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## MODELS OF SURROGACY REGARDING ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE INTENDED PARENTS

## MODELE MACIERZYŃSTWA ZASTĘPCZEGO W ODNIESIENIU DO NABYWANIA PRAWNEGO RODZICIELSTWA ZAMIERZONYCH RODZICÓW

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### Abstract:

Today, surrogacy is becoming a more common method of procreation. Comparing to the adoption, surrogacy enables intended parents to become parents of the child genetically related to them. The existence of a genetic link between the child and the intended parents is one of the reasons surrogacy is becoming more popular than adoption. However, there are no rules at the international level governing surrogacy in general, or international surrogacy. Each country is free to set its own rules regarding surrogacy. Some countries ban surrogacy, others have explicit legislation allowing it. This legislation varies from state to state and it is creating different models of surrogacy. In the article, the Author has focused on the research of different models of surrogacy regarding the establishment of legal parenthood of the intended parents. Those models can be described as an ex-ante model, ex-post model, and hybrid model. Distinguishing criterion for our differentiation is whether the court's or other state authority's decision on legal parenthood of the intended parents is delivered before the conception, eventually the birth of the child, or after its birth. Paper evaluates how each model works and what are its cons and pros.

**Keywords:** surrogacy, legal parenthood, models of surrogacy, ex ante, ex post, hybrid

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### **Streszczenie:**

Macierzyństwo zastępcze (surogacja) staje się coraz bardziej powszechną metodą prokreacji. W porównaniu do adopcji, macierzyństwo zastępcze umożliwia rodzicom zamierzonym zostać rodzicami dziecka genetycznie z nimi powiązanego. Istnienie powiązania genetycznego między dzieckiem a zamierzonymi rodzicami jest jednym z powodów, dla których surogacja staje się bardziej popularna niż adopcja. Jednak na poziomie międzynarodowym nie ma żadnych zasad dotyczących macierzyństwa zastępczego. Każdy kraj może dowolnie ustalać własne zasady dotyczące macierzyństwa zastępczego. Niektóre kraje zakazują stosowania macierzyństwa zastępczego, inne mają na to wyraźne przepisy prawne. Ustawodawstwo to różni się w zależności od kraju i tworzy różne modele macierzyństwa zastępczego. W artykule Autorka skupiła się na badaniu różnych modeli macierzyństwa zastępczego w odniesieniu do ustanowienia prawnego rodzicielstwa zamierzonych rodziców. Modele te można opisać jako model *ex-ante*, model *ex-post* i model hybrydowy. Kryterium różnicującym jest to, czy decyzja sądu lub innego organu państwowego w sprawie legalnego rodzicielstwa zamierzonych rodziców zostanie wydana przed poczęciem, po poczęciu czy po jego urodzeniu. W artykule oceniono, jak działa każdy model oraz jakie są jego wady i zalety.

**Słowa kluczowe:** macierzyństwo zastępcze, rodzicielstwo prawne, modele macierzyństwa zastępczego, *ex ante*, *ex post*, hybryda

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### **Statement of the problem in general outlook and its connection with important scientific and practical task**

Who the child's parents are? A simple question that does not have a simple answer nowadays. Advances in the field of reproductive medicine and transformation of society from traditional to modern challenge usual concepts of parenthood. Methods of assisted reproduction have allowed, among other things, an increase of surrogate motherhood to such an extent that law must lay down clear rules for determining who shall be, in the cases of surrogate motherhood, considered the child's legal parents. Establishing legal parenthood is an issue of particular importance for determining a child's legal status. Legal parenthood is also the basis for further filiation. In most countries, the establishment of legal motherhood is still ruled by the Roman-law premise *mater semper certa est* meaning that only the woman who carried and gave birth to the child

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is his legal mother regardless of existence or non-existence of genetic relationship between the mother and the child she gave birth to. As a result, the surrogate is usually considered to be the legal mother of the child born to her as a result of the surrogacy arrangement regardless of the genetic link between the surrogate and the child. Fatherhood is usually established by paternity presumptions. Since the surrogate's intention is not to get or to keep the legal motherhood to the child, there must be a legal process enabling the transfer of legal parenthood to the intended parent who, on the other hand, enter into a surrogacy agreement to become legal parents of the child born to the surrogate. Transfer of legal parenthood may be done in many different ways and it is controlled by the court or other state authority. The reason for such a control is to ensure all the legal requirements for surrogacy are met and there is no abuse of the surrogate, the child, or even the intended parents.

### **Analysis of latest research where the solution of the problem was initiated.**

Traditionally, the focus in legal research of surrogacy has been placed on many challenging areas as exploitation (Wertheimer A., 1992; Wilkinson S., 2003; Allen A., 2018), payments (Millbank J., 2014; Peet J.L., 2016), reproductive tourism (Deonandan R., 2015; Walmsley H., et al., 2017), the best interest of the child (Bradley K.W., 2018; Lind J., 2019), international surrogacy agreements (Pryce C., 2016; Trimmings K., Beaumont P., 2011). However, research of different models of surrogacy regarding the establishment of legal parenthood of the intended parents has been, to the best of our knowledge, subject to a minority discussion. As a result of such findings, we have decided to focus on surrogacy from a different point of view and by a doctrinal study using comparative research try to differentiate surrogacy models according to the moment of establishment of legal parenthood of intended parents.

Academic literature focusing specifically on the models of surrogacy as they are set in the article is not available at the moment. We have analyzed papers published on models of surrogacy in general in different countries. Surrogacy legislation and its practical issues in Greece are analyzed by Zervogianni E. who is a proponent of surrogacy as she believes it is better to allow surrogacy and to have clear legislative framework than to deal with the consequences of forbidden or international surrogacy ad hoc (Zervogianni E., 2019, p. 160). Sources on surrogacy in Greece in English are however limited, so we had to work mostly with the legislation on surrogacy translated to English. We have concluded that legislation is quite clear on the issues on legal parenthood to the child born to a surrogate. The Israeli official legislation on surrogacy is also not

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available in English. Since legislation is the primary source of the analyses, we have worked with translated legislation provided mostly by Weisberg K. and analyzed in papers by Samama E., Zafran R., Schuz R., And Twine F.W. All the authors focus on surrogacy issues from a long-term perspective. Weisberg K. describes the Israeli approach towards surrogacy as a unique one since it constitutes a complex regulatory scheme (Weisberg K., 2005, p.4). However, it has to be noted that her book on surrogacy in Israel was published in 2005 and since then a lot of countries adopted laws on surrogacy that are not so strict as Israeli's. Weisberg's book is though a very helpful source for academic analyses. Samama E. (2015) explains why is surrogacy well accepted by Israeli society and also provides results of her research on the surrogacy process in Israel based on the applications for the approval of the surrogacy contract. Although her study was published in 2015, data she has analyzed go back to the years 1996 to 2009. The actual issue discussed in Israel is whether surrogacy should be also available to single men and gay couples, as Israel's High Court rules that prohibition of surrogacy for single men and gay couples violates the constitutional rights to equality and parenthood. We suppose such a ruling will not affect the existing model of surrogacy in Israel regarding the inference of the state into the surrogacy process. It can be expected that subjects to surrogacy agreements will be defined broader. As to the legal motherhood to the child born to a surrogate, we have found out there are two different approaches to the question presented by Schuz, R. and Blecher-Prigad A. (2012, p. 181) on the one hand, and Laufer-Ukeles (2002, p. 97) on the other. Critical analyses on surrogacy in the United Kingdom are provided by Jackson E. and Fenton-Glynn C. Concerning California we have worked with the papers written by White, P.M. and Reagan, C., Purvis. Reagan examines different models of legal parenthood under the California Family Code, but in general, not directly in surrogacy cases. He explains how parental rights are established in California. While, on the other hand, provides an overview of the medical issues regarding surrogacy, infertility treatment, and multiple embryo transfers. Caballero and Purvis also explain specifics of parenthood by the intent model in cases of surrogacy in California.

### **Aims of paper. Methods.**

The paper aims to analyze the process of surrogacy motherhood and the establishment of the legal parenthood of the intended parents in the legislation of different countries allowing surrogacy. The main method used is the doctrinal research based on comparison focused on the inference of the state authorities in the process of establishing legal

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parenthood of the intended parents to the child to be born to the surrogate as the result of the surrogacy contract. By defining the main differences, we have set up three different models of surrogacy. A critical analysis is used to set the cons and pros of each model.

**Exposition of main material of research with complete substantiation of obtained scientific results. Discussion.**


### **Introduction to the Models of Surrogacy and Establishment of the Legal Parenthood**

Surrogacy is recently viewed as the method of infertility treatment (Brinsden P., et al., 2000; Goli M., et al., 2019), as it enables individuals who are not able to conceive or carry the child naturally to have a child genetically related to them. We suggest that instead of using the term treatment other terms should be used. Surrogacy in our view is used to deal with childlessness but does not treat infertility. Term treatment suggests that the infertility is somehow cured, but that is not correct when it comes to surrogacy. Surrogacy enables women and couples with medical conditions preventing them to conceive or to carry on pregnancy to have a child of their own by the use of a third person, a surrogate. Surrogacy such raises many legal, ethical, social, and psychological concerns that lead to surrogacy prohibition in many countries. But as Zervogianni (2018, p.160) points out it is also a reality and, as long as there are persons who cannot have children differently, this will not change. However, when it comes to legal parenthood, surrogacy enables the fragmentation of motherhood to different women, especially in cases of gestational surrogacy. Surrogate is the gestational mother of the child, the intended mother may or may not be his genetic mother. If the child is raised by a woman other than the two mentioned, she will be the child's social mother. To avoid conflicts mainly between the surrogate and the intended mother, countries which allow surrogacy to take different approaches in determining legal motherhood in surrogacy cases.

From the legal point of view, the main purpose of surrogacy is to establish legal parenthood of the intended parents otherwise than by adoption. The establishment of parenthood may happen by different means and procedures. The distinguishing criterion for such a differentiation is whether the court's or other state authority's decision on legal parenthood of the intended parents is delivered before the conception, eventually the birth of the child, or after its birth. If the decision is delivered before the child's birth, surrogacy may be referred to as ex-ante, if it is after the birth of the child

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it is ex-post surrogacy. Some countries have decided to combine both models and there is the involvement of the state before the child's conception or birth, as well as after his birth. Such involvement forms a hybrid model of surrogacy. We have decided to make a comparison of different models of surrogacy to find out what are difficulties connected to these models and what are the consequences of specific legal regulation in practice.

### **Ex-ante model of surrogacy**

The ex-ante model of surrogacy can be defined as a model that allows the establishment of legal parenthood of the intended parents before the child is born. By the comparative research we have concluded that there are two types of ex-ante models of surrogacy:

- A) first, the surrogacy contract is valid, legally binding and enforceable, without the prior state review or approval, but a court order issued before child's birth is also necessary to establish legal parenthood of the intended parents,
- B) second, the surrogacy contract is valid, legally binding, and enforceable only with the state approval granted before the surrogate fertilization.

Common features of both models are that if the state approval is granted or the pre-birth order issued, surrogate and her husband or partner do not have any parental rights and duties concerning the child and intended parents are considered legal parents from the child's birth and listed in the birth registry as the child's parents after the child are born. All the legal steps necessary to the establishment of the intended parent's parenthood are thus made before the child's birth.

### **The first model of ex-ante surrogacy works in California, USA.**

California is well known as particularly friendly towards surrogacy in general (Berk H.L., 2015:146; Beir Z.M., 2018:296). It allows commercial surrogacy, international surrogacy, same-sex surrogacy, social surrogacy. California does not strictly require the existence of a genetic link between the intended parent/s and the baby born to the surrogate, as other jurisdictions usually do. No statutory provision or the case law is requiring the existence of the genetic link between the intended parents and the child-to-be-born to the surrogate-based on the surrogacy agreement. Intend parents and their child born through surrogacy may be complete genetic "strangers". Both, the case-law and statutory law, highlight intent as the key factor in determining parenthood where multiple parties have conflicting claims of maternity or paternity (Caballero S.M., 2016, p. 296). It should be noted, that this applies also in cases where no party claims responsibility. Some commentators describe it as the model of "parenthood by intent"

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(Dorfman D., 2016, p. 408; Wald D.H., 2007, p. 383). Purvis (2012, p. 219) also states: "For example, in *Johnson v. Calvert*, the California Supreme Court looked to the intent of parties involved in a surrogacy agreement. The court only looked to intent, however, after concluding that California statutes determining maternity failed to answer which woman-the the biological mother who had donated an egg, or the gestational surrogate who had given birth-was the legal mother of the child. After determining that both women had an equal claim under state law, the court concluded that "she who intended to procreate the child-that is, she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law."

In our opinion, parenthood by intent brings many difficulties and it is not in the child's best interest. The reason for such a statement is that it may cause uncertainty of the child's legal statutes in cases there is a dispute over parenthood. Proponents of the intentional parenthood suggest it is in line with the procreation freedom including also right to have or not to have children. This may be true, but we need to keep in mind that cases of surrogacy are slightly different from other methods of assisted reproduction. There is a third person involved whose rights and human dignity must be preserved.


Surrogacy in California is governed by the California Family Code (hereinafter referred to as "the CFC"), specifically by the Uniform Parentage Act (hereinafter referred to as "the UPA"). The Uniform Parentage Act was enacted in 1973 by the Uniform Law Commission to protect the rights of "non-marital" or "illegitimate" children by separating the parent-child relationship from the parents' marriage (Reagan C., 2019, p. 2167). Before the UPA, a child born out of wedlock did not have the right to support and inheritance from their biological father because only the mother was the legal parent (Jacobs M.B., 2002, p. 370). The Uniform Parentage Act was incorporated into the California Family Code as its sections 7600 – 7730 in 1992 and it has been subject to several amendments since 1973.

Both forms, gestational and traditional surrogacy, are allowed by the CFC, but the pre-birth order is granted only in cases of gestational surrogacy.

While traditional surrogacy requires surrogate to be the genetic mother of the child as her own ova are used to conceive the child, gestational surrogacy is defined as an arrangement in which an embryo from the intended parents or a donated oocyte or sperm is transferred to the surrogate uterus (Patel N.H., et al., 2018, p. 212). Gestational surrogacy is preferred since it is viewed as being less ethically troublesome, more legally acceptable, and considered to pose fewer psychological difficulties for the surrogate

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mother compared with traditional (genetic) surrogacy (White P.M., 2017, p. 433). We agree with this opinion as a surrogate in cases of traditional surrogacy may feel a strong bond with the child she carries. Such a form of surrogacy can also be problematic from a legal point of view, especially in cases where maternity, even in the case of surrogacy, is based on the *mater semper certa est* principle and the surrogacy agreement is unenforceable. In cases of traditional surrogacy, it is up to the court discretion whether and when to grant it. Under section 7962 of the UPA, only gestational surrogacy agreements are enforceable. Nevertheless, traditional surrogacy is not forbidden in California.

But in cases of traditional surrogacy, the court must put heavy consideration on the fact that surrogate is not only the birth mother of the child but also his genetic mother, so she might have difficulties to give up the child.

The UPA does not define surrogacy agreement but uses a wider term - assisted reproduction agreement. Section 7606 (2) of the UPA defines assisted reproduction agreement as a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract.

Surrogate is defined as a woman who bears and carries a child for another through medically assisted reproduction and pursuant to a written assisted reproduction agreement. The surrogacy agreements for the gestational carrier are presumed valid and enforceable, provided they have been executed following the provisions of the UPA.

The executed agreement means that parties to the agreement have agreed to the terms and conditions of the proposed contract and signed by the parties. As a result, the agreement has become effective. Such a contract may be then rescinded or revoked only by the court order. Only if all the conditions are met, the chosen assisted reproduction procedure may be performed.

In our opinion, legislation in California clearly specifies the definition of the surrogacy contract and its parties, as well as it protects all the parties involved in the surrogacy. The fact that the agreement is effective only if executed by following the provisions of the UPA is of particular importance, as there is always a risk of surrogate's exploitation. Such a risk is eliminated by the thorough control of the agreement provisions by the court since there is a need for legal counseling for all the parties involved.

Under section 7962 (f) (2) of the UPA, the court shall issue a pre-birth order establishing a parent-child relationship of the intended parents and the child-to-born to the surrogate upon the petition of any party to the surrogate agreement.

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The court examines whether the agreement was executed in compliance with the provisions of the UPA and if so it shall issue the order forthwith and without further hearing or evidence unless the court or a party to surrogacy agreement has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed following the UPA. The order may be also issued after the child is born. Section 7633 of the UPA allows bringing an action for the determination of parent and child relationship to the court before the child is born. The court may issue an order or judgment determining the parent-child relationship before the birth of the child, but its enforcement shall stay until the birth of the child. It also can be argued, that the fact that by issuing a pre-birth order intended parents are considered to be the child's legal parents from its birth also ease the international process of surrogacy. Intended parents may return to their home country soon after the birth of the child and register him in the home country. By registration, the child's legal protection is granted. We believe that such a process is the best interest of the child born via surrogacy. On the other hand, such an approach may lead to child trafficking. Because of this, it is again the court's responsibility to examine all the documents and incentives of the parties before the ruling on the pre-birth order. Child trafficking is a very common argument of surrogacy opponents, but if the rules are set, there is a minimum risk of such a behavior.

### **The second ex-ante model of surrogacy works in Greece.**

Surrogacy has become legal in Greece since 2002 after the amendment of the Greek Civil Code (Presidential Decree no. 456/1984) by Act no. 3089/2002 on Medically Assisted Human Reproduction. Greece such became the first EU country to introduce a comprehensive regulatory framework on surrogacy (Zervogianni E., 2018).

Nowadays, the main legal regulation can be found in several legal acts: The Greek Civil Code, Act no. 3089/2002 on Medically Assisted Human Reproduction and Act no. 3305/2005 on Enforcement of Medically Assisted Reproduction. Altruistic, gestational, and based on medical reasons surrogacy is allowed in Greece.

The surrogacy contract signed by the surrogate and the intended parents is valid and enforceable presuming it has been authorized by the competent court prior to the transfer of the reproductive material to the surrogate. Article 1458 of the Greek Civil Code rules: "The transfer to a woman's body of fertilized ova other than her own and her ensuing pregnancy is permitted by court authorization granted before the transfer, provided there is a written and free of financial benefits agreement between the parties wishing to have a child and the surrogate mother, as well as her spouse if the latter

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happens to be married. Such court authorization is granted following a petition by the woman wishing to have a child, if it is proved that she is medically incapable of carrying out pregnancy and that the surrogate mother, in view of her overall health condition, is capable of doing so.” During the authorization procedure, the court examines if the surrogacy contract is not contrary to the provisions of legal acts governing surrogacy. Once the contract is authorized and the child is born, intended parents are considered to be the child’s legal parents from his birth and further approval or authorization is not needed (article 1464 of the Greek Civil Code).

The judicial authorization of the surrogacy contract such creates a presumption of motherhood on behalf of the intended mother after the birth of the child.

However, this presumption is rebuttable within the six months after the birth of the child if surrogate proves that the child is genetically related to her.

If we compare both models of surrogacy, we come to the conclusion that both countries have decided to take a similar approach. One may ask whose rights and interests are protected the most by such a model of surrogacy. Regarding the features of both models we have described above, we may come to the conclusion that the interests of the intended parents are protected the most. We support this conclusion by the fact that the surrogate has very limited options to withdraw from the surrogacy contract once it is approved by the court or other state authority. We also believe that such a procedure is intended to protect the interests of the child since once he is born his legal status is not questionable. Of course, each and single case must be considered individually.

### **Ex-ante model of surrogacy has some cons and pros.**

A positive thing is that having intended parents listed as legal parents upon the birth of the child helps to avoid the uncertainty of the child’s legal and family status. Intended parents can make all the medical decisions after the child is born.

On the other hand, if the court just examines papers and does not interact with the intended parents of the child, as, in California, it cannot evaluate if the intended parents are suitable to become parents. However, there are opinions that assessing parental eligibility of the intended parents in surrogacy are discriminatory and interfere with their right to private and family life, as subjects who may procreate naturally are not subject to such assessment. Another difficult question comes with the validity and enforceability of the surrogate agreement and the medical decisions regarding child-to-be-born and the surrogate.

It is not unusual that the surrogacy agreements contain abortion or fetus selective reduction clauses or clauses determining the lifestyle of the surrogate during the period

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surrogacy agreement is effective. There are no legal limitations to the content of surrogacy contracts on the matters in questions which raise moral and ethical dilemmas. If the contract is enforceable, the court shall enforce the contract.

### **Ex-post model of surrogacy**

Ex-post model of surrogacy usually does not involve state authorities in the process of surrogacy until the child is born. The surrogacy contract may be valid but is not enforceable. The establishment of maternity is ruled by the Roman-law principle *mater semper certa est*. Surrogate is the legal mother of the child regardless of whether it is traditional or gestational surrogacy. There is no way of establishing the legal parenthood of the intended parents before the child is born. Once the child is born, the transfer of legal parenthood to the intended parents is possible usually by a parental order issued by the court. The court rules on the parental order in a procedure where all the legislative requirements for establishing legal parenthood are considered ex-post after the child is born.

Such a model of surrogacy works in the United Kingdom. The United Kingdom is one of the few European countries explicitly regulating issues of surrogacy since 1985 when the Surrogacy Arrangements Act (hereinafter referred to as “the SAA”) was adopted and its model can be described as ex-post. The UK legislation on surrogacy also includes Human Fertilization and Embryology Act 2008 (hereinafter referred to as “the HFEA”) regulating all the requirements which must be met to grant a parental order.

The UK legislation allows traditional and gestational surrogacy but strictly requires that at least one of the intended parents must be the genetic parent of the child.

Commercial surrogacy is forbidden, only expenses reasonably incurred may be paid by the intended parents. The SAA in its section 1A rules that no surrogacy arrangement is enforceable by or against any of the persons making it.

This means that the intended parents cannot sue the surrogate mother in contract law if she refuses to hand over the child and she cannot sue them if they refuse to take the child after birth or fail to make any of the agreed payments (Jackson E., 2016).

Intended parents may file an application for the parental order after the child is born and the surrogate mother must agree freely, unconditionally, and with a full understanding of what is involved in the making of the order. Her consent is ineffective if given less than six weeks after the child's birth. If the surrogate is married or a party to

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a civil partnership and her spouse or partner has provided consent to the artificial insemination, her spouse or the partner is considered the child's other legal parent and his/her consent to the parental order is also required.

The agreement of a person who cannot be found or is incapable of giving agreement is not required. In any other case, if the consent is not given, the parental order may not be granted. If this is the case, and a child born to the surrogate is living with the intended parents, they do not have any parental responsibility since they are not the child's legal parents. If any serious medical decision is to be made, the surrogate is the person who may grant the consent for the medical intervention, not the intended parents. Such a situation may last for several months since the intended parents have six months period to apply for the order and the procedure itself at the Family Court also takes a few months.

When studying the UK model of surrogacy and comparing it to the Californian model, we have come to conclusion that those two models are different also by the level of protection of the contracting parties. From our perspective, the UK law protects the rights and interests of the surrogate over the rights of the intended parents.

As far as we are concerned, all the legal rules regarding surrogate's status in the process of transferring parenthood to the intended parents are made in favor of the surrogate. We support this /argument with the fact that the surrogacy contract is unenforceable under UK law. The UK law also puts heavy consideration of the best interest of the child born via surrogacy (Fenton-Glynn C., 2015, p. 34-37). Intended parents are the least protected party of the contract. On the other hand, in our understanding under the Californian law protection of the intended parents is higher.

To conclude, the main advantage of the ex-post model of surrogacy is a high degree of legal certainty regarding legal parenthood to the child born to the surrogate. Nevertheless, it seems to be impractical when it comes to the matters of every-day life, as until the parental order is issued, the surrogate is the legal mother of the child with all the rights and duties regarding important decisions on behalf of the child. In particular, this is the case if there is a breakdown of the relationship between the surrogate and the intended parents.

### **Hybrid model of surrogacy**

A hybrid model of surrogacy can be described as the one in which there is a state intervention before the child's conception and after the child's birth since the legal parenthood may be transferred solely by the court order.

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Usually, the authorization of the court or other public authority is required before any surrogacy arrangements between the surrogate and the intended parents or before the transfer of the fertilized ova into the surrogate's body.

This model of surrogacy usually considers surrogacy contract binding and enforceable legal document, but it is required to be authorized by the court or public authority.

A contract becomes effective only if the authorization is provided. By the authorization effective control of all surrogacy arrangements is ensured. Authorization prior to the child's conception can review status as well as incentives of all the parties to the arrangement, which may include psychological evaluation of the surrogate as well as of intended parents. This model seems to be complicated for the parties involved, as a lot of paperwork and examination takes place prior to the child's conception as well as after his birth. After the child is born, a court decision is required for intended parents to become legal parents of the child born to the surrogate.

A hybrid model of surrogacy works in Israel. Surrogacy in Israel is strictly regulated, but on the other hand, Israel has a unique approach to surrogacy, as it is not only government-supervised but also government-sponsored (Weisberg K., 2005, p. 4).

Israeli model can be described as a hybrid model since not only the court is in final control of transfer of legal parenthood to the intended parents, but also the state authority who grants approval to conclude surrogacy agreement at the first place. Surrogacy in Israel is governed by the Surrogate Motherhood Agreements (Approval of the Agreement and Status of the Child) Act of 1996 (hereinafter referred to as "the Surrogate Act"). The law is meant for women in the fertile age who are unable to be impregnated and to carry a pregnancy or if a pregnancy might significantly risk their health.

The Surrogate Act consists of two parts – first part governs surrogate agreement and its approval by the Committee for Approval of Surrogacy Agreements (hereinafter referred to as "the Approval Committee") which must be granted before the surrogate's fertilization and must be signed by all the parties in the presence of the board, and the second part governs the statute of the child born to the surrogate and transfer of legal parenthood to intended parents which may be established only by the court order.

The type of surrogacy allowed under Israeli law is only full genetic surrogacy, i.e., the ovum belongs to the intended mother or a donor, and it is fertilized by her husband's sperm via in vitro fertilization (IVF) (Samama E., 2015). Legally, surrogacy in Israel combined with sperm donation is prohibited (Samama E., 2015; Zafran R., 2008).

The Surrogacy Act also requires that the ovum does not belong to the birth mother, i.e. traditional surrogacy is forbidden in Israel. But as of October 27th, 2018, when

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Amendment number 2 to the Surrogate Act came into force, also single woman may be involved in surrogacy as the only intended parent. If this is the case, she must be the genetic mother of the child. As a result, sperm donation should be allowed naturally. Moreover, the Israeli law also governs specific demands on a surrogate: she must be over 18, resident of Israel, not be married, she must have already given birth to a child and must not be related to either of the intended parents. There is an exception to the rule that surrogates may not be married in section 2 para. 3 (a) of the Surrogacy Act: “surrogate may be married, if it has been proven to the board’s satisfaction that the intended parents were not unable, with reasonable effort, to enter into a surrogacy agreement with a surrogate who is not married” (Shalev C., 1997, p. 61).

Surrogate can initiate the surrogacy process provided she had gone through no more than four births and can go through three surrogacy procedures, however no more than two births. Surrogate and intended parents must be of the same religion. All the parties to the surrogacy agreements must go through checks of their suitability, physical, mental, and social.

Unlike in the United Kingdom, where no state intervention takes part before the child is born, in Israel, the surrogacy agreement must be approved before its signature by the parties and before the surrogate’s fertilization. Approval of the special committee is necessary for the validation of the agreement and approved agreement is enforceable. Section 5 (a) (1,2) of the Surrogate Act states that such a procedure shall ensure that not only the agreement was entered into consensually and of free will, but that the best interest of the future child will be considered thoroughly. The committee has also the discretion to withhold its approval on the grounds of the health of the surrogate, the welfare of the child-to-be-born, or the violation of their rights. The surrogacy agreements authorization committee is authorized to redeliberate the authorization it has granted provided an essential alteration in the facts, circumstances, or conditions used as a base for its decision has occurred and as long as the fertilized egg has not yet been transplanted in the surrogate. The surrogacy agreement may include provision for monthly payments to the carrying mother to cover the actual expenses entailed in performing the agreement, including loss of income, temporary loss of earning capacity, and any other reasonable compensation (Shalev C., 2011).

Once the approval is granted, parties shall sign the agreement in the Approval Committee’s presence. If the in-vitro fertilization of the surrogate is successful and child is born, intended parents or the birth mother shall inform the social welfare officer immediately after the child’s birth and no later than 24 hours after his or her birth (Section

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5 (a) (2) of the Surrogate Act). Surrogate is obliged to deliver the child to the intended parents as soon as possible after the birth in the presence of a social welfare officer.

Under the Israeli Surrogacy Act, there is almost no legal uncertainty regard status of the child born to the surrogate. The Surrogate Agreements Act does not give any legal status to the birth mother upon the child's birth (Twine F.W., 2015, p. 52).

The Surrogate Agreements Act in Section 10 (b) provides the social welfare office is the child's sole legal guardian from the time of its birth until a parental order is made or until another order is made to determine the status of the child.

Another order is an order to determine child's status under section 14 of the Surrogate Act - if the surrogate asks to withdraw from a surrogate motherhood agreement and to keep custody of the child, the court may not issue parental order if based on the report if the social welfare officer, there has been a change of circumstances which justifies surrogate's withdrawal or her consent, and that it is not likely to have an adverse effect on the child's welfare. If this is the case, the court shall issue an order determining surrogate child's legal mother and custodian and could make provisions on the child's status and his relationship to the intended parents or one of them. Zafran (2008, p. 14) suggests that one possible but not exclusive interpretation of the statute would suggest that its underlying premise is that the parenthood of all three agents is recognized and that the court's intervention is needed, in contexts of the continued agreement just as in contexts of misgivings, to declare which of the three is to be formally recognized in each situation that may arise. If the surrogate does not apply for the guardianship over the child, or if she does and the court finds it contradictory to the child's welfare, the may make any other provisions on the child's status, as it finds appropriate under the circumstances of the case. However, in practice, there have not been any cases where the surrogate has asked to keep the child. (Schuz R., 2019, p. 178).

As to the physical custody of the child, after birth, the child is in the physical custody of the intended parents who have all the responsibilities and obligations of the parents to its child. Intended parents shall apply for the parental order within the seven days after the child's birth; if they fail do make the application, the social welfare officer shall do so.

When it comes to the legal motherhood, its establishment seems to be slightly difficult under current Israeli law. The law's basic assumption, though nowhere codified, is that legal parenthood is based on "natural" parenthood. When the birth results from a sexual union between a man and a woman known to each other, the man who provides the sperm is the father, and the woman who bears the child is the mother (Zafran R.,

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2008:5). Having this in mind, the surrogate should be considered a child's legal mother upon his or her birth. By the virtue of law – the Surrogacy Act, the surrogate is deprived of the performance of legal rights and duties towards the child since the moment he or she is born. Technically, she is the child's legal mother with parental responsibility, as the motherhood in Israel is governed by the *mater semper certa est* rule (Schuz, R., Blecher-Prigad A., 2012, p. 181), without its specific expression in the legislation, but factually, she may not perform it. This view is contrary to Laufer-Ukeles' (2002, p. 97) who compares adoption and surrogacy in Israeli law and concludes that the Surrogate Agreements Act does not necessitate a transfer of rights from the birth mother to the intended parents, since the Act assumes that these rights never existed, and requires only a parentage order. Reason for our understanding of surrogate is the legal mother upon the birth of the child lies the wording of section 12 (a) of the Surrogate Act which explains the effect of the parental order as follows: When a parental order is made, the intended parents shall be the parents and sole guardians of the child, and it shall be their child for all intents and purposes. On the contrary, if the parental order is not made, the intended parents would not be considered the child's legal parents and would not be entered into the birth register as the child's parents.

## Conclusions

At the very beginning, the basic purpose of surrogacy was to enable parenting for the subjects with medical conditions preventing them to have their own child.

As time passes, surrogacy becomes a more common type of parenthood also for single people, and for same-sex couples where having a child naturally is simply not possible. Surrogacy regimes differ all over the world. Some countries explicitly ban surrogacy, others keep silent and have no legal regulation, and the small number of states have explicit regulation allowing surrogacy.

From our point of view, the main concern of surrogacy is the establishment of the legal parenthood of the intended parents, as it is important for the determination of the child's legal status. Different models of surrogacy deal with the issue in a different way. In the paper, we have examined legislation of five different countries to provide an analysis of the establishment of the legal parenthood of the intended parents.

We have focused on the process of surrogacy starting with the conditions necessary to conclude the surrogacy contract in order to consider the contract valid and enforceable. There is state interference in each model of surrogacy we have examined.

As we have stated at the beginning of the paper, surrogacy raises many ethical and

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moral questions, and if the state decides to allow surrogacy, it has to make sure, rights and interests of all the subjects to the surrogacy will be secured.

We can summarize that if there is no interference of the state in the surrogacy process before the child is born, the surrogacy contract is not enforceable and the legal parenthood can be transferred to the intended parents only after the child is born and the surrogate mother agrees provides her consent. Such a model works in the United Kingdom, where a woman who gave birth to the child is his legal mother.

Such a model aims to the protection of the surrogate if she changes her mind and decides not to give up the child.

On the other hand, ex-ante model of surrogacy enables to transfer of legal parenthood to the intended parents before the child is born. The surrogacy contract is usually enforceable since the state controls the process of surrogacy from the beginning.

Enforceability depends on the approval of the surrogacy contract by the state authority. Intended parents are considered to the child's legal parents from the moment of his birth. Surrogate does not have any parental responsibility towards the child.

The hybrid model of surrogacy seems to be strict since there is a state interference to the surrogacy process before the child is born and after the child is born.

The state controls the surrogacy process strongly, so we may assume that the interests of all the persons involved are protected properly. On the other hand, very strict rules may encourage subjects considering surrogacy to travel abroad to the country with less strict rules and requirements. The proper balance needs to be found.

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