

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL
(QUESTIONNAIRE NO 1)**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS
(QUESTIONNAIRE NO 1)**

drawn up by the Permanent Bureau

*Document préliminaire No 3 d'avril 2013 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

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INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.¹ The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "filiation" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".²

A detailed chronology of the background to this project is available on the website of the Hague Conference < www.hcch.net >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements³ ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 - 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire - Parentage / Surrogacy - [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

¹ Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

³ See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

Identification

Name of State (or territorial unit, where applicable): **United States of America**

Information for follow-up purposes

Name and title of contact person: John Kim, Assistant Legal Adviser

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QUESTIONNAIRE

Note: wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

Part I: Internal law concerning the establishment and contestation of legal parentage

A. Birth registration

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

For births in the United States, U.S. state laws require birth certificates to be completed for all births, and Federal law mandates national collection and publication of certain vital statistics data. (See <http://www.cdc.gov/nchs/births.htm>.) Births are registered by U.S. state and local authorities, pursuant to applicable U.S. state laws. There is not a Federal registrar of births. For births of U.S. citizens abroad, parents would typically register a child under the laws in the jurisdiction of birth. Such births may also be registered in a U.S. state if permitted by the law of that state. Upon request, and after necessary supporting documentation is submitted to the U.S. embassy or consulate in the country of birth, the Department of State may issue a Consular Report of Birth Abroad of a Citizen of the United States. This is not a birth registration, it is a certification of the acquisition of U.S. citizenship at birth by a person born abroad.

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory⁴ and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

Procedures depend upon the laws in each U.S. state.

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative⁵ legal mother:

Please tick all which apply:

- a) Hospital birth record (stating the name of the woman who gave birth to the child)
- b) Sworn statement by the putative legal mother stating that she gave birth to the child
- c) Signed statement by the putative legal mother stating that she gave birth to the child
- d) DNA test to prove a genetic link between the putative legal mother and child
- e) Other: please explain Information required depends upon the laws in each U.S. state. Many of these laws require the types of information identified in items (a) – (d) above.

4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:

⁴ See Art. 7 of the United Nations *Convention on the Rights of the Child* ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

⁵ "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

Please tick all which apply:

- a) Formal acknowledgement⁶ by the putative legal father
- b) Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify
- c) Judicial decision (court order) establishing or confirming legal paternity
- d) Sworn statement by the putative legal father stating that he is the genetic father
- e) Signed statement by the putative legal father stating that he is the genetic father
- f) Signed agreement between the legal mother and putative legal father
- g) DNA test to prove a genetic link between the putative legal father and child
- h) Other: please explain Information required depends upon the laws in each U.S. state. Many of these laws require the types of information identified in items (a) – (g) above.

5. What are the legal consequences in the internal law of your State of registering persons in the State records⁷ as the parents of a child?

- a) Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
- b) Other: please explain The legal consequence of registration is primarily a matter of U.S. state law, although there may be situations in which federal law may apply.

6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?

Legal consequences in many circumstances depend upon U.S. state law, although federal laws also apply in some circumstances.

7. Is it possible to give birth anonymously in your State?

- Yes
- No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:⁸

There are safe haven laws in U.S. states that permit abandonment of a baby within a certain time period after birth and under certain conditions or in certain locations. Whether an abandoning parent may retain anonymity, and what rules apply, is a matter of U.S. state law. In some U.S. states, it is possible for couples using a surrogate mother to obtain a pre-birth order that directs the hospital or office of vital

⁶ In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11 et seq.** below.

⁷ It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

⁸ In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the *extract* from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (e.g., if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid.*

records to list the intending/legal parents on the birth certificate as opposed to the surrogate mother who delivers the child.

B. Establishment of legal parentage

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (*i.e.*, with no need for the woman to take any steps to establish her legal maternity)?
- a) The woman who gives birth to the child
 - b) The genetic mother (*i.e.*, the woman whose gamete (egg) created the child)
 - c) There is no legal mother *by operation of law*: please explain
 - d) Other: please explain The establishment of legal parentage is a question of U.S. state law. Such law may vary with respect to who is the legal mother by operation of law.
9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (*i.e.*, with no need for the man to take any steps to establish his legal paternity)?
- a) The husband of the woman who gave birth is *presumed* to be the legal father
 - b) The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (*e.g.*, the couple must be cohabiting, etc.)
 - c) The genetic father (*i.e.*, the man whose gamete (sperm) created the child)
 - d) There is no legal father *by operation of law*: please explain
 - e) Other: please explain The establishment of legal parentage is a question of U.S. state law. Such law may vary with respect to who is the legal father by operation of law.

If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to “rebut” these presumptions: U.S. state law varies regarding the circumstances and types of actions that are required to rebut a presumption, if any exists, that a person is the legal father of a child.

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a “declaration”) establishing or confirming the legal parentage of a child?
- Yes – go to **Question 10 b**).
 - No – go to **Question 11**.
- b) Please explain to which State authorities such an application should be made:
- i. The authority responsible for birth registration (see **Question 1** above)
 - ii. The judicial authorities (*i.e.*, the courts): please specify
 - iii. Other State administrative authorities: please specify
 - iv. Other: please explain The establishment of legal parentage is a question of U.S. state law. While many U.S. states allow parents to sign declarations of paternity, the exact methods for doing so would vary by state. If a U.S. state allows for a similar declaration of maternity, the applicable process would also vary according to the requirements of that U.S. state.
- c) Please explain who may bring such an application:
- i. Only the individuals currently considered to be the legal mother and / or father and / or the child
 - ii. Any person claiming to be the legal mother and / or father of a child
 - iii. Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:

- iv. Any person
- v. Other: please explain The question of who can bring an application for establishment of maternity or paternity is governed by U.S. state law and may vary by U.S. state.

d) Is there a timeframe within which such an application must be made?

- Yes, please specify:
- No
- In certain situations: please explain The timeframe within which an application for maternity or paternity may be brought is governed by U.S. state law.

11. Is it possible in your State for a putative legal father to “voluntarily acknowledge”⁹ his legal paternity (if his legal paternity has not arisen by operation of law – see **Question 9** above)?

- Yes
- No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic father, the man must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

Most, if not all, U.S. states allow a putative father to voluntarily acknowledge his legal paternity. The question of who may undertake the acknowledgement, the procedure for doing so, and who, if anyone, other than the father must also consent, is governed by U.S. state law.

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

U.S. Embassies and Consulates do not have the authority to establish legal parentage for children born abroad. Therefore, an individual cannot acknowledge legal paternity to representatives of the United States Government at a U.S. Embassy or Consulate.

12. Is it possible in your State for a putative legal mother to “voluntarily acknowledge” her legal maternity?

- Yes
- No
- Not applicable – legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

Some U.S. states allow a putative mother to voluntarily acknowledge her legal maternity. The question of who may undertake the acknowledgement, the procedure

⁹ See note 6 above.

for doing so, and who, if anyone, other than the mother must also consent, is governed by U.S. state law.

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

U.S. Embassies and Consulates do not have the authority to establish legal parentage for children born abroad. Therefore, an individual cannot acknowledge legal maternity to representatives of the United States Government at a U.S. Embassy or Consulate.

13. Please explain the legal consequences in your State of a "voluntary acknowledgement" of legal parentage:

- a) Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
- b) The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State's acceptance of that issue
- c) Other: please specify The legal consequences of a "voluntary acknowledgement of legal parentage" are governed by state law.

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- Yes
- No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate: The establishment of legal parentage is governed by U.S. state law.

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- Yes
- No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) Operation of law:
- b) Order of the court or other State authorities:
- c) Adoption:
- d) Other: The establishment of legal parentage is governed by U.S. state law. The legal mechanisms by which two persons of the same sex may be able to establish their legal parentage varies by U.S. state.

C. Establishment of legal parentage where assisted reproductive technology ("ART")¹⁰ has been used¹¹

¹⁰ In this document, "assisted reproductive technology" ("ART") is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: *e.g.*, two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to "do-it-yourself" or "DIY" methods of non-procreative conception: *i.e.*, where medical third parties are not involved in the procedure.

¹¹ Please note: surrogacy arrangements are dealt with separately in **Section D** below.

16. Is ART permitted in your State?

- Yes, all forms of ART are permitted
- Yes, but there are certain restrictions on the services available and who may access these services: please specify
- No, all forms of ART are completely prohibited – **please go to Section D.**
- Other: please explain Various forms of assisted reproductive technology are permitted in many U.S. states. Some U.S. states prohibit certain types of ART, while some U.S. states do not regulate the matter.

17. Is there regulation of the use of ART in your State?

- Yes, legislation regulates the use of ART: please briefly explain
- Yes, there are rules or “codes of practice” concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain
- No, there are no rules at all – **go to Question 19**
- Other: please explain Federal and U.S. state laws govern the use of certain ART methods. The scope of these laws varies greatly by U.S. state.

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) Who may access ART services (*e.g.*, relationship status; age or health requirements; nationality / residency requirements, etc.):
- b) Who may perform ART services:
- c) The regulation of medical or other institutions which perform ART services (*e.g.*, the licensing of clinics or hospitals):
- d) Which ART services may be performed:
- e) Whether egg donation is permitted and, if so, under which conditions:
- f) Whether sperm donation is permitted and, if so, under which conditions:
- g) The costs of ART (including the amount paid to any gamete donors):
- h) The anonymity of gamete donors:
- i) The right of the child to know his / her genetic or birth origins:
- j) The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) Other: please explain ART is governed by both federal and U.S. state law. Because U.S. state laws differ on this topic, there is not one comprehensive set of laws and regulations that applies throughout the United States.

19. Please explain the consequences of ART for legal *maternity* arising *by operation of law*:

- a) The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
- b) Other: please specify Issues of maternity and paternity are governed by U.S. state law.

Please explain whether the above position results from legislation, rules, case law or other source(s) of law: The form of the applicable law varies among the U.S. states, and may include legislation, regulations, and case law.

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- b) The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- c) The genetic father will always be the legal father:
- d) Other: please explain Issues of maternity and paternity are governed by U.S. state law.

Please explain whether the above position results from legislation, rules, case law or other source(s) of law: The form of the applicable law varies from U.S. state to U.S. state, and may include legislation, regulations, and case law.

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

U.S. state laws govern issues of maternity and paternity.

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

U.S. state laws govern issues of maternity and paternity.

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
- No
- Other: please explain Some statistics are available on certain types of ART. See, e.g., www.cdc.gov/art/.

D. Surrogacy arrangements

Regulation of surrogacy

24. Does your State permit surrogacy arrangements?

- a) Yes, *all* forms of surrogacy arrangements are permitted:
- i. As a result of express legislation or rules: please specify
 - ii. By default, because surrogacy is unregulated in internal law.
Go to **Question 26**.
- b) No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition:

Go to **Question 26**.
- c) It depends upon the nature of surrogacy arrangement (e.g., commercial surrogacy arrangements are prohibited): please specify
- d) Other: please specify The establishment of legal parentage and the regulation of surrogacy are governed by U.S. state law. In those U.S. states that regulate surrogacy, the nature of such regulation varies widely. Some U.S. states address surrogacy arrangements in their statutes while in some U.S. states the law has developed through case law. Some U.S. states will not enforce surrogacy agreements at all, finding them contrary to public policy,

and others permit commercial surrogacy and allow an intending couple to go to court before the birth of a child to have their parentage established. Many U.S. states have not addressed surrogacy at all. In the United States, the National Conference of Commissioners on Uniform State Laws has drafted a Uniform Parentage Act that addresses parentage and has an optional section addressing surrogacy. However, to date, only nine U.S. states have adopted some form of this Act and of those, less than half included the section on surrogacy.

Please provide any clarification, where necessary:

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?

- Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:
- No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:
- Other: please specify The rules relating to surrogacy and parentage vary by U.S. state.

b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

- i. Who may be intending parents¹² to an arrangement, including:
- a. Nationality, domicile or residency requirements:¹³
please specify
- b. Marital or other relationship status:
- c. Age requirements:
- d. Health requirements:
- e. Psycho-social requirements:
- f. Other:
- ii. Who may be a surrogate mother, including:
- a. Nationality, domicile or residency requirements:¹⁴
please specify:
- b. Marital or other relationship status:
- c. Age requirements:
- d. Health requirements:
- e. Psycho-social requirements:
- f. The surrogate mother must already have her own children:
- g. Other:

¹² Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

¹³ See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

¹⁴ See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

- iii. Which types of surrogacy arrangements are permitted, *e.g.*, traditional and / or gestational,¹⁵ etc.: please specify
 - iv. Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify
 - v. Which other bodies or persons may facilitate a surrogacy arrangement (*e.g.*, by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, "matching" surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify
 - vi. Whether financial remuneration can be paid to the surrogate mother:
 - a. No financial remuneration at all is permitted
 - b. Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such "reasonable expenses":
 - c. Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
 - vii. Whether the surrogacy arrangement is contractually enforceable: please specify
 - viii. Who may make decisions concerning the pregnancy (*e.g.*, whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
 - ix. The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
 - x. Other: please specify The rules relating to surrogacy and parentage vary by U.S. state.
- c) Please explain any legal consequences, both criminal (*e.g.*, penal sanctions) and civil (*e.g.*, for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with: The rules relating to surrogacy and parentage vary by U.S. state.
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

Surrogacy and legal parentage

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (*i.e.*, without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law: As stated in the response to question 24(d), the National Conference of Commissioners on Uniform State Laws drafted a Uniform Parentage Act that addresses parentage and has an optional section addressing surrogacy. The Uniform Parentage Act addresses ways to establish (and contest) legal parentage. To

¹⁵ See the **Glossary** for the definition of the terms used in this paper.

date, however, only nine U.S. states have adopted versions of the Uniform Parentage Act, and of those nine, less than half included the optional section on surrogacy. Thus, it remains the case that U.S. state laws related to surrogacy vary widely. Some U.S. states have enacted statutes that explicitly address surrogacy. In other U.S. states, courts determine legal parentage after surrogacy according to case law that has developed. In these U.S. states, case law may be overruled at any time if the state legislature subsequently enacts contrary law. Finally, there are still many U.S. states that do not address surrogacy in any way.

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- c) No
- d) Other: please specify The rules relating to surrogacy and parentage vary by U.S. state.
- e) Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.
- f) Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- Yes: please describe exactly what will be on the record and / or certificate
- No: please explain

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
- No
- Other: please explain Complete information is not available.

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring:

- No
 Other: please explain The U.S. Government does not track surrogacy-related crimes in the United States.

E. Contestation of legal parentage

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?
- a) The authority responsible for birth registration (see **Question 1** above)
b) The judicial authorities (*i.e.*, the courts): please specify If there is a dispute about legal parentage, the concerned party would have to bring a case in front of a state or local court having jurisdiction over the parties.
c) Other State administrative authorities: please specify
d) Other: please explain
32. Who may bring an action to challenge legal parentage?
- a) Only the individuals currently considered to be the legal mother and / or father and / or the child
b) Any person claiming to be the legal mother and / or father of a child
c) Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question
d) Any person
e) Other: please explain U.S. state law identifies who may bring an action to challenge legal parentage.
33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?
- Yes, please specify:
 No
 In certain situations: please explain U.S. state law identifies the timeframes within which legal parentage may be challenged.
34. On what grounds may legal *maternity* be challenged before the authorities in your State?
- a) Only on the basis that the "mother" did not, in fact, give birth to the child
b) Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)
c) Other: please explain The grounds for bringing an action to challenge legal maternity would be governed by state law, which may vary by state.
35. On what grounds may legal *paternity* be challenged before the authorities in your State?
- a) Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
b) Other: please explain The grounds for bringing an action to challenge legal paternity would be governed by state law, which may vary by state.
36. What are the legal consequences of a successful challenge concerning legal parentage?
- a) The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)

- b) The decision of the State authorities will only be binding for limited, specific purposes: please explain
- c) It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
- d) Other: please explain The legal consequences of a successful challenge concerning legal parentage would be governed by U.S. state law, which may vary by state.

37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?

- a) The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
- b) The birth record and / or certificate is amended but the original record and / or certificate is retained
- c) Other: please explain What happens to a child's birth record after a successful challenge to legal parentage depends on the nature of the proceeding and U.S. state law.

F. The acquisition of nationality by children

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- a) By birth within the territory of the State
- b) By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question of who is / are the child's *legal* parents for the purposes of determining nationality: See sections 301 and 309 of the Immigration and Nationality Act.
- c) By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
- d) If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):¹⁶ please specify
- e) Other: please specify See Title III of the Immigration and Nationality Act; regulations and guidance of the U.S. Department of State and the U.S. Citizenship and Immigration Services; and relevant Federal court decisions.

G. Legal developments

39. Please state whether the law in your State concerning the matters covered in **Part I** above (*i.e.*, birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before parliament or before the courts) to change the law in future:

Many of the topics covered are primarily a matter of U.S. state law, which continually develops, and can evolve through legislative changes or through case law. Interested individuals should review relevant U.S. state laws regarding birth registration, establishment and contestation of legal parentage, ART, and surrogacy, as laws differ in each U.S. state. In drafting legislation, U.S. states may draw upon the Uniform

¹⁶ As to which, see note 4 above, citing Art. 7 of the UNCRC.

Parentage Act, drafted by the National Conference of Commissioners on Uniform State Laws, and the ABA Model Act Governing Assisted Reproductive Technology. With respect to questions regarding nationality of children, federal immigration and nationality laws and regulations can evolve through case law, enactment of legislation, and issuance of new regulations.

40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage

A. PIL and co-operation rules concerning birth registration

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:

- a) Only when the child is born on the territory of the State
- b) When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
- c) When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child
- d) When the child is considered a national of the State,¹⁷ regardless of the place of birth of the child
- e) Other, please specify: Birth registration is a matter of U.S. state law, and the circumstances in which a birth abroad may be registered in a U.S. state are controlled by its laws. While the Department of State will issue a Consular Record of Birth Abroad (CRBA) when a U.S. citizen parent of a child born abroad so requests and meets statutory evidentiary requirements, a CRBA is not a birth registration but instead documents the acquisition of U.S. citizenship.

42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?¹⁸

- a) The *lex fori* (*i.e.*, the internal law of your State) is always applied by the relevant authorities
- b) If the situation has foreign elements (*e.g.*, the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules:
- c) Other: please specify This issue is a matter of U.S. state law.

43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (*e.g.*, the child is registered in your State as the State of birth, and in the State of the parents' nationality and the registers conflict)?

- Yes: please explain the circumstances of the case(s) and the difficulties which arose: We are aware of some cases in which children have been registered in at least two States, and conflicting birth certificates can lead to difficulties in

¹⁷ As to which, see **Question 38** above.

¹⁸ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

determining the citizenship of a child when the birth certificates identify different places of birth.

No

44. Are there any bilateral or multilateral¹⁹ agreements in force between your State and any other State such that:

a. When a child's birth is registered which involves foreign elements (*e.g.*, one or more foreign national parents), this information is communicated to the authorities in the other relevant State?

Yes: please specify

There are no formal agreements but this may happen in practice: please explain

No

b. When there are changes to a child's legal parentage *subsequent to* birth registration as a result of steps taken in your State (*e.g.*, due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

Yes: please specify

There are no formal agreements but this may happen in practice: please explain

No

B. PIL rules concerning the establishment of legal parentage

By operation of law or agreement

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?²⁰

Yes: please specify The establishment of legal parentage is governed by U.S. state law.

No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

Yes: please specify The establishment of legal parentage is governed by U.S. state law.

No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises

Not applicable: it is not possible to establish legal parentage by agreement

By voluntary acknowledgement

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

¹⁹ *E.g.*, the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< www.ciecl.org >).

²⁰ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

Please tick all which apply:

- a) When the child is (habitually) resident in your State: please specify
- b) When the child is a national of your State
- c) When the individual acknowledging the child is (habitually) resident in your State: please specify
- d) When the individual acknowledging the child is a national of your State
- e) Other: please specify The rules for establishing and recognizing parentage are matters of U.S. state law.

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time of the acknowledgement, or
- iii. At another time: please specify

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, *i.e.*, whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify The rules for establishing and recognizing parentage are matters of U.S. state law.

- b) For the substantive validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify The rules for establishing and recognizing parentage are matters of U.S. state law.

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child's birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a)
- b)

C. PIL rules concerning the recognition of legal parentage established abroad

Birth certificates

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State *as validly establishing the legal parentage of those persons recorded within it (i.e., the recognition of the content of the certificate)*.²¹

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition (e.g., the birth certificate must be authenticated by way of legalisation or apostille²²); and
- d) any grounds of *non*-recognition.

A birth certificate from another State may be recognized by applicable authorities at the federal, state or local level. The purpose for which recognition is sought will determine the authorities responsible, procedure undertaken for recognition, conditions for recognition, and grounds of non-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Voluntary acknowledgements

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State *as validly establishing the legal parentage of the author of the acknowledgement (i.e., the recognition of the content of the acknowledgement)*.²³

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

A voluntary acknowledgment undertaken in another State may be recognized by the applicable authorities at the federal, state or local level. The purpose for which recognition is sought will determine the authorities responsible, procedure undertaken for recognition, conditions for recognition, and grounds of non-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Decisions of judicial authorities

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (*i.e., a court judgment or order*) will be recognised in your State as validly establishing legal parentage.²⁴

²¹ It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).

²² See, in this regard, the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, available on the Hague Conference website at < www.hcch.net > under "Apostille Section".

²³ It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).

²⁴ *Ibid.*

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

A decision of the relevant judicial authority of another State may be recognized by applicable authorities at the federal, state or local level. The purpose for which recognition is sought will determine the authorities responsible, procedure undertaken for recognition, conditions for recognition, and grounds of non-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

52. Please specify the *effects* of the recognition of the legal parentage established abroad (see **Questions 49 to 51** above) and which law(s) govern(s) these effects:

The effect of recognition will vary depending upon the purpose for which the individual has sought such recognition and the relevant authority recognizing the legal parentage. Federal and U.S. state law may be relevant.

D. PIL rules concerning the contestation of legal parentage

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) When the child whose parentage is disputed is a national of your State
- c) When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) When a putative parent disputing legal parentage is a national of your State
- e) Other: please specify The answer depends upon the law applicable, which varies amongst the U.S. states.

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii At the time the relevant State authorities are seised with the dispute, or
- iii. At another time: please specify

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) The *lex fori* (*i.e.*, the internal law of your State)
- b) The law of the State of the child's nationality
- c) The law of the State of the (habitual) residence of the child: please specify
- d) The law of the State of the putative parent's nationality

- e) The law of the State of the putative parent's (habitual) residence:
please specify
- f) Other: please specify The answer depends upon the nature of the legal proceeding, which varies amongst the U.S. states.

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

E. "Cross-border reproductive care"²⁵ and the consequences for legal parentage

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (*e.g.*, the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

- Yes: please explain
- No
- Other: please explain

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

- Yes: please provide details See response to question 58.
- No

F. Legal developments and practical challenges

57. Please state whether the law in your State concerning the matters covered in **Part II** above (*i.e.*, the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before Parliament or before the courts) to change the law in future:

The issues covered in Part II are governed primarily by U.S. state law, which is updated regularly, through legislation, regulation, and case law.

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered: The United States Government is not directly involved in the establishment or contestation of parental rights. We are aware, however, of some cases where parents have had difficulties in establishing nationality or immigration benefits for their children born through cross-border ART procedures.

²⁵ In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

Part III: The particular challenges concerning International Surrogacy Arrangements²⁶ ("ISAs")

This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:²⁷

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: i.e., those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: i.e., those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

A. Incoming cases²⁸

- This Section is inapplicable – there have been no "Incoming cases" of ISA in this State. Go to Section B.**

Basic empirical data

59. Do you have any information concerning:

- a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?

- Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

- No information is available

- b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

- Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

²⁶ See the **Glossary** for the definition of the terms used in this paper.

²⁷ Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: e.g., the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

²⁸ I.e., those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

- 2013 (so far)
 No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State²⁹ and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years:

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

Reliable information is not available.

The procedure for Incoming cases of ISA

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

- a) Enter your State with a child born abroad as a result of an ISA:
 The child will need to enter the United States on a valid travel document (*i.e.*, a proper passport and/or visa depending on the circumstances and location of his or her birth). The child's eligibility for a U.S. passport or visa is subject to federal nationality and immigration law. The parents would have to apply for the U.S. passport or visa at the local U.S. embassy or consulate.
- b) Reside permanently in your State with the child:
 In order to reside permanently in the United States, the child would either need to be a U.S. citizen or be a Legal Permanent Resident. The requirements for an immigrant visa differ from those for a visitor visa. The intending parents would be able to get information about how to apply from their local U.S. embassy or consulate.
- c) Have their legal parentage recognised (or established) under the law of your State (*if* this is possible):
 The establishment or recognition of legal parentage is governed by U.S. state law.

Please include an estimate of the time it may take to complete each stage of this process:

- a) Timing will vary according to circumstances.
- b) Timing will vary according to circumstances.
- c) Timing will vary according to circumstances.

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

²⁹ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

Please tick all which apply:

- i. The country in which the child was born: please explain The law of the State where the child was born may affect the nationality of the child, which will affect the type of passport or other travel documents the child may need to travel. Otherwise eligible nationals of certain States may not need a visa to visit the United States.
- ii. The particular document(s) produced by the intending parents to establish their legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- iii. Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain The genetic relationship of the child to the parent may affect the nationality of the child.
- iv. The nationality of the intending parents: please explain The nationality of the intending parents may impact whether the child can demonstrate that he or she is a U.S. citizen or whether he or she needs a visa to enter the United States.
- v. Any other factor: please explain

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
 - a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:
- No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary:
- b) An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
- c) A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary:
- d) A post-birth court order from the State of birth (i.e., transfer of parentage): please state from which countries these orders originate and any other details necessary:
- e) An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention³⁰ was attempted by either State³¹:
- f) Other: please specify surrogacy agreements and copies of local surrogacy or parentage laws; medical records describing any fertility treatment or other ART procedure.

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases:

³⁰ Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < www.hcch.net >, under "Intercountry Adoption Section".

³¹ See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

- b) The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain
- c) The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases
- d) Other: please explain The outcome is case-specific, and official statistics are not available to determine which outcome is most frequent.

If possible, please state which of the four outcomes above occurs most frequently in your State:

The challenges encountered

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) The embassies / consulates in the State of the child's birth
- b) The immigration authorities
- c) The judicial authorities (*i.e.*, the courts): please specify which
- d) The Ministry of Justice (or equivalent)
- e) The Ministry of Foreign Affairs (or equivalent)
- f) The Ministry of Health (or equivalent)
- g) The Ministry of Social Affairs (or equivalent)
- h) Other: please explain

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave his / her State of birth:
- b) The child being able to enter your State:
- c) The child being able to reside in your State:
- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (*e.g.*, trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: *e.g.*, due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the

- intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain The United States Government would not normally be involved in matters that do not involve immigration or citizenship and, therefore, is not involved in matters identified in (f),(g), or (h).

Please provide any further information you consider relevant concerning the above problems:

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
 b) Legal costs:
 c) Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:
 d) Expenses and / or other costs paid to the surrogate mother:
 e) Other: please explain The United States Government does not maintain statistics or details of private arrangements intending parents have entered into with surrogates in other countries.

Areas of concern

68. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your particular concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
 b) The nationality of children born to ISAs:
 c) The right of children born to ISAs to know their (genetic and birth) origins:
 d) The surrogate mother's free and informed consent to the surrogacy arrangement:
 e) The psychological impact of an ISA on the surrogate mother:
 f) The medical or other care provided to the surrogate mother:
 g) The financial aspects of ISAs:
 h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
 i) The (mis)-information provided to intending parents or surrogate mothers:
 j) The eligibility and / or suitability of the intending parents to care for the child (*e.g.*, in terms of age, criminal records, psycho-social suitability, etc.):
 k) Contractual matters: *e.g.*, issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
 l) Other: The United States recognizes that these cases often center around issues of nationality. We believe the topic of nationality is more appropriately discussed and addressed in the context of public international law and not private international law.

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

69. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents resident in your State engaging in ISAs?

- Yes: please explain
 No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information: Family law issues such as parentage and the regulation of surrogacy are generally matters of U.S. state law. We are unaware of any current efforts to draft federal legislation addressing international surrogacy.

70. Please provide any other information you consider relevant concerning your State's experience of Incoming cases of ISA:

B. Outgoing cases³²

This Section is inapplicable – there have been no “Outgoing cases” of ISA in this State. Go to Part IV.

Basic empirical data

71. Do you have any information concerning:

a) The number of **Outgoing cases** of ISA which have required the assistance of your State authorities in recent years?

- Yes – please provide any figures available:
 Pre-2009
 2009
 2010
 2011
 2012
 2013 (so far)

No information is available

b) How many children have been born to surrogate mothers in your State as a result of ISAs involving intending parents resident in another State?

- Yes – please provide any figures available:
 Pre-2009
 2009
 2010
 2011
 2012
 2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Outgoing cases of ISA involving your State³³ and, further, please provide a general comment concerning the prevalence of Outgoing cases of ISAs and whether such cases have increased in the past five years:

³² *I.e.*, those cases where your State is the State in which the surrogate mother gives birth and from which the child has to leave to travel to the place of residence of his / her intending parents.

³³ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Outgoing Cases of ISAs involving your State and / or whether this has increased in the past five years? In the United States, the use of various different assisted reproductive technology procedures to have a baby is quite common. We anticipate that only a relatively small percentage of such procedures performed in the United States involve international surrogacy.

72. Please list any States in which intending parents, engaging a surrogate mother in your State by way of ISA, have been resident:

No reliable information is available.

The procedure for Outgoing cases of ISA

73. In general, which of your State authorities are involved in assisting those who undertake an ISA with a surrogate mother in your State?

Please tick all which apply and provide information concerning their particular role:

- a) The immigration authorities: please specify
- b) The judicial authorities (*i.e.*, the courts): please specify which
- c) The Ministry of Justice (or equivalent)
- d) The Ministry of Foreign Affairs (or equivalent)
- e) The Ministry of Health (or equivalent)
- f) The Ministry of Social Affairs (or equivalent)
- g) Other: please explain The procedures required for undertaking a surrogate birth would be governed by U.S. state law, which would vary by state. Foreign intended parents who wish to enter the United States for the purposes of entering into a surrogacy arrangement will need to enter legally. Depending on the facts of their case, the parents may need to obtain a visa from the U.S. embassy or consulate in their district. Depending on the U.S. state where the child will be born, the parents may need to have their surrogacy agreement approved by a court in that state. However, not all U.S. states in the United States require court approval of surrogacy agreements. If the parents wish to get a U.S. passport for the child they can follow the instructions listed on www.travel.state.gov. Please see also the answer to question 1 with respect to birth certificates.

74. Do foreign-resident intending parents require a visa or any other immigration document(s), or do they have to meet any other conditions, to *enter* your State to be able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- Yes, they have to meet the following conditions – please specify:
- Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:
- No
- It depends upon the State of residence or nationality of the intending parents: please specify

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (*e.g.*, where this law forbids surrogacy arrangements).³⁴

³⁴ *E.g.*, see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition

- Yes – please explain how this law is taken into account: Surrogacy is regulated by U.S. state law. The requirements for intended parents, including the issue of whether or how the law of the State of their habitual residence is taken into account, is a question of U.S. state law, which will vary by state.
- No
- It depends upon the State of residence or nationality of the intending parents: please explain Surrogacy is regulated by U.S. state law. The requirements for intended parents, including the issue of whether or how the law of the State of their habitual residence is taken into account, is a question of U.S. state law, which will vary by state.

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

Your response to this question will likely depend upon your answer to **Questions 26 to 27** above.

Please tick all which apply:

- a) They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
- b) They can obtain an amended birth certificate: please explain
- c) They can obtain a *pre*-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
- d) They can obtain a *post*-birth court order (*i.e.*, a transfer of parentage): please explain any conditions for obtaining such an order
- e) They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard³⁵
- f) Other: please specify The determination of parentage is governed by U.S. state law. The process for foreign-resident parents to obtain parentage of a child born through surrogacy in the United States will depend on the law of the U.S. state in which the child is born.

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

In general, parents would need a birth certificate for the child to document the child's identity and the parent's relationship to the child. Depending on where the parents are travelling, they may need to obtain a visa for the child, which would be a matter of the law of that State.

Please state the time it may take to complete this process:

to similar effect: *i.e.*, that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

³⁵ See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- a) The country in which the intending parents live: please explain The law of the State where the intending parents live will govern whether the child is eligible for entry, residence, or nationality in that State.
- b) The particular document(s) produced by the intending parents to establish legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- c) Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- d) The nationality of the intending parents: please explain The nationality of the parents may affect the nationality of the child and, therefore, may affect what type of travel document or visa is required for the child to travel to a particular State.
- e) Any other factor: please explain

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

Yes – please specify:

- a) Which authorities in each State were involved: The New Zealand Central Authority for the Hague Adoption Convention (NZCA) and the United States Central Authority for the Hague Adoption Convention (USCA)
- b) The nature of the co-operation: The NZCA asked for the opinion of the USCA on whether an adoption in New Zealand of a child born through a surrogate mother in the United States to parents who are habitually resident in New Zealand would be subject to the Hague Adoption Convention. The parents had obtained a court order from a California State court that granted legal parentage to the intended parents. The USCA responded that the Hague Adoption Convention would not apply to that case.
- c) Whether the co-operation resulted from legislation, guidelines or practice: The cooperation was the result of normal communications between central authorities.
- d) The result: We did not receive any further inquiries or comments on this case.

No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.
Please explain how this is achieved:
- b) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
- c) The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
- d) The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) Other: please explain We have no reliable means of tracking where children born through surrogacy in the United States go with their intended parents, whether those parents are habitually resident inside or outside of the United

States. As a general matter, most children born in the United States are U.S. citizens who would have a right to travel outside of the United States.

If possible, please state which of the five outcomes above occurs most frequently in your State:

The challenges encountered

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave your State:
- b) The child being able to enter the State in which his / her intending parents are resident:
- c) The child being able to reside in the State in which his / her intending parents are resident:
- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: e.g., due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain In the United States, questions of family law, including the regulation of parentage and surrogacy are governed by U.S. state law. Generally, the U.S. Government's involvement would be limited to the issuance of passports. As children born in the United States are U.S. citizens, there is generally not an issue with respect to the issuance of passports for such children.

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain We do not have reliable information on these matters.

Areas of concern

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (*e.g.*, in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: *e.g.*, issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other: In the United States, questions of family law, including the regulation of parentage and surrogacy, are issues left to the U.S. states. Therefore, each U.S. state might have an independent position on the issues addressed in this question. The United States Government would only be involved in issuing a passport to a child who is a U.S. citizen.

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- Yes: please explain
- No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

Part IV: Current bilateral or multilateral instruments in the field

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;

- b) Any matters specifically related to surrogacy arrangements;

Please provide any detail you consider necessary:

Part V: Thoughts on possible future work

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify: The United States does not believe that a private international law instrument should address the status of children, including those born as a result of international surrogacy arrangements. Moreover, this topic is not ripe for work as States have different views on the substance of the topic.

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

We do not believe that there should be consideration of the international regulation of the matters raised in this questionnaire at this time.

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment

Safeguards

- c) The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all

parties involved, in particular the child(ren) concerned: please comment

Co-operation

- d) The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

Other

- e) Other: please specify

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,³⁶ which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment
- c) Provisions concerning the child(ren)'s nationality: please comment

Safeguards

- d) The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, *i.e.*, the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (*e.g.*, the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.)
- e) Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (*e.g.*, surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment
- f) Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment

Co-operation

- g) The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the

³⁶ See **Part III** of the Questionnaire above.

intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;³⁷ and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

Other

- h) Provisions concerning the financial aspects of international surrogacy arrangements: please comment
 i) Other: please specify

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 e) Other: please specify

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 f) Other: please specify

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire:

Thank you for your time: this information will greatly assist the work of the Permanent Bureau.

³⁷ Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.