object for the desires of someone else, for something that concerns life’s most fundamental aspect. This, the argument goes, is contrary to Kant’s categorical imperative that every human being shall be regarded and treated as an object in themselves and never only as a means (to an end).

2.3.6 Counter-arguments to surrogates as a commodity

The surrogates-as-body-selling argument, above, has been called the ‘prostitution argument’ and while opponents acknowledge that it highlights the vulnerability of the gestational surrogate, it has also been described as ‘somewhat off target.’ Three examples are given to support this.

First, just as it was argued in the context of child selling that the purpose of surrogacy is crucial, above, this reasoning is equally relevant when comparing prostitution and surrogacy. That is to say, the objectives of prostitution and surrogacy are quite clearly different. Prostitution involves selling a woman’s body for sexual satisfaction, whereas the purpose of surrogacy is to create a child. Thus, it is contended, even though both services are executed for money, the prosti-
tution analogy is not solid; it is difficult to compare surrogacy with prostitution because they have such different purposes.\textsuperscript{123}

A second objection put forward against the ‘body selling’ or prostitution argument is that people are permitted to ‘sell their bodies’ in a variety of other ways. In the USA, for example, one can legally sell inter alia plasma, sperm, eggs and hair. To this end, they ask, why should surrogacy be more like prostitution – which is an illegal form of body selling – than it is like selling eggs, or other legally sold body parts?\textsuperscript{124}

This is an interesting objection. If the sale of such body parts could be incorporated into the definition of selling a service, the argument certainly makes sense if surrogacy is also regarded as selling a service. If, however, surrogacy is regarded as baby selling, the argument is not so persuasive. Moreover, could the same argument be upheld in jurisdictions where surrogacy, or indeed the sale of body parts, is not legal, such as in Sweden?

A third objection to the prostitution argument is that surrogacy contracts do not actually turn women’s bodies into objects of sale and are therefore not ‘body selling’. According to this argument, there is a difference between paying women (prostitutes) for the use of their bodies and compensating women for their services (surrogates).\textsuperscript{125}

\section*{2.3.7 Concluding remarks}

From the arguments above, it seems that even where the surrogacy contract represents a commercial transaction, whether or not the child is a commodity might depend on how the surrogacy contract is actually formed.

Whether or not a surrogacy contract turns the surrogate into a commodity is also open to question. What is clear is that there is no consensus about how to label the process of surrogate motherhood – particularly if one’s aim is to avoid the label of commodification. Whether it can instead be phrased as baby selling, renting a womb or selling a right to a child is in part a semantic exercise. If we accept that money changes hands we really have to acknowledge that surro-

\textsuperscript{123} Above.
\textsuperscript{124} Above.
\textsuperscript{125} Damelio and Sorensen (n 94) p 271. Here Damelio and Sorensen refer to H M Malm, ‘Commodification or compensation: a reply to Ketchum’ in H B Holmes and L M Purdy, \textit{Feminist Perspectives in Medical Ethics} (1992) 297 p 297.
gacy will involve commodification – be it of a child, a uterus, or a woman. Yet the word commodification somehow feels offensive in the context of human services, especially reproduction, even though it does not have to be. Either way, as long as commercial surrogacy is involved, it is difficult to get past the argument that surrogacy arrangements commodify something. The question that should be in focus is whether commodification must in itself be unethical.

2.4 Exploitation arguments

Arguments that surrogacy is unethical because it is exploitative have at least two sources. The first, exemplified above by current Swedish policy, is that surrogacy is simply wrong because it morally objectionable (because it is exploitative to treat another as a means to one’s own ends). This was also the view taken by the Warnock Committee in the UK in 1985, which used the same line of argument. This form of exploitation has been called ‘wrongful use’ exploitation. It is regarded ‘as an evil because it amounts to using a person (merely or solely) as a means.’

The idea that surrogacy is exploitative also originates from the argument that surrogacy arrangements contain the element of unfair advantage. This is reflected in the definition used above, ie exploitation is ‘[t]he action or fact of treating someone unfairly in order to benefit from their work.’ It is this meaning of exploitation that is explored below.

First and foremost, arguments that surrogacy is exploitative concern taking advantage of the surrogate mothers, and exploitation arguments can be raised in relation to both commercial and altruistic surrogacy. Where it concerns altruistic surrogacy the potential for exploitation is most likely to arise due to the close personal relation-

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128 <http://oxforddictionaries.com> accessed 13/5-11. See also Part 2.2.1, above.
129 It should be mentioned that intended parents may also be exploited by surrogacy brokers and even by surrogates but due to space restrictions these factors cannot be explored here.
ship between the surrogate and the intended parents rather than economic factors. Because altruistic surrogates are often sisters or mothers of one of the intended parents they might, for example, be manipulated into – or feel pressured into – acting as a surrogate out of a sense of loyalty or duty. In such a case it can be difficult for them to say no.\footnote{It is beyond the scope of this chapter to explore this issue further. Clearly, however, in any jurisdiction contemplating surrogacy regulation, the protection of altruistic surrogates from exploitation must be regarded as a priority.}

The potential for exploitation with commercial surrogacy, on the other hand, exists primarily for economic reasons.\footnote{It could be mentioned that while it is technically possible to commodify something without exploiting it, exploitation is clearly also possible without commodification. ie since the commodification of something is connected to its use as an article of trade (See Part 2.3.1, above). Often, however, the two go hand in hand.} Because reproductive technology is a growing business there are opportunities for large profits for third parties such as brokers and ART clinics. This, combined with the strong desires of the intended parents, provides a compelling incentive to manipulate the surrogate and, where relevant, the egg donor. A high risk group for exploitation are surrogate mothers who are economically vulnerable.\footnote{See Satz (n 101) pp 527–528. Satz also points out that there are potential adverse consequences in terms of racial stratification (p 528).}

Just because there is a high risk of exploitation in surrogacy arrangements does not have to mean that the process of surrogacy, in itself, is exploitative. Freeman analysed six objections to surrogacy in 1989, including the principal objection that surrogacy exploits or dehumanises women.\footnote{The remaining five objections he analysed in the article were: Surrogacy arrangements commodify children; Things go wrong; Disgenic dangers; Slippery slopes; and Harm to children. He was also clear to emphasise that there were additional objections raised in the literature, even though many were variants of the objections considered (p 177).} The only argument he found to be justified was that there was a ‘danger that the practice will commodify children and in doing so obstruct the recognition of the full personality of children.’\footnote{Michael Freeman, ‘Is surrogacy exploitative?’ in Sheila McLean (ed) Legal Issues in Human Reproduction (1989) 164 p 177.} He believes that the remaining objections, including the objection that surrogacy is exploitative, had ‘been found to be either not proven, speculative or preventable.’\footnote{Above.}
Freeman also refers to the Warnock Committee’s conclusion that surrogacy was totally ethically unacceptable. According to Freeman, if the Warnock Committee’s argument — that treating others as a means to their own ends must always be regarded as morally objectionable — had been applied consistently, not only practices such as donor insemination, egg donation, embryo experimentation and embryo donation would have to be rejected. Even other medical procedures such as bone marrow transplants, kidney donations and blood transfusions should not be permitted.

Whether or not surrogacy is inherently exploitative, then, appears to be open to individual interpretation. For those who subscribe to the Kantian argument — as appears to be the case in the reasoning found in the Warnock Committee report and the Swedish preparatory works, above — the very nature of surrogacy is exploitative and it always will be. For others, such as those accepting the utilitarian or consequentialist line of reasoning, there might be situations where surrogacy does not involve wrongful use or unfair advantage. In such situations it could be argued that surrogacy arrangements do not necessarily have to be exploitative, ie if it is accepted that exploitation contains an element of unfair advantage.

One situation in which surrogates are exposed to a high risk of exploitation, however, is where arrangements involve reproductive tourism ie where intended parents enter into a surrogacy agreement with a surrogate in another country. Today, this is the main form of surrogacy arrangement used by Swedish couples since there is no possibility for them to access surrogacy in conjunction with ART at home.

2.5 Reproductive tourism arguments

Because surrogacy services are becoming more accessible and more widespread, people are retaining the services of surrogates abroad more often in order to fulfil their desire to become parents. The use of

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136 Above p 167. And note that the Warnock Committee uses almost identical reasoning as that found in the Swedish preparatory works in 1987 (see further, Part 3.2.1.1 and Part 4.2.1, below).


138 Freeman 1989 (n 134) p 167.
Cross border reproductive services is commonly known as reproductive tourism. One of the arguments raised by opponents to surrogacy is that surrogacy arrangements lead to reproductive tourism, which in turn leads to both commodification of women and children, and to the exploitation of women. Concerns about reproductive tourism are not dissimilar to those identified in the commodification and exploitation arguments, above. Reproductive tourism, however, adds the dimension of cross cultural transactions to surrogacy arrangements. In light of the rapid growth of this now multi-billion dollar industry, and the economic nature of the transactions, reproductive tourism brings with it unique ethical problems. It therefore warrants a brief discussion of its own.

One of the main objections to reproductive tourism is that it is seen as exploitative because cross border reproductive services take advantage of the vulnerabilities of poor women in less developed countries. These women, it is argued, are being solicited to complement the reproductive deficiencies of women in the West.

Supporters of using the market for such services claim that women who provide their reproductive services are free agents and are in the best position to judge what is in their own interests. Most of these women can earn a great deal more by selling their reproductive capacity at market rates than they could ever earn from any other kind of legitimate employment.

Critics, on the other hand, argue that just because a woman sees employment as a surrogate as being a better option than no job at all, does not mean that she has made this decision freely. Only women who are fully informed about the effects of such a decision on their wellbeing are able to act autonomously. This view is supported by

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139 See Anne Donchin, ‘Reproductive tourism and the quest for global gender justice’ (2010) 24(7) Bioethics 323 p 323. See also Part 1.1.1, above, regarding statistics from India and USA.

140 This is in no way meant to dispute the fact that each society has its own sub cultures and particular groups within a society might be more susceptible to exploitation than others.

141 See Donchin (n 139) pp 323–324. Donchin emphasises that feminist critiques on cross border practices are not only relevant to surrogacy but also to other practices which trade on women’s sexuality (including prostitution and the sale of eggs for stem cell research). See p 324.

142 Donchin (n 139) p 324.

143 The same argument can be applied to prostitution. See Donchin, above p 324.

144 Above p 324.
Hermerén, who points out that ‘informed consent in the context of surrogacy does not mean that this is problem-free’ since the economic situation of the surrogate might mean that she consents to something which she would otherwise not consent to.145

According to Donchin, while a woman’s power to grant legitimate consent is not necessarily compromised to the same degree everywhere, the poverty in developing countries induces people to accept work that they would not otherwise accept. For women, this can mean being pressured into becoming, inter alia, surrogates.146

In the context of reproductive tourism, those women who provide reproductive services have, typically, very limited earning capacity, little formal education, and must provide for their own children. Accounts given of their motivations show that they feel they must supplement the family income so that their children can receive an education or so that they can have less crowded living conditions.147

These women, on whom this profitable industry is dependent, are often recruited by brokers who reap large profits from the cross border baby business. Using India as an example, the women providing reproductive services only receive about half of the amount paid out for the service.148

For the reasons outlined above, reproductive tourism can be seen as a problem. Another way to view it, however, is instead to see it as a solution to legislation that is restrictive.149 This does not imply that

145 Hermerén (n 79) p 68. In this context, Hermerén is referring to the situation where wealthy people from the west travel to eg India and pay a surrogate who for 9 months has her freedom substantially curtailed to bear a child for them.
146 Donchin (n 139) pp 325–326. Donchin also gives the examples of sex workers and ovum donors in this connection.
147 Above p 326.
148 Above pp 326–327. Moreover, it could also be pointed out that the ‘health care of the travellers and the children born following the surrogacy arrangement falls on the home country (p 328). For an ethnographic study of surrogacy in a clinic in Anad, western India, see Amrita Pande, ‘"It may be her eggs but it’s my blood": Surrogates and everyday forms of kinship in India’ (2009) 32 Qual Sociol 379–397; and Amitra Pande, ’Not an "Angel", not a "Whore": Surrogates as "Dirty" Workers in India’ (2009) 16(2) Indian Journal of Gender Studies 141–173. In these articles Pande gives account of a study of commercial gestational surrogacy undertaken in 2006–2007. Participants comprised 42 surrogates, husbands and in-laws, 16 intended parents, two surrogacy brokers and two doctors.
149 This is the view of Guido Pennings who discusses the issue in his article ‘Reproductive tourism as moral pluralism in motion’ (2002) 28 J Med Ethics 337 p 338. Here, he goes on to describe the various legal solutions under the following headings:
restrictive legislation is not useful as a public reflection of the moral conviction of a jurisdiction’s majority. However, it is difficult to enforce laws which are not considered morally justified. To this end, people will either go abroad or sidestep the law in other ways if they wish to access, for example, medical services prohibited in their own countries.\textsuperscript{150}

Reproductive tourism can thus be seen as ‘a pragmatic solution to the problem of how to combine the democratic system which proceeds according to the majority rule, with a degree of individual freedom for the members of the minority.’\textsuperscript{151} According to Pennings, ‘… respect for the moral autonomy of the minority demands an attitude of tolerance.’\textsuperscript{152} At a minimum, this implies that a state should not take active measures to prevent its citizens from looking for medical care in states where policies might better coincide with their own moral views/standards.\textsuperscript{153}

In summary, supporters of cross-border reproductive services argue that reproductive tourism has a stabilising effect on the restrictive policies of the home country because people who feel oppressed by domestic limitations are able to bypass them. On the other hand, this also indirectly supports the exploitation of women in poorer regions,\textsuperscript{154} who are almost invariably the providers of reproductive services.

2.6 Harm to children arguments

[Assisted reproductive technology makes not only parents but also children. Children do not and cannot choose their families; they are third parties to any reproductive agreement.\textsuperscript{155}]

\begin{thebibliography}{9}
\bibitem{150} Above p 340.
\bibitem{151} Above p 341.
\bibitem{152} Above.
\bibitem{153} Above.
\bibitem{154} Donchin (n 139) p 328.
\bibitem{155} Satz (n 101) p 528.
\end{thebibliography}
2.6.1 The main arguments

Another important and recurring argument against permitting surrogacy is that such arrangements can cause harm to children. The root of these arguments often stems from an apprehension for the child’s psychological welfare. This is exemplified, inter alia, by concerns that children born following surrogacy arrangements might have problems exercising their right to trace genetic origins; are likely to experience confusion over their identity; and have an uncertain legal status at birth.156

The right to trace genetic origins, both in connection with adoption and ART involving donor gametes, is well established in Sweden. A sub-problem of reproductive tourism is that it is not always possible to trace the genetic origins of the child born in another jurisdiction following a surrogacy arrangement or ART where donor gametes are used. As Donchin points out, these children may never be able to find out the identity of their genetic parents, or the surrogate mother. Their birth records may only include the names of the social parents.157 This complicates tracing somewhat and could render it impossible. Tracing genetic origins could also be difficult where surrogacy arrangements are made in secrecy in Sweden. This situation is in direct conflict with Swedish domestic law which provides that all donor offspring have a right to trace their genetic origins when they are sufficiently mature.158

Whether a child has a right to know the identity of a surrogate mother when both of the intended parents of the child are also the child’s genetic parents has not been an issue in Sweden to date. Clearly, Swedish legislation regarding donor offspring, or even assisted reproduction in general, does not cover surrogacy births. There is, thus, no public position on access to information in such a situation. Even so, based on the longstanding Swedish policy of genetic truth, it would be difficult to argue that the right to know the identity of the surrogate, i.e. the biological mother, should not be equally important as the right to know the identity of a donor in similar circumstances.

156 This list excludes or is over and above the connected commodity and exploitation arguments, above, and is by no means exclusive. It is possible, for example, to argue that surrogate births – especially in impoverished countries – expose children to medical risks.
157 See Donchin (n 139) p 328.
158 SFS 2006:351, Ch 6, s 5 (Insemination); Ch 7, s 7 (IVF). The right to trace genetic origins, however, will not be explored in detail here. For an account of the donor offspring’s right to information in Sweden see Stoll 2008 (n 12).
Another concern raised in relation to surrogacy and harm to children is based on the belief that surrogate-born children are likely to experience confusion over their identity. Even if children born following surrogacy arrangements, at home or abroad, are able to trace their genetic origins, they may nevertheless experience confusion over their identity. In such a case, the child might wonder who their ‘real’ mother is. Is she, for example, the mother at home who is responsible for the child’s day-to-day care – and who may or may not be the child’s genetic mother; the surrogate mother who gave birth – and who may or may not be the child’s genetic mother; or is she yet another mother, a woman who donated her eggs?

Where surrogacy is regulated domestically, this problem can be overcome by ensuring that information about all of the involved parties is recorded for future access if needed.

Freeman points out that this problem is shared by adopted children. As long as birth records are available to those who want the information, this difficulty cannot be regarded as a major problem. He does, however, mention that another possible psychological problem for the surrogate child involves concerns over whether the child was bought and sold. He also raises the need to consider the possible impact on any other children of the surrogate, who might, for example, wonder whether they will be given away too. According to Freeman, this problem should be possible to overcome if parents prepare their children in advance.

The final argument raised here in the context of harm to children is that surrogacy results in uncertain legal status. Since Swedish legislation does not regulate surrogacy or parenthood following surrogacy arrangements – either made domestically or abroad – the normal family law rules apply when determining the legal status of the intended parents and the child in such situations. While this can be resolved to the satisfaction of all of the (adult) parties following arrangements

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159 That is, their personal identity as opposed to the difficulties experienced in establishing parenthood which confirms the child’s legal status.
160 Freeman 1989 (n 134) p 176.
161 Above p 176.
162 Above p 177.
163 The Swedish rules on parenthood, and on how legal parenthood is established, are set out in Chapters 1–3 of the Children and Parents Code (SFS 1949:381).
made within Sweden, assuming all parties are in agreement, the various statuses are by no means certain. Issues connected to both family law status and the citizenship of the child can also arise following surrogacy arrangements abroad. When problems arise in this connection, there is a risk that the child will suffer as a result of his or her unsettled legal status. This reinforces the harm to children arguments against surrogacy because the child’s welfare is clearly at risk when he or she lacks legal parents and/or citizenship.

2.6.2 Harm to children and the right to treatment

In jurisdictions where ART is regulated, an issue which providers are obligated to determine before any treatment may be commenced is whether the intended parents have a right to access the available ART services. In Sweden, for example, the right to ART is not absolute but is contingent upon, inter alia, the civil status of the intended parents and the best interests of the prospective child. IVF or insemination with donor gametes is only possible if the woman seeking treatment is married or cohabiting. The Genetic Integrity Act thus excludes single women from accessing assisted reproductive services, reflecting current Swedish family law policy that all children should have two legal parents. Another hoop intended parents must cross through before being approved for treatment is to convince the doctor that it is appropriate for the insemination or IVF to take place, considering the medical psychological and social circumstances of the spouses. A precondition for the provision of treatment is an assumption that the prospective child will grow up under good conditions.

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164 That is, through a confirmation of paternity by the intended and genetic father, and adoption by the commissioning mother with the consent of both legal parents.
165 This is exemplified by the case, NJA 2006 s 505, above. By contrast, Swedish law is clear where it concerns parenthood with other forms of ART.
166 See, for example, ‘Äntligen har Gabriel fått sina föräldrar’, 2009-12-28 <http://arbetarbladet.se/nyheter/sandviken/1.1679418>;
‘Babyn André har blivit svensk’, 2009-04-04 <http://www.aftonbladet.se/nyheter/article4822790.ab>;
‘Får inte åka hem’, 2009-03-30 <http://www.aftonbladet.se/nyheter/article4770289.ab>
167 SFS 2006:351 Chapter 6, section 1 (Insemination); Chapter 7, section 3 (IVF).
168 SFS 2006:351.
169 SFS 2006:351 Chapter 6, section 3 (Insemination); Chapter 7, section 5 (IVF). See also SOSFS 2009:32 (M) Användning av vävnader och celler i hälso- och sjukvården och vid klinisk forskning mm: Chapter 4, sections 5–10 for evaluation and infor-
Why, though, should intended parents who wish to access ART, including surrogacy treatment, be subject to controls that do not apply to intended parents attempting to conceive naturally? One possible reason is that the provision of ART is usually state funded, or at least state regulated. If the state actively contributes to the process of creating babies, or supports it through regulation, this in itself could motivate some form of control mechanism; after all, one would assume that the right to ART reflects the values of the society in which the treatment is administered. Another reason could be that, assuming the state is supplementing the costs of ART, controlling access to treatment might be a way of making sure that the limited resources in question are allocated in a way which is most consistent with a state’s policy and ethical values. If the state were to attempt to regulate natural reproduction it would be necessary to cross over into the private sphere of the family which would be difficult to justify. Where it concerns ART, however, the state has already entered the private sphere through regulation and subsidy, opening the way for regulating access to parenthood with ART since the two issues are mutually dependent. Even so, is such public involvement reasonable?

2.6.3 Comparing the best interests of the child: adoption and IVF

The validity of public interference in determining who has a right to access ART services, and thus who has a right to become a parent, has been questioned. Moreover, where it concerns the interests of the prospective child, a distinction has also been drawn between public control in selecting parents for adoption, which is generally accepted

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170 On this issue, see Daniela E Cutas and Lisa Bortolotti, ‘Natural versus assisted reproduction: In search of fairness’ (2010) 4(1) Studies in ethics, law, and technology 1 p 14. See also Torbjörn Tännäs, ‘Our right to in vitro fertilisation – its scope and limits’ (2008) 34 Journal of Medical Ethics 802. He concludes that, ‘in order to refuse treatment with respect to the right of the prospective child’, it is difficult to defend the claim that the prospective parents are not good enough to deserve the right to treatment (p 804). In Tännäs’s view, ‘[i]n order to do so it is necessary to show that the life of the child, if it is allowed to come into existence, is not worth living. This is rarely the case, even with poor parents.’ (p 804). Presumably this argument would apply equally to surrogacy arrangements in relation to determining the suitability of patients for access to treatment.
and seen as legitimate, and IVF. While public control over access to parenthood in cases of adoption is generally accepted as legitimate, it has been argued that there is a distinction between selecting parents for adoption and IVF in relation to the interests of the (prospective) child.

Tännö, who from a utilitarian perspective considers, inter alia, the grounds for denying prospective parents access to IVF treatment, points out that where a child is in need of adoptive parents, the child has special needs and it therefore makes sense to find the best possible parents just for that child. This, he believes, is different from the situation where a couple asks for IVF services. In the latter case, the parents have no child and if they are denied treatment, ‘their prospective child will never be born.’ In such a situation, Tännö argues, it cannot be said that ‘only the best is good enough for the child, with respect to parents. There are no putative alternative parents to compare with.’

In a similar vein, Cutas and Bortolotti distinguish between the right to reproduce and the right to parent in their comparison of natural and assisted reproduction. They also distinguish cases of parenthood following social intervention ie via adoption, custody and foster care, where decisions must be based on the child’s best interest, from cases of prospective parenthood following medically assisted reproduction, where no children exist before a decision is made to permit or deny access. In the former situation, parenting is assisted but not reproduction. In the latter, both reproduction and parenting are assisted. In their view, current policies restricting access to assisted reproduction for certain groups cannot be ethically justified because they are inconsistent with the lack of regulation applying to natural reproduction and parenting.

171 See, for example, Tännö, above, and Cutas & Bortolotti, above.
172 See, for example, Tännö, above; and Cutas & Bortolotti, above.
173 Tännö 2008 (n 170) p 804.
174 Above pp 804–805.
175 Cutas & Bortolotti 2010 (n 170) above.
176 Above pp 1–2.
177 Above p 2.
178 Above p 14. See also Satz (n 101) pp 526–527. Here, Satz raises the question: why should we be concerned about the motivations and parenting capacities and the infertile when genetic parents are not screened for their capacity to raise children or their emotional maturity? Satz does, however, point to one distinction between unas-
Solberg proposes that, rather than seeing the ethics of ART as a trade-off between the welfare of the child and the autonomy of the adult, we should be developing an approach that focuses on producing functional parents.\textsuperscript{179} She points out that the welfare of the child principle, as borrowed from the practice of adoption, confuses the ethical framework of assisted reproduction. Solberg is not criticising the welfare of the child principle \textit{per se} but believes that ART’s ethical framework is based on false premises. Replacing it with a different approach – an approach which focuses on functional families and producing functional parents – would ‘make it clear that [in contrast to adoption] assisted reproduction is not about choosing the best parents for an existing child – it is rather about being sure that the intentions of becoming parents are not futile.’\textsuperscript{180}

2.6.4 Concluding remarks

A child perspective is, of course, important when establishing policies for the regulation of surrogacy and other forms of assisted reproduction. Arguments that it is not necessary because there is no existing child are difficult to support. After all, the intention behind treatment is to produce a child. Accordingly, it seems obvious that the interests of any future child must be considered when policy makers are contemplating regulation.\textsuperscript{181}

Assuming that the welfare of any future child must be considered prior to surrogacy arrangements and other forms of ART, the next question is whether it follows that this justifies a restriction on the right to parenthood. Moreover, to what extent is it reasonable to interfere in the reproductive choices of adults? If there is a way to facilitate parenthood through assisted reproduction while ensuring that harm to future children is minimised – eg by focusing on functional families, above – broadening the right to become parents through ART and protecting the welfare of the future child should be able to co-exist.

\textsuperscript{179} B Solberg, ‘Getting beyond the welfare of the child in assisted reproduction’ (2009) 35 Journal of Medical Ethics 373 p 373.
\textsuperscript{180} Solberg, above p 375. See also similar comments by Tännsjö 2008 (n 170) p 11.
\textsuperscript{181} Regarding the interests of the child that is not yet in existence see Anna Singer ‘Barns rätt till två föräldrar – en överspelad grundregal?’ JT 2009-10, 411 p 418–420.
Rather than starting out with a policy of restriction, the starting point could be a right to parenthood with aim to minimise harm.

2.7 Legal arguments

2.7.1 The arguments

The potential legal complications following surrogacy arrangements are often used as arguments that surrogacy is unethical and should not be permitted. Characteristically, these problems arise in connection with the legal parenthood of the child and are most commonly formulated in terms of the rights and responsibilities of parents; difficulties either in determining the right to legal parentage or, alternately, in determining parental obligations ie who is it who has – or should have – legal responsibility for the child.182

2.7.2 Disputes over rights to the child

2.7.2.1 Assumption that surrogates will want to keep the baby

As mentioned in Part 2.1 above, the result of several high profile surrogacy cases from the 1980s and 1990s, where surrogates were unable to relinquish the child to the intended parents after the birth,183 has formed the basis for a widely-held assumption that most surrogacy arrangements break down for this reason.184 Yet the view that most surrogates change their mind and want to keep the baby appears to be unfounded. Recent findings, based on the analysis of studies on surrogate mothers, suggest that most surrogates report not feeling a maternal bond with the babies they relinquish and experience little difficulty

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182 Ideally, these problems would be more appropriately couched in terms of children’s rights ie the right of a child to have his or her family law status clear and certain already at birth, something which would require a fail-safe mechanism for the determination of parentage. This would be consistent with the best interests of the child and to this end could support an argument in favour of regulating surrogacy arrangements, or at the very least, ensuring that parenthood following surrogacy arrangements was regulated, leaving no doubts as to the family law status of the various parties.


184 See Scott (n 63).
when giving the child to the intended parents.\footnote{See Holcomb and Byrn 2010 (n 4) p 656; and Elly Teman, ‘The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood’ (2008) 67 Social Science & Medicine 1104 p 1104.} In 2008, Teman reported that an estimated 25 thousand women had given birth following legal, commercial surrogacy arrangements in the USA since the late 1970s.\footnote{Above p 1104. Here, Teman emphasises that because of the large number of informal agreements that take place it is impossible to accurately estimate the incidence of surrogacy arrangements.} The overwhelming majority of these arrangements had happy endings. It is estimated that over 99 per cent of these surrogates willingly surrendered the child as agreed under the surrogacy contract. Moreover, less than 0.01 per cent [1/10 of 1 per cent] of surrogacy cases in the USA result in court battles between surrogate and intended parents.\footnote{Teman 2008 (n 185) p 1104; Elly Teman, \textit{Birthing a mother: the surrogate body and the pregnant self} (2010) p 3.} Teman concludes that these numbers are difficult to ignore.\footnote{Teman 2008 (n 185) p 1104.}

Teman also points to studies which reveal that most surrogates report high satisfaction with the arrangement and report that relinquishment has not caused psychological problems. Moreover, longitudinal studies reveal that these positive attitudes remain constant over time, and most surrogates express an interest in becoming surrogates again.\footnote{Teman 2010 (n 185) p 3.}

In England and Wales, the association COTS (Childlessness Overcome Through Surrogacy) – a voluntary surrogacy organisation run by people dedicated in helping others through surrogacy – reports that ‘[a]round 98 per cent of [surrogacy] arrangements involving COTS members have reached successful conclusions’.\footnote{See <http://www.surrogacy.org.uk/FAQ4.htm> accessed 2013-05-31.} Established in 1988, the organisation celebrated its 500\textsuperscript{th} surrogate birth in August 2004 and its 855\textsuperscript{th} birth in 2013.\footnote{See <http://www.surrogacy.org.uk/About_COTS.htm>; and <http://www.surrogacy.org.uk/FAQ4.htm> accessed 2011-05-31. At the time of writing, COTS had over 750 members.}

Israel had yet to report a case of non-relinquishment as of 2010.\footnote{Teman 2010 (n 187) p 302, note 15.}

If the figures above are representative of the success of surrogacy arrangements in general, there appears to be little support for the argument that most surrogate mothers change their mind about giving
up the baby. Even though there is always a risk that the surrogate could back down on the agreement and refuse to relinquish the baby, it is – as Teman points out, above – difficult to ignore the numbers.

2.7.2.2 Who has a right to be the legal parent/s of the child?

Where surrogacy arrangements do break down, for whatever reason, determining legal parentage often becomes a problem.\(^{193}\) It is understandable that this, in turn, can give rise to objections to permitting surrogacy arrangements. The family law status of a child and the child’s parents should be certain. Who, then, should have a right to keep the baby, or the obligation to care for the baby, if there is a dispute?

When there is a dispute over legal parentage because the surrogate mother refuses to relinquish the child to the intended parents, the question to be resolved is: who has the right to be the legal parent or parents of the child? In this situation, the surrogate mother decides, after entering into the surrogacy agreement, and after the pregnancy has been confirmed, that she is unable to give up the baby in accordance with the agreement. This problem may arise with or without a formal (written) contract between the surrogate mother and the intended parents.

While disputes of this nature are relatively uncommon, they receive a disproportionate amount of publicity, above, which leaves the impression that they occur more frequently than they in fact do. Even so, however unusual they might be, problems flowing from disputes over the right to parenthood following surrogacy arrangements have a serious impact on the parties; something which supports the case for ensuring that jurisdictions have a clear mechanism in place for the transfer of parenthood. An important question in this connection is whether a surrogate’s refusal to give up the child is made any less legitimate or ethical if she is not the genetic mother to the child, only the biological mother.

\(^{193}\) Often, not always, since some jurisdictions have legislation which clearly clarifies legal parentage following surrogacy, even in the event of dispute. It should be mentioned that problems in establishing legal parentage can arise even where surrogacy arrangement do not break down eg where jurisdictions have no clear legislation, or where a child is born abroad. In the latter situation, foreign laws might be inconsistent with domestic laws. This can result not only in unclear parental status but also in uncertainty regarding the child’s citizenship.

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One way for a jurisdiction to minimise the risk of disputes over the right to parenthood following surrogacy arrangements is to establish regulation clarifying parenthood in such situations. Clearly, regulation alone cannot alone guarantee the problem-free transfer of parental rights and responsibilities. However, regulation that clarifies the respective legal parental statuses of the parties following surrogacy arrangements and provides a mechanism for the transfer of parental rights and obligations from the surrogate to the intended parent/s, would guarantee a greater degree of certainty. It should follow that the risk of disputes over parentage would also be reduced through regulation; something which would serve both the child’s interests as well as the interests of the intended parents and the surrogate and her spouse.

2.7.3 Disputes over obligations to the child

Surrogacy arrangements may also break down because intended parents are not willing or able to take the child as agreed. When disputes over legal parentage arise for this reason, the question to be resolved is: who has, or should have, the obligation to be the legal parent or parents of the child? Thus, rather than the issue being about conferring parental rights, it is about establishing parental responsibility.

Disputes over who is legally responsible for the child can occur, for example, where intended parents no longer want the child because it has a disability, or where the commissioning couple divorce after the pregnancy is established and the non-genetic intended parent is no longer interested in the baby. Sometimes, however, the intended parents might be unable to take the child in spite of their original intentions. An example where this situation could arise is if the intended parents were to die unexpectedly. Irrespective of whether the intended parents will not, or cannot, fulfil their part of the agreement, the problem about what to do with the baby remains. If the surrogate is not prepared to keep the child, legal parenthood must be allocated in some other way in order to ensure that someone takes legal responsibility for the child.

Opponents of surrogacy use such situations as support for not permitting surrogacy arrangements. Arguments could also be made that such situations motivate specific regulation establishing parenthood following surrogacy arrangements – even if the practice of surrogacy itself is not regulated.
2.7.4 Freedom of contract arguments

2.7.4.1 The arguments

Another argument relied on by some proponents of surrogacy arrangements is that surrogacy contracts should be permitted based on the liberal principle of freedom of contract. The foundation for this argument is twofold: first, legally competent consenting adults should be free to enter into contracts; and secondly, contracts should be kept. The main argument against freedom of contract is that it is not possible to protect a potentially weak party, or the intended child, from harm or exploitation where surrogacy arrangements are left completely to market forces.

2.7.4.2 Reasons to permit freedom of contract with surrogacy arrangements

Supporters of commercial surrogacy argue that if women wish to sell their gestational labour, it is paternalistic to prevent them from doing so. Arguments supporting freedom of contract in this context are well illustrated using the example of reproductive tourism where surrogacy arrangements are made between surrogates from poor socio-economic backgrounds and commissioning couples from wealthy countries. Liberal arguments defend the practice both for surrogates and for commissioning couples. Where it concerns commissioning couples, the arguments defending surrogacy focus on the benefits these couples enjoy. Examples include freedom to contract, freedom of choice, significant cost savings and the possibility to avoid any attachment to the surrogate. For surrogates, on the other hand, the arguments highlight the resulting economic relief, the surrogate’s subsequent ability to care for her family, the surrogate’s freedom of choice and freedom to use her body as she sees fit, and the surrogate’s freedom to contract. From a liberal perspective, the emphasis – for both commissioning couples and surrogates – is on rational individuals who come together for mutual benefit.

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194 See Satz (n 101) p 526.
195 See Jennifer A Parks, ‘Care ethics and the global practice of commercial surrogacy’ (2010) 24(7) Bioethics 333 p 334. In her article, Parks (with a focus on Indian surrogates) critiques the liberal arguments that are given to support surrogacy and discusses inter alia moral issues concerning surrogacy in the global context.
196 Above p 334.
2.7.4.3 Reasons to limit freedom of contract with surrogacy arrangements

Arguments opposed to permitting freedom of contract with surrogacy arrangements are often connected to the belief that at least one of the contracting parties is in a weaker position. The weak party could be the surrogate, the donor, the intended parents or – where the arrangement is concluded by a broker – more than one party. If this is the case, freedom of contract is in fact an illusion for the weaker party. Limiting such freedom, then, is a way to ensure that weak parties are not taken advantage of and can be protected.

The potential impact of a surrogacy contract on the intended child must also be considered. The child also needs protection. Small children cannot be a party to a parenting agreement, yet they are the most vulnerable party following any commercial surrogacy contract. In order to ensure that children are protected, it could thus be argued that freedom of contract should be limited.\(^{197}\)

Where it concerns the surrogate, there is over nine months between the commencement and the completion of the contract. Some women will most likely change their mind during this time. Many people are uncomfortable with the idea of enforcing a contract that separates a birth mother from her child against her will. There are several reasons for this, including the fact that the birth mother has experienced the pregnancy and contributed to the creation of the child, and the concern that it is not possible for a woman to anticipate the consequences of being separated from a child she has given birth to.\(^{198}\)

Another problem that has been put forward in relation to freedom of contract and surrogacy arrangements is that it puts on an equal foot-

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\(^{197}\) See Satz (n 101) p 531. Here, in the context of adoption, Satz argues that there are several reasons to limit freedom of contract. For example: small children are the most vulnerable party affected by the parenting contract; they are totally dependent on their caretakers; and they need some kind of continuity of care. These arguments are equally relevant to surrogacy arrangements which nearly always involves adoption of some sort.

\(^{198}\) Above p 527.

Regarding the second reason, this appears to be an argument against enforcing surrogacy contracts because informed consent is not possible in this situation. This is convincing but it needs to be remembered that the same argument could be used in other situations also i.e wherever it is not possible to appreciate the consequences.

Note also that this is in line with one of the reasons why Tänsjö believes that surrogates must always have a right to keep the baby if they change their mind. See Törbjörn Tänsjö, Göra barn (1991) p 98.
ing the purchase and sale of goods and services with corresponding transactions concerning body parts and vital life processes. According to this line of argument, different cases cannot, from an ethical point of view, be treated the same.\(^{199}\) Freedom of contract should therefore be curtailed in this context.

Even where it is acknowledged that surrogacy contracts are not inherently immoral, it has been argued that the liberal freedom of contract view is associated with ‘inequality, alienation, and risk of abandonment.’\(^ {200}\) One justification for this view is that harms that can be experienced by children who have been created through the global practice of ART – for example, when things do not go as planned and a child ends up stateless or without parents – cannot be addressed by liberalism.\(^ {201}\)

### 2.7.4.4 A possible alternative

What if it is accepted that surrogacy contracts are not “free” due to their nature? Does this mean that commercial surrogacy can never be justified? According to Damelio and Sorensen, there is a way to protect the surrogate and enhance her autonomy.\(^ {202}\) They suggest that commercial surrogacy should be combined with a requirement that gestational surrogates participate in a class on contract pregnancy. Included in such a class would be information about how other paid surrogates have experienced the surrogacy process; what surrogates

\(^{199}\) See Thomas Idergard, ‘Surrogatmoderskap kan aldrig motiveras etiskt’, Läkartidningen 2011-02-18 nummer 8 (Debatt endast på webben).<http://www.lakartidningen.se/07engine.php?articleId=16023> accessed 1 July 2013. Idergard believes that ethics should automatically follow the law, but that a contract which is valid must also, reasonably, have something valid as an object (which he does not believe surrogacy is). Idergard is not persuaded by the common liberal argument in favour of permitting surrogacy arrangements ie, as long as two adults freely enter into a contract, which does not restrict anyone else’s right to freely enter into such a contract, it is morally wrong to prohibit the content of such a contract. According to Idergard, to say that a formal, equitable process legitimates every type of content, as long as it does not encroach upon someone else’s possibility to take part in equitable contract processes, is an erroneous conclusion. It should be mentioned that Idergard is of the opinion that surrogacy can never be ethically justified.

\(^{200}\) Parks (n 195) p 334.

\(^{201}\) Above p 335. Parks uses the example of Baby Manji, the child born to an Indian surrogate for a Japanese couple, who was stateless at birth inter alia because it was not possible to establish maternity since the commissioning parents had divorced prior to the birth and the commissioning mother, who was not genetically related, refused to accept responsibility for the child.

\(^{202}\) Damelio and Sorensen (n 94) p 269.
can and cannot be legally required to do, and alternative forms of employment. This would put the surrogate in a better position so that she is able to make informed decisions and in turn enhance and protect her right to make choices about her body.\textsuperscript{203}

To conclude, an important question for any state to consider when contemplating the introduction of commercial surrogacy is whether a person’s desire for a genetically related child gives them a right to enter into an enforceable surrogacy contract. Moreover, if the state must be involved in the enforcement of the contract, it is no longer a matter solely for the contracting parties; something which might be seen as inconsistent with the liberal idea of freedom of contract.\textsuperscript{204}

2.8 Social and medical arguments

2.8.1 The arguments

Finally, it should be mentioned that there are also social and medical arguments that have been put forward against surrogacy.\textsuperscript{205} Two examples are briefly outlined below. First, the social argument that surrogacy should not be permitted because it restricts the lifestyle of surrogates\textsuperscript{206} and, second, that surrogacy poses medical and psychological risks to the surrogate mother.\textsuperscript{207} Like some of the arguments outlined above, there is some overlap between the categories.

2.8.2 Surrogacy restricts the lifestyle of the surrogate

It can happen that conflicts arise between the surrogate and the intended parents in relation to lifestyle matters such as the appropriateness of smoking, drinking alcohol, the taking of certain kinds of medication

\textsuperscript{203} Above p 270.
\textsuperscript{204} See Satz (n 101) pp 527–528.
\textsuperscript{206} Another example of a social argument justifying the prohibition of surrogacy is that infertile couples should accept their childlessness; that there is no right to children.
\textsuperscript{207} Another kind of possible conflict which fits under both social and medical categories is differences in opinion about whether or not the surrogate should be permitted to, or required to, have an abortion if the foetus is found to be abnormal.
or illicit drugs, diet, leisure activities. In jurisdictions where commercial surrogacy is legal, restrictions regarding social and lifestyle issues can be written into the contract. Restricting the lifestyle of a surrogate in this way can be seen as contrary to the (ethical) principle of self-determination (or autonomy) which provides that one should be able to determine over one’s own actions provided this does not violate another’s right to self-determination.208

It does not necessarily follow, however, that permitting surrogacy must be inconsistent with the right to self-determination. Israel is an example of a jurisdiction which has regulated surrogacy arrangements without compromising the surrogate’s right to rule over her own body.209 Thus, because it is possible for surrogacy to co-exist alongside the right to self-determination, the argument that surrogacy should not be permitted because it conflicts with this right is not strong. There is, nevertheless, a real risk that a surrogate’s autonomy could be curtailed, both in relation to commercial and non-commercial surrogacy. This risk must therefore be carefully evaluated by policy makers when contemplating the regulation of surrogacy.

2.8.3 Surrogacy poses medical risks for surrogate mother

The medical arguments against surrogacy arrangements are based on the belief that surrogacy pregnancies harm the surrogate mother because they pose medical and psychological risks. Every pregnancy involves well-known medical risks. One argument against supporting surrogacy arrangements is that the person who wants to have the child should also bear the medical risks.210 A connected concern, in line with the exploitation argument, is that it is unethical to support reproductive tourism since the medical risks to surrogates in the jurisdictions visited might be disproportionately high when compared with those associated with pregnancy and birth in Sweden.211

209 Ch 4 s 18 of the SMA Act gives the surrogate mother the express right to an abortion. See further Part 5.5, below.
210 See Hermerén (n 79) p 69. Hermerén also states that this is an argument against egg donation and uterine transplant are also given in this context.
211 Moreover, a medical risk to the mother could pose a medical risk to the child, strengthening the harm to children arguments, above.
These arguments, and the others raised against permitting surrogacy arrangements, above, while not exclusive, are sufficient to reveal that there are valid ethical concerns about surrogacy which cannot be ignored. In particular, the risks for exploitation, commodification, and violating the surrogate’s right to self-determination appear to be high – both with commercial and altruistic surrogacy. In these particular cases, it would seem reasonable to accept the argument that the surrogacy arrangements in question are ethically indefensible.

2.9 Possible pitfalls of an altruistic model: A lesson from Greece

As indicated above, the existence of an altruistic surrogacy model alone cannot guarantee that surrogacy arrangements will be ethical. If a State regards commercial surrogacy as unethical, for example, and a surrogate is paid for her labour, that particular arrangement will in turn be classified as ethically unacceptable. While many of the objections to surrogacy seem to focus on the pitfalls of commercial surrogacy, it could be useful, for a moment, to consider what the pitfalls of altruistic surrogacy might be. To this end, the Greek experience of altruistic surrogacy is thought provoking because it highlights the difficulties inherent in attempting to adhere to an altruistic model.

Surrogacy has been regulated in Greece since 2002, when the Greek Civil Code was amended\(^\text{212}\) to permit altruistic gestational surrogacy where the arrangement is approved by the Court before treatment commences.\(^\text{213}\) Before the provisions were enacted, the committee appointed to review surrogate motherhood and medically assisted reproduction had decided not to include a prohibition on financial benefit. According to Hatzis, it was believed unnecessary because the courts would be most likely to nullify contracts showing financial benefit based on Article 178 of the Greek Civil Code which provides that ‘a legal act that is against conventional morality is null.’\(^\text{214}\) This

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\(^{213}\) The Greek law on surrogacy is further considered in Part 7.4, below.

\(^{214}\) See AN Hatzis, ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’ (2009) 8 Portuguese Economic Journal 205 pp 214–216. In addition to describing the regulation of surrogacy contracts in Greece, Hatzis pro-
would have given the courts the discretion to determine whether surrogacy contracts were immoral, leaving the question open for interpretation and enabling the courts to either allow financial benefits or to set limits without prohibiting it.  

The proposed Article was, however, amended by the legislature and the one enacted by Parliament contained a requirement that there be no financial benefit resulting in a prohibition of commercial surrogacy. Within two years, the problem of compensation of surrogate mothers had, according to Hatzis, become obvious because most surrogacies were commercial in spite of the prohibition against financial benefit – which had not been defined in the 2002 Law, above. The Greek legislator’s reaction was to enact a new law which clarified that financial benefit did not include compensation for the costs of the treatment and pregnancy (including the post-partum period) or compensation for the surrogate’s lost salary due to the surrogacy. The same law also criminalised commercial surrogacy by providing that a breach of the prohibition against financial benefit would attract criminal sanctions.

The consequence of this is that parties to surrogacy arrangements have ‘had to break a law that clearly was inefficient, unreasonable and unjust.’ The fact that parties have broken the law is not without support and is reflected in the results of an empirical study by Hatzis published in 2009. Of 32 available decisions approving surrogacy agreements, provides a critical analysis of Greece’s surrogacy regulation from a law and economics perspective raising important issues such as economic analysis of contract law; child welfare and best interests; commodification and exploitation.

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215 Above.
216 Article 1458 of the Greek Civil Code.
217 Article 1458 of the Greek Civil Code.
220 Here, Hatzis is referring to Article 26 of Law 3305/2005 which provides that a breach of Article 1458 of the Greek Civil Code or of Article 13 of Law 3305/2005 (both of which stipulate that financial benefit is not permitted) would attract criminal sanctions. See Hatzis 2009 (n 214) p 218. See also Aristides N Hatzis, ‘The Regulation of Surrogate Motherhood in Greece’ (1 September 2010) p 10. Available at SSRN: <http://ssrn.com/abstract=1689774> accessed 13 March 2013. Note that a translation of Articles 13 and 26 of Law 3305/2005 can be found in Hatzis (1 September 2010) at pages 3 & 4 respectively. It could also be mentioned that an independent authority was also instituted 2006 to define the amount of compensation that could be paid to surrogate mothers, but according to Hatzis, it was abrogated in 2010 (see Hatzis, September 1, 2010 at p 10).
221 Hatzis 2009 (n 214) p 216.
ments that were published by the District Court of Athens between 2003 and 2007, Hatzis found only five decisions in which the surrogate was a close relative of the commissioning mother. In every other case, the surrogate mother was the commissioning mother’s “best friend”. Of these 26 “best friends”, 21 were from Eastern Europe. In only five cases, the surrogate was a Greek woman and here, Hatzis points out that the age difference between the surrogate and her “best friend” ranged from 10 – 20 years.

By 2010, Hatzis’ research team had located most of the surrogacy decisions published by the Athens District Court, commencing from the time Law 3089/2002 was enacted until 2010. Several decisions from other district courts were also included in the 2010 figures. The results were consistent with those found in the first study. This time, of 92 judicial decisions that authorised surrogacy, the surrogate mother was a close relative in only 13 cases. In the remaining cases, the surrogate mother was the “best friend” of the commissioning mother, once again often an Eastern European immigrant with an age difference of between 10 and 20 years. It has also been observed that none of these decisions contain any reference to evidence submitted in support of the close friendship in question ie something that could show that a friendship was sufficiently close that it might result in the surrogate offering her womb altruistically for the commissioning mother. Most of the cases were published after Law 3305/2005 came into effect.

According to Hatzis, estimates indicate that there are a great deal more surrogacy arrangements in Greece than figures show and that many procedures occur illegally in order to avoid the expenses and disturbances associated with the court procedure. Even from the decisions published, however, Hatzis believes that it is obvious that

222 Hatzis, above, reports that the decisions available were from early 2003 after the law was promulgated until summer 2007, but not including 2006 because these decisions not accessible due to ‘book-binding procedures’ p 216.
223 The close relatives in question were three sisters, one sister in law and one mother. See Hatzis, above p 216.
224 Above.
225 But this time, the results did not include some 2009 decisions, also due to book-binding procedures. See Hatzis 2010 (n 220) p 10. The results of the empirical study are reported on pages 10–11.
226 Above p 11.
227 Hatzis 2009 (n 214) p 217; Hatzis 2010 (n 220) p 11.
surrogacy in Greece is not an altruistic deed and that financial benefit is evident in the form of “under the table” payments.228

Hatzis also raises the point that discrimination is a direct consequence of altruistic surrogacy. He believes that the prohibition of financial gain ‘results in discrimination against couples with no altruistic relatives or friends available and unfairness against surrogate mothers because it doesn’t allow them to decide for themselves about the cost of their decision.’229 This is a convincing argument. Moreover, it adds to the existing discrimination debates because it shifts the focus from arguments that tend to rest on the discriminatory consequences of commercial surrogacy ie in which access to surrogacy is connected to income.

2.10 If something is unethical, should it be illegal?

If surrogacy arrangements can be regarded as ethically questionable – or even be shown to be ethically indefensible in particular situations – is this sufficient justification for prohibiting them? Moreover, even if surrogacy in itself is unethical, does this imply that it should never be permitted?

In an article about the ethics of post-menopausal motherhood, Daniela Cutas explores the relation between morality and legality.230 This issue is also highly relevant in the context of commercial and altruistic surrogacy. She writes that:

Most accept that all morality should not become legislation and that all legislation need not constitute an implementation of morality. Therefore, even if we do show that an act is immoral, we are still bound to show why it is that sort of an immoral deed that should become illegal. In addition, we are bound to show that making an act illegal will lead to better results than not making it illegal.231

Applying this reasoning to medically assisted surrogacy, then, the challenge is to establish, first, whether surrogacy arrangements are

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228 Hatzis 2009 (n 214) p 217; Hatzis 2010 (n 220) p 11.
229 Hatzis 2009 (n 214) p 218.
231 Above.
immoral. If so, are these arrangements of such a nature that they should also become illegal? If so, why? And finally, what are the potential legal outcomes of the alternatives? That is to say, what is the likely outcome of legally permitting surrogacy arrangements as compared with prohibiting them?

Whether or not surrogacy will be seen as immoral, however, will not only depend on the facts of a given situation; it will also depend on one’s own ethical standpoint, and one’s view on surrogacy itself. In surrogacy arrangements, the surrogate is clearly used as a means to an end by the intended parents; the end being the production and delivery of a baby. There is little doubt about this process. It could also be argued that the surrogate uses the parents as a means to an end, or perhaps even the baby. Here, the parents (the means) are so desperate to have a baby that the surrogate can extract money from them (the end) if she produces and delivers one to them (in this way the baby is also the means). If, however, one is convinced that we must never treat other people only as a means to an end, and that treating people only as a means to an end is integral to the surrogacy process, surrogacy will always be unethical.

If one considers Cutas’ model, above, if surrogacy is immoral it should not necessarily be ruled out – although it may well be. There are clear benefits from being compelled to justify, first, that something is immoral and subsequently, why this is sufficient reason to prohibit it. An obvious advantage is that such a justification and reasoning process would presumably call for a state investigation and be followed by public debate. Resulting public policy would thus be more

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232 Where it concerns the current policy that surrogacy is ethically indefensible, the response to this question requires a detailed investigation into why or why not this is the case; a comprehensive public debate which explores as many arguments and options as possible.

233 Cutas uses this line of questioning to tackle the problem of postmenopausal motherhood in Cutas 2007 (n 230) p 462.

234 Another possible alternative is that the brokers, and even the clinics, use both the surrogate and the intended parents as a means to an end.

235 See above, Part 2.2. See also, for eg, Etiska vägmärken 1, Statens medicinsk-etiska råd 2008 p 23; and Kuhse and Singer (n 75) p 4.

236 As was reasoned above in the context of whether surrogacy is inherently exploitative. See Part 2.4.

237 Something which is about to occur in Sweden, since the impending government investigation on ‘Increased possibilities for the treatment of infertility’ was announced on 19 June 2013. (Dir 2013:70).
likely to be regarded as legitimate and hence have a greater chance of public acceptance, even if not everyone agreed with the outcome.

2.11 Conclusion

It has been shown in this chapter that there are many different views about the ethics of surrogacy. Just as there are strong arguments in favour of prohibiting surrogacy arrangements, there are equally strong arguments in favour of facilitating them under certain circumstances.

Where it concerns developing countries such as India, it is difficult to persuasively argue that surrogacy involves neither exploitation nor commodification (at least of some sort). To claim that arrangements are entered into freely when there is such a significant disparity in economic and social conditions between surrogates, commissioning parents and brokers is naïve and fails to take into account obvious differences between the parties whereby those with money and resources benefit (most).

If one shifts the focus to countries such as England, where surrogacy is regulated and established routines are in place to protect all of the parties, it is more difficult to think of surrogacy arrangements in terms of black or white. While exploitation and commodification are clearly possible, it must be easier to minimise the incidence of these factors where surrogacy is regulated. Even commercial surrogacy, which might expose parties to greater risks of exploitation than altruistic surrogacy, can at least be regulated to minimise such risks. Moreover, the sale of organs, gametes and personal services are never exploitation- or commodification free either and if these can be morally justified in certain situations it is difficult to argue that surrogacy arrangements should never be permitted. Risk – be it moral, social, medical or economic – is inherent in all forms of (legal) trade, irrespective of whether the transaction involves body parts, human services or the purchase of goods. To be able to minimise risks for particular transactions, however, one must first be aware of what the true risks are.

Why the Swedish Government and Parliament continued, for so many years, to hold that surrogacy is ethically indefensible, as a basis for continuing to reject the mounting number of calls for an investigation into surrogacy and related issues, is difficult to understand. Such a position could be seen as indirectly supporting the commodification
and exploitation of surrogates and surrogate-born children in developing countries where the focus of surrogacy is steered by economic gain rather than the promotion of individual interests and where the interests of the child barely rates a second thought prior to its birth.

A public investigation which carefully identifies the problems and examines and explores all of the alternatives will not only promote public debate; it will also increase awareness and legitimise any subsequent public policy.

Why, though, has surrogacy been so difficult to place and keep on the public agenda, and until now, to regulate? Possible contributing factors might include, inter alia, the complexity of the nature of the associated problems; the multiplicity of views on surrogacy itself; possible fears about the consequences of surrogacy due to lack of information; the fact that gestational surrogacy is a relatively new technological possibility and the law has not had a chance to catch up – or keep up – with the medical developments; and the ability to avoid seeing surrogacy as a national problem because couples can leave the jurisdiction to access services anyway, and things usually turn out in the end.
Chapter 3
3 Surrogacy, parenthood and Swedish law

The rules on the establishment of legal status for parents satisfy the child’s fundamental interest in having legal status.\(^{238}\)

3.1 Introductory remarks

The main purpose of this chapter is to explore the Swedish legal rules for establishing legal parenthood at the time of the child’s birth, with a view to seeing how they may be applied to surrogacy arrangements.

The chapter begins with an overview of the background to Sweden’s current policy on surrogacy and some brief comments about the impact of the Genetic Integrity Act (GIA)\(^{239}\) on surrogacy arrangements. As was seen in Chapter Two, above, historically, the public position on surrogacy in Sweden – that such arrangements are ethically indefensible and should therefore not be permitted – is firmly established. An attempt is therefore made to understand the driving forces behind this policy by, inter alia, taking a look at the preparatory works to the now-repealed IVF Act and relevant amendments made prior to the implementation of egg donation, including the proposed and actual amendments made to the parenthood provisions of the Children and Parents Code\(^{240}\) following the 2001/02 Government Bill on the treatment of infertility.\(^{241}\)

How legal parenthood is, or could be, established at the time of a child’s birth through the unwritten presumption of maternity, and under the presumptions and rules contained in the Children and Parents

\(^{238}\) Anna Singer 2000 (n 53) p 383. On the various purposes of legal parenthood see pp 381–399.

\(^{239}\) SFS 2006:351. Hereafter also referred to as the Genetic Integrity Act or the GIA.

\(^{240}\) SFS 1949:381. Hereafter also referred to as the Children and Parents Code or FB (Föräldrabalk).

\(^{241}\) Prop 2001/02:89.
Code is then considered, generally and in relation to assisted reproduction and surrogacy.

The issue of birth records following surrogacy arrangements is also raised.

The starting point for the chapter is the child’s right to legal status (or family law status). This implies that the child has a right to have confirmed that he or she is someone’s child and that, according to the law, he or she belongs in a family.²⁴² For a surrogate-born child, then, it follows that if the legal parental status of the surrogate mother and the intended parents is unclear, or not possible to determine at the time of the child’s birth, the child’s right to having his or her family law status established cannot be satisfied either.

3.2 Background to Sweden’s current policy on surrogacy

3.2.1 Surrogacy in general

3.2.1.1 The Insemination Investigation

Sweden’s restrictive policy on surrogacy can be traced back to the mid-1980s. As discussed in Chapter Two, above, the Insemination Investigation had at that time produced its second report, Children conceived through In Vitro Fertilisation, which recommended inter alia that surrogacy and egg donation should not be permitted.²⁴³ This was accepted in the Government Bill on IVF.²⁴⁴

Importantly, a view emphasised by the Insemination Committee – here in relation to egg donation – was that:

²⁴² Singer 2000 (n 53) p 383.

The first report of the Insemination Committee (SOU 1983:42), was dealt with in my Licentiate of Laws thesis, Stoll (n 12). SOU 1985:5 is the Committee’s second report. In addition to dealing with issues concerning the practice of in vitro fertilisation, the Terms of Reference of the Insemination Investigation directed the Committee to, inter alia, investigate connected problems which arise alongside IVF and insemination, including questions of an ethical nature. (SOU 1985:5 p 13, citing Dir 1981:72, Artificiella inseminationer, Skr. 1982/83:103 p 46.) Thus, it is not surprising that the Insemination Committee raised surrogate motherhood in its investigation into IVF.

[it] can never be a human right to have children. Nature’s imperfection must sometimes be accepted. No person may be treated simply as a means to satisfy another but [rather] every individual has his or her own human dignity. The objective of the use of artificial fertilisation methods must be the prospective child’s best interest.\textsuperscript{245}

This view, that there is no natural right to have one’s own child, was also held by the Swedish National Council on Medical Ethics (SMER) in its 1995 report on ART,\textsuperscript{246} and reinforced in the Government Bill on the treatment of infertility several years later.\textsuperscript{247} It also has support in international law.\textsuperscript{248}

Subsequently, as was shown in Chapter Two, calls to permit surrogacy arrangements continued to be denied on the basis that such arrangements are not ethically defensible and not consistent with the principle of human dignity.\textsuperscript{249} Unlike the public stance on egg donation, however, which shifted to one of acceptance (or at least tolerance) at the beginning of the 21st century, the no-tolerance policy on surrogacy remained unchanged. This is significant since the 1987/88 Government Bill on IVF took an equally strong position in relation to egg donation.\textsuperscript{250} Here it was stated, inter alia, that:

IVF with a [donor’s] egg contradicts the human life processes and, to such a high degree, has the character of technical construction that it lends itself to damage mankind … this form of fertilisation cannot, in my opinion, be ethically defended. I consider, thus, that IVF with donated eggs should not be permitted.\textsuperscript{251}

\textsuperscript{245} SOU 1985:5 pp 38–39. These comments were made in comparing the (already wide-spread) incidence of insemination in Sweden with IVF – which was still in its introductory phase and required much greater manipulation with the human life process – and the issue of whether egg donation should be permitted.

\textsuperscript{246} Assisterad befruktning – synpunkter på vissa frågor i samband med befruktning utanför kroppen, Statens medicinsk-etiska råd, 1995-04-05 p 14.

\textsuperscript{247} See prop 2001/02:89 p 23.

\textsuperscript{248} See, eg, S.H. v Austria, Application no. 57813/09, Grand Chamber, European Court of Human Rights, 03 November 2011. This case concerned the right to private and family life covered by Article 8 of the ECHR, in relation to two Austrian couples who were denied access to IVF because Austria prohibits egg donation, and sperm donation with IVF. The ECtHR held that the Convention had not been violated. Individual member states of the Council of Europe could impose restrictions in relation to ART.

\textsuperscript{249} See Part 2.2, above, where the background in relation to why surrogacy was regarded as ethically indefensible is addressed.

\textsuperscript{250} Prop. 1987/88:160.

These words are categorical in their condemnation of egg donation. Yet, egg donation is now permitted under Swedish law. Where it concerns surrogacy, however, the precautionary approach,\textsuperscript{252} continues to apply,\textsuperscript{253} at least pending the outcome of the current investigation.\textsuperscript{254} The arguments put forward against surrogacy in the early legislative preparatory works have, to date, been relied on by policy makers to justify why surrogacy is not ethically defensible and why it should therefore not be permitted. Until 19 June 2013, when the Government established the investigation on increased possibilities for the treatment of infertility,\textsuperscript{255} these decades-old arguments have also been accepted by each government in office as sufficiently persuasive to reject, outright, all requests to investigate the possibility of regulating surrogacy in Sweden.

In light of Sweden’s long-standing and unequivocal position against surrogacy, which is still unresolved, two questions in particular must be raised. First, what was (officially) assumed about surrogacy when it was first placed on the political agenda; and secondly, are the arguments that were put forward against surrogacy and against its regulation at that time equally well-grounded today? The answer to the first question can be found in the 1985 report of the Insemination Committee and the subsequent Government Bill that followed.

\subsection*{3.2.1.2 Assumptions made about surrogacy and reasons for not recommending regulation\textsuperscript{256}}

Where it concerns official Swedish policy, the position that surrogacy is ethically indefensible has almost always been justified with refer-

\begin{itemize}
\item \textsuperscript{252} See prop 2001/02:89 p 23. See also SMER, 2013:1 p 117.
\item \textsuperscript{253} Receiving an egg from another woman is no longer regarded as a problem in Sweden, at least not for lawmakers. The condition is that the gestating mother is regarded as the real mother. In terms of surrogacy, then, it is the gestation by a woman other than the intended mother which creates the problem. Perhaps it is this that should be in focus when considering how or if we regulate, or why we won’t regulate. That is, rather than couched things in terms of medical ethics we should be looking at why and why not we can agree that it is ethical to give an egg away as long as the intended mother does the gestating (when until recently genetics had been seen as central to motherhood) but not to give your egg away to another mother for gestating when you are an intended mother. Clearly, there is a different value allocated to the genetics and gestation where it concerns the validity of motherhood.
\item \textsuperscript{254} Dir 2013:70. See Part 1.5, above.
\item \textsuperscript{255} Dir 2013:70.
\item \textsuperscript{256} That is, assumptions of the Insemination Committee – as gleaned from its report on children conceived through IVF.
\end{itemize}
ence to the legislative preparatory works to the IVF Act, in particular the Insemination Committee’s 1985 Report. Yet, as mentioned above, there was only one express reason given by the Committee in this report that clarified why it regarded surrogacy as ethically indefensible. It concluded that surrogacy was ethically indefensible ‘because it presupposes that children become objects of financial bargaining’.  

Moreover, this was a conclusion drawn only in the Swedish and English summaries of the report, not in the main text of the report. In addition, there were several assumptions made about surrogacy which were accounted for in the body of the report and which served as the basis for justifying why surrogacy should not be regulated, or why it did not need to be. These include the assumption that surrogacy was not regarded as altruistic but rather as a commercial activity; the view that surrogacy was incompatible with Swedish adoption law; and the belief that surrogacy conflicted with the principle that a woman has the right to be in control of her own body. The reasons, outlined in turn below, were supported by the Government in its Bill on IVF.

Importantly, no attempt was made to analyse any of these factors in terms of ethics. This could be regarded as surprising, particularly since the Committee’s recommendation to reject surrogacy, and the subsequent acceptance by the Government and the Swedish Parliament, was strongly justified by the view that the practice is ethically indefensible. Why a more comprehensive ethical analysis was not carried out at the time is not known. It is possible that the Insemination Committee assumed the issues it raised made it obvious that surrogacy was an unethical practice but there is no indication of this in the report.

The first-mentioned assumption made by the Insemination Committee, that surrogacy results in children becoming objects of financial bargaining, is evident from its express comment, above. It did not elaborate further on the issue except to emphasise that:

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257 SOU 1985:5 p 10 (Swedish summary); p 66 (English summary). See above, Part 2.1.

258 That is to say, as opposed to reasons why surrogacy itself was regarded as ethically indefensible.


260 Even the comment about children being used as objects of bargaining was not analysed but rather made as a conclusion as to why surrogacy could not be ethically defended.
surrogate motherhood is, in our view, a highly dubious phenomenon foremost with regard to its character of bargaining about children. In order to create guarantees for the prospective child it requires ... several amendments to legislation, which are incompatible with the current law.\footnote{See the Insemination Committee’s concluding position on surrogacy: SOU 1985:5 p 50, where it also stated that ‘[e]ven if the procedure can help certain infertile couples to have children, we find no grounds to consider such changes [to the law].’}

The second assumption, that\textit{ surrogacy is not altruistic}, follows from the assumption immediately above. It is clear from the report of the Insemination Committee that one of its starting points was that the practice of surrogacy was not altruistic.\footnote{The reason for the assumption that surrogacy was predominantly commercial is not surprising given that almost all of the available material on surrogacy at the time pointed to it being commercial. This belief appears to have been an important factor contributing to the Committee’s final conclusions as to why regulation was not necessary. Its reasoning was that the family law rules do not permit payment for the adoption of a child. The Committee may have thus assumed that surrogacy would simply not be possible because of its belief that surrogacy involves buying a child. Hence, since one cannot buy a child, there is no need to regulate.} In describing the surrogacy process occurring in the USA and the UK at the time, the Committee explains that ‘[a]gainst a fee (50,000—100,000 kr.) a “surrogate mother” is consequently hired who is prepared to bear a child and thereafter immediately surrender it to another woman.’\footnote{See also p 49, and note that at that in 1985, as far as known, gestational surrogacy, in which the surrogate mother has no genetic connection to the child, had not yet occurred anywhere in the world (SOU 1985:5 p 49).} It also adds that a contract between the surrogate mother and the couple who will receive the child is usually drawn up, which provides that the “ordering” couple shall adopt the child after it is born.\footnote{SOU 1985:5 p 33.} It further, clarifies that ‘[u]nder the Swedish legal system such an arrangement is made difficult by the fact that adopting a child against financial compensation is not permitted.’\footnote{SOU 1985:5 p 34. See section below in relation to the adoption provisions in question.} Although one reference to the possibility of surrogacy without payment is made in a footnote,\footnote{SOU 1985:5 p 50. In footnote 1 on p 50, the Insemination Committee for the first time refer to the fact that ‘there have, however, been cases abroad where, eg, a woman (often a twin) has offered herself as a surrogate mother for her sister or a close friend without [receiving] payment.’} the overwhelming impression received from comments made by the Committee indicates...
that the practice of *altruistic* surrogacy was not contemplated in this context. Surrogacy was assumed to have a commercial element.

A third important assumption at the time of the investigation into IVF was that the practice of surrogacy conflicted with adoption laws. As a result, it was regarded as unlikely that surrogate motherhood would be able to be carried out in Sweden. Several grounds were given for this by the Insemination Committee, referring to the adoption provisions in force at the time. The grounds were primarily economic. First, it was significant that an adoption application may not be approved if, inter alia, payment has been given or promised by either the adoptive or the relinquishing parents.\(^{267}\) The Committee thus found that ‘[s]ince a proportionately high payment will probably be a condition for the entire procedure, it is likely that surrogate motherhood would fall through already on this ground’.\(^{268}\) In addition, it was pointed out that a contract for payment, which would have led to the adoption application being rejected if the court had known about the contract, is without effect even if the application is approved.\(^{269}\) Moreover, in an adoption matter, the court must obtain information from the Social Welfare Committee about, inter alia, whether payment has been given or offered.\(^{270}\) Accordingly, the Committee believed that since the adoption provisions imply that the adoption may only be approved by the court after a social investigation regarding the suitability of the intended parents, there could be no guarantee that the “ordering” couple would be permitted to adopt the child they ordered. As to why surrogacy could not be supported, the Committee found that:\(^{271}\)

the process [of surrogacy] presupposes that the legally-binding contract between the ordering couple and the surrogate mother shall override the prevailing provisions on adoption. It is, of course, for the child, of great importance that no obscurity exists regarding who has responsibility for [him or her].\(^{272}\)

\(^{267}\) SOU 1985:5 p 49, referring to FB 4:6. The provision on this issue is still the same at the time of writing.
\(^{268}\) SOU 1985:5 pp 49-50.
\(^{269}\) SOU 1985:5 p 49, referring to FB 4:6. As stated in the footnote above, the provision on these issue still apply at the time of writing.
\(^{270}\) SOU 1985:5 p 49, referring to FB 4:10. This provision is still applicable today.
\(^{271}\) SOU 1985:5 p 50.
\(^{272}\) SOU 1985:5 p 50.
An interesting feature of the Insemination Committee’s discussion on surrogate motherhood is its reference to surrogacy as ‘a new type of adoption practice’ which, ‘in technology’s footsteps’, has begun to be applied.\(^{273}\) This is a stark reminder of the enormous changes that have taken place in the area of assisted reproduction since the mid-1980s. The Committee’s focus in this part of its report appears to be on the process of adoption rather than surrogacy. That is to say, it refers to what we now know as partial and full – or traditional and gestational – surrogacy in terms of adoption, not as an independent medical procedure from which adoption could follow. In the words of the Insemination Committee: ‘[b]oth of the above forms of adoption [my emphasis] are, in everyday speech, called surrogate motherhood.’\(^{274}\)

Another significant concern held by the Insemination Committee was that surrogacy arrangements conflicted with the fundamental principle of Swedish law that a woman has the right to be in control of her own body. The implications of this principle on surrogacy – which are still relevant today – are that the surrogate could not be prevented, irrespective of the contract terms, from inter alia neglecting herself during the pregnancy; from abusing drugs or medication; or even from terminating the pregnancy.\(^{275}\) In the Committee’s view, a condition central for the realisation of surrogacy arrangements was that, already in the foetal phase, someone other than the surrogate herself has a right of determination over the child.\(^{276}\) This was, and continues to be, difficult to reconcile with Swedish law.

Within the context of concerns, two other issues were raised in the Insemination Committee’s report which should be mentioned. First, the Committee expressed concern in relation to the absence of known guidelines for surrogacy both in the USA and in the UK. In its view, this meant that several legal questions pertaining to surrogate motherhood could be regarded as unresolved in these countries. Examples given of such legal questions included the following possible scenarios:

\(^{273}\) SOU 1985:5 p 33. Also see the same comment in the deliberations and recommendations on surrogacy, p 49.
\(^{274}\) SOU 1985:5 p 33.
\(^{275}\) SOU 1985:5 p 33.
\(^{276}\) SOU 1985:5 p 50.
• A surrogate mother refusing to surrender the child;\textsuperscript{277}
• the “ordering” couple refusing to take the child;\textsuperscript{278} and
• the court rejecting an application for adoption.\textsuperscript{279}

Secondly, an issue was raised concerning genetic origins. Here it was noted by the Committee that if the child born to the surrogate mother is not her genetic child, the legal situation is uncertain where it concerns the child’s descent/ancestry.\textsuperscript{280}

\textbf{3.2.1.3 Support for Insemination Committee assumptions in Government Bill on IVF}

In the Government Bill on IVF,\textsuperscript{281} surrogate motherhood was completely rejected.\textsuperscript{282} The Insemination Investigation’s conclusions in relation to surrogacy were fully supported and it was proposed that surrogate motherhood be prohibited.\textsuperscript{283} Three motivating factors for rejecting surrogacy, in line with the issues raised by the Insemination Committee, were expressly mentioned in the Bill:

\textsuperscript{277} SOU 1985:5 p 33. Since adoption is dependent upon the surrogate mother’s consent, if she changes her mind and wants to keep the baby she can thus prevent the adoption from taking place by refusing to consent to it (SOU 1985:5 p 50), thereby emphasising the uncertainty of surrogacy arrangements.
\textsuperscript{278} SOU 1985:5 p 33. ‘[T]here is no regulation that forces the “ordering” couple to fulfil the contract’ (SOU 1985:5 p 50).
\textsuperscript{279} SOU 1985:5 p 33. Other issues such as who has the right to determine what happens to the foetus eg in questions of abortion, and whether the “ordering” couple have any influence over the surrogate mother’s lifestyle during the pregnancy where it concerns alcohol and medication usage, or smoking (SOU 1985:5 p 33).
\textsuperscript{280} SOU 1985:5 p 50.
\textsuperscript{281} Prop 1987/88:160.
\textsuperscript{283} Prop. 1987/88:160 p 14, see first line under Part 2.5 of the Bill: “Surrogatmoderskap skall vara förbjudet”. This appears to indicate the intention for, or need of, some form of express legislative prohibition against surrogacy, something which has never eventuated either through the IVF Law (and now GIA), the Children and Parents Code, or the Penal Code.
1. That the practice of surrogacy conflicted with the fundamental principle in relation to adoption that compensation may not be given or offered;

2. that surrogate motherhood conflicted with prevailing legal principles in that it required that someone other than the pregnant woman would have the right of determination over the child already in the foetal stages; and

3. that the practice of surrogacy would presuppose that the legal contract between the commissioning couple and the surrogate mother would override the prevalent provisions on adoption.284

It was concluded, also in line with the Insemination Committee’s Report, that the prohibition on egg donation would preclude gestational surrogacy.

3.2.1.4 Are arguments against surrogacy equally valid today?

An important question that should be considered is whether arguments put forward against surrogacy and against its regulation when it first became a political issue are equally persuasive, or well-grounded, today?

From the outset, it must be emphasised that the absence of altruistic surrogacy is no longer assumed as it was in the 1980s.285 In turn, it is no longer assumed that surrogate-born children must become objects of financial bargaining. These two old assumptions would therefore no longer serve as a hindrance to the development of any future Swedish policy on surrogacy.

As to the legal arguments, most arguments raised against surrogacy by the Insemination Committee in 1987 – with the possible exception

284 Prop. 1987/88:160 p 14. These points were raised in SOU 1985:5 p 50. The opinion given by the Parliamentary Committee on Health and Welfare was also consistent with the Government Bill and the Insemination Committee. See bet SoU 1987/88:26 p 12.

285 This is evident both from the acknowledgement that altruistic surrogacy could, under certain conditions, be an ethically defensible method of ART (SMER 2013:1 p 171); and from the recent Terms of Reference for the investigation on increased possibilities for the treatment of infertility, which expressly directs the investigator to, inter alia, take a position on surrogacy, with the starting point that it ‘shall be altruistic’ (Dir 2013:70 p 1).
of some of the adoption arguments which seemed to rest on the belief that surrogacy and adoption were one and the same process – continue to be well-motivated today. Connected questions that should be asked, then, are whether the existing law could be amended; and how new laws could be drafted in order to protect the interests of the parties in question. Clearly, a decision about whether surrogacy arrangements should be supported through regulation or prohibited must be the first step. If, for example, it were to be decided that surrogacy should be permitted, the concerns expressed above – that legalising surrogacy could not co-exist with certain Swedish laws – could be alleviated. It should be possible to draft surrogacy legislation and any relevant amendments to associated laws in such a way that they do not conflict with existing Swedish law. As will be seen in the following chapters, there is more than one way to regulate surrogacy. What needs to be done, rather, is to determine which sort of surrogacy regulation would be appropriate in Sweden and then make it fit into our legal culture rather than accepting the legal culture of another State. In this way, it will be possible to ensure, for example, that surrogacy arrangements are not ruled by commercial interests; that surrogates retain their right to self-determination; that children are not made the objects of financial bargaining and that the institution of adoption is not compromised.

Whether the ethical concerns that have been raised – not only in the preparatory works but also in other forums – are still equally persuasive today, and whether the practice of surrogacy could be reconciled with these concerns, is another question. At the same time, however, it is clear that these early perceptions about the impact of surrogacy have influenced the direction taken by subsequent investigations, and the legislature, in relation to the issue of surrogacy and parenthood.

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286 While it is beyond the scope of this chapter to explore this question, if one’s aim is to argue for a review of surrogacy policy in general, it might be helpful to revisit some of the arguments, above, to see whether they are equally relevant or well-grounded today.
3.2.2 Surrogacy and parenthood

3.2.2.1 Clarifying the status of birth mothers – Government Bill on infertility

Even though the issue of surrogacy has been raised in a number of public and governmental investigations and preparatory legislative materials to date, questions specific to how to establish or transfer legal parenthood following surrogacy arrangements have, until now, not been considered in depth.

Clarifying the status of birth mothers was, however, an issue raised in the Government Bill on the treatment of infertility. This was prior to the implementation of changes that were to permit egg donation in Sweden. At that time, the Government considered the possibility of introducing a statutory rule on maternity by adding a new provision into Chapter One of the Children and Parents Code as follows:

The woman who gives birth to a child is the child’s mother.

The intention was to create a general statutory rule of maternity in favour of the gestational mother, in order to ensure that a woman giving birth after egg donation in Sweden would be regarded as the legal mother of the child. The effect of codifying the unwritten presumption of maternity would have removed any doubt about maternity following egg donation, making it clear that maternity would be determined in accordance with a gestational rather than a genetic connection to the child. It would also have clarified maternity following surrogacy arrangements.

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287 See for eg SOU 1985:5, Prop 1987/88:160; Ds 2000:51; and prop 2001/02:89. See also SOU 2007:3 (here the issue was only mentioned, not discussed: see p 48).
288 This, however, could change soon since the Terms of Reference for the investigation on increased possibilities for the treatment of infertility give the investigator the task of proposing amendments that would need to be made to, inter alia, the family law on parenthood in line with the outcome of the investigation. (Dir 2013:70 pp 1, 9-11.)
289 Prop 2001/02:89.
290 Proposed wording for FB 1:8. See Lagrådssremiss, Behandling av ofrivillig barnlöshet (2001) p 5. (The referral was presented to the Council on Legislation on 29 November, 2001.); Prop 2001/02:89 p 75 (Bilaga 3, Lagrådssremissens lagförslag); and prop 2001/02:89 p 67 (Bilaga 1, Lagförslag i Ds 2000:51).
291 See prop 2001/02:89 p 55.
The intention that the scope of the proposed provision should extend to maternity following surrogacy appears clear from the wording of Part 7.2 of the Bill which dealt with surrogate motherhood, even though surrogacy itself was expressly regarded by the Government as ethically indefensible and not the subject of regulation at that time. Here, the Government stated that:

the question of surrogate motherhood, as well as the question of egg donation, makes it urgent that it is established in the law who shall be regarded as the mother of a child.292

Thus, even though the main impetus behind the proposed amendment was to ensure that there would be no confusion as to the legal status of the mother following egg donation, it appears clear that the implementation of a general statutory rule of maternity reflecting the Mater-est rule, was originally intended.

This view is further supported by comments made by the Government in its referral to the Council on Legislation from which it sought advice regarding, inter alia, the proposed amendments to the Children and Parents Code.293 In regard to the proposed amendment on maternity, it was emphasised that the new provision should make clear that ‘the woman who gives birth to a child shall in legal respects always be regarded as the child’s mother.’294 The recommended formulation of the proposed amendment specifically reinforces this.295

3.2.2.2  No need for a general statutory rule of maternity – Council on Legislation

After reviewing the Government’s proposed amendments to the Children and Parent’s Code, the Council on Legislation found that, rather than a general statutory provision of maternity, a specific provision, the scope of which was confined to egg donation, would be more ap-

292 Prop 2001/02:89 p 55.
293 Lagrådssremiss, Behandling av ofrivillig barnlöshet (2001). (The referral was presented to the Council on Legislation on 29 November, 2001.)
294 Lagrådssremiss, Behandling av ofrivillig barnlöshet (2001) p 49. (The referral was presented to the Council on Legislation on 29 November, 2001.) Note: My emphasis on the word “always”.
The Government followed the Council’s recommendation.

According to the Council on Legislation, the motivation behind the proposed new generally-formulated rule was to make it clear that a woman who gives birth to a child shall be regarded as the child’s mother even when the child has been conceived following the fertilisation of another woman’s egg. The Council considered, however, that the provision under consideration was formulated so that it established maternity for all children and not only for those belonging in the very limited group which was really intended with the provision.

Referring to the Latin maxim *mater semper certa est* it was pointed out that customarily, in the European legal systems, maternity has been regarded as an easily established biological fact and to this end there has been no need to legally regulate who a mother to a child is. Moreover, in the view of the Council, the reason behind the proposed change to the Code was not because a general need for such a provision had arisen. Rather, the proposed amendment was chosen to solve a specific problem that could arise when a woman gives birth following egg donation; that in such a case it might be regarded as unclear whether the gestational mother or the genetic mother should be regarded as the child’s legal mother.

It is apparent from the Council’s opinion that it understood the proposed amendment was intended to set aside any doubt about who the legal mother was by giving precedence to the gestational mother. Even so, it found it unnecessary to formulate a general legal rule on maternity in order to solve the specific problem. To this end, it considered it preferable to enact a special provision which was limited in scope to respond to the particular problem identified.

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298 On the question of who and what is a mother see M Freeman, and A Margaria, ‘Who and what is a mother? Maternity, responsibility and liberty’ (2012) 13 Theoretical Inq.L 153-179. In this article, the authors explore the issue from a European perspective in the context of anonymous birth and its implication for a child’s right to know his or her origins.

299 Prop. 2001/02:89, pp 83–84 (Bilaga 4).

300 Prop. 2001/02:89, p 84 (Bilaga 4).
The issue of surrogacy is not specifically addressed in the Council’s opinion.

### 3.2.2.3 Discussion

Clearly, there was no indication from the Bill on the treatment of infertility that surrogacy with ART should be supported and promoted. Moreover, measures to prevent this had already been taken care of by the proposed amendments to the Genetic Integrity Act (see below). The purpose of the originally-proposed amendments to the Children and Parents Code, then, was not to prevent ART surrogacy (which had already been achieved via implied prohibitions in the Genetic Integrity Act) or back door surrogacy arrangements, but to clarify legal parental status where it was uncertain. This situation was and is relevant not only for gestational mothers who give birth following egg donation in Sweden but also for surrogate mothers who might happen to give birth in Sweden, or Swedish commissioning mothers who engage a surrogate abroad.

Accordingly, that this was an opportunity to also clarify the family law status of future surrogate mothers must have been anticipated and intended, even when there was no intention to regulate surrogacy. The Government of the day must have realised it could not completely prevent surrogacy arrangements from being entered into abroad, or – in the case of traditional surrogacy – even in Sweden. And there is no indication that it considered it appropriate to try to prevent this; something which is apparent from the absence of criminal sanctions (ie not prosecuting parents) and the fact that privately-arranged surrogacy arrangements which do not require ART are not prohibited, even though they are not enforceable.

### 3.2.2.4 Concluding reflections – surrogacy and parenthood

It should be emphasised that the reasons set out by the Insemination Committee appear to have been given in order to justify why it would not be necessary to regulate surrogacy, rather than to justify why surrogacy should not be permitted. That is to say, the Committee was presumably trying to show that surrogacy arrangements would be inconsistent with current Swedish law and that, importantly, even
should they occur, such arrangements could not be sanctioned by law or enforced amongst the parties.\textsuperscript{301}

Given Sweden’s record in relation to protecting the best interests of the child, it may, on the one hand, seem remarkable that no specific mechanism which clarifies the status of the parents, and thus the child, following surrogacy has been implemented to date. On the other hand, and with the benefit of hindsight, the explanation for this might well lie in the fact it was genuinely not considered necessary to regulate parenthood in this connection in order to protect the child’s interest since Swedish law already contained a number of built-in obstacles to prevent the enforcement of surrogacy arrangements.\textsuperscript{302} Accordingly, the apparent acceptance that surrogacy arrangements would not be workable in Sweden without regulation, could explain – at least in part – why there is no regulation of parenthood following surrogacy today.

The dramatic advances in reproductive technology in recent years, making it possible to separate genetic motherhood from biological motherhood, could not have been anticipated when the Children and Parents Code was drafted over 60 years ago. Such advances were barely predictable in the mid-1980s, when surrogacy was examined for the first time by the Insemination Committee. Even in 2001, when the Council on Legislation considered whether or not a general statutory provision clarifying motherhood was necessary, it must have been difficult to contemplate the growth in the global surrogacy industry, which in turn has increased the possibilities for couples in Sweden to access such services. These changes are significant and they have an impact on family law status and how parenthood is perceived. In the interests of certainty it might be time to reconsider whether sole reliance on the \textit{Mater-est rule} to define a mother is as clear-cut as seemed before the so-called reproductive revolution. In addition, is it the most suitable way forward and, even if so, might there now be advantages of enshrining the principle in legislation?

\textsuperscript{301} In this way, it was able to avoid taking a stand on some of the difficult ethical issues which might have provided more convincing reasons for not permitting its practice.

\textsuperscript{302} See Part 3.2.1.2, above (with reference to SOU 1985:5).
3.3 The Genetic Integrity Act

Even though surrogacy arrangements are not expressly prohibited by statute, the Genetic Integrity Act, which regulates assisted reproductive technology, contains an implied statutory prohibition against surrogacy. This is expressed in terms of a restriction and may be found in Chapter 7, Section 3 of the Act which provides that:

[a] fertilised egg may only be introduced into a woman’s body if the woman is married or a cohabitant and the spouse or cohabitant has consented to this in writing. If the egg is not the woman’s own, it must have been fertilised by the spouse’s or cohabitant’s sperm.

Thus, under current Swedish law, ART may not be carried out unless at least one of the prospective parents is genetically connected to the child. Since the woman giving birth must also be one of the prospective parents, this provision, in effect, prohibits the use of ART to facilitate surrogacy arrangements.

This does not, however, imply that Swedish couples cannot engage the services of a surrogate mother. The provision, above, applies only to procedures carried out under the Act; that is to say, ART procedures taking place either in a publicly-funded Swedish hospital or an institution authorised by the National Board of Health and Welfare to perform such procedures. There is no express or implied legislative provision that prohibits DIY surrogacy arrangements made between private individuals.

It should also be pointed out that, even though the criminal law does not provide for the statutory regulation of surrogacy ie by way of the Penal Code, criminal sanctions can flow from surrogacy arrangements. Chapter 8, Section 5 of the Genetic Integrity Act provides that ‘[a] person who violates Chapter 7, Section 3 or 4, habitually or for profit, shall be sentenced to a fine or imprisonment for up to six months.’

303 SFS 2006:351.
304 SFS 2006:351 Ch 7, s 3. Note: Ch 8, s 5 provides for the possibility of criminal sanctions for breach of Ch 7, ss 3-4.
305 Because ART is only permitted in situations where ‘the woman is married or cohabiting’: SFS 2006:351 Ch 7, s 3. See also Ch 6, s 1 concerning donor insemination.
306 SFS 2006:351, Ch 6, s 2; Ch 7, s 4.
To conclude, the wording of Chapter 7, Section 3 of the Genetic Integrity Act, above, impliedly prohibits the use of ART for the facilitation of surrogacy arrangements. It follows, that any such facilitation would involve a breach of this part of the Act and could subsequently result in the imposition of criminal sanctions. Although this provision has not been tested at the time of writing, it is clear from the wording of Chapter 7, Section 3 that criminal sanctions in a given case would only apply to the doctor who transferred the fertilised egg to the woman’s body, or to the institution which employed the doctor, not to the commissioning couple. Moreover, in order to attract criminal sanctions it would have to be shown that the violation was carried out either habitually or for profit.

3.4 The Children and Parents Code

The Swedish rules on parenthood, and on how legal parenthood is established following a child’s birth, are set out in the first three chapters of the Children and Parents Code. Chapter Four of the Code deals with legal parenthood through adoption. In the absence of specific statutory provisions about surrogacy, it is these rules that would also form the foundation on which to establish of parenthood following surrogacy arrangements. To this end, a brief overview of the application of the general parenthood rules, and those rules pertaining to parenthood following ART, is set out below before turning to the various ways in which legal parenthood is or would be acquired or allocated after surrogacy today.308

The Children and Parents Code currently classifies parenthood in three ways, distinguishing between paternity (faderskapet), maternity (moderskapet) and parenthood (föräldraskapet). It should be men-

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tioned that in the Code, the term parenthood, or föräldraskapet is not only used in its generic sense.\textsuperscript{309} The term is also used as an alternative to fatherhood for the second – and in this case female – parent.\textsuperscript{310} Thus, for the purposes of Chapters 1–3 of the Code, a legal parent is either a father (male), a mother (female) or a parent (female spouse of the mother).

How, then, is parenthood established for those “parents” in the categories mentioned? Is there a single determining factor or basis on which the allocation of legal parentage turns? If not, what alternative bases are used and how does the law define or justify them?\textsuperscript{311}

3.5 Legal parenthood following surrogacy arrangements

3.5.1 Introductory remarks

In the absence of specific statutory provisions for the establishment of parenthood following surrogacy arrangements,\textsuperscript{312} what, is, or would be, the legal parental status of the various parties to a surrogacy agreement at the time of the child’s birth? To this end, the purpose of Part 3.5 is to attempt to determine who would, or would not, be the legal parents of the surrogate-born child under existing Swedish law and on what basis.

Irrespective of whether or not a dispute were to arise in relation to parental status, the existing Swedish rules governing the establishment of parenthood, below, would have to be applied to the facts in the case at hand in order to determine who the legal parents of the child are. The likely outcome of applying these rules in relation to each of the

\textsuperscript{309} That is to say, relating to or describing the entire group or class of parents; something which could include eg maternity and/or paternity, or the general role of being a parent.

\textsuperscript{310} And also to distinguish the second legal female parent from the legal mother. See, eg, Ch 1, s 3.

\textsuperscript{311} For example, in the way that the alternative of intention as a basis for determining parentage following ART is with reference to the consent of the intended parent prior to the ART procedure.

\textsuperscript{312} Cf with rules on the establishment of parenthood following other forms of ART – although note that where it concerns home insemination – which is not regulated either – the issue of parental status/parenthood is still clearly established by law.
parties to a surrogacy arrangement is explored in this Part. Parenthood through adoption is considered in Chapter Seven.

3.5.2 Establishing maternity

3.5.2.1 No general provision – unwritten law applies

The Children and Parents Code contains no general statutory provision clarifying maternity. In its absence, Swedish law applies the unwritten presumption of maternity which stems from the Roman-law principle *mater semper certa est* (the mother is always certain). Historically, the question of who is the mother of a child has been regarded as so obvious that the Swedish legislator, along with most legislators in Europe, has not considered it necessary to clarify by enshrining it in statute. This unwritten rule of the civil law often appears alongside another Latin maxim: *mater est quam gestatio demonstrat* (by gestation the mother is demonstrated). While these principles (hereafter referred to as the *Mater-est rule*) have now been codified in several jurisdictions with wording to the effect that ‘the mother of the child is the woman who gives birth to the child’, most jurisdictions, including Sweden have not yet found this necessary.

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313 See comments made by the Council on Legislation in prop 2001/02:89 pp 83-84 (Bilaga 4), above in Part 3.2.2.2.
314 See further Singer 2000 (n 53) pp 365–366. See also Anna Singer, ‘“Mater semper certa est”?’ Juridisk Tidskrift 2006–07 Nr 2, 424. As to the (historically) perceived necessity of establishing who the mother to a child is, Singer (at p 424) gives the example of the Statute-drafting Board in 1915 which was of the opinion that ‘it is directly evident who is the mother of a child’. (Referring to Lagberedningens förslag till revision av giftmälsbalken och vissa delar av ärvadabalken. III. Förslag till lag om barn utom äktenskap mm, Stockholm 1915 s 190.)
315 See C L Baldassi, ‘Mater Est Quam Gestatio Demonstrat: A Cautionary Tale’ (27June 2007). Available at SSRN: http://ssrn.com/abstract=927147 p 3 (of 21). Note, however, Baldassi’s comments that while this phrase is often referred to as a common law maxim, its origin is in fact from 1983, not ancient Latin law. According to Baldassi, the maxim was intended ‘as a new companion phrase for the longstanding *pater est* presumption, since the latter’s traditional partner, *mater semper certa est*, had outlived its usefulness in an age of bifurcated biological motherhood, with certainty no longer being as possible as it was in the past.’ See pp 6–7.
3.5.2.2 Maternity following ART – egg donation

Even though there is apparently no need to expressly clarify maternity, the Children and Parents Code does make one exception by defining motherhood following egg donation. Chapter One, Section 7 of the Code provides that:

>[i]f a woman gives birth to a child who has come into existence after an egg from another woman has, through in vitro fertilisation, been introduced into her body, she shall be regarded as the child’s mother.\(^{317}\)

The wording of this provision reinforces the principle *mater est quam gestatio demonstrat*, above. The Code makes it clear that maternity following egg donation, is connected to the pregnancy and birth. Thus, gestation becomes the determining factor for maternity, overriding genetics.

Interestingly, rather than reinforce the unwritten rule of maternity, the inclusion of this provision in the Children and Parents Code raises additional questions about what determines a mother. If it has been, and continues to be, so obvious that the gestational mother must be regarded as the legal mother,\(^{318}\) one might wonder why it was necessary for the legislator to specifically clarify maternity where it concerns egg donation.\(^{319}\)

One possible explanation could be that it somehow reinforces *intention to parent* since – without the provision clarifying maternity for egg donation – it is not absolutely clear whether gestation or genetics should or would rule. If this is the case, it follows that, in relation to surrogacy, it is not absolutely clear either.

3.5.2.3 Maternity following surrogacy

In light of the above, is, or should, maternity following surrogacy be based on:

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\(^{317}\) FB 1:7. This provision introduced by SFS 2002:251.

\(^{318}\) See comments made by the Council on Legislation, in prop 2001/02:89 pp 83-84 (Bilaga 4).

\(^{319}\) Moreover, if one of the intentions behind the rule in FB 1:7 was in fact to prevent back door surrogacy arrangements (see comments made by Anna Singer and Åke Saldeen in Part 3.7.2 below), it could be regarded as unusual that there is no express indication of this intention in the preparatory works.
1. a combination of intention and genetics (in favour of the commissioning mother following gestational surrogacy);

2. intention alone (in favour of the commissioning mother following traditional surrogacy); or

3. gestation alone (in favour of the surrogate mother following traditional and gestational surrogacy)?

It is obvious that the same bases apparently used for establishing maternity with egg donation (intention and gestation) are not appropriate for surrogacy. After all, an objective central to surrogacy arrangements – that the commissioning mother will become the legal mother – is the opposite to the corresponding objective of egg donation, where the aim is for legal parentage to remain with the gestational mother. 320

Since unwritten Swedish law is the source used for determining how maternity is established, above, the surrogate mother will be regarded as the legal mother of the child when the child is born because she has given birth to the child. The Mater-est rule will be applied and maternity will be conferred on the surrogate by virtue of gestation. Even if it is her intention to relinquish the child to the commissioning parents, she will still be regarded as the legal mother at the time of the child’s birth. Likewise, if the surrogate were to be genetically connected to the child – as would be the case with privately arranged surrogacy taking place in Sweden – this factor, while not irrelevant, would not be decisive for the purposes of determining legal parentage. 321

A commissioning mother has no legal parental status under Swedish law at the time of the child’s birth. Even if she has supplied the

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320 One could compare this with the need for statutory clarification about what determines fatherhood following sperm donation. There, the corresponding distinction was between genetics and intention. In the case of egg donation, however, there are two determining factors that are relevant: gestation and intention.

321 Apart from being against public policy, any challenge of maternity on the grounds of intention alone (ie the agreement or contract) where the surrogate is also the genetic mother of the child would almost certainly be dismissed. The fact that the surrogate was the mother would be regarded as obvious by virtue of gestation. The question that remains, however, is whether a maternity dispute, in a situation where the surrogate was not the genetic mother, would be entertained at all. See Part 3.7.2 below re comments regarding a possible declaratory claim.
gametes for conception, her genetic relationship is irrelevant to her status as legal mother because she has not given birth to the child; maternity flows from proven gestation, above. Moreover, it makes no difference if the child is born in Sweden or abroad.\textsuperscript{322} Regardless of whether or not the commissioning mother’s parental status as legal mother is recognised in the jurisdiction of the child’s birth, she will not be recognised as the legal mother in Sweden, since, according to Swedish law, maternity flows from gestation.\textsuperscript{323} If it is known that she did not give birth to the child, the commissioning mother will be unable to assert a claim of maternity in relation to a surrogate-born child, irrespective of whether she is in a heterosexual union, a same-sex union, or single. In order to become the child’s legal parent, she must adopt the child.

Likewise, an egg donor has no legal parental status under Swedish law where it concerns surrogacy or any other ART procedure. Even though treatment for gestational surrogacy is unable to be performed

\textsuperscript{322} It is important to note that existing provisions of the Swedish Citizenship Act (SFS 2001:82) which regulate the citizenship of a child born abroad might mean that a child born overseas following a surrogacy arrangement is not automatically a Swedish citizen even where the commissioning parents are both the genetic parents of the child. The Act provides that a child acquires Swedish citizenship by birth if the mother is a Swedish citizen. In order to acquire citizenship by birth through a father, however, the child must also be born in Sweden, or the father must be married to the child’s mother, in this case the surrogate (Section 1). In a case reported in the tabloid press in 2009, the Swedish Ambassador – quite correctly – (initially) refused to issue a passport for a child born following commercial surrogacy in the Ukraine on the basis that the child was not a Swedish citizen. Here, the commissioning mother was unable to fall under the Children and Parents Code’s definition of “mother”. Moreover, the commissioning – and legal – father was not married to the surrogate; nor was the baby born in Sweden. See ’Får inte åka hem’, 2009-03-30 <http://www.aftonbladet.se/nyheter/article4770289.ab>). In response to this case, the Swedish Migration Board has created routines to make it easier for surrogate-born children born to Swedish parents abroad to receive a Swedish passport on the basis of the child’s genetic connection to the commissioning father. Thus, if paternity can be established in the country of birth, the Migration Board will issue a passport for the child but the father must nevertheless have his paternity established in accordance with Swedish law on his return to Sweden. Information obtained in a telephone interview and email correspondence between Jane Stoll and Bo Lundberg, Expert in Citizenship Issues, 22 January 2013. But note that the report of the Citizenship Investigation released in April 2013 has recommended that that a child be able to acquire Swedish citizenship at birth, if ‘one of the child’s parents is a Swedish citizen’ SOU 2013:29 Det svenska medborgarskapet [trans: Swedish Citizenship] pp 56, 280.

\textsuperscript{323} See FB 1:7 where it concerns egg donation.
in Sweden due to the restrictions on IVF, above, egg donation in connection with surrogacy procedures is still relevant for Sweden. Egg donation is an integral part of gestational surrogacy. Therefore, it always becomes an issue when Swedish commissioning couples retain a gestational surrogate abroad. Even in situations where commissioning parents supply their own gametes for the pregnancy, the commissioning mother – but not necessarily the commissioning father – will be regarded as a donor under Swedish law. The same will apply when commissioning parents travel abroad for surrogacy treatment using their own gametes with a Swedish surrogate, returning to Sweden for the birth, as happened in NJA 2006 p 505. In either situation, it is highly unlikely that a woman who provides her gametes for a pregnancy that she does not go through herself, would succeed in asserting legal parentage in relation to a surrogate-born child – irrespective of whether the child has been born in Sweden or abroad.

If the egg donor is also the commissioning mother, or a female commissioning parent, she would – like all other commissioning mothers, have to apply to adopt the child to have her legal parental status established, above.

### 3.5.2.4 Basis for maternity

The primary basis for establishing maternity under unwritten law, then, appears to be gestation. However, it could also be genetics, or both, since until recently the assumption has been that the woman who gives birth is not only the gestational mother but also the genetic mother. The role of intention as a basis for determining motherhood at birth has historically been irrelevant.

Where it concerns the determination of legal maternity following ART, while the significance of intention is not irrelevant, the primary basis for maternity following egg donation – in line with the provision contained in Chapter One, Section 7 of the Children and Parents Code – appears to be gestation.

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324 See Part 3.3.
325 See Part 3.7.2 re one possible alternative, that the commissioning genetic mother could institute a declaratory claim (but the outcome would be most uncertain).
326 That is, cf motherhood in general where it plays no role in determining legal maternity.
3.5.3 Establishing paternity

3.5.3.1 General provisions

The Roman presumption of paternity *pater est quem nuptiae demonstrant* (the father is he whom the marriage points out), also known as the *Pater-est-rule*, was applied to determine fatherhood in Sweden until 1917 when it became part of the written law. The establishment of paternity is now, like maternity with egg donation, regulated by the Children and Parents Code. Under the Code, paternity continues to be presumed in certain situations.

A man who is married to the child’s mother at the time of the child’s birth is automatically deemed to be the legal father of the child. His paternity, however, may be revoked in certain situations, set out in the Children and Parents Code. The same applies if the mother is a widow, assuming the child could have been conceived before the husband’s death.

In other situations, paternity – whether presumed or not – must be established by confirmation, or by court judgment.

If a man is not married to the child’s mother but they are cohabiting under marriage-like conditions, his paternity will be presumed but it must also be confirmed in accordance with Chapter One, Section 4 of the Children and Parents Code before it can be established. This provision sets out the necessary elements required for a valid confirmation of paternity. Such a confirmation must be in writing and be witnessed by two persons. It must also be approved by the legal mother of the child and by the Social Welfare Committee. A father who is not living with the child’s mother must also confirm his paternity in order to have it established.

If paternity is not automatically deemed or presumed, or if it cannot be confirmed, it can be established through court judgment.

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329 FB 1:1. Presumptions of paternity are rebuttable.

330 In accordance with FB 1:5(1).
Social Welfare Committee is obligated to try to find out who the child’s father is and to ensure that paternity is established.331

3.5.3.2 Paternity following ART

The presumptions of paternity, above, also extend to fatherhood following ART in certain circumstances.

After insemination or IVF, with or without donor gametes, a man who is married to the child’s mother when the child is born is deemed to be the legal father of the child. If donated gametes were used for the conception, he can have his paternity revoked if he can show that he did not consent to the procedure. Where the child’s father is a cohabitant he will be presumed the father of the child if he consented to the procedure.332 A cohabitant must, however, confirm his paternity in order for it to be established, above. This rule applies even in relation to privately-arranged donor insemination, and insemination carried out abroad.333

A donor who provides sperm for a private insemination in Sweden could, however, confirm his paternity if there is no consenting husband or cohabitant to the procedure. Even if the mother is married, or a cohabitant, the donor could still confirm his paternity in accordance with Chapter One, Section 4 of the Children and Parents Code, above. The Court could also declare a sperm donor to be the child’s father through judgment if paternity could not otherwise be presumed or confirmed.334 Paternity cannot, however, be established through judgment in relation to a sperm donor who has donated in accordance with Chapters Six or Seven of the Genetic Integrity Act.335

3.5.3.3 Paternity following surrogacy

It is possible for legal parental status to be conferred on the husband or male cohabitant of the surrogate mother. If the surrogate is married, her husband will automatically be deemed the legal father of the child when the child is born.336 If it is otherwise shown that he is not the child’s father his paternity could be revoked in accordance with Chap-

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331 FB 2:1.
332 See FB 1:6.
334 In accordance with FB 1:5(1) 1. See further Walin and Vängby, above, 1:27.
335 FB 1:5(2).
336 In accordance with the rule in FB 1:1.
ter One, Section 2 of the Children and Parents Code. Presumably, he would be expected to prove that he did not consent to the surrogacy insemination.\(^{337}\) If the surrogate mother is not married but living in marriage-like conditions, her male cohabitant will be presumed the legal father of the surrogate-born child if he consented to the surrogacy arrangement but in this case, his parentage must be confirmed and approved by the Social Welfare Committee before paternity can be established.\(^{338}\)

A commissioning father who has supplied his sperm for the conception of a surrogate-born child could acquire legal parental status through a confirmation of paternity, as was the case in NJA 2006 s 505, above. Thus, while a commissioning mother’s genetic relationship might be legally irrelevant in relation to legal parental status following surrogacy, the genetic relationship of the commissioning father is relevant. To this end, and bearing in mind that all surrogacy inseminations carried out in Sweden today are DIY inseminations, the fact that the paternity of the surrogate’s husband is presumed and automatically deemed would not prevent the commissioning genetic father having his paternity confirmed. Assuming that the surrogate mother and her husband were to endorse the confirmation of paternity made by the commissioning father, the paternity of the surrogate’s husband can be revoked and the commissioning father’s paternity will be approved by the Social Welfare Committee.\(^{339}\) Irrespective of whether the commissioning genetic father is in a heterosexual union, a same-sex union, or single, his legal parental status may be established through confirmation. As with the presumption of paternity following ART, however, if the surrogate mother is married, her husband will automatically be presumed, and deemed, the child’s legal father at the time of birth.

Although an objective of surrogacy is that the commissioning father will become the legal father of the surrogate-born child, a sperm donor who is not the commissioning father and who donates his sperm for the purposes of a DIY surrogacy arrangement could nonetheless acquire legal parental status. This is an interpretation that must be made from the rule establishing paternity following insemination in

\(^{337}\) Since FB 1:6 provides that a man who consents to his wife’s insemination is deemed to be the child’s father.

\(^{338}\) Confirmation of paternity in accordance with FB 1:3 – FB 1:4; Consent as required by FB 1:6.

\(^{339}\) In accordance with FB 1:2, FB 1:4.
Chapter One, Section 6 of the Children and Parents Code, above. The rule does not distinguish between a sperm donor who donates his sperm privately for the purposes of a surrogacy-insemination and a sperm donor who donates privately for traditional insemination. Thus, it follows that the possible ways paternity could be acquired by a donor following a DIY surrogacy-insemination would be the same as those outlined above in relation to paternity following DIY traditional insemination. That is to say, if he wished to assert his paternity he could attempt to confirm his parentage in accordance with the Code, above, based on his genetic connection to the child. Like the situation where paternity is confirmed by a commissioning father, above, it would have to be approved by the child’s legal mother (in this case the surrogate), her husband as the case may be, and the Social Welfare Committee. Paternity could also be conferred on a sperm donor in the absence of intention. This might be possible, for example, if the surrogate mother’s husband were able to have his paternity revoked or, in the case of an unmarried surrogate, if neither the commissioning father nor the surrogate’s cohabitant agreed to accept or confirm paternity in relation to the child. In these situations, if the sperm donor refused to confirm his parenthood, paternity would have to be established through court judgment.

3.5.3.4 Basis for paternity

Accepting that the existence of marriage serves as a default basis through which paternity is established – since a mother’s husband is always deemed the father at the time of the child’s birth – and that this can be revoked, what other (non-default) bases remain for the determination of legal fatherhood?

Where ART is not involved, the primary basis for determining paternity appears to be genetics. This is indicated by the way in which the Swedish Authorities are required to investigate the identity of the genetic father where the mother is not married, if paternity is not oth-

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340 Since donating sperm privately is not an action covered by the GIA, it does not protect a donor from legal parental responsibility. In the same way, it would not prevent a sperm donor from asserting parentage in relation to a surrogate-born child.

341 See FB 1:5 in relation to establishing paternity through court judgment. Although a sperm donor who donates in accordance with the provisions of the GIA cannot have paternity established by a court, surrogacy arrangements do not fall under the scope of the GIA. Therefore, a sperm donor providing sperm for a surrogacy arrangement would not be protected.
Intention to parent also plays a role, however. This is implied by the fact that a married man is automatically presumed to be the father of a child born during the marriage even if he has no genetic connection to the child born. Moreover, as was seen above, a married man need not confirm his paternity even if he is aware that he is not the genetic father of the child. It is conferred on him by default. If, however, his wife were to arrange a DIY insemination without his written consent, he would be able to revoke his paternity if he wished to do so. Thus, the actual basis for paternity in these situations does appear to strongly point towards intention even though the basis remains concealed beneath an illusion of genetics.

With ART, on the other hand, especially where treatment involves the usage of donor gametes, there appears to be a clear shift in relation to the primary basis used for determining paternity ie from genetics to intention. The intention is evidenced by the requirement that the spouse or cohabitant of a woman undergoing treatment must consent to the treatment. This consent becomes a determining factor for fatherhood following ART ie through his consent, the husband or cohabitant agrees, in writing, to take legal parental responsibility for the child born from another man’s sperm. The intention basis is further supported by the fact that paternity cannot be established in relation to a sperm donor who donates under the Genetic Integrity Act; the rationale being, inter alia, that it is never intended that a donor should become the parent of a child born from his genetic materials.

Where a couple’s own gametes are used in an ART procedure, the primary basis for paternity also appears to be genetics, as is indicated in the case of parenthood following conception occurring without ART, above.

3.5.4 Establishing parenthood – same-sex couples

3.5.4.1 Parenthood following ART

In 2005, a new provision introduced into the Children and Parents Code put same-sex female couples in a similar position as heterosexual...

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342 FB 2:1.
343 That is, legal parenthood (as opposed to maternity or paternity) in respect of the same-sex spouse of a legal mother or legal father.
al couples where it concerns presumptions of parenthood. Today, the wife, or female registered partner or cohabitant of a woman who gives birth following ART carried out in accordance with the Genetic Integrity Act, is presumed to be the child’s parent. Parenthood must, however, be established by confirmation or judgment. The requirements for a valid confirmation of parenthood by the mother’s spouse are the same as those for the confirmation of paternity set out in Chapter One, Section 4 of the Code, above.

The effect of the 2005 amendments to the Code was to place unmarried same-sex female cohabitants on an equal footing with their heterosexual counterparts where it concerns legal parentage following ART, as proposed. Married couples and registered partners in same-sex female unions, however, were not put in the same position as married couples in heterosexual unions, since parenthood for the second female parent must always be established through confirmation or judgment.

In this connection, it could be mentioned that two years later, in the report of the investigation into parenthood and assisted reproduction the issue of placing same-sex couples in the same position as heterosexual couples was also raised. Here, it was recommended that:

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344 This rule, introduced by SFS 2005:434, came into effect on 1 July 2005 in connection with the amendments to the Genetic Integrity Act which made it possible for female cohabitants or registered partners to have access to ART with donor sperm (see preparatory legislative materials Ds 2004:19 Föräldraskap vid assisted befruktning för homosexuella [trans: Parenthood with ART for homosexuals]; Prop 2004/05:137 om Assisterad befruktning och föräldraskap [trans: Government Bill on assisted reproduction and parenthood]; and 2004/05:LU25 Lagutskottets betänkande 2004/05:LU25 Assisterad befruktning och föräldraskap [trans: Report on ART and parenthood]).

345 FB 1:9. The original wording of this provision provided for the presumption of parenthood only for a registered partner or cohabitant. The word “wife” was added to the provision when amendments were made to the Code in 2009 (through SFS 2009:254) to take into account the introduction of same-sex marriage in Sweden.

346 See FB 1:9(2).


348 SOU 2007:3 Föräldraskap vid assisterad befruktning [trans: Parenthood with assisted reproduction].
The woman who is the mother’s registered partner shall automatically be deemed to be the child’s parent and a provision regarding parenthood for the mother’s partner (presumption of parenthood) comparable to the current presumption of paternity shall be introduced. … If the mother is a cohabitant with a woman, parenthood shall be established through confirmation or judgment in the same way that occurs today when the child is born following ART within the Swedish health system.349

An aim of the proposed provisions recommended by the investigator in the report,350 was to ensure that females in same sex unions who are married to or registered partners of the mother of a child would be automatically presumed a parent of the child born; the same situation applicable to married heterosexual males.351 Instead, however, the resulting amendments to the Children and Parents Code provide that parentage for females in same-sex unions must be confirmed, even where couples are married or in registered partnerships.

Why it is still necessary for the wife or registered partner of the woman who gives birth to have their parenthood established through confirmation – something which is not required of heterosexual couples – is unclear.

Where it concerns parenthood for same-sex male couples, Chapter One of the Children and Parents Code is silent in relation to the legal

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349 SOU 2007:3 p 75.
And note that the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL) have issued a living document outlining its demands in relation to family political issues. Here, the same view is expressed in relation to the presumption of parenthood as that outlined in the SOU, above. See RFSL:s familjepolitiska krav, 2009-08-08 p 4: <www.rfsl.se/public/rev_familjepolitisktprogram_090820.pdf> accessed 2012-11-21.
See also: RFSL:s yttrande över Föräldraskap vid assisterad befruktning (SOU 2007:3), 2007-09-03, p 2 (where RFSL were positive about the proposed introduction of a presumption of maternity). Available at <www.rfsl.se/public/ry_070903_assistbefr_sou20073.pdf> accessed 1 July 2013.
350 See SOU 2007:3 pp 15–24. See also an alternative draft text of the corresponding FB proposed provisions by Anna Singer (SOU 2007:3 pp 129–133).
parental status of the male partner who is not genetically connected to the child born. This is perhaps not surprising since the only way in which two men in a same-sex union are able to have a child together is through surrogacy/adoptive or adoption. In the first-mentioned situation, only one of them can be the genetic, and legal, father of the child at the time of the child’s birth.352

3.5.4.2 Parenthood353 following surrogacy

Today, the female spouse of a surrogate mother would have no legal parental status in relation to a surrogate-born child. As was seen above, the rule in Chapter One, Section 9 of the Children and Parents Code, whereby the spouse of the woman giving birth can have her parentage confirmed, applies only to ART performed in Sweden under Chapters Six or Seven of the Genetic Integrity Act. Surrogacy arrangements, however – whether privately arranged in Sweden or carried out abroad – do not fall under the scope of this section of the Code, or any other. It must therefore follow that there is no basis under Swedish law through which the female spouse of the surrogate mother could be regarded as a legal parent of the surrogate-born child at the time of the child’s birth.354

Nor would a female commissioning parent in a same-sex union – either through marriage, registered partnership, or cohabitation – have any legal parental status in relation to a surrogate-born child under Swedish law. She would have to adopt the child in order to become a legal parent. It should be mentioned that in such a case, since a commissioning mother has no legal parental status either,355 the couple would have to go through the traditional adoption process in order to adopt the child they commissioned.

Likewise, a male commissioning parent in a same-sex union who is the partner of the commissioning father could have no legal parental status under Swedish law. As was seen above, without being genetically connected to the child, there is no legal basis through which he could assert parentage. In order to become a legal parent he must apply to adopt his male partner’s child. In this case, however, assuming

352 In such a case, he would acquire paternity through confirmation, above.
353 That is, legal parenthood (as opposed to maternity or paternity) in respect of the same-sex spouse of a commissioning mother, commissioning father, or the surrogate.
354 On the scope of FB 1:9, see further Walin and Vängby (n 333) 1:36a.
355 Above.
it has been established that the commissioning father is the child’s legal father, a step-child adoption would be possible.

3.5.4.3 Basis for parenthood
As regards ART, the basis for establishing parenthood for the female partner of the child’s mother, in those situations where the rule in Chapter One, Section 9 of the Children and Parents Code applies, is intention, verified by consent to the ART treatment.

For the male partner, there is no legal basis for parentage at the time of the child’s birth. In order to become a legal parent the male partner of the child’s father would have to apply to adopt the child.

3.5.4.4 Concluding reflections
Where it concerns the determination of parenthood under the Children and Parents Code for same-sex couples following surrogacy, it seems clear that the only way a commissioning non-genetic parent can become the legal parent of a surrogate-born child is through adoption.

For male partners, a step-child adoption is possible for the non-legal parent, provided the genetic father of the child – the commissioning parent’s spouse – has already established his paternity.

For female commissioning couples, however, a step-child adoption is not possible because neither the commissioning mother nor her spouse – the commissioning female parent – can claim any legal parental status in relation to the child, since maternity flows with gestation.

Likewise, if neither paternity nor maternity has been established in favour of the commissioning father or the commissioning mother, the only way commissioning couples can become legal parents is to apply for adoption through the traditional adoption process.

One cannot fail to be struck by the different consequences for male and female same-sex couples wishing to have legal parentage established following surrogacy. It seems completely reasonable for a male couple to have the right to take advantage of the more streamlined stepchild adoption process when the commissioning father is the genetic parent of the child. However, it does seem equally unreasonable that a female couple in the corresponding situation should have to go through the entire traditional adoption procedure in order to be placed in the same position as their male counterparts. Understandably, this disparity is an unintended consequence of the law failing to keep up
with the realities of changing family constellations. Even so, if the legislator wishes to recognise and facilitate the rights of female couples following surrogacy arrangements, some consideration might be given to how this problem could be resolved. One possibility could be to give genetically-connected commissioning mothers in same sex unions the same right to have their legal parentage established following surrogacy as commissioning fathers have today.

3.5.5 Single commissioning parents following surrogacy

Regardless of whether or not a single commissioning mother is genetically connected to the surrogate-born child, she cannot be regarded as a legal parent under Swedish law because she has not given birth to the child (see above). The only way for a single female commissioning parent to become a legal parent is through adoption.

A single commissioning father, on the other hand, could become the legal father of the surrogate-born child by having his paternity established through confirmation, above.\textsuperscript{356}

\textsuperscript{356} Or where necessary, through court order/judgment, above.
3.5.6 Tables showing bases for parenthood and possible legal parents

3.5.6.1 Bases for parenthood following ART

Table 1. Range of bases for determining parenthood following ART with donor gametes in Sweden in 2013 (primary basis shown first).

<table>
<thead>
<tr>
<th></th>
<th>Egg donation</th>
<th>Sperm donation</th>
<th>IVF-Sperm donation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Gestational mother</strong></td>
<td>Gestation</td>
<td>Gestation Genetics</td>
<td>Gestation Genetics&lt;sup&gt;357&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Husband or male partner of gestational mother</strong></td>
<td>Marriage Genetics Intention</td>
<td>Marriage Intention</td>
<td>Marriage Intention</td>
</tr>
<tr>
<td><strong>Wife or female partner of gestational mother</strong></td>
<td>Not possible&lt;sup&gt;358&lt;/sup&gt;</td>
<td>Intention</td>
<td>Intention</td>
</tr>
</tbody>
</table>

<sup>357</sup> Note that it is not lawful to combine egg and sperm donation in the same ART procedure in Sweden.

<sup>358</sup> Above.
3.5.6.2 Possible legal parents after ART

Table 2. Range of individuals who could assert legal parentage following ART in Sweden in 2013.

<table>
<thead>
<tr>
<th></th>
<th>Egg donation</th>
<th>Sperm donation without IVF</th>
<th>Sperm donation with IVF</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Gestational mother</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td><strong>Husband or male partner of gestational mother; or</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td><strong>Wife or female partner of gestational mother</strong></td>
<td>NO</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td><strong>Egg donor; or</strong></td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td><strong>Sperm donor</strong></td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
</tr>
</tbody>
</table>
### 3.5.6.3 Bases for parenthood following surrogacy

Table 3.

Range of bases for determining parenthood following surrogacy in Sweden in 2013 (primary basis shown first). Includes situations where couples have travelled abroad for treatment but where child is born in Sweden.

<table>
<thead>
<tr>
<th></th>
<th>Egg from SM</th>
<th>Egg from CM</th>
<th>Egg from donor</th>
<th>Sperm from CF</th>
<th>Sperm from donor</th>
<th>Sperm from SM’s spouse</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SM</strong></td>
<td>Gestation</td>
<td>Gestation</td>
<td></td>
<td>Marriage</td>
<td>Marriage</td>
<td>Marriage</td>
</tr>
<tr>
<td>SM’s ♂ spouse or</td>
<td></td>
<td></td>
<td></td>
<td>Intention</td>
<td>Intention</td>
<td>Genetics</td>
</tr>
<tr>
<td>SM’s ♂ cohabitant</td>
<td></td>
<td></td>
<td></td>
<td>Intention</td>
<td></td>
<td>Genetics</td>
</tr>
<tr>
<td>SM’s ♀ spouse</td>
<td></td>
<td></td>
<td></td>
<td>No basis</td>
<td>No basis</td>
<td></td>
</tr>
<tr>
<td>SM’s ♀ cohabitant</td>
<td></td>
<td></td>
<td></td>
<td>No basis</td>
<td>No basis</td>
<td></td>
</tr>
<tr>
<td><strong>CM</strong></td>
<td>No basis</td>
<td>No basis</td>
<td>No basis</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>CF or</strong></td>
<td></td>
<td></td>
<td></td>
<td>Genetics</td>
<td>No basis</td>
<td>No basis</td>
</tr>
<tr>
<td><strong>CP ♀ or</strong></td>
<td>No basis</td>
<td>No basis</td>
<td>No basis</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>CP ♂</strong></td>
<td></td>
<td></td>
<td></td>
<td>No basis</td>
<td>No basis</td>
<td>No basis</td>
</tr>
<tr>
<td><strong>ED</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SD</strong></td>
<td></td>
<td></td>
<td></td>
<td>Genetics</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

←Bases for parentage→

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359 Abbreviations used in Tables 3 and 4 are defined in the Abbreviations section at the front of the thesis.
360 For an alternative table showing possible parents for surrogacy in general see Table 5, Part 6.1, below.
361 Or registered partner.
### 3.5.6.4 Individuals who could assert legal parentage following surrogacy

Table 4. Range of individuals who could assert legal parentage, or be deemed legal parents, following surrogacy in Sweden in 2013.

<table>
<thead>
<tr>
<th></th>
<th>Egg from SM</th>
<th>Egg from CM</th>
<th>Egg from donor</th>
<th>Sperm from CF</th>
<th>Sperm from donor</th>
<th>Sperm from SM’s spouse</th>
</tr>
</thead>
<tbody>
<tr>
<td>SM</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SM spouse ♂ or ♂</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SM spouse ♂</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CM</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CF or CP ♀ or ♂</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CP ♀</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CP ♂</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Egg Donor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>NO</td>
</tr>
<tr>
<td>Sperm Donor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>YES</td>
</tr>
</tbody>
</table>
3.5.7 Concluding remarks

When applying the parenthood rules contained in Chapter One of the Children and Parents Code to surrogacy arrangements, the scope for having legal parentage established by commissioning parents is limited. A commissioning mother can never establish maternity in relation to a surrogate-born child at the time of the child’s birth. Likewise; a commissioning parent ie the same-sex spouse of a commissioning mother or father, can never establish parenthood. Moreover, a commissioning father’s paternity is only possible to establish where he has provided the genetic materials for the pregnancy, and where his confirmation of paternity has been approved by the surrogate.

As Tables 3 and 4, above, show, in most situations, an individual commissioning parent cannot acquire legal parental status at the time of the child’s birth. For those commissioning parents who are unable to have legal parenthood confirmed following surrogacy, the only option is adoption.

Yet as the regulation of ART has evolved since the mid-1980s, the Swedish rules on parenthood, as set out in the Children and Parents Code have also evolved. This is particularly evident through amendments that accommodate new kinds of family formation. Thus, in situations where donated gametes are used with ART, legal parenthood can be established even where a parent is not genetically connected to the child in question. At the time of writing, the Code clarifies the allocation of paternity following ART through donor insemination with or without IVF, and egg donation. Moreover, the Code provides for the allocation of parenthood following ART where both parents are women. In spite of the Code’s widening scope where it concerns parenthood rules following ART, however, it remains silent in relation to maternity, paternity and parenthood following surrogacy arrangements. Hence, the Code is also silent in relation to male couples wanting to share the parentage of a child from the time of the child’s birth since – apart from the alternative of adoption – using surrogacy is the only way two men can become the legal parents of a baby together.

As indicated in Part 3.1, above, if legal parental status is unclear at the time of the child’s birth, this will affect the child’s right to having his or her family law status established.
3.6 NJA 2006 s 505 – implications for parenthood

The events surrounding the Supreme Court decision NJA 2006 s 505, concerning the transfer of parenthood after non-commercial surrogacy,\(^{362}\) serve as a stark reminder that the outcome of legal parentage for commissioning parents, particularly commissioning mothers, is far from certain.\(^{363}\)

The case reveals that current Swedish laws for the establishment and transfer of parenthood are not equipped to resolve some of the situations created by surrogacy. It also highlights another problem: the possibility for male commissioning genetic parents to confirm their parentage under the Children and Parents Code, but not female commissioning genetic parents shows that, where it concerns surrogacy, the law favours commissioning genetic fathers over commissioning genetic mothers. Although this might well be a result of the different conceptions of male and female parenthood where, traditionally, female parenthood is attached to gestation, this result is nevertheless difficult to justify in a culture that prides itself on gender equality.

In the case in question, both parents provided their gametes for the creation of the surrogate-born child. There was no more involvement by the father than by the mother in creating the child – indeed, the process of egg stimulation and retrieval is considerably more complex than sperm collection – yet the genetic father was able to establish his status as the legal father through confirmation while the mother was not. This led to a situation whereby the genetic father in the case was able to prevent his wife, the genetic mother, from adopting the child by withdrawing his consent to the adoption, because he was the child’s legal parent.

Although the Supreme Court was not united, it is difficult to see how the majority could have arrived at a different decision and determined the case in favour of the commissioning mother. After all, the law is unequivocal where it concerns consent to adoption, and the question before the Court was whether the revocation of prior consent to an adoption would serve as a hindrance in relation to the applicant’s permission to adopt. The Court determined that it did, and rejected the application. Even though the Court took into account the unique cir-

\(^{362}\) This case is highlighted in the Prologue, above.

\(^{363}\) For a detailed case analysis of NJA 2006 s. 505 (in Swedish), see Singer 2006 (n 314) 424.
cumstances of the case, it found no reason to deviate from settled principle that the revocation of consent to an adoption before a legally binding decision is made creates a hindrance to the adoption. Whether it is equally clear that the outcome was in the best interest of the child in this particular case might be open to question. What is clear, however, is that existing laws could simply not accommodate the problem raised which in this case was peculiar to surrogacy.

A reaction provoked by this case is that it highlights a sense of unfairness between two equally-contributing parties. Here, the woman’s right to become a parent must be sacrificed while the corresponding right of her husband remains unaffected. This raises the question: is it reasonable that our legal system recognises the genetic contribution of the commissioning father by permitting a male who provides his gametes for a surrogacy pregnancy to become the legal father through a confirmation of parenthood while at the same time failing to recognise the genetic contribution of the commissioning mother?

3.7 Discussion – parenthood

3.7.1 Introductory remarks

Notwithstanding the absence of tailor-made provisions for surrogacy arrangements, it seems clear that the unwritten presumption of maternity (Mater-est rule) and the existing parenthood provisions of the Children and Parents Code are applicable for determining legal parentage at the time of the child’s birth following surrogacy arrangements.

What is also evident, however, is that the outcome of applying the parenthood rules to surrogacy cases is quite different from that seen when applying the parenthood rules to ART regulated by the Genetic Integrity Act. A striking difference is that, where it concerns surroga-

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364 NJA 1973 s 62.
365 Although the majority of the Court did point out that Swedish precedent in this regard was consistent with Article 21(a) of the CRC ie that ‘States Parties … shall ensure that the best interests of the child shall be the paramount consideration and … that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption …’.
cy, parenthood is not necessarily allocated in line with the intention of the parties as it is with other forms of ART. For example, it is contrary to the intention behind surrogacy arrangements that: the surrogate mother should become the legal mother; the surrogate’s husband will be presumed to be the legal father; or that a donor can acquire parental responsibility. In the event that any of these situations should occur, it would, of course, be due to the fact that legal questions concerning surrogacy – questions that must be determined – must be squeezed into a regulatory framework that was not built to accommodate them. Moreover, the fact that it is nonetheless possible to apply the existing rules of parenthood, unchanged, to surrogacy, might reduce the sense of urgency to develop more appropriate rules that take into account the special circumstances of such arrangements. Whether or not this situation warrants rectification is, ultimately, up to the legislator.

Two inevitable consequences that flow from continuing to apply the existing family law rules of parenthood on surrogacy arrangements, however, merit particular attention. They concern, first, the risk that in the event of a dispute over maternity in relation to a surrogate-born child, the outcome is unclear; and secondly, the effect of the current family law rules of parenthood noticeably favours commissioning fathers and male commissioning parents over their female counterparts. These are discussed, in turn, below.

### 3.7.2 Uncertainty remains in event of dispute over maternity

Any uncertainty as to how maternity would be determined in the event of a dispute appears to be due to the fact that, in Sweden, legal maternal status is grounded in unwritten law. Moreover, the basis for attaching maternity to gestation has been a recent phenomenon, arising out of necessity because a choice between genetics and gestation has been essential in order to deal with the unique situations of egg donation. Yet is prioritising gestation over genetics when allocating maternity as self-evident as it might appear? The legislator’s resolve to expressly provide for maternity following egg donation,\(^{366}\) clearly shows that the unwritten law in relation to maternity is by no means unequivocal. One might otherwise wonder why it was deemed necessary to express-
ly provide through statute that it is the gestational mother and not the donor who is the legal mother following egg donation carried out in accordance with the Genetic Integrity Act. And although the law is now clear as to the maternal status of gestational mothers following egg donation, the rule in Chapter One, Section 7 of the Children and Parents Code concerns egg donation, not surrogacy. Furthermore, there are clear indications that the intention behind the wording of this rule was to limit the scope of the provision to egg donation. Thus, if there were to be a dispute as to who has a right to assert legal maternity following surrogacy, there is arguably scope for differing interpretations. While greater scope might have particular advantages, certainty is not one of them. This situation will remain as long as the allocation of maternity is determined in accordance with the (unwritten) Mater-est rule. Accordingly, the outcome of an attempt by a commissioning and genetic mother to assert maternity in relation to a surrogate-born child is thus impossible to predict. There is no precedent for such a claim in Sweden.

In NJA 2006 s 505, the majority of the Supreme Court referred to the fact that the genetic mother’s claim to be declared the surrogate-born child’s mother could not be examined by the Court since the case before it concerned adoption. Accordingly, the claim was dismissed. The Court pointed out, however, that there is a possibility to institute such an action in the District Court in accordance with Chapter 13, Section 2 of the Code of Judicial Procedure (RB).

According to Anna Singer, in light of the circumstances of the case, above, had the Supreme Court been able to entertain the commissioning mother’s claim that she and not the surrogate mother should be regarded as the child’s legal mother, it should have been possible for the commissioning mother to institute an action under RB, above, and

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367 This is clear from the report of the Council on Legislation to the Swedish Government (see Parts 3.2.2.1–3.2.2.2, above). There are, however, different views on this issue. See, eg, comments made by Anna Singer and Åke Saldeen, below.

368 Rättegångsbalk (SFS 1942:740). On the possibility of instituting a declaratory claim to establish maternity see Singer 2000 (n 53) pp 361–364. Here, Singer also discusses the prerequisites for such a claim at pp 426–428. For an account (in English) on the institution of declaratory claims (in general) under RB 13:2 see Bengt Lindell, Civil Procedure in Sweden (2013) pp 80–81. It should be mentioned that there are 3 conditions that must be met in order for a court to entertain a declaratory claim: the issue must concern a legal relationship; uncertainty as to the legal relationship must exist, and the uncertainty must be detrimental to the plaintiff (Lindell p 82 para 239), RB 13:2.
to have her status as the legal mother of the child confirmed.\footnote{Singer 2006 (n 314) p 430.} This is because the child in question was born in 2002, before amendments were made to the Children and Parents Code, clarifying that maternity following egg donation flows with gestation.\footnote{Singer 2006 (n 314) p 429.} Since the unwritten presumption of maternity – which applied exclusively at that time – was and is possible to refute, there would have been no obstacle for the commissioning mother to institute a declaratory claim that she be deemed the legal mother of the child, invoking the rule in RB 13:2, above.\footnote{FB 1:7. Singer (n 314) pp 424 & 429; See also Saldeen 2009 (n 308) p 54.}

Today, however, Singer believes that the rule in Chapter One, Section 7 of the Children and Parents Code would completely rule out any possibility for a commissioning mother in the applicant’s situation to (successfully) institute an action to have her parentage established on the basis of a genetic connection\footnote{Singer (n 314) p 429.} because ‘[t]he rule applies also to so called surrogacy arrangements.’\footnote{Singer (n 314) p 424.}

Åke Saldeen agrees. In his view, the rule ‘must be regarded as applying not only to egg donation but also to so called surrogate motherhood.’\footnote{Saldeen 2009 (n 308) p 54.} As to why the rule must be seen to apply also to surrogacy, Saldeen draws support from the preparatory works, citing the legislative bill 2001/02:89 in which the Government points out that ‘the question of surrogate motherhood, as well as the question of egg donation, makes it urgent that it is established in the law who it is who shall be regarded as the mother to a child.’\footnote{Referring to Prop 2001/02:89 p 55.} Further, he believes that were it possible to institute such an action today it would make the rule in Chapter One, Section 7 of the Children and Parents Code ‘hardly meaningful when its aim is to try to counteract the occurrence of surrogate motherhood’\footnote{Saldeen 2009 (n 308) pp 54–55.}

Another interpretation is that the rule in Chapter One, Section 7 of the Children and Parents Code was never intended to apply to surrogate motherhood.\footnote{This is the view of the author.} This view is based on comments made by the Council on Legislation\footnote{Discussed in 3.2.2.2, above.} that, rather than formulate a general statuto-
ry rule of maternity, it was preferable to create a special provision, limited in scope, in order to solve the specific problem identified (ie the need to clarify legal maternal status following egg donation). Further support for this view is that the issue of surrogacy was not even specifically addressed in the Council’s opinion. On this interpretation there should be no hindrance even today, given similar facts as those presented in NJA 2006 s 505, for a commissioning mother to institute a declaratory claim that it is she, not the surrogate mother, who should be regarded as the child’s legal mother. This, of course, has implications for legal certainty where it concerns the parental status of commissioning and surrogate mothers, and consequently, the legal status of the surrogate-born child. What has historically been so obvious is suddenly by no means clear.

There are several other factors which support the notion that determining maternity solely on the basis of gestation is not yet carved in stone. First, there is no written law expressly clarifying parental status following surrogacy arrangements. Secondly, there is no absolute consensus either in medicine or at law regarding whether gestation should override genetics where it concerns what makes a mother. Thirdly, it could also be mentioned that the Swedish Supreme Court in NJA 2006 s 505 was divided about whether or not the applicant should have been able to adopt her genetic child even without the consent of the child’s father. The fact that the applicant was also the child’s genetic mother was not insignificant in this regard. If the Court were instead required to rule on the issue of maternity, ie in order to determine who a legal parent in fact is, rather than decide whether a commissioning mother could adopt her genetic child without the consent of the child’s legal parents, the outcome might be a result in favour of the commissioning mother. What these factors imply is that the issue of legal maternal status following surrogacy arrangements has not yet been finally resolved.

There is no question that existing Swedish law is capable of assigning parental status following surrogacy arrangements. This has been clearly confirmed, above. What remains uncertain, however, is what the outcome might be in the event of a dispute over maternity. As long

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379 That is, since the requirement of uncertainty in relation to the legal relationship in question (see fn 368, above) is clearly met.

380 Also important, over and above the special facts presented in the case, was that the adoption, even if approved without the father’s consent, would not have affected his legal parental status.
as there is a shadow of doubt lingering over the true legal basis for motherhood, there is a risk that the surrogate-born child’s right to have parents determined already at the time of birth will be compromised.

In addition to uncertainty surrounding the legal parental status of commissioning and surrogate mothers, the family law rules when applied to surrogacy appear discriminatory in that they favour the facilitation of legal parental status for commissioning males over commissioning females.

3.7.3 Determination of parenthood rules following surrogacy are discriminatory

When considering the outcome of legal parentage amongst commissioning parents (mother, father, and parent), the difference between male and female commissioning parents is stark.

First, commissioning fathers can always assert their paternity in relation to a surrogate-born child if they are genetically connected to the child; commissioning mothers who have a genetic connection to the child can never do so. They must apply to adopt the child, either through the step-child- or traditional adoption process, depending on the parental status of the commissioning father.

Secondly, a male commissioning parent, ie the male partner of a commissioning father, can apply to adopt the legal child of his male partner through the step-child adoption process; a female commissioning parent in the same situation must apply to adopt the child through the traditional adoption process together with the commissioning mother – who might also be the child’s genetic mother.

Thirdly, single male commissioning parents whose sperm has been used for the conception of a surrogate-born child can always have their parenthood established through confirmation whereas single female commissioning parents can never have their parentage established based on their genetic connection to the child. A single female commissioning mother would have to apply for adoption through the traditional adoption process. In this situation, the step-child adoption process, available to a commissioning mother who is in a heterosexual union, is not an option.

In summary, a male who is genetically connected to a surrogate-born child – irrespective of his own civil status – can assert his paternity in the same way as he can with any other form of reproduction. A
A man who is not genetically connected to a surrogate-born child can apply to adopt the child either through a traditional- or step-child adoption. The form of adoption will depend on the legal parental status of his partner. By contrast, whether a woman is genetically connected to a surrogate-born child or not makes no difference. She can never assert her maternity but must always adopt in order to become a legal parent. If the woman is one of two commissioning parents, the form of adoption required will always depend on the legal parental status of her partner.381

The six figures (Figures 1–6) below summarise the result of applying existing Swedish law to surrogacy arrangements in order to determine the various parties’ eligibility for legal parentage. The figures reveal that the family law status rules and adoption rules result in the unequal treatment of commissioning mothers and male and female commissioning parents when compared to commissioning fathers. This unequal treatment is evident both at the time of the child’s birth and where it concerns the nature of adoption required following surrogacy.

381 That is, a woman in a heterosexual union might be able to adopt through the step-child adoption process assuming her partner is the legal father of the child while a woman in a same-sex union will always have to apply for adoption through the traditional adoption process.
Figure 1. How a commissioning mother can acquire legal parentage under existing Swedish family law rules.
Figure 2. How a commissioning father can acquire legal parentage under existing Swedish family law rules.  

382 Regarding the form of adoption, it makes no difference where the egg or sperm come from or whether the commissioning father is in a heterosexual- or same-sex relationship or single.
Figure 3. How a commissioning single mother can acquire legal parentage under existing Swedish family law rules.
Figure 4. How a commissioning single father can acquire legal parentage under existing Swedish family law rules.
Figure 5. How a commissioning female parent in a same-sex union can acquire legal parentage under existing Swedish family law rules.
Figure 6. How a commissioning male parent in a same-sex union can acquire legal parentage under existing Swedish family law rules.
3.7.4 Minimising unequal treatment when there is a genetic connection

Moving for a moment to the importance of the biological connection between the surrogate-born child and his or her parents, one consideration that could be made is whether the Swedish law on parenthood could be amended so that it would become less of a catalyst for unequal treatment. Specifically, by making it possible for commissioning genetic mothers, in certain situations, to have their maternity established in relation to surrogate-born children in a similar way as commissioning genetic fathers may do so today. That the present situation is unfair seems obvious. Resolving it, however, while possible, is not necessarily uncomplicated.

First, let us accept that it is possible to agree on the following five assumptions:

1. The surrogate mother is the child’s legal mother when the child is born.

2. The surrogate-born child should, where possible, have two legal parents at the time of birth.

3. One or both of the commissioning parents are genetically connected to the surrogate-born child.

4. The goal of surrogacy is for the commissioning parent or parents to ultimately take on the role of legal parent/s in relation to the surrogate-born child.

5. If a State supports surrogacy, but has no specific parental transfer mechanism, it is in the best interests of the surrogate-born child that, where possible, one of the two legal parents at birth is a commissioning genetic parent.

Imagine, now, that single female commissioning parents, or female commissioning parents in same-sex unions for that matter, were given the right to become one of the “original” legal parents of a surrogate-born child, based on a genetic connection to the child. This would, of course, give rise to unequal treatment against commissioning genetic mothers in heterosexual unions who also contribute to the creation of
a surrogate-born child in the same way, since they must go through a step-child adoption in order to have their legal parenthood established. However, in the last-mentioned situation, the commissioning genetic spouse already has the possibility of becoming a legal parent and to take this right from him would also result in unequal treatment.

Moreover, if unequal treatment in this context were to be removed in relation to the heterosexual commissioning mother by making it possible for her to become a legal parent when the child is born, without treating any of the existing legal parents unequally, another problem is created: The surrogate-born child will have three legal parents; something which is not at this time able to be accommodated under Swedish law. In order to ensure that a child has no more than two legal parents at any given time, it would therefore be necessary to strip one of the legal parents recognised under existing law – the genetic father or the surrogate mother – of their right to legal parentage, in order to avoid treating the heterosexual commissioning mother unequally, thereby continuing the cycle of unequal treatment.

It appears as though it is not possible to draft a law which is completely fair to all of the parties in this situation; at least not while gestation is the determining factor where it concerns maternity. If, however, an attempt is made to isolate the various consequences specific to legal parenthood in relation to each possible genetic commissioning parent, without losing focus on the welfare of the child and in particular of the child’s need for legal parents at birth, it might be possible to justify a degree of unequal treatment on the basis of the various outcomes.

At least five different parent-constellations can be identified in which a surrogate-born child could have a genetic commissioning parent. These, along with the consequences for the commissioning parents and the child, are summarised below. For the purposes of these examples, it can be assumed that the surrogacy treatment that would be required is lawful; and that the surrogate’s partner is a male whose paternity will be presumed if the surrogate-born child needs a father.383

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383 The surrogacy procedures required for the examples in question can also be assumed lawful for the purposes of the examples.
Parent alternative 1: Commissioning genetic father in a male-male union

When the child is born, the surrogate is the legal mother and the legal father is the surrogate’s spouse or the commissioning father.

The child will have two legal parents at birth: one female and one male.

The commissioning father can be the child’s legal parent at birth.

Parent alternative 2: Commissioning genetic mother in a female-female union

When the child is born, the legal mother is surrogate, and the legal father is the surrogate’s spouse or the provider of sperm.

The child will have one or two legal parents at birth: one female, and one male.

Neither of the commissioning parents can be the child’s legal parent at birth.

Parent alternative 3: Commissioning genetic mother as a single parent

When the child is born, the legal mother is the surrogate, and the legal father is the surrogate’s spouse or the provider of sperm.

The child will have one or two legal parents at birth: one female, and one male.

The commissioning mother cannot be the child’s legal parent at birth.
Parent alternative 4: Commissioning genetic father as a single parent

When the child is born, the legal mother is the surrogate, and the legal father is the surrogate’s spouse or the commissioning father.

The child will have two legal parents at birth: one female, and one male.

The commissioning father can be the child’s legal father at birth.

Parent alternative 5: Commissioning genetic mother and father in a heterosexual union

When the child is born, the legal mother is the surrogate, and the legal father is the surrogate’s spouse or the commissioning father.

The child will have two legal parents at birth: one female, and one male.

The commissioning father can be the child’s legal father at birth.

In the examples above, the consequence for the surrogate-born child is that in relation to two of the five parent-constellations, neither of the commissioning genetic parents can be the child’s legal parent at birth under Swedish law today. In the remaining three situations, it is possible for one of the commissioning genetic parents to acquire legal parental status already from the child’s birth, but never two. When looking at the total number of (possible) commissioning genetic parents from the sample, however, three out of six – all females – are ineligible for legal parenthood at the time of the surrogate-born child’s birth: the single commissioning mother; the commissioning mother in a same-sex union; and the commissioning mother in a heterosexual union.

Even if the law were to be amended such that every surrogate-born child could, where possible, have at least one commissioning parent who is also a legal parent at birth, and assuming that the surrogate mother remains the legal mother at birth, it would not be possible for the commissioning genetic heterosexual mother to become a legal parent at that time because the role of commissioning legal parent will
have already been filled by her spouse, the commissioning father. She would thus face unequal treatment where it concerns her right to legal parenthood in comparison with other commissioning genetic parents.

If we take the child’s interest as the starting point, however, it becomes obvious that the surrogate-born child’s interest in having one commissioning parent as one of his or her first legal parents, and the surrogate mother as the second, makes it necessary to forfeit the interests of one of the commissioning genetic parents – in this case the commissioning mother – in having their legal parentage established at birth. If the child’s interests are paramount and the interests of the various parents must be balanced in order to secure the child’s interests, some discrimination is not only inevitable but also justified.

If the law were to be amended to facilitate a commissioning genetic parent’s right to legal parenthood at birth, thus making it possible for the surrogate-born child to have at least one commissioning parent who is also a legal parent, this would not have to imply that the interests of a commissioning genetic father must take precedence over those of a commissioning genetic mother. Ultimately, however, it is important not to lose sight of the goal to ensure that the surrogate-born child’s needs are given priority over any interest an intended parent might have in asserting legal parenthood, irrespective of whether the parent in question is male or female.

384 That is, first of two possible legal parents.
385 In relation to the development of assisted reproduction creating new possibilities for building families, and the implications of this on the respect for the different human rights, Eva Ryrstedt has pointed out that ‘these questions are … complex in that the child’s interests and rights must be placed in relation to the various rights of the parents.’ See Ryrstedt 2003 (n 328) p 554. Regarding the right to be a parent, see Caroline Sörgjerd, ‘Rätten att bli förälder — en analys av reglerna om assisterad befruktning och adoption’ (2012) SvJT 675. In this connection, Sörgjerd considers, inter alia, whether the Swedish principle that everyone should be treated equally should even apply where it concerns ART and adoption. She concludes that ‘the best interest of the child shall be the starting point for determining who should qualify for society’s help to become a parent – not the principle of equal treatment’ (p 706).
3.8 Birth records

3.8.1 Introductory comments

Over and above parental status issues, unregulated surrogacy has implications for birth records.386 If it is not absolutely clear who the parents of a child are; or whether a genetic contribution and a gestational contribution should be valued equally, how can birth records be accepted as accurate? How the parents and child are registered on the population register387 is of importance to the child’s right to know its genetic origin.

In Sweden, birth records are administered and maintained by the Swedish Tax Agency. Unlike many other countries, Sweden does not issue “birth certificates” per se. Rather, information is entered onto the population register and extracts from the register are issued when they are needed for specific purposes. Where it concerns adoption, the court notifies the Swedish Tax Agency that it has approved an adoption before the Agency is able to register the information about the parents and child on the population register.388

3.8.2 Adoption of a Swedish child in Sweden

Where it concerns the traditional adoption or step-child adoption of a Swedish child in Sweden, when the Swedish Tax Agency is first noti-
fied of the child’s birth, the child’s biological parents\textsuperscript{389} are listed as the legal parents on the register. Following an adoption, the biological parents remain on the register as the child’s biological parents and the adoptive parent or parents are entered as the child’s legal parents.

If a child were to be born following a surrogacy arrangement in Sweden, this process would apply.

\subsection*{3.8.3 Adoption of children born abroad}

For children born abroad, where it concerns a traditional adoption, the fact that the child has been adopted is always entered onto the register, but the names of the biological parents are not listed. If known, however, these names would be kept by the Social Welfare Committee so that the child is able to trace its origins if desired.\textsuperscript{390}

Concerning an adoption following surrogacy, assuming the father of the child is acknowledged as the biological and legal parent, his name will be listed on the register as the legal parent when the Swedish Tax Agency is first notified of the child’s birth – within one week of arriving in Sweden. The child’s gestational mother, and the fact that she has relinquished the child, would be entered onto the register, but not her name. There would be no entry on the population register connecting the commissioning mother to the child.\textsuperscript{391}

When the commissioning mother’s application to adopt the child is approved, her name is entered onto the population register as the child’s legal mother but it remains clear that she is also the adoptive mother. The information that the child has another biological mother remains on the register.\textsuperscript{392}

\textsuperscript{389} In the case of the mother this refers to the woman who gave birth to the child.

\textsuperscript{390} For background information in English about foreign adoptions in Sweden see Maarit Jänterä-Jareborg, ‘The recognition and legal effects of foreign adoptions in Sweden’ in Scandinavian studies in law (1992) 93.

\textsuperscript{391} It should be mentioned that there are no specific regulations about adoptions following surrogacy arrangements entered into abroad. The practice and process outlined above reflects, rather, the general principles of adoption; in particular that an adoption must be of benefit to the child and that a child should be able to trace its origins.

\textsuperscript{392} The information about the way in which parents are entered onto the child’s birth record in Parts 3.8.2–3.8.3 was confirmed in a telephone conversation between Jane Stoll and the Swedish Tax Agency, 10 September 2013.
3.9 Concluding remarks

A possible explanation for the dearth of specific rules for surrogacy is that, since ART has become more widely available, it appears to be the case that the rules on parenthood or family status are reviewed, implemented and amended in conjunction with, or after, a particular form of ART has been regulated. Even so, it has been shown above that applying the existing Swedish law, by way of the written and unwritten presumptions of parenthood, to establish parentage following surrogacy arrangements is possible. Moreover, even though the result might not always be consistent with the original intentions of the parties or with the best interests of the individuals concerned, some situations could be quite happily resolved if all parties are in agreement and do not change their mind.

But do the existing family law rules for the determination of parentage provide certainty following the specific situation of surrogacy? The answer to this question appears to be both “yes” and “no”. On a strict application of the law it appears certain since it is possible to determine who will be the legal parents following surrogacy, with or without a dispute over the child. This, however, might not be so clear to the person on the street; a man who has provided sperm for the creation of what he considers to be his child, or for his spouse who might also have contributed genetically to the child’s creation; or to a sperm donor who could unwittingly become responsible for a child he has no intention of taking responsibility for.

Considering the need for legal certainty, though, if it appears that the law is clear, does this mean that the family law status is certain? The answer to this is: not necessarily, but probably, as long as there is no dispute. The fact that contracts for surrogacy would most likely be regarded as pactum turpe\(^3\) and therefore unenforceable might conflict with the State’s obligation to protect the interests of the child born following a surrogacy arrangement. This creates a conflict of interests which the state must resolve. Thus, in order to ensure that the best interests of the child are protected, it is unlikely that an application to examine a claim of parenthood following surrogacy would be rejected.

\(^3\) This appears clear if one considers the Swedish preparatory works where it expressly states that surrogacy is unethical. On the relevance of pactum turpe in this connection, see Part 7.1, below.
outright, even if the outcome in the end would almost certainly result in the application of the existing written and unwritten presumptions and rules of parenthood.

As to other areas of uncertainty, it must be accepted that surrogacy births are not as straightforward as traditional births because the expectations of the parties are quite unique. In a surrogacy arrangement, for example, there are already two possible “mothers” for the intended child, even before the child is conceived: a commissioning mother who will become the social mother after the child is born; and the surrogate mother who, by virtue of giving birth, is the legal mother until parenthood is transferred by adoption. Assuming the surrogacy arrangement goes according to plan, the commissioning mother expects to become the social mother of the child at birth and the legal mother of the child following adoption. The surrogate mother in turn expects the commissioning mother to take responsibility for the child’s care after the child is born and to subsequently adopt the child, releasing the surrogate from the legal ties of parenthood in respect of the child. But what if the surrogate does not want to give up the child? What if the commissioning parents change their mind and do not want the child? Could they be forced to take the child if the surrogate is the legal mother; and how could this be consistent with the best interests of the surrogate-born child? What if one or more of the commissioning parents die, or if they is a divorce, or if their application for adoption is not approved? These situations contribute to an uncertainty that goes beyond what was contemplated when the unwritten and statutory rules on parenthood were developed.

What appears certain in relation to surrogacy arrangements is that the current family law status rules will and can be used to establish the status of the parties at the time of the birth of the child. Anyone intending on entering into a surrogacy arrangement in Sweden should be able to find out that this is how parentage will be determined, and that legal parenthood can only be transferred to a commissioning mother, or to commissioning parents who have no legal parental status, via adoption which requires the consent of both legal parents. What re-

394 After all, the Supreme Court stated in NJA 2006 s 505 that the applicant could institute a declaratory claim in the District Court in accordance with RB 13:2 if she wished to assert her claim to maternity.
395 Excluding a possible donor.
mains uncertain is what their eventual rights and/or obligations would be in respect of the child if the agreement should fall through.

Notwithstanding the fact that Swedish law can deal with the establishment of parenthood following surrogacy arrangements, it is clear that the situation is far from satisfactory, particularly if there is an ambition to ensure that the surrogate-born child’s legal status, from birth, is guaranteed. Since it is widely known that surrogacy arrangements are being entered into at home and abroad it is obvious that the uncertainty regarding the parentage of surrogate-born children must be resolved.

One of the tasks of the newly-established investigation on increased possibilities for the treatment of infertility is to, in the context of surrogacy arrangements, ‘propose amendments to be made to the legal rules concerning parenthood and to other legislation as required.’ 396 The absence of surrogacy regulation should not rule out the possibility of clarifying, through legislation, the legal parental status of the various parties at the time of the child’s birth. This would serve to increase certainty for surrogates, commissioning parents and donors and would, in turn, promote the interests of all parties. Most importantly, it would secure the child’s interest in having parents at birth.

In the following two chapters, consideration is given to how other jurisdictions – England and Wales, and Israel – have sought to resolve questions of family law status following surrogacy arrangements.

396 Dir 2013:70 p 1, point 6.
4 Surrogacy and parenthood in England and Wales

4.1 Introductory remarks

The law on surrogacy in England and Wales can in part be found in the Surrogacy Arrangements Act 1985 (SAA). Surrogacy arrangements that require the use of ART also fall under the Human Fertilisation and Embryology Act (the HFE Act) administered by the Human Fertilisation and Embryology Authority (HFEA). The HFE Act does not, however, specifically regulate surrogacy. Even so, because it regulates parenthood in cases of assisted reproduction, which includes surrogacy, it is of central importance to the issue of parenthood following surrogacy arrangements.

Prior to the implementation of the SAA, there was no legislation governing surrogacy arrangements in England and Wales. In the event of a parenthood dispute, or an uncertainty about parentage, the courts attempted to determine parenthood in accordance with prevailing common law principles.

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397 Also referred to as the Surrogacy Arrangements Act.
399 For information about the HFEA and the functions of the Authority see the document: About the Human Fertilisation and Embryology Authority, Human Fertilisation and Embryology Authority, October 2009. This document may also be found at: <http://www.hfea.gov.uk/docs/About_the_HFEA.pdf> accessed 14 July 2013. In addition, the latest statistics published by the HFEA in relation to fertility treatment in the UK can be found in the report: Fertility treatment in 2011: Trends and figures, HFEA, 2013. This is also available at <http://www.hfea.gov.uk/docs/HFEA_Fertility_Trends_and_Figures_2011_-_Annual_Register_Report.pdf> accessed 1 September 2013. For an overview of the number of clinics performing IVF and insemination in the UK, and the number of women treated in each region see p 10 of the report but note that there are no reported statistics in relation to surrogacy treatments, only of IVF and insemination treatments.
Surrogacy in England and Wales may comprise either gestational (full) surrogacy, which requires IVF, or traditional (partial) surrogacy. Commercial surrogacy is prohibited – although it is only an offence for third parties to profit – and while altruistic surrogacy arrangements are lawful they are not enforceable. The prohibition of commercial surrogacy is significant for legal parentage because, in awarding a parental order in respect of a child born following a surrogacy arrangement, the court must be satisfied that no payment has been given or received by the commissioning parents unless authorised by the court.\(^{400}\)

The main aim of this chapter is to give an account of the legal rules in place for the establishment and transfer of legal parenthood following surrogacy arrangements in England and Wales, particularly those pertaining to the HFE Act.\(^{401}\) After a brief summary of the relevant background to the current law and policy on surrogacy,\(^{402}\) the question of legal parenthood, especially parenthood following surrogacy arrangements, is explored. The Parental Order, introduced by the 1990 Act as an alternative to adoption for the transfer of legal parentage, is then considered. Finally, some reflections on birth records and the best interests of the child are made.

\(^{400}\) 2008 Act s 54(8).

\(^{401}\) It is beyond the scope of this chapter to deal in any depth with the law on adoption, or with the common law surrogacy case law which preceded the implementation of the SAA 1985 and the HFE Act 1990. For a thorough account of English surrogacy cases both before and after the implementation of the SAA 1985 see ‘Mothers are special’, in Julie McCandless, *Reproducing the Sexual Family: Law, Gender and Parenthood in Assisted Reproduction* (2010), thesis submitted for the degree of Doctor in Philosophy, Keele University (Chapter 6, pp 295–359). See also Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 2nd edn (2007) pp 784–795.

4.2 Relevant background and current statute law

4.2.1 Where it began: The Warnock Committee

In July 1982, the “Warnock Committee”, chaired by Dame (now Baroness) Mary Warnock DBE, was established

\[[t]o consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations.\]^{403}

In its analysis on surrogacy, the Warnock Committee expressed, inter alia, concern about the potential exploitation associated with commercial surrogacy arrangements. The Committee found that:

Even in compelling medical circumstances the danger of exploitation of one human being by another appears … to outweigh the potential benefits, in almost every case. That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved.\]^{404}

The Committee therefore recommended that legislation be introduced which would prohibit the creation or operation of surrogacy agencies. It also recommended that professionals and others who knowingly provide assistance to bring about a surrogate pregnancy be criminally liable for their actions.\]^{405}

The part of the Warnock Report referred to above, has been described by Freeman as ‘using Kantian language’\]^{406} and echoes similar arguments which have been put forward on the same subject in Swe-


\[405\] Warnock Report [8.18] p 47.

\[406\] Freeman 2010 (n 402) p 833 (referring to Warnock Report p 46).
den, in particular, the belief that it is morally objectionable for people to treat others as a means to their own ends. It should be mentioned, however, that the Warnock Committee was primarily concerned with the commercial exploitation of surrogacy, and to this extent it can be distinguished from Sweden’s policy at the time which was to oppose unequivocally all forms of surrogacy. The serious risk of exploitation, coupled with a concern that it would otherwise be difficult to prevent, also served to motivate the Warnock Committee’s proposal to implement criminal sanctions.

The Report of the Committee, commonly known as the Warnock Report, was presented to the Parliament in July 1984. Shortly thereafter, the Surrogacy Arrangements Act was enacted. The Human Fertilisation and Embryology Act came into force in 1991, having received Royal Assent in 1990, and the HFEA – the regulatory body established by the 1990 Act – officially started its work on 1 August 1991.

4.2.2 The Surrogacy Arrangements Act

The long title of the SAA reveals its purpose:

An Act to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers.

The SAA was passed within one year of the Warnock Committee’s report. While the legislation prohibited commercial surrogacy, however, it did not go as far as the Warnock Committee recommended in that it only prohibited persons and agencies operating on a commercial basis from negotiating surrogacy agreements. According to Freeman and McCandless, the speed with which the legislation was passed was primarily due to a reaction in January 1985 to the UK’s first major,

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407 See, eg, prop 2001/02:89 p 55; and Assisterad befruktning – synpunkter på vissa frågor i samband med befruktning utanför kroppen, Statens medicinsk-etiska råd, 1995-04-05 (on surrogacy in particular, see pp 23–24).
411 HFE Act 1990 s 5.
412 SAA 1985 [16th July 1985].
413 SAA 1985 s 2.
and much-publicised, commercial surrogacy case, the ‘Baby Cotton’ case, below. The surrogacy agreement in question was commercial in nature and had been negotiated by an American surrogacy agency. The surrogate, Mrs Cotton, who gave birth in the UK, was happy to give the baby to the American commissioning couple. Although the local authority took action and made Baby Cotton a ward of court, the judge hearing the matter determined that the commissioning parents be given care and control of the infant and that they be permitted to remove the child from the UK. In his view, he had a duty to make a decision based solely on what was in the best interests of the child. Largely due to the haste with which SAA was enacted, it has been described as ‘an ill-considered and largely irrelevant panic measure’.

Where it concerns the issue of determining parentage, the SAA contains several provisions that are pertinent. First, the Act clearly defines the term “surrogate mother” as the

... woman who carries a child in pursuance of an arrangement –

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.

Further, Section 1A of the SAA 1985 provides that ‘[n]o surrogacy arrangement is enforceable by or against any of the persons making it.’

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414 Re C (A Minor) [1985] FLR 846. See further Freeman 2010 (n 402) p 833 and McCandless (n 401) p 304.
415 This case is considered in Department of Health, October 1998, ‘Surrogacy: Review for Health Minister of current arrangements for payments and regulation; Report of the Review Team, Cm 4068 p 87 para 3.7. For comments on the case see also McCandless (n 401) p 304.
416 Freeman 1989 (n134) p 165.
417 Surrogacy Arrangements Act 1985 s 1(2). This is the wording that applies to the Acts of England, Wales and Northern Ireland. The wording of the Scottish Act differs in that the words ‘parental responsibility being met’ is replaced by ‘the parental rights being exercised’
418 SAA 1985 s 1A. This section was inserted by the HFE Act 1990 (c 37, SIF 83:1) s 36(1).
Finally, the ‘Act applies to arrangements whether or not they are lawful.’ \(^{419}\)

As regards the Section 2 prohibition against commercial surrogacy arrangements, \(^{420}\) payment is defined in Section 1(8) as meaning ‘payment in money or money’s worth’. \(^{421}\) Even so, neither the 1985 Act nor the majority opinion in the Warnock Report addressed the issue of payments to surrogates expressly. A possible explanation for this, given in the 1998 Brazier Report, \(^{422}\) was that the Warnock Committee may have assumed existing adoption laws would be sufficient to deter the exchange of payments between the commissioning parents and the surrogate mother. \(^{423}\) The issue was, however, raised in a dissenting

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\(^{419}\) SAA 1985 s 1(9).

\(^{420}\) SAA 1985 s 2.

\(^{421}\) SAA 1985 s 1(8).


\(^{423}\) See the Brazier Report, 1998 p 17 para 3.2. Here, the Review Team was referring to s 57(1)-(2) of the Adoption Act 1976 which provides, inter alia, that payment or
opinion of the Warnock Report where it was pointed out that under existing law, money may not change hands in an adoption process, yet ‘most surrogate mothers would expect payment for their services’. In the opinion of the dissenters, payments made to a surrogate mother should not serve as a barrier where it concerns the child’s adoption by the commissioning parents. It could be mentioned that this is a view which also appears to be held by judges in the context of awarding parental orders.

4.2.3 The Human Fertilisation and Embryology Act

As indicated above, the HFE Act plays a decisive role in the determination of parenthood following surrogacy arrangements. One of the purposes of the HFE Act 1990, which is made clear from the long title of the Act, is ‘to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child’. This is also one of the stated purposes of the 2008 Act.

The 2008 Act was the culmination of an extensive review process which was initiated in response to significant scientific developments and societal changes. It came about following a review of the 1990...

Important elements of the HFE Act 2008 concerning parenthood include ‘allowing for the recognition of both partners in a same-sex relationship as legal parents of children conceived through the use of donated sperm, eggs or embryos’ and ‘enabling people in same sex relationships and unmarried couples to apply for an order allowing for them to be treated as the parents of a child born using a surrogate.’

In addition to the HFE Act, and the HFE Regulations, the HFEA issues Directions and a Code of Practice. The directions are of


See for example The Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010 No 985, made by the Secretary of State for Health in exercise of the powers conferred by sections 55 and 61 of the HFE Act 2008(a).

As of 5 July 2013, directions had been issued on the following topics (the direction name, below, is preceded by the reference number of the direction in question):

0000 - Revocation of Directions
0001 - Gamete and Embryo donation - version 3
0002 - Recording and providing information to the HFEA under a research licence - version 2
0003 - Multiple Births - version 4
0004 - Bringing into force the Code of Practice
0005 - Collecting and recording information for the HFEA - version 2
0006 - Import and export of gametes and embryos - version 3
0007 - Consent - version 3
0008 - Information to be submitted to the HFEA as part of the licensing process - version 3
0009 - Keeping gametes and embryos in the course of carriage between premises
0010 - Satellite and Transport IVF
0011 - Reporting adverse incidents and near misses - version 2
0012 - Retention of records - version 2

Directions are available in pdf format from the HFEA’s website.

course binding. The Code of Practice, currently in its eighth edition, ‘gives guidance about licensed activities … [and] also serves as a useful reference for patients, donors, donor-conceived people, researchers and those working in the fertility sector.’\(^4\)\(^3\)\(^6\) It comprises regulatory principles, guidance notes, and a glossary. The guidance notes, of which there are 32, are regarded as ‘the core of the Code’.\(^4\)\(^3\)\(^7\) Each guidance note outlines the regulatory principles which will include one or all of the following:

- Mandatory requirements ie relevant citations from the HFE Act, references to HFEA Directions, and HFEA licence conditions;
- HFEA interpretation of the mandatory requirements;
- HFEA guidance ie guidance for “best-practice” to help centres comply with the Act;\(^4\)\(^3\)\(^8\) and
- Other useful information including other legislation, professional guidelines and links to relevant websites.\(^4\)\(^3\)\(^9\)

The HFEA guidance notes that are particularly relevant to parenthood following surrogacy arrangements are Guidance Note 6 (Legal parenthood); Guidance Note 8 (Welfare of the Child); and Guidance Note 14 (Surrogacy).\(^4\)\(^4\)\(^0\)

\(^4\)\(^3\)\(^6\)\ Code of Practice, User guide to the Code p 7.
\(^4\)\(^3\)\(^7\)\ Code of Practice, User guide to the Code p 8.
\(^4\)\(^3\)\(^8\)\ An example of the Swedish equivalent to the HFEA interpretation and guidance would be the Guidelines or “Allmänna Råd” found in the Swedish directions and guidelines, SOSFS series, issued by the National Board for Health and Welfare.
\(^4\)\(^4\)\(^0\)\ Other guidance notes of interest include Guidance Note 20 (Donor assisted conception), and Guidance Note 31 (Record keeping and document control).
4.3 Legal parenthood following surrogacy arrangements

4.3.1 Introductory remarks

At common law, legal parenthood has traditionally been governed by genetic parentage. This means that the woman and man who provide the genetic materials for a conception will be the parents of the child subsequently born. Yet because paternity was, until relatively recently, almost impossible to prove, the common law created presumptions. In addition, with the advent of ART, statutory presumptions of parenthood were developed. These made it possible for intended parents whose gametes were not used for a conception brought about by ART, to become legal parents at the time of the child’s birth. The way in which parentage is determined after surrogacy arrangements will depend, inter alia, on whether the surrogate mother has become pregnant with or without ART.

In this Part, the parental status of the various parties to a surrogacy arrangement at the time of the child’s birth is explored in order to ascertain who the legal parents of the child are. For the purposes of this Part, it is assumed that there is no dispute about the various roles and intentions of the individuals who have taken part in the arrangement, ie the surrogate and her partner; the commissioning parent or parents; and donors where relevant.

4.3.2 Establishing maternity

4.3.2.1 In general and following ART

At common law, motherhood is and has been established through birth. The maxim *mater est quam gestatio demonstrat* (“by gestation the mother is demonstrated”) has traditionally been the legal standard for determining maternity. Authority for this is the House of Lords decision *The Ampthill Peerage* which concerned inter alia the claim to the British peerage title Baron Ampthill. Here, Lord Simon stated

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442 That is to say, donors other than the commissioning parents.
443 As it is in many civil law jurisdictions including Sweden.
444 *The Ampthill Peerage* [1977] AC 547 HL.
that ‘[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition.’

With the advent of the HFE Act in 1990, the common law presumption of maternity, above, also became the legal (statutory) standard for establishing maternity following ART. The rules for establishing legal parenthood following ART are set out in the parenthood provisions contained in Part Two of the HFE Act 2008. The Act is unequivocal that the woman who gives birth to a child following ART is regarded as the legal mother at the time of the child’s birth. The 2008 Act clarifies this in two places. First, Section 33(1) sets out the meaning of the term “mother”. Here, it provides that:

\[
\text{[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.}\]

The section above applies whether or not the woman in question was in England or Wales at the time of the ART treatment. Moreover, the Act makes it clear that a woman does not – and in fact cannot – acquire legal parental status merely because she has donated her

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445 The Ampthill Peerage [1977] AC 547 at 577. See further Freeman 2007 (n 53) p 164; Probert 2009 (n 441) p 224 (10–002) who explains that ‘…in most cases someone would have seen the mother give birth.’; and McCandless (n 401) p 296 (Chapter 6, “Mothers are special”).
446 That is, by s 27 of the HFE Act (1990); see further McCandless (n 401) p 296. While s 27 was repealed by s 33(1) of the 2008 Act, the wording contained in the Act’s definition of mother remains the same.
447 It could be mentioned that parenthood under the HFE Act has also been referred to as Statutory Motherhood and Statutory Fatherhood. See Freeman 2010 (n 402) pp 825–832.
448 2008 Act, s 33(1). See also s 27(1) of the 1990 Act.
449 2008 Act, s 33(3).
eggs. Thus, the contribution of genetic material through egg donation has no impact on the legal status of the donor.

Whilst the SAA defines "surrogate mother", and confirms that surrogacy arrangements are unenforceable, it does not clarify the legal parental status of the various parties to surrogacy arrangements. For this, one must turn to the HFE Act.

It will be recalled that one of the purposes of the HFE Act is "...to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child ...". Thus, where ART is used, the status of the various parties to a surrogacy arrangement at the time of the child’s birth is determined, first, by applying the statutory parenthood provisions contained in Part Two of the HFE Act 2008. However, where surrogacy does not require IVF, or where there is otherwise no involvement of a licensed centre in England or Wales – for example, in situations where the surrogacy agreement is privately arranged – these provisions do not apply.

Knowing, then, that the SAA ‘applies to arrangements whether or not they are lawful’; and prohibits commercial surrogacy arrangements; and provides that surrogacy arrangements are unenforceable, it seems clear that any uncertainty or questions raised over legal

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450 2008 Act, s 47. The provision provides as follows:
'A woman is not to be treated as the parent of a child whom she is not carrying and has not carried, except where she is so treated -
(a) by virtue of section 42 or 43, or
(b) by virtue of section 46 (for the purpose mentioned in subsection (4) of that section), or
(c) by virtue of adoption.'
Note: (a) and (b) above refer to exceptions where the woman is in a civil partnership or where there is a second female parent; (b) provides an exception where an embryo has been transferred after the death of the intended consenting female parent.
451 Probert 2009 (n 441) p 229, 10–008, points out that this is also the case under the common law.
452 Surrogacy Arrangements Act 1985 s 1(2). See Part 4.2.2, above.
453 SAA 1985 s 1A. This section was inserted by the HFE Act 1990 (c 37, SIF 83:1) s 36(1).
454 See 2008 Act, long title, 13 November 2008. Note that this purpose was also one of the purposes of the 1990 Act. See above, Part 4.2.2.
455 See also Chapter 6, Legal parenthood, in the Human Fertilisation and Embryology Authority, Code of Practice 8th edn, 2010 (Subsequently referred to as HFEA Code of Practice 2010).
456 SAA 1985 s 1(9).
457 SAA 1985 s 2.
458 SAA 1985 s 1A.
parentage arising from surrogacy arrangements that do not fall under the remit of the HFE Act must be resolved by applying established common law principles of parenthood. It also follows that, where legal parentage is in dispute, it must be determined by the court and these presumptions of parenthood would be the starting point.

With this in mind, what might the respective legal parental statuses of the various mothers be at the time of the surrogate-born child’s birth?

4.3.2.2 Maternity following surrogacy

It was seen above in Part 4.3.2.1 that the woman who has carried a child following ART, and no other woman, is to be treated as the child’s mother.\(^{459}\) There can be no doubt that surrogacy following ART falls under this provision. Accordingly, since the *surrogate mother* carries and gives birth to the child following a surrogacy arrangement it is the surrogate who must be regarded as the child’s legal mother at the time of the child’s birth, even if the surrogate was not in England or Wales at the time of the treatment.\(^{460}\) Moreover, the 2008 Act is clear that genetics plays no role in determining legal maternity following ART.\(^{461}\) Rather, it is the carrying of the child that is decisive. The effect of this is that the surrogate mother will be the legal mother of the child at birth irrespective of whether she is genetically connected to the child or not.\(^{462}\) According to McCandless and Sheldon, because maternity is grounded on gestation, ‘a surrogate mother’s right to be recognised as a child’s legal mother has never been successfully challenged’ in the UK.\(^{463}\)

The position of the *surrogate mother* as legal mother is further reinforced by Section 1A of the SAA which provides that ‘[n]o surrogacy arrangement is enforceable by or against any of the persons making it.’ This provision not only makes it clear that the surrogate mother cannot be compelled to give up her legal maternal status. It also im-

\(^{459}\) HFE Act 2008 s 33(1).

\(^{460}\) HFE Act 2008 s 33(3).

\(^{461}\) HFE Act 2008 s 47.

\(^{462}\) See also Human Fertilisation and Embryology Authority, Code of Practice 8th edn, 2010 (Subsequently referred to as HFEA Code of Practice 2010), Interpretation of mandatory requirements, 6G.

\(^{463}\) McCandless and Sheldon 2010a (n 402) p 183. Here, in fn 49 of the same page they give the example of *Re P (a Child)* [2007] EWCA Civ 105, in which a genetic father was able to win a residence order but the legal maternal status of the surrogate remained unaffected.
plies that she may not elect to allocate the legal parenthood she ac-
quires at the time of the surrogate-born child’s birth to the commis-
sioning mother or anyone else. The legal parental status of the surro-
gate when the child is born is, thus, that of legal mother. Her status
will remain unchanged unless – and in such a case, until – parenthood
is transferred by one of the mechanisms set out below. The status of
the surrogate under the HFE Act is consistent with the position at
common law, above.

Since the HFE Act is clear that the woman who carries and gives
birth to the child – and no other woman – is to be regarded as the
mother of the child, a commissioning mother cannot ever be recog-
nised as the legal mother of a surrogate-born child at the time of the
child’s birth. As already established, it makes no difference if she is
also the genetic mother; for the purposes of the Act she is regarded
as a donor and has the same status as a commissioning mother who
has no genetic connection to the child. The commissioning mother is
unable to acquire legal parental status in the absence of a parental
order, made together with the commissioning father, in accordance
with the Act (below), or an adoption order. Thus, while a commission-
ing mother might be a social mother, she may never be a legal mother
when the surrogate-born child is born. The absence of legal parental
status for commissioning mothers at the time of the surrogate-born
child’s birth also reflects the common law position that maternity is
established through gestation.

The legal parental status of an egg donor following treatment for
surrogacy is the same as that of any other egg donor. She cannot ever
be regarded as the legal mother at the time of the surrogate-born
child’s birth. This applies even when a commissioning mother donates
her egg or eggs for surrogacy treatment under the HFE Act. She can-
not acquire legal maternal status at the time of the surrogate-born
child’s birth because it is only the woman who carries the child and
gives birth who may be regarded as the mother.

To conclude, based on both common law principles and on the
HFE Act, above, there is no doubt that the surrogate mother is the

\[464\] 2008 Act s 33(1), above, Part 4.3.2.1 (which is also consistent with the common
law principle that the woman who has borne and given birth is presumed to be the
legal mother of the child at birth).
\[465\] 2008 Act, s 47, above, Part 4.3.2.1. See also HFEA Code of Practice 2010, Inter-
pretation of mandatory requirements, 6G.
\[466\] 2008 Act s 33(1).
legal mother of the surrogate-born child at the time of the child’s birth. There is no possibility for anyone else to have legal maternal status in this context. In order to become the legal mother of a surrogate-born child, a commissioning mother must either be eligible to apply for a parental order or, alternatively, apply to adopt the child.

4.3.3 Establishing paternity

4.3.3.1 In general and following ART

Historically, proving paternity at common law has been much more difficult than proving maternity. Yet this was an important question to determine – not the least in order to make the father financially responsible for the child. The law therefore resorted to presumptions. The husband of a married woman, for example, is presumed by law to be the father of any child born to the wife during the marriage. The only way this presumption of paternity could be rebutted was if it was established beyond reasonable doubt that the woman’s husband could not have been the father. The presumption of paternity continues to be law today although the burden of proof for rebutting the presumption was reduced in 1969 to the civil standard ie on the balance of probabilities. Over and above the presumption of paternity, there was a presumption that the man who had been named on the birth certificate was the father of the child, although Probert points out that ‘… the value of this was limited by the fact that restrictions were placed on the entry of any name other than that of the husband.’

While paternity is still presumed in the situations above, the importance of these presumptions has been reduced as the development of scientific tests has made it possible to establish paternity with certainty. In addition to the common law presumptions, there are statutory provisions which apply for the determination of fatherhood following ART. These statutory fatherhood provisions – like the statuto-

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467 Probert 2009 (n 441) p 224 (10–002).
468 Probert 2009 (n 441) p 224 (10–003).
469 This came about through s 26 of the Family Law Reform Act 1969. See Judith Masson, Rebecca Bailey-Harris, and Rebecca, Cretney’s Principles of Family Law, 8th edn (2008) p 529; and Probert 2009 (n 441) p 224 (10–003). See also Freeman 2007 (n 53) who points out that, within marriage, the presumption is based on the presumption of legitimacy (p 167).
470 Probert 2009 (n 441) p 224 (10–003).
ry rules on maternity, above – can be found in Part Two of the HFE Act 2008.

As regards establishing paternity following ART, the meaning of “father”, where it concerns a child who is or has been carried by a woman following ART with donor sperm, is set out in Section 35(1) of the 2008 Act.\(^{472}\) In effect, a man acquires paternity of a child if he is married to the mother at the time of treatment\(^ {473}\) unless it can be shown that he did not consent to the treatment.\(^ {474}\) Accordingly, this rule supersedes the common law rule that the person who provides the sperm that leads to conception is the father of the child.\(^ {475}\) It is important to note that Section 35 applies even where the woman in question is not in the United Kingdom at the time when the treatment takes place.\(^ {476}\)

Paternity following ART in which donated sperm has been used can also be conferred on an unmarried man where the agreed fatherhood conditions, as prescribed by the HFE Act, have been satisfied.\(^ {477}\) In such a case the treatment procedure must have taken place in the United Kingdom, and been provided by a person licensed under the Act.\(^ {478}\) The intended father must also have been alive at the time of the treatment.\(^ {479}\) Importantly, the agreed fatherhood conditions require that both the intended father and the woman being treated must consent in writing to the man being treated as father.\(^ {480}\)

If a man’s sperm, or an embryo created using his sperm, is used after his death, he will not be treated as the father of a child.\(^ {481}\) The HFE Act allows an exception to be made for the purpose of enabling the man’s particulars to be entered onto the register of births as the father

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\(^{472}\) Formerly found in the 1990 Act s 28(2); provision now repealed.

\(^{473}\) 2008 Act s 35(1)(a).

\(^{474}\) 2008 Act s 35(1)(b).

\(^{475}\) On this see Probert 2009 (n 441) p 229, 10–009. But note that it is clear from ss 38(2) & 38(3) that s 35 does not affect the presumption under common law that a child is the legitimate child of the parties to a marriage. See Explanatory Notes, Human Fertilisation and Embryology Act 2008, para 175 (re s 38) p 29.

\(^{476}\) 2008 Act s 35(2).

\(^{477}\) 2008 Act s 36(b). The agreed fatherhood conditions are set out in s 37.

\(^{478}\) 2008 Act s 36(a).

\(^{479}\) 2008 Act s 36(c).

\(^{480}\) See further 2008 Act s 37.

\(^{481}\) 2008 Act s 41(2).
of the child provided certain requirements have been met, including consent requirements, prior to the man’s death.482

A sperm donor will not be regarded as the father of a child born following ART where he has donated sperm in accordance with the HFE Act for the purpose of treatment services.483

4.3.3.2 Paternity following surrogacy

The legal parental status of the surrogate mother’s male partner will depend on several factors including civil status, consent and the nature of the surrogacy arrangement.

Where the sperm of the surrogate’s partner is used he will also be the legal father of the child.

Under the HFE Act, several factors can have an impact on the legal parental status of the male partner of a surrogate after she is treated with donor gametes. Like all couples who receive ART under the HFE Act, if the surrogate is married at the time of treatment, her husband will be regarded as the legal father of the surrogate-born child when the child is born unless it is shown that he did not consent to the treatment in question.484 This situation is the same whether the surrogate is treated in England or Wales, or abroad.485 Moreover, it makes no difference whose sperm is used for the surrogacy treatment.

If the surrogate is unmarried, her male partner will be recognised as the child’s legal father if he has consented to this, in writing before the treatment took place.486 However, this applies only when the treatment is given by a licensed person, in England or Wales.487 Thus, if the treatment were to occur abroad the surrogate’s partner would not be recognised as the child’s legal parent.

With DIY surrogacy, the common law presumption of paternity, above, will apply such that the husband of the surrogate mother will

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482 2008 Act s 39(1)–(4). For the requirements see s 39(1)(a)–(e) of the 2008 Act. Note that the requirements set out in s 39(1) apply whether the mother was in the UK or elsewhere at the time of the ART treatment (s 39(2)).
483 See s 41(1) HFE Act 2008, and para 5, Schedule 3 of the 1990 Act.
484 HFE Act 2008 s 35(1), s 42(1). The parenthood provisions of the HFE Act which brought in line civil partners who have ART with married partners came into effect on 6 April 2009. These provisions are not retrospective.
485 HFE Act 2008 s 35(2).
486 In accordance with the HFE Act 2008 ss 36–37.
487 HFE Act 2008 s 36(a).
be presumed the surrogate-born child’s legal father when the child is born. This presumption may be rebutted.488

The position of the commissioning father under the HFE Act is similar to the position of the commissioning mother. That is to say, he has no legal parental status at the time of the surrogate-born child’s birth because the legal father or second parent of the child will be the husband or consenting partner of the surrogate mother.489 In addition, like the commissioning mother, even if the commissioning father has supplied the sperm for the treatment he must register as a donor and is therefore unable to be the legal father of the child when the child is born.490 To become the legal father of a child born following surrogacy, a commissioning father would have to apply for and have approved a parental order or, alternatively, apply to adopt the child.

A sperm donor who donates sperm for the purposes of surrogacy treatment under the HFE Act has no legal parental status in relation to the surrogate-born child.491

Finally, it should be mentioned that a situation could arise where a surrogate-born child could be born without a legal father. This is because it is possible under the HFE Act for a surrogate mother who is single at the time of the surrogate-conception to be the only legal parent at the time of the surrogate-born child’s birth.492

4.3.4 Establishing parenthood – same-sex couples

4.3.4.1 Parenthood following ART

When the new parenthood provisions of the HFE Act 2008 came into force in April 2009 it became possible for both partners in a same-sex relationship to be recognised as legal parents of children conceived through the use of donated gametes or embryos.493 This feature of the

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489 In accordance with the HFE Act 2008 ss 35–37. See also ss 42–44 in relation to the consenting female partner of the woman being treated.
490 See HFEA Code of Practice (2010), Interpretation of mandatory requirements, 6G .
491 HFE Act 2008 s 41.
492 The requirement under s 13 of the HFE Act 1990 to consider the child’s need for “a father” was amended by s 14(2)(b) of the HFE Act 2008 such that clinics are now required to consider the child’s need for “supportive parenting”.
493 The parenthood provisions contained in Part 2 of the 2008 HFE Act came into force on 6 April 2009. According to Freeman 2010 (n 402) “[s]ome of the most radi-
2008 Act meant that the rights of same-sex couples in relation to having their legal parental status recognised following ART were brought in line with the rights of heterosexual couples.494

Where a woman undergoing ART services is in a civil partnership, the woman’s civil partner acquires parental status in the same way that a husband acquires parental status when his wife undergoes fertility treatment.495

Where the woman undergoing treatment has no civil partner, the HFE Act enables a second woman to be treated as a parent of the child. The requirements are, in principle, the same as those that apply under the Act’s agreed fatherhood conditions, above.496 That is to say, the treatment procedure must have been provided by a licensed person in the United Kingdom,497 the second parent must have been alive at the time of the treatment498 and the ‘agreed female parent conditions’ must have been met.499

4.3.4.2 Parenthood following surrogacy – second parent

In the context of surrogacy, a second female parent is the civil partner or cohabitant of the commissioning mother. She has no genetic connection to the surrogate-born child, since the genetic mother is either the commissioning mother or an independent donor. The general rule is that a commissioning second female parent following surrogacy treatment that has been carried out in accordance with the HFE Act has – like a commissioning father – no legal parental status at the time of the surrogate-born child’s birth.

cal provisions in the 2008 Act … concern cases where a woman is to be the other parent.’ (p 829).


495 See 2008 Act s 42.

496 See 2008 Act s 37.

497 2008 Act s 43(a).

498 2008 Act s 43(c).

499 2008 Act s 43, cf s 36, above: Treatment provided to woman where agreed fatherhood conditions apply. The agreed female parenthood conditions set out in s 44 of the 2008 Act also have the same effect as those set out in s 37 (the agreed fatherhood conditions).
An exception to this rule exists, however, if the surrogate is single or has a partner who does not wish to be the legal parent of the child, and if the eggs of the intended second parent have been used for the surrogate-conception. In this situation, provided the relevant consent requirements have been complied with, the intended second parent can become the second legal parent of the child.\textsuperscript{500} Even so, she must still register as a donor.\textsuperscript{501}

In all other situations, in order to become a legal parent, a commissioning second female parent must apply for a parental order\textsuperscript{502} or apply to adopt the child.

A \textit{second male parent}, like his female counterpart, is the civil partner or cohabitant of the commissioning father. He has no genetic connection to the surrogate-born child and has no legal parental status at the time of the surrogate-born child’s birth.

Also in this case, however, there is an exception that enables an intended father, ie the male partner of a commissioning father, to become the legal father of the surrogate-born child when the child is born. This is dependent upon two factors. First, the surrogate must either be single or have a partner who does not want to be the surrogate-born child’s legal parent; and secondly, the intended father may not have provided his sperm for the treatment.\textsuperscript{503}

Since April 2010, male same-sex commissioning couples also have the right to apply to the court for a parental order. This means that the

\textsuperscript{500} That is, along with the surrogate mother (the first legal parent).
\textsuperscript{501} See HFEA, ‘Commencement arrangements for the parenthood provisions in Part 2 of the Human Fertilisation and Embryology Act 2008’, information sheet. Undated. <http://www.hfea.gov.uk/docs/parenthood_commencement_guidance.pdf> accessed 11 April 2013. The rationale for this is difficult to understand. While these principles apply to parenthood following surrogacy treatment they appear to be more suited to the situation of an egg donation between a same-sex female couple where one woman is the gestational mother and the other is the genetic mother. In the situation addressed in the text above, it would make more sense if the commissioning parent who provides her eggs for the treatment were to be regarded as the commissioning mother or intended mother, not – as appears to be the case – the intended second parent.
\textsuperscript{502} This has been possible since 6 April 2010, when the HFE Act introduced changes in relation to parental orders which require same-sex couples to be treated in the same way as heterosexual couples.
second male parent in a same-sex union now has this option if he wishes to become the child’s legal parent. If the application is granted, the birth may be registered in the Parental Order Register showing both men as the parents of the child. If a parental order is not possible, he could apply to adopt the child.

In conclusion, there are few situations in which commissioning parents in England and Wales are able to have their legal parental status established already at the time of the surrogate-born child’s birth. In most cases, parenthood will have to be transferred from the surrogate mother and, where relevant, her partner to the commissioning parents. Where the requirements set out in Section 54 of the 2008 Act have been satisfied, it is possible for legal parentage to be transferred to the commissioning parents through a parental order. If not, adoption might be an option.

4.4 The parental order

4.4.1 The requirements

In order to facilitate the transfer of parenthood following surrogacy arrangements where at least one of the commissioning parents is genetically connected to the surrogate-born child, the 1990 Act introduced the parental order provision which came into effect in 1994. Parental orders are an alternative to adoption and in the Explanatory Notes to the HFE Bill they are even described as “fast track adopt-

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504 See 2008 Act s 54(2)(b) and (c).
506 Where it concerns adoption, a registered adoption agency must be involved. In determining whether or not a child may be adopted ‘[t]he paramount consideration of the court or adoption agency must be the child’s welfare, throughout his life.’ (Section 1(2) of the Adoption and Children Act 2002). The effect of an adoption order, like a parental order, is that the child is treated in law as a child of the adoptive parents. Probert 2009 (n 441) p 236, 10–023. In relation to stepparent adoptions see Masson, Bailey-Harris and Probert (n 469) pp 871–873 paras 22-058–22-059. The use of adoption for the transfer of parentage following surrogacy arrangements is addressed further in Chapter 7, below.
tion”. This reflects the fact that, like an adoption order, a parental order extinguishes the legal relationship between the surrogate-born child and the original legal parents, and the surrogate-born child becomes the child of the commissioning couple for all legal purposes.

The conditions that must be satisfied before an application for a parental order may be approved by a court are set out in Section 54 of the 2008 Act. Broadly, the conditions required to be met under section 54 can be seen as concerning three individual groups: the commissioning parents, the surrogate and her partner, and the child. These are addressed in turn, below.

First, where it concerns commissioning parents, there must be a genetic connection between at least one of the applicants and the surrogate-born child before the court may make a parental order. Under the 1990 Act, only married couples could apply for a parental order. The 2008 Act extended the categories of eligible applicants to include civil partners, unmarried opposite-sex couples and same-sex couples who are not living in a civil partnership i.e. partners in an enduring family relationship. Single applicants, however, are unable to become legal parents through parental orders. According to Fenton, Heenan and Rees, this rule ‘appears anachronistic and discriminatory’ since single women are eligible to adopt and they also have access to ART. In their view, it is clearly illogical to suggest that a surrogate-

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507 Human Fertilisation and Embryology Bill, Explanatory Notes, House of Lords, 5 February 2008 [Bill 70], Clause 54: Parental orders, note 185 p 33. See also McCandless (n 401) p 330 who refers to parental orders as ‘a type of fast-track adoption procedure for certain surrogacy arrangements’.

508 See also Probert 2011 (n 441) who calls parental orders an ‘expedited form of adoption for use in surrogacy cases’ p 134 para 320.

509 Parental orders were previously governed by s 30 of the 1990 Act. Section 54(9) of the 2008 Act sets out where applications may be lodged.

510 HFE Act 2008 s 54(1)(b).

511 HFE Act 2008 s 54(2)(a)-(c). These provisions came into effect in April 2010. The other provisions concerning parental orders remain unchanged from the 1990 Act. See further Department of Health, Explanatory Notes, Human Fertilisation and Embryology Act 2008 (undated), para 188 p 32. Note that where it concerns the category of partners in an enduring family relationship, applicants may not be within ‘prohibited degrees of relationship in relation to each other’ s 54(2)(c). This is defined in s 58(2) as one’s parent (including adoptive parents), grandparent, brother, sister, uncle, or aunt; both full blood or half blood.

A born child needs two parents while a child who needs to be adopted needs only one.513 Applicants must be at least 18 years of age,514 and at least one applicant must be domiciled in the UK, Channel Islands or Isle of Man when the application and order is made.515 In addition, an application must be made to a family proceedings court516 within six months of the child’s birth.517 The court must also be satisfied that no money or other benefit – over and above reasonably incurred expenses – has been given or received by the applicants unless approved by the court.518 This effectively rules out the granting of a parental order if it can be shown that the surrogacy arrangement has been a commercial one. The court has, however, awarded parental orders in respect of cross-border surrogacy arrangements which were clearly commercial on the basis that it was in the best interests of the surrogate-born child.519

Certain conditions concerning the surrogate mother must also be met. First, the surrogate must have become pregnant following treatment with ART.520 This means that parties to privately arranged surrogacy agreements which have resulted in pregnancies following intercourse or DIY insemination are not eligible to apply for a parental order. Secondly, consent to the making of the order must be obtained

513 Above p 282.
514 HFE Act 2008 s 54(5).
515 HFE Act 2008 s 54(2).
516 Section 54(9)(a) of the HFE Act 2008 provides that proceedings related to parental orders are family proceedings. On the meaning of family proceedings see Masson, Bailey-Harris and Probert (n 469) pp 592–594. See also Probert 2011 (n 441) pp 29–32 for an overview of the courts administering family and succession law in England and Wales.
517 HFE Act 2008 s 54(3).
518 HFE Act 2008 s 54(8).
519 See for example J v G [2013] EWHC 1432 (Fam) in which a parental order was awarded to the applicants in respect of twins following a cross-border surrogacy arrangement in California, USA. In this case the surrogate was paid $56,750 plus expenses; Re C (A Child) [2013] EWHC 2413 (Fam), where a parental order was awarded following a cross-border surrogacy arrangement in Russia. The amount paid in this case was £50,000 (about half of the payment went to the agency); Re X & Y (children) [2011] EWHC 3147 (Fam) an Indian surrogacy case which resulted in the commissioning parents having two surrogate-born children from two different surrogate mothers; See also Re L (a minor) [2010] EWHC 3146 (Fam) concerning a commercial surrogacy arrangement in the USA; and Re: X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam) concerning a commercial surrogacy arrangement in the Ukraine.
520 HFE Act 2008 s 54(1)(a).
‘freely and unconditionally’ from the surrogate, and from the other legal parent where relevant. The consent must be given in writing. Importantly, the surrogate’s consent is ineffective if given less than 6 weeks after the child’s birth.

In relation to the child, a prerequisite for the granting of an order is that it is necessary for the child to be living with the applicants at the time of the application and the making of the order. In this connection, McCandless highlights the fact that this ‘means that a child is required by law to live for a period of time with persons who have no legal rights or responsibilities towards her or him.’

The effect of a parental order is that the child is ‘treated in law as the child of the applicants’ It gives parental responsibility to the commissioning parents and extinguishes the parental responsibility that anyone has had for the child prior to the order being made.

4.4.2 Parental orders in practice
Eight-hundred and eighty Parental Orders were registered in England and Wales between 1995 and 2011; one-hundred and thirty-three of these were from the year 2011. In England alone, the total number of parental orders made between 2002 and 2012 was 586. Of these, 409 orders were made under s 30 of the HFE Act 1990 and 177 orders were made under the HFE Act 2008.

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521 HFE Act 2008 s 54(6).
523 HFE Act 2008 s 54(7).
524 HFE Act 2008 s 54(4)(a). Moreover, the applicants must be domiciled in the UK, Channel Islands or the Isle of Man, s 54(4)(b).
525 That is, ‘given the (at least) six weeks moratorium on the transfer of legal parenthood between the legal parent(s) and the commissioning parents’, McCandless (n 401) p 334.
526 HFE Act 2008 s 54(1).
527 It also extinguishes any order – such as a residence order – made under the Children Act 1989. See Freeman 2010 (n 402) p 842.
529 This information was received from Hannah Bower, Children and Family Court Advisory and Support Service (Cafcass England) in an email sent to Jane Stoll on 14

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Applications for parental orders commence in the Family Proceedings Court. In determining whether a parental order may be awarded, the Court must consider the Welfare Checklist. It also must make the welfare of the child the paramount consideration when considering a parental order application. These requirements were introduced in April 2010.\(^{530}\)

The Welfare Checklist, found in Section 1 of the Adoption and Children Act\(^ {531}\) provides, inter alia, that:

> the paramount consideration of the court ... must be the child’s welfare throughout his life.\(^ {532}\)

Section 1 of the Adoption and Children Act also stipulates the various things the court must consider. The “checklist” includes the child’s wishes and feelings, with regard to his or her age and level of understanding; the child’s particular needs; the likely effect on the child of the order (throughout life); the age, sex, or background of the child, and any other characteristics considered relevant; any harm,\(^ {533}\) which the child has suffered or is at risk of suffering; and the child’s relationship with relatives, and any other person considered by the Court to be relevant.\(^ {534}\)

In England, parental order reporting is performed through the Children and Family Court Advisory and Support Service (Cafcass) by experienced social workers.\(^ {535}\) When an application for a parental or-


\(^{531}\) Adoption and Children Act 2002.

\(^{532}\) Adoption and Children Act 2002 s 1(2).

\(^{533}\) As defined by c 41 of the Children Act 1989 (see Adoption and Children Act 2002 s 1(4)(e) ).

\(^{534}\) Adoption and Children Act 2002, s 1(4)(a)-(f).

der is submitted, the Court appoints a Cafcass social worker to act as a Parental Order Reporter. In response to the introduction in 2010 of the HFEA (Parental Orders) Regulations,536 above, and new rules of court which set out the procedural requirements for parental order applications,537 Cafcass issued a guidance document for Parental Order Reporters,538 to support the parental order process.539

The Parental Order Reporter’s role includes identifying the information required by the Court to determine the application; ensuring the criteria for making the order are met; making initial checks on the commissioning couple to confirm whether there is information regarding the risk of harm to the child; applying the adapted Welfare Checklist; and establishing whether there is any reason why the Court should not make the order.540

4.5 Birth records/registration

The way in which births are registered and records are maintained has, of course, an influence on the child’s right to know about his or her origins. In England and Wales, a child’s birth must be registered within 42 days.541 Probert emphasises that the register does not record bio-

540 See Cafcass, above, Duties of the Parental Order Reporter, Part 5.1.
541 Probert, 2011 (n 441) p 45 para 60, referring to the Births and Deaths Registration Act 1953 s 10(1). For information about birth registration and birth certificates see also Stephen Cretney, Judith Masson and Rebecca Bailey-Harris, Principles of Family
logical fact but legal status. Thus, where children are born following ART in which donor gametes have been used, it is the legal parents who will be registered as parents on the birth certificate, not the gamete donors. The implication of this for surrogacy arrangements is that the original legal parents will be named on the child’s first birth certificate, even when the commissioning parents are the genetic parents of the child.

A Parental Order Register is, however, maintained by the Register General at the General Register Office. This register contains a record of the result of parental orders made under the HFE Act. When the child concerned is 18 years of age, he or she has a right to find out details about his or her birth from the register.

After a parental order is made in favour of the commissioning parents, it will be registered in the Parental Order Register. The entry will record the commissioning parents as the legal parents of the child and this will replace the entry originally made in the register of births. A new birth certificate will be issued, replacing the first certificate. On this birth certificate, the commissioning parents will be registered as the child’s parents.

A similar process applies where it concerns adoption. In these cases, the child will be registered in the Adopted Children Register, maintained by the Registrar General. The earlier entry made in the register of births will be changed and the fact that the child has been adopted will be recorded. The adoptive parents will be registered as the legal parents of the child and the child’s birth certificate will be replaced with a certified copy of the Register entry. Adopted children may also apply to see the original birth certificate when they are 18 years of age.

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542 Probert 2011 (n 441) pp 45–46, para 61.
543 Section 30 of the 1990 Act and s 54 of the 2008 Act.
544 See Freeman 2010 (n 402) p 843. See also Probert 2009 (n 441) 10–022 p 235.
545 Probert 2011 (n 441) p 46 para 63.
546 Probert 2011 (n 441) p 46 para 63; Masson, Bailey-Harris and Probert (n 469) p 827, para 22-010.
547 Probert 2011 (n 441) p 46 para 63. For more detail regarding access to birth and adoption records following adoption see Masson, Bailey-Harris and Probert (n 469) pp 827–832.
It should be mentioned that the Registrar General also maintains an Adoption Contact Register. This makes it possible for birth parents and other relatives to leave messages for adopted individuals indicating, for example, whether contact is welcome and vice-versa.\textsuperscript{548}

4.6 The welfare of the child

The regulation of surrogacy in England and Wales appears to have a strong emphasis on the welfare of the intended child. This is evident from the HFE Act itself, its statutory instruments and the Code of Practice. The requirement, above, that the welfare of the child must be the paramount consideration before a parental order can be awarded, and the system of birth registration following parental orders are additional examples of the child-centred approach in relation to surrogate-born children.

Moreover, The HFE Act provides that:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.\textsuperscript{549}

Concerning the Authority’s Code of Practice, the Act further stipulates that:

The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (including a child’s need for a supportive parenting), and of other children who may be affected by such births.\textsuperscript{550}

To this end, the Code of Practice guidance note on the welfare of the child, is particularly relevant.\textsuperscript{551}

\textsuperscript{548} See Masson, Bailey-Harris and Probert (n 469) p 830 para 22–013, referring to the Adoption Act 1976 s 51A.
\textsuperscript{549} HFE Act 2008 s 13(5).
\textsuperscript{550} 2008 Act Section 25(2).
\textsuperscript{551} Human Fertilisation and Embryology Authority, Code of Practice 8th edn, 2010, Guidance Note 8 on the welfare of the child, mentioned above in Part 4.2.3.
4.7 Concluding remarks

By virtue of the SAA and the HFE Act, the law on surrogacy in England and Wales provides a high degree of certainty where it concerns the determination of parentage at the time of the surrogate-born child’s birth. This is accomplished through clear statutory provisions that clarify the family law statuses of surrogates and their spouses, and commissioning parents. Moreover, in codifying the Mater est rule, the HFE Act is unequivocal that, in England and Wales, the gestational mother is legal mother of the child, leaving no room for anyone else to dispute maternity. Concerning the issue at hand, this means that a surrogate-born child has the security of having a guaranteed, pre-determined, legal mother at the time of birth: the surrogate. Other aspects of the surrogacy laws that unmistakably aim to protect the interests of the surrogate-born child were raised above.552

Even so, notwithstanding that the clarity of the various statuses promotes certainty for all parties when the surrogate-born child is born, there is no certainty regarding who the final parents of the child will ultimately be. Because the SAA provides that a surrogacy arrangement is not enforceable against any party,553 it is left open for the surrogate to change her mind and keep the child. By the same token, the commissioning parents cannot be compelled to take the surrogate-born child.

To conclude, the SAA and the HFE Acts, together, appear to provide a comprehensive regulatory framework for surrogacy arrangements in England and Wales. The legislation enables heterosexual and same-sex couples, and single women to access the ART services provided by licenced centres. It also permits altruistic surrogacy arrangements. A particular strength of the relevant legislation is its clarity in relation to parentage. Applied to surrogacy arrangements, the high level of certainty regarding legal parental status when the surrogate-born child is born serves not only the child’s interests but also the interests of the other parties.

552 See Part 4.6.
553 SAA 1985 s 1A.
Chapter 5
5 Surrogacy and parenthood in Israel

5.1 Introductory remarks

Israel has been referred to as ‘a pronatalist society whose Jewish-Israeli population will try anything in order to have a child.’\footnote{See Joseph G Schenker, ‘Legal aspects of ART practice in Israel’ (2003) 20(7) Journal of Assisted Reproduction and Genetics 250 p 251; Elly Teman, ‘“Knowing” the surrogate body in Israel’ in Rachel Cook et al (eds) Surrogate motherhood: International perspectives (2003) 261 p 262 [Teman 2003a].} This has contributed to Israel being a world leader where it concerns ART research. Israel also holds the highest per capita number of fertility clinics in the world and its national health insurance heavily subsidises the costs of ART; both childless couples who have no children together, and singles who wish to establish a family, are entitled to state funded ART.\footnote{See Schenker, above p 251; and Teman 2003a, above, p 262; and Carmel Shalev, ‘Halakha and patriarchal motherhood – An anatomy of the new Israeli surrogacy law’ (1998) 32 Israel Law Review 51 p 52. Note that Schenker’s discussion on surrogacy in the article, above, can also be found in Abraham Benshushan and Joseph G Schenker, ‘Legitimizing surrogacy in Israel’ (1997) 12(8) Human Reproduction 1832–1834. Regarding routine prenatal care in Israel see Tsipy Ivry, Elly Teman and Ayala Frumkin, ‘God-sent ordeals and their discontents: Ultra-orthodox Jewish women negotiate prenatal testing’ (2011) 72 Social Science & Medicine 1527 pp 1528–1529. Regarding the social acceptance of IVF, and access to IVF in Israel compared to other countries see Frida Simonstein, ‘IVF policies with emphasis on Israeli practices’ (2010) 97 Health Policy 202.} Its policy of providing almost unlimited state funding for ARTs is unique and is widely accepted as symbolising its pronatalism,\footnote{Daphna Birenbaum-Carmeli, ‘The politics of ‘The Natural Family’ in Israel: State policy and kinship ideologies’ (2009) 69 Social Science & Medicine 1018 p 1018.} as are the generous maternity benefits received by working mothers.\footnote{Above p 1019. Maternity benefits include, for example, free maternity care, redundancy protection for pregnant women and those on maternity leave, sick leave for birth-related illnesses; and certain tax reductions (see p 1019).}
The Surrogate Motherhood Agreements Act 1996\textsuperscript{558} (The SMA Act) was passed by the Israeli Parliament (the Knesset) in 1996. Israel thus became the first country in the world to combine the legalisation of surrogate motherhood agreements with a requirement that such agreements be approved and administered by a special approvals committee appointed by the Government.\textsuperscript{559} According to Teman, the 1996 surrogacy law provided ‘Israeli women with even more options to populate the nation.’\textsuperscript{560} By 2007, over 100 surrogate-born children had been born under the Israeli legislation.\textsuperscript{561} In June 2012, this figure had increased to 395.\textsuperscript{562}

In spite of Israel’s approval of surrogacy as a reproductive alternative, however, not all religious authorities welcome it with open arms.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{558} Surrogate Motherhood Agreements (approval of agreement and status of the newborn) Law (1996) SH no 1577 p 176. This is the full name of the Act in English as used in the unofficial published translation of A.G. (Aryeh Greenfield) Publications, Haifa. Aryeh Greenfield’s translation is also the one used by D Kelly Weisberg in her book \textit{The Birth of Surrogacy in Israel} (2005).
  \item \textsuperscript{560} TEMAN ELLY, \textit{‘The medicalization of “nature” in the “artificial body”: Surrogate motherhood in Israel’} (2003) 17(1) Medical Anthropology Quarterly, 78 p 81 [Teman 2003b].
  \item \textsuperscript{561} See Birenbaum-Carmeli 2007 (n 558) p 39.
  \item \textsuperscript{562} The total number of deliveries being 309, including 79 sets of twins and two sets of triplets. These figures were obtained from Rabbi Yuval Cherlow, a member of the Approvals Committee, in a meeting held at Yeshiva campus in Petach Tikvah, Israel on Tuesday 12 June 2013.
\end{itemize}
\end{footnotesize}
Jewish authorities with more traditional views have strong objections to surrogacy arrangements while those with more liberal views are more flexible and support it. The response of other religious authorities also varies from intolerance to tolerance to support.

The aim of this chapter is to examine the way in which Israel regulates surrogacy agreements and to attempt to understand some of the driving forces behind its unique legislation. First, the background to Israel’s current policy on ART and surrogacy is explored. The Surrogate Motherhood Agreements Act is subsequently considered, paying particular attention to the requirements relevant to the approval of the surrogacy contract, since these factors directly affect the status of the parties and therefore concern the issue of parenthood. This is followed by a discussion on legal parenthood following surrogacy arrangements, focusing on the status of the parties to the contract. Possible withdrawal from the surrogacy contract is then addressed before concluding with some comments about the register which must be kept in respect of all orders issued under the Act.

5.2 Background to Israel’s current policy on ART and surrogacy

5.2.1 The relevance of Israel’s history

Israel is an important jurisdiction to study in the context of parenthood following surrogacy arrangements; not only because it stands out as having developed a comprehensive law devoted entirely to surrogacy,563 but also because it has, like England and Wales, implemented and tested a mechanism for the transfer of parenthood to the intended parents. Yet it is clear that Israel’s reproductive policy is heavily influenced by religion and by the State’s pronatalist ideology.564 This stands in stark contrast to the reproductive policies of England and Wales, and Sweden. This appears, at least in part, to be due to the fact

563 See Birenbaum-Carmeli 2007 (n 558) p 39.
that in Israel religion, pronatalism and the law are closely intertwined. An awareness of how these factors have influenced ART and surrogacy policy contributes, therefore, to an understanding of the Israeli law itself.

5.2.2 Religious aspects – ART in general

Although Israeli law is secular, its family law is not. For its Jewish population, questions of personal status – including paternity, legitimacy, marriage and divorce – are regulated by Judaic law. Special rabbinical courts have exclusive jurisdiction in relation to these matters and are responsible for adjudicating and enforcing the cases according to Jewish law. Matters concerning the other religious denominations are regulated by their own communal laws and are administered by the appropriate communal courts.565

Schenker explains that the Jewish outlook on reproduction has its roots in God’s first commandment to Adam ie to be fruitful and multiply. To this end, Judaism permits the practice of all ART techniques when the gametes come from the husband and wife; from the Judaic standpoint, IVF has been supported by the two Chief Rabbis of Israel.566 According to Islam, IVF may be performed, but only where it involves the husband and the wife.567 Where it concerns Christians, IVF may be practised by Anglican, Protestant and other denominations but not by Roman Catholics since ART is not accepted by the Vatican.568

In this chapter, the (dominant) Jewish-Israeli response to ART and surrogacy is the focus because it is predominantly this influence which is responsible for the formation of the regulation of ART in Israel. It is important to note, however, that Israel is a pluralist society and there are more interests at stake than those of the Jewish population.

565 See Schenker (n 554) p 251.
566 Above.
567 Above.
568 Above.
5.2.3 The pronatalist influence

5.2.3.1 Pronatalism

The pronatalistic ideology evident in Jewish Israeli culture has been attributed to several factors including the biblical directive to “be fruitful and multiply”; the Holocaust trauma; and demography politics.\(^{569}\) Inherent in the last two factors is what Teman describes as ‘the emotional needs of a people in a permanent state of war.’\(^{570}\)

Israel has also been described as a highly familial society,\(^{571}\) in which Jewish Israelis, for the most part, subscribe to a familial form of life.\(^{572}\) In this context, the centrality of childbearing is evident and it has been reported that:

> the majority of Israelis agreed that the lives of childless people were virtually empty and that raising one’s children was life’s greatest joy.\(^{573}\)

According to Kahn, this is a factor that profoundly affects the acceptance of ART in Israel. Religiously observant Jews, in particular, see the biblical command to “be fruitful and multiply” as an essential religious duty that forms the basis for their way of life. The obligation for Israeli Jews to reproduce also has deep historical and political roots.\(^{574}\) In this connection, she points out that:

> Jewish citizens of the Jewish state come from only three places; from immigration, from conversion and from Jewish mothers … Israeli Jewish women are left as the primary agents through which the nation can be reproduced as Jewish … \(^{575}\)

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\(^{569}\) See, in the context of familism, Birenbaum-Carmeli (2009) (n 556) p 1019. See also Teman 2003b (n 560) p 80.

\(^{570}\) Above p 80. (Here Teman refers to the work of Yuval Davis 1989).

\(^{571}\) Birenbaum-Carmeli 2007 (n 558) p 24.

\(^{572}\) Birenbaum-Carmeli 2009 (n 556) p 1019. This feature of Israeli-Jewish society complements pronatalism, and presumably plays an important role for the successful implementation of the policy.

\(^{573}\) Above p 1019.

\(^{574}\) According to Kahn, some Israeli Jews believe that by having children, the perceived demographic threat represented by Palestinian and Arab birth rates might be counterbalanced. Others consider it their duty to produce soldiers to protect the fledgling nation. Still others feel that they must have children to replace the six million Jews who were killed in the Holocaust. See Susan Martha Kahn, *Reproducing Jews: A cultural account of assisted conception in Israel* (2000) p 3.

\(^{575}\) On these issues see Kahn, above p 3.
Moreover, since Israel is a country where the family is placed ‘as the cornerstone of nation’s construction’\textsuperscript{576}, Teman concludes that it is not surprising that ‘women enter into symbolic relations with the state specifically through their roles as wives and mothers.’\textsuperscript{577} In her view:

\begin{quote}
[i]his pronatalist focus is symbolically expressed in the laws and regulations relating both to abortion and the new reproductive technologies. The cultural reproductive imperative is so strong that Israeli legislation actively encourages Israeli women to pursue technologically assisted reproduction.\textsuperscript{578}
\end{quote}

Pronatalism, then, has had a decisive impact on the way in which Jewish Israelis view and embrace conception and reproduction; both natural and assisted. Where it concerns assisted conception following ART and surrogacy, the pronatalistic influence is clearly evident. Two key areas where this is clear are the scope and practice of ART; and the level of state subsidy and access to ART.\textsuperscript{579} These are outlined, in turn, below.

\section*{5.2.3.2 Scope and practice of ART}

IVF treatment for infertility was introduced in Israel in 1982.\textsuperscript{580} Since then Israel has become one of the world leaders in research and development of ART. The far-reaching scope of ART in Israel becomes particularly evident when ART is measured by the number of clinics per person. When calculated in this way, there is no contest: as mentioned above, Israel has more fertility clinics per capita than any other country in the world.\textsuperscript{581}

Already in the mid-1990s, Israel was reported to have 24 fertility clinics for its then population of 5.5 million. This was four times the

\begin{footnotes}
\footnotetext[576]{Teman 2003b (n 560) p 80.}
\footnotetext[577]{Above.}
\footnotetext[578]{Above.}
\footnotetext[579]{Another way Israel’s pronatalism is exemplified through its reproductive policies is by the state’s generous maternity benefits and allowances for pregnant women and for those women trying to conceive. Generous benefits for mothers are another example.}
\footnotetext[580]{Schenker (n 554) p 251.}
\end{footnotes}

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per capita number than the United States.\textsuperscript{582} As of 2006, 30 fertility clinics were in operation in Israel which had a reported population of seven million.\textsuperscript{583} Figures from 2010 reveal that Israel performs four times as many IVF cycles as France and Australia and twice as many as Iceland.\textsuperscript{584} Moreover, in Israel, approximately 3.6\% of all births are from IVF.\textsuperscript{585} It is hardly surprising, then, that parenthood in Israel has been described not only as ‘a social command, but … also a flourishing medical industry.’\textsuperscript{586}

5.2.3.3 \textbf{State subsidy of ARTs and wider access}

The state subsidy of ARTs in Israel, and the fact that it is available to all women who wish to become mothers are additional ways through which the pronatalistic and familial policies of the Israeli state are expressed.

When compared to other countries, where IVF and DI are not permitted or expensive, ART in Israel is both legal and state-funded. Israel’s national health insurance funds up to seven cycles of ART for each child, up to the birth of two children. All Israeli married and unmarried women, irrespective of marital status or religion, are eligible for subsidised ART.\textsuperscript{587}

According to Birenbaum-Carmeli, fertility treatment in Israel has been openly accepted by politicians as a way to increase the Jewish population and has therefore been fully state-funded.\textsuperscript{588} By comparison, abortion and contraceptives – treatments which limit family size and which are not consistent with the pronatalist ideology – are unsubsidised or only partly subsidised by the public health system.\textsuperscript{589}

\begin{itemize}
\item \textsuperscript{582} Kahn 2000 (n 554) p 2. See also Teman 2003b (n 560) p 81.
\item \textsuperscript{584} Above. It could be noted that Iceland is reported to be the country with the second highest IVF rate after Israel (p 6).
\item \textsuperscript{585} Above p 6.
\item \textsuperscript{586} Above.
\item \textsuperscript{587} See Teman 2003b (n 560) pp 80–81; Teman 2003a (n 554) p 262; Kahn (n 574) p 2; and Shalev 1998 (n 555) p 52.
\item \textsuperscript{588} Birenbaum-Carmeli 2007 (n 558) p 25.
\item \textsuperscript{589} See Birenbaum-Carmeli 2007 (n 558) p 25. See also Kahn (n 574) p 3; and Shalev 1998 (n 555) p 52, note 6. Shalev points out that contraceptive devices are not covered by the law; nor are all cases of legal abortion. Most recently, the Haifa Feminist Center (n 583) reported that fertility treatments are unlimited, receiving public funding up to the second child (p 6).
\end{itemize}
To conclude, it is clear that Israeli policy encourages families, and also single women to have children and heavily subsidises the costs connected with conception and birth. This initiative is directly connected to its pronatalistic ideology and, as mentioned above, evidenced through low or no-cost ART.

The option of not becoming a mother is virtually non-existent in Israel, while solutions such as international adoption are still considered to be secondary options when genetic parenthood is possible.  

5.2.4 Background to the surrogacy law

5.2.4.1 The Aloni Commission

Surrogacy was placed firmly on the public agenda in 1991 when a public commission was appointed by the Ministers of Health and Justice to examine the subject of in vitro fertilisation. The Commission’s task was to examine the legal, social, ethical and halakhic aspects of treatments connected to IVF, including surrogacy arrangements. The Aloni Commission, named after the Judge who served as its Chair, published its findings in 1994.  

Before any law on surrogacy could become a reality, however, the Commission first had to satisfy the requirements of the Jewish orthodox establishment. Thus, it was necessary to negotiate a compromise between the restrictive orthodox regulations and the more liberal views of secular Israelis.  

One of the driving forces said to be behind the establishment of the Aloni Commission was the first well-publicised Nahmani case (no.1). One commentator has in fact stated that the ‘… legalization of surrogacy … was prompted directly by the Nahmani affair.’  

In the first case, which preceded the Commission, a married couple, the Nahmanis, appealed to the Supreme Court to receive public funding for IVF

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590 Teman 2003a (n 554) p 262.
591 For readers interested in more information on the background to the Israeli surrogacy law, D Kelly Weisberg’s book, The birth of surrogacy in Israel 2005 (n 558) above, includes inter alia several detailed case studies and a comprehensive account of the Aloni Commission’s findings.
593 Benshushan and Schenker (n 555) p 1834; Schenker (n 554) p 255.
594 See Birenbaum-Carmeli 2007 (n 558) p 38.
for the purpose of generating pre-embryos for transplant into the uterus of a surrogate mother. After the appeal was approved, the Ministries of Health and Law set up the Aloni Commission, above, the recommendations of which provided the basis for the SMA Act.595

5.2.4.2 Religious considerations

Benshushan and Schenker point out that religious aspects in relation to surrogacy are very important and that attitudes differ, worldwide, among the main religions, as was also seen in relation to the other ARTs, above. Judaism, for example, supports surrogacy; the earliest case being reported in the Bible (Genesis 16:2). Most Christian churches, on the other hand, prohibit surrogacy on the grounds that it is not consistent with the unity of marriage and human procreative dignity. Where it concerns Islam, surrogacy is not permitted either, on the basis that pregnancy should be the product of a legitimate marriage. Benshushan and Schenker also refer to the Quran’s statement that ‘[o]ur mothers are those who provide the womb and give birth’. Hinduism, however, permits surrogacy, although problems might develop if the child conceived is not male since to have a son is regarded as a religious duty. Buddhist law permits surrogacy as well, and surrogacy is also available to couples in India in most IVF centres.596

One qualification regarding Judaism support of surrogacy must, however, be mentioned: In spite of the common view that surrogacy is embraced by Judaism, not all Jewish authorities accept it. Nor, as Spitz points out, are all Jewish authorities united in relation to surrogacy. Among Orthodox authorities, for example, traditional surrogacy is almost unanimously condemned.597 It has, however, been accepted by the Conservative and Reform movements as a last resort for those couples who are otherwise unable to have children.598

Shalev explains that ‘the halakha is, by its very nature, a system of pluralist opinions, and that in the matter of medically-assisted repro-

595 Above pp 38–39.
598 Above p 66.
duction there are various, often contrary views.' In this connection, Solomon points out that, despite surrogacy’s history in the Hebrew Bible, gestational and traditional surrogacy continue to be condemned by traditionalists. Where it concerns liberal authorities, most are generally in favour of surrogacy arrangements even though objections are raised by some.

5.2.4.3 Outcome of the Aloni Commission

The outcome of the Aloni Commission was the passage of the SMA Act. The decision of the Knesset was to regulate surrogacy agreements in an attempt to accommodate the various interests rather than prohibit them. While there was a great deal of disagreement amongst rabbis, lawmakers, feminists, and other interests in the lead up to the law, in the end the protechnology, pronatalist interests prevailed. The surrogacy law was passed by the Knesset (the Israeli Parliament) in March 1996, in the record time of nine months from the first draft. But the law was a compromise. According to Shalev, while the foundation for the Aloni Commission’s recommendations was to promote the privacy and autonomy of the parties, the Act’s guiding principle is the preservation of the kinship rules prescribed by Jewish halakha; something which was strongly influenced by political considerations. In this connection, Kahn has said that:

…the structure of the Israeli parliamentary system is such that orthodox rabbis can exert unusual pressure on secular lawmakers in various legal spheres, and the assisted reproduction of new Jewish citizens is one of them. Thus rabbinic beliefs about kinship are explicitly mani-

599 Shalev 1998 (n 555) p 6, see fn 25.
601 That is, the Surrogate Motherhood Agreements (approval of agreement and status of the newborn) Law (1996) SH no 1577 p 176. For alternative translations for the Hebrew title of the Act, see Part 5.1, above.
603 See Kahn (n 574) p 140.
605 Shalev 1998 (n 555) pp 59–60.
fest in secular legislation regarding the appropriate uses of reproductive technology.  

What, then, are the features of the law that might have a special bearing on kinship, in particular for the transfer of parenthood and the status of the parties?

5.3 The Surrogate Motherhood Agreements Act

5.3.1 Scope, function and features

As is evident from its title, the Surrogate Motherhood Agreement Act regulates agreements. That is to say, the Act is not concerned with the regulation of the medical aspects of surrogacy but with the creation and performance of the agreement itself.

An important function of the SMA Act is to avoid the conflicts and problems that might arise from being involved in a surrogacy arrangement. In particular, the Act is tailored to prevent problems associated with the status of the parties, and the child, from a religious perspective; above all, from a Jewish perspective. To this end, the Act regulates the relationship between the intended parents and the surrogate.

There are two main parts of the Act. The first part concerns the approval of the surrogacy agreement by a statutory approvals committee, and the conditions of the agreement. The second part deals with the determination of parenthood and the status of the child.

Kahn believes that the provisions ‘were designed to limit potential rabbinic legal problems about the status of children … [t]hey represent the outcome of prolonged political wrangling by orthodox rabbis and secular lawmakers who were closely involved with the drafting of this legislation.’

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606 Kahn (n 574) p 213, note 7.
607 Dorner 2000b (n 602) p 194.
608 See Shalev 1998 (n 555) p 60. Note that the two main parts of the Act referred to, above, are Chapters 2 (Approval of surrogate motherhood agreement) & 3 (Status of the newborn). The remaining chapters of the Act (1 & 4) deal with interpretation (definitions) and miscellaneous provisions respectively. See Surrogate Motherhood Agreements (approval of agreement and status of the newborn) Law (1996) SH no 1577 p 176, unofficial published translation of A G (Aryeh Greenfield) Publications, Haifa.
609 Kahn (n 574) p 143.
The Act, thus, contains a number of special features which are highly relevant to the issues of parenthood and status. These are addressed, below, and include, first, the above-mentioned requirement that Committee approval must be obtained for all surrogacy agreements. Other important features considered concern the requirements placed on the parties – specifically, the surrogate and commissioning father – and the nature of the surrogacy contract, which is enforceable. It could also be mentioned that some of these features appear strongly connected to religious (Jewish-Israeli) considerations.

5.3.2 The Approvals Committee

A striking feature of the Israeli Surrogacy Law is that it ensures a high degree of state control in relation to all surrogacy arrangements through tight monitoring by a state-appointed committee, the Approvals Committee. In this way, the Act facilitates freedom of contract between the parties – albeit within carefully defined limits – while protecting the interests of the parties. At the same time, the SMA Act promotes the state’s religious and pro-natalistic agendas. This is perhaps not surprising in light of the purposes of the legislation, above.

How then, is the Approvals Committee composed and what are its tasks? Requirements for the composition of the Committee are set out in Chapter Two of the SMA Act. The Committee is composed of seven members, appointed by the Minister of Health. Three of its members are physicians – two specialists in obstetrics and gynaecology and one specialist in internal medicine. The remaining four members comprise one clinical psychologist; one social worker; one public representative who has legal training; and one religious personality who is of the same religion as the parties. At least three of the members must be male and three female and a quorum comprises five members. All sessions of the Committee are in camera. Committee decisions must be in writing and adopted by a majority of members.

610 SMA Act Ch 2 s 3(a)(1)–(7). Note that the social worker, legal representative and religious representative are appointed in consultation with the Minister of Labor and Social Welfare; Minister of Justice; and the Minister of Religious Affairs, respectively. See Ch 2 s 3(b).
611 SMA Act Ch 2 s 3(b).
612 SMA Act Ch 2 s 3(d).
613 SMA Act Ch 2 s 3(f).
614 SMA Act Ch 2 s 3(e).
The tasks of the Approvals Committee are to ensure that all applications for the approval of surrogacy agreements meet the requirements set out in the legislation and to approve agreements where this is possible. This includes the examination of the necessary documents submitted with each application and approving the agreement, outright or conditionally. Agreement conditions concerning payment may also be approved.

Where it concerns the best interests of the child, the Approvals Committee must be satisfied that there are no misgivings about the well-being of the intended child. Moreover, an agreement cannot "include any condition that injures or prejudices the rights of the child that will be born …".

Surrogacy arrangements without the approval of the Committee are prohibited and can incur penalties of up to one year in prison.

5.3.3 Requirements on the surrogate mother

5.3.3.1 Surrogate’s marital status
One of the requirements for the approval of surrogate motherhood agreements, set out in Chapter Two of the SMA Act, is that ‘the birth mother is not married.’ Specifically recruiting unmarried Israeli women into the ranks of possible surrogates is central to legislation. Various reasons have been given for this in the literature.

One explanation for recruiting unmarried surrogates is to circumvent potential adultery. Connected to this is that adultery has consequences for the status of the child. Many rabbis maintain that where a married Jewish woman carries an embryo conceived with the sperm of a Jewish man who is not her husband, it could be regarded as an act of

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615 SMA Act Ch 2 s 2 (Surrogate motherhood agreement); s 4 (Application for approval of agreement); s 5 (Approval of agreement). Section 4 stipulates inter alia the nature of the various medical and psychological evaluations that must accompany an application for approval of the agreement.
616 SMA Act Ch 2 s 6 (Payments). According to Schenker, a main objective of the Committee is to prevent the illegal commercialisation of surrogacy and to this end the agreement of expenses is supervised by the Approving Committee. See Schenker (n 554) p 256.
617 SMA Act Ch 2 s 5(2).
618 SMA Act Ch 2 s 5(3).
619 SMA Act Ch 3 ss 19(a)–(b).
620 Ch 2, s 2(3)(a).
621 Kahn (n 574) p 141.
adultery between the two, even where the conception results from ART and the surrogate’s ova is not used. Such a situation would have direct consequences for the child’s status.622

According to Shalev, the rule against using married surrogates has its origins in a halakhic debate about whether ‘a child born to a married woman from a man who is not her marital partner is a mamzer (a bastard)’ This is significant for the child because, if the child is a mamzer, he or she is only able to marry other mamzerim or converts. Importantly, this rule does not apply to the extra-marital child of a married man, only to that of a married woman. An unmarried woman’s child does not carry any marriage impediments.623 In his connection, in order to prevent the child from being illegitimate according to Judaism, the surrogate should be either single or divorced.624

In spite of the potential risks to the child, above, the Act does provide an exception to the rule against married women being surrogates. This possibility enables the Committee to approve an agreement with a surrogate who is married, where it can be shown that the intended parents are unable – despite reasonable efforts – to enter into a contract with a surrogate who is unmarried.625

What is it that motivates unmarried women to become surrogates? Kahn argues that the voluntary participation of unmarried women in surrogacy arrangements depends on particular beliefs about the biogenetic origin for motherhood. These beliefs make it possible for them to carry embryos which they do not regard as their own because the surrogacy law stipulates that the ova used may not come from the surrogate. Although economic desperation repeatedly surfaces as a motivating factor for surrogates, in addition to an altruistic desire to help, Kahn concludes that the women’s specific beliefs about motherhood’s biogenetic origins are decisive for their willingness to act as surrogates. 626

622 See Kahn (n 574) p 145.
623 Shalev 1998 (n 555) p 65.
624 Schenker (n 554) p 255.
625 Ch 2, s 2(3)(a). How this exception can be reconciled with the potential risks to the child resulting from perceived adultery is unclear.
626 Kahn (n 574) p 141.
5.3.3.2 Surrogate’s connection to child and commissioning parents

A feature which is central to the surrogate motherhood agreement under the SMA Act is the requirement that the surrogate cannot have a genetic connection to the child. That is to say, her egg must not be used for the IVF procedure.627

The rule that the surrogate must not be related to either of the intended parents also has its basis in the laws of **mamzerut**, above. It is not only adultery that labels a married woman’s child a **mamzer**. **Mamzerut** results from other forbidden sexual unions also, including incestuous relations.629 Another explanation that has been given for the rule is that it serves to prevent potential pressure that might otherwise be placed on relatives to become surrogates. This, in turn, avoids subsequent family complications.630

5.3.3.3 Surrogate’s religion

Another important requirement for the approval of surrogate mother agreements under the SMA Act is that the surrogate and the commissioning mother must be of the same religion.631 This requirement is strictly applied for Jews. For non-Jews, however, an exception may be made in consultation with the religious representative on the Approvals Committee.632

Shalev states that the reason the SMA Act requires the surrogate mother and commissioning mother to share the same religion is because ‘the Jewish linage of a person is determined through the mother …’.633 This, according to Teman, is essential in order to guarantee that the child will be regarded **halakhically** Jewish. Because Jewishness is determined matrilineally, a child is considered Jewish if gestated in the womb of a Jewish woman. However, while gestation can pass on Jewishness, genetic material cannot. By way of example, Teman explains that if an embryo created from non-Jewish gametes is gestated in the womb of a Jewish woman, the child will be regarded **halakhically** Jewish. However, if an embryo created from Jewish gametes is

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627 SMA Act Ch 2, s 2(4).
628 SMA Act Ch 2, s 2(3)(b).
630 Schenker (n 554) pp 255–256.
631 SMA Act Ch 2, s 2(5).
632 See SMA Act Ch 2, s 2(5).
gestated in the womb of a non-Jewish woman, the child will not be regarded *halakhically* Jewish.\(^{634}\)

The inclusion of this requirement in the SMA Act is an example of a compromise between the secular and religious interests in creating the surrogacy law, above.

According to Kahn, it shows how secular legislators were able to accommodate the prevalent rabbinic belief that the birth mother in a surrogacy arrangement is the *halakhic* mother of the child. In this way, the *halakhic* relationship between the birth mother and the child, which transfers Jewishness to the child, may be safeguarded in order to reproduce a Jewish child who will subsequently be brought up by a Jewish couple.\(^{635}\) The Jewishness of the child is thus secured while the parenthood order, the mechanism for creating parenthood constructed by the Israeli legislators specifically to enable surrogacy agreements, permits the transfer of parenthood from the secular legal aspect.\(^{636}\)

### 5.3.4 Requirement on the commissioning father

Yet another special feature of the SMA Act is that the sperm used for the surrogate-conception must come from the intended father.\(^{637}\)

Shalev provides that the rationale for this approach was not explained in the Bill’s commentary.\(^{638}\) The *halakhic* rational for the restriction comes from ‘the rules of affiliation to a sperm donor’ and includes, for example, the conviction that ‘[p]aternity is established at conception whereas maternity … is established at birth’.\(^{639}\) Moreover, since identifying information about sperm donors is not registered in Israel, there is a *halakhic* advantage in using the intended father’s sperm because knowledge of the identity of the father reduces the risk of forbidden relations in relation to the child.\(^{640}\)

\(^{634}\) Teman 2003b (n 560) p 95, note 9.

\(^{635}\) See Kahn (n 574) p 146.

\(^{636}\) See Kahn, above p 146. See further on p 148 where Kahn observes (inter alia) that ‘not only is the surrogate’s womb rented in Israeli surrogate-mother agreements, the Jewishness of her womb is rented as well, since it is only by renting a specifically Jewish womb that the organic ability to confer Jewishness can be legally accessed.’

\(^{637}\) SMA Act Ch 2 s 2(4).

\(^{638}\) Shalev 1998 (n 555) p 67.

\(^{639}\) Shalev 1998 (n 555) p 68.

\(^{640}\) Shalev 1998 (n 555) p 68. According to Schenker, the reason for this requirement with ART in general, is to avoid the risk of incest. He does, however, point out that, where it concerns DI, ‘[s]ome Jewish authorities have found the solution to this prob-
Another reason for the prohibition against the use of donated sperm in surrogacy arrangements could be the uncertain status of the sperm donor under Israeli law. From the few cases where the Israeli courts have been asked to rule on paternity following donor insemination, Zafran has found that the courts are inclined, first, to view the sperm donor as the father and secondly, to deny full paternal status to the woman’s husband or partner, who had consented to the insemination procedure.\(^641\) In practice, however, she points out that any difficulties caused by the donor’s ambiguous legal status are tempered by the mechanism for ensuring his anonymity.\(^642\)

Even so, while the Committee can in special cases authorise surrogacy with egg donation, sperm donation is not permitted.\(^643\)

5.3.5 Surrogacy contracts are enforceable

A central feature of the SMA Act, directly connected to the status of the parties and the child, is that it provides for a clear enforcement mechanism: Surrogacy contracts entered into and approved under the Act are not only legal; they are also enforceable. This is implicit from the name of the SMA Act itself, the wording and general language of the Act and the purposes of the Act, above, even though it is not expressly prescribed in the Act’s provisions. Further, the Act provides that a parenthood order ‘shall’ be made by the Court, unless it is shown to contradict the child’s welfare.\(^644\) This indicates an assumption that the surrogacy contract will be enforced.

It is important to clarify that the enforceability mentioned above, refers to the right to enforce the surrogate motherhood agreement as provided for under the SMA Act. For example, the commissioning parents may enforce their right to become parents of the child, assuming the conditions required by the Act and under the agreement are


\(^{642}\) Zafran 2008 (n 641) p 123.

\(^{643}\) See also Schenker who provides that ‘according to Judaism it would make the child “illegitimate” ’; Schenker (n 554) p 255.

\(^{644}\) SMA Act Ch 3 s 11(b) (Status of the Newborn: Parentage order).
met, and subject to the child’s interests. Similarly, the surrogate can enforce the payment of expenses, as agreed and approved under the contract, if the commissioning parents do not meet their obligations to make payments. There is no enforcement mechanism, however, for the commissioning parents to control the surrogate’s behaviour during the pregnancy.645

Thus, once the surrogacy contract has been approved by the approvals committee, it becomes legal and enforceable. This protects the commissioning parents’ legal rights in relation to the child immediately after the birth. Even though a surrogate has the right to undergo an abortion while pregnant, the conditions available for her to dispute the surrogacy contract after the birth of the child are severely limited.646

5.4 Legal parenthood following surrogacy arrangements

The principle of the Law is that the intended parents are the legal parents of the child.647

5.4.1 Guardianship

Before exploring the various legal parental statuses of the parties following the birth of the surrogate-born child in Israel, the issue of the child’s guardianship must be mentioned. The Israeli SMA Act has implemented an innovative method to protect the legal position of the child from the time of birth, and until the time when the parentage order is made. It makes it possible for the child to have a separate legal guardian after the birth – a guardian who is not a party to the surrogacy agreement – while at the same time enabling the intended parents to care for the child from the outset.

645 See SMA Act Ch 2 s 5(a)(3) which provides that ‘the surrogate motherhood agreement does not include any condition that injures or prejudices the rights of the child that will be born, or the rights of one of the parties.’ (author’s emphasis).
646 See Elly Teman, ‘Embodying surrogate motherhood: Pregnancy as a dyadic body-project’ (2009) 15(3) Body & Society 47 p 66; On the birth mother’s right to withdraw from the agreement see SMA Act Ch 3 s 13. On the birth mother’s right to abortion, this is implied in Ch 2, s 5(a)(3) of the Act (see wording above).
647 Shalev 1998 (n 555) p 63.
The SMA Act makes a clear distinction between custody, guardianship and delivery of the child. Under the Act, the intended parents have the right to *custody* of the child from the time of the child’s birth.\(^{648}\) Moreover, it appears clear from the wording of the Act that this right of custody is accompanied by an obligation of parental responsibility toward the child.\(^{649}\) Despite this, however, it is the welfare officer, specially appointed for this purpose, who is the sole *guardian* of the child from the time of the child’s birth until the status of the child is determined by a parentage order; or by another order as the case may be.\(^{650}\) *Delivery* of the child to the intended parents by the birth mother must be in the presence of the welfare officer, above, as soon as possible after the child is born.\(^{651}\)

### 5.4.2 Establishing maternity

When the Israeli government legalized gestational surrogacy arrangements in 1996, the resultant law made the distinction between the two women’s designated titles very clear. The law officially recognized only the woman who will raise the baby, legally referred to as the ‘intended mother’, as the official mother. The gestational surrogate, who is not genetically linked to the baby, is legally addressed as the ‘carrying mother’, recognizing her role as the temporal work of *carrying* the baby in her womb rather than as the mother the baby is intended for.\(^{652}\)

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\(^{648}\) Ch 3 s 10(a) (Status of the Newborn; Custody, guardianship and delivery).

\(^{649}\) The wording is that ‘...they shall bear toward it all the responsibilities and obligations of a parent to his child.’ SMA Act Ch 3, s 10(a).

\(^{650}\) SMA Act Ch 3 s 10(b).

\(^{651}\) SMA Act Ch 3 s 10(c). According to Dr Etti Samama, who made an extensive study on all of the Approvals Committee files up until the end of 2009 (655 files) and followed this up with deep interviews by telephone (one hour each) the authorised welfare officer is not always able to be present when the child is given to the commissioning parents. If, for example, the parents do not notify the welfare officer until the following day, it can take two days before she visits the commissioning parents. During this time, they already have the baby since they usually get the baby “in their hand” in the delivery room and can take the baby home. Information obtained during a telephone meeting with Dr Samama (currently Head of the Medical Technology Policy Division at the Ministry of Health, Israel) on Thursday 14 June 2012.

\(^{652}\) Teman 2009 (n 646) p 48.
5.4.2.1 Status of surrogate

As was seen above, kinship under Jewish law is determined through gestation, not through genetics. Based on this, and knowing that the rabbinical courts have exclusive jurisdiction on questions of personal status, above, it might seem logical, even clear, that the surrogate mother is the legal mother of the child at the child’s birth. This at least appears to be the case.

The lines become blurred, however, when one takes into account the secular law, the SMA Act. Here, it is not equally clear that the legal mother is the woman who gives birth to the child. Nor is there any corresponding indication that the commissioning mother is the legal parent at the child’s birth. The Act does not use the terms “legal mother” or “legal parents”. Rather, the terms favoured are “birth mother” and “intended parents”; a feature which is perhaps not surprising considering the Jewish conception of kinship.

Given that the appointed welfare officer is the sole legal guardian of the child from the time of the child’s birth, and, subject to this exception, that the intended parents have full parental responsibility in relation to the child from birth, how do we determine the true status of the surrogate mother? Moreover, how can this be reconciled with the basic assumption under Israeli law ‘that legal parenthood is based on “natural parenthood.”

According to Zafran, ‘[e]xisting Israeli law acknowledges the status of the woman who carries the pregnancy (the gestational mother) as legal mother, even in the absence of a genetic link to the offspring.’ Her view is based on the assumptions that this applies, first, since it is

653 See further Teman 2003b (n 560) p 87.
654 See Part 5.2.2.
655 Or, alternatively, the term “carrying mother”, as Teman prefers to use, above.
656 SMA Act Ch 3 s 10(b).
657 SMA Act Ch 3 ss 10(a)−10(b).
658 On this basic rule see Zafran who goes on to explain that ‘[w]hen birth results from sexual union between a man and a woman known to each other, the man who provides the sperm is by definition the father, and the woman who bears the child is the mother. [fn] This fundamental rule, which establishes a “natural” test for defining parenthood and provides the background for various statutes and judicial determinations over the years, draws on concepts of Jewish law (halakhah).’ See Zafran 2008 (n 641) p 118.
659 See Zafran (n 641) p 141.
how the law is applied in cases of egg donation\textsuperscript{660} and secondly, because the issue does not seem to be contradicted in the surrogacy law. Zafran’s conclusion is that because court intervention is necessary to sever the parental tie of the surrogate under the SMA Act, ‘[i]t therefore stands to reason that the Surrogacy Law also assumes the maternal status of the pregnancy carrier.’\textsuperscript{661}

This is persuasive. It is further evidenced by the fact that the SMA Act does not rule out the possibility of a change of heart by the surrogate mother even though the starting point is that the commissioning parents will obtain their parentage order and be recognised as the sole legal parents of the child.\textsuperscript{662}

If one accepts that, without surrogacy, the mother who gives birth is the natural mother of the child (and thus, also the legal mother), it appears to be at odds with the basic assumption of parenthood, above, to claim that the surrogate birth mother is not, simply because she plans to give the baby away to the intended parents. Yet the Act, while not disputing the birth mother’s claim to “motherhood”, does not confirm that the surrogate is the “legal mother”.

A possible alternative interpretation of the status of the surrogate under Israeli law could be that she is afforded the status of natural mother but, in light of the contractual agreement she has entered into under the SMA Act, she forfeits her unconditional legal right to the status of legal mother to the child. However, because the Act makes it possible for a birth mother who wants to withdraw from the surrogacy agreement to apply to the court for its approval,\textsuperscript{663} it cannot be said that the surrogate has no status at all in relation to the child.\textsuperscript{664} Yet if

\begin{itemize}
\item \textsuperscript{660} Zafran mentions that although the regulations on IVF are silent about parenthood following egg donation ‘their underlying premise is that the woman who gives birth is the mother.’ (Referring to ‘IVF Regulations § 11’), Zafran (n 641) p 126.
\item \textsuperscript{661} See Zafran (n 641) p 142.
\item \textsuperscript{662} See further Shalev 1998 (n 555) p 63.
\item \textsuperscript{663} SMA Act Ch 3 s 13. The possibilities for such approval are very limited. See below.
\item \textsuperscript{664} This is supported by the following: The birth must be registered by a (Ministry of Interior) clerk before the birth mother – in this case, the surrogate – leaves the hospital (information was obtained in an interview with Dr Ruth Zafran on 13 June 2012 at IDC (Herzliya Campus) Interdisciplinary Center, Herzliya); at birth, the surrogate-born child is entered in the population register under the surrogate mother’s name. Only after the Court Order, the entry is changed and the child is entered as the child of the commissioning parents. The child then receives a new registration number so that no one can trace it – with the exception of access by religious authorities in the event of marriage (Etti Samama (n 651) 14 June 2012); and the surrogate is required, in
\end{itemize}
the surrogate was the true legal mother at birth, under Israeli law, why would she be required to apply to the court, in the limited circumstances that are available, for an order to ‘determine the birth mother’s status as the child’s mother and guardian …’?\textsuperscript{665}

Alternatively, then, the surrogate’s status could perhaps be seen as that of the acknowledged natural mother to the child, with a conditional right to apply to be the legal mother under limited circumstances.\textsuperscript{666} She has no absolute right to the child by virtue of her giving birth.

### 5.4.2.2 Status of commissioning mother

At the time of the child’s birth, the status of the commissioning mother, irrespective of whether or not she is also the genetic mother, is less certain than the status of the surrogate mother because ‘there is neither statute nor presumption that firmly supports her legal standing as a mother. In contrast to paternity, determined in principle by the source of the sperm, maternity is determined, in Israeli law, by birth.’\textsuperscript{667}

Unlike the surrogate, whose status as natural mother is at least undisputed by virtue of pregnancy and childbirth, the intended mother has no true parental status. She has a right under the surrogacy contract which reflects the intention of the parties that she will acquire the status of mother to the prospective child; and a future right under the SMA Act to be the legal mother and guardian of the prospective child, subject to the conditions for parentage orders being met.

Thus, the status of the commissioning mother at the time of the child’s birth (or very shortly after), assuming the baby is handed over as agreed, could be described as that of state-authorised custodian with a conditional right to be the legal mother and guardian of the child as soon as the parentage order is approved by the court. Like the surrogate, she has no absolute right to the child; neither by virtue of

\textsuperscript{665} SMA Act Ch 3 s 13(c).

\textsuperscript{666} In light of the apparent difficulties in merging religious law with secular law it appears that the statutory law has found a compromise which has attempted to take into account the interests of all of the parties.

\textsuperscript{667} See Zafran (n 641) pp 142–143.
her genetic connection to the child nor on the basis of the surrogacy contract.  

5.4.2.3 Status of egg donor

In Israel, customary practice provides that egg donation is anonymous. Donors have no legal parental status in relation to the child born in situations where a donated egg is used for conception with IVF. It follows, then, that the egg donor has no rights or obligations in relation to the child born following a surrogacy arrangement either. The basis for this is the essential principle, above, that the mother is the woman who gives birth.

Although the practice of IVF – both with and without egg donation – is governed by the Public Health (In Vitro Fertilization) Regulation 1987 and by Ministry of Health guidelines, the regulations are silent in relation to parenthood following egg donation. Even so, the egg donor in IVF is not seen as a potential legal mother. She is not a party to the agreement and the implied assumption is that she will not be involved in any way in competing for the status of parent.

There are indications, however, of a change in rabbinical thinking in relation to who is regarded as the mother in surrogacy cases. According to Jotkowitz, the former consensus – that the birth mother is regarded as the mother – has shifted over the last few years. Now,

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668 It should be mentioned, however that this principle has been successfully challenged in respect of an “egg donation surrogacy” abroad. In a foreign surrogacy case, reported in March 2012, concerning a heterosexual couple, a Tel Aviv Family Court Judge ruled that a commissioning mother whose eggs were used for the surrogate-conception would not have to adopt twins born to a surrogate in the Republic of Georgia. <http://www.haaretz.com/print-edition/news/israeli-moms-won-t-have-to-adopt-babies-born-to-surrogates-1.416911> accessed 30 July 2013.

669 Zafran (n 641) p 124. Zafran refers to § 15(a) of the IVF Regulations, above, which provide that ‘a clinic conducting in vitro fertilization activities shall not provide information related to the identity of a sperm donor or an egg donor.’

670 See Zafran (n 641) p 126.


672 Zafran (n 641) p 124.

673 Zafran (n 641) p 126, referring ‘generally’ to § 11 of the IVF Regulations (not available).

674 See Zafran (n 641) p 130.
there is a view emerging that the genetic mother is considered the mother. This is supported in a Jerusalem Post article from 2010 where it is reported that:

[...]any of the country's most influential rabbinical arbiters have gradually changed their minds from considering the woman who undergoes in-vitro fertilization (IVF) with donor eggs the baby's halachic mother, to regarding the donor – even if she is not Jewish – as the real mother.

This probably has no effect in real terms on the use of donor eggs for surrogacy, however. What is at stake does not appear to be the identity of the donor but, rather, the Jewishness of the donor.

It should be noted that ‘this about-face in rabbinical opinion from two decades ago has developed recently but has not been made public before.’ According to Jotkowitz, the reasons for the change in Jewish legal decision-making are not clear. In his view, it cannot be attributed to new scientific information because the genetic basis of heredity was widely understood already in the 1980s when the first rulings about IVF were issued. Jotkowitz speculates, rather, that the reason for the about face might be that a vast number of Israeli women

677 This is clear from the continuation of the article which provides: ‘Because of the complete turnover of opinion among leading rabbis as to who is the mother according to Jewish law when ova for IVF are donated, more “Jewish eggs” must be donated so that desperate, infertile Israeli women will not have to go abroad to purchase eggs from non-Jews.’ See the Jerusalem Post, ‘Rabbis change views on who’s the “mother” of IVF children’, Judy Siegel-Itzkovich, 25 January, 2010 (above). Why is this relevant to parenthood following surrogacy? This issue is raised here because donor eggs, ie eggs that are not from the gestational mother, are always used for surrogacy arrangements in Israel. Even though legal parenthood from a secular perspective can be resolved through the surrogacy legislation, a clear shift in rabbinical thinking regarding what constitutes a real mother could nevertheless have implications for how parenthood following surrogacy arrangements is viewed, and on the legal and religious status of the surrogate-born child, at least by the Jewish community. This risk must be regarded as clear. (Since according to Siegel-Itzkovich, above, under Halachic law, a child born from an egg donated from a non-Jewish genetic mother would be regarded as the child of the genetic mother and would therefore have to undergo Orthodox conversion in order to become Jewish).
678 Above.
buy ova from non-Jewish women; something which became unacceptable to rabbinic authorities.  

Either way, it appears clear that an anonymous egg donor who donates ova to be used in IVF for a surrogacy arrangement in accordance with the SMA Act has no legal parental status in relation to the surrogate-born child.

5.4.3 Establishing paternity

5.4.3.1 Status of surrogate’s partner

In principle, the status of the surrogate’s partner is not at issue in relation to surrogacy arrangements in Israel because of the requirement under the SMA ACT that the birth mother may not be married.  If the Approvals Committee were to, in an exceptional situation, approve a surrogacy agreement between the intended parents and a surrogate mother who is married, however, it is not clear what the result would be in relation to the legal parental status of the surrogate’s husband.

On the one hand, it appears clear that the surrogate’s partner would have no legal parental status in relation to the child for several reasons. First, there would be no genetic connection between the surrogate’s partner and the child; secondly, the sperm used for the pregnancy would come from the intended father; and thirdly, there is no provision in the Act for any parents other than the parties to the surrogacy contract; that is to say, the surrogate and the intended parents.

On the other hand, it might depend on the situation. Under Israeli law, the husband of the woman who gives birth is automatically the father of the child born and there is no need for a written confirmation by the husband or the gestational mother. If the husband were to contest his fatherhood, however, he would not be registered as the child’s father. Applying this to surrogacy, it would appear that the surrogate’s husband would be registered as the surrogate-born child’s legal father when the child is born, unless he contested his parentage.

If the mother is not married but cohabiting with a man, however, the Israeli law on parenthood requires that the gestational mother and her male partner must both acknowledge that he is the child’s father.

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679 Jotkowitz (n 675) p 839.
680 SMA Act Ch 2 s 2(3)(a).
681 This information about the Israeli parenthood law and the registration of parentage in Israel was obtained at a meeting with Dr Ruth Zafran (see above, n 664).
Even so, the mother is not compelled to provide the name of the father for registration since there is no requirement under Israeli law that a child must have two legal parents. Thus, in the situation of a surrogate birth, the surrogate’s male partner would not automatically be the child’s father at the time of birth. If the surrogate had a female partner, her partner would have no legal parental status in relation to the surrogate-born child.

5.4.3.2 Status of commissioning father

Although paternity in Israel is determined in principle by the source of the sperm, this does not appear to give the commissioning father legal parental status at the time of the child’s birth where it concerns surrogacy arrangements. It makes no difference that the SMA Act provides that the commissioning father must also be the genetic father of the child. Thus, the legal parental status of the commissioning father is like that of the commissioning mother, above. That is, he has no true legal parental status at the time of the child’s birth, but he has a right under the surrogacy contract to acquire the status of legal father in relation to the surrogate-born child; and a future right under the SMA Act to become the child’s legal father and guardian, again, subject to the conditions for parentage orders being met.

Thus, the legal parental status of the commissioning father, at the time of the child’s birth, could also be described as that of state-authorised custodian with a conditional right to be the legal father and guardian of the child after the parentage order is approved by the court.

5.4.3.3 Status of sperm donor

It was seen above that the Approvals Committee may, in special cases, approve a surrogacy arrangement with egg donation. Sperm donation, however, is never permitted with surrogacy.

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682 Information obtained at a meeting with Dr Ruth Zafran, above (n 664).
683 This is because as it stands today, where it concerns same-sex female partners, the (non-genetic) female partner of a gestational mother can only become the child’s legal mother through adoption. Information confirmed at a meeting with Dr Ruth Zafran, above.
684 This was mentioned in the context of the commissioning mother, above, in comparing maternity and paternity. See also Zafran (n 641) pp 142–143.
685 SMA Act, Ch 2 s 2(4).
686 For interest, sperm donation and artificial insemination are regulated by: Rules as to the Administration of a Sperm Bank and Guidelines for Performing Artificial In-
5.4.4 Establishing parenthood in same-sex relationships

In May 2012, a public commission for the evaluation of fertility and childbirth recommended, inter alia, that extensive changes be made to the SMA Act.687 One change proposed was that same-sex couples should be permitted to qualify for surrogacy treatment in Israel.688 This issue is currently under review. Thus, at the time of writing, surrogacy treatment in Israel is only available to heterosexual couples. This is clear from Chapter One, Section 1, of the SMA Act where “intended parents” are defined as ‘a man and woman who are spouses and who contracted with a birth mother for the birth of a child’.689 Same-sex couples wishing to access surrogacy services must therefore travel abroad in order to do so which can lead to complications in establishing parentage on their return.

Another recommendation of the public commission, however, was ‘the codification of the surrogacy process performed by Israelis abroad’.690 On 3 January 2013, the Israel High Court of Justice, hear-
ing a case in which two gay male couples sought recognition as the parents of surrogate-born children born in the United States, urged the State to clarify its legal procedures for same-sex couples seeking surrogacy treatment abroad. In the Court’s view, the absence of a legal framework in this regard amounted to discrimination since it meant that couples had to undergo genetic testing to prove their parenthood and a formal adoption process.691 On 20 March 2013, the Ministry of Health Implementation Committee adopted a recommendation to recognise both commissioning parents in a same-sex union as parents when children are born through surrogacy arrangements abroad. To this end, the Committee has decreed that a non-genetic commissioning same-sex parent should be recognised as the legal parent of the surrogate-born child, without having to adopt the child,692 but the issue is yet to be determined by the Knesset.

5.5 When parties change their mind

According to Teman, Israel had yet to report a case of non-relinquishment as of 2010.693 Even so, the SMA Act anticipates the situation that the surrogate mother might change her mind and withdraw from the agreement.694

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692 According to the news article, the Implementation Committee recommendations will be forwarded to the office of the Director General before the legislation is submitted to the Knesset for a vote. ‘Israel's health ministry to recognize gay couples as parents: A committee of Israel's health ministry adopted court recommendation to recognize both members of gay couples as parents of children born with the aid of overseas surrogacy’ 20 March 2013, Dan Littauer, Gay Star News Ltd, available at: <http://www.gaystarnews.com/article/israels-health-ministry-recognize-gay-couples200313> accessed 31 July 2013.
693 Teman 2010 (n 187) p 302, note 15. As to surrogacy arrangements in other countries, Teman has also reported that an estimated 99% of surrogate mothers willingly relinquish the child as agreed. See Teman 2008 (n 185) p 1104. See further Chapter Two, above.
694 SMA Act, Ch 3 ss 13–14.
After a parentage order has been made it is not possible for the court to give its approval to the surrogate’s withdrawal from the surrogacy agreement. Before a parentage order is issued, it is possible in limited circumstances. However, it is important to recall that the general rule is that the intended parents shall be the child’s legal parents, above. This is reflected in Chapter 3, Section 11(b) of the SMA Act which provides that:

\[\text{the Court shall make a parentage order, unless it concluded—after having received a report from the Welfare Officer—that doing so would contradict the child’s welfare }\]

To this end, the possibilities for the surrogate mother to keep the baby are limited – eg when compared with England and Wales where she has an unconditional right to keep baby. In Israel, the Court must be satisfied after receiving a report from the Welfare Officer, that a change of circumstances justifies the surrogate’s withdrawal of consent, ‘and that this is not likely to have an adverse effect on the child’s welfare.’

In relation to the recognition of maternity, an interpretation that should be highlighted has been put forward by Zafran. She believes that the SMA Act makes it possible to recognise the parental status of all three parties to the surrogacy agreement ie two mothers and one father. In support of this she points to the fact that if the court ratifies the surrogate’s withdrawal from the surrogacy agreement, the surrogate should be declared the mother of the child but ‘“it may include in the order directives regarding the child’s status and relations with the intended parents or with one of them.”’ She thus believes that “… the Surrogacy Law can be understood as not precluding the recognition of the maternity of the intended (genetic) mother, in tandem with the maternity of the gestational mother.”

The other possible situation in which a surrogate might change her mind is if she were to decide to terminate the pregnancy instead of giving birth to the child. The surrogate’s right to, inter alia, an abor-

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695 See Shalev 1998 (n 555) p 62.
696 SMA Act, Ch 3 s 11(b).
697 SMA Act, Ch 3 s 13(a).
698 See Zafran 2008 (n 641) p 130, citing the Surrogacy Law s 13(c).
699 See Zafran 2008 (n 641) p 142, note 142.
tion is expressly permitted under the Act. Moreover, neither the intended parents nor any other person has a right to control the surrogate’s lifestyle during the pregnancy. This, according to Schenker, includes her nutritional and drinking habits, use of drugs and sexual behaviour. Moreover, the intended parents may not intervene in the surrogate’s prenatal care or force her to undergo invasive procedures, such as amniocentesis, or non-invasive prenatal procedures, against her will.

The Act does not expressly provide for the possibility that the commissioning couple might withdraw from the surrogacy agreement. According to Schenker, in such a case, the surrogate mother will become the legal guardian and if the surrogate refuses to take responsibility for the child, the child ‘will be transferred to the welfare authorities of the state.’ The possibility for the Court to make an order on the surrogate-born child’s status in such a situation is provided for in Section 14(b) of the SMA Act.

5.6 The parentage order

Assuming the surrogacy arrangement proceeds as planned, the surrogate will release the surrogate-born child into the care of the intended parents as soon as possible after birth, in line with the agreement. Even so, the commissioning parents will not be the legal parents of the child until a parentage order has been awarded in their favour by the Court.

The parentage order, considered further in Chapter Seven, is the mechanism provided under the SMA Act to facilitate the transfer of legal parentage to the intended parents. It enables a relatively speedy parental transfer and eliminates the need for the intended parents, who are often both the genetic parents, to adopt the child in order to ac-

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700 SMA Act, Ch 4 s 18.
701 Schenker (n 554) p 257; See also Shalev: ‘As long as the child hasn’t been born the Law respects the carrying mother’, Shalev 1998 (n 555) p 63. The argument that surrogacy would not work in Sweden because it implies controlling the surrogate’s behaviour and restricting her autonomy has been used in Sweden and has been justified by claiming that this is, in turn, against Swedish policy (Chapter 3 above). Clearly, these objections could be satisfied by making a rule about it, as was done in Israel.
702 See Schenker (n 554) p 257.
703 SMA Act Ch 3 s 11 ss (a)–(b).
quire legal parental status. Once the surrogacy arrangement has reached the parentage order stage, the process appears to be extremely simple and has only two requirements: an application by the parents and an order from the court. First, within seven days of the child’s birth the intended parents must apply for a parentage order. If no application is made, the welfare officer must apply for the order.\textsuperscript{704} Secondly, the Court must make the parentage order unless it would contradict the child’s welfare.\textsuperscript{705}

The apparent ease with which the parentage order is able to be made is no doubt facilitated by the fact that the agreement is supervised from its inception. In addition to the Approval Committee’s involvement in the creation of the contract, the welfare officer is actively involved in the case due to the notice requirements under the Act,\textsuperscript{706} through his or her role as sole designated guardian of the child from its birth,\textsuperscript{707} and through being present for the physical delivery of the child to the intended parents by the surrogate mother.\textsuperscript{708} A report for the Court is also prepared by the welfare officer.\textsuperscript{709} Moreover, the intended parents have had custody of the child from the time of the child’s birth.

An interesting observation is that the SMA Act does not stipulate that the parentage order transfers parenthood \textit{from} the surrogate to the intended parents; there is in fact no special requirement for the surrogate’s consent under the parentage order provisions of the Act. The inclusion of the parentage order in the Act, and its process, thus provides another indication that the starting point for the statute is that the agreement will be executed and that the intended parents will become the legal parents of the child.\textsuperscript{710}

\begin{flushright}
\textsuperscript{704} SMA Act, Ch 3 s 11(a). \\
\textsuperscript{705} SMA Act, Ch 3 s 11(b). The wording of s 11(b) is: ‘The Court \textit{shall} make a parentage order …’ [my emphasis] \\
\textsuperscript{706} At the end of the fifth month of pregnancy, the parties must notify the welfare officer about the details of the forthcoming birth. Another notice must be given immediately after the birth (not later than 24 hours) by the intended parents. See SMA Act Ch 3 s 9 ss (a)–(b). In respect of the third point, see comments made by Dr Etti Samama (n 651), above. \\
\textsuperscript{707} SMA Act Ch 3, s 10 (b). \\
\textsuperscript{708} SMA Act Ch 3, s 10 (c). \\
\textsuperscript{709} See SMA Act, Ch 3, s 11(b). \\
\textsuperscript{710} Shalev 1998 (n 555); SMA Act Ch 3, s 11.
\end{flushright}
According to Zafran, ‘[t]he order’s significance lies in its providing an exception to the usual legal rule recognizing the woman giving birth to the child as the mother.’\textsuperscript{711}

The effect of a parentage order is that ‘the intended parents shall be the parents and sole guardians of the child, and it shall be their child for all intents and purposes.’\textsuperscript{712}

5.7 Birth records – Registry

All orders made under the SMA Act must be entered into a special register.\textsuperscript{713} As regards inspection of the register, ‘[t]he provisions of section 30 of the Adoption of Children Law 5741-1981 shall apply to this matter, mutatis mutandis.’\textsuperscript{714}

The reasons for the requirement to keep a special register that records the children born through surrogacy arrangements appear to be two-fold. The first is to allay the concerns in relation to mamzerut and Jewish ancestry. The second reason is the need for certainty in establishing genetic parentage and the parent-child relation due to the fear of sibling marriage. This is a ‘pertinent consideration within the ‘halakhic rules of affiliation and marriage.’\textsuperscript{715}

Referring to the Aloni Commission Report, Shalev states that a register creates a danger of stigmatization for the children born following surrogacy arrangements.\textsuperscript{716}

\textsuperscript{711} Zafran 2008 (n 641) p 158. Moreover, she believes that ‘… the Surrogacy Law opens the door to establishing maternal ties with two or more women, by allowing the intended mother to retain ties to the child even when the gestational mother was declared to be the legal mother.’ (Also p 158.) In this context she is referring to s 13 ie when the birth mother withdraws from the agreement.

\textsuperscript{712} SMA Act, Ch 3 s 12(a). See also Shalev 1998 (n 555) p 63.

\textsuperscript{713} SMA Act, Ch 3 s 16(a).

\textsuperscript{714} SMA Act, Ch 3 s 16(b). See also Shalev who states that the right to inspect the adoption register is held by ‘the Attorney General, marriage registrars, and a chief welfare officer, as well as to an adoptee aged 18 years or over and by permission of a welfare officer.’ No one else has a right to access the register. See Shalev 1998 (n 555) p 64.

\textsuperscript{715} Shalev 1998 (n 555) p 68. Note that because there is no register which identifies sperm donors, this consideration is also behind the requirement that the intended father must be the genetic father of the child (Shalev p 68).

\textsuperscript{716} Referring to the Aloni Commission Report, paras 4.1–4.13, Shalev 1998 (n 555) p 69.
The concern about the possibility of half-sibling marriage is pertinent to all forms of medically-assisted reproduction involving donor gametes, and ought not justify a special register for surrogate mother arrangements. On the other hand, it is possible that the right of the child to information about the circumstances of its birth is stronger in the case of surrogacy.\(^\text{717}\)

Kahn believes that \textit{halakhic} concerns over the child’s status, and the possibility that he or she might marry a child born to the surrogate (ie his or her \textit{halakhic} mother) are circumvented by the requirement, above.\(^\text{718}\) However, Shalev’s comments – regarding the risks of stigmatising surrogate-born children and the possibility of half-sibling marriage being equally applicable to all donor offspring – are convincing. They are also relevant for other jurisdictions setting up a similar register.

Bearing in mind that an egg donor could also be involved in creating a child through surrogacy, the emphasis evident in Israeli secular law on the gestational and legal mothers but not on the donor appears to be consistent with the fact, above, that under Judaism, religious identity is determined matrilineally.

5.8 Concluding remarks

While the driving forces behind the Israeli surrogacy legislation are strongly religious and pronatalistic, the SMA Act is nevertheless a secular law that provides for a high degree of certainty where it concerns the determination of parentage following surrogacy arrangements. It achieves this, inter alia, through provisions that clearly define the family law statuses of the parties to the agreement. Moreover, the Act clearly attempts to protect the interests of the surrogate-born child and the individuals whose behaviour it regulates.

The SMA Act’s goal to have the greatest possible certainty in relation to status issues by ensuring that surrogacy agreements will be enforced is facilitated by the requirement that all surrogacy arrangements must be approved by the Approvals Committee before treatment may commence. The approvals process thus helps to ensure that conflicts can be avoided between the parties and in this way all the

\(^{717}\) Shalev 1998 (n 555) p 69, note 55.

\(^{718}\) Kahn (n 574) p 214, note 13.
relevant interests can be protected while certainty is promoted. In light of the fact that there have been no reports of surrogate-born children being kept by surrogate mothers, this process has proven to be effective.

From the perspective of the surrogate-born child, the SMA Act performs well. Several specific examples which point to its child-centred approach can be found in the Act. These include the requirement that the Approvals Committee may not approve a contract unless it is satisfied that there are no misgivings about the intended child’s welfare; the appointment of a welfare officer to ensure that the surrogate-born child’s interests are protected, both before and after birth; the reporting requirements placed on the parents and the surrogate; provisions providing for the child’s custody (commissioning parents) and sole-guardianship (designated welfare officer) from birth until the parentage order is awarded; the establishment of a special register for parentage orders; and provisions for determining the child’s status in the event that any of the parties withdraw from the surrogacy contract.

As to the surrogate-born child’s right to parents from birth, this has a high chance of being fulfilled under the SMA Act. Even though the commissioning parents are not the legal parents until the parentage order is finalised, the child is in their care from birth. Moreover, there is a presumption, already from the outset, that the commissioning parents shall be the surrogate-born child’s parents. This presumption, in relation to future parental status, is difficult to rebut.

To conclude, the Israeli SMA Act provides solutions to a problem that exists worldwide. It also provides specific solutions to aspects of surrogacy that have religious and cultural relevance to Israel. To this end, some provisions of the SMA Act, such as the requirement that the surrogate mother is single, are clearly designed to avoid specific religious problems and might not be suited for application in all jurisdictions. Clearly, the religious and cultural reasons comprised the motivation for creating an Act that would not be inconsistent with the majority religion of the State. The content of the Act, however, does not create “religious provisions” but practical solutions. It does this by way of legal rules that are sanctioned by secular law. These solutions also appear to be very effective in protecting individual rights. Thus, the reasons behind the legislation and why certain provisions were drafted do not, and should not, render the Act irrelevant for other jurisdictions.
Chapter 6
6 Determining the basis for legal parentage following surrogacy arrangements

6.1 Introductory remarks

Returning to the discussion in Chapter Three, above, it seems clear that in Sweden today there is no single basis for establishing parentage at the time of the child’s birth. Rather, there are several bases from which legal parentage can be determined when a child is born. In Sweden, there appears to be three primary bases for this: genetics, gestation and intention, although parentage is often grounded on a combination of these factors. Thus, before attempting to decide which mechanism – if any – would be appropriate for the transfer of parentage following surrogacy arrangements, it might be beneficial to consider whether a new basis for establishing parentage following surrogacy should or could be implemented.

It has also been shown, above, that existing bases for establishing parenthood in Sweden have evolved over time to take into account new possibilities of family formation. A clear example of this is evident with ART sperm donation, where the male or female consenting cohabitant of the woman treated will be presumed the child’s legal parent at birth notwithstanding the absence of a genetic connection; another, is that the female consenting spouse or registered partner of the gestational mother will be presumed the child’s legal parent following ART.

While there is arguably scope to further adapt the parentage rules in order to accommodate surrogacy arrangements, the question remains: how could this be achieved? Should we find something new, or be

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719 In this case, intention to parent as evidenced by meeting the consent requirements in relation to ART, but it could also be intention to parent evidenced by contract in jurisdictions where surrogacy contracts are enforceable.

720 See Chapter 3, above.
content to allocate parentage following surrogacy under existing rules? At the very least, should motherhood be fixed such that there is a clear statutory basis for establishing maternity?

Going back for a moment to Table 3, in Part 3.5.6.3, above, we are reminded that the possible number of individuals who could contest legal parentage, or be deemed legal parents, following a surrogacy arrangement in Sweden today was shown to be four for a given pregnancy:

1. The surrogate mother;
2. the surrogate mother’s spouse or cohabitant;
3. the commissioning father; and
4. the sperm donor.

Consider, however, what might happen if surrogacy were to be regulated in Sweden, thereby lifting existing restrictions that apply today under the GIA. In such a case, the scope of potential parents would in fact be wider than this. Table 5, below, indicates that no less than six different individuals might, for a given pregnancy, have an interest in asserting legal parentage in relation to a surrogate-born child at the time of the child’s birth.

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721 See Part 3.3, above.
Potential bases for parenthood following surrogacy\textsuperscript{722}

Table 5.
Examples of potential bases for determining parenthood following surrogacy in Sweden if surrogacy arrangements were to be facilitated (primary basis shown first)

-includes situations where couples travel abroad for treatment but where the child is born in Sweden

<table>
<thead>
<tr>
<th></th>
<th>Egg from SM</th>
<th>Egg from CM</th>
<th>Egg from donor</th>
<th>Sperm from CF</th>
<th>Sperm from donor</th>
<th>Sperm from SM's spouse \textsuperscript{723}</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. SM</td>
<td>Gestation</td>
<td>Genetics</td>
<td>Gestation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. SM's ♂ spouse or SM's ♂ cohabitant</td>
<td>Marriage Intention</td>
<td>Marriage Intention</td>
<td>Marriage Intention</td>
<td>Marriage Intention</td>
<td>Marriage Genetics Intention</td>
<td></td>
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<tr>
<td>3. SM's ♀ spouse \textsuperscript{724}</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Genetics</td>
</tr>
<tr>
<td>4. SM's ♀ cohabitant</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td></td>
</tr>
<tr>
<td>3. CM</td>
<td>Intention</td>
<td>Genetics</td>
<td>Intention</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. CF or CP♀ or CP♂</td>
<td>Intention</td>
<td>Intention</td>
<td>Intention</td>
<td>Genetics Intention</td>
<td>Intention</td>
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<tr>
<td>5. ED</td>
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<td>Genetics</td>
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<td>6. SD</td>
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<td></td>
<td>Genetics</td>
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</tbody>
</table>

\textsuperscript{722} Abbreviations used in Table 5 are defined in the Abbreviations section at the front of the thesis.

\textsuperscript{723} Or cohabitant.

\textsuperscript{724} Or registered partner.
From the examples shown in Table 5, above (which is not intended to provide an exhaustive account of possible parents or bases for parentage), it is apparent that the number of individuals who could attempt to assert legal parentage in relation to a given surrogate-conception would increase if the restrictions on surrogacy were to be lifted.

Thus, if surrogacy arrangements are to be regulated rather than simply tolerated or ignored, it seems obvious that existing rules for establishing parentage will not be able to resolve the new legal status issues raised by surrogacy. This, in turn, has certainty implications for the child’s right to parents.

With this in mind, the purpose of this chapter is to consider alternative ways in which statutory rules and statutory presumptions might be used to establish legal parentage following surrogacy arrangements. The main aim is to explore whether there are any viable options – over and above those presumptions and rules in force today – that could be implemented which would more effectively determine legal parental status at the time of the child’s birth. A related question is whether any of these options could render a transfer mechanism unnecessary i.e. such that the commissioning parents could both be deemed legal parents at the time of the child’s birth. Another aim is to stimulate debate about the possible consequences of maintaining the status quo compared with contemplating other options.

At least three challenges exist for lawmakers attempting to resolve the question of legal parentage following surrogacy. First, does surrogacy, like other forms of ART, warrant the implementation of special parentage rules? Secondly, if so, what will serve as the basis for determining parenthood? Will it be genetics, gestation, intention or a combination of these factors? Thirdly, in what way will the implemented rule or rules be formed? As presumptions – which can be rebutted – or as legal rules; specific to surrogacy or general?

One alternative explored below is the possibility of codifying the existing unwritten presumption of maternity, making it into a general rule of law. Such a measure would firmly settle the status of the gestational mother as legal mother at the time of the surrogate-born child’s birth which would, in turn, confirm the child’s status. The creation of other possible rules and presumptions of maternity and paternity based on genetics and intention are also explored.
6.2 Create new presumptions and rules or continue to apply existing ones

6.2.1 Introductory remarks

Whether or not the Swedish family law status rules should be changed to make it easier to establish parenthood following surrogacy is a matter that policy makers will inevitably have to grapple with. In the end, the result might well depend on whether surrogacy is accepted as an alternative for assisting childless couples to become parents or not. In the event that the existing presumptions and rules for establishing parenthood following surrogacy were to be deemed inappropriate, however, what possible alternatives are there? It has been shown that existing family law status rules are not designed to accommodate surrogacy arrangements, but is there a better alternative?

If surrogacy is to be brought in line with other ARTs, one could expect the creation of new statutory presumptions and rules which will make it easier to determine legal status at the time of the surrogate-born child’s birth. If so, what might the appropriate basis or bases for parenthood be? Alternately, assuming it were not considered necessary to overhaul the entire family law status rules to protect the interests concerned, would it be possible to combine some of the existing rules and presumptions with new ones? For example, if the policy were to clarify the gestational mother’s position as the legal mother, it might be sufficient to introduce a new statutory rule confirming maternity in favour of the gestational mother without amending any of the other status rules. Either way, the likely outcomes of determining maternity, paternity and parenthood based on the criteria of genetics, gestation and intention, should be considered, even if only to rule out certain options as unworkable.

6.2.2 Rationale for creating new presumptions and rules

What, then, could the rationale for creating new presumptions and rules be? There are, in fact, several arguments that justify tampering with long-established principles, even for the sake of a relatively small
number of births each year\textsuperscript{725} rather than continuing to apply the existing rules and presumptions of parenthood to surrogacy cases.

First, it could be argued that the Swedish family law status rules discriminate against commissioning parents and surrogate-born children. While the current rules and presumptions of parenthood have been tailored to accommodate other forms of ART, evolving over time, surrogacy arrangements are not catered for. Bearing in mind that surrogacy arrangements are not prohibited in Sweden,\textsuperscript{726} using the existing parenthood rules as the starting point for determining parentage following surrogacy arrangements is not consistent with the purpose behind surrogacy or with unique circumstances presented by such arrangements. This is because the rules appear to reflect – first and foremost – the importance of \textit{genetics}. Even where it concerns maternity, genetics arguably plays an equally strong role in the historical interpretation of motherhood as gestation does. While there are, of course, exceptions to parenthood being based on genetics, as exemplified by the provisions governing parenthood following ART, there are no exceptions made under Swedish law today for surrogacy. In relation to the other ARTs – including DIY processes – the parenthood rules have been amended, both to protect the children born and to clarify family law status. Without such change, these statuses would have remained unclear. Surrogacy also comes under the ART umbrella and, clearly, the State has an obligation to protect the interests of surrogate-born children, like all other children. Yet we cannot apply on surrogacy the same standards used for determining parentage following other ARTs, since the circumstances of surrogacy are unique. This makes family law status in these situations uncertain. A conclusion that must be drawn from this is that, in not making their family

\textsuperscript{725} It is not possible to obtain statistics on the number of births following DIY surrogacy arrangements in Sweden. However, according to a survey completed by the National Board of Health and Welfare, in which each Swedish municipality was asked whether it had dealt with matters concerning surrogacy, it was reported that 101 surrogate-born children were known to have returned to Sweden following cross-border surrogacy arrangements in 2012. This figure is regarded as conservative. See Surrogatmödraskap – enkät 2012, Dnr 39141/2012, 2012-10-25, Gunilla Söderström, Utredare, Avdelning Regler och tillstånd (Enhet Regler 1), Socialstyrelsen, Stockholm. See also the news article: M Forssblad, 'I sverige är: 100 barn födda av surrogatmödrar', \textit{Sveriges radio}, 27 February 2013 <http://sverigesradio.se/sida/artikel.aspx?programid=1646&artikel=5456618> accessed 30 June 2013.

\textsuperscript{726} That is, when the surrogacy procedure does not occur under the GIA.
law status clear, the State could be seen to discriminate not only against commissioning parents but also surrogate-born children.

Another argument that might support amending the parenthood rules to accommodate surrogacy is that it would remove any doubt about the respective statuses of the gestational and commissioning mothers. In light of the long-standing reliance on the *Mater-est rule*, above, it could be assumed that gestation alone has been, and continues to be, the sole basis for determining maternity. An alternative interpretation, which is argued here, however, is that it is not. Rather, it seems more likely that the presumed basis for maternity has always been genetics, supported by gestation. That is to say, the proven fact of gestation has historically been used to provide undisputable evidence of the genetic connection the mother has to the child. Because the separation of these two features was until recently never contemplated, their corresponding value in connection to establishing or proving maternity was never an issue. Whether gestation or genetics should be given priority was therefore never in dispute since they always went hand in hand. Thus, any presumption on which maternity has been based – before the advent of IVF and egg-donation – must have assumed a genetic basis even if gestation was the evidential tool for proving the connection between mother and child. Basing maternity on gestation alone – as is the case with egg donation – is thus a recent construction which has been necessary in order to make a choice between the two women who have contributed to the creation of a given child. The need for clarity as regards surrogacy should be equally overwhelming.

Most importantly, however, if we believe that the surrogate-born child deserves to have parents at birth just like other children, satisfying the best interests of the child requires certainty through rules that will provide this. As already suggested more than a few times, certainty is not possible while family law statuses are unclear, yet it could obviously be promoted if a State were to take a definite position about legal status and turn it into written law. In the end, one can only speculate about what it is that is truly at the core of motherhood. Even so, through technology, the possibility for a new legal basis for maternity has been created. If the parenthood rules are to be unambiguous, it is necessary to choose which contribution – genetics or gestation, or perhaps, intention – is to be prioritised when a choice must be made in

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727 See Part 3.7.2, above.
assigning maternity following surrogacy arrangements. Likewise, where it concerns paternity and parenthood following surrogacy, if intention, or genetics, or both are to play a role in determining parentage a priority must be made and it should be unequivocal.

If the objective of the family law status rules is to maximise legal certainty concerning family law status for the child and parents, this cannot, under existing law, be achieved.

6.3 Possible alternatives – maternity

6.3.1 Introductory remarks

As mentioned above, the possibility of separating genetics and gestation is relatively new and has challenged the notion of what constitutes a mother. It is no longer sufficiently persuasive, as it was in the pre-IVF era, to accept that motherhood can be proven by gestation alone because the role of genetics, which also plays a part – as evidenced by the significance of genetics where it concerns establishing paternity – is no longer indelibly intertwined with the role of gestation. Thus, if it is essential to make a choice between two competing alternatives for maternity, the best way to achieve legal certainty would be to make the priority clear through legislation rather than continuing to attempt to apply the unwritten Mater-est rule, which rests on the assumption that there is only one possible mother, to surrogacy situations.

Moreover, since it is no longer self-evident that the woman giving birth is the mother,\(^\text{728}\) to choose to continue to rely on the unwritten law to establish maternity, without at least exploring other alternatives could be regarded as imprudent. If doubts are raised about the status of the respective genetic and gestational mothers, legal uncertainty will exist which in turn will affect the rights, interests and expectations of the parties in question. If follows that, at least in the event of a

\(^{728}\) Indications that even the Swedish Supreme Court is not certain in this respect can be found in NJA 2006 s 505 (3rd page). There, the majority of the Court, despite clarifying that Swedish law applied the unwritten presumption of maternity (that a woman who gives birth to a child is regarded as the child’s legal mother), nonetheless informed the plaintiff that, in relation to the question of having her maternity established by a Court of law, it was possible to initiate a claim in the District Court in accordance with RB 13:2(1).
dispute, such a situation could have a profound impact on the interests and well-being of the child who should—at the very least—be guaranteed one identifiable legal parent at the time of birth. One way to facilitate this is for the legislator to take a definite position about which mother it is who will be given legal responsibility for the child at the child’s birth.

Assuming there would be no objection to clarifying maternity through legislation, the basis for motherhood must still be determined and a decision must be made about how such a provision should be formulated.

What, then, are the possible alternatives to applying the unwritten Mater-est rule for establishing maternity? A legal rule about establishing maternity could be formulated in a general way so that it covers all births, or be specifically targeted to surrogacy.

6.3.2 General statutory rule of maternity based on gestation

6.3.2.1 Formulation and effect

One alternative to applying the unwritten law to establish maternity, would be to create a general statutory rule stipulating that the gestational mother will be deemed the legal mother at the time of a child’s birth. This measure, which would in effect codify the unwritten presumption of maternity, would also serve to resolve the problem of uncertainty surrounding maternity following surrogacy arrangements.

Needless to say, the idea of instead creating a statutory presumption of maternity is not a feasible alternative in this context, since certainty could not be further enhanced with a presumption of maternity that is based on gestation. Moreover, it could have the unintended effect of being even weaker than the current unwritten “presumption” of motherhood (Mater-est rule) since the latter is more like an unwritten rule of law than a presumption because it appears that it cannot be rebutted.

A general statutory rule of maternity could be achieved by inserting a new statutory provision into Chapter One of the Children and Parents Code, such that the woman who gives birth to the child is the legal mother. The result would be that, irrespective of genetic connection, intention or the form of conception, the gestational mother will have the status of legal mother when the child is born.
The idea of a general statutory rule of maternity is not new for Sweden. As was seen above, it was already raised in the 2001/02 Government Bill on the treatment of infertility. Although at that time, the Council on Legislation instead recommended the implementation of a more restrictive provision to deal specifically with the problem at hand rather than make a general rule that would apply to all births and children, this does not imply that the appropriateness of a general statutory rule of maternity could not – or should not – be re-visited today.

Norway has enacted a provision to this effect. The Norwegian provision, which has been in force since 1 January 1998, expressly provides that the mother of a child is the woman who has given birth to the child. It also makes clear that a contract to give birth to a child for another woman is not binding.

6.3.2.2 Implications of basing maternity on gestation
There is no question that the implementation of a general statutory rule of maternity in favour of the gestational mother would resolve the problem of uncertainty where it concerns the rights and obligations of genetic, gestational and commissioning mothers following surrogacy arrangements. It would also make clear the legal statuses of the respective mothers and the child.

There are also other advantages of confirming maternity by statute. From the perspective of the child, there would be no risk that the he or she would be born without at least one legal parent since a general provision of maternity would always guarantee the security of having a legal mother at birth.

Such a rule would also codify and thereby make clear what, in practice, is assumed concerning both natural conceptions and all forms of ART in Sweden, but what is unclear where it concerns surrogacy.

729 See Parts 3.2.2.1–3.2.2.2.
730 And note that this was in spite of the fact that the original draft text for the provision proposed by the Government was drafted as a general rule of maternity (see above, Part 3.2.2.1).
731 See §2 Lov om barn og foreldre, 8 April 1981, nr 7 (amended by lov 13 juni 1997 nr 39).

The Norwegian text of the provision is as follows:
‘§ 2 Kven som er mor til barnet
Som mor til barnet skal reknast den kvinna som har fødd barnet.
Avtale om å føde eit barn for ei anna kvinne er ikkje bindande.’
If the Children and Parents Code were to contain a general statutory rule which clarified that the decisive factor for determining maternity at the time of the child’s birth is gestation, its scope would be wider than the scope of the existing unwritten presumption. It would cover both natural births and all forms of ART, including egg donation and surrogacy. To this end it would minimise disputes about the allocation of maternity, even in situations where conception has occurred without the assistance of the Swedish national health system. It would also make it unnecessary to have a specific statutory rule of maternity for egg donation.

Creating a general statutory rule of maternity would require minimal change to existing legislation and it would continue to reflect what has been long accepted as unwritten law. Moreover, it would provide certainty about the identity of the legal mother at the time of the child’s birth, irrespective of the nature of conception. In light of the more recent technological developments that have made it possible to separate genetic and gestational motherhood, such a rule is well-motivated.

If a general principle of maternity in favour of the gestational mother were to be codified, there would be no need to consider a tailor-made statutory rule of maternity for surrogacy based on gestation. Nor would it be necessary to consider a tailor-made statutory rule of maternity flowing from genetics or from the intention of the parties, below.

Even for those who do not support surrogacy, a general statutory rule of maternity might be regarded as positive. A rule clearly providing that maternity is determined through gestation could serve to temper expectations of entitlement that might otherwise be held by intended parents because it would make it unequivocal that the act of providing gametes does not, in itself, imply parental rights in relation to the surrogate-born child.

In spite of its advantages, a general rule conferring maternity on the gestational mother could, however, also be perceived as having a disadvantage where it concerns surrogacy arrangements. This is because the parties’ intention that the commissioning mother will become the legal mother of the child would not be able to be realised without a

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732 See above, ie it could be achieved by inserting a new provision into the Children and Parents Code.
733 That is to say, assuming State policy in relation to maternity did not change.
formal transfer of maternity from the gestational to the commissioning mother. To this end, any legal certainty attached to this rule would be connected to the various statuses at the time of birth and could not extend to a guarantee that the commissioning mother would become the legal mother of the child.

6.3.3 Tailor-made statutory rule of maternity based on gestation

A second alternative to applying the unwritten law to establish maternity following surrogacy would be to enact a statutory rule that is tailor-made specifically to clarify maternity following surrogacy. Such a rule could be inserted into Chapter One of the Children and Parents Code and could provide, for example, that ‘the woman who gives birth to a child following a surrogacy arrangement is the child’s legal mother.’ Like a general statutory rule of maternity, above, the effect of this option would be to resolve the problem of uncertainty by securing the gestational mother as the surrogate-born child’s legal mother at the time of the child’s birth.

A comparable solution was chosen by the Swedish legislator when it resolved the question of maternity following egg donation. Thus, since Sweden already has a functioning tailor-made provision clarifying maternal status following egg donation, the implementation of a new statutory rule that specifically resolves the question of maternity following surrogacy should at least be possible. As was seen in Chapter Four, above, a similar solution has also been applied in England and Wales in the context of clarifying maternity following ART in general, which of course includes surrogacy.

A specific statutory rule of maternity in favour of the surrogate mother could be implemented even in the absence of surrogacy regulation. In such a case, however, it might be necessary to consider further regulation.

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734 Here is it presumed that, should surrogacy become regulated in Sweden, any surrogacy contract, while legal, would also be unenforceable where it concerns the requirement of a gestational mother to consent to a transfer of parentage to the commissioning mother.
735 Whether it would be deemed necessary to add words to the effect of “and no other woman” and/or “irrespective of who provided the genetic materials for the pregnancy” would be a matter for the legislator.
736 See FB 1.7.
737 FB 1.7.
738 See Part 4.3.2, above.
ther clarification as regards defining certain terms (the meaning of surrogate mother and surrogacy arrangement) in addition to clarifying the scope of the provision (what types of surrogacy are covered and where they take place).

A tailor-made statutory rule conferring legal maternal status on the surrogate mother at the time of the surrogate-born child’s birth would not be inconsistent with, and would not affect, the existing unwritten presumption of maternity. Nor would it imply a need to amend the statutory rule of maternity following egg donation, found in Chapter One, Section 7 of the Children and Parents Code.739

6.3.4 Tailor-made statutory rule of maternity based on genetics

6.3.4.1 Formulation and effect

Instead of relying on a general or specific statutory rule of maternity based on gestation to establish maternity following surrogacy arrangements, an alternative would be to make genetics the primary basis for maternity. This could be achieved by creating a tailor-made statutory rule which would provide that the woman who contributes her genetic materials in relation to a surrogacy arrangement is the legal mother of any child subsequently born. Such a rule would establish the parentage of the commissioning mother, based on her genetic connection to the child, already at the time of the child’s birth; or earlier. It would also resolve uncertainty regarding maternity following surrogacy arrangements.

Determining maternity in this way would require some form of proof that genetically links the commissioning mother to the child. This could be achieved through DNA tests of the mother and child. Clearly, this option would only be viable for surrogacy if the genetic materials for the pregnancy came from the commissioning mother. The existence of a surrogacy agreement would also have to be established in order to distinguish the pregnancy in question from an egg donation pregnancy. Thus, even though the intention of the parties would not be the primary basis with this option, evidence that a surrogacy agreement had been entered into would nevertheless have to be produced.

739 That is, since the rule in FB 1:7 is specific in providing that the woman who gives birth to a child following egg donation is the legal mother of the child.
6.3.4.2 Implications

As regards the implications of basing maternity on genetics, there would be both advantages and disadvantages. The advantages of maternal certainty and resolving status issues for both mother and child would be similar to those mentioned in Part 6.3.2.2, above, although the result would be to instead clarify the status of the genetic mother as legal mother at birth rather than the gestational mother.

In addition, assuming the commissioning mother and genetic mother were to be one and the same, a practical advantage of conferring maternity based on genetics would be that a mechanism for transferring parentage from the gestational mother to the commissioning mother would not be necessary.

There are also foreseeable disadvantages associated with applying a genetic model to surrogacy arrangements for determining legal parenthood. The first of these concerns the fact that it would be based on an assumption that a commissioning and genetic mother’s legal status would be guaranteed from the moment of birth. This would almost certainly have to imply that the gestational mother would, already during the pregnancy, forfeit any future right to legal maternal status in relation to the child she is carrying; something which is reasonable to assume because under Swedish law a child may not have more than two legal parents at a given time. Thus, if a commissioning mother, along with her partner, were to become legal parents at the time of the surrogate-born child’s birth, there would be no room for the surrogate to have legal parental status at birth as well.

A connected disadvantage is the risk that, in determining maternity based on genetics, the commissioning mother could, at the expense of the surrogate mother, be regarded as the only “real” mother by virtue of her genetic connection to the unborn child already during the pregnancy. There is no question that this would impinge on the maternal and personal integrity of the surrogate mother and, as highlighted above in Chapter Three, it conflicts with prevailing Swedish legal principles to permit someone other than the gestational mother to have

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740 While it is possible in certain situations for a child to have two female legal parents under Swedish law, a child cannot have two legal mothers. Nor, if it is possible to establish who the second parent or father of a child is, can a woman elect to be the only legal parent.

741 Even if the alternative of having two legal mothers at a given time (the surrogate and the commissioning mother) were to be opened, the issue of the potential conflict of interest between the two mothers would remain.
the right of determination over the unborn child-to-be already in the foetal stages.\textsuperscript{742} Some of the problems that could arise in attempting to apply a genetic model on maternity can be illustrated with the following example:

First, let us imagine that the surrogate mother must forfeit any future maternal right to the child during the pregnancy. At the same time, assume that the genetic commissioning mother is given a (guaranteed) future right to become the legal mother of the surrogate-born child at the time of the child’s birth. Bear in mind, also, that a pregnant woman, in general, has no legal parental status in relation to her unborn child, since a foetus is not a legal person. Yet, by virtue of her rights to self-determination and autonomy, she nonetheless has a bundle of rights connected to the pregnancy (which for the purposes of this example we can call “maternal-connected rights”). It is evident that there are conflicting maternal rights and interests in this example and the best way to prioritise between the respective maternal – or perceived maternal – rights is by no means clear.

To what extent, for example, does the surrogate mother lose her maternal-connected rights – such as the right to decide whether to have an abortion – in favour of the commissioning mother? Moreover, if she does lose her rights, when would this occur? We have already seen that, under this option, the surrogate mother has no future right to become the legal mother since she has forfeited this right. Since she has no future right to become the legal mother, should this, or would this, also imply that she has no maternal-connected rights? Ever? Because if it does, then, she would have no right to, for example, choose to have an abortion which in turn implies

\textsuperscript{742} See Part 3.2.1.2, above. It is important to note that under Swedish law there is no “child” during the foetal stages, only a foetus ie a “child-to-be”. See Elisabeth Rynning, ‘Åldersgräns för mänskliga rättigheter? Om rättten till hälso- och sjukvård vid livets början’ i Rolf Nygren, Anna Hollander och Lena Olsen (red) \textit{Barn och rätt} (2004) 149 pp 152–159.
that she has no right to determine over her body or the unborn foetus.

If the genetic commissioning mother, on the other hand, acquires a (guaranteed) future right to become the surrogate-born child’s legal mother at birth, before the child is born, and the surrogate mother at the same time loses the same right, it could be assumed that the commissioning mother might also expect to have the right of determination in relation to that future child’s welfare and treatment; ie to take over the maternal-connected rights from the surrogate when the surrogate loses them. After all, this would be consistent with the rights of gestational mothers in general. That is to say, a pregnant woman clearly has a bundle of maternal-connected rights. Moreover, even though she has no legal parental status in relation to her unborn child, above, she has – like the commissioning mother in this example – a future right to become the legal mother of that unborn child.

This example typifies some of the possible difficulties a legislator would face in attempting to balance the maternal-connected rights of commissioning and surrogate mothers. Moreover, it shows that giving a commissioning mother any maternal-connected rights could not easily co-exist with the principle, fundamental to Swedish law, that a pregnant woman has the right of determination over her own body.⁷⁴³ The importance of self-determination and autonomy in this context has recently been reinforced by both SMER⁷⁴⁴ and the Swedish Government.⁷⁴⁵ This principle is so ingrained that a mother’s right to abuse alcohol and other dangerous drugs during a pregnancy will in most cases take precedence over an unborn child’s right not to be exposed to substances that could cause serious foetal damage. Even in such a situation the possibility for the social welfare authorities to intervene and secure compulsory psychiatric care is limited and a condition for

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⁷⁴⁴ In February 2013. See SMER 2013:1, p 172.
⁷⁴⁵ In June 2013. See Dir 2013:70, p 7.
intervention is that it must be necessary for the mother’s own need for treatment. Whether it is possible to find a balance between permitting the surrogate to live without undue interference and satisfy the commissioning mother’s perceived or real right to make decisions, which affect the surrogate, in what she regards as the best interest of her unborn child should, of course, be considered by the legislator. Whether such a balance could be achieved through a statutory rule of maternity flowing from genetics, however, without encroaching on the well-established rights of the gestational mother – the surrogate – is doubtful.

Over and above the possible advantages and disadvantages of basing maternity following surrogacy on genetics, another issue that should be considered is the connection between gestation and genetics where it concerns a child’s origins. Sweden has had a long-standing policy of promoting genetic truth. This is reflected, inter alia, through an open adoption policy and through laws that give donor offspring the right to trace their genetic origins. Yet the term “genetic truth” was coined before it was possible to separate gestation and genetics. Thus, it cannot be assumed that the term does not equally embrace the significance of gestation since genetics and gestation have been intertwined since time immemorial. By basing maternity on genetics alone, the gestational contribution of the surrogate mother is at risk of being diminished, or even disregarded. If we fail to acknowledge the value of the gestational link in forming part of the identity of the surrogate-born child, what message are we sending, as a society, about how we view “genetic truth”? The same question should, of course, also be asked if we fail to acknowledge the significance of genetics, by only recognising the gestational mother at the time of the child’s birth.

The importance of tracing genetic origins raises yet another issue: birth records. If maternity following surrogacy were to be established on the basis of genetics, it would be necessary to consider the way in which births would be registered, both in relation to the form of registration and the practicalities. This option presumes, for example, that the commissioning mother – assuming she is the genetic mother – is to be registered as the surrogate-born child’s legal mother from the mo-

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ment of birth. As already pointed out, this would avoid the need for a transfer of parentage from the surrogate mother to the commissioning mother. In addition, it would mean that the child would not have two different legal mothers in short succession. However, it would also open up the possibility, or risk, of disregarding the existence of the gestational contribution of the surrogate.

If, on the one hand, the child’s right to information about origins is grounded on genetics alone, it could be argued that there is no need to include the surrogate mother on the child’s birth record. On the other hand, if gestation is also believed to play an important part for the child’s identity, it would not be consistent with the child’s interest if the existence of the surrogate mother is obliterated from the child’s birth record. How the surrogate mother’s contribution could be documented and who would be responsible for providing notice for the birth registration are issues that would require consideration in all situations where the basis for maternity is not gestation.

An issue that warrants re-emphasis is that, since the rationale behind basing maternity on genetics following surrogacy arrangements would be to confer legal parental status on the commissioning mother, a logical assumption must be that she is also the donor of the genetic material provided for the pregnancy. Needless to say, if any future law regulating surrogacy were to permit the use of donor eggs from a source other than the commissioning mother, it would not be appropriate to base maternity following surrogacy arrangements on genetics. Likewise, it would not be suitable to choose this alternative if the genetic materials of the surrogate were permitted to be used for conception.

As to the latter, if maternity following surrogacy were to be based on genetics, special rules would be required to protect the interests of parties undertaking DIY surrogacy arrangements, in which no assistance is sought from the public health system. This would be necessary in order to cater specifically for the situation of traditional surrogacy, where the surrogate is both gestational and genetic mother.

Finally, if basing maternity on genetics, it would have to be made absolutely clear that such a basis applies only to egg donation for the purpose of surrogacy arrangements – that is to say, where the egg donor and the commissioning mother are one and the same – and not to egg donation in general. To this end, the wording contained in Chapter One, Section 7 of the Children and Parents Code could be
amended to reflect the objective of egg donation in which the woman receiving the egg is the intended legal mother, as compared with egg donation (surrogacy) in which the woman giving the egg is the intended legal mother.

6.3.5 Tailor-made statutory rule of maternity based on intention

6.3.5.1 Formulation and effect

If gestation or genetics were to be found unsuitable bases for establishing maternity following surrogacy arrangements, a third basis could be explored: basing maternity on the intention of the commissioning mother\(^\text{747}\) such that legal parenthood be established in her favour at the time of the surrogate-born child’s birth. Evidence of such intention could be found in the surrogacy agreement, which would have to be enforceable, and from specific consents that could be developed for use prior to surrogacy treatment. As regards the latter, it is assumed that the effect would be similar to that of consents made today, prior to ART with donor gametes carried out in accordance with the Genetic Integrity Act, in that they provide evidence of an intention to parent following treatment that results in the birth of a child. This could be facilitated by creating a tailor-made statutory rule to be included in Chapter One of the Children and Parents Code which would provide that ‘the commissioning mother following surrogacy treatment in accordance with the [Act in question] is the legal mother of the surrogate-born child at the time of the child’s birth’, reflecting the intention of all parties to the surrogacy contract.\(^\text{748}\)

As indicated, a statutory rule of maternity based on intention would make it possible for the commissioning mother to acquire legal parental status from the time of birth, without the need to transfer parenthood from the surrogate mother. In light of the discussion about the need to pay regard to the self-determination and autonomy of the gestational mother, above, it is reasonable to assume that legal parental status could not and would not be conferred prior to birth. Rather, the commissioning mother would have a future right to legal maternal status at the time of the surrogate-born child’s birth. To this extent,

\(^{747}\) Along with the other parties to the surrogacy agreement.

\(^{748}\) The possibility of using contract as a basis to transfer parentage following surrogacy arrangements, on the other hand, is raised in Chapter 7, below.
this alternative would have the same effect as the corresponding rule based on genetics.

6.3.5.2 Implications

If maternity were to be determined in favour of the commissioning mother at the time of the surrogate-born child’s birth, the same concerns raised in relation to assigning maternity based on genetics would also apply to maternity allocated in accordance with intention. That is to say, in addition to the issues already addressed above concerning risks to the integrity of the gestational mother, there would be similar implications for the tracing of origins and birth records that would need to be addressed.

Since this option is based on intention, the commissioning mother’s maternal status would not be conditional on her genetic connection to the child. Nor would it make a difference if the surrogate mother’s own genetic materials were used. The same concerns raised above in relation to maternal and personal integrity, however, are equally relevant.

Given its political history in relation to surrogacy arrangements, it is probably safe to assume that a model for maternity based on contractual intention alone at the time of the child’s birth would not, at least in the foreseeable future, be accepted in Sweden.

This option would also be difficult to implement from a practical and technical perspective. It would almost definitely require that the surrogacy treatment be carried out in a licensed centre, using standard contracts with standard terms in order to ensure consistency throughout the country. Thus, there would still need to be a default basis for establishing maternity following surrogacy for parties who have chosen to pursue surrogacy through private arrangements, or arrangements abroad. Furthermore, a high degree of monitoring would be necessary\textsuperscript{749} which would presuppose a high administrative burden on the State.

Suffice to say, an intention-based rule of maternity would not be open to rebuttal, assuming intention was possible to establish. It would thus eliminate the need to transfer maternity after the child’s birth.

\textsuperscript{749} For example: ensuring contracts were correctly entered into and complied with; evaluating the outcome of the contracts to ensure the requirements had been met; and ensuring that the treatment of the commissioning mother in question did not occur privately or abroad to mention a few.
This advantage in favour of the commissioning mother, however, is not sufficient to make this option likely to be persuasive.

6.3.6 Tailor-made statutory presumption of maternity based on intention

6.3.6.1 Formulation and effect

Since the Children and Parents Code already contains tailor-made statutory presumptions of paternity for the determination of fatherhood following ART,\(^{750}\) one might ask whether it really is necessary to create a statutory rule of maternity at all. Instead of creating a new legal rule basing maternity on gestation, genetics or intention, would it instead be possible to create a tailor-made statutory presumption of maternity in favour of the commissioning mother; a presumption based on intention, which would be clear from the surrogacy contract? After all, statutory presumptions of paternity and parenthood have effectively served to establish parentage following other forms of ART since the 1980s.\(^{751}\) These presumptions, too, appear to be based primarily on an intention to become a parent; something which is supported by the consent of the prospective parent to the treatment of his or her spouse or partner.

A statutory presumption of maternity following surrogacy based on intention could be formulated to have a similar scope and application as existing Children and Parents Code presumptions that currently regulate paternity and parenthood following ART, above. If one were to apply current presumptions of parenthood to surrogacy in this way, the effect of this measure would be that the commissioning mother would be presumed the mother of the child on the basis of intent,\(^{752}\) assuming – as with all presumptions of parenthood – that the presumption was not rebutted. One possible ground for rebuttal that could be contemplated, for example, might be the existence of a known hin-

\(^{750}\) See FB 1:6 (insemination); FB 1:8 (IVF).

\(^{751}\) Sperm donation with and without IVF (all couples), egg donation in same sex unions (second parent).

\(^{752}\) With or without the need for a confirmation of maternity – in line, for example, with what is currently required for paternity and parenthood under FB – as the case may be.
drance in relation to the commissioning mother’s right to claim maternity. With a statutory presumption of maternity, the commissioning mother could be afforded all the rights and obligations associated with parentage at the time of the child’s birth, thus, giving her a similar right of parenthood as parties to ART have today when they are not genetically connected to the child.

At first blush at least, an intention-based statutory presumption of maternity in favour of the commissioning mother might appear to offer a good compromise between the surrogate’s need to have a gestational period free from interference and the commissioning mother’s interest in knowing that she will – assuming the presumption of maternity is not rebutted – be able to become the legal mother at the time of the child’s birth. In this situation, once again, a genetic connection between commissioning mother and child would be possible but not necessary for her legal maternal status, since maternity would be based on intention.

6.3.6.2 Implications
If the commissioning mother’s maternity were to be established by statutory presumption it would – unlike the other three options for maternity outlined above – be subject to rebuttal which would have implications for legal certainty. In particular, any aspirations to ensure that the child will have a guaranteed mother at the time of birth would be unattainable with this option. Even if it were to be made clear that the surrogate mother had neither rights nor obligations in relation to the child at the time of the child’s birth, thereby appearing to promote certainty in relation to the commissioning mother’s legal status, this would not necessarily protect the rights or interests the child should have in being guaranteed a legal mother at birth. The reason for this is because a statutory presumption cannot provide the same degree of certainty as a statutory rule. If the presumption were to be automatic, there would be no requirement for the commissioning mother to have her maternity confirmed. In such a case, assuming all of the parties were in agreement, and the commissioning mother accepted the surrogate-born child as planned, the child would have a legal mother at

753 In, for example, the spirit of FB 1:2 ie in this case to be sure that the gestational mother did not get pregnant in a way that was inconsistent with the terms of the contract.
birth. Assume, however, that there were to be either a rebuttal or that
such a presumption required a confirmation of maternity\textsuperscript{754} – some-
things not unreasonable in light of the potential risks to the child in this
situation. If, as mentioned, the surrogate mother were to have no legal
responsibility in relation to the child from birth, there would be a risk
that the child could be without a parent from that time. This might, for
example, occur if the commissioning mother could not for some rea-
son be confirmed legal mother of the child. Without securing a back-
up or alternative for the legal role of mother, a \textit{presumption} of mater-
nity in favour of the commissioning mother could, thus, imply a risk
that the surrogate-born child’s interests in having a legal mother at
birth might not be guaranteed.

Lack of certainty, then, would be an unavoidable consequence of a
presumption of maternity in favour of the commissioning mother fol-
lowing surrogacy. Not only is this inconsistent with the fact that
motherhood has historically been regarded as something certain. If
one, in addition, considers that certainty in this context is a prerequi-
site for the best interests of the surrogate-born child, it could be seen
as somewhat counter-productive to sacrifice the relative certainty of
the \textit{Mater-est rule} for a written presumption of maternity in favour of
a commissioning mother. As it is, certainty attached to the notion of
maternity has been challenged by the gestational-genetic divide. The
introduction of a presumption of maternity would only serve to rein-
force this uncertainty.

A connected question is whether maternity could in fact be estab-
lished by presumption without some form of mechanism which trans-
fers legal status from the surrogate to the commissioning mother; a
factor which, again, has implications on certainty.\textsuperscript{755} The current statu-
tory presumptions of paternity and parenthood are based on the prem-
ise that the field of possible presumed parent-candidates for any given
birth is only one: the male or female partner of the gestational mother.
Under existing family law rules, if the “wrong” parent is presumed, it
is possible to find the “right” one, or for the “right” parent to assert his
or her parentage. But there is only ever one person who has the right
to be awarded legal status as father or parent to a child at birth. A stat-
utory presumption of maternity following surrogacy, on the other
hand, would not be based on the same premises. If we attempt to ap-

\textsuperscript{754} That is, irrespective of whether the commissioning mother is married or not.

\textsuperscript{755} Cf the example of Pre-birth Judicial Approval in Part 7.4, below.
ply the same principles of paternity and parenthood to maternity following surrogacy, the pool of possible mothers to consider increases to three: the surrogate, the commissioning mother and, possibly, an egg donor. A presumption of maternity based on intention and formulated in favour of the commissioning mother, would disregard the contributions made by the surrogate and, where relevant, the egg donor. Where it concerns an egg donor, such a presumption might be justified on the basis that Swedish law does not recognise the contribution of egg and sperm donors for the purposes of determining parentage following ART. However, while there is no overall consensus – either in science or at law – about whether it is genetics or gestation that gives a woman the right to call herself a mother at the time of the child’s birth, it could be difficult to find support for a statutory presumption that disregards the maternal contributions of both gestation and genetics in favour of intention.

Even if maternity is not disputed, some thought needs to be given to what could, or should, be done about the position of the surrogate mother? If a transfer mechanism is necessary in order to establish legal maternal status in favour of the commissioning mother, a presumption of maternity would, of course, seem pointless. A statutory presumption conferring maternity on the commissioning mother at birth, however, would diminish the contribution of the surrogate mother since it implies that she has no status in relation to the surrogate-born child.

As indicated above, essential questions to resolve before implementing a statutory presumption of maternity in favour of the commissioning mother is whether such a presumption would, if unchallenged, operate in the same way as today’s presumptions of paternity and parenthood; and whether this would be a feasible way to confirm maternity following surrogacy arrangements. For example, would the nature of the presumption of maternity be such that, if unchallenged, it would not be needed to prove (like with heterosexual married couples today)? Or would it be like the presumptions applying to same-sex female unions and unmarried heterosexual couples which require the involvement of, and approval by, the Social Welfare Committee?

Since an assumption behind this alternative is that it would not require a parental transfer, it would be difficult to reconcile with Swe-

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756 That is, assuming the ART procedure in question is carried out in accordance with Swedish law.
dish law and policy, even if surrogacy were to be strictly regulated. In
light of the fact that the Swedish interpretation of maternity, even
today, has not even specifically included the notion of genetics, it
would require an enormous shift in socio-political thinking before
maternity based primarily on intention could be contemplated.

Moreover, if the measure only took effect from the time of birth,
might it imply that the surrogate is the legal mother when the child has
been born? And could this be reconciled with the commissioning
mother acquiring legal parental status at the time of the child’s birth?
One solution might possibly be to implement a provision enabling the
commissioning mother to confirm her maternity with the Social Wel-
fare Committee before the child’s birth, and then have this confirm-
ation approved by the Social Welfare Committee after the birth, in the
same vein as confirmation occurs today where it concerns establishing
parentage for female couples and unmarried heterosexual couples
following ART.\textsuperscript{757} Such a provision would, nevertheless, have the
effect of displacing the gestational mother; something that the existing
confirmation provisions of the Children and Parents Code do not do
since it is always the partner of the gestational mother who seeks to
confirm parentage prior to the birth, not one of two competing candi-
dates for legal maternal status.

Here, it could be mentioned that the statutory presumption of ma-
ternity implemented by the Greek legislator, addressed below in Part
7.4 does not appear to consider the issue of status prior to birth either,
although the (maternal) integrity issues are defined in that the right of
the commissioning mother only comes into play when the surrogate-
born child is already born.\textsuperscript{758} The Greek “presumption”, however, is
more like a statutory rule than a presumption since it can be rebutted
only if it can be shown that the surrogate is the genetic mother of the
child. The likelihood of this is extremely remote since anything other
than gestational surrogacy is unlawful in Greece. Moreover, since the
existence of the presumption is subject to prior judicial involvement
approving the surrogacy arrangement before conception occurs, it is
not only dependent upon surrogacy being regulated, but the process

\textsuperscript{757} That is to say, parentage can be confirmed with the Social Welfare Committee
before the child’s birth (FB 1:4 & FB 1:9 regarding same sex female couples follow-
ing ART). It just cannot be approved by the committee before birth.

\textsuperscript{758} See Part 7.4. The Greek solution for parentage following surrogacy arrangements
was implemented through Law 3089/2002 on Medically Assisted Human Reproduc-
tion, considered further in Chapter 7, below.
itself is similar to a transfer mechanism. It is therefore more suitably dealt with in the following chapter.

Overall, this alternative appears to be less certain than the other alternatives because it is a presumption that could be rebutted. If the primary objective of clarifying maternity following surrogacy would be to establish, with certainty, who the mother of the surrogate-born child is at birth, thereby securing at least one guaranteed parent for the child, this alternative should not be prioritised.

6.3.7 Closing reflections: maternity

Bearing in mind that the main goal behind clarifying legal parental status following surrogacy is to promote certainty, how do the various options for maternity, above, compare? Certainty in this context implies that the child has a known mother at birth and that there is no doubt regarding the rights and obligations of the commissioning mother and the surrogate. Thus, if an option is to be viable, it must meet the criterion of securing maternity, indisputably, at the time of the child’s birth. Moreover, if an option is to be consistent with longstanding Swedish policy, it should also guarantee the integrity of the surrogate mother by supporting her right of non-interference during the gestational period.

The implementation of a *general statutory rule of maternity based on gestation* would provide certainty in favour of the gestational mother, whether or not she were to be genetically connected to the surrogate-born child. If the legislator’s goal is to ensure that the gestational mother is the first legal mother following surrogacy, such a rule would show that a clear stand had been taken about prioritising gestation over genetics. A *tailor-made statutory rule of maternity based on gestation* would achieve the same result for determining legal maternal status following surrogacy arrangements as a general statutory rule of maternity.

A *tailor-made statutory rule of maternity based on genetics* would have the advantage of providing certainty for the commissioning mother. However, a possible disadvantage of this measure is that it would be difficult to determine at which point her “motherhood” commenced. If it would be too early it could compromise the integrity of the surrogate mother; if it would be too late, it would reduce the certainty of the commissioning mother.
A tailor-made statutory rule of maternity based on intention would have a similar effect, and similar disadvantages, as the rule based on genetics, immediately above. In addition, there would be a greater risk that it could be regarded as child commodification because the contractual nature of parenthood would be emphasised by virtue of intention being the determining factor. This would be a complicated rule to enforce.

A tailor-made statutory presumption of maternity based on intention, however, would not provide certainty in relation to legal status for any of the parties. Assuming that the protection of the child’s interests must be a priority, and that this requires having a guaranteed legal mother at birth, it cannot be achieved by basing legal maternal status on a presumption.

Irrespective of the measure chosen, certainty regarding the child’s position to trace origins must be presumed, and would require additional measures in relation to record keeping and birth registration to ensure that information about surrogate mothers and, where relevant, donors would be able to be accessed by the surrogate-born child should he or she wish to do so in the future.

If Swedish society continues to value the importance of openness in relation to a child’s origins – not only for the sake of the child but also for the contributing creators of the child and their families – it might be necessary to consider how to recognise and value the contribution of both genetic and gestational mothers, whether it be following surrogacy or egg donation. Moreover, in light of the new motherhood dilemma posed by surrogacy, it might be timely to explore whether it would be possible to interpret “genetic truth” in a new way, to embrace both genetics and gestation, perhaps through birth registration and birth records, in a way that minimises the risk of harm to the child and the families involved. For the sake and security of the child and other interested parties this must, however, be made possible without compromising legal parentage.

As long as the Swedish legislator has no plan to permit two legal mothers following surrogacy, it is obvious that a choice between the possible mothers must be made when establishing maternity at birth. To this end, a key question that must be resolved is: Should the surrogate mother always have an unconditional right – as in England and Wales – to change her mind and keep the surrogate-born child? If the answer to the question is “yes”, it would seem that the only possible
alternative for establishing maternity at the time of the child’s birth following surrogacy is to base it on gestation.

6.4 Possible alternatives – paternity

6.4.1 Introductory remarks

First, it must be emphasised that the existing uncertainty evident when it comes to establishing maternity following surrogacy arrangements, above, has no parallel where it concerns paternity. Where there is a genetic connection between the commissioning father and the surrogate-born child, establishing paternity is unlikely to pose a problem under current Swedish law. Unlike the situation of maternity, where there could be two equally convincing biological contenders competing for motherhood, biological fatherhood cannot be shared. One is either a biological father or one is not. Thus, as long as it continues to be possible to assert paternity based on a genetic connection to the child, the existing Swedish rules of parenthood are capable of resolving paternity questions following surrogacy arrangements entered into in Sweden and abroad.

If surrogacy were to be regulated, however, would there be a more effective way to determine fatherhood? Some possible alternatives are considered below.

6.4.2 General statutory rule of paternity based on genetics

If it were deemed suitable to implement a general statutory rule of maternity, a logical question would be whether a similar provision for paternity should also be considered. To this end, would there be any advantage in attempting to create a general statutory rule of paternity based on genetics to replace the already-existing codified presumptions of paternity?

As it is today, a general statutory rule of paternity based on genetics would be unnecessary. It would also be difficult to justify. The concept of paternity deviates substantially from that of maternity in that genetic and biological fatherhood cannot – at least not yet – be divided in the way that genetic and biological (gestational) motherhood can. Thus, bearing in mind that the primary basis for the current paternity rules is genetics/biology, there can only ever be one candidate for the
role of legal father to a child.⁷⁵⁹ This is obvious because no more than one male can, through genetics, contribute to the creation of a child. Where it concerns heterosexual couples and natural conception, the family law provisions on legal parentage stipulate that the father is deemed to be the husband or partner of the mother.⁷⁶⁰ This is based primarily on the father’s presumed genetic connection to the child.⁷⁶¹ The possibility for alternative father-candidates to assert paternity is, again, based on their genetic connection to the child. This is clear from the wording of the provisions in the Children and Parents Code⁷⁶² even though a presumed father is not required to prove a genetic connection to the child.⁷⁶³ In reality, it of course happens that the husband or male partner of a woman giving birth elects to accept the role of legal parent, in line with the presumptions of paternity, knowing that he is not the child’s genetic father. The Swedish laws on parentage, however, are nonetheless based primarily on genetics. Thus, if a man is not only the intended father but also the genetic father of a surrogate-born child, he could, today, confirm his parentage in relation to that child in accordance with Chapter One, Section 4 of the Code.⁷⁶⁴ Clearly, in this situation, his paternity is contingent not on his intention to be a parent but on his presumed genetic connection to the child.

Would, however, the creation of a new general statutory rule of paternity – based on genetics – promote overall certainty in relation to establishing paternity, not only following surrogacy arrangements but also in other situations?

Assuming the primary basis for determining paternity is, and continues to be, a genetic connection to the child, even if it were possible to draft a general statutory rule of paternity, it would be unlikely to have any advantages over the statutory presumptions of paternity in

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⁷⁵⁹ If there is any difficulty in determining paternity it flows from the need to determine which male (the one male who has contributed his genetic materials to create the child) it is who should take responsibility for the child cf maternity where two women could assert a right to parentage.
⁷⁶⁰ See FB 1:1.
⁷⁶¹ With exceptions as provided in FB.
⁷⁶² See eg FB 1:2; FB 1:5.
⁷⁶³ Clearly, where it concerns ART using donor gametes, exceptions have been created to the genetic basis for parentage but only where the treatment in question occurs under the provisions of the Genetic Integrity Act. These exceptions have been necessary in order to protect the interests of the child and to protect the donor. In these situations, the true basis for parentage is, rather, intention.
⁷⁶⁴ The surrogate mother would also have to confirm this in writing (FB 1:4).
force in Sweden today. Such a provision would, however, imply that the deemed legal father might be a husband, a boyfriend, a lover or a casual encounter; even a stranger. The resulting effect would be that someone with no relational connection to the child, and no interest in being the child’s father, could be forced into taking legal parental responsibility when someone else who might be quite prepared to take on the role would not be able to do so without adopting the child.

Any advantage of certainty attached to this measure would be dependent upon easily proving that the prospective legal father is genetically connected to the child in question. Moreover, proving this could be a complex, invasive and time consuming process, which could not guarantee locating the “father”. For these reasons, and because there would be a greater risk that the child could be rendered fatherless than there is under the existing rules of paternity, implementing a statutory rule of paternity based on genetics would not be appropriate.

To conclude, a general statutory rule of paternity would be inflexible, particularly in its inability to accommodate a situation where a man might wish to accept parental responsibility for a child to whom he is not connected genetically, and could thereby be completely counter-productive to the best interests of the child. Such a rule would also have other disadvantages, outlined above. Since the existing presumptions of paternity are already functional, even in relation to surrogacy, paternity could continue to be determined in the same way as it is today. A general statutory rule of paternity would therefore be superfluous.

6.4.3 Tailor-made statutory presumption of paternity based on genetics

A possible alternative to implementing a general rule of paternity based on genetics would be to create a special statutory presumption that would apply only to establishing fatherhood following surrogacy. This could be achieved by inserting into the Children and Parents Code a provision which provides that the man who contributes his

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765 It would be difficult to draft a single provision that did not conflict with other provisions of Chapter 1 of the Children and Parents Code. Moreover, a single provision providing that a man who contributes his genetic materials for the creation of a child will no longer be presumed the father of the child but shall be the legal father of the child, unless overridden by another statute (eg where donor gametes are used in accordance with the operation of the Genetic Integrity Act) would serve no purpose.
genetic materials for the purpose of a surrogacy arrangement is presumed to be the legal father of the child subsequently born.

A tailor-made statutory rule of paternity based on genetics would operate in the same way as the corresponding rule, above, for maternity, making it possible for parentage to be confirmed at the time of the child’s birth, or earlier as the case may be. It would, of course require proof that the commissioning father is the genetic father of the child.

The advantages highlighted above in relation to the corresponding presumption on maternity would also apply in the case of paternity.

Even if the surrogate mother’s own genetic materials were used for the conception of the child, it would not provide a hindrance to confirming paternity in the same way that it would in relation to maternity, since the gametes used for the surrogate-conception would also originate from the commissioning father.

This option for resolving paternity following surrogacy arrangements, however, might seem superfluous since the current rules on parenthood already permit a genetic father to assert paternity based on his genetic connection to the child. Even so, if the legislator’s goal is to ensure that the first legal father following surrogacy is the commissioning father, a tailor-made statutory presumption of paternity based on genetics would strengthen the commissioning father’s position as legal father by prioritising it over, for example, the surrogate’s husband.

The viability of this option would, nevertheless, depend on the scope of any future regulation on surrogacy. If, on the one hand, the use of donor sperm were to be permitted in conjunction with surrogacy arrangements, it would not be possible to base paternity on genetics in such situations. On the other hand, it might still be possible to base paternity on genetics in those cases where the commissioning father has provided his genetic materials for the conception. Thus, another issue that would have to be considered is whether genetics would be the most appropriate basis – or even the only possible basis – on which legal paternity following surrogacy should be defined.\(^{766}\)

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\(^{766}\) Eg In the spirit of other ARTs where donor gametes are used.
6.4.4 Tailor-made statutory presumption of paternity based on intention

This option for determining paternity following surrogacy would involve the creation of a mirror provision of the intention-based tailor-made statutory presumption of maternity, based on the surrogacy contract. It would have a similar scope and application as current Children and Parents Code presumptions that regulate the determination of parenthood for married and unmarried heterosexual and female couples. The effect of this when applying existing principles to surrogacy, would be that the commissioning father would be recognised as the legal father of the child in accordance with a presumption of paternity based on intention, assuming that the surrogacy contract had been executed in accordance with the law in question and that there would not be any hindrance in relation to his right to paternity. The commissioning father – like his female counterpart, above – could, thus, be afforded all the rights and obligations associated with legal parenthood from the time of the surrogate-child’s birth.

As mentioned above in relation to maternity, because this alternative for establishing parentage is based on intention, and verified by the surrogacy contract and the various parties’ consents to treatment, its success would not be conditional on the commissioning father being genetically connected to the child. To this extent it would be similar to paternity or parenthood based on intention following ART in which donor sperm is used, although there is a clear distinction where it concerns the latter in that the gestational mother is also the intended legal mother.

Like other options, an intention-based statutory presumption of paternity in favour of the commissioning father would eliminate the need to transfer paternity after the child’s birth.

Record keeping issues, mentioned above in relation to the corresponding alternative for maternity, would have to be taken into account, particularly where there is no genetic connection between the commissioning father and the child.

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767 With or without the need to confirm parentage with the Social Welfare Committee as the case may be.
768 In, for example, the spirit of FB 1:2, mentioned above in relation to the corresponding part on maternity ie in this case to be sure that the gestational mother did not get pregnant in a way that was inconsistent with the terms of the contract.
The fact that this alternative would be rebuttable would have an impact on certainty.

6.4.5 Closing reflections: paternity

As shown above, unlike the question of motherhood, there is no comparable division between genetics and gestation for fatherhood. A genetic and biological father are – at least today769 – one and the same since paternity cannot be divided into biological and genetic fatherhood in the same way that maternity can be divided into gestational and genetic motherhood. For this reason, using the same criteria for establishing rules on maternity is not necessarily appropriate for paternity.

When the Greek legislature determined to regulate surrogacy, with the enactment of Law 3089/2002 on Medically Assisted Human Reproduction, no changes were made to the paternity rules even though a presumption of maternity in favour of the commissioning mother was implemented. Since paternity under Greek law is attached to the consent of the intended father to the procedure (where ART is involved) and the male’s kinship relationship with the legal mother (in general), it was only necessary to amend the rules concerning maternity. A similar response could also be an alternative for the Swedish legislator. Even though it might be technically possible to create new presumptions and rules for paternity in order to resolve the issues of fatherhood following surrogacy arrangements, it is not necessary.

Something that should be remembered is that, in spite of being able to use surrogacy as a solution to infertility, nothing has really changed in relation to the way in which men participate in ART procedures, irrespective of the method of ART chosen. Therefore, unless one is striving for a 100 per cent provable genetic basis at the time of the child’s birth, it might make sense to leave well enough alone and keep the rules of paternity exactly as they are. After all, it is the reproductive potential of women, not men, that has changed. Perhaps, then, the focus of any new rules for parenthood should be on confirming maternity in relation to new alternatives that are relevant in that connection.

769 That is, assuming the father was born a male. There is a possible exception to the general assumption that a male cannot be both genetic and gestational father to a child, not explored here: In a situation where a woman has a sex change but keeps her uterus and ovaries, she might be capable of bearing a child and could thus be both the gestational and genetic parent (father) to a child.
rather than trying to transform a paternity paradigm that already functions well.

6.5 Possible alternatives – parenthood for partners of legal parents in same-sex unions

6.5.1 Introductory remarks

In this Part, several alternatives that might be possible for establishing legal parentage for the second commissioning parent in a same-sex union following surrogacy are considered.

As was seen in Chapter Four, above, in addition to regulating paternity, the Children and Parents Code has provisions for establishing parentage in relation to the wife or female partner of a mother who gives birth following ART.\textsuperscript{770} In this context, the legislator refers to the second parent in a same-sex female union as a “parent” which means that “parenthood” is conferred rather than “maternity”. This distinguishes the parent in question from the gestational mother (legal maternal parent) and makes it clear that she is not a presumed genetic father (legal paternal parent). The effect of these provisions is that the second female parent in a same-sex union is, in principle, put in the same position as a male parent in a heterosexual union. That is to say, parenthood is presumed in these situations and is based on the consent of the non-gestational parent in the relationship, as it is for heterosexual unions and – in the case of couples who are not married, approved by confirmation, above. Where the rules for same-sex female parents and parents in heterosexual unions differ, is that a confirmation of parentage by a second female parent, even where she is married to the birth mother, must always be approved by the Social Welfare Committee after the birth of the child before her parentage can be established.

This policy has been questioned before in an effort to ensure that the rules regulating parentage for same-sex female unions are not less favourable than those applying to heterosexual unions.\textsuperscript{771} It is clear that the rules do not treat married female couples in the same way as married heterosexual couples but the reason for this unequal treatment

\textsuperscript{770} See FB 1:9; FB 1:4. See further Part 3.5.4.1, above.

\textsuperscript{771} See Part 3.5.4.1, above and references therein.
has not been clarified in the relevant preparatory legislative works. If one were to speculate – excluding any possible political reasons – the answer might lie in the fact that our parentage regulation is founded on genetics. Thus, it might be difficult to conceptualise parentage in terms of same-sex unions since it is clearly not possible for each parent in a same-sex union to contribute genetically in relation to a particular child born out of that union. Although it is obvious that parentage allocated on the basis of genetics is equally inconceivable in heterosexual unions where children are born from donor gametes, or where conception occurs outside of the heterosexual partnership in question, it is at least possible to create an illusion of genetically-based parentage where it concerns a child born in a male-female union. As soon as the union is female-female or male-male, however, parentage of the second parent must be based on some other factor, such as intention.

For the purposes of this Part, it can be assumed that the question of paternity can be resolved for the commissioning genetic father in a same-sex union, ie the male parent who provides his gametes for the conception, in the same way that parentage can be determined for a commissioning genetic father in a heterosexual union, since the Code is primarily based on genetics. The second male commissioning parent, ie the prospective male parent who has not provided his genetic materials for the conception, is therefore in a similar position vis-à-vis parentage as a second female commissioning parent. By contrast, the commissioning genetic father is in a better position than a female commissioning mother in the same situation because he has a right to assert his paternity from the time the child is born by virtue being the genetic father of the child. A commissioning genetic female parent, on the other hand does not, under Swedish law, meet the traditional requirement or standard for legal motherhood ie gestation. On that ground she is unable to assert her maternity or parentage in relation to the child born, because gestation is the determining factor for maternity and since egg donation does not give a right to parentage.

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772 This situation envisages the situation of cross-border surrogacy since a commissioning genetic female parent cannot access treatment in Sweden.

773 One consideration could be whether the parenthood rules already in existence that apply to same-sex female unions following ART be, in the short term, adjusted to apply also to surrogacy in line with that suggested for the paternity rules, above. Even though the end result might not necessarily be consistent with the Children and Parents Code parentage provisions following other forms of ART eg normally an egg
If surrogacy arrangements were to be regulated in Sweden, then, what might the possible options be for establishing legal parentage for the second commissioning parent in a same-sex union, who has no genetic connection to the child?  

6.5.2 General statutory rule of parenthood

Under Chapter One, Section 9 of the Children and Parents Code, the wife or female partner of a woman who gives birth following ART will be presumed the legal parent of the child born, assuming the child is conceived in accordance with Chapters 6 and 7 of the Genetic Integrity Act and the requirements stipulated in the relevant provisions have been met. The Code is silent on the legal parental status of the female partner of the child’s mother where ART is not required; likewise where it concerns the legal parental status of the male partner of a legal father.

Like the corresponding option for paternity, above, a general statutory rule of parenthood for the non-genetic parent in a same-sex union, could provide that he or she shall – unless overridden by another statute – be the legal parent of the child.

It was shown in relation to determining fatherhood, above, that the creation of a general statutory rule of paternity – as an alternative to the current statutory presumption – would presumably have as its primary basis genetics, because there is no equivalent to gestation where it concerns paternity. If formulated as a legal rule instead of a presumption, however, it would not be sufficiently flexible to accom-

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774 An exploration about the way in which parentage could be allocated to male and female single parents, and additional family formations, eg others comprising the HBT group, is beyond the scope of this thesis. These issues also deserve careful consideration even though it is not possible to analyse them here.

775 SFS 2006:351.

776 That is FB 1:9 and FB 1:4.

777 For example where donor gametes are used in accordance with the operation of the Genetic Integrity Act.
moderate the widening range of situations requiring exceptions, since a rule is not rebuttable.\textsuperscript{778}

Even if a general genetic-based statutory rule were deemed to be an appropriate way to determine paternity – which is unlikely – it does not follow that such a rule would be suitable where it concerns the determination of legal parenthood for the second male parent in a same-sex union. In this situation, there could be no genetic connection between the second parent and the child. Moreover, today there would already be candidates to fill the two available parental roles: the legal mother (the gestational mother) and legal father (the genetic father). This would, therefore, leave no additional room for another legal male parent at the time of the child’s birth.

A similar situation reversed, however, applied to female couples in same sex unions, could offer more scope for flexibility. If, for example, gestation were to be accepted as the undisputed legal basis for maternity, a gestational mother could be impregnated with the fertilised ova of her partner, who could then allege a statutory right, based on genetics, as the second legal parent. This corresponds, largely, to the legal basis for paternity as it exists today. Strictly speaking, this would not be regarded as a surrogacy case since surrogacy assumes that the gestational mother will relinquish the baby. It does, however, appear to be the only possible way in which a general rule of parenthood for the second female parent, based on genetics, could be applied.

One of the reasons for exploring new possibilities for the determination of parentage, above,\textsuperscript{779} is to see whether it might be possible to promote greater certainty than that which exists today in relation to maternity, paternity and parenthood; particularly with a view to whether this would facilitate parentage following surrogacy arrangements. To this end, the creation of a new general statutory rule of parenthood – presumably based on genetics – would be unlikely to promote greater certainty in relation to establishing the legal parental of the second parent, neither following surrogacy arrangements nor in other situations. In nearly all possible situations, the other parent will already have a genetic connection to the child, and would thereby have his or her paternity or maternity established. Thus, there would

\textsuperscript{778} Exemplified, for example, by provisions providing for the allocation of paternity following ART where there is no genetic connection between the father and the child.

\textsuperscript{779} Part 1.1.2.
be no remaining ground on which his or her same-sex partner could assert parenthood. Even if the egg-sharing example anticipated above, were to be considered for regulation, it would be simpler to create a special rule to cover this specific situation rather than trying to implement a general statutory rule of parenthood which could only benefit a defined group, knowing that it would not result in more overall certainty than that already existing under current law.

To conclude, for the reasons outlined above, the alternative of a general statutory rule of parenthood would not be a viable option for establishing the parenthood of the second parent in a same-sex union.

6.5.3 Tailor-made statutory presumption of parenthood based on intention

Another possible alternative for establishing the parentage of a second parent in a same-sex union following surrogacy arrangements might be to create a tailor-made statutory presumption of parenthood based on intention, like the corresponding presumptions for maternity and paternity considered above. Such a presumption could provide that a commissioning second parent will be presumed the legal parent of the surrogate-born child when the child is born based on his or her intention. This could be conditional, for example, on the surrogacy contract having been executed and performed in accordance with specified regulations or law and the giving of any relevant consent in relation to treatment.

With this alternative for establishing parentage, genetics would play no role since any requirement of a genetic connection in relation to the surrogate-born child will have been fulfilled by the partner of the commissioning second parent: the commissioning mother or father as the case may be. The implementation of this option would also imply that the surrogate-born child commissioned by a couple in a same union could have two legal parents at birth.

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Note that this would have the effect of discriminating against male couples who would not have any chance of benefiting from such a statutory rule.
6.6 Concluding remarks

It is clear that we must, and do, use different bases for determining parenthood depending on the situation at hand. However, while this in most cases serves to protect the interests of the children and certain intended parents by providing a degree of flexibility in allocating legal parental status, it inevitably leads to a degree of uncertainty and discrimination. Yet any attempt to dismantle the existing framework for determining parentage – which has been built up and carefully considered over many years – would not only be unnecessary, it might also be imprudent.

Even so, if we are to justify our rules, it is important to be aware and clear about the basis or bases on which the rules stand and the policy behind them; in this case, protecting interests but prioritising child interests.

Establishing tailor-made statutory rules, or statutory presumptions, of maternity, paternity and parenthood for surrogacy arrangements could facilitate greater certainty for all parties following surrogacy, even in jurisdictions where surrogacy is otherwise not regulated. Thus, it could be an important first step in the protection of the various interests.

Depending on the basis chosen for the rule or presumption in question, however – ie genetics, gestation or intention – having parenthood determined from the time of the child’s birth might only be part of the solution. Assuming maternity will continue to be established by gestation, regardless of the basis for establishing paternity and parenthood for commissioning parents in same-sex unions, some form of mechanism which transfers legal parentage to one or both of the commissioning parents, or establishes parentage in another way, is likely to be necessary in most cases.

In the end, however, irrespective of the basis ultimately chosen for parenthood following surrogacy, if the surrogate-born child’s interests are to be protected, the status of the child and at least one of the parents must be established at birth. The child must have parent/s and therefore the parents must be identified. If this is to be achieved, there must be – at the very least – a way of irrefutably identifying the legal mother of the child. It is clear that under today’s law, this is not something which can be determined with certainty. An irrefutable statutory rule of parenthood in favour of the commissioning parents might be regarded as a somewhat extreme measure. The implementation of a
general, statutory rule of maternity to the effect that the woman who
gives birth to the child is the legal mother of the child, however, irre-
spective of the mode of conception, could be the answer. This could
be achieved by codifying the *Mater-est* rule. Moreover, because codi-
fication of the rule would make it irrebuttable, it would have the im-
mediate effect of restoring certainty where it concerns the identity of
the (legal) mother to pre-IVF-times. To this end, the child born fol-
lowing a surrogacy arrangement would always have the security of
having a legal mother at the time of his or her birth, and the woman
giving birth will be acknowledged as the child’s mother.

Moreover, this measure could be achieved without requiring signif-
ican change – which might be regarded as an advantage while the
policy on surrogacy is still in its developing phase. Existing statutory
presumptions concerning paternity, and parenthood for the second
parent in same sex relationships could be retained even if a new gen-
eral statutory rule of maternity in favour of the gestational mother
were to apply to all births.\textsuperscript{781} In addition to resolving the question of
legal maternal status once and for all, the effect of this would be to
leave the area of determining parental status, including status follow-
ing surrogacy arrangements, flexible. Thus, if it were deemed fit to
change the bases for parenthood in relation to surrogate-born children
in the future, any exception to the general rule that maternity is estab-
lished through gestation could be brought about through an amend-
ment of the Children and Parents Code.

Since the implementation of a general statutory rule of maternity
alone would not be sufficient to satisfy all of the interests in question,
however, a tailor-made transfer- or establishing mechanism for surro-
gacy would be needed so that commissioning parents are able to have
their legal parental status confirmed. A number of possible alterna-
tives are discussed in the following chapter.

\textsuperscript{781} Since a general statutory rule of maternity would not be inconsistent with the
existing statutory presumption of maternity following egg donation, the latter could
then be repealed.
Chapter 7
7 Establishing legal parentage for commissioning parents

7.1 Introductory remarks

If a commissioning parent has no legal parental status in relation to the surrogate-born child when the child is born, it is obvious – assuming that a State does not prohibit surrogacy – that some form of mechanism to establish legal parentage will be necessary in order to protect all of the interests in question. In this Chapter, three ways in which legal parental status could be conferred on commissioning parents after the child’s birth are explored: Adoption, the Parental Order and the Pre-Birth Judicial Approval.

The first of these, Adoption, is already a well-established way of transferring parentage from the child’s original legal parents to the intended parents. Another way in which legal parentage may be conferred on commissioning parents is through a Parental Order, as practised in England and Wales, and Israel, above. Both of these measures for establishing legal parentage involve the transfer of parenthood from the original legal parents – the surrogate mother and where relevant her partner – to the commissioning parents. The third alternative considered is the Pre-Birth Judicial Approval of the surrogacy arrangement which is the model used by Greece for establishing parenthood following surrogacy. It differs from Adoption and the Parental Order in that it does not require a transfer of parentage after the surrogate-born child’s birth.

It should be mentioned from the outset that in some jurisdictions it has been possible to establish parenthood after surrogacy arrangements based purely on the intention of the parties as evidenced by the surrogacy contract entered into prior to conception.\textsuperscript{782} Even if such an

\textsuperscript{782} In California USA, for example, gestational surrogacy contracts are enforceable whereas traditional surrogacy contracts are not. See G Cohen, ‘Regulating reproduction: The problem with best interests’ (2011) 96 Minnesota Law Review 423. In this
alternative might be interesting to explore, it is quite safe to say that the implementation of this form of contract model— which must imply that the agreement would not only be legally enforceable but also that the State would not interfere in the relationship between the parties— would not be a model that could be contemplated in Sweden, at least not in the foreseeable future. In part, this is because no consideration would be given to whether the agreement is ethical or not. Also, however, because the focus of such agreements moves from the child’s needs and interests to the will and interests of the commissioning parents, there would be no room for a consideration of the best interests of the child. Moreover, determining paternity and maternity are matters of public interest since status is of fundamental importance for a person’s identity. To this end, matters of status, where disputed, must be determined by the court; parties cannot determine these issues amongst themselves.

A connected question is whether surrogacy contracts would fall under the notion *pactum turpe*. If so, an action concerning the performance of such a contract could be dismissed by virtue of Section 36 of the Contracts Act on the grounds that the contract is against good morals or illegal. As far as the specific issue of determining parent-

connection, Cohen refers to the following case authorities at p 430 (and fn 12): *Johnson v Calvert* 851P.2d 776, 784 (Cal 1993); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900–01 (Ct App 1994).

age goes, however, this is a moot point. Status is an issue that must be determined. It cannot depend on whether or not a surrogacy contract in itself might or might not be deemed a *pactum turpe*.

It is assumed in this chapter that any model implemented to transfer or otherwise establish legal parentage must, first and foremost, satisfy the surrogate-born child’s best interest. Having accepted this as the starting point, the focus of the Chapter is on how the various models could be implemented in Sweden, although the solutions explored might be possible to adapt so that they are able to comply with the laws of other jurisdictions.

7.2 Adoption

7.2.1 Transfer of parenthood through adoption

The institute of adoption was introduced into Swedish law in 1917.\(^{787}\) The effect of an adoption is that legal parental status is relinquished by the birth parents\(^{788}\) and conferred, through court order, on the adoptive parent or parents. Adoption severs the legal relationship between the original parents and the child and transfers all parental rights and responsibilities in relation to that child to the adoptive parents.\(^{789}\)

Adoption is regulated by Chapter 4 of the Children and Parents Code. In Sweden today, adoption is the only avenue through which a commissioning parent without legal parental status at the time of the surrogate-born child’s birth is able become the legal parent of the child. Thus, all commissioning female parents, and commissioning male parents who are not genetically connected to the surrogate-born child must apply to adopt the child if they wish to become legal parents. The requirements for adoption will vary depending on whether it is a traditional or step-child adoption.

The step-child adoption process makes it possible for an intended parent to apply to adopt his or her spouse’s child.\(^{790}\) Clearly, a prereq-

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<td>Lag (1917:378) om adoption (repealed when Föräldrabalk (SFS 1949:381) came into effect on 1 January 1950). For a comprehensive account of the history of adoption in Sweden see Singer 2000 (n 53), Chapter 5 ’Parenthood through adoption’.</td>
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<td>That is, the gestational mother and the genetic or legal father.</td>
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<td>See FB 4:7–8.</td>
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uisite for a step-child adoption is that the legal parentage of the non-adopting parent must already be established. Applied to surrogacy arrangements, then, the only possible commissioning parent who can have legal parental status when the surrogate-born child is born is a commissioning genetic father, since female commissioning parents contributing their genetic materials have no legal parental status under Swedish law. It follows, that only female and male spouses of commissioning genetic fathers who have legal parental status would be eligible to apply for a step-child adoption.

A traditional adoption enables a single person or a couple who are married or in a registered partnership to adopt a Swedish or foreign child. If the commissioning parents are both women, a traditional adoption will be necessary in order to transfer legal parentage from the surrogate and the legal father to the couple. Other commissioning parents who would have to apply to adopt the surrogate-born child through the traditional adoption process include single commissioning females, with or without a genetic connection to the child; single commissioning males who have no genetic connection to the child; and commissioning male couples, where neither of them have a genetic connection to the child.

An application for adoption following surrogacy could concern a child born in Sweden following an agreement between private individuals, or a child born abroad as a result of a surrogacy arrangement in a jurisdiction where surrogacy is regulated or permitted.

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791 That is, assuming they are able to confirm their paternity in accordance with the Children and Parents Code by virtue of their genetic connection to the child.
792 See FB 4:1 (a man or woman who have attained the age of 25 can adopt a child with the permission of the Court, and an exception to the lower age limit); FB 4:3 (spouses must adopt together, and exceptions to this); and FB 4:4 (people who are not spouses may not adopt together).
793 Adoption would also be required in situations where surrogacy is not used, for example, where a same-sex female couple are unable to have a child without egg donation. Since egg and sperm donation are not permitted in the same treatment cycle in Sweden, they must travel abroad to receive treatment. When the child is born, it is only the gestational mother who has legal parental status under Swedish law. Accordingly, her spouse must adopt the child in order to acquire legal parentage. (If the gestational mother is a surrogate, both women will need to adopt the child.)
7.2.2 Purpose of adoption and basis for parenthood

Ever since the first Swedish adoption provisions came into effect in 1917, the primary objective of adoption has been the satisfaction of the child’s interests. Other purposes, both historically and today, are to give the child parents who in turn provide the child with care, an upbringing and a home.

Singer points out that an important objective of adoption has been and is to place adoptive parents on an equal footing with biological parents. That is to say, to ensure that the legal relationship existing between the adoptive parent or parents and the adopted child should be judged in the same way as the relationship between parents and their biological children.

The adoption provisions contained in Chapter 4 of the Children and Parents Code apply for all national and international adoptions that must be approved by a Swedish Court, irrespective of which country

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794 Singer 2000 (n 53) p 238. Singer points out, however, that the definition of ‘child’s interests’ in connection with adoption has varied in the same way as it has in other situations where the best interests of the child is the goal. (Also at p 238.)

795 Singer 2000 (n 53) p 238.

796 Singer 2000 (n 53) p 234–235. See also FB 4:8, which is the enactment of this principle.
the child comes from. A fundamental principle of adoption is that it must be in the best interests of the child.

Note also that States Parties to the CRC have an obligation in adoption matters to ‘ensure that the best interests of the child shall be the paramount consideration’. Amongst other things, this includes a requirement to:

[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.

Where it concerns the alternative categories, or bases, on which parenthood is grounded – ie gestation, genetics and intention – legal parental status in cases of adoption is based on the expressed will of the adoptive parents to assume the responsibilities of social and legal parenthood in relation to the child they wish to adopt. In other words, the intention to take on the role of parent. Neither genetics nor

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799 CRC Article 21(a)-(e).

800 CRC Article 21(d).

gestation plays a decisive role where it concerns the determination of parenthood through adoption.802

7.2.3 Overview of the adoption process803

The adoption process is initiated by an application to the District Court. Prior to making a decision about the adoption, the Court obtains an opinion from the Social Welfare Committee about the child and the adoptive parents and about whether the applicant or applicants would make suitable adoptive parents.804 Permission to adopt requires, inter alia, a finding by the District Court that the adoption must be to the benefit of the child.805 The child’s legal parents must have consented to the adoption.806 If the Committee gives its approval, which presupposes that the investigation has found that the adoption would be to the advantage of the child, a decision confirming that it is suitable for the adoption to take place may be made by the District Court.807 The Court uses the Committee’s decision as the basis for whether or not to approve the adoption.808

The process used for a step-child adoption is similar to that of a traditional adoption. Both, for example, require home studies809 and the approval of the Social Welfare Committee before an adoption order can finally be made. A traditional adoption, however, also requires an application to and the involvement of an adoption organisation and, where the child is to be adopted from another country, a decision approving the adoption from the country in question.

802 Historically, genetics has also played a part in situations where a single woman adopted her own biological child so that the child would not appear illegitimate (See Singer 2000 (n 53) p 263), hence the use of the word ‘decisive’, above.
803 For detailed information in English about adoption in Sweden, see Socialstyrelsen, Adoption: Handbook for the Swedish social services (2009). This handbook on adoption was produced by the Swedish National Board of Health and Welfare. It is an English translation of the Introduction and Part 1 of the original Swedish handbook which deals with intercountry adoptions. Adoptionscentrum (www.adoptionscentrum.se) also has information in English.
804 Regarding the involvement of the Social Welfare Committee see FB 4:10. Note that the Social Services Act (2001:453), Chapter 10, Section 5, stipulates the scope of the Social Welfare Committee’s power to make decisions pursuant to specified parts of the Children and Parents Code.
805 FB 4:6. See also Ryrstedt 2002 (n 798) p 8.
806 FB 4:5a(1) but note exceptions to the consent requirement in FB 4:5a(2).
807 FB 4:6.
808 See FB 4:10, above.
809 The alternative term “adoption assessments” could also be used in this context.
7.2.4 Possible advantages and disadvantages

There are several possible advantages of using adoption to transfer parentage following surrogacy. Foremost, adoption is an accepted way of transferring parenthood that has as its principle aim the satisfaction of the child’s interests.

Another advantage of retaining the adoption model for surrogacy is that the adoption process in relation to surrogacy cases is by no means unprecedented. In Sweden, and other jurisdictions, adoption has been used to transfer parenthood even in the absence of specific laws regulating surrogacy arrangements, or parentage following surrogacy. This confirms that it can be relied upon as functional in this context. Thus, in the event that surrogacy arrangements might remain unregulated by the State, adoption could continue to be applied as the model of choice for the transfer of parenthood, irrespective of whether the surrogacy arrangement were to be made in Sweden or abroad. The administrative machinery required to give effect to traditional and step-child adoptions is already in place and firmly established. It could also be seen as advantageous that, by retaining the adoption model, the costs involved in setting up an entirely new and unproven mechanism for the transfer of parentage for the commissioning parent or parents could be avoided.

Even in jurisdictions where surrogacy is regulated, adoption has also been used to transfer parentage following surrogacy arrangements. In England and Wales, and Israel, for example, adoption acts as a complement to their parental- and parentage orders respectively, when legal parentage must be transferred but where couples do not otherwise meet the requirements set out for the order in question.

There are, however, some potential disadvantages of using the institution of adoption to enable the transfer of parentage following surrogacy. First, using adoption to establish parenthood following surrogacy could be regarded as inconsistent with adoption’s aims, above. Traditionally, the State’s involvement in adoption matters comes after the child is born. To date, this is consistent with the State’s response concerning adoption following surrogacy in Sweden because the State plays no part in creating the child but strives to ensure that the child has parents after the birth. If surrogacy were to be regulated, however, the State’s role would change. It would then play an active part in the

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810 Part 7.2.2, above.
approval that would lead to the creation of the surrogate-born child, rather than simply finding parents to satisfy the child’s interests. It follows, that, in accepting adoption as a model for the transfer of parentage following surrogacy, the purpose of adoption is subtly changed. Moreover, the role of the State shifts from that of locator and provider of parents for an existing child to that of facilitator of parents for a child not yet in existence.

Another conceivable disadvantage of using adoption for the transfer of parentage following surrogacy is that it could be seen to reinforce discriminatory treatment of female commissioning parents in favour of their male counterparts.\textsuperscript{811} As was shown above, same-sex male commissioning parents in certain circumstances may benefit from the provisions enabling step-child adoptions while same-sex female and single commissioning parents cannot. It must be emphasised that this result is not due to the law of adoption \textit{per se}. Rather, the discriminatory effect appears to be a consequence of the way in which the rules on parenthood are constructed.\textsuperscript{812} Still, it nevertheless highlights inconsistencies between the rights afforded to different categories of commissioning parents where it concerns applications for adoption. Take the following situation:

\begin{quote}
\textit{A commissioning female couple (A and B) are married. They have entered into a private surrogacy arrangement in Sweden which went as planned [assume for this example that gestational surrogacy is permitted]. A is the genetic mother of the surrogate born child (Baby AB) but she is not the legal mother since she did not give birth to}
\end{quote}

\textsuperscript{811} In this context, the term “discrimination” is used in its generic sense ie unfair or unequal treatment (when compared to others) or ‘something that discriminates or distinguishes; a distinction, difference (existing in or between things) …’\textsuperscript{, Oxford English Dictionary} <http://www.oed.com/view/Entry/54060?redirectedFrom=discrimination#eid> accessed 30 April 2013. This can be distinguished from the legal definition of discrimination as defined by s 4 of the Discrimination Act (SFS 2008:567). See especially ‘Indirect Discrimination’ in s 4(2) ‘… that someone is disadvantaged by the application of a provision … that appears neutral but that may put people of a certain sex, a certain transgender identity or expression … a certain sexual orientation or a certain age at a particular disadvantage, unless the provision … has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.’

\textsuperscript{812} See Parts 3.5.2.3 (Maternity following surrogacy) and 3.5.4.2 (Parenthood following surrogacy), above.
the child. B has no legal parental status either. A and B would now like to become legal parents of Baby AB.

Their friends and neighbours, a commissioning male couple (C and D) are married and have also entered into a private surrogacy arrangement in Sweden. This too went as planned. C is the genetic father of the surrogate-born child (Baby CD). He was able to confirm his paternity and is therefore the legal father of Baby CD. D has no legal parental status and would also like to become the legal parent of Baby CD.

In each of the families, above, one of the commissioning spouses has provided the gametes for the conception of the surrogate-born child. Yet in accordance with the family law rules that determine the respective legal parental statuses of the spouses, only one of the commissioning spouses – the commissioning genetic father, C – can assert legal parentage at the time of the child’s birth. This has several consequences:

One is that Baby AB is residing with two “parents” who have no legal parental status. Another is that neither A nor B can apply to adopt Baby AB through the step-child adoption process. This is because, under Swedish adoption law, the non-adopting parent must be the child’s legal parent; and in accordance with the unwritten Maternal rule, applied in Sweden, neither of the applicants is a legal parent since neither of them gave birth to Baby AB. D, on the other hand, is able to apply for a step child adoption because his spouse, C, is the legal father of Baby CD by virtue of his genetic connection.

Thus, the Swedish law on adoption law does not make it possible for the commissioning female couple to access the step-child adoption process. It makes no difference that A is the genetic mother. A and B’s only option, if they wish to become the legal parents of Baby AB, is to go through the traditional adoption process. Knowing that, in principle, the respective contributions of the male and female spouses are almost identical, it appears at first blush as though the Adoption law discriminates against female commissioning couples. Yet this is not actually the case since, in rendering it impossible for the commissioning female couple to access the step-child adoption process, the Adoption law is merely applying
the Children and Parents Code definitions of what constitutes a legal parent. The effect, however, is that female commissioning parents are discriminated against when compared with their male counterparts where it concerns their ability to apply for a step-child adoption because a genetic father can have his paternity confirmed while a genetic mother cannot unless she is also the gestational mother.

Even so, while it might be unfair that a commissioning genetic father can assert his paternity through confirmation but a commissioning genetic mother cannot assert her maternity, the State’s obligation is to protect the surrogate-born child’s interest, rather than to ensure that male and female commissioning parents are treated equally. If adoption is to be the model of choice for transferring parentage to a commissioning parent who is not a legal parent, however, the question of whether it is possible to rectify the source of discrimination without adversely affecting the surrogate-born child’s best interest should at least be explored.

Finally, another disadvantage of using adoption for the transfer of parentage following surrogacy is that, commercial surrogacy at least, is inconsistent with another principle of adoption law: the principle against receiving or providing payment for adoption. How could this principle be reconciled with surrogacy in situations where the arrangement involves some form of compensation between the parties? If the surrogacy arrangement is commercial in nature – be it in Sweden or abroad, it conflicts with the adoption law prohibition against financial compensation. Even if commercial surrogacy were to be prohibited in Sweden, however, this issue needs to be resolved because couples will continue to travel to other jurisdictions for surrogacy treatment where commercial surrogacy is legal if their needs cannot be met in Sweden. However, even though there is a technical hindrance to adoption in commercial surrogacy cases, in practice, it does not appear to have had an impact on applicants to date. Nonetheless, in theory, it concerns a commissioning parent’s eligibility to adopt a child born as the result of a commercial surrogacy arrangement. Since, in principle, all surrogacy arrangements entered into by Swedish citizens abroad are commercial in nature, the scope is not insignificant.

813 FB 4:6(3). See also Singer 2000 (n 53) pp 286–288 for a discussion on the prohibition against financial compensation in conjunction with adoption.
7.2.5 Concluding comments adoption following surrogacy

If surrogacy is not going to be regulated or permitted in Sweden, and assuming there is no change made to the Children and Parents Code to the effect that the basis for legal parentage at birth following surrogacy arrangements is intention, there must still be some way of transferring parentage to the commissioning parent or parents after such arrangements. Today the mechanism used for transfer is adoption. For the reasons outlined above, adoption could continue to serve as the model for parental transfer. However, several issues could be considered so that adoption rules might be more appropriately adapted to the special needs that arise by virtue of surrogacy. For example, how the differences in status between a commissioning mother who donates genetic material and a commissioning father who donates genetic material could be reconciled; and what criteria should be used to determine who might be a legal parent in such situations. Moreover, if adoption is retained as the model, or an alternative model, for the transfer of legal parenthood following surrogacy, should it be combined with a general statutory rule of maternity in favour of the gestational mother?

If, surrogacy were to be regulated, on the other hand, it might be prudent to consider whether a special transfer mechanism customised for surrogacy arrangements would be more suitable than continuing to use the adoption model; or whether such a mechanism could serve as a complement to adoption. Several other jurisdictions have created unique processes for the transfer of parentage from the surrogate mother – and, as the case may be, her spouse – to the commissioning parents. One of these is the Parental Order.

7.3 Parental order – after birth

7.3.1 Introductory remarks

It will be recalled from Chapters Four and Five, above, that a statutory-based model for the transfer of parenthood following surrogacy has

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814 As was the situation in NJA 2006 s 505.
815 Advantages, of implementing such a rule – including certainty for all parties and the guarantee of a legal mother for the child at the time of birth – were outlined above in Part 6.3.2.
been implemented in England and Wales, and Israel. This model permits parenthood to be transferred to the commissioning parents after the birth of the surrogate-born child through court order in certain specified situations without the need for adoption. In England and Wales, the term “parental order” is used to describe the court order. Israel, by contrast, uses the term “parentage order”.

While the end result is the same in each jurisdiction, ie the commissioning parents become the legal parents after the parental- or parentage order is awarded by the court, some of the prerequisites required for granting the respective orders are quite different.

In this part, the notion of the parental order is explored with a view to determining whether it might be possible to introduce such a model to transfer parenthood in Sweden should surrogacy arrangements be regulated. Drawing on the experience of England and Wales, and Israel, an attempt is made, first, to identify the basic assumptions behind the model. This is facilitated by looking at the shared characteristics of the relevant provisions that regulate parental orders in each jurisdiction. Differences are also highlighted. Next, considerations that should be made in order that the parental order model might be optimised, or adapted, for application in Sweden are explored. Some potential advantages and disadvantages of applying a post-birth parental order in Sweden are subsequently highlighted.

For the purposes of this part, the term “parental order” will be used to refer to the order made by the Court that confirms the transfer of parentage from the surrogate mother and, where relevant, her partner to the commissioning parents, unless it is necessary to specify the particular orders of England and Wales, or Israel. The model presupposes that the commissioning parents are not the legal parents at birth and that the transfer occurs after the birth of the surrogate-born child.

7.3.2 The England and Wales, and Israeli models compared

7.3.2.1 Prerequisites for parental orders – Similarities
When comparing the relevant provisions that regulate surrogacy and parenthood, it becomes evident that England and Wales, and Israel, appear to be in agreement about a number of foundational elements necessary for the application of the parental order. At least six main
common assumptions are apparent. Of these, four are substantive in nature and two process-related.

The first assumption is that a parental order will only be possible in situations where the surrogacy agreement is made between the surrogate mother and the commissioning parent or parents before conception occurs. It follows that the pregnancy must have come about as a result of the surrogacy-related treatment.

Secondly, at least one commissioning parent must be genetically connected to the child.

A third common assumption appears to be that both male and female commissioning parents who have provided their gametes for the conception are treated as donors for the purpose of legal parentage.

Fourthly, the surrogate-born child is placed in the custody of the commissioning parent/s immediately after birth.

As to process-related assumptions, both jurisdictions have in common that a court order is required to confirm the legal parental status of the commissioning parents. In England and Wales, before legal parental status can be transferred from the surrogate, and her partner as the case may be, they must provide consent in accordance with the Surrogacy Arrangements Act 1985 (SAA). In Israel, the consent requirement of the surrogate is not expressly provided in the Surrogate Motherhood Agreements Act 1996 (SMA Act). Her voluntary consent to hand the surrogate-born child over to the commissioning parents, however, could be implied from the conditional right she has to change her mind and by the fact that she allows the commissioning parents to take the child from her after the birth.

Finally, there is an assumption in both jurisdictions that – provided the basic requirements for parental orders are otherwise satisfied – no adoption is necessary for the transfer of parentage to the commissioning parents. This is the case even if one of the commissioning parents

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816 SMA Act (Israel) s 13(a).
817 This is also indicated by comments made by Dr Etti Samama in a telephone meeting on 14 June 2012. Here, she referred to a series of individual interviews she had lead with a cohort of surrogate mothers who had given birth to gauge their experiences. One surrogate reported that she was tempted not to sign [over the baby to the commissioning couple] after the birth – not because she wanted to keep the baby but because she wanted the commissioning couple to suffer a little for giving her such a difficult time during the pregnancy. If the surrogate had to sign a paper to confirm that she was releasing the child, the conclusion must be that the surrogate mother’s consent as a condition for the parental order must at least be implied even if it is not expressly provided for in the SMA Act.
is not genetically connected to the child. In England and Wales, the order which is made for the transfer of parenthood has, thus, been referred to as a form of “fast-track” adoption.818

7.3.2.2 Differences
In addition to sharing several similar features, the laws regulating the parental order following surrogacy in England and Wales, and Israel, also contain some fundamental differences, both where it concerns substance and process. These differences have been summarised in Tables 6 – 9, below. While the differences can be clearly seen in the tables, two points of divergence are significant and warrant further mention.

The first of these points of divergence is the apparent status of the respective surrogate mothers. In England and Wales, the status of the surrogate mother as legal mother of the child at birth is unequivocal. The surrogate, and no other woman, is the legal mother at the time of the child’s birth. Moreover, the surrogate mother has an express statutory right to keep the surrogate-born child irrespective of whether or not she is the genetic mother. In Israel, by contrast, the status of the surrogate mother is not as clear.

The second significant point concerning the parental order models in the two jurisdictions is the striking difference in the character and degree of State interference. While the England and Wales model stipulates the requirements for parental orders there is little, if any, active interference by the State in relation to the terms of the agreement or the relationship between the parties until these factors are examined after the child is born. It is completely up to the parties themselves to ensure that their arrangement complies with the requirements that must be met in order to have a parental order awarded. In the Israeli model, however, the State actively intervenes in the process from the outset. This is exemplified by the involvement of the Approvals Committee, which ensures that all agreements conform to the legal requirements set out in the Israeli Act, above. In addition to closely regulating the relationship between the surrogate and the commissioning parents before conception, the State continues its monitoring role until the parentage order is made. This level of State-

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818 Human Fertilisation and Embryology Bill, Explanatory Notes, House of Lords, 5 February 2008 [Bill 70], Clause 54: Parental orders, note 185, p 33. See also McCandless (n 401) p 330.
control is not surprising since, it will be recalled that an important function of the Israeli Act is to prevent conflicts, including problems connected to the status of the parties from a religious perspective.\textsuperscript{819}

7.3.2.3 Key structural elements shared – despite substantive differences

Despite the obvious differences in relation to the implementation of the parental order models, above, each jurisdiction’s model nonetheless shares a similar structural framework. That is to say, the principal issues that have been prioritised for the regulation of parental orders appear to be remarkably consistent, even where the objectives and substantive outcome might be completely different. Six key areas that both States have considered when determining the necessary prerequisites for the granting of parental orders can be identified. These key areas – which could also be seen as forming a structure or foundation for regulation – are:

1. The type of treatment permitted for which a parental order may be granted.
2. The nature of the regulation.
3. The nature of the agreement.
4. The determination of status before the parental order is awarded.
5. Specific requirements on or in relation to the parties, and specific rights.
6. The process and timing of the parental order.

The four tables below summarise the main features of the parental order as practiced in England and Wales, and Israel, grouped under the six key areas referred to above. Table Six shows the nature of treatment, agreements and regulation. In Table Seven the parentage/status issues are compared. Table Eight concerns various requirements on or in relation to the surrogate mother, commissioning parents and the child. Table Nine looks at the Parental Order, and the situation of the surrogate after birth, before the Parental Order is awarded.

\textsuperscript{819} See Part 5.3.1, above.
### 7.3.2.4 Tables summarising the main features of the respective parental orders of England and Wales, and Israel

Table 6. Parental Order: Scope of application and nature of regulation

<table>
<thead>
<tr>
<th>England &amp; Wales</th>
<th>Israel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treatment</td>
<td></td>
</tr>
<tr>
<td>Only possible following ART surrogacy</td>
<td>Only possible following ART surrogacy</td>
</tr>
<tr>
<td>Agreements</td>
<td></td>
</tr>
<tr>
<td>Applies to surrogacy arrangements in England and Wales and abroad</td>
<td>Applies only following surrogacy in Israel</td>
</tr>
<tr>
<td>Arrangement may not be commercial</td>
<td>Commercial agreements permitted (but not left to market forces) as long as agreements are approved by the Approvals Committee</td>
</tr>
<tr>
<td>Agreements are not enforceable</td>
<td>Agreements are enforceable (in principle) Enforceable both ways (But there is no enforcement mechanism to control the surrogate mother’s behaviour during the pregnancy)</td>
</tr>
<tr>
<td>Regulation</td>
<td></td>
</tr>
<tr>
<td>The pre-conception relationship is not regulated</td>
<td>The pre-conception relationship is regulated</td>
</tr>
<tr>
<td>Terms of the surrogacy agreement are checked when the application for the parental order is made to ensure that the parties have met the conditions necessary for the awarding of a parental order</td>
<td>Terms of the surrogacy agreement must be approved by the Approvals Committee before treatment can commence</td>
</tr>
<tr>
<td><strong>England &amp; Wales</strong></td>
<td><strong>Israel</strong></td>
</tr>
<tr>
<td>------------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>
| **Parentage / Status issues** | **Social worker**  
Legal Guardian from birth |
| **Status of Surrogate Mother** | **Status of Surrogate Mother**  
Not clear from Act  
*Note:* Before birth the surrogate mother has a right to abortion. Expressly provided by statute.  
Surrogate mother may, in limited circumstances only, change her mind and keep the surrogate-born child |
| Legal mother |  |
| Surrogate mother has an unconditional right to keep the surrogate-born child |  |
| **Status of Surrogate Mother’s partner** | **Status of Surrogate Mother’s partner**  
Not an issue, surrogate is single |
| Legal father if he consented to treatment |  |
| **Status of Commissioning Mother** | **Status of Commissioning Mother**  
Not clear from Act  
BUT starting point is that commissioning parents are the legal parents of the surrogate-born child (Shalev 1998 p 63)  
Custody from birth; parental responsibility |
| No legal status until parental order is made |  |
| **Status of Commissioning Father** | **Status of Commissioning Father**  
Same as commissioning mother even though commissioning father is always the genetic father |
| Depends, can be legal father if SM single |  |
| **Status Egg Donor** | **Status Egg Donor**  
No status, Anonymous |
| No status, Not anonymous |  |
| **Status Sperm Donor** | **Status Sperm Donor**  
Not permitted |
<p>| No status, Not anonymous |  |</p>
<table>
<thead>
<tr>
<th>Requirements on or in relation to</th>
<th>England &amp; Wales</th>
<th>Israel</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Surrogate Mother</strong></td>
<td>May be single or married</td>
<td>Must be unmarried (single, divorced or widowed)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Must be same religion as the commissioning parents (strictly applied in relation to Jewish commissioning parents)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>May not have a genetic connection to the surrogate-born child</td>
</tr>
<tr>
<td><strong>Commissioning Parents</strong></td>
<td>Can be married, unmarried, opposite- or same-sex couples</td>
<td>Not available to single commissioning parents or same-sex couples</td>
</tr>
<tr>
<td></td>
<td>Not available to single commissioning parents</td>
<td>Sperm for the conception must come from the commissioning father</td>
</tr>
<tr>
<td></td>
<td>One commissioning parent must be the genetic parent of the surrogate-born child</td>
<td></td>
</tr>
<tr>
<td><strong>Child</strong></td>
<td>Must be living with commissioning parents when the application and order are made</td>
<td>CPs care for child from birth</td>
</tr>
<tr>
<td></td>
<td>Parental order may not be awarded after the child is six months old</td>
<td>But note: Social worker is Guardian until PO made</td>
</tr>
</tbody>
</table>
Table 9. Parental Order: Process

<table>
<thead>
<tr>
<th></th>
<th>England &amp; Wales</th>
<th>Israel</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parental order</strong></td>
<td>Order is final</td>
<td>Order is final</td>
</tr>
<tr>
<td><strong>Process</strong></td>
<td>→Application to Court</td>
<td>Simple process</td>
</tr>
<tr>
<td></td>
<td>→Consent</td>
<td>2 steps</td>
</tr>
<tr>
<td></td>
<td>→Parental Order Reporters</td>
<td>→Application</td>
</tr>
<tr>
<td></td>
<td>→Judge considers the child’s best</td>
<td>→Order</td>
</tr>
<tr>
<td></td>
<td>interests etc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>→Order</td>
<td></td>
</tr>
<tr>
<td>Must be made within 6 months of birth</td>
<td></td>
<td>Commissioning parents must submit an application for a parental order within 7 days of the surrogate-born child’s birth; if not, an application must be made by the welfare officer (SMA Act Chapter 3, s 11(a) )</td>
</tr>
<tr>
<td>Consent to the parental order must be freely given</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consent not valid before the surrogate-born child is 6 weeks old</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Public interference</strong></td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>Minimal interference from the State early on in the process.</td>
<td>Significant interference from the State before conception and throughout process.</td>
</tr>
<tr>
<td></td>
<td>State-monitoring is significant after birth due to increased administrative requirements prior to making the parental order</td>
<td>State-monitoring is minimal after birth due to administrative requirements having been met throughout pregnancy; makes the process efficient in the final stages</td>
</tr>
</tbody>
</table>
7.3.2.5 Closing reflections

It is not insignificant that a number of common elements underpin the structure of the parental order models found in England and Wales, and Israel; particularly when one takes into account their tangible religious and cultural differences which – at least in part – account for some variation in their respective regulatory provisions. Yet in spite of this, each jurisdiction studied has found a strikingly similar underlying framework on which to base their parental order model. The existence of common ground could indicate that this structural basis for the parental order might also be able to be applied across other cultures, without limiting or restricting individual variation in relation to the substantive components contained within the model. If this is indeed the case, these jurisdictions have already laid the foundations for a functioning model. This, in turn, could provide a significant advantage for other jurisdictions contemplating the implementation of a similar model to transfer parentage following surrogacy.

In the following Part, these structural areas are explored to see how they might be applied in Sweden should surrogacy be regulated in the future.

7.3.3 Optimising the model

7.3.3.1 Introductory remarks

It has been shown above that the parental order has been tested and has proven to be an effective mechanism for the transfer of parenthood in at least two jurisdictions. By 2011 in England and Wales, almost 900 parental orders had been made since the model was introduced. Israel has had its own parental order model in operation for almost two decades. Could a similar mechanism to transfer parenthood following surrogacy also be implemented in Sweden, and if so, what would be required? Moreover, what features might make this form of establishing parenthood attractive for other jurisdictions contemplating surrogacy regulation?

One way to determine whether the parental order would be suitable for implementation is to first strip the model down to its foundations and examine the key structural areas – relevant to parenthood – that

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820 See Tables 6–9, Part 7.3.2.4.
821 See Part 4.4.2.
have already been regulated successfully in other jurisdictions. These areas were identified above. Assuming the structure is regarded as an appropriate basis on which to build, do any of the key areas supporting it contain features that would also be regarded as relevant for regulation in Sweden? Moreover, could these features be imported directly into a Swedish model, or is it possible to adapt them so that they are suitable? Finally, are there any additional considerations that should be included?

In the following sections, it will be assumed that the parental order model has been deemed suitable for implementation. If this model is to be optimised for Sweden, or any other jurisdiction, what general considerations would have to be made before implementing it? And what conditions would have to be met by the parties before awarding a parental order? An example of issues these questions raise, in relation to each of the six structural areas identified from the parental order models of England and Wales, and Israel, follows below.

7.3.3.2 Type of treatment permitted for which a parental order may be granted.

As to the general considerations to be made before implementing a parental order model, a fundamental question that must be answered when a State chooses to implement a parental order model is: What sort of surrogacy arrangements will be covered by the order?

There are two options available. The first is to leave the field completely open so that all commissioning parents are eligible to apply for a parental order, irrespective of how or where the surrogate-born child was conceived. The other option is to apply some form of restriction which limits the eligibility for application to certain types of treatment. Israel, for example, restricts applications for parental orders to commissioning parents who have undergone assisted reproduction treatment, in Israel, in accordance with the SMA Act. In England and Wales, on the other hand, the scope is somewhat broader. There, eligible commissioning couples who have undergone ART surrogacy treatment abroad are also able to apply for a parental order. DIY surrogacy, however, does not fall within the parental order’s scope.

Where it concerns conditions that must be met by the parties, an issue intimately connected to making the application for a parental order subject to certain types of treatment, is whether to also limit the scope of eligible commissioning parents who will have access to the parental
order. This would require taking a stand about whether access to the parental order should or would be further limited to a certain group or groups of commissioning parents who also meet the treatment requirements, above. If, for example, applicants are to be limited to married or partnered, heterosexual commissioning parents, as they are in Israel, a relevant consideration could be whether or how this could be justified in a secular state such as Sweden? If, on the other hand, the range of possible applicants is to be extended to same-sex couples and single parents, could a parental order still be motivated as being in the child’s interest?

Whether to restrict parental order access to recipients of certain types of treatment, and to specific constellations of commissioning parents, might depend on whether an alternative avenue exists for commissioning parents to become legal parents if they would not be eligible to apply for a parental order. If certain groups or individuals are unable to fall within the confines of the parental order, will they still be able to become legal parents through adoption? Moreover, would an otherwise ineligible commissioning male parent be able to instead assert his paternity at birth following IVF or DIY surrogacy, thus facilitating the possibility for his male or female partner to apply for a step-child adoption?

Finally, if it were to be deemed more suitable to retain the adoption model for particular groups of commissioning parents, it might be necessary to re-consider the effect of the existing laws of paternity where it concerns surrogacy arrangements. Of specific relevance in this connection is the appropriateness of continuing to enable commissioning male parents who have provided their sperm to a surrogate for the purposes of traditional surrogacy to assert their paternity in relation to a surrogate-born child at birth. Does it undermine the parental order model if paternity could be established in this way or would it, rather, complement the model by providing an alternative way to become a legal parent? Could this be a problem for society if it, in turn, facilitated the legal parentage of single male commissioning parents; and what would the passive or active acceptance of such a possibility reveal about Sweden’s attitude to equality between women and men if a commissioning genetic father is able to become a legal parent of the surrogate-born child at birth through confirmation while a commissioning genetic mother has no corresponding possibility to confirm her parentage?
**7.3.3.3 Nature of regulation/degree of State intervention**

Another important consideration to be made before implementing a parental order model in any jurisdiction concerns the nature of regulation. Even if surrogacy itself were to be left to market forces, or regulated privately or professionally, it would be necessary to have at least some form of State regulation for the administration of the parental order. Public intervention would therefore be unavoidable if a parental order model were to be considered appropriate for Sweden.

A closely connected consideration that must be made is about the desired level of State intervention that should be permitted or required where it concerns the relationship between the parties, and the relationship between the parties and the State.

Israel’s model is characterised by a high level of public intervention in which State monitoring begins already before the surrogacy agreement is made. The supervision of both the relationship between the parties and of that between the parties and the State is extensive in the early stages of the surrogacy arrangement and continues, albeit to a lesser degree, until the parental order has been awarded. The level of public intervention already in the pre-conception stages, and during the pregnancy, appears to make the process for awarding the Israeli parental order very efficient. By the time the child is born, not only have most of the requirements for the parental order already been complied with; they have also been documented due to the strict monitoring requirements throughout the surrogacy process. This must be of considerable assistance to the welfare officer who prepares the report prior to the Parental Order being made and makes it possible for the order process to comprise only two steps: the application and the order.\(^{822}\)

The level of public intervention by the State in England and Wales, by contrast, is low in the early stages of the surrogacy arrangement. No attempt is made to monitor or control the relationship between the parties to the surrogacy agreement for the purposes of the parental order until after the child’s birth. At this time, however, there is a significant increase in the level of State intervention as the parental order reporters gather information to support the decision to be made about whether or not the conditions required to award a parental order have been met. This is a longer and more laborious procedure than the cor-

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\(^{822}\) See Table 9, Part 7.3.2.4.
responding one undertaken in Israel. Moreover, by the time the surro-
gacy arrangement reaches the parental order stage it, too, intrudes on
the private sphere of the applicants. In addition, the order process ap-
ppears to be more complicated than its Israeli counterpart's.823

Overall, the parental order models in both England and Wales, and
Israel, involve a high degree of public interference even though the
timing of State scrutiny on the commissioning parents and the surro-
gate mother is unique in each jurisdiction.

In the absence of a market-regulated commercial model any paren-
tal order model implemented in Sweden would have to include at least
a moderate degree of State intervention in order to ensure that all of
the interests were protected, and in particular the interests of the child
in securing parents. Based on current Swedish policy, which has been
emphatic about the need to prioritise the protection of interests from
exploitation and commercialisation, a model similar to Israel’s, in
which State intervention commences at an early stage, might be more
consistent with public goals than the English model. Early State in-
volve ment would facilitate the protection of rights and interests and
thereby help to circumvent problems rather than having to resolve
them after they arise.

7.3.3.4 Nature of the arrangement

In determining the regulatory form for surrogacy, one of the main
considerations that must be made before implementation is whether or
not to permit commercial surrogacy. This issue is of course highly
relevant for any jurisdiction contemplating surrogacy regulation. The
implementation of a parental order model itself, however, is not con-
tingent upon resolving the question of whether or not the nature of the
surrogacy agreement must be commercial or altruistic. As regards the
specific issue of combining commercial surrogacy with the parental
order, however, there are some unique concerns which should, never-
theless be carefully considered. Whether a parental order model for
the transfer of parentage could be reconciled with a commercial model
for surrogacy arrangements would, in part, depend on the nature of the
“commercial” model implemented. The more “free-market” the model
is, the more difficult it might be to protect the interests of the surro-
gate-born child and the other parties. Bear in mind that the parental

823 See Table 9, Part 7.3.2.4.
order has been described as “fast-track adoption”\textsuperscript{824} not only because it is a relatively speedy way to transfer parentage; it also has the same effect as adoption without the same degree of State interference. However, one reason the State “interferes” by actively taking a role in traditional adoption matters, is to protect adopted children from becoming the objects of exploitation and financial gain. Thus, it might be considered unwise to combine the parental order model with commercial surrogacy because the extensive checks and balances normally associated with traditional adoption are lacking with the parental order, which could compromise the welfare and interests of the surrogate-born child.

Even so, this does not necessarily have to imply that commercial surrogacy can never work effectively with the parental order model. Israel is a clear example of a jurisdiction which has successfully managed to integrate commercial surrogacy with the parental order. It needs to be remembered, however, that the Israeli surrogacy model is an unusual hybrid of two extreme models – ie between the unregulated or loosely-regulated commercial models ruled largely by market forces and the highly regulated non-commercial models governed heavily by statute. This factor no doubt contributes significantly to why the parental order appears to co-exist in harmony with commercial surrogacy in Israel. It should be remembered, however, that the Israeli model, while commercial in nature, contains an exhaustive series of safeguards designed to protect the interests at stake, commencing already before the surrogacy agreement is approved.

Whether the surrogacy model is commercial or altruistic could also have an impact on the type of conditions that must be met by the parties, if any, before a parental order can be awarded. A purely commercial model might not include any specific conditions regarding the parentage of the surrogate-born child apart from a requirement to produce the surrogacy agreement with evidence of the parties’ consent to the transfer of parenthood. Even with a commercial model, however, the State might be well-motivated to supervise or approve payments made to the surrogate mother in order to avoid exploitation of the parties to the agreement, as it does in Israel. If, on the other hand, the model is an altruistic one, the State might have an interest in making sure no money over and above reasonable and/or approved expenses

\textsuperscript{824} Human Fertilisation and Embryology Bill, Explanatory Notes, House of Lords, 5 February 2008 [Bill 70], Clause 54: Parental orders, note 185, p 33.
has been paid to the surrogate. In England and Wales, the parental order reporters assume a monitoring role when they check the surrogacy agreement after the birth but before the parental order is awarded. If it is found that the amount paid is commercial in nature the parental order might not be made.\textsuperscript{825}

Additional considerations that should be made where it concerns the nature of the agreement might include, for example, the extent to which the parties are free to create their own terms; whether the surrogacy agreement should be approved before treatment commences, as practiced in Israel; or whether the agreement should not be interfered with before conception but still be examined prior to the issuing of the parental order. For Sweden, the outcome of these issues will no doubt be influenced by whether it were to choose a surrogacy model that regulates the relationship prior to conception, like Israel’s, or a model similar to the one practiced in England and Wales where the relationship is not regulated and where parties themselves must therefore ensure that their agreement falls within the scope of agreements for which a parental order may be granted.

Consideration must also be given to any specific requirements that must be complied with for the issuing of a parental order. Attention might be given, for example, to whether, and if so, how, the surrogacy agreement should clarify the inclusion of any promise of payment or compensation for the surrogate mother. If, however, it is determined that surrogacy be limited to altruistic arrangements, it might be necessary to specify that the surrogacy agreement does not include any promise of financial gain in relation to any of the parties. Other possible required terms that could be contemplated for inclusion in surrogacy agreements are that the agreement is made voluntarily and that it has been entered into before the conception of the surrogate-born child.

Whether or not the agreement is to be enforceable, and any exclusions, such as the control of the surrogate’s behaviour, should also be determined and expressly clarified by statute.

\textsuperscript{825} It was shown in Part 4.4.1, above, that the court must be satisfied that no money or other benefit – over and above reasonably incurred expenses – has been given or received by the applicants unless approved by the court (HFE Act 2008 s 54(8) ). Although note that in respect of commercial cross-border surrogacy arrangements the court has awarded parental orders on the basis that it is in the child’s best interests. See case examples in fn 519, above.
Finally, if some form of monitoring will be required in order to satisfy the conditions for the awarding of parental orders, consideration must be given to the form of mechanism to be used for such monitoring. Relevant issues in this context include determining which body or group of individuals, and at what point, will bear the responsibility for the monitoring of the agreement; the extent, if any, of the Social Welfare Committee’s involvement; and whether to establish a specially appointed body – such as Israel’s Approvals Committee – to take on the responsibility of approving surrogacy contracts and monitoring the agreement to facilitate compliance with parental order requirements.

7.3.3.5 Determination of status issues
Before implementing a parental order model it would facilitate certainty if the status of all participating and connected parties at the time of the child’s birth was unambiguous. Clearly, if parenthood is to be transferred, there should be no doubt regarding from whom it has been transferred. Assuming that surrogacy itself were to be regulated, the various statuses should have already been clarified in anticipation of the need to resolve parentage issues. Even so, irrespective of whether or not new status rules are created specifically for surrogacy, or whether the existing rules of parenthood from the Children and Parents Code would apply also to surrogacy arrangements, the parental status of the various parties should be unequivocal. As it is today, Swedish law is not completely clear where it concerns maternity in relation to surrogate motherhood. At the very least, then, this issue needs to be prioritised before implementing a model that transfers parentage after surrogacy.

Possible ways to clarify maternity could be to formulate a special rule for surrogacy – as found in the legislation of England and Wales, above, 826 or by enacting a general rule of maternity in favour of the gestational mother, as has been done in Norway, 827 assuming this continues to be the policy.

It should be mentioned, however, that the contrasting legislation of Israel, which does not expressly provide that legal maternity is conferred on the surrogate mother or the commissioning mother at birth, does not appear to have experienced any problems to date in relation to its parentage order. This could, in part, be explained by the fact that

826 See Part 4.3.2.2, above.
827 See Part 6.3.2.1, above.
the State appoints the Welfare Officer as the child’s legal guardian at birth. Another possible explanation could be – in line with a main aim of the Israeli surrogacy law to ensure that conflicts are avoided – the high level of State intervention throughout the surrogacy arrangement. Whatever the reason, it cannot be ruled out that a dispute over maternity would arise in the future if a surrogate mother were to attempt to assert her maternity on the basis of gestation. If one accepts that it is in the best interests of the child to have parents determined already from the time of birth, this aspect of the Israeli model might pose a risk to the welfare of the child because it is not totally clear in its allocation of legal motherhood at birth.828

If Sweden is to implement legislation to regulate surrogacy, there is no point taking risks that can already be anticipated. A reliable way to avoid a conflict over legal parental status in Sweden would be to resolve the issue of status for all connected parties through statute, either before or when surrogacy regulation is implemented.

In addition to determining legal parental status at the time of birth, and how it should be transferred, another question that must be decided concerns who it is who will have parental responsibility for the child between birth and the awarding of the parental order. This issue is highly relevant for surrogacy because the surrogate-born child is almost always placed in the care of his or her commissioning parents from the moment of birth, or as soon as possible after. In England and Wales, the child is in the care of the commissioning parents from the beginning. This is also the situation in Israel. If a guardian is appointed, as it is in Israel, what should the guardian’s role be when the parents anyway have the day to day care of the child? Moreover, should it imply that the surrogate mother has no say in relation to the child’s medical treatment and so on before the parental order is granted?

Presumably under future Swedish regulation, the commissioning parents will not be the legal parents at the time of the surrogate-born child’s birth. It is therefore crucial for all concerned that the terms used in connection with defining the parental role following surrogacy arrangements – for example, custody, guardianship and parental responsibility – are clearly defined and unambiguous so that there is no question as to their meaning.

828 See Parts 5.4.2.1–5.4.2.3, above.
7.3.3.6 Other requirements on and rights of the parties

Several other factors relevant to parentage should also be considered before implementing a parental order model or deciding whether the parental order would be suitable for implementation in Sweden. These include exploring the possible requirements that should be placed on the applicants for a parental order; and clarifying any specific rights\textsuperscript{829} that could or should be conferred on, for example, the surrogate mother, the commissioning couple and the child, in relation to parentage matters.

Where it concerns the *surrogate mother*, an issue that must be considered is whether to place restrictions on the selection of participating surrogate mothers on the basis of their civil- or marital status. One alternative that has been mentioned above was the situation seen in Israel, where the awarding of parental orders will only be possible following surrogacy arrangements if the surrogate mother is single. Another possibility is to choose to restrict the scope of surrogates in this context to women who are married or living in a permanent union; something which could be seen as providing additional protection for the child by ensuring it has two parents. Other issues concerning the surrogate that would be relevant for consideration in Sweden are whether or not there should be a requirement that a surrogate mother has already had a child of her own; whether to permit traditional surrogacy for the purposes of awarding the parental order or whether to restrict the scope of the order to gestational surrogacy, where the surrogate has no genetic connection to the child; and whether it is reasonable to place any restrictions on the surrogate during the pregnancy in relation to her behaviour or her right to abortion. In relation to the last-mentioned issue, SMER’s recent recommendations strongly reinforce Sweden’s long-standing policy to ensure that pregnant women should be freely able to exercise choice about their own bodies.\textsuperscript{830}

Where it concerns the *commissioning parents*, there are a number of relevant issues to consider in relation to possible requirements and rights connected to parental orders. The first is whether to limit the scope of parents to whom a parental order may be awarded. That is to say, will it only be possible for heterosexual married couples to have their parentage established in this way or will the option also be open for male and female same-sex couples and singles to apply for paren-

\textsuperscript{829} That is, over and above those already mentioned above.

\textsuperscript{830} SMER 2013:1 p 22.
tal orders following surrogacy. The second consideration is whether to place a requirement on the genetic connection between the commissioning parents and the child. If so, should at least one commissioning parent be genetically connected to the child, as required in England and Wales, or should both commissioning parents have a genetic connection? If such a requirement were to be implemented, it would mean that the parental order would be ruled out for single commissioning parents who would instead be compelled to go through the traditional adoption process in order to become a legal parent.

As to rights of the surrogate-born child, important issues that must be determined include deciding who will have responsibility for the child’s daily care from the moment of birth; and how custody and guardianship will be arranged. Should there be a requirement that the child must be living with the commissioning parents from the time of birth and when the parental order is made final, as is the case in both England and Wales, and Israel?

In light of the considerations mentioned above, is there a need for a new legal construction which can resolve the problem of the child being in the care of parents who have no legal parental status until the parental order is granted? Or could a legal guardian be appointed specifically for the purpose of intervening, in the absence of a legal parent, if decisions need to be made about the child that the commissioning parents will have no legal right to make? A similar solution has been used to resolve the problem in Israel.

Whether it is appropriate to stipulate minimum and maximum times during which the parental order can be awarded would also need to be considered. In the England and Wales model, for example, a parental order cannot be granted before the child is six weeks old. Nor can it be granted after the child is six months old.

Finally, one consideration that is relevant for surrogates, commissioning parents and the surrogate-born child, and which must be determined, is the degree of flexibility for parties to change their mind. Should the surrogate mother have an unconditional right to keep the surrogate-born child, irrespective of whether or not she is genetically connected to the child, as she does in England and Wales? If the commissioning parents change their mind and refuse to take the child, how should or could this be resolved? If the surrogate mother – and

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831 This issue has recently been raised for contemplation in Sweden. See Dir 2013:70 p 5.
where relevant, her partner – are not prepared to keep the child, how might this situation be dealt with? It is important not to lose sight of the child’s interests in having parents both at birth and when the agreement is concluded.

7.3.3.7 Timing and nature of the parental order
An assumption behind parental orders made in England and Wales, and in Israel, is that they are final. Presumably, this would also be the case if this model were to be implemented in Sweden. The effect of a parental order would, thus, be that the commissioning parents would become the legal parents in all respects once the order has been made. Other relevant considerations that should be made in this connection include the timing of the order; how the relevant consents should be managed; specific requirements on the parties (above); and the process itself.

Once again, returning to the issue of State intervention, a decision would have to be made regarding the stage at which the State’s involvement would appear in the parental order process.832 One of the merits of early State involvement would be that the processing of the order itself could be more efficient because much of the administrative work required before approving the order would already have been completed when the parental order application was made. It would, however, come at a cost to the private lives of the parties if they were to be scrutinised already during the pre-birth phase of the agreement. On the other hand, this so-called cost might be regarded as academic since the parties would otherwise be subject to a substantial amount of scrutiny at the end of the arrangement.

7.3.4 Potential advantages
It seems clear that there are a number of features of the parental order model for the transfer of parenthood that could be regarded as attractive for implementation in Sweden. Based on the criteria used above, a major advantage of the model is its flexibility. The structure has already been set up and tested, and the foundational issues that were

832 That is, whether it would it, for example, be more suitable to have a high degree of public interference from the beginning, as appears characteristic of the Israeli model, or to leave the monitoring to the authorities at the end of the surrogacy arrangements, as occurs under the England and Wales model.
raised for regulation, above, by England and Wales, and Israel are also relevant for Sweden. Moreover, the model provides certainty for both the surrogate-born child, who is guaranteed at least one legal parent at birth and for the parties to the arrangement, who can be sure about their legal parental status at the time of the surrogate-born child’s birth. It could also be perceived as an advantage that allowance can be made if the birth mother changes her mind.

Assuming that a parental order model would apply to both parents, irrespective of their genetic connection to the child, a clear advantage of the England and Wales model is that both of the commissioning parents are expressly regarded as donors while the surrogate mother, and where relevant, her spouse, are the legal parents of the child until the parental order is finalised. The classification of both commissioning parents as donors, then, puts them on an equal level where it concerns legal parental status at the time of the surrogate-child’s birth. This could be seen as an attractive solution because it avoids the element of discrimination, highlighted above, in which some commissioning genetic parents can become legal parents at birth but not others. On the other hand, the alternative of permitting the genetic father to assert his paternity has the advantage of ensuring that the child is living with at least one of its legal parents from the time of birth.

Another potential advantage of this measure is the possibility for greater State control, above. If State intervention were to be initiated at an early stage it should help to ensure that agreements are fair and that all relevant interests can be considered in order to provide the best possible conditions for the protection of the respective individual rights. This would also make it possible to ensure that the best interests of the intended child remain central in all decisions made in connection with the pregnancy and in relation to the awarding of the final order after the birth.

To conclude, the implementation of the parental order model in Sweden would bring with it several clear advantages. From both a societal and legal perspective it would be an efficient and fair way to find a solution to an existing problem.

7.3.5 Potential disadvantages

If the parental order were to become the accepted model for the transfer of parenthood following surrogacy, what features might raise concerns or be regarded as disadvantageous? The most obvious feature
that comes to mind is that it inevitably requires some form of intrusion by the State into the private realm of the family; into a particularly private area of the lives of commissioning parents and the surrogate mother. Such interference, however, is nothing new. The State already intrudes into the private lives of prospective parents before adoption and, to a lesser extent, with assisted reproduction.

Lack of certainty in relation to the future legal parental status of the commissioning parents might be another possible area of concern. Overall, however, the model provides a greater degree of certainty regarding parentage than the situation at hand today, since the legal parental statuses of all parties are clearly defined from the outset. This certainty, though, is attached to the legal position each individual will have at the time of the surrogate-born child’s birth and, where this eventuates, after an order is made. It bears no connection to their respective legal statuses in the future. Thus, where it concerns the commissioning parents, there is no certainty when the child is born that they will become legal parents. After all, they cannot be sure that the surrogate will relinquish the child until the parental order is finalised. Likewise for the surrogate mother, who cannot be sure that the commissioning parents will accept the child. If one considers the perspective of the commissioning couple, it could be perceived as a significant disadvantage that they have no absolute right to legal parentage before the parental order is finalised.

In the end, however, it comes down to the need to balance and prioritise the interests in question. The first priority must be to secure parents for the surrogate-born child already at birth. Unfortunately, when a choice must be made between potential candidates for legal parentage, it is an inevitable feature of the parental order that at least one party will find themselves in a zone of uncertainty until the order has been awarded by the Court.

7.3.6 Concluding remarks

The parental order model could be a good alternative not only for transferring parenthood following national surrogacy arrangements but also for transferring parenthood after cross-border surrogacy arrangements.833

833 See Part 4.4.1, above, in relation to England and Wales where parental orders have been awarded also in respect of cross-border commercial surrogacy arrangements.
In many situations the model could be used to transfer legal parentage instead of adoption. It might also be regarded as fairer to commissioning parents as a whole since both male and female commissioning parents who donate their gametes would be regarded as donors until the parental order is made.\(^{834}\) Thus, the contribution of commissioning genetic mothers would be given equal value to the contribution of commissioning genetic fathers. While male commissioning parents would no longer be able to assert paternity on the basis of their genetic connection,\(^{835}\) both male and female commissioning parents in heterosexual or same-sex unions would be able to apply for a parental order on the basis of their genetic connection to the child. Thus, assuming the relevant requirements for surrogacy arrangements would be met, the need for traditional or step-parent adoption in such cases could be avoided.

This model would not have to affect existing rules for the determination of parenthood following DIY national surrogacy arrangements. The implication of this would be that a commissioning genetic father in these situations would still have the option of establishing his paternity but his wife or partner would always have to adopt the surrogate-born child through the step-child adoption process. If the legislator’s goal is to avoid, where possible, unequal treatment where it concerns the determination of maternity and paternity following surrogacy, the implications of extending this right to commissioning genetic mothers so that they too might be able to assert legal parentage at birth, should be explored.\(^{836}\) If having two legal parents at birth continues to be regarded as being in the best interests of the child, one solution could be to confer legal parental status on the surrogate mother and the commissioning genetic father or mother, as the case may be.

Although it is possible in England to have one legal parent at birth (the mother) a parental order cannot be made in favour of a single parent.

\(^{834}\) This is in line with the requirements of the English model at the time of writing.

\(^{835}\) That is, assuming the surrogacy arrangement in question was subject to the surrogacy legislation in question.

\(^{836}\) That is, to consider whether it could be arranged so that the same conditions applied for all surrogacy arrangements, whether they are regulated, cross-border or private-domestic (DIY) in nature such that both commissioning parents would have to adopt, or both would be made eligible for the awarding of a parental order.
The regulatory experience of England and Wales, and Israel, means that there is no need to re-invent the wheel to create a model which appears to work efficiently and which is able to take into account the various interests.

The fact that some of the parental order prerequisites are quite different in the jurisdictions studied makes the parental order model interesting, particularly because it shows that the model provides a flexible solution for resolving parentage following surrogacy arrangements. If the same outcome can be achieved through quite different methods, it might indicate that the model could be adapted so that it satisfies the needs of other jurisdictions.

7.4 Parenthood based on pre-birth judicial approval

7.4.1 Introductory remarks

A possible alternative to implementing a post birth parental order model to resolve parentage following surrogacy, above, would be to instead consider a pre-birth model. Such a solution has been chosen by Greece which implemented a statutory presumption of maternity based on the pre-birth judicial approval of the surrogacy arrangement in 2002.837

The Greek model for determining the legal parental status of the commissioning parents does not require any transfer of parentage from the surrogate mother at all. Instead, parentage rests on a statutory presumption of maternity in favour of the commissioning mother that establishes her legal maternal status from the moment of birth, provided that court approval for the surrogacy had been sought and granted before the surrogate mother became pregnant. In this way, the legal parental status of the commissioning father is also resolved since paternity under Greek law flows from the father’s relationship with the legal mother.

This response to parenthood is novel, not the least because it gives the commissioning parents legal parental status from the moment of birth. It also eliminates the need for any form of parental transfer and does not require a court order or an adoption to establish or dissolve parentage after the child is born. Moreover, it combines an altruistic gestational surrogacy model with commercial-like principles which rest on the assumption that the contract will be enforced. In these respects, it differs significantly from the models of England and Wales, and Israel. For these reasons some comments about the Greek model for establishing parentage based on the pre-birth judicial approval of the surrogacy arrangement are justified.

7.4.2 Overview of the requirements and process

7.4.2.1 Surrogacy under the Greek Civil Code

As mentioned in Part 2.9, above, surrogacy has been regulated in Greece since 2002, when the Greek Civil Code was amended by Law 3089/2002 on Medically Assisted Human Reproduction. This law revised family law and the new articles were incorporated into the Code. Hatzis describes the regulation as ‘part of a major reform of the Family Law Book of the Greek Civil Code, which was first put


839 See Kriari-Catranis (n 838) p 272. See also Papadopoulou-Klamaris (n 838); and Kounougeri-Manoledaki (n 838) p 268. According to Papadopoulou-Klamaris the fact that the new family law was incorporated into the Civil Code was not usual; New legislation is usually ‘the object of a special law’ (p 521).
into effect in 1946. Article 1458 of the Code regulates surrogacy.

In 2005, Law 3305/2005 on the Enforcement of Medically Assisted Reproduction was introduced to regulate ART and surrogacy in more detail. Where it concerns surrogacy, the most important Articles of the 2005 law are Article 13 (Surrogate motherhood), which stipulates the scope of financial compensation and Article 26 (Criminal sanctions).

Where it concerns access to surrogacy treatment, since the fundamental purpose of the Greek ART law is to combat human infertility, ART is not intended to be used as an alternative method of procreation. The aim is, rather, to benefit heterosexual couples when other forms of treatment for infertility have not been, or are not expected to be successful. To this end, married and unmarried women who are cohabiting with a man, and single infertile women are able to access surrogacy in accordance with the Code.

7.4.2.2 Conditions for Court approval

The conditions that must be met before the Court will give permission for the surrogacy procedure are set out in Article 1458 of the Greek Civil Code. Moreover, gestational surrogacy is only permitted following court authorisation which must be issued before the embryo transfer takes place. The application for the Court authorisation must be made by the commissioning mother.

As regards the surrogacy agreement between the parties, it must be in writing. Where the surrogate mother is married, her husband must also consent to the agreement. No financial benefit between the surro-
gate and the commissioning parents is permitted. The agreement may, however, provide for the compensation of expenses.

The commissioning mother must also provide a medical certificate showing that she is unable to carry a child to term. Likewise, a medical certificate affirming that the surrogate is in good health and that she can conceive must be submitted with the application.

Permission for surrogacy will only be given when the commissioning mother and the surrogate mother are both domiciled in Greece. Reasons given for this requirement are to discourage reproductive tourism and to ensure that only Greek residents are able to benefit from the surrogacy regulations.

If the commissioning parents cannot provide the genetic materials for conception, it is possible to use gametes from donors.

7.4.3 Legal parental status of the commissioning parents

7.4.3.1 Parenthood (in general)

Under Greek law, the basis of kinship, or affiliation, is biological origins. Motherhood is established through the birth of a child since delivery ‘defines the child’s kinship with its mother and her relatives.’ Unlike Swedish law, however, where the presumption of maternity is unwritten, the Greek Civil Code contains a written presumption of maternity in favour of the gestational mother.

The basis for paternity is also biological and, like the law of many other jurisdictions, Greek law provides that when a man is married to a woman who gives birth to a child during the marriage, he is pre-
sumed to be the father of that child. Unmarried men may have their paternity confirmed through acknowledgment by making a declaration of paternity, with the consent of the child’s mother. The declaration must be made after the child’s birth, and before a notary.

Following ART, maternity is established by delivery, above, and paternity is presumed on the basis of the consent to the ART treatment.

If there is a dispute regarding maternity or paternity, the Court is able to order that all relevant evidence be produced. If there are no particular health reasons to the contrary and a party refuses to take the applicable medical test, the Court will presume that the allegations of the opposing party or parties are proved.

### 7.4.3.2 Parenthood following surrogacy arrangements.

Where it concerns *maternity following surrogacy arrangements* that comply with Article 1458 of the Greek Civil Code, above, the Code contains an express presumption of maternity in favour of the commissioning mother. The effect of this Article is that, the legal mother of the surrogate-born child is presumed to be the woman who has obtained the court permission for the surrogacy treatment ie the commissioning – or presumed – mother. Thus, the commissioning mother becomes the child’s legal mother already at birth, making an exception to the *Mater-est rule*. The presumption may be contested by the presumed mother or the surrogate mother within six months of the child’s birth but can only be reversed if it can be proven that the surrogate mother is the genetic mother of the child.

As for *paternity following surrogacy arrangements*, the commissioning father is also presumed to be the legal father of the surrogate-

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855 Papadopoulou-Klamaris (n 838) p 522. Greek Civil Code, Articles 1463 and 1465. The presumption is rebuttable.
856 Papadopoulou-Klamaris (n 838) p 522. Greek Civil Code, Articles 1475–1476.
857 And note that paternity cannot be contested by a husband who has given consent to the use of donated sperm for the purposes of ART. See Greek Civil Code, Article 1471.
858 See Kriari-Catranis (n 838) p 275 who refers to Article 615, para 1 CC together with Article 614, para 1 CC.
859 Greek Civil Code, Article 1464 (as amended by Law 3089 of 2002).
860 Subject to the conditions for Court approval in Article 1458 being met.
861 Greek Civil Code, Article 1464 (as amended by Law 3089 of 2002). See also Hatzis 2010 (n 220) p 6.
862 Greek Civil Code, Article 1464 (as amended by Law 3089 of 2002).
born child after the child’s birth. This is based on the rules of paternity contained in the Code, above.\textsuperscript{863} That is to say, he must be the husband or cohabitant of the commissioning mother – who is also the presumed mother – and he must have consented to the surrogacy treatment.\textsuperscript{864}

When the surrogate-born child is born, the hospital in question issues a birth certificate for the child, which contains the information that the child was born following a surrogacy arrangement. The certificate must be submitted to the civil registrar by the commissioning parents within 10 days of the child’s birth, which is also required of all other parents. In addition, the parents must provide a copy of the judicial decision made which gave permission for the surrogacy procedure.\textsuperscript{865}

7.4.4 Reflections concerning the nature of the court approval

The judicial approval of surrogacy, then, does not comprise an order concerning the parentage of the surrogate-born child since the effect of the court permission itself neither establishes nor transfers maternity. What it appears to do, however, is to give rise to a presumption of maternity in favour of the commissioning mother at the time of the child’s birth which – without the order – would not exist. This, in turn, directly affects the status of the commissioning father since it, by virtue of his relationship with the commissioning mother, also makes him the legal father when the surrogate-born child is born.

There is, thus, no mechanism for the transfer of parentage following surrogacy as such. Instead, there is a presumption of maternity and a corresponding presumption of paternity in favour of the commissioning parents provided that the court has, in advance of the treatment for surrogacy, approved the surrogacy arrangement and given permission for treatment.

\textsuperscript{863} Papadopoulou-Klamaris (n 838) p 522. Greek Civil Code, Articles 1463 and 1465. The presumption is rebuttable.

\textsuperscript{864} In the case of the paternity of a married man see the Greek Civil Code, Article 1465 (Presumption issue from marriage); In the case of the paternity of a male cohabitant see Article 1456 (regarding written consent for ART) and Article 1475, which provides that the act of consent to ART has the same effect as the voluntary acknowledgment of paternity.

\textsuperscript{865} See Hatzis 2010 (n 220) p 6.
7.4.5 Potential advantages of pre-birth judicial approval of surrogacy

From the perspective of the commissioning parents, there are clear advantages of a presumption of maternity in favour of the commissioning mother based on the pre-birth judicial approval of surrogacy. First, it creates a high degree of certainty in relation to their future legal parental status already from the moment the surrogacy arrangement is approved by the Court. This certainty is also an advantage for the surrogate and her spouse, and for the child. Another advantage is that, because the legal parental status of the commissioning parents is activated already as soon as the child is born, it is not subject to a transfer mechanism.

From the perspective of the child, it has been suggested that the presumption of maternity in favour of the commissioning mother following gestational surrogacy is positive because it establishes the surrogate-born child’s kinship with the woman who wants the child, as soon as the child is born. Kounougeri-Manoledaki considers this to be a better solution for the child than having one legal mother – the gestational mother – at birth and another legal mother – the commissioning mother ie the woman who wants the child – after the adoption is confirmed. According to Kounougeri-Manoledaki, the solution of adoption, in addition to taking time, differs in quality from its alternative. In her view, it is not the same for the child to have the commissioning mother (who wants the child) as an adoptive mother as it is to have the commissioning mother (who wants the child) as the child’s mother from the moment of birth. In the former situation, the gestational mother must still agree to the adoption; in the latter situation, the child only ever has one legal mother – the commissioning mother – ‘without the intervention of judicial proceedings and with no legal connection at all with any other ‘mother’.” She thus believes that the solution offered by the Greek legislator is more child-centred (than the adoption alternative) and reflects the interests of the child.

The involvement of the State in approving the treatment could also be seen as an advantage of the Greek model since an opportunity is created to ensure that the best interests of the prospective child are

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866 That is, the presumption found in Article 1464 of the Greek Civil Code.
867 See Kounougeri-Manoledaki (n 838) pp 273–274.
868 Above p 274.
869 Above pp 273–274.
considered before the agreement is approved.\textsuperscript{870} In addition, the State’s involvement gives legitimacy to the agreement and to the treatment.\textsuperscript{871}

From the perspective of the surrogate mother, an advantage is that she would have the right to be free from any interference or demands that might affect her bodily integrity during the pregnancy. The model also presupposes that she would have the right to abort the child.

All of these features would make this option an interesting one for the Swedish legislator.

7.4.6 Potential disadvantages of pre-birth judicial approval of surrogacy

Since the presumptions of parentage in favour of the commissioning parents are automatic by virtue of the Court’s pre-treatment approval of the surrogacy treatment, several possible disadvantages of the Greek model come to mind. These are connected to the absence of any administrative monitoring of the parties after the surrogacy treatment commences.

First, the Greek model includes no possibility for any of the parties to change their mind. This might seem somewhat heartless if the gestational mother feels that she cannot give up the baby; and perhaps even more so if the surrogacy model were to be an altruistic one.

From the perspective of the surrogate-born child, the model also has a weakness because there is no capacity to re-evaluate the arrangement in light of the various interests, particularly the interests of the child, if the situation changes. Because the presumption of maternity, and thereby paternity, is already pre-ordained when the court gives permission for the surrogacy, it removes the possibility for a consideration of the best interests of the surrogate-born child once the child is born.\textsuperscript{872} The focus is, rather, on the intention and interests of the parties at the time the agreement is approved.

\textsuperscript{870} Even if this is not a requirement under the Greek Civil Code, such a requirement could be included should a jurisdiction choose to base surrogacy regulation on the Greek model.

\textsuperscript{871} It could be mentioned that with the Greek model, above, the nature of the State intervention at the beginning of the surrogacy arrangement, prior to the confirmation of the Court approval, is more like that seen with Israeli model than the model of England and Wales. After the surrogate-born child’s birth, however, there is minimal involvement by the State.

\textsuperscript{872} That is, in relation to legal parentage.
Moreover, the fact that there appears to be no requirement of a genetic link between the commissioning parents and the surrogate-born child under the Greek Civil Code might be regarded by some as a negative feature.

7.5 Concluding remarks

What considerations need to be taken into account when searching for an appropriate model for the transfer of parenthood following surrogacy arrangements? Irrespective of the model chosen, careful attention must be paid to the various interests that need protecting, how those interests might be protected, and whose interests should be prioritised.

If we accept that the child has a right to parents, and that the rights of the adult parties are also important but that they must nevertheless defer to the needs and interests of the child, one thing seems clear: Any model for the transfer of parenthood must be structured so that it protects, first and foremost, the best interests of the child. How, then, can this be achieved?

The arguments addressed in Chapter Two, above, about why surrogacy arrangements are seen as problematic could serve as a starting point from which to determine whose interests need protection where it concerns parenthood following surrogacy arrangements. The issues raised concerning surrogacy and harm to children (Part 2.6), are particularly relevant. The legal arguments that have been put forward for and against surrogacy, explored in Part 2.7, also provide some guidance regarding the various interests and factors that need to be considered when establishing a model for the transfer of parenthood following surrogacy arrangements.

Although adoption has been, and continues to be, used to transfer parentage following surrogacy arrangements in Sweden, the institute of adoption was clearly not created with surrogacy in mind. Rather, it is used in surrogacy cases by default because there is no other way in which to transfer parenthood from the surrogate mother to the commissioning mother. This raises the question of whether adoption really is the best solution, or even an appropriate solution, to apply where it concerns parenthood following surrogacy. It would, however, make

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873 For example, the surrogate mother and her partner, possible donors, the commissioning parents and the child.
sense to retain the adoption model for the transfer of parentage following surrogacy in certain situations. Even if a specific parental transfer model for surrogacy is implemented, adoption will continue to be needed as a complement. If, for example, the legislator’s ambition is to ensure a genetic connection between at least one of the commissioning parents and the surrogate-born child, adoption would still be required in situations where commissioning parents are unable to meet this requirement. Without an alternative model, adoption is essential.

The parental order developed in England and Wales, and the parentage order, established in Israel, were created specifically for the transfer of parenthood following surrogacy. As was seen above, these models have been shown to work effectively in their respective jurisdictions. Their operation, however, assumes the existence of some form of regulation for surrogacy; something which Sweden lacks at the present time. A parental order model can be combined with commercial and altruistic surrogacy but it rests on the assumption that at least one parent has a genetic connection to the surrogate-born child. Moreover, as is the case in England and Wales, the model can co-exist with a rule that gives the surrogate mother an unconditional right to keep the surrogate-born child.

The pre-birth judicial approval of surrogacy, currently practiced in Greece, gives rise to a statutory presumption of maternity in favour of the commissioning mother which, in turn, assumes that the commissioning parents are automatically the legal parents at the time of the surrogate-born child’s birth. It is not necessary for either of the commissioning parents to have a genetic connection to the child because the parentage is based on the intention to parent which is judicially sanctioned through the court’s decision to permit the surrogacy treatment to go ahead. While this model is less flexible for the parties than the agreement-based model found in England and Wales (in that there is less scope for a change of heart) it is nevertheless subject to State scrutiny at the beginning of the relationship between the parties. Thus, there is the potential at least, to implement a version of this model which could balance the various interests in a more complete way than would occur with a pure contract model. It must be difficult to combine this model with altruistic surrogacy, however (as is the case in Greece), since altruism tends to be closely connected to the surrogate’s right to change her mind and keep the baby. Moreover, in Sweden today, there are strong indications that if surrogacy were to be
regulated, an altruistic model would be favoured over a commercial variety. The pre-birth judicial approval model would thus most likely be ruled out for Sweden in today’s political climate which is strongly veering towards an altruistic model for surrogacy that reinforces the status of the surrogate mother as legal mother when the child is born.
8 Closing reflections

8.1 Summary of situation in Sweden

Today in Sweden, parenthood following surrogacy arrangements is determined by applying the parenthood rules contained in the Children and Parents Code, and by applying the unwritten *Mater-est rule*. This is necessary because there are no special laws regulating surrogacy, or parenthood following surrogacy. The Genetic Integrity Act, which regulates ART, does not – in contrast to some other jurisdictions – regulate parenthood following ART. To this end, it has no direct impact on issues concerning family law status. The Act’s implied prohibition against surrogacy in conjunction with IVF, however, prevents surrogacy treatments from being facilitated under the Swedish national health system but this disincentive does not prevent surrogacy arrangements from being entered into, at home and abroad.

Due to the dearth of specific legislation clarifying family law status following surrogacy, there could be differing interpretations as to how legal parental status should be conferred on the parties in a given situation. It follows, that their legal parental status in respect of the surrogate-born child is uncertain, and this, in turn, implies that the status of the child is uncertain.

8.2 Understanding and solving the problem

An important objective of this thesis has been to consider how family law status following surrogacy could be made more certain. A contributing factor to existing uncertainty is that surrogacy arrangements result in family formations that deviate from those that have been recognised and regulated by the Swedish legislator. The family created through surrogacy does not fit comfortably into the existing legislative framework and thus lacks the protection afforded to other families whose structures are recognised by law.
Perhaps the greatest source of uncertainty following surrogacy arrangements concerns maternal uncertainty. This has arisen as a result of advances in reproductive technology which have made it possible to separate gestation and genetics. Thus, the historical certainty attached to maternity that bases motherhood primarily on gestation is no longer cast in stone.

In this connection, the fundamental assumption which surrogacy challenges is that birth and motherhood are inseparable. Although it has been possible to separate genetics and gestational motherhood for several decades with the help of egg donation, the aim of egg donation is to keep birth and motherhood together: the birth mother keeps the baby she bears even though she has no genetic connection to the child. Our laws have been drafted to specifically protect the status of the birth mother as legal mother following egg donation. Surrogacy, on the other hand, with or without egg donation, is based on the separation of birth and motherhood. This is a completely different starting point from that of egg donation, yet our current legal framework is not equipped to differentiate between the two situations where it concerns the legal status of the “mother”, even following gestational surrogacy. This, in turn, has implications for the status of the surrogate-born child.

On the one hand, this could be regarded as understandable. After all, with both egg donation and gestational surrogacy, the birth mother gives birth to a child that is not her genetic child. The woman giving birth following egg donation is the legal mother of the child she bears and this is supported by legislation; the woman giving birth following traditional or gestational surrogacy (including surrogacy undertaken abroad) is also the presumed legal mother of the child she bears although this has no basis in Swedish statute law due to long-standing legal tradition founded on what was until recently undisputable: the woman who gives birth must be the mother of the child (the *Mater-est rule*). On the other hand, the continued acceptance of this assumption could be regarded as surprising for two main reasons. First, because the intention behind all surrogacy arrangements bears no similarity to that behind egg donation since, with surrogacy, it is never intended that the birth mother will be the mother of the child; and secondly, because it is now possible to separate genetics and gestation. Even if gestation should continue to be given precedence over genetics where
it concerns legal maternal status, these factors raise important questions that should at least be discussed.

The dilemma for law and policy makers is that a priority must be made between the respective contributions of genetics and gestation in situations where a decision must be made about maternity. Egg donation has in the last decade become less controversial in Sweden, no doubt contributed to by the fact that the gestational mother is, after all, the mother who will raise the child. With surrogacy, however, the dilemma of separating the genetic and gestational contributions is amplified because the gestational mother does not intend to raise the child. Instead, she intends to give the child to another woman who may or may not be the child’s genetic mother.

Irrespective of the dilemma, a decision about what makes a (statutory) mother must be made if the State is to meet its obligations to the child. The child needs parents. One of the alternatives considered in this thesis that could promote greater certainty, even in the absence of regulation, is to codify the _Mater-est rule_ and make it into a statutory rule of law in favour of the gestational mother. This assumes a policy that favours the gestational mother as the child’s legal mother at the time of the child’s birth and reinforces the existing unwritten presumption of maternity. Applied to surrogacy, it would – at least at the time of the surrogate-born child’s birth – provide complete certainty as to the legal status of the various “mothers”. This, in turn, would guarantee that the surrogate-born child has at least one legal parent at that time. The creation of alternative presumptions of maternity, paternity and parenthood could also be considered but it appears that the main problem today is connected to the uncertainty attached to maternal status. To this end there would be little benefit in changing the rules connected to paternity and same-sex parenthood in the absence of a clear regulatory direction since these rules already function well (and probably better than the alternatives considered). One effect of applying the existing Swedish parenthood rules to surrogacy is that it appears impossible for female commissioning parents to become legal parents at time of the surrogate-born child’s birth, irrespective of whether they have a genetic connection to the child or not. Male commissioning genetic parents on the other hand, are able to confirm their paternity in relation to the surrogate-born child.

In situations where the commissioning parent is not the legal parent at birth, the issue of how parenthood can be transferred must also be
determined. Currently in Sweden, the only alternative available is adoption. Other alternatives explored in this thesis were the parental order and the pre-birth judicial approval of surrogacy contracts.

Although the purposes of adoption are not, on the whole, consistent with the goals of surrogacy, adoption has proven to be an effective mechanism for the transfer of parenthood following surrogacy arrangements to date. Irrespective of whether an alternative solution is implemented, adoption would not and should not be made redundant in this connection. The scope of an alternative transfer mechanism following surrogacy would presumably be limited and to this extent, adoption will continue to be required as a complement. This has proven to be the case in other jurisdictions and works effectively in England and Wales, and in Israel. One issue that should be given attention in Sweden is whether female commissioning parents wishing to adopt could be put in the same – or a similar – position as their male counterparts. It seems unreasonable that commissioning female couples are unable to benefit from the step-child adoption process because neither commissioning parent can have her legal parental status confirmed at the time of the surrogate-born child’s birth, while male couples in the same situation do not face this problem. This situation could be resolved by implementing a measure that would give a commissioning genetic mother in a same-sex union the right to confirm her parentage in relation to a surrogate-born child.

The parental order as a transfer mechanism appears to be well suited in situations where surrogacy is State regulated. A major advantage of this model is that it provides an effective way to transfer parenthood following surrogacy without the need for a more invasive and time consuming traditional adoption process. An important decision that would have to be made before implementing a parental order model, however, would be the extent and timing of State intervention. The Israeli parentage order requires the active involvement of the State from the outset whereas the England and Wales parental order has no pre-contractual monitoring. The choice a State makes would be largely dependent upon its objectives in relation to surrogacy in general. The main goal of the Israeli legislation, for example, is to avoid conflicts so that the contract can be enforced. It is therefore not surprising that the Israeli parentage order includes the monitoring of the parties at an early stage. The corresponding England and Wales law by contrast has as its starting point that surrogacy contracts are not
enforceable and that the surrogate has an unconditional right to keep the surrogate-born child. This could explain why the State in this situation does not intervene until a parental order application is imminent. The fact that Israel, and England and Wales, might have different legal, political and religious cultures from each other, and from other jurisdictions, does not render their surrogacy regulation irrelevant as a source of inspiration for other countries seeking new solutions for the transfer of parentage. As has been shown in this thesis, the laws of both jurisdictions are effective and could be adapted to function in a variety of legal cultures.

In contrast to the parental order models, above, the Greek solution for establishing parentage following surrogacy does not require a transfer of parentage after the surrogate-born child’s birth. Instead, a pre-birth judicial authorisation of the surrogacy contract creates a presumption of maternity in favour of the commissioning mother which coincides with the birth of the surrogate-born child. While this measure has the advantage of almost absolute certainty in relation to future maternal (and hence paternal) status, it follows that there is virtually no room for parties to change their mind.

8.3 Connected considerations
8.3.1 The need for regulation in general

It has been argued in this thesis that the clarification of legal parental status following surrogacy arrangements is an urgent measure that is necessary to ensure that the surrogate-born child’s right to parents, at birth, can be guaranteed. It is also in the interests of other parties to have certainty in relation to their family law status.

The impending Swedish investigation will, inter alia, consider whether surrogacy should be regulated in Sweden, and make recommendations about resulting amendments that should be made to the rules concerning parenthood, and other legislation as required. It could be expected that the parallel investigation, on the examination of children’s rights under Swedish law, might also consider the specific question of children’s rights in the context of surrogacy arrangements. Both investigations are timely and the findings made by the latter will

874 Dir 2013:35.
no doubt complement and strengthen those made by the investigation considering the increased possibilities for the treatment of infertility.

It is, however, by no means certain that surrogacy will be regulated in Sweden. If it is determined that surrogacy should be permitted and regulated, the model ultimately chosen should, at a minimum, depend on how well it is able to protect the various interests. This means, first and foremost, protecting the interests of the surrogate-born child in addition to – where possible – the interests of other connected parties. Obviously, State interests are assumed and would, of course, include a State’s interest in meeting its obligations to protect children (by ensuring they have parents).

Several other considerations, over and above those directly concerned with establishing and transferring parenthood, will also have to be made.

8.3.2 What to do if no one wants to take responsibility for the surrogate-born child

Unfortunately, it does happen that commissioning parents change their mind. This of course has implications for the best interests of the surrogate-born child. Assuming the child has a right to parents, a decision by commissioning parents not to accept the child affects the child’s possibility of realising this right. If the surrogate mother has no desire to keep the baby either, how can the child’s need for parents be met? Someone must take responsibility for the baby. How a State plans to deal with this potential scenario is an issue that must be addressed irrespective of the model chosen for surrogacy.

It was seen in Chapter Four (England and Wales), above, that the Surrogacy Arrangements Act clarifies the position of the surrogate mother as legal mother. The Act also contains an express declaration that a surrogacy arrangement is not enforceable; neither by nor against any of the persons involved. This provision reinforces the policy that the gestational mother is the legal mother making it consistent with common law and other ART statute law. Another effect, however, is that it clearly makes it impossible for a surrogate mother to assert that she is not the child’s mother. If, for example, a surrogate does not wish to keep the child, this provision might be seen as being to her

\[875\] SAA 1985, Section 1A.
disadvantage if the commissioning parent or parents were to change their mind and refuse to take the child. On the other hand, this provision, in making it impossible to dispute maternity, thereby ensures that the child is not left without a legal mother at birth.

This, in itself, however, cannot solve the problem that arises when no one wants to take responsibility for the surrogate-born child. Even if a provision similar to the England and Wales provision, above, were to be enacted in Sweden such that the surrogate mother is the legal mother surrogate-born child at birth, it might be difficult to compel a surrogate mother to take on a parental role for a child she never intended to raise. There is, thus, no guarantee that the surrogate will be the active parent in the child’s life if the commissioning parents do not accept the child. How the child’s interests could be protected in the best possible way should this situation arise therefore requires some consideration.

8.3.3 Role of State

Another consideration that must be made concerns the nature and degree of monitoring by the State. Would it be suitable to have a similar situation as that practiced in England, where there is a high administrative load on the authorities after the surrogate-born child has been born but before parentage can be transferred because all of the requirements must be carefully checked prior to the approval of the parental order? Alternatively, would it be better to adopt an Israeli-style approach, where the administrative burden is heavier before the surrogate-conception, resulting in a significantly more streamlined process for the transfer of parentage after the surrogate-born child is born?

Clearly, both models take time and resources. A disadvantage of the England and Wales model, however, is that the administrative load takes place after baby is born. This results in delays in confirming parenthood for the commissioning parents – who are already caring for the baby assuming all goes well. Thus, it might be more effective to use the time before the agreement is approved, to do the groundwork, as in Israel.

The role of the State in determining what issues will be regulated and in the on-going administration and enforcement of the model it establishes could vary considerably depending on the model chosen. Will the form of regulation be loose with minimal intervention (Eng-
land and Wales) or will the State play a more active role in controlling and monitoring the process, as it does in Israel where contracts are approved by an approvals committee? The consideration of these issues would clearly be a necessary part of the preparatory work required before surrogacy regulation could be implemented.

8.3.4 Commercial or altruistic model for surrogacy

8.3.4.1 Introduction

A decision regarding whether to choose an altruistic or a commercial model is unavoidable and it has been shown that an active State role does not have to imply that commercial surrogacy could not be considered. Nor does it have to mean that interests cannot be protected. The Israeli model for surrogacy shows that it is possible to successfully accommodate the practice of commercial surrogacy and still prioritise the protection of interests when the model is combined with regulation.

It has also been shown, however, that Swedish policy to date has been overwhelmingly sceptical where it concerns commercial surrogacy. This has been reinforced most recently in the report of the Swedish National Council on Medical Ethics where it is recommended that commercial surrogacy not be permitted in Sweden; something that has already had an influence on the terms of reference for the recently-appointed investigation, above. Although the findings of the official investigation will not be known for some time, it is unlikely that this recommendation would not be followed, both by the committee appointed to investigate surrogacy-connected issues, and subsequently by the Swedish Government and Parliament.

The possible advantages and disadvantages of commercial surrogacy, in general, were raised in Chapter Two, above. One of the main concerns of implementing a commercial surrogacy model is how safeguards could be applied to protect the parties and the surrogate-born child. A commercial model, in particular where surrogacy contracts are strictly enforced, will be labelled as child selling, no matter how it is described. As pointed out by Carmel Shalev in the context of the commodification of children, above, even if the transaction is seen as ‘a contract for reproductive services rather than for the sale of a baby,'
the result is still the same – to put a monetary value on a life that is considered priceless.\footnote{877 Shalev 1989 (n 104) p 159.}

\section*{8.3.4.2 Possible implications of the Greek empirical studies}

Even altruistic models for surrogacy regulation can be seen to have their pitfalls, however. The Greek experience exemplifies this. Thus, several implications of the Greek empirical studies on surrogacy arrangements, reported in Chapter Two, above, require special attention. If an altruistic model is to be implemented in Sweden, or in any jurisdiction, clarity about what expenses are and are not included within the notion of altruism is essential. Moreover, the Greek studies reported by Hatzis, above, reveal that a pure altruistic model might be an unrealistic goal unless surrogacy agreements and arrangements can be rigorously monitored by the State or by a body appointed for that purpose.

Also of significance is that, even after the Greek legislator clearly defined what it regarded as financial compensation, above, the nature of the surrogacy arrangements in question did not appear to change; they were no more or no less altruistic than before the amendment. This could indicate that closer scrutiny is required when choosing an altruistic model for surrogacy.

In this connection, it should be remembered that the Greek model for approving surrogacy – in spite of its requirement for judicial permission prior to treatment – involves only minimal supervision by the State. The role of the court appears, in principle, to be more administrative than judicial in that its task is to check the contract and to ensure that the conditions that must be met before surrogacy treatment may commence have been met.\footnote{878 That is, those contained in Article 1458 of the Greek Civil Code.} In the words of Hatzis, ‘the judges give their permission to the surrogacies without investigating further into the existence of a close relationship [between the parties], following a formal bureaucratic procedure’.\footnote{879 See Hatzis 2010 (n 220) p 5.} Nor is there any monitoring for continued compliance after the court approval has been issued.

In light of the Greek experience, it becomes clear that an altruistic model, in which the performance of the contract itself is not monitored, poses a substantial risk that surrogacy arrangements will not remain altruistic. If a State’s decision to prohibit commercial surrogacy...
cy is grounded on the desire to protect parties to surrogacy arrangements from the possible consequences of unethical and immoral behaviour – such as exploitation, for example – it might not be sufficient to simply prohibit commercial surrogacy. Some form of scrutinising of the parties during the performance phase of the agreement is arguably a prerequisite for the protection of the interests in question. Even then, this could not completely prevent unethical behaviour.

Perhaps it might be more feasible to consider a model along the lines of the Israeli regulatory model which permits payments over and above actual expenses as long as they are approved, and combines this with careful monitoring. If one is focussing on parties’ interests, in particular the interests of the child, there does not appear to be much to gain from the enforcement of a strict altruistic model when compared with a tightly controlled, but nonetheless permitted, commercial model as practised in Israel.

As regards the investigation concerning increased possibilities for the treatment of infertility, it is a shame that the Swedish Government did not grasp the opportunity to initiate a truly “unprejudiced investigation” as recommended by the Parliamentary Standing Committee on Health and Welfare. Instead, where it concerns the nature of surrogacy, ie whether it should be altruistic or commercial, the framework for the investigation has been defined so narrowly as to almost completely rule out any consideration of whether or not a commercial model might be appropriate. The decision not to keep an open mind on this issue, at least until or unless it can be shown that commercial surrogacy must be inconsistent with an ethical regulatory model, is disappointing. Not because altruistic surrogacy should not be the model of choice in Sweden but, rather, because no room has been left for an objective assessment about the wider implications of commercial surrogacy; about what the various possible forms could imply, including advantages and disadvantages; and whether there might be some forms of surrogacy that could be regarded as ethical.

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880 Dir 2013:70.
881 Bet 2011/122:SoU26 pp 1, 3 & 14.
882 In this respect, the Government’s response to limit the scope of the investigation to altruistic surrogacy is reminiscent of the former public response exemplified by repeated refusals to initiate an investigation into surrogacy on the ground that “surrogacy is ethically indefensible” without any attempt to objectively justify why such arrangements were ethically indefensible. This close-minded response, which soon became the mantra of all surrogacy opponents in Sweden, effectively delayed an
8.3.5 Issues to consider concerning birth records

Even in the absence of surrogacy regulation, the fact that surrogacy has become an alternative for building Swedish families raises a number of issues regarding birth registration and birth records. Briefly, several factors that should be considered in this connection include:

- The need to determine who should be registered as having a connection to the surrogate-born child; and where on the register (or in what manner) this information should be recorded;

- the need to consider the significance of the role of a genetic connection to the surrogate-born child in comparison with a gestational or social connection; and

- if genetics is to be emphasised, or acknowledged, thereby making “donors” transparent by entering them on the register when registering the child’s birth following surrogacy, the need to decide whether the same principles should also apply when dealing with records following egg donation and sperm donation. And if not, on what basis could withholding such information be justified?

8.3.6 International issues

As has already been highlighted, this thesis has focussed predominantly on how one might resolve parenthood issues flowing from surrogacy occurring within our own national borders. Another area which must be addressed as a matter of urgency, however, is how to manage the transfer of parenthood following cross-border surrogacy arrangements. At the time of writing, there are no consistent national routines that have been established to deal with the problems created by the merging of different national laws and different requirements regarding the establishment of parentage. This has an impact on certainty and the current situation in Sweden is not as congenial to the various interests as it should be. In particular, if matters are to be resolved promptly and consistently, clear guidance is needed for the Social

important public investigation into the matter for almost three decades. Now that an investigation is finally underway, there is a palpable risk that history could repeat itself, but this time, in relation to the assumption that “commercial surrogacy is ethically indefensible”, and as a result, unnecessary to include in the investigation.
Welfare Committee officers who are responsible for ensuring that parentage can be established following cross-border surrogacy. It is alarming that many professionals responsible for assisting commissioning parents on their return following international surrogacy arrangements feel ill-equipped to respond to the problems faced in establishing the paternity of the commissioning father and in securing custody in relation to the surrogate-born child. For the commissioning parents, this means delays in acquiring legal parental status and/or legal responsibility in relation to the child; and custody delays also affect the commissioning parents’ rights to parental leave which has economic consequences for families which can already be living under strained economic circumstances.

If participation in cross-border surrogacy cannot be prohibited, this problem needs to be prioritised. Moreover, knowingly allowing a situation to continue which permits infants, even in small numbers, to enter Sweden in the care of intended Swedish parents – and where neither parent, irrespective of a genetic link, is legally recognised as the child’s legal parent under Swedish law at the time of entry – cannot be consistent with the best interests of the child.

8.4 Clear family law status rules are essential

Even in jurisdictions where surrogacy is regulated, expectations of parties who enter into surrogacy arrangements cannot always be met. In this connection, there is a human factor at play which makes absolute certainty impossible. This also makes it difficult to define the scope of a surrogate-born child’s right to know and be cared for by his or her parents. In regulated jurisdictions, certainty in relation to the legal parental status of the surrogate mother, her partner, possible donors, the commissioning parents, and thereby the status of the child, is enhanced. This is because parties have the opportunity of knowing, before choosing surrogacy, what their legal status will be when the child is born; who will have legal responsibility for the child; how parenthood can be transferred; and whose interests will take priority in the event of a dispute. These factors serve to protect the surrogate-born child, whose interests in securing parents at birth must override

883 This is supported by the results of the study reported in fn 725.
any competing rights held by the commissioning parents or any other party who might attempt to assert legal parentage.

Likewise, in jurisdictions where surrogacy is regulated, the question of who the legal parents of the surrogate-born child are at the time of birth is an academic one since it is – or should be – clarified as part of the regulatory package.

In jurisdictions where surrogacy is not regulated, however, it is only possible to satisfy the surrogate-born child’s interests, above, if the status rules are absolutely clear about who it is who holds the rights and responsibilities of legal parentage in relation to a child at the time of birth.

If it is accepted that a surrogate-born child has a right to parents, at birth, the State has an obligation to ensure that this right can be realised. If a State’s laws are silent on the determination of legal parental status in relation to surrogacy, it seems obvious that the child’s right to parents can only be fulfilled if existing status rules can be unambiguously interpreted such that surrogacy falls within their scope.
Sammanfattning
Sammanfattning

Bakgrund
Surrogatarrangemang har blivit ett allt vanligare alternativ för ofrivilligt barnlösa par och ensamstående som har en önskan att bli föräldrar. I flera länder har under senare år surrogatmoderskap reglerats på olika sätt. I Sverige finns ingen lagreglering som tillåter eller förbjuder surrogatmoderskap. I några länder finns emellertid regleringar som uttryckligen förbjuder och i vissa fall vissa till och med kriminaliserar surrogatarrangemang. Förbud mot surrogatmoderskap har dock visat sig ha mycket begränsad verkan. De som vill ingå i ett privat surrogatarrangemang i syfte att skapa en familj kan i viss utsträckning göra det genom ett "gör det själv" surrogatmoderskap. Om de blivande föräldrarna har ekonomiska medel är det möjligt för dem att ingå surrogatarrangemang i länder där sådana är tillgängliga och tillåtna. I sådana fall kommer fastställandet av barnets familjerättsliga förhållanden att behöva regleras även i länder där sådana arrangemang inte är tillåtna. När det saknas uttrycklig reglering uppstår i många fall osäkerhet rörande de berörda parternas familjerättsliga status, inte bara för de blivande föräldrarna – surrogatmodern och hennes partner – utan också och i synnerhet för barnet.

Syfte och mål
Det övergripande syftet med denna avhandling är att undersöka de juridiska aspekterna av rättsligt föräldraskap och hur det fastställs i Sverige efter surrogatarrangemang. Avsikten är att inledningsvis undersöka om nuvarande nationella lagar som reglerar familjerättslig status på ett tillfredsställande sätt skyddar barn och parterna i ett surrogatarrangemang. Vidare beskrivs hur vissa andra utvalda länder har reglerat motsvarande frågor. I avhandlingen identifieras problem som kan uppstå. Avslutningsvis ges föreslag på alternativa lösningar på
nationell nivå rörande fastställande av det rättsliga föräldraskapet efter surrogatarrangemang, oberoende av om surrogatarrangemang regleras eller inte. Viktiga frågor som behandlas i detta sammanhang är huruvida befintliga nationella familjerättsliga regler behöver klargöras och förtydligas i samband med surrogatmoderskap, om det skulle vara lämpligt att omvärdera eller kvalificera presumtionen om moderskap i syfte att undanröja alla tvivel om att det är den kvinna som födder barnet som är barnets rättsliga mor även efter surrogatmoderskap, och ifall adoption skulle kunna vara ett alternativ för överföring av det rättsliga föräldraskapet från surrogatmamma till mottagande förälder eller föräldrar, och om så är fallet, ifall en sådan överföring bör vara beroende av ett medgivande/samtycke från surrogatmamman efter förolossning.

Utgångspunkten för avhandlingen är antagandet att det är bäst för barnet att ha rättsliga föräldrar vid födelsen och att detta intresse måste prioriteras framför de blivande föräldrarnas intresse av att bli föräldrar. Denna utgångspunkt grundar sig på och överensstämmer med gällande svenska lagar och politik på området.

Mot bakgrund av surrogatmoderskapets kontroversiella karaktär undersöks också de etiska konsekvenserna av surrogatmoderskap. Syftet är att ge en förståelse för hur värden som är omedvetna eller dolda kan göra det svårt för en stat att reglera föräldraskap efter surrogatmoderskap eller andra fertilitetsbehandlingar som kräver assistans av en tredje part.

Begränsningar


Nya offentliga initiativ 2013

I Sverige har sedan lång tid tillbaka funnits en stor skepsis mot surrogatarrangemang, i huvudsak med hänsyn till etiska argument och skyddet för det blivande barnets och surrogatmoderns intressen. Mot denna bakgrund är det av intresse att notera tre offentliga initiativ under år 2013 som har potential att väsentligt påverka framtida svensk policy rörande surrogatmoderskap och det sätt på vilket surrogatmoderskap regleras.


Det andra initiativet var regeringens tillsättande i mars 2013 av en särskild utredare för att undersöka barns rättigheter enligt svensk lag (Dir 2013:35 Översyn av barnets rättigheter i svensk rätt). En av utredarens uppgifter är att granska ett urval av avgöranden av domstol och administrativa beslut för att utvärdera i vilken utsträckning tillämpningen av lagar och andra regler är i överensstämmelse med FN:s
konvention om barnets rättigheter (barnkonventionen) som Sverige har ratificerat.

Det tredje initiativet, som direkt påverkar den lagstiftning och politik som rör surrogatmoderskap, är den statliga utredning om Utökade möjligheter till behandling av ofrivillig barnlöshet (Dir 2013:70) som tillsattes den 19 juni 2013. Utredarens uppgift är att övervåga olika sätt att öka möjligheterna genom vilka ofrivilligt barnlösa skulle kunna bli föräldrar. Direktivet anger bland annat att utredaren ska:

- ta ställning till om surrogatmoderskap ska tillåtas i Sverige, med utgångspunkten att detta i sådant fall ska vara altruistiskt,
- ta ställning till om det behövs särskilda regler för de barn som tillkommit genom surrogatmoderskap utomlands,
- ta ställning till om det ska krävas en genetisk koppling mellan barnet och den eller de tilltänkta föräldrarna vid assisterad befruktning,
- föreslå de följdändringar i den föräldraskapsrättsliga regleringen och annan lagstiftning som behövs.

Utredningen är ett svar på en rekommendation från riksdagens socialalutskott i mars 2012 om att en bred och förutsättningslös utredning om surrogatmoderskap bör göras som omfattar rättsliga, etiska och ekonomiska perspektiv och som beaktar internationella förhållanden, särskilt barn (bet 2011/12:SoU26).

Avhandlingens disposition

surrogatmoderskap aktualiserar, mångfalden av synpunkter på surro-
gatmoderskap som företeelse, eventuella farhågor om följderna av surrogatmoderskap på grund av brist på information, att surrogatmo-
derskap med assisterad befruktning är en relativt ny medicinsk möj-
lighet som lagen inte hunnit komma ikapp eller hålla jämna steg med. Av betydelse är vidare att alla inte ser surrogatmoderskap som ett nationellt problem eftersom par kan lämna landet för att få assisterad befruktning eller göra surrogatarrangemang i tron att eventuella rätts-
liga problem i slutändan kommer att ordna sig. En offentlig utredning som noggrant identifierar problemen och undersöker tänkbara och realistiska alternativ kommer inte bara att främja den offentliga debat-
ten, den kommer även att öka medvetenheten om surrogatmoderskap i samhället och skulle också kunna legitimera eventuella lagstiftnings-
åtgärder.

I kapitel tre undersöks den svenska rättsliga regleringen för upprät-
tandet och överföringen av rättsligt föräldraskap med syfte att se hur denna kan tillämpas på surrogatarrangemang. Kapitlet inleds med en genomgång av bakgrunden till Sveriges nuvarande politik om surro-
gatarrangemang och föräldraskap efter surrogatmoderskap. Effekterna för surrogatmoderskap av lag (SFS 2006:351) om genetisk integritet m.m. berörs innan frågan om föräldraskap enligt föräldrabalken och oskriven lag, både generellt och i förhållande till assisterad befruk-
tning och surrogatmoderskap, uppmärksammas. Vissa frågor som rör födelseregistrering tas också upp. Utgångspunkten för kapitlet är bar-
nets rätt till familjerättslig status. Detta innebär att ett barn har rätt att få bekräftat att han eller hon är någons barn och att, enligt lagen, till-
höra en familj. Om det är oklart vem som är rättslig förälder eller vilka som är rättsliga föräldrar till ett barn fött genom ett surrogatarrange-
mang, om det är surrogatmamman eller de beställande föräldrarna, och detta inte kan klargöras när barnet föds, följer att barnets rätt till famil-
jerättslig status inte är tillgodesedd.

I kapitel fyra behandlas de rättsliga regler som gäller för faststäl-
lande och överföring av det rättsliga föräldraskapet efter surrogatmo-
derskap i England och Wales. Efter en kort sammanfattning av den relevanta bakgrunden till den nuvarande lagstiftningen och de rättspo-
litiska ställningstagandena till surrogatmoderskap, och de regler som gäller för fastställande av rättsligt föräldraskap utan assisterad be-
fruktning, redovisas reglerna som gäller efter ART och surrogatmo-
derskap. Sedan undersöks två mekanismer för överföring av föräldrar-
skapp efter surrogatmoderskap – föräldrabeslut (parental order) och adoption.
Kapitel fem behandlar regleringen rörande avtal om surrogatmoderskap i Israel. Efter en beskrivning av bakgrunden till Israels nuvarande politik beträffande ART och surrogatmoderskap ges en redogörelse för den israeliska regleringen rörande surrogatmoderskap, med särskilt fokus på de krav som ställs för godkännande av avtal om surrogatmoderskap. Reglerna för fastställande av rättsligt föräldraskap efter surrogatmoderskap beskrivs utförligt. Även överföring av föräldraskap genom föräldrabeslut behandlas (parental order). Frågan om födelseregister berörs också.


Huruvida en rättsordning behöver en särskild mekanism för att överföra föräldraskap efter surrogatmoderskap kommer att vara avhängig den valda grunden eller grunderna för föräldraskap. I kapitel sju undersöks tre möjliga alternativ: adoption efter födelsen, överföring av föräldrarättslig status till de mottagande föräldrarna efter födelsen (parental order) och rättsligt godkännande av surrogatmoderskap före födelsen (pre-birth parental order). De två första alternativen innebär att de blivande föräldrarna inte är rättsliga föräldrar till barnet vid barnets födelse. Status som rättsligt förälder måste därför överföras från de första rättsliga föräldrarna till de blivande föräldrarna. Idag i Sverige är adoption det enda sättet på vilket föräldrarättslig status kan överföras till de blivande föräldrarna efter surrogatmoderskap. Alla föräldrar som inte har föräldrarättslig status vid tiden för barnets födelse måste adoptera barnet, antingen genom traditionell adoption eller styvbarnadoption om de vill bli barnets rättsliga föräldrar. Fördelarna och nackdelarna med de modeller som används för överföring av rättsligt föräldraskap i England, Wales och Israel, beaktas innan den lösning som valts av Grekland diskuteras kort. Den grekiska modellen kräver inte en överföring av föräldraskap, eftersom ett godkännande av surrogatavtal, som görs av domstol, innebär att den blivande modern presumeras vara barnets rättsliga mor när barnet
föds. Den blivande faderns status som rättslig far är kopplad till mo-
derns status.

I avhandlingens avslutande kapitel åtta sammanfattas resultaten av
undersökningen vad gäller föräldraskap och surrogatmoderskap. Vi-
dare presenteras flera anknytande frågeställningar som bör övervägas
vid en reglering av surrogatmoderskap.

Att förstå och att lösa problemet

En viktig målsättning med avhandlingen är att undersöka hur faststäl-
landet av ett barns familjerättsliga status efter surrogatmoderskap
skulle kunna göras säkert och förutsägbart. Surrogatarrangemang –
åtminstone i Sverige – skapar och innebär osäkerhet om barnets rätts-
liga ställning eftersom de resulterar i familjeformationer som avviker
från dem som har erkänts och reglerats av den svenska lagstiftaren.
Familjer som skapas genom surrogatarrangemang passar inte på något
självklart sätt in i det befintliga regelverket och därmed saknar de
samma skydd som andra familjer vars strukturer erkänns i lag.

Det verkar uppenbart att den huvudsakliga källan till oklarheter rö-
rand barnets familjerättsliga status har sin grund i den osäkerhet som
föreligger vad gäller moderskapet. Denna osäkerhet har i sin tur sin
grund i den relativt sentida möjligheten att separera graviditet och
genetik. Den visshet som historiskt sett har funnits rörande moderskap
som en följd av graviditeten har inte längre grund för sig.

Det grundläggande antagandet som surrogatmoderskap utmanar är
att födelse och moderskap är oskiljaktiga. Trots att det har varit möj-
ligt att separera genetik och moderskap under flera decennier med
hjälp av äggdonation är syftet med äggdonation att separera födandet
från det rättsliga moderskapet: den födande modern behåller barnet
hon bär även om hon inte har någon genetisk koppling till det. Svensk
lag har utformats för att ge den biologiska modern rättslig status som
mor efter en äggdonation. Surrogatmoderskap, å andra sidan, med
eller utan äggdonation, utgår från att graviditeten skiljs från moders-
skapet. Detta är en helt annan utgångspunkt än den som legat bakom
tillåtandet av äggdonation. Vårt nuvarande regelverk är inte utformat
för att skilja mellan dessa två situationer när fråga blir om fastställan-
det av rättsligt moderskap och därmed inte heller fastställandet av
barnets rättsliga status.
Följden blir att ett dilemma uppstått för politiker och lagstiftare; en prioritering måste göras mellan genetik respektive graviditet i situationer där ett beslut måste fattas om moderskapet. Att äggdonation under det senaste decenniet har blivit mindre kontroversiell i Sverige kan förklaras dels av att det är den födande kvinnan som, trots allt är mor, den som ska uppostra barnet. När det gäller surrogatmoderskap måste genetik och graviditet skiljas åt, en tanke som försvåras av att den födande kvinnan inte har för avsikt att uppostra barnet. Istället tänker hon att överlämna barnet till en annan kvinna som kan eller inte kan vara barnets genetiska mor.

Oberoende av svårigheterna att ta ställning till problemen måste ett val göras om staten ska uppfylla sina skyldigheter gentemot barnet. Barnet behöver och har rätt till föräldrar. Ett alternativ som har beaktats i denna avhandling som skulle kunna främja större säkerhet, även i avsaknad av reglering, är en kodifiering av Mater-est regeln till förmån för den födande kvinnan. Detta förutsätter ett accepterande av den födande kvinnan som barnets rättsliga mor vid tiden för barnets födelse, oberoende av hennes avsikt att inte bli rättslig förälder. En sådan regel förstärker den existerande oskrivna presumtionen om moderskap. Tillämpat på surrogatmoderskap skulle det, åtminstone vid tidpunkten för det surrogatfödda barnets födelse, ge fullständig säkerhet om den rättsliga statusen för de olika "mödrarna". Detta, i sin tur, skulle garantera att barn tillkomna genom surrogatarrangemang har minst en juridisk förälder vid sin födelse. Skapandet av alternativa presumtioner om moderskap, faderskap och föräldraskap kan också övervägas, men det största problemet i dag förefaller vara kopplat till osäkerheten vad gäller moderns status. Att ändra regler rörande faderskap och samkönat föräldraskap tjänar inte något till i avsaknad av en tydlig rättslig riktning eftersom de redan fungerar väl (och förmodligen bättre än de angivna alternativen). Det ska i detta sammanhang särskilt nämnas att en effekt av att tillämpa gällande svenska regler om föräldraskap på surrogatmoderskap är att det verkar omöjligt för kvinnliga blivande föräldrar att bli rättsliga föräldrar vid tiden för det surrogatfödda barnets födelse, oavsett om de har en genetisk koppling till barnet eller inte. Manliga blivande genetiska föräldrar, på andra sidan, har möjlighet att bekräfta sitt faderskap i förhållande till surrogatfödda barn.

I situationer där de blivande föräldrarna inte är barnets rättsliga föräldrar vid barnets födelse måste frågan om hur föräldraskap kan överföras avgöras. För närvarande är adoption det enda alternativet i svensk rätt. Andra alternativ har undersökts i denna avhandling. Även
om tillämpningen av adoptionsinstitutet inte helt överensstämmer med målen för surrogatmoderskap har det hittills visat sig vara en effektiv mekanism för att överföra föräldraskap efter surrogatmoderskap. Oavsett om en alternativ lösning implementeras för överföring av föräldraskap skulle adoption inte förlora i betydelse i detta sammanhang.

Förtydligandet av de blivande föräldrarnas familjerättsliga status efter surrogatarrangemang är en åtgärd som brådskar och är nödvändig för att säkerställa att barn födda genom surrogatarrangemang garanteras rättsliga föräldrar redan från födelsen. Det är också av intresse för andra parter att få klarhet i sina familjerättsliga förhållanden. Detta kan endast uppnås genom en tydlig och klar lagreglering.
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