

# **SURROGACY AND JAPAN: A Case for Regulation**

Sachi Spaulding

## **ABSTRACT**

Within the last few decades, assistive reproductive technology (ART) has had high levels of usage, particularly artificial insemination (AI) and in vitro fertilization (IVF). The advent of IVF opened a host of additional possibilities, including the recruitment of women who have no genetic link to the child to serve as surrogates. Over the past several decades, the average age of a woman who has her first child in Japan has climbed to 30.7.<sup>1</sup> Couples have increasingly found themselves unable to bear children and have turned to IVF. Yet Japan has no statutory provisions regulating surrogacy, and the Japanese Society of Obstetrics and Gynecology flatly bans the practice. As a result, many infertile couples have gone abroad to arrange surrogacy. But in 2007 the Supreme Court ruled that the legal mother in a surrogacy birth is the surrogate, even if a foreign court had ruled otherwise. This case is translated in full in this Article, along with an exploration of the state of ART and surrogacy in Japan and potential routes for regulation. This analysis is done mainly through the lens of comparison with the United States and the recent Child-Parent Securities Act (CPSA) in New York.

## **ABOUT THE AUTHOR**

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1. *Number of Newborns in Japan Fell to Record Low While Population Dropped Faster Than Ever in 2018*, THE JAPAN TIMES (Jun. 7, 2019), <https://www.japan-times.co.jp/news/2019/06/07/national/number-newborns-japan-fell-low-918397-2018-government-survey> [<https://perma.cc/M4WJ-TBJW>].

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## INTRODUCTION

With the fourth lowest birth rate in the world,<sup>2</sup> the third largest economy,<sup>3</sup> and the third longest life expectancy,<sup>4</sup> Japan has a population problem. If the birth rate continues at its current pace, the social systems will be burdened as the workforce cannot be replaced to meet the capacity necessary to support the large aging population.<sup>5</sup> Complicating the low birth rate is the fertility rate—the Health Ministry estimates that nearly 20 percent of couples struggle with infertility, and Japan has the highest rates of IVF but the lowest rates of success.<sup>6</sup> In 2018, it was estimated that Japan’s population deficit could be almost entirely stabilized by loosening regulations on gamete donation and surrogacy.<sup>7</sup> Currently, surrogacy is de facto banned in Japan, with only one doctor known to have performed it, and his requirements were extremely strict.<sup>8</sup> These included “(1) women who have no uterus and cannot carry a pregnancy

2. *The World Factbook: Birth Rate*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/the-world-factbook/field/birth-rate/country-comparison> (last visited Aug. 18, 2020).

3. Prableen Bajpai, *The 5 Largest Economies in the World and Their Growth in 2020*, NASDAQ (Jan. 22, 2020, 2:24 PM), <https://www.nasdaq.com/articles/the-5-largest-economies-in-the-world-and-their-growth-in-2020-2020-01-22> [<https://perma.cc/L43M-FZ3C>].

4. *The World Factbook: Life Expectancy at Birth*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/the-world-factbook/field/life-expectancy-at-birth/country-comparison> (last visited Aug. 18, 2020).

5. Sasha Ingber, *Japan’s Population Is In Rapid Decline*, NPR (Dec. 21, 2018, 4:54 PM), <https://www.npr.org/2018/12/21/679103541/japans-population-is-in-rapid-decline> [<https://perma.cc/NTN6-J9YU>].

6. *No Country Resorts to IVF More Than Japan—or Has Less Success*, THE ECONOMIST (May 26, 2018), <https://www.economist.com/asia/2018/05/26/no-country-resorts-to-ivf-more-than-japan-or-has-less-success> [<https://perma.cc/J4CA-65G3>].

7. *Id.*

8. Marcelo De Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 424–26 (2010).

to term; (2) intended couple must be legally married and both be able to donate sperm and eggs; (3) surrogates also have to be married and already have children of their own; (4) surrogates, who usually are the wife's mother or sister, serve on a voluntary basis and receive no financial remuneration; (5) surrogates will be registered as the mother of the child and then the child will be adopted by the intended couple."<sup>9</sup> The cases that he had where the surrogate was not blood related was with the sister-in-law.<sup>10</sup> Section 90 of the Civil Code ["A juristic act with any purpose which is against public policy is void."<sup>11</sup>] make surrogacy contracts unenforceable because they go against public order and good morals.<sup>12</sup> Additionally, children born of surrogacy are not recognized as the legal children to their intended parents. In 2007, the Supreme Court determined that the mother-child legal relationship is formed by the act of giving birth, thus making the surrogate the legal mother.<sup>13</sup>

This Article focuses on that 2007 court case that is the controlling law on surrogacy, as there has been no legislation since then. Along with this case, there are guidelines by the Japanese Society of Obstetrics and Gynecology (JSOG) which effectively control the domestic medical implementation of Assistive Reproductive Technology (ART). While they hold little power over breaking of these guidelines (they threatened to expel Dr. Netsu from the JSOG at various points due to his work with surrogacy and donated eggs),<sup>14</sup> their guidelines are almost uniformly followed.<sup>15</sup> Before I discuss the case, I will explore the innate difficulty with international reproductive tourism, introduce ART and its history in Japan, and discuss global trends for surrogacy and potential paths Japan could take with legislation. The Supreme Court urged the government to make legislation promptly to create direction for surrogacy and the novel legal questions it has raised.<sup>16</sup> Further, the Court makes some suggestions for possibilities for that legislation, which has yet to materialize.

## I. COVID-19

In 2020, the COVID-19 pandemic gripped the world, putting normalcy on pause. As countries raced to beat the virus domestically, borders

9. *Id.* at 424.

10. Masayuki Kodama, *The Current State of Surrogate Conception in Japan and the Ethical Assessment of Dr. Yahiyo Netsu: An Ethical Investigation of Japanese Reproductive Medicine (Surrogacy)*, 6 *ASIAN BIOETHICS REV.* 55, 59.

11. See MINPŌ [MINPŌ] [CIV. C.] art. 90, para. 1 (Japan). Section 90 is a central part of the Japanese Civil Code—it is one of the few sections which has broad interpretative potential. It states that contracts against public policy are void.

12. Ōsaka Kōtōsaibansho [Osaka High Ct.] May 20, 2005, Hei 16 (ra ㊦) no. 990, 1919 *HANREI JIHŌ* [HANJI] 107 (Japan).

13. Saikō Saibansho [Sup. Ct.] Mar. 23, 2007, Hei 18 (kyo7) no. 47, 61 *SAIKŌ SAIBANSHO MINJI HANREISHŪ* [MINSHŪ] 619 (Japan).

14. De Alcantara, *supra* note 8, at 426–27.

15. *Id.* at 424.

16. Saikō Saibansho [Sup. Ct.] Mar. 23, 2007, Hei 18 (hiro) no. 47, 61 *SAIKŌ SAIBANSHO MINJI HANREISHŪ* [MINSHŪ] 619 (Japan).

were closed, flights were limited or ended, and visas were unavailable or extremely difficult to secure. This was devastating to families engaging in cross-border surrogacy. Parents were blocked from their newborns, fighting to see them any way they could. COVID-19 posed an incredibly difficult challenge for even the most well-regulated reproductive tourism regimes.

The reality is, when couples desperate for children are pushed outside their countries to find a locale more legislatively favorable to the surrogacy process, they are risking factors completely outside their control. Parents are making a gamble on the state of the world for the ten-month period—will borders be open? Will relations be friendly?

The United States, Ukraine and Russia are now the prime surrogacy destinations in the world due to the legality of commercial surrogacy and, in some of these places, much stronger protections for all the parties involved.<sup>17</sup> However, with COVID-19, babies were stranded in their surrogate's countries, where the intended parents could not reach them because of travel bans (and the lack of ability to safely travel with the newborns). In one week in July, 2020, two articles of the heartbreak imposed by COVID-19 and international surrogacy were posted on mainstream U.S. media sites. In the *Chicago Tribune* one, one American couple is separated from their baby in Ukraine,<sup>18</sup> and a Chinese couple watch their baby stuck in Illinois daily on a baby monitor.<sup>19</sup> The Americans from the *New Yorker* article ended up hiking from the border of Belarus and Ukraine to reach their child,<sup>20</sup> and a Chinese couple was finally able to secure visas after months of struggle.<sup>21</sup> 200–400 babies born to American surrogates are estimated to be separated from their parents in Europe and Asia, being cared for by clinic employees, nurses, surrogates, and relatives.<sup>22</sup> This illuminates the fact that even within the most protected jurisdictions for surrogacy, like states within the United States, and where all the involved parties want the babies to go to their intended parents abroad, there are still potential legal hurdles with heart-breaking effects of familial separation in cases of international surrogacy. If these families had been able to partake in surrogacy domestically, they would have been united with their child faster. But these stranded babies in the United States are largely from jurisdictions where surrogacy

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17. For example, the U.S. states of California and New York.

18. Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster*, THE NEW YORKER (Jul. 20, 2020), <https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster> [<https://perma.cc/SW65-EGR3>].

19. Nara Schoenberg, *Chinese Infants Born to Chicago-Area Surrogates are Stranded In the U.S. Without Their Parents, Due to COVID-19: 'I am Missing This Kid Every Minute'*, CHICAGO TRIBUNE (Jul. 22, 2020, 10:58 AM), <https://www.chicagotribune.com/lifestyles/ct-life-chinese-babies-stranded-in-america-07212020-20200722-mi3k-k2jokvewrl5rzjqjr6yt74-story.html>.

20. Widdicombe, *supra* note 18.

21. Schoenberg, *supra* note 19.

22. *Id.*

is illegal or even criminalized—France, China, etc.<sup>23</sup> In Ukraine, at least 120 babies were reported stranded.<sup>24</sup> Domestic law in Ukraine states that the intended parents are the legal parents of children born through surrogacy. Hospital policy allows only the legal parents to take the baby from the hospital, but a healthy baby cannot stay at the hospital longer than eight days. These surrogate-born babies then end up cared for in orphanages until their parents can reach them.<sup>25</sup> The largest Ukrainian agency, which has previously battled controversy,<sup>26</sup> has taken over a hotel with their 45 stranded newborns.<sup>27</sup> The company, BioTexCom, made a promotional video showing the steps they took to provide for the newborns. This quickly brought widespread shock and condemnation.<sup>28</sup> They had hoped to educate the public and put pressure on the government to ease travel restrictions so parents could more easily unite with their children.<sup>29</sup> Ukraine is one of the cheapest legal destinations still available for international surrogacy, and significant exploitation concerns exist due to the economic crisis.<sup>30</sup>

While a global pandemic is an extreme potentiality to consider, COVID-19 has shown how devastating of an impact an event with global reach can have. As has been noted numerous times, including in the Supreme Court case that is translated here,<sup>31</sup> surrogacy is happening. If it is illegal domestically, people go abroad. The drive and determination to have children is extremely strong and people will find ways to have them, even with extreme bureaucratic and legal hurdles and large price points.<sup>32</sup> Driving people across borders complicates the legal international order and damages children's welfare by encouraging traffic to more exploitative or less regulated systems where the protection of the children, the surrogates, and the parents are ignored for profit.<sup>33</sup> By

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23. *Id.*

24. Widdicombe, *supra* note 18.

25. *Id.*

26. Samantha Hawley, *Damaged Babies and Broken Hearts: Ukraine's Commercial Surrogacy Industry Leaves a Trail of Disasters*, AUSTRALIAN BROADCASTING CORPORATION (Aug. 21, 2019, 12:53 AM), <https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388> [<https://perma.cc/FV4R-86CP>].

27. Widdicombe, *supra* note 18.

28. Oksana Grytsenko, *The Stranded Babies of Kyiv and the Women Who Give Birth For Money*, THE GUARDIAN (Jun. 15, 2020), <https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money> [<https://perma.cc/M9QR-S8K4>].

29. *Id.*

30. *Id.*

31. Saikō Saibansho *supra* note 16.

32. Widdicombe, *supra* note 18.

33. See Michael Safi, *Baby Gammy's Twin Can Stay with Australian Couple Despite Father's Child Sex Offences*, THE GUARDIAN (Apr. 13, 2016), <https://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders> [<https://perma.cc/2BBM-N78E>]. The authors describe the case of Baby Gammy. See *India-Japan Baby in Legal Wrangle*, THE BBC

enabling people to stay in their home countries, governments can regulate and maintain a safer system that protects all the parties involved. With its strong economy and developed medical infrastructure, Japan has the capacity to do so.

## II. BACKGROUND TO ASSISTIVE REPRODUCTIVE TECHNOLOGY (ART)

Science brings once unimagined possibilities into the public's grasp. ART is one of these horizons. ART is now commonplace when the idea of IVF or surrogacy had been inconceivable before. Artificial insemination (AI) is the most common method of ART and has been in existence the longest—the first successful human usage was apparently in 1776 in Scotland, and the utilization of donor sperm was first documented in the United States in 1884.<sup>34</sup> By the 1970s, sperm banks were popular and common globally, with particular prevalence in places like the United States.<sup>35</sup> AI is a procedure where spermatozoa is removed and then injected into the woman, creating a higher concentration that can assist with unknown male fertility difficulty, or certain conditions like limited motility.<sup>36</sup> Since then better technologies have developed, with IVF now a fairly routine additional treatment for more significant fertility difficulties. It can also select away from genetic problems.<sup>37</sup> With IVF, the egg is fertilized outside the body, and is then transplanted back into the uterus.<sup>38</sup> This procedure has allowed for expanded childbirth access—infertile couples, couples with genetically-linked diseases, LGBTQ+ couples, and individuals are all now able to have genetic children through IVF. This is because donor eggs and/or sperm can be utilized, and another woman—a surrogate—can carry the child to term. These various scenarios have brought novel legal questions to Japan, such as who the legal parents of children born from IVF and a surrogate mother are under the Family Registration System within a social system which values genetic childbirth and connection.<sup>39</sup>

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(Aug. 6, 2008), [http://news.bbc.co.uk/2/hi/south\\_asia/7544430.stm](http://news.bbc.co.uk/2/hi/south_asia/7544430.stm) [<https://perma.cc/U3DF-PTXG>]. The authors describe the case of Baby Manji.

34. Chiaki Shirai, *Reproductive Technologies and Parent-Child Relationships: Japan's Past and Present Examined Through the Lens of Donor Insemination*, 19 INTL. J. OF JAPANESE SOC. 18, 19 (2010).

35. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS, VIEWS, & VISION IN OBGYN 137, 140 (2015).

36. *Intrauterine Insemination (IUI)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722> (last visited Aug. 18, 2020) [<https://perma.cc/V398-W3W3>].

37. *In Vitro Fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> (last visited Aug. 15, 2020) [<https://perma.cc/QC4T-SUHK>].

38. *Id.*

39. Shirai, *supra* note 34, at 18, 25.

### III. JAPAN AND ART

ART has been present in Japan for quite some time. AI has been practiced since 1948, IVF since 1983, and the first surrogacy (a center arranging for abroad surrogacy) practice began in 1991.<sup>40</sup> A commercial sperm bank opened in 1996. Dr. Netsu performed IVF with donated eggs in 1998, and then performed the first (announced) domestic surrogacy case in 2001,<sup>41</sup> doing so in defiance of the Japan Society of Obstetrics and Gynecology (JSOG).<sup>42</sup> These guidelines state that all members are prohibited from performing surrogacy, for the following reasons: “(1) priority should be given to the welfare of the child and surrogacy offends it; (2) surrogacy is associated with the burden of mental and physical risk; (3) surrogacy makes family relationships complex; (4) surrogacy contracts are not acceptable in terms of social ethics.”<sup>43</sup> In 2007, the Japan Federation of Bar Associations reiterated that surrogacy should be banned, with concern for “children’s welfare, fear of offense against human dignity, potential for economic exploitation, and risk of deterioration in family relationships to support that viewpoint.”<sup>44</sup> The Ministry of Health, Labor, and Welfare stated that priority should be placed on the to-be-born child’s welfare, that the body should not be merely treated as a means for reproduction, that safety need be carefully considered, that eugenics needs to be rejected, that commercialism in reproduction should be rejected, and that human dignity needs to be respected.<sup>45</sup> The Science Council of Japan released a report in 2008, suggesting that surrogacy should be prohibited and commercial surrogacy should be a punishable offense. The report further included the following recommendations: that there should be a regulatory agency managing experimental surrogacy which would be permitted on a trial basis; that the woman giving birth should be the legal mother and the intended parents could adopt; that the child should have a right to one’s origins; and that the child’s welfare should be of utmost importance.<sup>46</sup>

More recently, Japan has retreated on certain more commonplace ART, like AI (artificial insemination). One of the only hospitals offering AID (artificial insemination by donor) through public sperm donation (Keio) has stopped taking patients due to concerns over retroactive donor identification laws which have been passed in jurisdictions like Australia.<sup>47</sup> The utilization of private sperm donations are still popular,

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40. Yukari Semba et al., *Surrogacy: Donor Conception Regulation in Japan*, 24 *BIOETHICS* 348, 349 (2010).

41. *Id.* at 349.

42. De Alcantara, *supra* note 8, at 424.

43. *Id.*

44. *Id.* at 425.

45. Semba et al., *supra* note 40.

46. De Alcantara, *supra* note 8, at 425.

47. Yuri Hibino & Sonia Allan, *Absence of Laws Regarding Sperm and Oocyte Donation in Japan and the Impacts on Donors, Parents, and the People Born as a Result*, 19 *REPROD. MED. & BIOLOGY* 295, 296 (2020).

but these are less safe as they are not being done through medical professionals who can do health checks.<sup>48</sup>

#### IV. ART AND THE LAW—GLOBAL TRENDS

ART, and particularly surrogacy, created significant legal problems that desperately needed clarity. Some parts of the developed world have made legislative decisions on the practice in response, varying from outright bans on anything but non-advertised altruistic surrogacy (i.e. Australia)<sup>49</sup> to an endorsement of regulated commercial surrogacy (i.e. California, USA)<sup>50</sup> with accessibility to donated gametes. California's reputation as the reproductive technology "Wild West" and other reproductive tourism locations abroad, such as India (in the past) and Ukraine, have drawn significant scholarly attention to the legal, ethical, and medical implications of the industry. There has been extensive research on the overarching concerns of feminism and human rights. There are three general international trends in ART legislation: most of Western Europe prohibiting it over religious and moral concerns, Southeast/South Asia and Mexico shifting from permissive to restrictive approaches due to exploitative concerns over the rapidly expanded and poorly regulated system, and jurisdictions allowing it with protective laws, most notably some states in the United States.

Even within countries that regulate and support surrogacy, there are differing levels of regulation as a result of different values and protections. Some focus more on protection of the surrogate, while others focus on the protection of the nuclear family. For instance, some places only allow surrogacy in the case of married, heterosexual couples where the intended mother has proven infertility.<sup>51</sup> Other jurisdictions allow the surrogate to retain parental rights until after birth,<sup>52</sup> while others will allow a shift that takes place the moment of birth, the change pre-approved by a court.<sup>53</sup> Yet other jurisdictions require that the intended parents accept the child no matter the phenotypic or genotypic factors.<sup>54</sup> Therefore, it is not merely a binary regulate-prohibit option with surrogacy, but rather a spectrum of options.

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48. *Id.* at 296.

49. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and is it Legal?*, BBC NEWS (Aug. 6, 2014), [https://www.bbc.com/news/world-28679020#:~:text=Paying%20the%20mother%20a%20fee,as%20commercial%20surrogacy\)%20is%20prohibited.&text=Commercial%20surrogacy%20is%20legal%20in,they%20cannot%20find%20a%20surrogate](https://www.bbc.com/news/world-28679020#:~:text=Paying%20the%20mother%20a%20fee,as%20commercial%20surrogacy)%20is%20prohibited.&text=Commercial%20surrogacy%20is%20legal%20in,they%20cannot%20find%20a%20surrogate) [https://perma.cc/X464-TAQU].

50. *Id.*

51. JSRG Saran and Jagadish Rao Padubidri, *New Laws Ban Commercial Surrogacy in India*, MEDICO-LEGAL J. 1, 2 (Mar. 27, 2020), <https://doi.org/10.1177/0025817219891881> [https://perma.cc/HC9V-38KN].

52. 78B UTAH CODE § 15.807(1) (2008).

53. 11 NEV. REV. STAT. ANN. § 126.720(4) (2019).

54. 19-A ME. REV. STAT. ANN. § 1932(J)(4)(a) (2015).



The United States, while expensive, provides the most promising destination for hopeful parents seeking ART. States like California have strong laws protecting intended parents and recognizing surrogacy contracts. However, due to the allowance of commercial surrogacy, California is one of the most expensive legal destinations in the world. New York has just passed legislation that will allow commercial surrogacy starting in February 2021 with the strongest surrogate protections of any state,<sup>55</sup> but ART in New York will likely be more expensive than even California due to the payment conditions required for surrogates beyond that of other states (including required insurance being paid by the intended parents to the surrogate for a year after birth).<sup>56</sup>

There are numerous reasons that Japanese citizens view the United States as a desirable surrogacy destination. In the United States, Asian American egg donations are available for couples that need a donated gamete. In places that allow surrogacy, there are several ways to determine legal parentage. They range from the most restrictive, requiring adoption proceedings (frequently used for situations like traditional surrogacy),<sup>57</sup> post-birth court orders, and, the most lenient, pre-birth orders. States like California utilize pre-birth. Pre-birth orders are the most permissive because they rescind parental rights from the surrogate before she has even given birth, while post-birth orders do so after birth so that the surrogate experiences the birth before losing her rights. California is thus a frequent U.S. destination for international couples if they can afford the premium due to the commercial surrogacy because of these extra protections like lenient pre-birth orders where one can even be granted for intended parents with no genetic link to the child.

Ukraine is more affordable than the United States, with Ukrainian surrogacy costing around 49,950 USD<sup>58</sup> and U.S. surrogacy costing an average of 150K.<sup>59</sup> A popular clinic with offices in California, New York, and Massachusetts, Circle Surrogacy, lists their surrogacy to cost 125K USD (with the potential for unexpected costs), or an insurance option where Circle covers unexpected costs in exchange for a 135k USD base price.<sup>60</sup>

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55. Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overtur-ban-n1176071> [<https://perma.cc/Z5Q9-55QJ>].

56. Child-Parent Security Act, N.Y. SB S7506B (2019), § 581–402.

57. See Nayana Patel et al., *Insight into Different Aspects of Surrogacy Practices*, 11 J. OF HUM. REPROD. SCI. 212, 212 (2018). The authors explain that traditional surrogacy is surrogacy where the surrogate's own egg is utilized, making her genetically related to the child she is carrying. A gestational surrogate would have no genetic link.

58. Cheung, *supra* note 49.

59. David Dodge, *What to Know Before your Surrogacy Journey*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/parenting/guides/surrogacy.html> [<https://perma.cc/T54W-Y672>].

60. *How Much Does Surrogacy Cost?*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/parents/how-it-works/programs-costs> (last visited Aug. 15, 2020) [<https://perma.cc/GJQ9-N53C>].

Japan, with its wealth and education levels, is economically closely akin to United States. Thus, U.S. legislation can illuminate a potential avenue for Japanese surrogacy law. Attitudes in the United States have shifted towards the allowance of legally protected gestational<sup>61</sup> surrogacy—42 states have explicitly permitted commercial and altruistic surrogacy or have nothing outlawing it.<sup>62</sup> New York, DC, and New Jersey changed to this category within the last decade. Only Michigan still refuses to recognize any (commercial or altruistic) contracts and imposes criminal sanctions.<sup>63</sup> The rest of the states either do not permit commercial surrogacy, or do not enforce contracts for either (without criminal sanctions).<sup>64</sup> Like the United States, Japan is a wealthy nation with highly developed medical and scientific technology, medical infrastructure, and high overall socioeconomic and education levels. As such, the important conversations regarding exploitation and labor are more nuanced for Japan and the United States than for countries like India where there is greater space for exploitation as a result of such a massive wealth and education gap between the agencies arranging surrogacy and the women they are recruiting.<sup>65</sup> However, Japan itself has not been subject to the same level of scrutiny regarding ART and legal regulation, and while there was movement towards legislation on the subject, fourteen years have passed since the Supreme Court spoke on the matter. At that point, the Court made its first—and only, to date—judgment on the parent-child relationship with a child born of surrogacy and the intended parents, and the situation is no clearer.<sup>66</sup> There are still no laws on surrogacy.<sup>67</sup> This 2007 Supreme Court case will be the subject of this Article, as it is the most significant statement on the legal status of surrogacy and parentage in Japan that exists.

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61. See *supra* text accompanying note 56.

62. CORNELL L. SCH. INT'L HUM. RTS. POL'Y ADVOC. CLINIC & NAT'L L. U., DELHI, SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED? 1, 14 tbl.1 (Cornell Law Faculty Publications 2017) [hereinafter CORNELL].

63. Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overturms-ban-n1176071> [<https://perma.cc/Z5Q9-55QJ>]; Michael Alison Chandler, *With New Surrogacy Law, D.C. Joins Jurisdictions that are Making it Easier for Gay and Infertile Couples to Start Families*, WASHINGTON POST (Jun. 3, 2017), [https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c\\_story.html](https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html).

64. *Id.*

65. Daisy Deomampo, *Transnational Surrogacy in India: Interrogating Power and Women's Agency*, 34 FRONTIERS 167, 182–84 (2013).

66. De Alcantara, *supra* note 8, at 422–23.

67. *Id.* at 423.

## V. JAPAN AND THE DRIVE FOR INTERNATIONAL ART

Japan's particular circumstances make legislation and clarity on ART crucial. In 2018, Japan had "less than half America's population, but more than a third more hospitals and clinics that offer fertility treatment."<sup>68</sup> Five percent of all births in 2017 were with IVF.<sup>69</sup> While Japan has the highest numbers of IVF in the world, it has the lowest IVF success rate.<sup>70</sup> Less than 10 percent of the IVF cycles done in Japan succeed.<sup>71</sup> According to the health ministry, nearly 20 percent of couples struggle with fertility.<sup>72</sup> When IVF fails, there are few options left, and none of them are readily accessible in Japan. Generally, donated eggs and/or surrogacy are the only real options left after IVF to have genetic children. In other countries, adoption is considered another viable alternative at this stage. However, adoption is also extremely difficult in Japan due to the requirement of parental consent over children in institutions. Stigma also exists around adoption.<sup>73</sup> As such, adoption is in-line with uterine transplants and surrogacy in terms of viable last-chance options.<sup>74</sup> These hurdles mean unknown numbers of individuals and couples<sup>75</sup> are pushed abroad to find more favorable markets that provide eggs and surrogates. For Japanese couples, the United States and Ukraine are popular destinations. The Japanese government should also be keen on the prospect—Japan's falling population is of great concern, as it will have broad implications on the economy and the country's social programs. It was estimated in 2018 that if Japan allowed and regulated surrogacy and loosened gamete donation requirements, most of the birth deficit could be fixed.<sup>76</sup>

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68. *No country resorts to IVF more than Japan—or has less success*, THE ECONOMIST (May 26, 2018), <https://www.economist.com/asia/2018/05/26/no-country-resorts-to-ivf-more-than-japan-or-has-less-success> [<https://perma.cc/F65Y-WQY2>].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Shirai, *supra* note 34, at 23–25.

74. Akari Nakazawa et al., *A Survey of Public Attitudes Toward Uterus Transplantation, Surrogacy, and Adoption in Japan*, PLoS ONE 1, 12 (Oct. 30, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0223571> [<https://perma.cc/5RLJ-G53Z>].

75. Actual number estimations are difficult because the lack of recognition for intended parents as legal parents in Japan encourages couples to hide their surrogacy and to pretend that the intended mother was the one who gave birth abroad. See Ōsaka Kōtōsaibansho [Osaka High Ct.] May 20, 2005, Hei 16 (ra ㄱ) no. 990, 1919 HANREI JIHŌ [HANJI], 107 (Japan) (intended parents filed themselves as legal parents when registering the baby in Japan and submitted a birth certificate with themselves as the legal parents).

76. *No country resorts to IVF more than Japan—or has less success*, *supra* note 68.

## VI. DIRECTIONS FOR LEGISLATION

Different states in the U.S. have taken various routes to regulate surrogacy, some quite contrary to other countries, providing examples for differing paths Japan could take. Generally, there is a restrictive to permissive trend (i.e. New York—criminal sanctions to full contractual protection of commercial surrogacy) and a permissive to restrictive trend (i.e. India—robust international commercial tourism industry to domestic-only altruistic surrogacy in limited situations). Of specific focus here is the restrictive to permissive format New York has. Alternatively, the situation in places such as India provide an extreme example in the other direction—permissive to restrictive. India used to be the center of the international surrogacy market,<sup>77</sup> with a massive billion-dollar industry catering to foreign couples coming to India for surrogates.<sup>78</sup> In 2015, several scandals and international legal quagmires later, and after some serious conversations about exploitation given the severe economic and educational gap between the involved parties, India's government stopped granting visas for foreign couples who tried to access surrogacy in India. In 2018, the Indian government made commercial surrogacy illegal.<sup>79</sup> The current Indian legislation also puts restrictions on domestic surrogacy—altruistic surrogacy is only allowed for infertile married heterosexual couples with a doctor's note attesting to infertility.<sup>80</sup> The couple must have been married for at least five years. The surrogate can only act as a surrogate once, and must be a close relative to the couple, and must be married with a biological child already.<sup>81</sup> One of these international legal quagmires brought massive media attention to international surrogacy tourism in Japan with Baby Manji—a child born to an Indian surrogate for a Japanese couple.<sup>82</sup> The gametes for the child were the intended father's sperm and a donated egg.<sup>83</sup> After the surrogate became pregnant, the Japanese couple broke up. The woman, with no genetic link to the gestating child, wanted nothing to do with the child. The baby girl's Japanese intended father still desperately wanted her, but Indian law banned him from adopting a girl (a single man cannot adopt a girl in India).<sup>84</sup> The baby went stateless for months, and the intended father's visa expired. Finally, she was able to come to Japan on a humanitarian visa and was claimed by her paternal grandmother to appease the Indian

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77. Lisa Lau, *A Postcolonial Framing of Indian Commercial Surrogacy: Issues, Representations, and Orientalisms*, 25 GENDER, PLACE, & CULTURE 666, 667 (2018).

78. *Id.* at 667.

79. Saran, *supra* note 51, at 2.

80. *Id.*

81. *Id.*

82. *India-Japan Baby in Legal Wrangle*, BBC (Aug. 6, 2008), [http://news.bbc.co.uk/2/hi/south\\_asia/7544430.stm](http://news.bbc.co.uk/2/hi/south_asia/7544430.stm) [<https://perma.cc/ZNR7-V9NB>].

83. *Id.*

84. Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, DUKE UNIVERSITY 1, 5 (2015) [https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji\\_Case2015.pdf](https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf).

officials.<sup>85</sup> They have since hidden from the public eye, but it is assumed her father went through adoption channels in Japan to become her legal father and to help her obtain Japanese citizenship.<sup>86</sup>

The majority of Western European countries restricts or outright ban domestic surrogacy. However, even in countries like France, with significant fines and criminal sanctions for surrogacy,<sup>87</sup> the parent-child relationship from international surrogacy is still recognized due to the European Court of Human Rights ruling that doing otherwise “violated the child’s right to respect for private and family life.”<sup>88</sup> Thus, Western Europe and the United States respect determinations on parental relationships from international surrogacy.

## VII. THE CHILD-PARENT SECURITIES ACT: A POTENTIAL GUIDE

New York State in the U.S. went from a complete ban on commercial surrogacy to endorsing it in a substantive and sweeping budget bill (the Child-Parent Securities Act) in 2020 to legalize commercial surrogacy starting February 2021. The law is of important consideration in the context of this Article because it could serve as a potential direction for Japan. New York banned surrogacy in 1992 after the famous Baby M<sup>89</sup> case in New Jersey. Before the 2020 law, New York was one of only two U.S. states that would not enforce surrogacy contracts and imposed fines or criminal sanctions for commercial surrogacy.<sup>90</sup> New York’s law banning surrogacy was based on “recommendations . . . [with] five main concerns: (i) individual access and societal responsibility in the face of new technological possibilities; (ii) the interests of children; (iii) surrogacy’s impact on family life and relationships; (iv) individual liberty in human reproduction and attitudes about reproduction and women; and (v) application of the informed-consent doctrine.”<sup>91</sup> These concerns are very similar to those noted by the Japanese legislature taskforce, the Japanese Bar, and the JSOG. Before the passage of the Child-Parent Security Act, New Yorker residents had to travel out-of-state to secure

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85. *Id.* at 6–7.

86. De Alcantara, *supra* note 8, at 421.

87. Isabelle R. Lescastereyres, *Recognition of the Parent-child Relationship as a Result of Surrogacy and the Best Interest of the Child*, 16 ERA F. 149, 150 (2015).

88. CORNELL, *supra* note 62, at 26.

89. See generally Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL’Y 41, 45–46 (2016). (*In re Baby M* was a custody case in New Jersey in 1988 where the intended parents were granted custody of child Baby M, born to Mary Beth Whitehead through traditional surrogacy (meaning it was her egg and she was thus genetically related to the child). Whitehead was granted visitation. The Supreme Court of New Jersey ruled that surrogacy contracts were against public policy. After she gave birth, Whitehead convinced the intended parents, the Sterns, to let her see the child. She kidnapped the child and fled states. The case brought surrogacy to jarring national attention to surrogacy).

90. CORNELL, *supra* note 62, at 12.

91. *Id.* at 19.

surrogacy, creating “numerous legal, financial, and practical challenges.”<sup>92</sup> Interstate laws on jurisdiction meant that New Yorker residents risked New York law being utilized which would threaten the enforceability of their contract (possible in situations like where a significant part of the overall process occurred in New York, such as the IVF procedures).<sup>93</sup> The situation was thus similar to Japan but in the context of a country with permissive alternative domestic destinations like California. Given that a state like New York, which had restrictive laws governing surrogacy in the past due to moral and scientific concerns, was able to pass highly permissive, this provides a potential guide for Japanese legislation. Japan, with an endemic need for ART to address its population problem, could mirror the New York legislation to evolve from a restrictive to permissive model, and provide protected pathways for people to pursue surrogacy. The New York concerns mentioned above<sup>94</sup> are mostly alleviated at this point, explored below, hence the successful passage of the CSPA. Children are not being sold when there is regulation in place—payment is for service, not for children. This is bolstered by a ban on traditional surrogacy in most regulated countries.<sup>95</sup> This traditional surrogacy ban and its purpose to protect children from sale can be bolstered by banning payment contingent on phenotypic or genotypic factors.<sup>96</sup>

Concern over the parent-child relationship and child’s welfare have existed throughout the process. However, “empirical research has not substantiated these concerns . . . research suggests that surrogacy does not have a negative effect on children born of surrogacy agreements and the existing children of surrogates.”<sup>97</sup> Additionally, even the Supreme Court of Japan, in their opinion on the 2007 surrogacy case, noted that when looking at the specific circumstance, children’s welfare was likely better served by recognizing their intended parents as their legal parents. In New York, the concerns over disruption to the nuclear family during the 1990s were assuaged in the following decades after social and legal frontiers had shifted, and laws explicitly protecting the rights of same-sex couples to marry were passed. This social shift has not been as significant in Japan, where although societal acceptance of nontraditional families has shifted,<sup>98</sup> there is no national binding legal acceptance.

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92. *Id.* at 11.

93. *Id.* at 15.

94. *See id.* at 19.

95. Christina Caron, *Surrogacy Is Complicated. Just Ask New York.*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/parenting/pregnancy/surrogacy-laws-new-york.html> [https://perma.cc/2M44-K96P].

96. FAM. CT. ACT § 581–502; Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUMBIA LAW SCHOOL SEXUALITY & GENDER CLINIC 64–84 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf) [https://perma.cc/98HM-AMFR].

97. CORNELL, *supra* note 62, at 20 (citations omitted).

98. Andrew McKirdy, *Fighting for the Right to Recognize Same-Sex Marriage in Japan*, THE JAPAN TIMES (June. 27, 2020), <https://www.japantimes.co.jp/news/2020/06/27/>

Concerns for surrogate safety and respect for her dignity can be alleviated with strong regulation within the legislation, as the CPSA seeks to attain with the strongest surrogate protections<sup>99</sup> of any U.S. state.<sup>100</sup> Further, another Japanese legislative concern—the possibility of litigation between parties—has showed to be extremely rare with regulation and contracting. In the United States, until 2008, out of the recorded 25,000 surrogate births, 99 percent of the surrogates willingly gave the children to the parents, and in the last 1 percent, less than 10 percent of those resulted in legal battles over parental rights. Thus, the likelihood for legal battle is extremely low, happening in less than 0.1 percent of surrogate pregnancies in the United States.<sup>101</sup> Thus, the likelihood for legal battle is extremely low, happening in only 0.1 percent of surrogate pregnancies in the United States.<sup>102</sup> The numbers suggest that when developed countries with regulated surrogacy systems allow controlled surrogacy, it can happen safely and with women able to provide their informed consent.

Alternatively, the status of IVF and ART in Japan is as such: the IVF technology utilized in surrogacy has now been in wide-usage for decades. Japan is the largest consumer of IVF technology in the world.<sup>103</sup> Japan has the lowest rate of multiple birth rates in East Asia,<sup>104</sup> one of the highest risks associated with IVF and surrogacy. In 2017, Japan had 448,210 cycles of IVF. The same graph had data<sup>105</sup> from South Korea shows only 41,995 cycles,<sup>106</sup> though Korea's population is about 40 percent of Japan's. Japan was also first in East Asia to limit the number of embryos allowed to be transferred and implanted to three.<sup>107</sup> In 2008, the JSOG suggested that for women under 35, only one embryo could be transferred, and two allowed after two failures or for women over 35.<sup>108</sup> 82.6 percent of cycles in 2012 were single transfer, and drastically reduced stillbirths, C-sections, preterm birth, and low birthweight.<sup>109</sup>

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*national/social-issues/lgbt-same-sex-marriage-japan* [<https://perma.cc/BT2U-ETWR>].

99. Examples include protection of the surrogate's right to abort, health insurance for the next year, payment regardless of outcome. See FAM. CT. ACT § 581–403.

100. Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overturns-ban-n1176071> [<https://perma.cc/949H-EMZT>].

101. CORNELL, *supra* note 62, at 21.

102. *Id.*

103. *No country resorts to IVF more than Japan—or has less success*, *supra* note 70.

104. Chia-Ling Wu et al., *Data Reporting as Care Infrastructure: Assembling ART Registries in Japan, Taiwan, and South Korea*, 14 E. ASIAN SCI., TECH, & SOC'Y: INT'L J. 35, 40 (2020).

105. The Japan data was for 2017 and the Korean data was for 2012.

106. Wu et al., *supra* note 104, at 42 tbl.1.

107. *Id.* at 45.

108. *Id.* at 46.

109. *Id.*

### VIII. SOCIAL ACCEPTANCE OF SURROGACY AND ART IN JAPAN

A survey conducted by the Ministry of Health, Labour and Welfare in Japan revealed that supportive opinions about surrogacy increased from 42.5 percent in 2003 to 54 percent in 2007.<sup>110</sup> More recent surveys suggest that opinions about surrogacy are more conflicted. This may be due to the fact that uterine transplants have emerged as a potential substitute that allows infertile parents to be the birth and genetic parents, unlike with surrogacy where they would only be the genetic parents (if using their own gametes). Younger people are more supportive than older people.<sup>111</sup> People with infertility also have higher rates of support for surrogacy.<sup>112</sup> Opinions against surrogacy are at most 22.8 percent, with the largest percentage of respondents falling into the category of “indecisive.”<sup>113</sup> As there is no legislation on surrogacy and the last court case on the subject is from 2007, falling rates of support may also be due to fewer people with awareness of surrogacy at all.

### IX. ADOPTION AS AN ALTERNATIVE

Japan has a high rate of marriage, and a 2005 survey found that only 5.6 percent of couples in a marriage for 15–19 years were childless.<sup>114</sup> While there are high overall adoption rates in Japan, most of them are adult adoptions.<sup>115</sup> Adoption of children is largely among family, and the adoption of orphaned or abandoned children has “historically been avoided.”<sup>116</sup> Surrogacy also provides an avenue for couples to have genetically related children when they otherwise could not, allowing them to appease a society which has “. . . a deeply rooted ideology valorizing blood relationships.”<sup>117</sup> A study tracking rates of children born in Japan of IVF and AID versus children within foster, institutional care, or adopted showed that adoption has plummeted as IVF has massively increased to around 20,000 children born of IVF in 2005, compared to approximately 2,000 adopted.<sup>118</sup> In comparison, in 2005, the United States reported 52,041 births through IVF,<sup>119</sup> and 146,172 children were adopted.<sup>120</sup> When questioned on why respondents did not consider adoption or fostering in the

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110. Yoshie Yanagihara, *Reconstructing Feminist Perspectives of Women's Bodies Using a Globalized View: The Changing Surrogacy Market in Japan*, 34 *BIOETHICS* 570, 572 (2020).

111. Nakazawa, *supra* note 74, at 10.

112. *Id.* at 5 tbl.3.

113. *Id.*

114. Shirai, *supra* note 34, at 19.

115. *Id.* at 23.

116. *Id.* at 20.

117. *Id.*

118. *Id.* at 24 fig.1.

119. Victoria Clay Wright et. al., *Assisted Reproductive Technology Surveillance—United States, 2005*, 57 *Surveillance Summaries* 1,1 (2008).

120. *Trends in U.S. Adoptions: 2008–2012*, *CHILD WELFARE INFO. GATEWAY* (Jan. 2016), <https://www.childwelfare.gov/pubPDFs/adopted0812.pdf> [<https://perma.cc/57HD-X8VW>].



Japanese study, 66 percent responded that they wanted a biological child. Multiple answers were allowed, and 14 percent stated that they were concerned about bias against adopted/fostered children, 4.7 percent didn't have a good image of adopted/fostered children, and 14.9 percent and 14 percent respectively thought their spouses or families would not support the decision.<sup>121</sup> For fostering rates, 77 percent of all children in need of fostering in the United States are fostered, while 90.2 percent of that population in Japan are institutionalized.<sup>122</sup> The out-of-wedlock birthrate in Japan was only 2.11 percent in 2008. Therefore, adoption and fostering are unpopular and are difficult avenues to pursue, leaving them as fairly unattractive alternatives to ART.

## X. THE CASE

Holding: The Tokyo High Court decision is reversed, and the appeal against the decision by the trial court is dismissed. The appellee (plaintiffs)<sup>123</sup> will bear the costs of the appeal.

[the Plaintiffs assert the following facts and reasons for appeal]:

The focus of this case are twins (the children) born in the USA to a Japanese couple (plaintiffs) by an American woman in Nevada. This was made possible through assistive reproductive technology (ART), and the gametes used to create the children were from the plaintiffs. Plaintiffs submitted a birth notification (notification) in Japan for the children as marital children, but the appellant refused to accept the notification on the grounds that the female plaintiff did not deliver the children, and thus there was no parent-child birth relationship. Plaintiffs sued under Article 118<sup>124</sup> of the Family Registration Law, demanding that the notification be ordered accepted.

The following is an outline of the facts of the case, drawn from the records:

Plaintiffs got married in 1994.

In 2000, the female plaintiff had a hysterectomy and pelvic lymphadenectomy<sup>125</sup> due to cervical cancer. She had some of her eggs removed at that point to avoid any radiation damage. The egg removal was done with the intention of having a surrogate carry her genetic child. In 2002, plaintiffs signed a surrogacy contract with an

121. Shirai, *supra* note 34, at 24 tbl.3.

122. *Id.* at 25.

123. The published public court opinion uses “X1X2” for the plaintiffs—the Japanese intended parents—as a redacted version from the original case. I will use plaintiff here instead of X1X2.

124. Koseki hō [*Family Register Act*], Law No. 224 of 1947, art. 118 (Japan), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2161&vm=&re=> [<https://perma.cc/6N2R-WJ9X>]. The noted Article 118 says: “the mayors of the municipalities designated by the Minister of Justice may handle the whole or a part of the clerical work related to family registers by means of an electronic data processing system” and “the designation set forth in the preceding paragraph shall be made by public notice, at the request of the mayor of a municipality.”

125. Removal of uterus and pelvic lymph nodes.

American couple and attempted pregnancy twice in the US. Neither pregnancy took.

In 2003, X1X2 had a successful surrogate pregnancy with an American woman (the American) from Nevada. On May 6th, 2003, the plaintiffs signed a contract (Agreement for Surrogate Birth) with the American and her husband (the Americans).<sup>126</sup> Under the contract, the American would be treated by a physician she approved that was selected by the plaintiffs, would accept a fertilized egg transplant into her uterus, and would carry a successful pregnancy to term. The contract makes the plaintiffs the legal parents, and within it the Americans agree to revoke all parental rights. Fertilized eggs were created using the plaintiffs' gametes at Center "C," and two were transplanted into the American's uterus.

In November 2003, the American gave birth to twins at Center "D" in Nevada, USA.

According to Chapter 126 Article 45<sup>127</sup> of the Nevada Revised Statutes, a surrogate birth agreement must have certain provisions to be valid. First, those seeking a surrogate must be a married couple. The contract must have the intended parent-child relationships, specify child custody should circumstances change (i.e. divorce, etc.), and the responsibilities and obligations of each party. If a person meets the requirements for parenthood and is designated as a parent in the contract, then they are required to legally be treated as the parent. Additionally, it is illegal under this statute to pay a woman for surrogacy beyond necessary medical and living expenses related to the contracted pregnancy. This chapter also contains various provisions relating to court procedures for establishing legal parent-child relationships. Chapter 126 Article 161 states that a determination made on the parent-child relationship is decisive in all aspects, and if the birth certificate states something contrary then a new one should be ordered by the court.<sup>128</sup>

In late November 2003, the plaintiffs filed a petition with Family Services of Nevada Second Judicial District Court in Washoe, Nevada. The court confirmed that the plaintiffs and the Americans agreed to and acknowledged the terms of the contract and ordered on December 1st, 2003 that the plaintiffs were the legal and biological parents of the children expected to be born around January 2004. All relevant documents were ordered to recognize the plaintiffs as the legal parents, and that the registrar accept the birth certificate which reflects this order and to retain it within the records. The order was issued within the "Arrangements and Orders for the Record of the Petitioners' Names for Birth Certificates and Other Records"<sup>129</sup> (Nevada trial).

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126. The published public court opinion uses "AB" for the American woman and her spouse. I will use "the Americans" here instead.

127. This is no longer included in the current version of the NRS. The updated requirements are listed under NEV. REV. STAT. § 126.750 (2013).

128. NEV. REV. STAT. § 126.161 (2017).

129. The Office of Vital Records in Nevada holds the birth certificates for the state of Nevada.

The plaintiffs raised the children as their own immediately. On December 31st, 2003, Nevada issued a birth certificate with the male plaintiff as the father and the female plaintiff as the mother of the twins.

The plaintiffs returned to Japan in January 2004 with their children and submitted a birth notification with the male plaintiff as father and the female plaintiff as mother. On May 28th, the plaintiffs were notified that their notification was not accepted on the grounds that there was no recognizable parent-child relationship. The female plaintiff needed to have given birth to have a mother-child relationship, and it was unconfirmed whether she had.

The trial court rejected the petition by the plaintiffs, but the Tokyo High Court reversed the trial court's decision and ordered the birth notification to be accepted.

The Tokyo High Court's reasoning was this:

According to Section 118 of the Code of Civil Procedure,<sup>130</sup> a foreign court judgment can be the binding final trial on a legal relationship under private law with procedural guarantees for both parties, no matter the procedure of the foreign court [Saikō Saibansho [Sup. Ct.] Apr. 28, 1998, Hei 6 (o) no. 1838, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ], 853 (Japan)]. The Nevada court's decision was a determination on the parent-child relationship of a judicial type similar to a Japanese judgment on personal status litigation or one under Section 23 of the Domestic Relations Trial Law.<sup>131</sup>

Requirements under Section 118 (3<sup>132</sup>) of the Code of Civil Procedure (for Japanese recognition of a foreign decision):

If the Nevada trial is not binding, then Japanese law applies as it is the home law for the plaintiffs. Under Japanese law, the mother-child relationship would not be recognized because the female plaintiff did not give birth. Therefore, the plaintiffs are not the legal parents. For the Americans, the governing law would be the Nevada Revised Statutes, which recognizes the contract. Thus, the Americans are also not the legal parents. In reality, these children would have no legal parents if the Nevada trial isn't recognized. Under Section 118 Clause 3 of the Code of Civil Procedure, the "contents of the judgment shall not be contrary to public order or good morality in Japan" means that the recognition of a foreign court's judgment will be contingent on its ability to be recognized and incorporated into the Japanese legal order without causing damage to Japan's public order or good morality. Thus, it needs to be determined whether recognizing the Nevada trial would be contrary to the public order and good morality of Japan.<sup>133</sup> It should be considered given the specific

130. Minji soshōhō [*Minsohō*] [C. Civ. Pro.] 1996, art. 118, para. 1–4 (Japan).

131. The referenced section is the elimination of presumed heirs.

132. 判決の内容及び訴訟手続が日本における公の秩序又は善良の風俗に反しないこと —the judgment and court proceeding are not contrary to Japanese public order or good morality. Minji soshōhō [*Minsohō*] [C. Civ. Pro.] 1996, art. 118, para. 3 (Japan).

133. Section 118 of the Civil Procedure Act lean heavily on Article 90 of the Civil Code.

circumstances and situation. The following are considerations for the circumstances of this case:

The Japanese Civil Code and other relevant laws were established when only natural births were possible. However, even if a parent-child relationship isn't established by the Civil Code with ART births, it is still possible to accept the relationship as determined by a foreign court if it's done with strict requirements for respecting that ruling in Japan.

These children were born from the plaintiffs' gametes and thus plaintiffs and the children are genetically related.

The plaintiffs only had a surrogate because the female plaintiff could not have children naturally as a result of cancer. This was their only option for genetic children.

The American was an altruistic surrogate. There were no unjustifiable factors in the motive or purpose of her offer to carry the children, and the fee for the pregnancy was the minimum related medical and living expenses, as was permitted by the Nevada Revised Statutes. Therefore, this was not a payment for the children themselves. The contract itself placed the highest priority to the American's life and safety. The American was also given the right to abort. There were no coercive elements and nothing that violated the American's dignity.

The Americans do not want a parent-child relationship, and the plaintiffs strongly wish for one. The plaintiffs have been raising the children as their own since birth. In this case, the plaintiffs being recognized as legal parents would likely be the most beneficial, rather than harmful, to the children's welfare.

Although the Health Sciences Council's Committee on Assistive Reproductive Medicine has concluded that surrogacy should generally be prohibited, the situation in this case does not violate any of the Committee's surrogacy guidelines. This case of surrogacy places a priority on the children's welfare, does not treat people merely as a means for reproduction, considers safety, is not eugenic, is not commercial, and preserves the surrogate's dignity. There's no actual ban in Japan for surrogacy at this point, and as such one cannot say that there are social norms banning surrogacy at this time.

During discussions in the Legal Council on Assistive Reproductive Medicine Parent-Child Relations Law Subcommittee, it was agreed that should a foreign court make a parenthood decision solely based on the existence of a contract, that would be contrary to public order and good morals in Japan. However, in this case, the decision was not based solely on the surrogate birth agreement. Here, it also considers the genetic relationship, the intent of the parties, and the lack of legal dispute. Thus, the trial is not contrary to public order and good morality.

Under the Japanese Civil Code, the plaintiffs cannot be the legal parents of the children, thus creating undeniable incompatibility within Japanese law by recognizing a foreign court decision which determines the plaintiffs as the legal parents. Many lower court cases and family

registration practical business dealings allow for a legal relationship to be made without meeting Japanese legal requirements (refer to Notice of Civil Affairs Bureau Director-General of the Ministry of Justice, No. 280, January 14, 1976). Should a foreign judgment meet the requirements for Section 118 of the Code of Civil Procedure, the judgment would be binding. This encourages international legal stability. There are no extenuating circumstances here that should encourage an exception.

Therefore, the Nevada trial should be recognized and binding through the application of Section 118 of the Code of Civil Procedure. Because under the Nevada trial's judgment the plaintiffs are the legal parents, the birth notification in Japan should be accepted.

The Supreme Court's opinion is as follows:

The Tokyo High Court Opinion cannot be supported. The reasons are thus:

For a foreign court's judgment to be binding in Japan under Section 118 of the Code of Civil Procedure, the judgment must not be against good morals and public order within Japan. A foreign court with different procedures from Japan does not get immediately disqualified. However, if the judgment is found to be incompatible with the basic principles of Japanese law, it should be considered contrary to public order [Saikō Saibansho [Sup. Ct.] Jul. 11, 1999, Hei 5 (o) no. 1762, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ], 2573 (Japan)]. Familial relationships of this type—parents to children—are so basic and fundamental that they become a public as well as private concern. It significantly impacts child welfare as well. Through this, it relates to fundamental principles for social status in Japan. Due to its importance, the criteria to create the parent-child relationship must be clear, and those criteria must be uniformly followed. Therefore, as the Civil Code creates Japanese social status law, only parent-child relationships established under the Civil Code are valid. The relationship cannot be created other ways. A foreign court decision contrary to Japanese law in creating a parent-child relationship is contrary to the basic principles of Japanese law and is thus inconsistent with the public order of Section 118 Clause 3 of the Code of Civil Procedure. This is the case even if there is room for exceptions. There needs to be legislation made to clarify this.

The Civil Code does not specify how the mother-child relationship is created. However, it is interpreted to be established through the reality of birth because the Civil Code was created with the assumption that the birth mother is the genetic mother to the child (see Section 772 (1) of the Civil Code).<sup>134</sup> In a similar situation, the Supreme Court found the mother-child relationship between a woman and an illegitimate child through the objective facts related to birth and pregnancy [Saikō Saibansho [Sup. Ct.] Apr. 27, 1962, Shōwa 35 (o) no. 1189, 16 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ], 1247 (Japan)]. Thus, the current Civil Code is based on a genetic mother-child relationship and was enacted when the women who

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134. MINPŌ [MINPŌ] [Civ. C.] art. 772, para. 1 (Japan).

conceived and gave birth were genetically related to the child born. This is also understood to be good for the child's welfare by making an early, clear decision on the mother-child relationship. However, with the advent of ART, the woman bearing the child is not necessarily genetically related (surrogates, donated gametes). Thus, the question becomes: does the Civil Code mean that the mother-child relationship is solely created by birth, even when there is no genetic relationship? On this front, though, there are no other provisions in the Code suggesting anyone other than the deliverer should be the mother. This is in part because this wasn't conceived to be a possibility at the time of Civil Code enactment. However, due to the fundamental nature of the relationship, a clear decision is needed, and as such the current interpretation of the Civil Code is that the deliverer of the child is the mother. A mother-child relationship cannot be formed with another woman, even if she is genetically related to the child.

The reality is that surrogacy is happening. This creates a situation that was unanticipated within the Civil Code, causing problems that need clear solutions. The medical and legal aspects to the parent-child relationship need to be considered, recognizing that people have a genuine desire for children and that there are social and ethical concerns over another woman giving birth. Because of all of these factors, the legislature should take prompt action and create clear legislation on the topic.

Based on the criteria we have established, the Nevada trial's format did not recognize the parent-child relationship in a way consistent with the Civil Code. Therefore, it is incompatible with the basic principles of social order in Japan, and under Section 118 Clause 3 of the Code of Civil Procedure is not binding in Japan. Japanese law is the applicable law (Article 28(1) on the Act on General Rules Concerning the Application of Laws),<sup>135</sup> and under Japanese law there is no mother-child relationship between the female plaintiff and the children. There is thus no legitimate parent-child relationship between the plaintiffs and the children.

The Tokyo High Court's decision was in violation of valid laws and regulations, and thus was incorrect. It was reasonable to grant the appeal. The original trial court's decision was valid, the appeal to the Tokyo High Court was invalid. This is a unanimous decision.

There are supplementary opinions from Judges Tsuno Osamu, Yuuki Furuta, and Isao Imai.

Opinion of Judges Tsuno Osamu and Yuuki Furuta:

It is clear here that the plaintiffs have devoted parental affection to these surrogate-born children. However, when interpreting the Civil Code and other relevant laws for the case, it is necessary to consider the problem in the broader scope of all parent-child relationships

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135. Hōno tekiyōni kan'suru tsūsokuhō [Act on General Rules for Application of Laws], Law No. 78 of 1996, art. 28-1 (Japan), [https://elaws.e-gov.go.jp/search/elawsSearch/elaws\\_search/lsg0500/detail?lawId=418AC0000000078](https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=418AC0000000078) [<https://perma.cc/P85X-GTAB>]. The translation for the relevant subsection is "If a child is born in wedlock according to the national law of the husband and wife at the time of birth of the child, then the child is a child born in wedlock."

where a gestational surrogate is utilized. Although the mother-child relationship is among the most fundamental of social relationships, there are currently no legal provisions for the relationship between the child and the genetic (but not gestational) mother.

In countries where surrogate births are allowed, there are ethical and legal difficulties that arise, such as the gestational surrogate developing a connection with the child and refusing to hand the child to the intended parents,<sup>136</sup> or when the intended parents refuse to accept the child.<sup>137</sup> Additionally, if surrogacy is only sometimes legal, then there must be clear standards defining what makes the surrogacy contract binding versus invalid. If this is not the case, it damages the welfare of the child, the surrogate mother, and the public interest in a clear parent-child relationship. If the validity of the parent-child relationship rests on whether the contract is binding, the parent-child relationship is destabilized. Currently, some children born from surrogacy will be recognized as legitimate children of their intended parents, but others will not, and this must be considered.

It's completely understandable why couples choose to use surrogacy. However, it is difficult to shift the definition of mother to the genetic over the gestational mother. These problems will continue to arise as ART develops further, and as such we strongly urge the legislature to take action after examining the various problems the court has outlined above.

Surrogacy can be considered comparatively. In countries where surrogacy is legal, including the United Kingdom and parts of the United States, there are two general systems: one where the parenthood is determined post-birth, and one where it is determined pre-birth (like here), through a legal proceeding. The requirements for valid surrogate contracts also vary from place to place. On the other hand, places like Germany, France, and some of the other U.S. states generally prohibit surrogacy. Children still born through surrogacy have the gestational carrier legally recognized as the mother. There is sometimes adoption available to change parentage in these cases. Surrogacy legislation varies widely between countries due to differing circumstances. This demonstrates that legislation is strongly favored because there are many potential routes available. In this situation, there is still room for special adoption, considering the facts that the American wants no parental relationship, the plaintiffs' intention to be parents, and a clear foreign judgment recognizing the plaintiffs as the legal parents.

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136. See Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html> [<https://perma.cc/XKN7-PJFW>]. The author discusses a case in the United States in which the surrogate kidnapped the child.

137. See Michael Safi, *Baby Gammy's Twin Can Stay With Australian Couple Despite Father's Child Sex Offences*, GUARDIAN (Apr. 13, 2016, 11:06 PM), <https://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders> [<https://perma.cc/2UKU-HWWS>]. The author describes a case in which the intended parents left one child (of twins) born to a surrogate in Thailand with the surrogate.

### Opinion of Judge Isao Imai:

I agree with the court's opinion that a legitimate parent-child relationship will not be formed between the plaintiffs and the children. I want to express my thoughts on how to solve these problems that were not envisioned when the Civil Code was enacted. The central question within this case is whether a foreign trial that recognized a legal parent-child relationship should be binding in Japan. However, as was stated above, a foreign trial contrary to the Civil Code on such fundamental principles is against the public order.

Medical advancement, like that within ART, has allowed for couples and single people to have children when they otherwise could not, creating a host of unanticipated legal problems. One example is the question of the father-child relationship between sperm donors and their offspring when the sperm donation was post-mortem [Saikō Saibansho [Sup. Ct.] Aug. 4, 2006, Hei 16 (ju) no. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ], 2563 (Japan)] and another is surrogacy. The Civil Code does not answer these questions as they were not envisioned during enactment. This does not mean the Civil Code can be dismissed outright. It is the court's responsibility to determine how to interpret the Civil Code for these situations.

Given the fundamental nature of the question here—the parent-child relationship and the success or failure of the family—it is crucial to not only consider the rights and interests of the involved parties, but also for how legal recognition of intended parent/gestational surrogate-born child relationships would impact Japan's social order. The plaintiffs desired genetic children, and this was their only option. Their contract with the surrogate did not violate her dignity, and A wished no relationship with the children that the plaintiffs so desperately want. Given the unique circumstances in this case, it could be best for the child's welfare and for the parties' interests to recognize the parent-child relationship with the plaintiffs. Unfortunately, it's not that simple. The repercussions of this decision must be considered. The medical and legal communities are still split on surrogacy and how it must be defined and regulated to be ethical, or even if it should be allowed at all. The legal relationships must be determined between the child, surrogate, egg donor, etc.

Medically and legally-informed legislation is crucially needed here. Medically, it must be determined whether surrogacy should be allowed at all, and, if so, under what conditions. Legally, it must be determined how the parent-child relationship is established, how to regulate the relationships between the involved parties, and how to protect right, interests, and child welfare. While finding the proper solution will be difficult, maintaining the status quo would be detrimental to the welfare of surrogate-born children.

Ideally, the legislature will make legislation in line with social consensus, allowing people to benefit from medical advancement. In the interim, there is sufficient room to allow special adoption in this case, and thus my opinion is in line here with the supplementary opinions of Judges Osamu Tsuno and Yuuki Furuta.