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The Rights of Stateless Children Born from Cross-Border Reproductive Care

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THE RIGHTS OF STATELESS CHILDREN BORN FROM CROSS-BORDER REPRODUCTIVE CARE

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INTRODUCTION

In July 2018, Kashka and Sinead, a lesbian couple of Polish and Irish nationality, gave birth to their daughter Sofia in Spain.¹ The couple resided in Ireland but looked abroad for reproductive care because of the high cost of Irish fertility clinics.² They eventually chose Spain to be Sofia's birthplace because both their names could be on the child's birth certificate.³ After four years of trying to conceive a child through in vitro fertilization (IVF), Baby Sofia was

¹ See Sinéad Deevy, *Irish Woman and Wife's Struggle to Bring Their Baby Home to Ireland*, IRISH TIMES (Dec. 9, 2019), <https://www.irishtimes.com/life-and-style/abroad/irish-woman-and-wife-s-struggle-to-bring-their-baby-home-to-ireland-1.4109428>.

² *Id.*

³ *Id.*

born, but the family's struggles were still far from over.⁴ First, Ireland refused to transcribe Baby Sofia's birth certificate because two women were listed as mothers.⁵ Then, Poland did the same.⁶ In both countries, transcription is a necessary step to obtain identity documentation and a passport.⁷ Without a passport, the family could not return home to Ireland.⁸ The family's final remedy was to apply for Spanish citizenship for Sofia.⁹ Although children born in Spain to non-Spanish parents normally are not eligible to be Spanish citizens, there is an exception through which children who would otherwise be stateless may acquire Spanish nationality.¹⁰ Even still, such applications can take years to be processed and approved.¹¹ While they waited, the family was stuck in Spain, unable to travel or go home, unable to introduce their daughter to her grandparents and cousins.¹² Baby Sofia was in legal limbo—not Irish, not Polish, not Spanish, but stateless.¹³

Baby Sofia's story is neither unique nor is the problem faced by Sofia and her parents unique to same-sex couples.¹⁴ Different-sex couples and single parents who travel abroad for reproductive care also face obstacles and the risk that their child will be born stateless.¹⁵ Increasingly, hopeful parents are traveling to other countries to benefit from assisted reproductive technology (ART) that is illegal, unavailable, or unaffordable in their home country.¹⁶ This phenomenon is sometimes called fertility tourism or reproductive tourism, although this Comment will refer to it as cross-border reproductive care.¹⁷ Many complicated legal problems can arise from cross-border reproductive care

⁴ *Id.*

⁵ Björn Sieverding, *Even Where Countries in Europe Recognise Marriage Equality, Children Born to Same-Sex Families Remain at Risk of Statelessness*, EUR. NETWORK ON STATELESSNESS (Nov. 7, 2019), <https://www.statelessness.eu/updates/blog/even-where-countries-europe-recognise-marriage-equality-children-born-same-sex>.

⁶ *Id.*

⁷ *Id.*

⁸ Deevy, *supra* note 1.

⁹ Sieverding, *supra* note 5.

¹⁰ *Id.*

¹¹ *See id.*

¹² *See* Deevy, *supra* note 1.

¹³ *Id.*

¹⁴ Sieverding, *supra* note 5.

¹⁵ *See e.g.*, Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT'L & COMP. L. 545, 571–74 (2013) (discussing the story of the twin boys of Jan Balaz and Susanne Lohle).

¹⁶ Mahmoud Salama et al., *Cross Border Reproductive Care (CBRC): A Growing Global Phenomenon with Multidimensional Implications (A Systemic and Critical Review)*, 35 J. ASSISTED REPROD. & GENETICS 1277, 1277 (2018).

¹⁷ *Id.*

arrangements.¹⁸ This Comment will focus on these problems through the lens of children's rights, particularly a child's right to a nationality.

This Comment will first examine the problem of statelessness, particularly for children born stateless. The Comment will then discuss the history of ART, methods of ART, and the state of cross-border reproductive care. This Comment will then explain how statelessness arises for children born through cross-border reproductive care arrangements. Next, this Comment will discuss existing international law on parentage and cross-border reproductive care. This Comment will also explore what protections exist for stateless people—stateless children in particular—under existing international law. After explaining existing international law, this Comment will consider the limitations and problems arising from current law. Finally, this Comment will propose potential solutions in international and domestic law. Within domestic law, this Comment will discuss solutions for countries that are destinations for cross-border reproductive care and receiving countries.

I. BACKGROUND

A. *The Problem of Statelessness*

Statelessness is the condition of having no legal or effective citizenship.¹⁹ Some commentators will distinguish between *de jure* and *de facto* citizenship.²⁰ *De facto* statelessness includes people who cannot prove or verify their citizenship or otherwise cannot access the benefits and protections citizenship confers.²¹ “Put another way, persons who are *de facto* stateless might have a legal claim to the benefits of nationality but are not, for a variety of reasons, able to enjoy these benefits. They are, effectively, without a nationality.”²²

Consider the story of Baby Sofia from the beginning of this Comment. Sofia is likely not *de jure* stateless.²³ If she is not a citizen of Ireland or Poland, she can acquire Spanish nationality because of Spain's safeguards against statelessness.²⁴ However, while the countries work out which state she belongs

¹⁸ See *id.* at 1278.

¹⁹ David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 246 (2006) (Like Weissbrodt and Collins's article, this comment will use the terms citizenship and nationality synonymously).

²⁰ *Id.* at 251.

²¹ *Id.* at 253.

²² *Id.* at 252.

²³ Sieverding, *supra* note 5.

²⁴ *Id.*

to, Baby Sofia is effectively stateless, unable to travel or access public services.²⁵ Undoubtedly, there are times when it is useful and even necessary to distinguish between *de jure* and *de facto* statelessness.²⁶ However, because *de facto* stateless people face the same obstacles as *de jure* stateless people and it is often difficult to tell which term applies to an individual, this Comment will from now on use the broad definition of statelessness that includes those who are effectively stateless.

The right to a nationality is one of the most fundamental rights a person can possess because one's nationality determines what other civil, political, economic, and social rights a person can exercise within a territory.²⁷ For these reasons, the right to a nationality has been called "nothing less than the right to have rights."²⁸ The inverse of this axiom is that stateless people are denied or face barriers to accessing every right.²⁹ Stateless people will face many hardships such as difficulty obtaining identity documents, acquiring jobs, receiving medical care, marrying, traveling, owning property, enrolling in school, and registering the birth of their children.³⁰ That final hardship is notable for it makes statelessness a problem often perpetuated from one generation to the next.³¹

It is difficult, if not impossible, to summarize all the ways a person can be or become stateless.³² The United Nations estimates that there are at least 4.3 million stateless people worldwide, about a third of whom are children.³³ There are certain well-trod paths to statelessness: the dissolution of a state, territorial transfer, racial or ethnic discrimination, displacement and migration, and revocation or renunciation of citizenship.³⁴ However, statelessness is sometimes caused by unique situations that slip through the cracks of citizenship law and administrative practice.³⁵ Therefore, rather than attempting to catalog all the

²⁵ *Id.*

²⁶ See Weissbrodt & Collins, *supra* note 19, at 253.

²⁷ *Id.* at 248.

²⁸ *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, J., dissenting).

²⁹ See Weissbrodt & Collins, *supra* note 19, at 265.

³⁰ *Id.* at 266.

³¹ *Id.* at 256.

³² *Id.* at 248.

³³ *Refugee Data Finder*, THE UN REFUGEE AGENCY, <https://www.unhcr.org/refugee-statistics/> (last updated Nov. 10, 2021) [hereinafter *Refugee Data Finder*]; see also *Statelessness Around the World*, THE UN REFUGEE AGENCY, <https://www.unhcr.org/en-us/statelessness-around-the-world.html> (last visited Feb. 15, 2022) [hereinafter *Statelessness Around the World*].

³⁴ See Weissbrodt & Collins, *supra* note 19, at 253.

³⁵ *Id.*

ways a person can lack citizenship, it is more helpful to understand how a person can obtain citizenship.³⁶

Citizenship can be acquired at birth (birthright citizenship) or after birth (naturalization).³⁷ Birthright citizenship is based on either where a child is born, known as *jus soli* or right of the soil, or based on the parents' citizenship and family heritage, known as *jus sanguinis*, right of the blood, or citizenship by descent.³⁸ Today, most states use a combination of *jus soli* and *jus sanguinis* to some degree.³⁹ For example, individuals born in the United States are granted citizenship regardless of their parents' citizenship. Typically, individuals born abroad to at least one U.S. citizen parent can acquire U.S. citizenship.⁴⁰ Treaties and international judicial bodies have repeatedly recognized that a state's sovereignty includes its discretion to dictate the terms of eligibility for citizenship.⁴¹

B. *An Overview of Assisted Reproductive Technology*

Although there is evidence that the ancient Hebrews practiced surrogacy and artificial insemination has been used since the late 1800s, ART is largely a phenomenon of the late 20th century. The first baby to be conceived through IVF was born in 1978.⁴² IVF is a procedure in which an egg is fertilized outside the body and inserted into a womb for gestation.⁴³ The egg may come from the gestational mother or a donor, and the sperm may come from the intended father or a donor.⁴⁴ Another technological development that has expanded the use of ART is cryopreservation, a process for freezing and storing gametes—sperm, eggs, or embryos—in liquid nitrogen.⁴⁵ This process allows the genetic material to be preserved for many years for possible future implantation into a womb for

³⁶ *Id.*

³⁷ See Lena K. Bruce, *How to Explain to Your Twins Why Only One Can Be American: The Right to Citizenship of Children Born to Same-Sex Couples through Assisted Reproductive Technology*, 88 *FORDHAM L. REV.* 999, 1005 (2019).

³⁸ *Id.*

³⁹ Weissbrodt & Collins, *supra* note 19, at 254.

⁴⁰ *Id.*; see also *Acquisition of U.S. Citizenship at Birth by a Child Born Abroad*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html> (last visited Feb. 15, 2022).

⁴¹ Lin, *supra* note 15, at 556.

⁴² *Id.* at 4.

⁴³ *Id.* at 2.

⁴⁴ *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sep. 10, 2021), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> (last visited Feb. 15, 2022).

⁴⁵ O'Brien, *supra* note 42, at 3.

gestation.⁴⁶ As the technology has developed and success rates have improved, the use of ART has skyrocketed.⁴⁷ For example, in the United States, the use of ART doubled in the 2010s.⁴⁸ By one estimate, more than eight million people have been born from ART so far.⁴⁹

Today, artificial insemination and IVF are legally allowed in almost all countries.⁵⁰ However, in most countries, the treatments are restricted to some degree.⁵¹ Older women, unmarried couples, single patients, same-sex couples, and transgender patients are most likely to be denied access to these treatments.⁵² Even patients with access to these treatments in their home country may choose to travel abroad if the procedure is more affordable in the destination country or, in the case of IVF, if the destination country has higher success rates or fewer restrictions on the number of embryos that may be transferred.⁵³

Gamete donation, where a third party donates sperm, an egg, or an embryo, is not legal in many countries for ethical and religious reasons.⁵⁴ Several countries also restrict who can donate genetic material and in what circumstances, such as limits on compensation and anonymity.⁵⁵ As with IVF, access to donated gametes may be restricted for older patients, unmarried couples, single patients, same-sex patients, and transgender individuals.⁵⁶ Even where gamete donation is legal, low supply, high costs, and long waiting lists may drive many people seeking third-party genetic material to look abroad.⁵⁷

More controversial than the forms of ART described thus far is surrogacy.⁵⁸ Surrogacy is the practice of a woman other than an intended parent carrying a pregnancy and giving birth to the child.⁵⁹ The term “intended parent(s)” refers to the individual(s) who plan to take the child into their home and raise the child

⁴⁶ *Id.* at 12.

⁴⁷ See Bruce, *supra* note 37, at 1002 (“The use of ART has doubled over the past decade.”).

⁴⁸ See *id.*

⁴⁹ C. Calhaz-Jorge et al., *Survey on ART and IUI: Legislation, Regulations, Funding and Registries in European Countries*, HUM. REPROD. OPEN 1, 2 (2020).

⁵⁰ Salama et al., *supra* note 16, at 1278.

⁵¹ *Id.*

⁵² *Id.* at 1278–79.

⁵³ *Id.* at 1279.

⁵⁴ *Id.* at 1278.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See e.g., Grégor Puppincq & Claire de La Hougue, *For an Effective Ban on Surrogacy in International Law* in INSTITUT FAMILLE & RÉPUBLIQUE, LE MARIAGE ET LA LOI: PROTÉGER L’ENFANT (2016).

⁵⁹ Salama et al., *supra* note 16, at 1279.

as their own.⁶⁰ There are two methods of surrogacy.⁶¹ The first is genetic surrogacy, sometimes called traditional surrogacy, where the surrogate's own egg is fertilized through artificial insemination or IVF.⁶² The other is gestational surrogacy, where an egg that does not come from the surrogate is made into an embryo and implanted in the surrogate's womb through IVF.⁶³ In gestational surrogacy arrangements, the egg may come from an intended parent or a donor.⁶⁴ If the surrogate is paid for carrying the child, the arrangement is considered commercial surrogacy.⁶⁵ If the surrogate is not paid or receives no compensation beyond medical expenses then the arrangement is known as altruistic surrogacy.⁶⁶

Many countries prohibit surrogacy for ethical and religious reasons.⁶⁷ Surrogacy raises thorny ethical concerns on both sides of the debate. On the one hand, issues include the commodification of women's bodies, the commodification of children, and the potential for exploitation of indigent surrogates and donors.⁶⁸ On the other hand, there is an individual's right to bodily autonomy, freedom to contract, and the rights of intended parents to form a family, especially when they are barred from traditional reproduction by an otherwise protected status, such as disability, sexual orientation, or gender identity.⁶⁹ State regulation of surrogacy can fall into four categories: 1) all surrogacy is illegal, including in countries where it is criminalized; 2) altruistic surrogacy is allowed, but commercial surrogacy is illegal; 3) altruistic and commercial surrogacy is allowed; and 4) the law is silent on surrogacy.⁷⁰

As with other ART, even where surrogacy is legal, intended parents may choose to use services abroad due to the expense of the service in their home country.⁷¹ For example, in 2018, the average cost of having a child through surrogacy in India was 20,000 USD, while the same service could cost 100,000

⁶⁰ Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 5 (2016).

⁶¹ Lin, *supra* note 15, at 550.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 550–51.

⁶⁵ *Id.* at 551.

⁶⁶ *Id.*

⁶⁷ Salama et al., *supra* note 16, at 1279.

⁶⁸ Lin, *supra* note 15, at 551–52.

⁶⁹ *Id.* See also Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 MICH. ST. U. COLL. L. INT'L. REV. 259 (2012).

⁷⁰ Lin, *supra*, note 15, at 552.

⁷¹ Salama et al., *supra* note 16, at 1279.

USD in the United States.⁷² Popular destinations for surrogacy include surrogacy-friendly states in the United States, such as California, Ukraine, and Russia.⁷³ Before 2017, India was also a top destination, but the state has since restricted access to surrogacy within its borders.⁷⁴

In any ART arrangement—whether artificial insemination, IVF, or surrogacy—three roles must be filled: 1) the genetic father, who can either be a sperm donor or an intended parent; 2) the genetic mother, who can either be an egg donor, a surrogate, or an intended parent; and 3) the gestational carrier, who can either be a surrogate or an intended parent.⁷⁵ Theoretically, an ART baby could have five “parents:” a sperm donor, an egg donor, a gestational surrogate, and two intended parents.⁷⁶ This creates problems when parentage laws are nearly universally built around the “rule of two.”⁷⁷ Parentage laws also create problems for ART babies by focusing on biological (genetic) relation or presumed biological relation as the basis for parenthood, as children born through ART often lack a biological (genetic) relationship with at least one, and sometimes both, of their intended parents.⁷⁸

C. *How Cross-Border Reproductive Care Can Lead to Statelessness*

Having laid a foundation in how citizenship at birth is determined, let us discuss some ways children can be born stateless because of cross-border reproductive care. When a child is born in a country with universal *jus soli* birthright citizenship, such as the United States, the child cannot be born stateless.⁷⁹ The parents and child may face other problems, like whether their home country will grant the child citizenship or recognize the intended parents as legal parents. Still, at minimum, statelessness is not a risk.⁸⁰

Therefore, statelessness at birth can only occur when the birth country operates under *jus sanguinis* principles.⁸¹ Establishing *jus sanguinis* citizenship

⁷² *Id.* at 1279–80.

⁷³ *Id.* at 1282.

⁷⁴ *Id.* at 1280.

⁷⁵ See David de Groot, *EU Law and the Mutual Recognition of Parenthood between Member States: The Case of V.M.A. v. Stolichna Obsthina*, EUR. U. INST. ROBERT SCHUMAN CTR. FOR ADVANCED STUD. 3 (January 2021).

⁷⁶ Bruce, *supra* note 37, at 1001.

⁷⁷ See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 13–14 (2008).

⁷⁸ Bruce, *supra* note 37, at 1002.

⁷⁹ *Id.* at 1005.

⁸⁰ *Id.*

⁸¹ *Id.* at 1005–6.

first requires establishing who the child's legal parents are.⁸² Here enters the problem of cross-border reproduction, as the birth country and the home country will often have different laws for recognizing parentage.⁸³ For example, if surrogacy is illegal in the home country, the home country would likely recognize the birth mother-surrogate as the legal parent. In contrast, the birth country would recognize the intended parents as the legal parents.⁸⁴ Neither country would grant citizenship because neither sees a legal relationship between the child and its citizens.⁸⁵

This hypothetical is similar to the real-life case of the Balaz twins. In 2008, a German couple, Jan Balaz and Susan Lohle, worked with an Indian surrogate to have twin boys born in India.⁸⁶ Mr. Balaz's petition for German visas for the twins was denied because surrogacy is illegal in Germany, and Germany recognized the Indian surrogate as the child's parent.⁸⁷ The family then sought Indian citizenship for the twins, which was unsuccessful because India recognized the intended parents, the German couple, as the child's parents.⁸⁸ Because the parents had no connections to India, Indian citizenship was unavailable.⁸⁹ The children were stateless and forced to remain in India for two years until the German couple could adopt the children and obtain the documentation needed to return to Germany.⁹⁰

Even when countries allow ART or surrogacy, statelessness can arise when outdated laws overly rely on genetic relations as a basis for parentage. For example, Ellie Lavi was an unmarried woman with U.S. citizenship residing in Israel.⁹¹ She worked with a fertility clinic in Tel Aviv to become pregnant using

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Anika Keys Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 651–52 (2013). *See e.g.*, Lin, *supra* note 15, at 547 (discussing the case of Samuel Ghilain where Ukraine, the birth country, would not grant citizenship because it recognized the intended parents, who were Belgian, as the child's legal parents. Belgium refused to recognize the Ukrainian birth certificate because it lacked laws recognizing surrogacy. Baby Samuel was placed with a Ukraine foster family for a year, followed by a Ukrainian orphanage for another year before his legal status was resolved.).

⁸⁵ *See* Lin, *supra* note 15, at 547.

⁸⁶ Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 551 (2013).

⁸⁷ *Id.* at 552.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 544.

embryos produced by donor sperm and donor eggs.⁹² She delivered twins, but her application for U.S. passports for her children was rejected because they did not have a biological (genetic) connection to a U.S. citizen.⁹³

Some countries only allow *jus sanguinis* citizenship to pass from father to child or from mother to child.⁹⁴ According to the United Nations, twenty-five states do not grant women equal rights to transfer nationality to their children.⁹⁵ Conversely, some countries only allow children to acquire citizenship at birth based on the status of the birth mother.⁹⁶ These countries may require fathers to undergo genetic testing or other additional verification to establish legal parentage and the ability to pass on their nationality.⁹⁷ However, a child born through ART arrangements may not have a legal father or mother because donors, especially anonymous donors, are not usually recognized as legal parents.⁹⁸

Consider the case of Baby Sofia again. Only the two mothers were listed on the Spanish birth certificate; the child does not have a legal father.⁹⁹ Mothers who use an anonymous donor—perhaps because they are in a same-sex relationship or single—may find their child born stateless if the mother is a national of a country that only allows fathers to pass on citizenship.¹⁰⁰

For the father's perspective, the Baby Manji case is illustrative.¹⁰¹ Mr. and Mrs. Yamada, a Japanese couple, contracted with a surrogate in India to have a child using Mr. Yamada's sperm and an egg from an anonymous donor.¹⁰² According to the fertility clinic's standard procedure, the surrogate and donor signed away all rights to the child.¹⁰³ After the IVF procedure was successful,

⁹² *Id.*

⁹³ *Id.* at 544–45.

⁹⁴ *Statelessness Around the World*, *supra* note 33; *see also* Kindregan & White, *supra* note 87, at 528.

⁹⁵ *Statelessness Around the World*, *supra* note 33.

⁹⁶ *See e.g.*, Kindregan & White, *supra* note 87, at 548 (“Japanese Civil Code determines citizenship based upon the nationality of the birthmother.”).

⁹⁷ *See e.g., id.* at 555 (“Under Israeli law, in order for a child born abroad to obtain Israeli citizenship, his parents need to receive permission from an Israeli family court to proceed with DNA testing in order to confirm that one or both of the parents is genetically related to the child. Establishment of a biological connection is a prerequisite for a child's naturalization as an Israeli citizen.”).

⁹⁸ *See e.g.*, Uniform Parentage Act §702 (Uniform L. Comm'n, 2017).

⁹⁹ Sieverding, *supra* note 5.

¹⁰⁰ In states where mothers cannot pass their nationality on to their children, if the father is unknown, the child is left stateless. Lindsey Reid, *Statelessness: Life Without a Nationality*, U. ALA. BIRMINGHAM INST. HUM. RTS. (March 28, 2018), <https://sites.uab.edu/humanrights/2018/03/28/statelessness-life-without-a-nationality/>.

¹⁰¹ *See* Kindregan & White, *supra* note 87, at 548.

¹⁰² *Id.* at 547.

¹⁰³ *Id.*

but before the child was born, the Yamadas divorced.¹⁰⁴ The couple had included a clause in their surrogacy contract stating that the father would care for the child in the event of separation.¹⁰⁵ Both Mr. and Mrs. Yamada wanted to honor that agreement after the divorce.¹⁰⁶ Therefore, no mother was listed on Baby Manji's birth certificate.¹⁰⁷ There were three potential mothers—the surrogate, the egg donor, and Mrs. Yamada—but each had renounced their claim to the child. Baby Manji was denied Japanese citizenship because the Japanese Civil Code at the time determined nationality based on the nationality of the birth mother.¹⁰⁸ Even though Mr. Yamada was biologically related to his daughter, he could not give her Japanese citizenship.¹⁰⁹ India also denied citizenship because it saw no legal relationship between the Indian surrogate and the child.¹¹⁰ Baby Manji was stateless.¹¹¹

Another example of children born through cross-border reproductive care with no legal mother is the Goldberg twins.¹¹² Dan Goldberg, an Israeli man, used his sperm, an anonymous egg donor, and an Indian surrogate to give birth to twins in India.¹¹³ Goldberg's male partner intended to co-parent the children with Goldberg but did not have a biological relationship with the children.¹¹⁴ Under Israeli law at the time, for children born abroad to obtain Israeli citizenship, their parents needed permission from an Israeli family court to do DNA testing.¹¹⁵ That testing then needed to confirm that the children were genetically related to at least one Israeli parent.¹¹⁶ However, when Goldberg petitioned the family court for permission to perform the DNA testing, the court ruled it lacked jurisdiction.¹¹⁷ This same judge had also denied paternity tests to at least two other same-sex couples.¹¹⁸ The judge's refusal to grant the order left the children stateless, without Israeli or Indian citizenship, and ineligible for

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 547–48.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 548.

¹⁰⁸ *Id.* at 547.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 549.

¹¹² *Id.* at 554–58.

¹¹³ *Id.* at 555.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 555–56.

¹¹⁸ *Id.* at 556.

health insurance.¹¹⁹ The children lived in an Indian hotel and could not receive medical checkups while their case was fought in Israeli courts.¹²⁰

It is worth noting that LGBTQ+ parents are particularly vulnerable to cross-border reproductive care-related statelessness.¹²¹ This is for many reasons, including same-sex couples' reliance on ART to have biological children,¹²² LGBTQ+ parents' increased risk of statelessness themselves,¹²³ and discriminatory marriage and parentage laws.¹²⁴ These laws can take the form of non-recognition of relationships between LGBTQ+ people or even criminalizing LGBTQ+ identity and behavior.¹²⁵ In some jurisdictions, LGBTQ+ families merely "fall [] through the gaps in complex sets of legislation and procedures."¹²⁶ Even where countries do not intend to bar same-sex couples from being parents, many states' laws include a "heteronormative parental presumption" that makes it more difficult for same-sex couples to establish legal parentage.¹²⁷ This makes it harder for same-sex couples to establish *jus sanguinis* citizenship.¹²⁸ Turning again to the example of Baby Sofia, Ireland has recognized marriage equality since 2015 and announced legislation recognizing lesbian co-parents.¹²⁹ Because Ireland is relatively tolerant of same-sex couples, Sofia's mothers did not think there would be any problem bringing

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Thomas McGee, 'Rainbow Statelessness' - *Between Sexual Citizenship and Legal Theory: Exploring the Statelessness-LGBTIQ+ Nexus*, 2 STATELESSNESS & CITIZENSHIP REV. 64, 81 (2020).

¹²² It is impossible for cisgender same-sex partners to both be the genetic parent of a child. Bruce, *supra* note 37, at 1003. With female-female partners, it is possible for one woman to be the genetic mother and another to be the gestational mother, but this still involves ART. Kristin Zeiler & Anna Malmquist, *Lesbian Shared Biological Motherhood: The Ethics of IVF with Reception of Oocytes from Partners*, 17 MED. HEALTH CARE PHIL. 347, 348 (2014). In rare and unique circumstances, it is possible for same-gender couples with one cisgender and one transgender partner to become genetic parents of a child together. *See e.g.*, Jackie Molloy & Denise Grady, *A Family in Transition*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/health/transgender-baby.html> (telling the story of a transgender man who gave birth to a daughter with his cisgender male partner). However, many gender-affirming treatments will hinder or eliminate fertility in transgender patients. Paul Amato, *Fertility Options for Transgender Persons*, U.C. S.F. (June 17, 2016), <https://transcare.ucsf.edu/guidelines/fertility>. Many transgender patients choose to cryopreserve their sperm or eggs before starting gender affirming care, similar to patients undergoing some cancer treatments, but this still leaves them dependent on ART to have biological children. Paul Amato, *Fertility Options for Transgender Persons*, U.C. S.F. (June 17, 2016), <https://transcare.ucsf.edu/guidelines/fertility>.

¹²³ *See* McGee, *supra* note 122.

¹²⁴ *See id.* at 81 (2020); Bruce, *supra* note 37, at 1003.

¹²⁵ McGee, *supra* note 122, at 80.

¹²⁶ *Id.*

¹²⁷ *Id.* at 83.

¹²⁸ *See id.*

¹²⁹ *Bill Allowing for Same-Sex Marriage Signed into Law*, IRISH TIMES (Oct. 29, 2015), <https://www.irishtimes.com/news/social-affairs/bill-allowing-for-same-sex-marriage-signed-into-law-1.2410678>; Sieverding, *supra* note 5.

their baby home.¹³⁰ However, the lesbian co-parent law had not gone into effect yet, and Baby Sofia still ended up stateless.¹³¹ Evidently, more is needed to address the problem of stateless “rainbow families.”¹³²

II. ANALYSIS OF EXISTING LAW

A. *Establishing Parentage in International Law*

Statelessness arises from cross-border reproductive care arrangements when 1) a child is born in a *jus sanguinis* country and 2) neither the birth country nor the receiving country recognizes its nationals as the child’s legal parents. Legal parentage is largely a matter of domestic law.¹³³ In other words, each state has its own laws for determining who will be listed as a mother or father on the child’s legal documents, who will have the right to make decisions about the child’s upbringing, and who will have the responsibility to care and provide for the child.¹³⁴ However, work has been undertaken at the international level to establish common principles and work towards the harmonization of substantive domestic law.¹³⁵

For example, the Convention on the Rights of the Child (Children’s Rights Convention) states that children “shall be registered immediately after birth.”¹³⁶ Although the specific procedure varies from country to country, typically, the parents or the professionals who attend the birth must register the child’s birth with some civil office.¹³⁷ In “the overwhelming majority of states,” the individuals who are listed as the parents on the child’s birth record are the child’s legal parents in that state.¹³⁸ In other words, registration of the birth and establishment of parentage are the same step in the vast majority of cases in the vast majority of states.¹³⁹ Once legal parentage is established, those individuals remain legal parents unless and until their status is contested.¹⁴⁰

¹³⁰ Deevy, *supra* note 1.

¹³¹ *Id.*

¹³² See McGee, *supra* note 122.

¹³³ See HAGUE CONF. ON PRIV. INT’L L., A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (March 2014) [hereinafter Hague Study].

¹³⁴ *Id.*

¹³⁵ *Id.* at 26.

¹³⁶ Convention on the Rights of the Child art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

¹³⁷ Hague Study, *supra* note 134, at 6.

¹³⁸ *Id.* at 6.

¹³⁹ *Id.* at 7.

¹⁴⁰ *Id.*

With few exceptions, the child's legal mother at birth is the person who gave birth to the child. In the vast majority of states, the legal status of parenthood attaches to the birth mother automatically as a matter of law.¹⁴¹ This ancient principle is known as *mater semper certa est*.¹⁴² For the purposes of recording the birth, the identity of the birth mother is usually certified by the attending medical professional.¹⁴³ Each state has its own rules for when the birth was not attended by a medical professional or when the birth mother is somehow in doubt, which may be as simple as the mother asserting the fact or may require additional proof and adjudication.¹⁴⁴ A small minority of states have rules for "anonymous" or "secret birth," where the birth mother's identity is not recorded in the child's birth record.¹⁴⁵

Establishing legal paternity is more complicated. In nearly all states, the husband of the birth mother will be presumed to be the genetic father, will be registered as the father, and will receive the legal rights and responsibilities of the father.¹⁴⁶ The rationale for this longstanding rule is that it is "more likely than not" that the husband of the birth mother is the genetic father of the child, and for the welfare of the child, it is better to have a registered father than legal uncertainty.¹⁴⁷ Each state has its own rules for if and when the presumption extends to children born shortly after the dissolution of a marriage, whether through death, divorce, or annulment; a small minority of states extend this presumption to an unmarried male cohabitant of the birth mother.¹⁴⁸

Because the establishment of legal paternity by marriage is based on the assumption that the husband of the birth mother is the genetic father, in most countries, the presumption can be rebutted by showing the husband is not the genetic father.¹⁴⁹ However, each state has its own rules about when such a challenge may be brought, who can raise such a challenge, and what sort of evidence is needed to successfully rebut the presumption.¹⁵⁰ When the birth mother is unmarried, paternity can typically be established by voluntary acknowledgment.¹⁵¹ This usually takes place at the time of birth registration and

¹⁴¹ *Id.* at 8.

¹⁴² *Id.*

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7–8.

¹⁴⁶ *Id.* at 9.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 10.

requires the birth mother and presumed father's consent.¹⁵² In the majority of states, this is an administrative process, but in some states, this requires a court order.¹⁵³

Every rule discussed in this section so far is not controversial, largely consistent across states, and a longstanding way to establish parentage. However, newer developments—same-sex marriage and co-parenting, ART, and surrogacy—have disrupted the traditional rules and led to wide splits in how states determine parentage.¹⁵⁴ In most cases, the birth mother is still the legal mother, even if the child was conceived with donated eggs and, therefore, has no genetic relationship to the birth mother.¹⁵⁵ The exception to the *mater est* principle is that in some states that allow surrogacy, the intended parents may be considered legal parents at birth.¹⁵⁶ This is not true in all surrogacy states; in some cases, the birth mother-surrogate will have to transfer her legal rights to the intended parents after birth, similar to an adoption proceeding.¹⁵⁷

In most cases, the birth mother's husband will still be the legal father, even if the child was conceived through ART, but in some countries, this is only true if the husband consented to the treatment.¹⁵⁸ Third-party gamete donors will almost never be legal parents in states that have ART legislation. The rare exception is some artificial insemination cases when the donor was not anonymous and assisted reproduction was undertaken informally.¹⁵⁹ Traditionally, the rationale behind the *mater est* and marital presumption rules is the assumption that the birth mother and her husband are the child's genetic parents. However, in the age of ART, the rules still stand even when the underlying assumption, a genetic connection, is not present.

In the states that allow same-sex couples to use ART, for two women, the law operates like it does for different-sex couples.¹⁶⁰ The birth mother is a legal parent as a matter of law automatically, as is her spouse.¹⁶¹ These traditional rules apply even if the underlying rationale, assumed genetic relation, is an impossibility. In states which do not permit same-sex couples to use ART but

¹⁵² *Id.*

¹⁵³ *Id.* at 10–11.

¹⁵⁴ *See id.* at 11–12.

¹⁵⁵ *Id.* at 13.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 13–14.

¹⁵⁹ Such as amongst friends, without the assistance of medical professionals. *Id.* at 14.

¹⁶⁰ *Id.* at 14–15.

¹⁶¹ *Id.*

do permit single women to use ART, two women may become legal parents by the birth mother obtaining legal rights automatically and the second parent completing a “step-parent” adoption.¹⁶² In states which do not permit same-sex parents, the child may have only one legal parent.¹⁶³ For cisgender men, becoming a legal parent through giving birth is impossible, so for male same-sex partners the only avenues for legal parentage are surrogacy and adoption.¹⁶⁴

As mentioned above, the Children’s Rights Convention is one international instrument that attempts to bring some consistency to domestic parentage laws.¹⁶⁵ However, aside from the Children’s Rights Convention, there is little regulation at the global level.¹⁶⁶ At the regional level, Europe’s 1975 Convention on the Legal Status of Children Born out of Wedlock brought some harmonization to parentage laws in Europe.¹⁶⁷ However, it failed to foresee the medical and social developments which were to come, and Europe still lacks harmonization when it comes to ART and same-sex parentage.¹⁶⁸ A handful of cases related to parentage have been brought before the European Court of Human Rights, but there is still much inconsistency across the European States.¹⁶⁹ There are other regional and bilateral agreements, but these mostly relate to the sharing of information and the procedural act of registration rather than the substantive law of parentage.¹⁷⁰

Each state has its own laws for whether and how it will recognize a foreign birth certificate for the purpose of establishing legal parentage, and these vary considerably.¹⁷¹ In some states, a determination of parentage is made *de novo*.¹⁷² Other states will recognize a foreign birth certificate and the legal statuses it confers if certain conditions are made.¹⁷³ For example, the Netherlands will recognize a foreign birth certificate if it was “(1) ... issued by a competent authority; (2) ... issued abroad; (3) ... laid down in a legal document; (4) ... made in accordance with local law; and (5) not ... contrary to Dutch public policy.”¹⁷⁴ In the Netherlands and in other countries with similar “public policy”

¹⁶² *Id.* at 15.

¹⁶³ *Id.*

¹⁶⁴ See Bruce, *supra* note 37, at 1003.

¹⁶⁵ Convention on the Rights of the Child, *supra* note 137; Hague Study, *supra* note 134, art. 22.

¹⁶⁶ See Hague Study, *supra* note 134, at 49.

¹⁶⁷ *Id.* at 27.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 28.

¹⁷⁰ See *id.* at 49.

¹⁷¹ See *id.* at 34.

¹⁷² *Id.* at 41.

¹⁷³ See *id.*

¹⁷⁴ *Id.* at 40.

language, foreign birth certificates are not valid when the birth mother was not the legal mother at birth—that is, in surrogacy arrangements.¹⁷⁵

B. Existing Regulation of Cross-Border Reproductive Care

As with other types of medical tourism, cross-border reproductive care has sparked ample concern but little international governance.¹⁷⁶ Some have called for a comprehensive international framework, similar to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Adoption Convention), to govern cross-border reproductive care.¹⁷⁷ However, given the controversial nature of ART—the complex ethical and religious questions it evokes and the wide range of responses across nations—such a convention is likely a long way from becoming a reality and would face an uphill battle to become widely adopted.¹⁷⁸

Within the analysis of existing treaties, particular attention has been paid to surrogacy. Those opposed to surrogacy have argued that existing treaties on human trafficking, women’s rights, and children’s rights could, and should, be applied to prohibit surrogacy.¹⁷⁹ For example, the Adoption Convention requires that consent to adoption has “not been induced by payment or compensation of any kind.”¹⁸⁰ French scholars Grégor Puppinc and Claire de La Hougue argue that the transactional nature of commercial surrogacy agreements, under which a birth mother gives up her child as part of a financial arrangement, violates the Adoption Convention.¹⁸¹ Likewise, the Optional Protocol to the Convention on the Rights of the Child, Concerning the Sale of Children, Child Prostitution and Child Pornography, to which 177 states are parties, prohibits the sale of children, defined as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”¹⁸² Puppinc and de La Hougue point to the breadth of this treaty and other prohibitions on human trafficking to argue against the legitimacy of

¹⁷⁵ See *id.* at 46.

¹⁷⁶ Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J. L. & PUB. POL’Y 349, 349 (2012).

¹⁷⁷ See e.g., Lin, *supra* note 15, at 565. See generally Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

¹⁷⁸ See Lin, *supra* note 15, at 5568–69 (2013).

¹⁷⁹ See Puppinc & de La Hougue, *supra* note 59.

¹⁸⁰ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption *supra* note 178, at art. 4.

¹⁸¹ Puppinc & de La Hougue, *supra* note 59, at 4–5.

¹⁸² The Optional Protocol to the Convention on the Rights of the Child, Concerning the Sale of Children, Child Prostitution and Child Pornography art. 1, art. 2, May 25, 2000, 2171 U.N.T.S. 227.

surrogacy.¹⁸³ Furthermore, the Adoption Convention requires that the mother's consent be given only after the birth of the child.¹⁸⁴ Therefore, one could argue any arrangement under which the intended parents are the child's legal parents at birth, regardless of compensation, would violate the Adoption Convention. Puppincck and de La Hougue even draw an analogy between surrogacy, the commodification of women's "reproductive function," and prostitution, which is also regulated by several international conventions.¹⁸⁵ However, thus far, arguments like Puppincck and de La Hougue's have not been persuasive before the courts.¹⁸⁶ There has not been sufficient will to interpret existing treaties as prohibiting surrogacy.¹⁸⁷

On the other hand, some legal minds argue existing human rights treaties create a right to a family and should be interpreted to protect cross-border reproductive care.¹⁸⁸ For example, Lindsey Coffey points to the Convention on the Rights of Persons with Disabilities (Disability Convention), which includes the right to marriage, family, parenthood, and relationships.¹⁸⁹ The Disability Convention calls on state parties to eliminate discrimination against persons with disabilities and guarantee the rights included in the Convention on an "equal basis" with non-disabled persons.¹⁹⁰ Infertility, Coffey argues, is legally a disability.¹⁹¹ Therefore, the Disability Convention protects the rights of infertile people to create a family in the ways they are able to, through ART and surrogacy.¹⁹² Coffey argues that states not only *should* legalize these practices but that parties to the Disability Convention are *obligated* to legalize these practices.¹⁹³ Furthermore, she argues these states must ensure substantive protections are in place for those who use the services.¹⁹⁴

Another example of this pro-ART view can be found in the case of *Artavia Murillo v. Costa Rica*.¹⁹⁵ This case before the Inter-American Court of Human

¹⁸³ Puppincck & de La Hougue, *supra* note 59, at 5–6.

¹⁸⁴ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption *supra* note 178 at art. 4 (c)(4).

¹⁸⁵ Puppincck & de La Hougue, *supra* note 59, at 6–7.

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.*

¹⁸⁸ See Coffey, *supra* note 70.

¹⁸⁹ Convention on the Rights of Persons with Disabilities art. 23, G.A. Res. 61/106, U.N. Doc. A/61/611 (Dec. 13, 2006) (entered into force May 3, 2008).

¹⁹⁰ *Id.*

¹⁹¹ See Coffey, *supra* note 70, at 268.

¹⁹² *Id.* at 267.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257.

Rights challenged Costa Rica's prohibition of IVF.¹⁹⁶ The challengers, couples affected by fertility challenges, argued that "the prohibition constituted [an] arbitrary interference in the right to private life and the right to found a family" and "the right to equality."¹⁹⁷ The Court ruled that an effective prohibition of IVF within a state party to the American Convention on Human Rights violated the Convention.¹⁹⁸ The Court stated that "the decision to have biological children using assisted reproduction techniques forms part of the sphere of the right to personal integrity and to private and family life" protected by Article 11(2) of the American Convention on Human Rights.¹⁹⁹ In addition, the Court agreed with the World Health Organization's characterization of infertility as a disability and found that the legal prohibition of means to overcome infertility's effects discriminates against those whom the disease disables.²⁰⁰ The Court also found the prohibition to be discriminatory on financial grounds because Costa Ricans with financial means were able to access IVF services by traveling to other countries.²⁰¹ Although the American Convention on Human Rights applies to a limited number of states, its language is similar to other human rights conventions, and the reasoning of *Artavia Murillo* could be applied elsewhere.

Comparing Puppink and de La Hougue with Coffey and the Court in *Artavia Murillo*, the wide spectrum of opinions on cross-border reproductive care becomes apparent. There is no existing international instrument explicitly governing cross-border reproductive care and no consensus on how existing treaties should be applied to the matter.

C. Existing Protections for Stateless Children in International Law

Although there is broad international recognition of the problem of statelessness, attempts to address the problem have been only mildly successful.²⁰² The United Nations estimates that there are still at least 4.3 million stateless people in the world.²⁰³ Two treaties have been promulgated specifically to address statelessness: the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention) and the 1961 Conventions on the

¹⁹⁶ *Id.* at 4.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 93.

¹⁹⁹ *Id.* at 80.

²⁰⁰ *Id.* at 87.

²⁰¹ *Id.* at 90.

²⁰² Lin, *supra* note 15, at 560.

²⁰³ *Refugee Data Finder*, *supra* note 33.

Reduction of Statelessness (1961 Statelessness Convention).²⁰⁴ As of February 2022, the 1954 Statelessness Convention has been adopted by ninety-six countries, and the 1961 Statelessness Convention has been adopted by seventy-seven parties.²⁰⁵ The 1954 Statelessness Convention obligates states to facilitate the naturalization of stateless people in their territory.²⁰⁶ The 1961 Convention goes a step further and explicitly requires states to grant nationality to children born in their territory who would otherwise be stateless.²⁰⁷ However, parties to the treaty are permitted to require an application before granting nationality in this scenario, rather than children receiving citizenship as a matter of law automatically.²⁰⁸ Recall that this was a potential outcome in Baby Sofia's case.²⁰⁹ Spain is a party to the 1961 Statelessness Convention and will grant citizenship to children born in Spain who would otherwise be stateless, even if only after a lengthy application process.²¹⁰ However, popular cross-border reproductive care destinations such as India, Russia, and the United States are not parties to the 1961 Statelessness Convention.²¹¹

In addition to the treaties specifically created to address statelessness, several other international instruments include a right to nationality or other protections against statelessness, especially for children.²¹² These instruments include the Universal Declaration of Human Rights,²¹³ the International Covenant on Civil and Political Rights,²¹⁴ the Convention on the Rights of the Child,²¹⁵ the Convention on the Elimination of All Forms of Racial Discrimination,²¹⁶ the

²⁰⁴ Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117; Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

²⁰⁵ *Convention Relating to the Status of Stateless Persons*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (last visited Feb. 15, 2022); *Convention on the Reduction of Statelessness*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en (last visited Feb. 15, 2022) [hereinafter *Signatories to the Convention on the Reduction of Statelessness*].

²⁰⁶ William Thomas Worster, *The Obligation to Grant Nationality to Stateless Children Under Customary International Law*, 27 MICH. ST. INT'L L. REV. 441, 474 (2019).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Sieverding, *supra* note 5.

²¹⁰ *Signatories to the Convention on the Reduction of Statelessness*, *supra* note 206; Sieverding, *supra* note 5.

²¹¹ Although, the United States' universal *jus soli* birthright citizenship would render that article of the Convention irrelevant. *Signatories to the Convention on the Reduction of Statelessness*, *supra* note 206.

²¹² Worster, *supra* note 207, at 477.

²¹³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights 15(1) (Dec. 10, 1948).

²¹⁴ International Covenant on Civil and Political Rights 24(3), Dec. 16, 1966, 999 U.N.T.S. 171.

²¹⁵ Convention on the Rights of the Child, *supra* note 137, art. 7.

²¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), Dec. 21, 1965, 660 U.N.T.S. 195.

Convention on the Elimination of All Forms of Discrimination Against Women,²¹⁷ the International Convention on the Rights of All Migrant Workers,²¹⁸ the Convention on the Rights of Persons with Disabilities,²¹⁹ and the U.N. Declaration on the Rights of Indigenous Peoples.²²⁰ In fact, “almost every major human rights treaty, instrument, or declaration since 1945” has asserted a right to a nationality.²²¹ In addition to the plethora of global treaties, Europe, the Americas, and Africa have promulgated regional human rights treaties that assert the right to a nationality.²²²

The Convention on the Rights of the Child is the most widely adopted of these instruments and is particularly relevant to the problem of children who are stateless at birth.²²³ Although widely adopted does not equate to widely enforced, the Convention is still an important international instrument. The Children’s Rights Convention states that children “shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”²²⁴ Article 7 goes on to say states should ensure these rights “in particular where the child would otherwise be stateless.”²²⁵ Articles 9 and 10 both stress the importance of keeping a child with his or her parents unless separation is necessary to protect the best interest of the child.²²⁶ In fact, Article 3 of the Children’s Rights Convention states, “in all actions concerning children ... the best interests of the child shall be a primary consideration.”²²⁷

Additionally, the Children’s Rights Convention states a child’s rights should be respected and ensured “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s ... national, ethnic or social origin... birth or other status” and that states “shall take all appropriate measures

²¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women art. 9, Dec. 18, 1979, 1249 U.N.T.S. 20378.

²¹⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 29, Dec. 18, 1990, 2220 U.N.T.S. 3.

²¹⁹ G.A. Res. 61/106, art. 18(1) (Dec. 13, 2006).

²²⁰ G.A. Res. 61/295, art. 6 (Sept. 13, 2007).

²²¹ Worster, *supra* note 207, at 478.

²²² *Id.* at 493.

²²³ As of February 2022, 196 countries are parties to the Convention on the Rights of the Child, including every member of the United Nations except the United States, which has signed but not ratified the treaty.

Convention on the Rights of the Child Status of Ratification Interactive Dashboard, U.N. OFF. HIGH COMM’R HUM. RTS., <https://indicators.ohchr.org/> (last updated Dec. 16, 2021).

²²⁴ Convention on the Rights of the Child, *supra* note 137, art. 7(1).

²²⁵ *Id.* art. 7(2).

²²⁶ *Id.* arts. 9, 10.

²²⁷ *Id.* art. 3.

to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [or] activities ... of the child's parents, legal guardians, or family members."²²⁸ The phrase "birth or other status" was originally intended to ensure children born out of wedlock received the same rights and protections as legitimate children.²²⁹ However, in recent years, the distinction between legitimate and illegitimate children has largely receded, and some scholars argue this language should protect children born from ART and surrogacy.²³⁰ The phrase "without discrimination" is relevant here, too, as many children face statelessness because of anti-LGBT discrimination.²³¹

D. Limitations of Existing Statelessness Law in the Context of Cross-Border Reproductive Care

The international treaties concerning statelessness and a right to nationality generally attempt to remedy the problem of stateless children by obligating the birth country to grant citizenship.²³² This citizenship is not automatic and sometimes is only granted after an application process, which can take years.²³³ While citizenship in the birth country is preferable to no citizenship at all, it is still problematic in the context of cross-border reproductive care. When birth-country citizenship is the remedy for the would-be stateless child in cross-border arrangements, the child will have a different nationality than their parents and their country of residence, which will likely cause administrative hurdles and potentially immigration problems that would not exist for other families.²³⁴ A preferable solution would be one that grants children the citizenship of their intended parents.

Another limitation of existing law is the meaning of "parent." The Children's Rights Convention includes several provisions protecting the relationship

²²⁸ *Id.* art. 2.

²²⁹ Boyce, *supra* note 85, at 660 n. 56.

²³⁰ *Id.*

²³¹ See Sieverding, *supra* note 5; Convention on the Rights of the Child, *supra* note 137, art. 2.

²³² See e.g., Convention on the Reduction of Statelessness, *supra* note 205, art. 1. See generally Worster, *supra* note 207, at 474.

²³³ See Sieverding, *supra* note 5.

²³⁴ This solution can also create problems for the children of the would-be stateless person down the line. Some states, such as the United States, only grant *jus sanguinis* citizenship if the citizen parent resided within the state's territory for a certain time. Weissbrodt & Collins, *supra* note 19, at 255–56. Imagine a couple that travels to the United States to have a daughter using ART or surrogacy that is illegal in their home country. They are unable to pass on their nationality to their daughter, but the child is a U.S. citizen under *jus soli* principles. The child lives her whole life in the parents' home country. The child would be unable to pass on any citizenship to her child. Not U.S. citizenship, because she never lived there, and not the citizenship of her home country because she was not a citizen. The second-generation child would be at risk of statelessness.

between children and their parents and limiting the separation of children and parents.²³⁵ However, the Children's Rights Convention does not contain a definition of legal parenthood.²³⁶ Therefore, the provisions of the Children's Rights Convention that protect the parent-child relationship do little good in the context of cross-border reproductive care when the identity of the child's legal parents is often the very thing at issue.

Finally, existing international law on statelessness faces the same challenges all international law faces: the necessity of consent and the paramount importance of state sovereignty.²³⁷ Citizenship and family law are two areas where states have near complete sovereignty and discretion.²³⁸ States that oppose ART, and surrogacy in particular, on religious or ethical grounds will likely resist any move that could be seen as legitimizing the practice.²³⁹ These states' public policy arguments against "baby markets" are not insignificant.²⁴⁰ However, they should be balanced against the reality of the cross-border reproductive care market and the best interest of the children it creates.

III. POTENTIAL SOLUTIONS

A. *Potential Solutions in International Law*

Regulation of ART in domestic law tends to be ineffective given the accessibility of cross-border reproductive care; would-be parents simply go abroad to avoid unfavorable regulation.²⁴¹ Thus, regulation in international law would be the preferable solution.²⁴² A multi-lateral treaty would need to take into account the religious and moral objections of states that oppose ART and surrogacy as well as the sovereignty and financial interests of states that are destinations for cross-border reproductive care. It would need to create greater clarity and consistency in establishing legal parentage across borders. The treaty should promote equity for people with disabilities, LGBTQ people, and other non-traditional families. Most importantly, such a treaty should prioritize the

²³⁵ Convention on the Rights of the Child, *supra* note 137, arts. 9, 10.

²³⁶ *See id.*

²³⁷ *See* Lin, *supra* note 15, at 556.

²³⁸ *Id.*

²³⁹ Britta C. Van Beers, *Is Europe 'Giving in to Baby Markets?' Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets*, 23 *MED. L. REV.* 103, 105 (2014).

²⁴⁰ *See id.*

²⁴¹ *Id.*

²⁴² Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 *J. PRIV. INT'L L.* 627, 633 (2011).

best interest of the most vulnerable player in cross-border reproductive care arrangements: the child.

Some scholars, such as Katarina Trimmings and Paul Beaumont, have noted The Hague Adoption Convention could be a useful template for a convention on surrogacy.²⁴³ With 104 signatures, the Adoption Convention has been one of the most effective international instruments addressing the protection of children.²⁴⁴ The Adoption Convention has been a success in part because countries of origin and receiving countries were equally involved in the process, just as a convention on cross-border reproductive care would need to include both destination countries and receiving countries in the drafting process.²⁴⁵ The Adoption Convention includes protections for children, birth families, and adoptive families.²⁴⁶ Likewise, a cross-border reproductive care treaty would need to include protections for children, donors, surrogates, and intended parents.

The similarities and overlap between adoption and cross-border reproductive care make the Adoption Convention a logical starting point for imagining a new treaty.²⁴⁷ Like ART today, in the 1980s, international adoption was a sensitive issue.²⁴⁸ The Adoption Convention was able to navigate these sensitivities.²⁴⁹ Trimmings and Beaumont argue that given the wide variety of domestic responses to surrogacy, a convention should not aim for the unification of rules but rather establish a framework to facilitate international cooperation.²⁵⁰ Such a framework should include procedural rules for courts, administrative agencies, and private actors, they argue.²⁵¹ The framework should also create substantive safeguards and a system for supervision and communication to ensure those safeguards are met.²⁵² In Trimmings and Beaumont's vision, a surrogacy convention would only set minimum standards and would not prevent state

²⁴³ *Id.* at 636.

²⁴⁴ *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last updated Oct. 26, 2020); Trimmings & Beaumont, *supra* note 243, at 636–37.

²⁴⁵ Trimmings & Beaumont, *supra* note 243, at 637.

²⁴⁶ *Id.*

²⁴⁷ *Id.* In some jurisdictions, adoption is the legal instrument through which a surrogacy agreement takes effect. For example, in the famous case of *In re Baby M*, in which a genetic surrogate wanted to keep the child conceived with the intended father's sperm, the court analyzed the case using an adoption law framework. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

²⁴⁸ Trimmings & Beaumont, *supra* note 243, at 637.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 635.

²⁵¹ *Id.*

²⁵² *Id.* at 635–36.

parties from setting higher standards, like the Adoption Convention.²⁵³ More detailed regulations could be worked out in bilateral agreements between member states.²⁵⁴

Where Trimmings and Beaumont's solutions fall short is that they are only focused on surrogacy. As this Comment has explored, statelessness at birth can arise from a variety of cross-border reproductive care arrangements. Trimmings and Beaumont's proposal likely would not have helped Baby Sofia, for example. To prevent statelessness arising from a wider array of cross-border reproductive care arrangements, an international convention must contain some unification of rules concerning the establishment of legal parentage and the recognition of parentage in other countries.

The Hague Conference on Private International Law, the institution that drafted the Adoption Convention and other influential instruments of private international law, has begun work on an international agreement on parentage and surrogacy.²⁵⁵ The Conference recognizes that there is no international consensus on issues such as ART, surrogacy, and paternity disestablishment in light of DNA testing.²⁵⁶ This lack of clarity on parentage jeopardizes children's fundamental human rights, such as those guaranteed in the Convention on the Rights of the Child.²⁵⁷ This area has been one of concern for the Hague Conference since at least 2010, and in 2015, an Experts' Group was convened.²⁵⁸ As of October 2022, the Experts' Group is developing two potential international instruments: a general private international law instrument on establishing and recognizing legal parentage and a separate protocol on international surrogacy agreements.²⁵⁹

One approach to a parentage convention would be to unify state laws on the establishment of legal parentage. This approach could mimic other uniform laws like the Uniform Parentage Act in the United States and the Uniform Child Status Act in Canada. These uniform laws recognize the fact that families form in many configurations and means of conception.²⁶⁰ Rather than fighting this reality, these uniform laws are guided by child-focused principles, "including

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *The Parentage / Surrogacy Project*, HAGUE CONF. PRIV. INT'L L., <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Feb. 15, 2022).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Hague Study, *supra* note 134, at 27.

promoting equality of treatment for children, regardless of their means of conception.”²⁶¹

Rather than trying to create uniformity in parentage laws, another approach is one that focuses on the mutual recognition of parentage. This would better protect national sovereignty and would likely be more widely adopted. Under such a convention, each state would be free to enact its own laws governing the establishment of legal parentage for children born within its borders, as they do now. However, when it comes to recognizing a foreign birth certificate, each signatory to the treaty would agree to recognize the birth certificates of other signatories. Rather than a patchwork of parentage recognition laws across countries, each state would recognize as legal parents the individuals who were registered as parents in the birth country.

States that are opposed to ART, surrogacy, or same-sex parentage would likely oppose either approach, but certain provisions could be added to a mutual recognition of parentage treaty to make it more palatable. First, the mutual recognition of parentage would operate as a presumption or default. It would allow for legal certainty on matters like establishing the child’s nationality and issuing identity documents at the child’s birth. If, at a later time, the receiving country had reason to believe the parentage of the birth country violated the receiving country’s laws or public policy interests, it could challenge the parentage.

The rule would work much like the marital presumption that is used to establish paternity in most countries. The presumption applies at the birth of the child but can later be challenged and overcome, such as if DNA testing proves another man to be the genetic father. For centuries, humans have known that the birth mother’s husband is not always the genetic father of the child, but our laws have favored legal certainty for the child. Likewise, countries know that when their nationals give birth abroad, sometimes the parentage laws of the birth country will not line up with those of the receiving country. Still, rather than leaving the child in legal limbo while the case is adjudicated, receiving states should prioritize legal certainty at birth and the welfare of the child.

Imagine how this rule would have played out in the case of Baby Sofia. Baby Sofia’s Spanish birth certificate listed two mothers: the birth mother and her spouse. Under a mutual recognition law, Ireland would have recognized the parentage established by the birth registration in Spain and granted Irish nationality to Baby Sofia. The family would have been able to return to Ireland

²⁶¹ *Id.*

and introduce the baby to her family. Rather than bouncing around temporary housing in Spain and running out of money, the mothers could live in their home and return to their work. Because Irish law at the time did not permit two women to be legal parents of a child, Ireland may have challenged the Spanish parentage, but the adjudication would have played out with much less strain on the family, and Baby Sofia would not have faced statelessness.

A mutual recognition of parentage agreement would likely need to set some minimum standards for birth countries. The legal parent should have some connection to the child, be it through a surrogacy contract, biological relationship, acknowledgment, or marriage to another parent. These minimums should be designed to prevent perverse loopholes to citizenship laws or avenues for human traffickers to exploit. The European Commission has identified mutual recognition of parentage within the European Union as a legislative priority.²⁶² This could serve as a testing ground to better understand the benefits and potential pitfalls of a mutual recognition of parentage framework.

Another solution in international law to consider is an agreement amongst reproductive care destination countries. As Anika Keys Boyce argues, “While it would be impracticable to have all nations agree to a uniform set of rules regulating the commercial surrogacy industry, it may be feasible to unite all countries offering surrogacy services under agreed upon, specific guiding principles.”²⁶³ Boyce argues such an agreement should include minimum standards for surrogates and care providers as well as a commitment to protect children that would be born stateless.²⁶⁴ Again, such a hypothetical agreement need not and should not be limited to the sphere of surrogacy. There is overlap between the countries that are popular destinations for surrogacy and those that are popular destinations for other ART.²⁶⁵ An international agreement amongst destination countries is another solution worth pursuing to prevent statelessness.

B. Potential Solutions in Destination Countries

While a comprehensive, widely adopted international instrument governing cross-border reproductive care would be the ideal solution, it is also likely a long way from being a reality.²⁶⁶ Too many children are born stateless, and

²⁶² de Groot, *supra* note 76; *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, EUROPEAN COMMISSION (2020).

²⁶³ Boyce, *supra* note 85, at 662.

²⁶⁴ *Id.*

²⁶⁵ For example, the United States is a major player in both markets. *See Salama et al.*, *supra* note 16.

²⁶⁶ *See Lin*, *supra* note 15, at 568–69.

statelessness is too serious a consequence to think only of long-term solutions. There are reforms a country could do on its own. When a child is born stateless, one problem is that the child is stuck in their birth country because they cannot obtain travel documents.²⁶⁷ Often this is a place where the parents have no job, no long-term housing, and no friends or family to help them care for their child.²⁶⁸ This limbo can drag on for months or even years.²⁶⁹ One solution destination countries could implement is facilitating emergency travel documents to allow families to live in the parent's home country while their case is adjudicated.²⁷⁰

Alternatively, states could require some guarantees from the receiving country at the beginning of the ART or surrogacy agreement.²⁷¹ India implemented a regulation that required foreigners who wished to visit India to commission a surrogacy arrangement to apply for a medical visa instead of a tourist visa.²⁷² One requirement to receive the visa was a letter from the foreign nationals' embassy stating that their country recognizes surrogacy and will permit the child to enter the country as the couple's legal child.²⁷³ A similar regulation could be implemented in other destination countries. The state would require intended parents entering a country for the purposes of ART treatment or surrogacy to obtain a medical visa. The intended parents would have to include in their visa application information to determine how the child would be recognized in the receiving country, such as a letter from the embassy. If the receiving country would not recognize the receiving parents as the child's legal parents, the destination could reject the medical visa.

If a destination country wanted only to address the problem of stateless children without hindering their ART market more broadly, then the state could grant children born in cross-border reproductive care arrangements *jus soli* citizenship as a matter of law. The 1961 Statelessness Convention already requires states to grant nationality to children born in their territory who would otherwise be stateless.²⁷⁴ The only change would be allowing such children to receive citizenship automatically rather than after a lengthy application process.²⁷⁵

²⁶⁷ See e.g., Deevy, *supra* note 1.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Boyce, *supra* note 85, at 664.

²⁷¹ *Id.*

²⁷² Lin, *supra* note 15, at 579–83.

²⁷³ *Id.*

²⁷⁴ Worster, *supra* note 207, at 474.

²⁷⁵ *Id.* at 474 n. 158.

C. Potential Solutions in Receiving Countries

Receiving countries should adopt a “best interest of the child” standard when evaluating parentage and citizenship questions arising from cross-border reproductive care. This is what is required of states who are party to the Convention on the Rights of the Child, which states, “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.”²⁷⁶

The case of *Re: X & Y* from the United Kingdom should serve as an example.²⁷⁷ In the U.K., commercial surrogacy is prohibited.²⁷⁸ Third parties who arrange commercial surrogacies can face criminal sanctions, although this is rarely enforced.²⁷⁹ Parties who enter surrogacy arrangements do not face criminal penalties, but the contract is unenforceable.²⁸⁰ “This precludes the surrogate from suing for non-payment, but it also prevents intended parents from taking civil action against the surrogate if she decides to keep the child.”²⁸¹

In *Re: X & Y*, a British couple petitioned the Court for a parental order for their twins, who were born via surrogate in Ukraine.²⁸² The children could not be Ukrainian citizens because Ukraine recognized the British couple as the children’s legal parents.²⁸³ The U.K. allowed the children to enter after a DNA test showed they were genetically related to the British intended father.²⁸⁴ The Court found that the couple’s payments to the surrogate had “significantly exceeded” reasonable expenses.²⁸⁵ However, the Court ultimately granted the parental order.²⁸⁶ The court strongly considered Parliament’s authority to regulate surrogacy and the public policy problems of allowing British citizens to circumvent the law by traveling abroad.²⁸⁷ However, these concerns were ultimately outweighed by the best interests of the welfare of the child.²⁸⁸ In the opinion, Justice Hedley declared that:

²⁷⁶ Convention on the Rights of the Child, *supra* note 137, art. 3.

²⁷⁷ See *Re: X & Y* (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (Eng.).

²⁷⁸ Lin, *supra* note 15, at 574.

²⁷⁹ *Id.* at 574–75.

²⁸⁰ *Id.* at 575.

²⁸¹ *Id.*

²⁸² *Re: X & Y* (Foreign Surrogacy), *supra* note 278.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.²⁸⁹

In other words, the best interest of the child standard will almost always favor the child's social parents, the individuals who have been raising the child as their own while the child's case is adjudicated, the individuals who, for whatever reason, the receiving country does not recognize as the child's legal parents.

British courts have repeatedly upheld the best interest standard in such cases.²⁹⁰ As we have seen with other potential solutions, much of the academic literature has focused on surrogacy, but thanks to the flexibility and circumstance-specific nature of the best interest of the child standard, it can be applied in any case where the child's parentage or citizenship is in doubt.

Critics of this approach will argue that it essentially nullifies state prohibitions and regulations of ART. States that oppose ART or surrogacy on religious or ethical grounds do not want to be seen as legitimizing the practice.²⁹¹ However, a state can find other ways to discipline parents and third parties who broker cross-border reproductive care arrangements without punishing the child. Although there are reasonable objections to ART and surrogacy, no public policy considerations justify allowing a baby to languish in statelessness. Refusal to grant citizenship to a child born because of the methods by which they were conceived not only unjustly punishes the innocent child but is contrary to the principles enshrined in the Convention on the Rights of the Child.²⁹² Article II of the Convention states that parties "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs

²⁸⁹ *Id.*

²⁹⁰ Lin, *supra* note 15, at 578.

²⁹¹ Van Beers, *supra* note 240.

²⁹² Lin, *supra* note 15, at 579.

of the child's parents, legal guardians, or family members." The plain language of the convention dictates all parties to the treaty must center the best interest of the child in their determinations and not punish the child for the way in which they were conceived.

CONCLUSION

The problem of stateless children born through cross-border reproductive care can happen to same-sex couples, different-sex couples, and single parents. It can happen to children born through artificial insemination, IVF, or surrogacy. It can happen in India, Israel, Spain, or Ukraine. To be born stateless means to be born without a legal identity: to have no identification documents, no means to travel, and no way to vindicate one's other civil rights. Despite the long recognition of the problem of statelessness, the problem persists. With the growth of cross-border reproductive care, the problem has found a new way to propagate.

This problem needs solutions. Receiving countries must more robustly enforce existing conventions on statelessness so that children who would otherwise be stateless can receive citizenship of their birth country without unnecessary administrative delay. Because some delays may be inevitable, states should more readily grant emergency travel documents, so families can work their way out of legal limbo at home rather than be stranded in a foreign country. Better yet, states should adopt a presumption of recognition of foreign birth certificates. Both receiving states and destination states in the international reproductive care market should continue working toward an international instrument that provides a comprehensive framework for cooperation and establishes shared parentage rules.

Finally, receiving states, although their ethical concerns with surrogacy and cross-border ART arrangements are legitimate, must adopt the best interest of the child standard in evaluating cases that come before them. This is required of them under the Convention on the Rights of the Child. Justice fundamentally demands that states not punish a child for the acts of their parents.

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