CHAPTER- 5
JUDICIAL RESPONSE TO SURROGACY

5.1 Introduction: Surrogacy arrangements lead to a number of abstractions like motherhood, paternity, personhood, enforceability, nationality, citizenship. However, these abstractions remain unsolved as in almost all the countries there is absence of clear and complete regulation of surrogacy arrangements. The matter becomes more complicated in case of international surrogacy arrangements. In such a situation the parties approach to the courts for resolving the matter. However, the courts also feel perplexed while confronted with the conflicts of surrogacy contracts as the legislation in any of the country do not provide complete answers to all the disputes relating to surrogacy. The attitude of courts in the beginning was to suppress and curtail the surrogacy arrangements specially the commercial surrogacy arrangements. But with the passage of time and social acceptance of the surrogacy arrangements, the courts have also changed their attitude towards surrogacy contracts. Although the case law on surrogacy reflects different situations and issues, it shares a common element that a surrogate mother has nurtured, cared and given birth to the child on the basis of a surrogacy contract. In order to understand the attitude of the courts there is a need to analyze the different decisions of courts in different countries. For this purpose judicial attitude of five countries i.e. U.S.A, U.K., Australia, Canada and India have been made subject matter of study in the present chapter.

5.2 Judicial Response to Surrogacy in U.S.A: The American public attention was exposed towards the practice of surrogacy arrangement with the case of Baby M. Although the courts have taken in to account the acceptability of the practice of surrogacy while dealing with the different case laws yet due to lack of complete

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legislation in this regard in a number of states in U.S.A. and specially the states where arrangements are criminally prohibited, the courts are not very successful in coping and balancing between the rights and liabilities of the parties on the one hand and framework of the legislation on the other hand. The courts in such situation refer only to the need of legislative enactment in regard to surrogacy arrangements. Judicial response to surrogacy in USA can be analyzed by going through certain case laws of different states of USA which is as under:

5.2.1. In the Matter of Baby M In the present case appeal was filed by the surrogate mother Mrs. Whitehead in the Supreme Court of New Jersey against the decision of Superior Court Chancery Division after the certificate was given by the court for the same. The Superior Chancery Court of New Jersey held that the surrogacy contract was valid and it terminated the parental rights of the surrogate mother. The court further ordered the custody of the child to the natural father. The court also authorized the adoption of child by wife of natural father. The facts of the case represented that Mr. and Mrs. Stern herein referred to as Sterns, had made a number of inquiries about several surrogacy parenting programmes. Finally they made a contract with Infertility Center of New York (ICNY). Many potential surrogates were examined by the couple and finally an agreement was entered in to with Mrs. Whitehead who agreed to act as a surrogate for the couple. She was psychologically examined and interviewed by the experts in order to know that whether she would be having any problem in relinquishing the custody of the child or not. It was agreed between the parties that the surrogate would be artificially inseminated with the sperm of Mr. Stern. The surrogate further agreed that she would conceive the child and deliver the same to Mr. Stern after delivery. Mrs. Stern was however, not made part of the contract. It was also agreed that the surrogate would be paid $10,000 and all medical expenses including expenses for performing her contractual obligations. It was also agreed that she would submit herself to psychiatric evaluation and would not abort the child except genetic

Id., at 1227.
Id., at 1238.
Id., at 1236.
or congenital abnormality and this decision was to be taken on the request of Mr. Stern.11

As per the agreement, the surrogate was inseminated with the sperm of Mr. Stern and conceived in July 1985.12 The child Baby M was born on 27th March, 1986. However, Mr. and Mrs. Whiteheads here in referred as Whiteheads never told in the hospital that the child was not their own. They also requested the couple not to reveal their relationship to the hospital authorities.13 The surrogate also expressed her willingness and intention to keep the child. However, on 30th March, 1986 the sterns took the child to their home in New Jersey. The surrogate spent sleepless night without child and requested to take child for one week. She took the child but did not return it to Sterns. Mr. Stern filed a complaint seeking enforcement of the surrogacy contract when the surrogate refused to relinquish the custody of the child. The ex parte order was passed by the court and the police authorities were instructed to execute the order of the court and hand over the child to Sterns. However, the surrogate fled with the child to Florida and lived at different hotels. Somehow the Sterns discovered the place of living of surrogate and initiated a supplementary proceeding in the court of Florida and obtained an order for the custody of the child. The same order was also reaffirmed by the court of New Jersey which ordered limited visitation right to the surrogate.14

The present court accepted the aspect of best interest taken by the trial court but on different basis. The court found that trial court review and analysis of the surrogacy contract was not valid. The court took in to account the arguments of both the parties. The surrogate mother asserted before the court that surrogacy contract is invalid and against public policy. It deprives the mother companionship of the child, which is termed as basic constitutional right. She maintained before the court that primary custody of the child should be given to her on the basis of tender age of the child and also for discouraging surrogacy contract in future.15 She also argued that the ex parte order passed by trial court was invalid and it only served as basic for passing final

11 Id., at 1235.
12 Id., at 1237.
13 Ibid.
14 Supra note 7 at 1238.
15 Id., at 1239.
decision by the trial court. On the other hand Sterns argued that surrogacy contract is valid and enforceable. The custody of the child should be given to them as it is in best interest of the child.\textsuperscript{16} After hearing the arguments from both sides and analyzing the law, the court held that the surrogacy contract is invalid and unenforceable. The court found that the enforcement of surrogacy contract is in direct conflict with the statutory law and against public policy. The court further found that one of surrogacy contract basic purpose is to achieve adoption of child through private placement which is permitted but payment of money for such purpose is made illegal and criminal.\textsuperscript{17} Apart from the payment or inducement of money, there is also coercion in the contract as the surrogate mother had to agree to surrender the child to the adoptive parents before the birth of the child.\textsuperscript{18}

The court found that though in the present case enough care was taken for not violating any prohibition under the statute law but it was clear from the contract that the money was paid and accepted in connection with the adoption of the child. The payment of $10,000 was made after the surrender of custody of child and completion of duties and obligations of surrogate mother.\textsuperscript{19} The court was of the view that best interest criteria was not sufficient to terminate parental rights, statutory criterion was required to be proved.\textsuperscript{20} The court however, found that termination of parental rights in the present case was not obtained by proving the statutory requirement but on the basis of the contractual obligation.\textsuperscript{21} The trial court had never found the surrogate mother as unfit mother.\textsuperscript{22} Further the court found that the surrogacy contract was against public policy as it guarantees permanent separation of the child from the natural parents.\textsuperscript{23} On the other hand as per the provisions of law the rights of both the parents in relation to child are equal. No one can be preferred over the other.\textsuperscript{24} The court was of the view that even if the consent was given by the surrogate for relinquishing the child, it could not be termed as valid consent as money was exchanged between the parties. Moreover the court found that money could not buy

\begin{footnotes}
\item[16] \textit{Id.}, at 1240.
\item[17] See \textit{§ N.J.S.A. 9: 3-54}.
\item[18] \textit{Supra note 7} at 1241.
\item[19] \textit{Id.}, at 1242.
\item[20] \textit{Id.}, at 1244.
\item[21] \textit{Id.}, at 1245.
\item[22] \textit{Id.}, at 1252.
\item[23] \textit{Id.}, at 1247.
\item[24] \textit{N.J.S.A. § 9: 17-40}.
\end{footnotes}
all the things. After considering all the aspects the court held that the surrogacy contract is void.

The court further considered the argument of constitutional right of procreation raised by Mr. Stern. The court found that the right did not exist as there is no fundamental right of father to take custody of child as part of his procreation when it is opposed by the mother of same child. Further equal weightage was to be given to the parents. The court however, considered the life that would be better for the child i.e. in custody of the Sterns or Whiteheads. The court was of the opinion that even if the surrogacy contract was void and unenforceable, the issue of custody of child would not be determined on the basis of its illegality. If it would be done, then it would affect the best interest of the child. In order to decide the custody of the child, the court was of the opinion that all the circumstances that were relevant and that had actually occurred must be taken in to account. The court also considered the opinion of eleven experts who believed that custody should be given to Sterns. Thus after analyzing all the criterions the court found that the interest of the child would protected if the custody would be given to Sterns as they were in the position to provide a secure home, understanding relationship which would be helpful in nourishment, development and growth of child.

The court further took up the issue of visitation rights of the surrogate. The court found that matter was not taken up by the trial court. So the court found it feasible to remand the matter to trial court for determining the issue of visitation. However, the court ordered that the question to be considered by the trial court was not that whether visitation should be allowed to Mrs. Whitehead as the court opined that it had to be given. The trial court had to decide only about the kind of visitation with or without conditions, circumstances of visitation etc. Thus the court affirmed the judgment of trial court in part and reversed in part.

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25 Supra note 7 at 1250.
26 Id., at 1251.
27 Id., at 1254.
28 N.J.S.A § 9-17-40.
29 Supra note 7 at 1258.
30 Id., at 1259.
31 Id., at 1261.
32 Id., at 1262.
5.2.2. Anna Johnson v. Mark Calvert\(^3\) In the present case, Mark and Crispina Calvert who were married couple entered into a surrogacy contract with Anna Johnson on 15\(^{th}\) January, 1990. Crispina had hysterectomy in 1984. Her ovaries were capable of producing eggs but unable to conceive a child. In 1989 Anna Johnson heard about the plight of Crispina from a co-worker and offered to serve as a surrogate for the couple. Both the parties entered into surrogacy agreement and signed a contract which provided that embryo would be created by the sperm of Mark and egg of Crispina and would be implanted in Anna.\(^3\) It was agreed in between the parties that after the birth of the child the surrogate would relinquish her parental rights and child would go to the home of Calverts. It was further agreed between the parties that the surrogate would be paid $ 10,000 in installments and last installment was to be paid six weeks after the birth of the child. Further it was agreed that they would be paying $ 200,000 as life insurance for the surrogate.

Thus as decided the zygote was implanted in the surrogate and pregnancy was confirmed after one month. However, before the birth of the child, the relationship between the parties deteriorated. Mark came to know that Anna was having previous still births and miscarriages which were not disclosed to them while entering into the surrogacy contract. On the other hand, Anna was not happy as the couple had not done enough as required for the life insurance policy in her favour. She also felt abandoned during premature labour in June 1990 as the couple had not helped her in that situation in any way. In the month of July 1990, she sent a letter to the couple demanding the balance of payments due to her. In the month of September the couple responded by filing a law suit for declaration of legal parentage. Anna filed her own action to be declared as the mother of the child. Both proceedings were consolidated in one case. Meanwhile on 19\(^{th}\) September the child was born. The blood sample of both child and the surrogate were taken for the purpose of analyzing.

The trial court gave a temporary relief that the child would live with couple and surrogate could visit the child till the court finally took the decision in the case.\(^3\) The trial court after hearing evidence and arguments ruled that the couple was genetic.

\(^{33}\)(1993) 851 P. 2d 776, 5 Cal. 4\(^{th}\) 84.
\(^{3}\)Id., at 777.
\(^{3}\)Id., at 778.
biological and natural parents of the child and the surrogate had no parental right to the child. It was further held by the court that surrogacy contract was legal and enforceable against the surrogate. The court also terminated the previous order of visitation. Anna appealed against the judgment of the trial court and appellate court also affirmed the decision of the trial court. Finally the surrogate filed review in Supreme Court of California.

The Supreme Court also confirmed the decision of the appellate court and held that the surrogate could not be treated as the natural mother of the child in the present case. The court took in to account the provisions of Uniform Parentage Act whose purpose is to eliminate the difference between legitimate and illegitimate children with concept of parent child relationship. The parent and child concept according to the court mean the legal relationship of either natural or adoptive parents. The court took in to account the fact that when the Uniform Parentage Act was passed, it was not motivated by the need of resolving the surrogacy disputes. However, according to the court it is applicable to any parentage determination including the rare case in which maternity is in dispute. The court disregarded the idea of ignoring the Act for resolving the matter between the parties. The court further took in to account Civil Code Section 7003 which provides that any interested party could bring an action to determine the existence of a mother child relationship. It also provided that the relationship could be established by proof of having given birth to the child. It declared that as far as practicable the provisions which were applicable to father and child relationship should also apply in an action to the existence and non existence of mother child relationship. However, the court was of the opinion that presumption given under the section was not applicable to the present case as there was no question of claiming mother child relationship.

The court also took in to account Section 892 of the Evidence Act which provides that blood testing could be ordered in order to establish maternity and paternity. After

36Id., at 779 Civil Code § 7001 provides that parent and child relationship means “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.” See also Civil Code § 7002 “The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”

37Id., at 780.

38Id., at 781.
scrutinizing all the evidence, the court found that Anna not Crispina gave birth to the child and Crispina not Anna was genetically related to the child. However, the court referred to the California law which refers only to one legal mother despite the advancement of new technology.\textsuperscript{39} Thus the court analyzed that as both women presented the evidence in regard to maternity, the court had to see the intention of party involved in the surrogacy contract. The court found that it was on the basis of the intention of the couple to have a child that Anna agreed to procreate the child for them. The couple was not having any intention just to donate the zygote to Anna. Although the gestative function was performed by Anna, it could be safely concluded that she would not have been given the opportunity to do the same if she prior to implantation of the zygote manifested her intention to be mother of the child. The court concluded that although the Act recognizes both genetic and gestation as a means to establish mother and child relationship, yet when two means could not coincide in one woman, the woman who intended to procreate is the natural mother under the California law.\textsuperscript{40}

The court also took in to account the argument of surrogate that the surrogacy agreement is violative of many social and adoption policies. However, the court disagreed and held that the gestational surrogacy differs in crucial respects from adoption. It could not be subjected to adoption statutes. The court held that as Anna was not the genetic mother of the child, the payments to her under the contract were for compensating her services in gestating fetus and undergoing labour rather than giving up parental rights.\textsuperscript{41} The court was not persuaded by the argument that surrogacy lead to involuntary servitude, economic exploitation or against public policy. The court held the opinion that although the evidence was available that the women who had lesser means adopt the surrogacy agreement; it in no way suggested that it is exploitative of them.\textsuperscript{42} Thus refuting all the arguments advanced by Anna the Supreme Court of California affirmed the decision of the appellate court that the intended mother is the legal mother of the child.

\textsuperscript{39}Id., at 782.
\textsuperscript{40}Id., at 783.
\textsuperscript{41}Id., at 785.
\textsuperscript{42}Id., at 786.
5.2.3. In Remarriage of John A. and Luanne H. Buzzanca

In the present case John (Respondent) filed a petition for dissolution of marriage with Luanne (Appellant) on the basis of no child of marriage on 30th March, 1995. The Appellant filed her response on 20th April, 2005 that parties were expecting a child by surrogacy. The child was actually born six days later. In September 1996, the appellant filed a separate petition to establish herself as mother of the child. The court consolidated the action with the dissolution case. The child was born because the appellant and respondent agreed to have an embryo genetically unrelated to them implanted in the womb of surrogate who agreed to carry the child up to delivery. However, after implantation and fertilization the couple separated. So the question for consideration before the court was regarding the parentage of the child. The appellant claimed that she and her ex husband were lawful parents but the respondent disclaimed any responsibility. The surrogate also appeared before the court in order to make it clear that she made no claim over the child. The trial court after taking into account different circumstances reached at an extraordinary conclusion that the child had no lawful parent. The court held that woman who gave birth to the child was not the mother. The court had already accepted a stipulation that neither she nor her husband were biological parents. The court further held that the appellant was not the mother as she had neither contributed egg nor given birth to the child. Further the respondent could not be father as he had only contributed the sperm so he had no biological relationship with the child.

The appeal was filed by the appellant against the decision of the trial court. The appellate court disagreed with the decision of the trial court and held that the trial court erred as it assumed that the legal parenthood under the California statute could only be established in one of the two ways either by giving birth or by contributing an egg. The court failed to consider the substantial and well settled body of law which held that there were times when fatherhood could be established even by conduct

\[^{43}\text{61 Cal. App. 4th} 1410, 72 \text{ Cal. Rptr. 2d 280.}\]
\[^{44}\text{Id.}, \text{at} 1413.\]
\[^{45}\text{Id.}, \text{at} 1412.\]
\[^{46}\text{Id.}, \text{at} 1414.\]
\[^{47}\text{Id.}, \text{at} 1418. \text{See also Section 7610 of California Family Code which provides that “The parent and child relationship may be established as follows: (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part. (b) Between a child and the natural father, it may be established under this part. (c) Between a child and an adoptive parent, it may be established by proof of adoption.”} \]
apart from giving birth or genetic relation with the child. The court found that
typical example of such a case is when an infertile husband consents to allow his wife
to be artificially inseminated, in such a case he is the legal father of the child as he
consented to the procuration of the child. The court further held that the same rule
which made a husband lawful father of a child due to his consent to artificial
insemination should also be applied in case of surrogacy. The court held that as a
husband who is unrelated to the child when born through artificial insemination of
wife is treated as the father of the child, the child born to a surrogate should also be
treated as the child of couple as he was born by surrogate for the biologically related
parents. The court further found that in each instance, a child was procreated
because a medical procedure was initiated and consented by the intended parents.
The only difference was that in this case unlike artificial insemination, there was no
reason to distinguish between husband and wife. The court held that even though
neither Luanne nor John was biologically related to Jaycee, they were still her lawful
parents due to their role as intended parents in initiating her conception and birth.
Thus the court reversed the trial court decision and directed a new judgment to be
entered declaring both appellant and respondent as the legal parents of the child.

5.2.4. E.A.G. v. R.W.S

In the present case, E.A.G. posted an online offer to serve as
a surrogate in the month of July 2006. R.W.S and B.C.F., two men in the committed
relationship responded to the offer and parties entered in to a traditional surrogacy
agreement resulting in artificial insemination of E.A.G. with sperm of R.W.S. E.A.G.,
the surrogate gave birth to a child named A.L.S. in July 2007. The surrogate and
R.W.S then signed recognition of parentage form which identifies E.A.G as mother
and R.W.S as father of the child. With the consent of surrogate, the gay couple took
the child to their home. The surrogate visited the house of the couple twice in order to

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48 Id., at 1416.
49 The Court refers to the case of People v. Sorensen (1968) 68. Cal. 2d. 280 in order to substantiate the
point considered. See also Section 7613 of California Family Code which provides that “If, under
the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is
inseminated artificially with semen donated by a man not her husband, the husband is treated in
law as if he were the natural father of a child thereby conceived.”
50 The Court here refers to the case of Johnson v. Calvert (1993) 5 Cal. 4th 84, in order to substantiate
this point.
51 Supra note 43 at 1419.
52 Id., at 1427.
53 Id., at 1429
54 2010 WL 4181449 (Minn. App.)
meet the child. However, during her third visit, she tried to take away the child due to which police had to be called. The police handed over the child in the custody of the couple. Later on the couple sent the agreement to the surrogate so that she could terminate the agreement and the child could be adopted by the other couple. However, the surrogate refused to sign the agreement and revoked her recognition of parentage. She sued R.W.S. to establish paternity alleging that the child was the product of sexual intercourse between her and R.W.S. She further sought sole custody of the child as well as support from the side of R.W.S. R.W.S. on the other hand admitted paternity and counter claimed the legal custody of the child with his other partner B.C.F. He also sought to enforce the contract of surrogacy. In December 2007, R.W.S. was adjudicated as the father of the child and was given sole legal and physical custody of child. The District Court concluded that the surrogate was not the legal parent of the child and further declared non existence of child mother relationship between them. The court on its own motion treated B.C.F. as party to the suit and declared that he was also legal parent of the child.

The appeal against the decision of the trial District Court was filed by the surrogate in Court of Appeal of Minnesota. However, she did not dispute that the child was legally and biologically related with R.W.S. The appellate court decided that the trial court had erred in deciding that the surrogate was not the mother of the child and further that B.C.F. was father of the child. The court took in to account the provisions of the Parentage Act which provides for the parent and child relationship with only exception of the egg donor. The court disagreed with the decision of the District Court that E.A.G. was an egg donor and therefore precluded from being a biological or genetic mother. The court found that her egg was neither fertilized in vitro nor implanted into other woman’s uterus. Instead she was artificially inseminated, her own egg was fertilized and resultanty she carried fetus giving birth to A.L.S. Thus she was not egg donor and the prohibition on egg donors becoming parents was not applicable in her case. The court further took in to account Minnesota Statue §257.54 (a) which indicates that giving birth is sufficient to establish parent child relationship. Thus statutory provisions did not prohibit the relationship between E.A.G. and

55 *Id.*, at 1.
56 *Id.*, at 2.
A.L.S. Thus the court reversed the finding of the District Court that E.A.G. was not the mother of A.L.S. It was further argued by the appellant that the District Court erred in concluding that B.C.F. was child’s biological and legal father under the Parentage Act. She argued that under the provision the legal relationship is based either on biology or adoption. B.C.F. had not adopted A.L.S. so there was no existence of the parent child relationship between them.

The court found that as per the provisions of law a determination that some one is child’s biological father do not preclude a ruling that another man is child’s legal father. There could also be rebuttal of paternity by the other man. However, in the present case B.C.F. did not attempt to rebut the paternity of R.W.S and no party asserted the conflicting paternity presumptions. The statute does not create a parent child relationship between B.C.F. and A.L.S. even if B.C.F was beneficiary of presumption as the presumption was rebutted in favour of R.W.S due to court decree in his favour. Thus the court held that District Court reliance on this presumption was an error and B.C.F. could not be treated as the legal parent of the child. The court further found that District Court had not abused its discretion in awarding sole and legal custody of the child to R.W.S. The court found that the best interest of the child was guiding principle in determining custody dispute. In making the best interest analysis, the detailed finding was required to be made which was made by District Court in this case. The court took in to account the finding that the surrogate had negative attitude towards the couple. Moreover the court found that even if the sole custody of child was to be given to the surrogate, she would not be in the position to take care of child’s need and happiness as she hadn’t got enough means to do so. Thus considering all these aspects, the Appellate Court declined to interfere in the order of the District Court in so far as it relate to the custody of the child. However, the court refused to entertain the declaration that the

58 Minn. Stat. § 257.52 defines parent child relationship as “the legal relationship existing between a child and the child's biological or adoptive parents.”
59 See Minn. Stat § 257.62 5 (c) which defines egg donation.
60 Supra note 54 at 4.
61 Supra note 54 at 5.
62 Supra note 54 at 5.
63 Minn. Stat § 518.17.
64 Supra note 54 at 6.
65 Id., at 9.
surrogacy contract is null, void and against public policy on the basis that the legislature is the best authority to deal with the matter.\textsuperscript{65}

5.2.5. In the Matter of Parentage of a Child by T.J.S. and A.L.S\textsuperscript{66} In the present case, the plaintiff T.J.S. and A.L.S., husband and wife respectively were unable to have a child through traditional means as A.L.S. could not carry the child to term. Therefore the plaintiffs entered in to surrogacy contract with A.F. who consented to act as a gestational carrier for them.\textsuperscript{67} The process of IVF was undertaken and two viable embryos were implanted in to the uterus of the gestational carrier. The embryos were biologically related to T.J.S. and the anonymous ovum donor. Thus there was no genetic connection between child and surrogate mother A.F. on the one hand and child and intended mother A.L.S on the other hand. The plaintiffs sought a declaration of parentage from the family court under the Parentage Act and also a pre birth order directing that their names be listed on the birth certificate as child’s parents and A.F. was to be prevented from being named as mother.\textsuperscript{68} The family court ordered that name of T.J.S. as father and A.L.S. as mother must be mentioned on the birth certificate provided the gestational carrier surrender her rights to the child 72 hours after the birth. The child was born on 7\textsuperscript{th} January, 2009. The gestational mother relinquished her rights after three days of birth of the child. The plaintiff did not notify the Bureau of statistics and vital records regarding their application of pre birth order. The state registrar moved to vacate the portion of the order directing A.L.S. to be listed as the mother of the child in the birth certificate.\textsuperscript{69} The trial court granted the state’s motion concluding that the state registrar has standing in the matter by virtue of her vital statutory responsibilities to record the birth records correctly and legally. The Parentage Act do not permit either explicitly or implicitly A.L.S to be declared as parent through a pre birth adjudication. The court held that A.L.S. exclusive remedy was step parent adoption pursuant to the birth of the child.\textsuperscript{70}

\textsuperscript{65} \textit{Id.}, at 5.
\textsuperscript{66} 212 N. J. 334, 54 A. 3d 263 (2012).
\textsuperscript{67} \textit{Ibid.}
\textsuperscript{68} \textit{Supra} note 66 at 335.
\textsuperscript{69} \textit{Id.}, at 336.
\textsuperscript{70} In the Matter of Parentage of a Child by T.J.S. and A.L.S. 419N.J. Super 46 at 53, See also N.J.S.A. § 9:3-48.
The appeal against the decision of the trial court was filed in Superior Court of New Jersey by the plaintiff. The appellate court also affirmed the decision of the lower court and rejected both statutory and constitutional arguments advanced by the plaintiff. Against the order of the appellate court, the plaintiff moved to Supreme Court of New Jersey. The court considered the plain language of the Parentage Act which provides that the presumption of paternity could not be understood or interpreted to create presumption of maternity.\(^71\) It is clear from the provisions that declaration of maternity is provided to the mother who is biologically or genetically related with the child. Otherwise the other woman had to adopt the child.\(^72\) The court also found concurrence with the analysis of the appellate court that gender based differentiation under the Parentage Act was not unconstitutional as difference was based on actual physiological distinction between men and women.\(^73\)

Further the court concurred with appellate division reasoning that in the context of surrogacy agreement, there was absence of statutory response in regard to equal protection challenge. The court also considered the constitutional argument of the plaintiff and held that a constitutional challenge to Parentage Act could succeed only if there is no way to construe the statute so as to preserve its constitutionality. However, if the legislature while enacting Parentage Act and in creating the gender based differences made choices in accordance with actual differences, then there could not be any violation of constitutional guarantee of equal protection.\(^74\) The court found that the Parentage Act while providing the maternity based on biology or genetics made it plain that the child in the present case was genetically related with the anonymous ovum donor and biologically with A.F. who carried it to term and gave birth. Thus it in no way offend the equal protection as A.L.S. was not deprived of any recognized right being neither biologically nor genetically related with the child.\(^75\) The court found that the plaintiffs unintentionally seek to avoid the plain and unavoidable biological fact that their child was biologically related to A.F. to whom the statute has provided rights. Thus the court found that the convenience and desire by the litigants could not override the clear legislative preferences and constitutional

\(^{71}\) N.J.S.A. 9:17-38 to -59.
\(^{72}\) N.J.S.A. 9:17-41 (a).
\(^{73}\) Supra note 66 at 337.
\(^{74}\) Id., at 338.
\(^{75}\) Id., at 339.
commands that were based on the biological connection between A.F. and the child.\textsuperscript{76}

The court found that the arguments which were advanced by the plaintiffs have to be satisfied by the legislature not by the courts. Thus the decision of the appellate court was affirmed by the present court.

\textbf{5.2.6. In re Baby}\textsuperscript{77} In the present case an agreement of surrogacy was entered into between Luca G. and Antonella T. (intended parents) on the one hand and Jennifer E. and Joshila M. (surrogate and her husband) on the other hand in the month of July 2010. The agreement stated that the intended mother and intended father were adult individuals over the age of 21 years and were in stable love relationship. Further it was provided in the agreement that they wanted to enter in the surrogacy arrangement where by the child born would be at least belonging to one of them biologically. It was further provided in the agreement that they would raise the child as their own and surrogate or her husband would have no rights over the child. The parties also agreed that certain assumptions like the woman who gave birth would be mother of the child would not be applicable in the present case. The surrogate and her husband agreed that they would not attempt to form any parental bond with the child. It was further agreed that they would co operate in all the legal obligations and other responsibilities and would hand over the child immediately after the birth.\textsuperscript{78} Pursuant to the agreement artificial insemination process was carried on and the surrogate mother became pregnant. In November 2011, prior to the birth of the baby, the intended father and mother, surrogate and her husband jointly filed a petition in the Juvenile court to declare the parentage and ratify the surrogacy agreement.

On 25\textsuperscript{nd} December, 2011 the Juvenile court entered a final order to declare the parentage, ratify the surrogacy agreement and directed the issuance of the birth certificate. It was decreed by the court that rights and responsibilities of the surrogate mother and her husband would be terminated for ever. It was further ordered by the court that intended parents would be the legal parents of the child to be born on January 9, 2012. It was further ordered that the legal relationship of parent and child would be established and recognized between the intended parents and the child.

\textsuperscript{76} \textit{Id.}, at 340.

\textsuperscript{77} 2013 WL 245039 (Tenn. Ct. App.)

\textsuperscript{78} \textit{Id.}, at 1.
Further the child was to be given to the intended parents immediately after birth as they were the lawful parents of the child. The intended parents would have all the responsibility regarding the child. It was further ordered that the office of vital statistics should issue the birth certificate for the child to reflect the child’s name at birth as a name selected by the intended father and mother and should place the name of the intended father on the birth certificate as the father of the child and surrogate mother name as the mother of the child.\textsuperscript{79} The child was born on 7\textsuperscript{th} January, 2012 and parties agreed that it would be in the interest of the child that the surrogate should nurse the child for a few days. On 13\textsuperscript{th} January, 2012, the surrogate filed a motion firstly for ex parte restraining and injunction order prohibiting the child from internation travel and surrender of the passport of the child. The juvenile court denied the motion of the surrogate and ordered that the physical custody of the child should be given to the intended father. She also filed another motion on the same day to alter or amend the order dated 22\textsuperscript{nd} December, 2012 made by the juvenile court. On 7\textsuperscript{th} January, 2012 surrogate again filed a motion for relief from final judgment.\textsuperscript{80} In both the motions the surrogate argued that there was no surrogate birth as provided under the Tennessee law as the couple was not married when they had entered in to the surrogacy arrangement. They got married only on 27\textsuperscript{th} January, 2012. Surrogate was initially heard by the magistrates and her motions were denied. She then came to Juvenile court in the form of appeal. However, the Juvenile court also confirmed the decision of the magistrate court and held that the surrogacy agreement was valid under the state law.\textsuperscript{81}

Against the decision of the Juvenile Court, the appeal was made before the Supreme Court of Tennessee. The issue before the court was to consider that whether the trial court had subject matter jurisdiction to uphold the surrogacy agreement. The another issues was whether the trial court erred in enforcing the surrogacy agreement as intended parents had not complied with the definition of surrogate birth given under Tennessee Code Annotated § 36-6-102 (48). Further issue was that whether the trial court erred in terminating surrogate’s parental rights when she did not have counsel and when court lacked any statutory authority. Lastly the issue was whether the trial

\textsuperscript{79} \textit{Id.}, at 2.
\textsuperscript{80} \textit{Id.}, at 3.
\textsuperscript{81} \textit{Id.}, at 5.
court erred in upholding surrogacy agreement and failed to perform the best interest analysis. On the first issue the court found that the definition of surrogate birth is found in the adoption statutes and application was also limited to that part. The court further found that although no adoption was required by the biological parents, but exception was applicable in relation to the non biological parents in whose case the adoption is essential. The court further found that the Juvenile court had jurisdiction over adoption proceedings, so it would also be having jurisdiction to confirm surrogacy agreements as a prelude to the adoption. Further the Juvenile Court had the jurisdiction over a proceeding to invalidate surrogacy agreement.

Taking up the second issue the court considered § 36-1-102 (48) (A) (ii) of code which provides for the definition of the surrogate birth. The court found that it would be absurd to adopt the position that this case did not include surrogate birth because the intended parents were married 20 days after the birth of the child. Rather it show the intent of the committed parents that child should live in stable and loving home. Further the surrogate knew about the status of parents at the time of signing of the surrogacy contract. The parties jointly petitioned trial court for approval of the agreement and order was entered by trial court only after approval of all the parties. Thus surrogate last minute change of heart could not provide a reason to invalidate the final judgment approving surrogacy agreement. Taking another issue the court rejected the surrogate argument of representation by the counsel on the basis that trial court did not abuse its discretion as surrogacy contract fits in the definition § 36-1-102 (48) (A) (ii) of the code. The statute further provides that there is no requirement of surrender for terminating the parental rights of the surrogate. She willingly signed the contract and at that time was represented by the counsel. Thus there was no merit in the argument raised by the surrogate before the court. The court also rejected the argument of the surrogate that there was failure to perform best interest analysis by the trial court. The court found that under the statute, best interest analysis is not required if there is existence of a valid surrogacy contract and in the present case the

83 Id., § 36-1-102 (48) (B).
84 "The insemination of a woman by the sperm of a man under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father's wife to parent[.]"
85 Id., § 36-1-102 (48) (B).
contract was valid as surrogate had already give up her rights. So the court confirmed the decision of the Juvenile court.

5.2.7. In the matter of Paternity of F.T.R In the present case the Supreme Court of Wisconsin consolidated the proceedings of biological father’s petition for adjudication of paternity and proceedings for the guardianship of child born out of surrogacy agreement in which motion was filed by the surrogate mother for the increased custody and for the placement of the child and by the biological father for seeking enforcement of surrogacy agreement. The facts of the case were that Marcia and Monica were very good friends. In 2004 and again in 2008, Marcia was diagnosed with leukemia. After receiving treatment, she was in good health and the doctor also considered this disease as non issue. However, her eggs were no longer viable and she become unable to bear children. In 2004 and again in 2008, Monica offered to act as a surrogate.

In 2008 Marica along with the consent of her husband accepted the offer of Monica. The parties discussed about using a donor egg, but finally decided to use the egg of Monica. So they entered in to a contract of surrogacy. It was agreed between the parties that Monica would become pregnant and carry child for the intended couple i.e. David and Marcia Roseckys. The agreement further provided that the couple would be treated as the legal parents of the child as the best interest of the child would be served by the couple. Monica would not have formal custody and placement of the child. It was further agreed that Monica would see the child through informal visits, and the Roseckys would raise the child. On November 7, 2009, the agreement was signed by David as the father and Marcia as the mother. On November 17, 2009, the agreement was also signed by Monica as the carrier and Cory Schissel (Cory) as the husband. Monica got pregnant by artificial insemination and consequently the child was born on 19th march, 2010. However, shortly after the birth of the child it was informed to the couple that Monica no longer wanted to give the custody of the child. Further she sought the custody of the child.

86 For Further details See § 36-1-102 (48) (C) and (48) (A) Tenn. Code Ann.
87 833N.W. 2d 634, 349 Wis. 2d 84, 2013 WI 66.
88 Id., at 637.
89 Id., at 639.
90 Id., at 638.
The case was filed before the Columbia County Circuit Court. The court held that the personal agreement of the surrogacy was not enforceable. The court awarded the primary custody of the child to the father David and secondary custody was awarded to Monica, the surrogate mother. The appeal was filed against the decision of the court in Supreme Court of Wisconsin after getting the necessary certificate by the biological father. The question before the court was to consider whether an agreement for traditional surrogacy and adoption of a child was enforceable or not. The court of appeal held that the personal agreement of surrogacy was enforceable and valid unless its enforcement would be contrary to the best interest of the child. The court took in to account that Wisconsin law do not provide specific answer to the question as to whether the contract was enforceable or not. The law does not contain any statement of public policy against enforcement. The statute even does not refer to provide compensation to the surrogate.

The court found that the criterion in surrogacy was different from that of adoption. Thus the court held that personal agreement was enforceable, however, the portion of the agreement calling for the termination of the parental rights was unenforceable. The court concluded that the interest supporting enforcement of personal agreement were more compelling than the interest against enforcement. The enforcement of surrogacy helps in promoting stability and permanence in the family relationship because it allows the intended parents to plan for the arrival of the child. Further it reinforces the expectation of all the parties to the agreement and reduce litigation. Thus the court concluded that the Circuit Court had erroneously exercised the discretion by excluding the surrogacy agreement from evidence and rendering its custody and placement decision without consideration of the surrogacy contract.

5.2.8. In the Matter of Paternity and Maternity of Infant T: In this case the matter came up before the Indiana Supreme Court on a petition to transfer the jurisdiction filed by the appellant pursuant to the opinion issued by the Court of Appeal. The present court reviewed the decision of Court of Appeal. In this case, a surrogate

91 Id., at 646.
92 Id., at 647
93 Id., at 650
94 Id., at 651.
95 999 N. E. 2d 843 (2013).
mother agreed to carry to term an embryo conceived from the sperm of biological father and egg of the unknown donor. However, before the birth of the child, the biological father along with the surrogate and her husband petitioned to establish the biological father’s paternity and disestablished maternity of the surrogate. The trial court denied both the requests on the basis that a father could not establish paternity pre birth and it had no authority to disestablish maternity. On an interlocutory appeal, the court of appeals reversed the trial court on the issue of paternity but agreed that a birth mother could not directly disestablish her maternity. The court of appeal considered the paternity statute as a template and found that it would not be in the best interest of the child and would also be contrary to the public policy to allow the birth mother to have the child declared a child without mother. The present court found that the court of appeal had reached the correct result but it had unnecessarily complicated the matter. The court held that as it was already declared by the general assembly that no Indiana court would enforce a surrogacy agreement and such agreements are void as a matter of public policy. In the present case also the petitioners were seeking remedy for a contract which was void as a matter of public policy under Indiana Code § 31-20-1-2. Thus the court held that the birth mother should be treated as legal mother of the child unless and until another parent adopts the child. Thus the court granted narrow interpretation of Indiana Code and left it to General Assembly to consider broader legislation to guide and protect future children and families in relation to surrogacy agreements.

5.2.9. In the Matter of Adoption of Children

In the present case a petition was filed on 27th Jan 2014 before Queen County Family Court, New York by the proposed adoptive parent J.H.-W for adopting the children J.J. and H.C. born through surrogacy arrangement. In this case the birth parent M.H.-W and proposed adoptive parent J.H.-W was same sex spouse. They hired a surrogate in Mumbai who conceived with birth parent sperm and anonymous donor’s egg through in vitro fertilization. As a result the twins were born on 12th May, 2013. The children were given in the custody of the birth parents immediately after birth. On 28th May, 2013, the children were granted citizenship of United States and were also permitted to return to the United States.

96 Ibid.
97 Id., at 844.
98 Id., at 844.
with birth parent and proposed adoptive parent. Since then the children were living and taken care of by the birth parent and proposed adoptive parent. The petition was filed to allow the other parent to adopt the child in the best interest of the child itself. The court considered § 10- a of New York Domestic Relations Law where in same sex couple marriage is declared as valid. The court took in to account § 110 of New York State Domestic Law which permits a second parent adoption in which one spouse could adopt the child of the other spouse. Thus the ability of the proposed adoptive parent was not in question in the present case. The only question to be decided by the court was that if the court could approve an adoption for finalization as New York statute considers surrogacy contract against public policy, void and unenforceable.

The court took in to account the case of In the Matter of Baby M 109 W.J. 396, where in surrogacy was declared as void and against public policy. The court further found that the position of surrogacy hadn’t changed after this case in the state of New York. Thus it was well settled that a party to a surrogacy contract could not seek the assistance of the court either for enforcing contract or for making any other claim based on the contract. The court also considered the cases decided by the different courts relating to surrogacy in the state and found that none of the case directly focussed on the surrogacy contract in context of adoption. For the purpose of considering that whether the court could approve an adoption finalization on the basis of illegal surrogacy contract, the court took in to account three cases Matter of Jacob 86 N.Y. 2d 651, T.V. v. New York State Department of Health 88 A.D. 3d 290, Matter of Doe 7 Misc 3d 352. In all these cases it was held that area of surrogacy is different from adoption. Illegality of surrogacy agreement could not penalize the children. Thus the court took in to account the criteria of best interest of the child. The court found that even if surrogacy contract exists, the legal parentage could be established through the adoption of the child. The court held that the surrogacy contract could not foreclose the adoption proceedings.

100 Ibid.
101 Supra note 99 at 842.
102 Id., at 844.
103 Id., at 845.
104 Id., at 846.
as the other requirements for the adoption had been fulfilled, the children could be adopted by the parents even if they are born or conceived through surrogacy which is declared as void and unenforceable.\textsuperscript{105} Thus the court allowed the adoption of the children by other parent.

5.3 Judicial Response to Surrogacy in England: The case law in the U.K. suggests that the relinquishment disputes are more frequent between the parties where the surrogate is genetically linked with the child.\textsuperscript{106} The courts in almost all the cases have looked into the welfare of the child.\textsuperscript{107} In certain cases even though the payment is made exceeding the permissible limit of law, the court granted parental order ignoring the exchange of payments between the parties.\textsuperscript{108} The courts in different cases have given priority to the interest of the child over the interest of the parties and enacted legislation. The controversy in first case of surrogacy had risen in the case of \textit{Re: C (A Minor) Wardship: Surrogacy}\textsuperscript{109} popularly known as Baby Cotton Case. In this case as the contracting couple has certain medical defects, the surrogacy agency in U.S. hired a surrogate of England on their behalf to conceive and deliver a child. It was a case of artificial and commercial surrogacy where $6500 was given to the surrogate for the relinquishment of the child. The surrogate left the child, Baby cotton after delivery and the intended father applied for the ward order. The judge determined the intended parents as suitable parents and custody of the child was awarded to the intended parents without analyzing the exchange of payment between the parties as no application according to the court was filed for the adoption of the child.

5.3.1 \textit{Re: X and Y (Foreign Surrogacy)}\textsuperscript{110} In the present case the application was filed by the applicants for parental orders before the High Court of Justice. The applicants were established and successful professional couple. However, the wife applicant was not successful in conceiving and undertaking pregnancy.\textsuperscript{111} The couple

\textsuperscript{105} \textit{Id.}, at 847.
\textsuperscript{106} Available at \url{http://eprints.qut.edu.au/45775/}.
\textsuperscript{109} (1985) FLR 846.
\textsuperscript{110} (2008) EWHC 3030 (Fam).
\textsuperscript{111} \textit{Id.}, para 2.
analyzed that the commercial surrogacy is permitted in Ukraine, California and India and in case of UK it is unlawful.\(^\text{112}\) After exploring different options in UK, the couple decided to pursue with surrogacy arrangement in Ukraine. The couple was introduced to many surrogates in Ukraine and finally they entered into an agreement with a married Ukrainian woman who had her own children. However, she was firstly interested in being a surrogate for her own sister. Her sister became pregnant naturally and then she offered to serve as surrogate for the couple. The woman was implanted with embryos conceived with donor eggs from anonymous donor and fertilized by the male applicant’s sperm. In due course the twins were born.\(^\text{113}\)

After the birth of children the application was moved before the court for parental order. The court had taken into account both England and Ukrainian law in order to analyze the position of parties. The court firstly took into account the English law. The court found that as per the law the surrogate mother is the legal mother of the twins and her husband is the legal father as she was a married woman.\(^\text{114}\) The court further analyzed the Ukrainian law and found that as per the law the surrogate and her husband were not the legal parents rather the applicants were the legal parents of the twins. The birth certificates issued in Ukraine also certified to this fact.\(^\text{115}\) The applicants entered into the country on temporary visa and had no rights to remain in Ukraine beyond specified period. The children thus became stateless as Ukraine authorities had not granted nationality to them and the applicants were not in a position to get British nationality for children as they had no right to bring them in the country.\(^\text{116}\) However, they received discretionary leave from the British immigration authorities to afford the applicants an opportunity to regularize the status under English law after it was established by DNA that applicant father was biologically related to the children.\(^\text{117}\)

The court examined the applicability of Section 30 of Human Fertilization and Embryology Act, 1990. The court found that the applicants were lawfully married to

\(^{112}\) Id., para 3.

\(^{113}\) Id., para 4.

\(^{114}\) Id., para 5 and 6, See also Section 27 and 28 Human Fertilization and Embryology Act, 1990.

\(^{115}\) Id., para 8.

\(^{116}\) Id., para 9.

\(^{117}\) Id., para 10.
each other and sperm of the husband applicant was used.\textsuperscript{118} Thus they were entitled to apply for the parental order if the other conditions of this section were fulfilled. The court further found that the application was made with in the stipulated time period of 6 months from the date of birth of child.\textsuperscript{119} Further the applicants were domiciled in England and Wales and had their own home. Both applicants were over age of 18 years and the consent of the surrogate was taken after the expiry of six weeks. However, the court found that two conditions were controversial and require some further consideration. First was in regard to consent of surrogate mother and her husband for the parental order. There was no doubt in regard to the consent of the surrogate before the court as sufficient evidence was adduced in this regard.\textsuperscript{120} However, with regard to the consent of the husband of the surrogate the court considered the contention of the applicants that it must not be required as it could lead to repercussion like it would put a premium on making surrogacy arrangement with unmarried surrogates. The court found that there was some basis in the argument; however, the court found that the statutory compulsion could not be overpowered by this compulsion.\textsuperscript{121} The court found that the consent of the surrogate husband was required in this case. However, the court made it further clear that it was validly taken at the time when the applicants were granted leave to regularize their positions under England law.\textsuperscript{122}

The court took up the other issue that no money or other benefit other than reasonable expenses must be incurred by the parties.\textsuperscript{123} The court took in to account the payments made to surrogate which include £ 235 per month during pregnancy and £ 25,000 on the live birth of the child. It was further provided that 80% of the payment had to be paid on the consent of surrogate to facilitate the applicants name on the birth certificate of the child and balance was agreed to be paid on signing the written consent to parental order application after expiry of six weeks. The court found that as the expenses were more than the reasonable expenditure, the same had to be authorized by the court for making them valid. The court found that in order to

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.}, para 11.
  \item \textsuperscript{119} \textit{Id.}, para 12. See also Section 30 (2), (3), (4) and (6) \textit{Human Fertilization and Embryology Act, 1990}.
  \item \textsuperscript{120} \textit{Id.}, para 13.
  \item \textsuperscript{121} \textit{Id.}, para 14.
  \item \textsuperscript{122} \textit{Id.}, para 15.
  \item \textsuperscript{123} \textit{Id.}, para 17, See Section 30 (7) \textit{Human Fertilization and Embryology Act, 1990}.
\end{itemize}
validate and authorize the payments, it must be seen that whether the amount was so disproportionate to the reasonable expenses, whether the parties had acted in good faith or acted in order to defraud the authorities.\textsuperscript{124} The court found that it was in the welfare of the children to remain in life long relationship. It further found that the payments were not disproportionate as they were validly accepted under the Ukrainian law. Taking in to account all these facts and circumstances, the court finally granted the order in favour of the applicants.\textsuperscript{125}

5.3.2 Re K (Minors) (Foreign Surrogacy)\textsuperscript{126} In the present case the applicants X and Y sought directions from the court regarding their application for a parental order and entry clearance for twins who were born in India as a result of the commercial surrogacy agreement. The applicants were habitually resident of England. The facts were that they sought the services of a surrogate in India where the sperm was donated by X and egg was provided by the anonymous donor. The twins were born and were handed over to the applicants after delivery.\textsuperscript{127} The applicants instituted the proceedings under Section 30 of Human Fertilization and Embryology Act (HFEA), 1990 for parental order. They were also required to apply for the entry clearance to bring the twins in England.\textsuperscript{128} The order of clearance could be granted only if the parental order was filed within 6 months from date of birth. Further there must also be probability of granting the order by the court. As the applicants had already applied for the parental order, they seek the view of the court regarding the likelihood of making of parental order.\textsuperscript{129} However, the court declined to make the observation on the basis that the court lacked jurisdiction in the matter as the children were not habitual resident in England.\textsuperscript{130} The court further found that in order to grant the parental order the welfare assessment had to be made by the guardian of the court which was not possible in this case as the children were not living with the applicants. Thus the court found that it had no jurisdiction in this matter. Further the court opined that there must not be usurping of function of executive. The court found that the function of entry clearance is of executive nature and not judicial. Further the court

\begin{itemize}
    \item \textsuperscript{124} Id., para 21.
    \item \textsuperscript{125} Id., para 22 to 27.
    \item \textsuperscript{126} (2010) EWHC 1180 (Fam).
    \item \textsuperscript{127} Id., para 2.
    \item \textsuperscript{128} Id., para 4.
    \item \textsuperscript{129} Id., para 5.
    \item \textsuperscript{130} Id., para 6.
\end{itemize}
considered that the giving of the advisory opinion as opposed to the declarations establishing rights and lawfulness was alien to the traditional practice of the court. Thus the court held that it could proceed with the matter only when the children will be in the country.

5.3.3 RE L (a minor) In this case the court authorized the payment made in excess of reasonable expenses incurred in commercial surrogacy agreement retrospectively. The order was granted when an application was made to the court under Section 54 of Human Fertilization and Embryology Act, 2008 (HFEA). The surrogacy agreement was made in Illinois, United States. The agreement was wholly lawful in the state as there was no restriction as to the payments made in the surrogacy agreement. However, the court in this case found that the payments were made in excess of the reasonable expenses. The court found that if the payments were more than the reasonable expense then the authorization had to be made by the court. Further the court found that the term ‘reasonable expenses’ was an opaque term which had no definite meaning. Thus it had to be interpreted according to the circumstances of each case. For this purpose the court took in to account the provisions of the old HFEA Act of 1990 and present HFEA Act of 2008. The court found that Section 54 of 2008 Act reproduces Section 30 of the old Act with only exception that there was broadening of categories of the persons who could file for the parental order. Apart from that the welfare clause used in the old Act was not replaced by the present Act. Rather the present Act makes welfare consideration not merely the first consideration for the court to consider but the primary consideration. The court considered the case of Re S (Parental Order) (2009) EWHC 2977 (Fam) and Re X (Children) (Parental Order: Foreign Surrogacy (2008) EWHC 3030 (Fam) which were decided before the

131 Id., para 7.
132 Id., para 1.
133 Id., para 3.
134 Id., para 4, See also Section 54 (8) Human Fertilization and Embryology Act, 2008.
135 When considering whether to give retrospective approval for a surrogacy agreement that would not have been lawful in England and Wales, the court had to (1) ensure that the arrangements were not being used to circumvent the childcare laws in England and Wales; (2) be astute not to be involved in anything that looked like payment for effectively buying children overseas; and (3) be astute to ensure that the sums paid were not such as to overbear the will of the surrogate.
136 The court retrospectively authorized under the Section 30 (7) Human Fertilization and Embryology Act, 1990 the payments made by the applicants to a foreign surrogate mother in excess of her expenses reasonably incurred, and made a parental order in their favour since that was in the best interests of the children concerned.
enactment of the present Act. However, the court found that even after the enactment of the present Act, these decisions still hold good.\textsuperscript{138} Thus considering all these issues the court authorized the payments made retrospectively keeping in mind the welfare of the child along with the fulfillment of legal requirements.

\textbf{5.3.4 JP v. LP}\textsuperscript{139} In this case the application was made to the High Court under its inherent jurisdiction and under Section 8 of Children Act, 1989 to ascertain the parental responsibilities of all the parties involved in the surrogacy agreement.\textsuperscript{140} The applicant JP referred as mother and respondent LP father of the child respectively, were married on 24\textsuperscript{th} May, 2008. The mother had a child by earlier relationship but had undergone hysterectomy afterwards. She was unable to conceive with the father. Thus the couple decided to conceive the child through partial surrogacy.\textsuperscript{141} For this purpose the couple took the help of a friend named SP who agreed to serve as a surrogate for the couple. She was artificially inseminated at home with the sperm of father and became pregnant thereafter.\textsuperscript{142} The parties agreed that the birth of the child should take place in a hospital named Leister Royal Infirmary. When the hospital authorities came to know that the child will be born as a result of surrogacy arrangement, they asked the parties to enter in to a formalized surrogacy agreement and provide the copy of the agreement to the hospital authorities.\textsuperscript{143} The parties agreed and the agreement was prepared by a firm of Birmingham solicitors. Consequently the child CP was born on 1\textsuperscript{st} March, 2010. The child was handed over to the care of the father and mother. The birth certificate of the child revealed that LP was the father of the child and surrogate mother was the mother of the child.\textsuperscript{144} However, the relationship between the couple broke and JP left the matrimonial home on 6\textsuperscript{th} July, 2010. She moved an application before Leicester County Court for residence order in her favour.\textsuperscript{145}

\begin{itemize}
\item\textsuperscript{138} Supra note 132, para 8.
\item\textsuperscript{139} (2014) EWHC 595 (Fam), 2014 WL 795219.
\item\textsuperscript{140} Id., para 1.
\item\textsuperscript{141} Id., para 3.
\item\textsuperscript{142} Id., para 4.
\item\textsuperscript{143} Id., para 6.
\item\textsuperscript{144} Id., para 8.
\item\textsuperscript{145} Id., para 9.
\end{itemize}
On 15th July, a shared residence ordered was made by the court in her favour. At the hearing the couple seeks to regularize the legal status of the child as between the mother, father and the surrogate mother pursuant to Section 54 of Human Fertilization and Embryology Act, 2008. The father signed the application on 16th July, 2010 and gave it to mother to sign and then lodge it in Leichester County Court. The mother signed the application on 28th July but did not lodge it with the court. Finally it was issued on 19th October by which the child becomes 7½ months. However, the law required that the application must be made with in 6 months from the date of birth of the child. The application was listed for directions on 3rd November, 2010 and again on 1st December but was not attended by either of the party. Finally the application was dismissed. The relationship between the couple continued to become fraught and finally on 12th September 2012, the mother made an application for sole residence of the child. The matter got transferred to the present court for decision in regard to the status of the parties involved in the surrogacy agreement. The issue before the court was to see that what could be responsibilities of all the parties with regard to the child where there could not be any parental order for regularizing the legal status of the child.

The court took in to account HFEA to analyze the responsibilities of different parties involved in the surrogacy agreement. The court found that the Act not only deals with the issue of consent and legal status but also with the welfare of the child. The court found that there was a difference between the partial and full surrogacy in relation to formal and informal procedure adopted by the parties. The court also found that even in case of partial surrogacy where informal procedure was adopted, the Act will be applicable. The court further found that surrogate mother will be the child’s legal mother until the child is adopted or parental order is given by the court. The court also found that LP is the genetic and social father of child CP as surrogate was unmarried. However, JP had no legal status and parental

146 Id., para 10.
147 Id., para 11.
148 Id., para 12.
149 Id., para 15.
150 Id., para 16.
151 Id., para 17. For Further Details See Section 13 (5) and (6) Human Fertilization and Embryology Act, 2008.
152 Id., para 21 and 22.
The court took into account the Parental Orders (Human Fertilization and Embryology) Regulations, 1994 by which Section 30 was brought in to effect under HFEA, 2008 which provides a fast track remedy by way of parenting orders.\(^{155}\) For parental orders the requirements of Section 54 were required to be fulfilled.\(^{156}\) The court analyzed that in the present case all the requirement except two were not fulfilled. The requirement which were not satisfied include that the application was made after the expiry of 6 months from the date of birth of the child and the child home was not that of the applicant.\(^{157}\) The court refused to provide a parental order on the basis that the statutory limit could not be exceeded beyond the period of 6 months in any case.\(^{158}\)

The court considered the option of adoption in regard to the status of the applicant. The court held that it was not a viable option as the couple were not married and if she was allowed to adopt the child, then it will result in relinquishment of rights of the father.\(^{159}\) The court also found that the option of special guardianship order was also not possible as it will result not only in exclusion of rights of surrogate but father as well.\(^{160}\) The court took into account the structure of arrangement given by the parties which provided that CP will be made as ward of the court and shared residence order was to be provided between the mother and father, all the issue of the parental responsibility were to be divided between the mother and father jointly and finally the surrogate mother was to be prohibited from exercising any responsibility regarding the child without the leave of the court. After scrutinizing the exceptional circumstances of the case, the court held that the giving of wardship order as desired by the parties was appropriate.\(^{161}\) The court however, gave a cautionary tale that this case represented the real danger which could arise in case of private partial surrogacy agreements where assistance is not taken from regularized fertility clinic.\(^{162}\)

\(^{153}\) Id., para 23.
\(^{154}\) Id., para 23.
\(^{155}\) Id., para 25.
\(^{156}\) Id., para 27.
\(^{157}\) Id., para 28.
\(^{158}\) Id., para 30 & 31.
\(^{159}\) Id., para 32, See also Section 46 and 47 Adoption and Children Act, 2002.
\(^{160}\) Id., para 33.
\(^{161}\) Id., para 37.
\(^{162}\) Id., para 39.
5.3.5 CC v. DD\(^{163}\) This case highlighted the legal complexities and need for international surrogacy arrangements, to ensure the welfare of all the parties involved. In the present case the applicants were of British and French origin and child was born in United States (US) to US surrogate mother.\(^{164}\) The facts of the case showed that Mr. and Ms. C were British French married couple who were living in France. Ms. C moved to France with Mr. C due to inability of Mr. C to stay. However, she continued to return in England on regular basis and maintained significant relation including owing of two properties in England.\(^{165}\) Q, the child was born through surrogacy arrangement entered in to under the law of Iowa between the couple on the one hand and Ms. D and her husband on the other hand. The child temporarily resided in Minnesota after birth.\(^{166}\) All legal steps were taken in Minnesota to secure the applicants status as Q’s legal parents. Finally they were declared as legal parents by Minnesota Court.

The application was filed in the present case by the applicants before the court for parentage order. The court found that in order to grant the parentage order, two requirements were to be satisfied. Firstly, the court had to consider whether the requirements of S. 54 HFMA been fulfilled. Secondly, it had to be seen that whether the child life long welfare would be secured after making the parental order.\(^{167}\) In order to analyze the first issue the court considered that whether one of the applicants was having biological relation with the child. The applicants clearly established before the court that Mr. C had biological relation with the child being sperm donor.\(^{168}\) The second requirement was regarding the status of applicant relationship. The applicants were in a married relationship, so this criterion was also met with under the Act.\(^{169}\) The court was also satisfied with other requirement that the application must be made with in a period of 6 months from the date of birth of the child.\(^{170}\) As per other requirement, the court found that the child’s home was with the applicants at the time of making of the application.\(^{171}\) The court further referred to the

\(^{163}\) (2014) EWHC 1307 (Fam), 2014 WL 2194751.

\(^{164}\) Id., para 3.

\(^{165}\) Id., para 5.

\(^{166}\) Id., para 6.

\(^{167}\) Id., para 9.

\(^{168}\) Id., para 13. See also Section 54(1) Human Fertilization and Embryology Act, 2008.

\(^{169}\) Id., para 15. See also Section 54 (2) Human Fertilization and Embryology Act, 2008.

\(^{170}\) Id., para 16. See also Section 54 (3) Human Fertilization and Embryology Act, 2008.

\(^{171}\) Id., para 17. See also Section 54 (4) (a) Human Fertilization and Embryology Act, 2008.
other aspect of Section 54 which provides that at least one of the applicants must be domiciled in the jurisdiction of the court and application could be determined irrespective of habitual or physical residence of the applicant.\textsuperscript{172}

The court found that as per the provision of the section, it was not required that the child or the applicant must be present in the jurisdiction of the court, it was only related to the domicile of one of the applicants.\textsuperscript{173} The court considered that domicile could be that of origin or of choice. The court took up the case of Ms. C who was born in England and subsequently after marriage shifted with her husband to France.\textsuperscript{174} Thus she was having domicile by origin. Thus the question before the court was that whether by moving to France, she had formed an intention to permanently and indefinitely live in France or not.\textsuperscript{175} The court after analyzing came to a conclusion that she had not given up her domicile by origin as her residence in France was for a limited purpose only due to her relationship with her husband. She was regularly attached to her native place. So the court found that the requirements of domicile by one of the party were fulfilled in this case.\textsuperscript{176} The court further noticed that the criterion of more than 18 years of age was also fulfilled by the parties.\textsuperscript{177}

The court then took up other requirement that the surrogate and her husband must consent freely, unconditionally and with full understanding for the parental order. In case of surrogate mother’s consent, it must be given after 6 weeks from the date of birth of the child.\textsuperscript{178} For this the court analyzed the evidence produced before it by the parties and felt satisfied that this requirement had also been met by the parties. Finally the court had to see whether the payments made between the parties were required to be authorized by the court or not. The court found that the payments even if already made have to be authorized by it. The courts thus had to see that whether the expenses were reasonable and parties had acted in good faith or not. After scrutinizing all the evidence the court was satisfied that the parties had acted in good faith and the

\textsuperscript{172} \textit{Id.}, para 18.
\textsuperscript{173} \textit{Id.}, para 20.
\textsuperscript{174} \textit{Id.}, para 25.
\textsuperscript{175} \textit{Id.}, para 26.
\textsuperscript{176} \textit{Id.}, para 27.
\textsuperscript{177} \textit{Id.}, para 28, See also Section 54(5) \textit{Human Fertilization and Embryology Act, 2008}.
\textsuperscript{178} \textit{Id.}, para 29, See also Section 54 (6) and (7) \textit{Human Fertilization and Embryology Act, 2008}. 
payment made between the parties was reasonable. The court further considered two other points firstly, that whether there was any breach on the part of the applicants so far as the breach relates to UK domestic law and secondly, whether the applicant’s child was already recognized under UK law by virtue of adoption and if it was so what will be the impact of parental order in this case. The court found that as far as the first point is concerned the domestic law will be applicable only if the applicants were habitually resident in British island. However, this was not the case, so the UK domestic law will not be applicable. The court found regarding the second issue that as a matter of English law due to the making of step parent adoption Ms. C is recognized as mother of the child where as Mr. C is not treated as a parent as the surrogate was married. The court felt satisfied with the submissions made by the parties which among other includes that a parental order was the order best suited to the surrogacy arrangements and even if the US adoption order will be recognized in UK that will not make the child as British citizen. In such a case the applicant had to move to Home secretary for special permission in this regard. The court also considered that if the parental order is granted that will be in the welfare of the child. Thus after analyzing all the issues and circumstances of the case, the court issued the parental order in favour of the applicants.

5.4 Judicial Response to Surrogacy in Australia: The Australian case law involves more applications for parental or adoption orders in relation to surrogacy arrangements. There is little or no dispute over the non relinquishment of child by the surrogate after delivery. The courts in Australia have also taken in to account the welfare of the child while dealing with the parental responsibilities of the parties involved.

179 Id., para 30 and 31, See also Section 54 (8) Human Fertilization and Embryology Act, 2008.
180 Id., para 35, See also Section 83 Adoption and Children Act, 2002.
181 Id., para 36, See also Section 83 (1) (b) Adoption and Children Act, 2002.
182 Id., para 39.
183 Id., para 40.
184 Id., para 42.
185 Id., para 43.
5.4.1. **Re Evelyn**\(^{187}\) The present case was an appeal against the order of trial court by the biological father and his wife named as Mr. and Mrs. Q for the sole custody of the child named Evelyn. The appeal was brought against the biological mother and her husband named as Dr. and Mrs. S..\(^{188}\) Due to hysterectomy arising from the ovarian cancer, Q was unable to conceive. Mrs. Q and Mrs. S met in the year 1981 and became close friends and after some time their spouses met each other and all developed friendship in between them. The infertility of Mrs. Q was always a subject matter of discussion between them.\(^{189}\) Mrs S formed the intention to help couple for begetting the child and it was also supported by her husband. In the month of September 2005, she traveled Q’s residence and disclosed her intention to undertake pregnancy on the behalf of couple. The Q’s were at shock and were unable to take any instant decision in this matter. However, Mrs. S periodically offered for the same and lastly the offer was accepted by the couple in January 2006.\(^{190}\) The agreement took place between the parties and the couple traveled to South Australia for the purpose of birth. The child was conceived through a surrogacy arrangement whereby S was inseminated with sperm of Q. Subsequently the child was born. Mrs. S was registered as the mother and Mr. Q as father in accordance with the state legislation. However, after the birth of the child some frictions started arising in between Q’s and S’s. The surrogate S wanted to maintain the contact with the child. However, Mrs. Q did not want that S should be so close to the child.\(^{191}\) She just wanted limited communication between the child and Mrs. S. The result was filing of applications before the Family Court. Q’s filed the application for custody of child in Brisbane and S’s filed it in Adelaide Registry of Family Court.

There was contested hearing before the Judge named Hilton in Brisbane and the interim order was made for placing the child with Q’s pending hearing and S’s would have such contact as may be agreed between the parties. The S’s lodged an appeal against the decision and also proceeded with stay application. The court dismissed the stay application. On 31\(^{st}\) July the application was further made to the court by S’s for transferring the case to Adelaide. The matter again came up before Judge Hilton and it

\(^{187}\)145FLR 90.
\(^{188}\)Id. at 91.
\(^{189}\)Id., at 94.
\(^{190}\)Id., at 95.
\(^{191}\)Id., at 96.
was ordered that the parties must attend the Psychiatrist Dr. V for making further report. It was further ordered by consent that Ss would have contact with Evelyn each Tuesday and Friday at the residence of Q’s between 10 a.m. and 11 a.m. and at other times as agreed between the parties.\textsuperscript{192} The next hearing was placed before the Judge Jordon where it was provided that Ss could have contact with the child between 9 a.m. to 5 p.m. Q’s sought an order of sole custody and responsibility of the child along with the residence at their place. On the other hand Ss required that the child should reside with them and they should be responsible for day to day care, welfare and development of the child. The Judge Jordon made the order that from 14\textsuperscript{th} February, 2008 Ss would have the custody of the child. They would have the responsibility of day to day care, welfare and development of the child. However, the court held the S’s and Q’s would have shared responsibility for long term care and Q’s could contact with the child at all reasonable time as agreed between the parties.\textsuperscript{193} The appeal was made by Q’s against these orders to the present court.

The appeal was filed on the basis that the trial judge had erred in determining the issue of residence on the basis of unsatisfactory evidence as the experts called by the parties had either limited or no contact with the parties. Further the appeal was filed on the basis that the trial judge had the obligation to require and erred in failing to require the parties to provide or to appoint court expert evidence in relation to the nature of the relationship between Evelyn, Mrs. S, Dr. S and their children on the one hand and the relationship between the Q’s and Evelyn on the other hand. The court must also be clear about the duties, responsibilities and care given by both the parties to the child. The court must also see the potential of care to be given to the child by the parties. Further it must also to be considered by the court that up to what extent the grief would be suffered by Q’s.\textsuperscript{194} It was further made part of the appeal that the trial court had erred in finding the order that child’s interest would be served by placing greater weight on immediate realities in the short term as compared to future hypothetical issues in the longer term. It was also made a ground for appeal that finding of the trial court that effect of placement of child with Q’s would affect the mental stability of Mrs. S was erroneous. There was also a request for calling fresh

\textsuperscript{192} Id., at 92.
\textsuperscript{193} Id., at 93.
\textsuperscript{194} Id., at 98.
evidence on the basis that expert opinion were not validly taken as there was no proper evaluation and assessment of the parties.\textsuperscript{195}

The present court firstly took up the matter of admitting fresh evidence in appeal. The court rejected the same on the basis that the trial court had already appreciated the evidence and moreover, the present court would not be in the position to examine and evaluate the evidence of parties and experts at the stage of appeal.\textsuperscript{196} The court found that the first and second ground of appeal were interrelated and considered the issue in the combined way for giving the order. The court considered that the evidence and consequences of grief suffered by the parties should be considered by the court and for that matter the court could take expert opinion.\textsuperscript{197} The court further made reference to the cases of \textit{In Marriage of Sadjak}\textsuperscript{198}, \textit{In Marriage of Lonard}\textsuperscript{199} and \textit{In Marriage of Barlett}\textsuperscript{200} where it was held by the court that if the evidence was inadequate, the trial Judge could refuse to proceed with the matter.\textsuperscript{201} The court however, held that this was not the circumstance in the present case. The court found the opinion on the basis that the parties were represented by the senior learned counsel. No application was made by the appellants to call for further evidence before that court. As far as the issue of family report was concerned the parties were satisfied with the report of Dr. V. Moreover, the court found that the fact that the report of Ms. H, an American expert psychologist had not been considered would not make the evidence inadequate or misleading.\textsuperscript{202} Thus the court held that first two grounds of appeal fail in the present circumstances of the case.

Regarding the third issue the court found that the decision of the learned trial judge was simply not based on the fact that Mrs. S was biological mother of the child. The court pointed out that the Judge had considered the relevant circumstances which could be favourable and unfavourable to both the parties. The court considered that due to the uniqueness of surrogacy agreements many questions would evolve to the

\textsuperscript{195} Id., at 99.
\textsuperscript{196} Id., at 100.
\textsuperscript{197} Id., at 102.
\textsuperscript{198} (1993) FLC 79.
\textsuperscript{199} (1976) 26 FLR 1.
\textsuperscript{200} (1994) 115 FLR 341.
\textsuperscript{201} Supra note 187 at 103.
\textsuperscript{202} Id., at 104.
mind of the child like identity, rejection etc. which could be better answered by Mrs. S. Moreover the court considered the circumstances of Mrs. Q also who according to court would not be in a comfortable position even if custody of the child be given to her. She would always fear in her mind regarding Mrs. S. Thus the life of the child would be more open, comfortable in custody of biological mother Mrs. S. The court held that the trial Judge was not in error to consider all these circumstances. Thus the third ground of appeal also fails. The court further took fourth ground of appeal. The court found that the ground taken by the appellant as basis for appeal was not the real basis of the decision given by the learned Judge. The court held that the trial Judge was correct in rejecting the contention and considering the best interest of the child. Thus after considering all the grounds for appeal, the court dismissed the appeal and order of lower court was maintained.

5.4.2. Re Mark: An Application relating to Parental Responsibilities In the present case the question for consideration before the court was regarding the joint parental responsibility of the child Mark who was born through surrogacy arrangement. Mark was one year old at the time of making application before the court by the parents. A surrogacy agreement was entered into between Mr. X and Y, the gay partners on the one hand and surrogate S and her husband on the other hand in United States of America (USA). It was provided in the agreement that the surrogate or her husband would have no link with the child and X and Y would be treated as the parents of the child. The embryo was created by using the sperm of X and egg of the anonymous donor. The child was born in USA on 31st May, 2002. Pursuant to the birth of the child a petition was filed in USA state court which determined that X was the biological father of the child in all public records including birth certificate and Mr. S, husband of the surrogate is not the father of the child. The birth certificate was issued on 3rd June, 2002 which showed X as father of child

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203 Id., at 106.
204 Id., at 107.
205 Id., at 108.
206 Id., at 110.
208 Id., para 1.
209 Id., para 2.
210 Id., para 6.
211 Id., para 5.
212 Id., para 4.
and S as mother of the child.\textsuperscript{214} On 10\textsuperscript{th} June, 2002 X, Y and child returned to Australia.\textsuperscript{215} The child had been living with them in Melbourne, Australia since then.\textsuperscript{216} On 27\textsuperscript{th} June, 2002 the child was registered as Australian Citizen.

On 11\textsuperscript{th} November, 2002 X and Y filed an application before the present court for seeking joint responsibility for the long term care, welfare and development of the child.\textsuperscript{217} In order to deal with the question of joint responsibility, the court firstly took in to account Section 65 C of Family Law Act, 1975 which provides that application for care, welfare and development of the child could be made either by the parent, or by the child or grandparent or any person who was concerned with the care, welfare and development of the child.\textsuperscript{218} The court found that both X and Y were concerned with the care, welfare and development of the child and thus had the status to bring the application.\textsuperscript{219} However, the court considered that whether X who had provided sperm was the father of the child or not. For this purpose the court took in to account Section 69R of Family Law Act which provides that if a person’s name is registered in the birth certificate then he is presumed to be the father of the child under the law of commonwealth, state territory or prescribed overseas jurisdiction.\textsuperscript{220} However, the regulation\textsuperscript{221} interpreting prescribed overseas jurisdiction did not declare any country or part of country jurisdiction for the purpose of the Family Act.\textsuperscript{222} Thus as per the court the designation of X as child father in public records and birth certificate gave no rise to presumption under the Australian Law. Thus in order to fix paternity of X, the court took in to account Section 60 H of Family Law Act which declares that the child who is born out of the artificial conception is the child of a woman or man even they were not biologically related with the child.\textsuperscript{223} The court found that the word parent was not used any where in the section. It means that the section recognizes social parents even though not biologically related to the child.\textsuperscript{224} Thus the court

\textsuperscript{213} Id., para 12.
\textsuperscript{214} Id., para 13.
\textsuperscript{215} Id., para 14.
\textsuperscript{216} Id., para 3.
\textsuperscript{217} Id., para 15.
\textsuperscript{218} Id., para 21.
\textsuperscript{219} Id., para 22.
\textsuperscript{220} Id., para 25.
\textsuperscript{221} For Further Details See Section 4 (1) Regulation 14 Family Law Act, 1975.
\textsuperscript{222} Supra note 207 para 28.
\textsuperscript{223} Id., para 38.
\textsuperscript{224} Id., para 39.
found that the definition was not exhaustive and could be enlarged in relation to the persons who could be regarded as the parents of the child.\textsuperscript{225}

The court while interpreting the section rejected the narrow interpretation given in the case of \textit{Re Patrick: An Application Concerning Contact} (2002) Fam CA 193. The court found that X had provided the genetic material with the express intention of begetting a child. He was not the anonymous egg donor.\textsuperscript{226} So the court felt satisfied that the word parent must also include the person like X.\textsuperscript{227} The court also found that as the child is genetically related with X and birth certificate also depicts X as the father of the child, a finding that X was not parent of child for the purpose of care, welfare and development of the child would not be in the interest of the child.\textsuperscript{228} That would also mean that the child had no parent at all. So the court declared that X would be treated as the parent of the child for the purpose of the said Act also.\textsuperscript{229} The court further felt satisfied that Y was also a person concerned with care, welfare and development of the child and shared equal responsibility with X since the birth of the child.\textsuperscript{230} In order to analyze the welfare of the child, the court also considered the report of the court counselor who found excellent relationship between X, Y and the child.\textsuperscript{231} Thus the order of joint responsibility was granted by the court in favour of both X and Y.\textsuperscript{232}

\textbf{5.4.3. \textit{Re Michael: Surrogacy Agreements}}\textsuperscript{233} In the present case the child Michael was born as a result of family surrogacy arrangement in October 2008.\textsuperscript{234} The applicant Sharon was diagnosed with cervical cancer. The treatment rendered her infertile. However, prior to the treatment, her eggs were harvested using the sperm of her husband Paul. The embryo was placed in the womb of Lauren, the mother of Sharon. Lauren was in de facto relationship with Clive.\textsuperscript{235} In accordance with the intention of all the adults the child was handed over by the surrogate mother Lauren to
Sharon and Paul, the intended parents after birth. Paul was listed as the father of the child and Lauren as the mother of the child in the birth certificate.\textsuperscript{236} The child was known by Paul’s surname and Lauren and her husband were considered as maternal grandmother and grandfather respectively in the society.\textsuperscript{237} The intended parents wanted to adopt the child. So Paul, Sharon and Lauren made an application to the Family Court of Australia for seeking leave to commence proceedings for the adoption of the child under Section 60 G of the Family Law Act, 1975 (FLA).\textsuperscript{238} The question before the court was to consider that whether the leave could be granted by the court to Paul and Sharon or if it was not possible whether the leave could be granted to Lauren to make an application for adoption on behalf of Paul and Sharon.\textsuperscript{239}

The court took up the matter and considered firstly that whether Paul and Sharon were child’s parents or not. The court took in to account different provisions of law and case law in order to find an answer to this query. The court considered Section 60 HB FLA which provides that a child could be declared as a child of one or more parents. However, in the opinion of the court, this section could not be made applicable to the present case as the section was not applicable in the state. There was no law in the state which could allow Paul and Sharon to have an order to the effect that child was their child.\textsuperscript{240} The court further considered Section 60 H FLA which generally covered children born as a result of artificial conception including the implantation of embryo in a woman.\textsuperscript{241} In December 2008, the section was amended and it now provides that if a child is born as a result of artificial insemination to a woman who is either married or in de facto relationship with other person, then she and that other person will be the parents of the child. In this situation even if the genetic material was provided by the third person, then also that person could not be treated as the parent of the child.\textsuperscript{242}

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\textsuperscript{235} Id., para 4.  \\
\textsuperscript{236} Id., para 6.  \\
\textsuperscript{237} Id., para 8.  \\
\textsuperscript{238} Id., para 11.  \\
\textsuperscript{239} Id., para 12.  \\
\textsuperscript{240} Id., para 17.  \\
\textsuperscript{241} Id., para 18.  \\
\textsuperscript{242} Id., para 24.  
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After considering and applying the section to the facts of the present case, the court came to conclusion that Paul and Sharon could not be treated as the parents of the child. Rather Lauren and Clive would be treated as child’s parents as per law. The court then considered Section 11 of Status of Children Act, 1996 (New South Wales) (SCA). According to this section child’s parent is the person whose name is entered in to the birth register. The section carries a rebuttable presumption. In the present case the name of Paul and Lauren was entered in to the birth register. The court further took in to account Section 14 of SCA which provides irrebuttable presumption of parenthood. The section is applicable in case the parties are either in the married relationship or are in de facto relationship. It provides that if a woman undergoes fertilization process, then her husband will be presumed as father of the child even if the sperm or the egg is provided by the other person. Further the court took in to account Section 17 of the SCA which provides that irrebuttable presumption will overpower the rebuttable presumption. Thus the court concluded that the presumption of registration of birth certificate was rebutted in favour of irrebuttable presumption that Lauren and her partner Clive were the parents of the child by operation of Section 60 H FLA. The court thus dismissed the application of Paul and Sharon under Section 60 G FLA as neither Paul nor Sharon falls with in the definition of term parents. However, the court pointed out that the couple could directly move to the Supreme Court for relative adoption order as after the amendment in Adoption Act in 2000 the procedure is made simple and adoption could be made without the consent of the Director General of Community Services.

The court also considered the issue of Lauran’s application for leave to adopt on behalf of Paul and Sharon. The court found that in order to grant leave to her, it must firstly be clear that there were some basis for filing the application and also prospects of success. The court considered Section 87 of FLA which provides that the person filing an application has to get the consent of the Director General and consent can only be given if the person is prospective adoptive parent. However, in the present

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243 Id., para 27 and 28.
244 Id., para 38.
245 Id., para 39.
246 Id., para 40.
247 Id., para 45 and 60.
248 Id., para 55.
249 Id., para 65.
case as Lauren was already in relationship with the child, she could not be treated as the prospective adoptive parent with in the meaning of the section. So there were no grounds to grant her leave for filing application before the Supreme Court.\(^{250}\) So the court rejected the application of the applicants in the present case.

\textbf{5.4.4. AB and CD v. EF}\(^{251}\) In the present case an application was moved before the court for seeking a parentage order under Section 12 of Surrogacy Act, 2010 (New South Wales) in respect of the twins born out of surrogacy arrangements.\(^{252}\) AB was the biological father of the children and CD was wife of AB (the applicants). CD was unable to conceive and therefore EF agreed to serve as surrogate. EF was biologically related with the child and was the first cousin of CD.\(^{253}\) The surrogacy arrangement made in this case was the pre commencement arrangement as it was made before the commencement of the Surrogacy Act.\(^{254}\) The children were six years old at the time of filing the case and living with the applicants since they left hospital after a week of their birth.\(^{255}\) The court considered that the applicants acted in all the respects as the parents of the children and the children were spending a happy life.\(^{256}\) The court considered Section 16 of the present Act in order to analyze that whether the orders could be made in the present case or not.\(^{257}\) The section provides that in case of pre commencement surrogacy arrangements the application must be moved with in 2 years of commencement of the Act.\(^{258}\) However, it further provides that the court can take up the matter even after the expiry of the said period if the exceptional circumstances exist.\(^{259}\)

The court took in to account the speech of Attorney General in which the discussion was made regarding the objective of the provision of 30 days limit in case of post commencement surrogacy arrangements. The court found that this limit operates as a cooling off period for the birth mother to consent for the parental order after the birth

\(^{250}\) \textit{Id.}, para 67.
\(^{251}\) \textit{Id.}, (2013) NSWSC 866, 2013 WL 3324398.
\(^{252}\) \textit{Id.}, para 1.
\(^{253}\) \textit{Id.}, para 2.
\(^{254}\) \textit{Id.}, para 1.
\(^{255}\) \textit{Id.}, para 4.
\(^{256}\) \textit{Id.}, para 5.
\(^{257}\) \textit{Id.}, para 6.
\(^{258}\) See Section 16 (2) of \textit{Surrogacy Act, 2010 (NSW)}.
\(^{259}\) \textit{Id.}, section 16 (3).
of the child. Moreover, the upper limit of 6 months in case of post commencement surrogacy arrangement was to provide certainty to the parties and stable environment to the child. The court found that the period of two years is also having the same objective in mind. In the present case the application was brought two months late than the specified limit. The parties had not provided any explanation for the same but the court inferred that it could be oversight. The court found that the arrangement by which the children were treated as the children of AB and CD was in place from a number of years. All the parties had proceeded to the court on the basis that children in question were children of AB and CD. If the court would not determine the status of children only on the basis of two months late filing of the application, that would make the status of children uncertain. Moreover, it would also be not in the interest of the children. The court thus found that there was an existence of exceptional circumstances in the present case. So after taking in to account all the circumstances, the court granted the application of parentage order to the applicants.

5.4.5. Re RMG

The present application was filed by the plaintiffs for seeking parentage order for the child RMG under Surrogacy Act, 2010 (NSW) here in referred to as Act. Further an order was sought for approving the name of the child and directing the Registrar to order the same to Registrar of Births, Deaths and Marriages and Director General of Department of Health respectively. In the present case SJG was the proposed mother and BG was the proposed father seeking parentage order. The birth mother was KGK and her husband MAK. The birth mother was the friend of biological parents. A surrogacy agreement was entered in to between the parties after the commencement of the Act and before the conception of the child. The arrangement was made due to medical reasons. In 2009 SJG had undergone a transplant operation for a donor pancreas and kidney. Due to this she was on anti rejection medications. The situation was such that if she tried to stop these

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260 Supra note 251 para 19.
261 Id., para 10.
262 Id., para 12.
263 Id., para 8.
264 Id., para 13.
266 Ibid, para 1.
267 Id., para 3.
medications, there was a risk of rejection of the organ. On the other hand for carrying pregnancy she had to stop taking medication. Finally it was decided by the prospective parents to have the child born through surrogacy agreement. Thus surrogacy agreement was undertaken and resultantly the child was born on 10th October 2013. Since then the child was living with the prospective parents and was being treated as their child. The matter was considered by the present court.

The court took in to account all the requirements prescribed by the Act. The court considered Section 16 of the Act which provides that the application for parentage order must be filed not less than 30 days and not more than 6 months from the date of birth of the child. The court further considered that the affidavits were sworn by the parties, two psychologist and doctor as required by Section 17 of the Act. The court further took in to account the fulfillment of the requirement set out by Section 18 of the Act. The court felt satisfied that all the requirements had been met by the parties.

268 Id., para 4.
269 Id., para 2.
270 Id., para 5.
271 Id., para 7.
272 Id., para 9.
273 *(a) I am satisfied that the making of the parentage order is in the best interests of the child: s 22 of the Act;
(b) the surrogacy arrangement is not a commercial surrogacy arrangement: s 23 of the Act;
(c) the surrogacy arrangement is a pre-conception surrogacy arrangement: s 24 of the Act;
(d) the surrogacy arrangement is an arrangement under which SJG and BG, as the two intending parents, are a couple as defined: s 25 of the Act;
(e) the child is under 18 years of age, and not of sufficient maturity to express his wishes: s 26 of the Act;
(f) the birth mother, being 38 years of age, was at least 25 years of age when she entered into the surrogacy arrangement: s 27 of the Act;
(g) each intending parent was at least 18 years old when they entered into the surrogacy arrangement: s 28 of the Act;
(h) there is a medical or social need for the surrogacy arrangement: s 30 of the Act;
(i) each of the affected parties, namely SJG, BG, KGK and MAK has consented to the making of the parentage order: s 31 of the Act;
(j) the intending parents reside in New South Wales: s 32 of the Act;
(k) the child is living with the intending parents at the time of the hearing of the application: s 33 of the Act;
(l) the surrogacy arrangement is in the form of an agreement in writing, signed by SJG, BG, KGK and MAK: s 34 of the Act;
(m) each of the affected parties received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement: s 35(1) of the Act;*
After considering all the requirements the court found that this case was a fit case for granting parentage order to the prospective parents. Thus the court made the order that there must be transfer of parentage of the child to the prospective parents and they would be treated as his parents for all the purposes. The court further directed the registrar to give notice of the same to Registrar of Births, Deaths and Marriages and Director General of Department of Health.  

5.6 Judicial Response to Surrogacy in Canada: As there is absence of clear legislative prohibitions on surrogacy, the Canadian courts are inclined towards the child friendly approach in recognizing the parentage especially in those cases where there is no evidence of exchange of any payment or compensation in between the parties. The court in some cases has also taken in to account the intention of the parties to the surrogacy contract.

5.6.1. R. (J.) v. H. (L)  

In the present case, the applicant J.R. was unable to have children. The husband of J.R. i.e. J.K. (other applicant) inquired about the possibilities of the gestational carriage. Both were accepted as candidates for in vitro fertilization at Toronto hospital. The respondent L.H. agreed to serve as a gestational carrier. The surrogate’s husband G.H. also signed the consent form and the gestational carriage agreement was entered in to between the parties. As a result of the agreement the pregnancy was undertaken by the surrogate and finally on 9th February, 2009 the twins were born. The DNA was conducted on the applicants and it was established

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(n) since the birth of RMG and before consenting to the parentage order, KGK and MAK have received further counseling from a qualified counselor about the surrogacy arrangement and its social and psychological implications: s 35(2) of the Act;  
(o) each of the affected parties received legal advice from an Australian legal practitioner about the surrogacy arrangement and its implications before entering into the surrogacy arrangement. Certificates of independent legal advice have been provided: s 36 of the Act. In addition, I note that the requirements of UCPR r 56A.9 have also been complied with;  
(p) the registrable information about the surrogacy arrangement has been provided to the Director-General of the Department of Health as required under the Assisted Reproductive Technology Act 2007 (NSW): s 37 of the Act; and  
(q) the birth of RMG has been registered in accordance with the requirements of the Births, Deaths and Marriages Registration Act 1995 (NSW): s 38 of the Act.”

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274 Supra note 265, para 12.  
276 2002 CarswellOnt 3445.
from the result of DNA that the applicants were the biological parents of the children.\textsuperscript{277} Thus the applicants moved to the court for an order of awarding custody of the twins to the applicants. Further the applicants sought a declaration that G. H. was not father of the twins and direction to the registrar general to register the statement of birth in the register.\textsuperscript{278} The court referred to Section 9 of Vital Statistics Act, 1948 which requires that the mother and father must certify a statement of birth with in thirty days of birth of the child. Further Section 9 (12) was referred to which deals with the certified copy of child parentage registration.\textsuperscript{279} The court further took in to account Section 4 of Children’s Law Reform Act which provides that any person could apply to the court for declaring himself or herself to be recognized as the father or mother of the child.\textsuperscript{280}

Further Section 97 of Courts of Justice Act was considered which gives the right and jurisdiction to the court to make binding declaration in this regard.\textsuperscript{281} The court co related all these provisions of law to the facts of the case. Firstly the court took in to account the relief claimed by the applicants and found that as they were the genetic parents of the child, they were entitled to be recognized as the parents of the child as per law.\textsuperscript{282} The court further considered the position of G.H., husband of the gestational carrier. The court found that as he was not the biological father of the child, the presumption of the paternity could not be raised in his case.\textsuperscript{283} The court considered that even though the relief with respect to gestational carrier was not sought by the parties, there was just a request for the same. The court considered that as per Section 1 of Vital Statistics Act, L.H. was clearly a birth mother. However, as the application was not opposed by any of the party to the gestational carrier agreement and the consent had been given by the gestational carrier and her husband in this regard, there was no need to consider the maternity of the gestational mother.\textsuperscript{284} The court considered that all these declarations were to be made in the best interest of the child.\textsuperscript{285} The court also considered the fact that the children were living

\textsuperscript{277} Id., para 6.
\textsuperscript{278} Id., para 2.
\textsuperscript{279} Id., para 4.
\textsuperscript{280} Id., para 9.
\textsuperscript{281} Id., para 10.
\textsuperscript{282} Id., para 11.
\textsuperscript{283} Id., para 12.
\textsuperscript{284} Id., para 16 and 17.
\textsuperscript{285} Id., para 20.
with their genetic parents.\textsuperscript{286} Thus considering all the above mentioned facts and circumstances, the court ordered that J.R. and J.K. are father and mother of the children respectively.

5.6.2. \textit{Rypkema v. British Columbia}\textsuperscript{287}, In the present case the petitioners, Rypkema and his wife who were married entered in to a gestational surrogacy agreement with the respondents in 2000. The petitioners contributed the required genetic material and the embryo was created and was successfully implanted in the uterus of the surrogate mother.\textsuperscript{288} It was agreed between the parties that the surrogate mother would terminate and renounce the ties with the child born through surrogacy agreement including the parental rights.\textsuperscript{289} Further it was agreed by the surrogate mother that she would recognize petitioners as the custodial parents of the child.\textsuperscript{290} It was further consented by the surrogate mother that the female petitioner would be considered and recognized as the legal mother of the child.\textsuperscript{291} However, the financial compensation was not agreed between the parties.\textsuperscript{292} The child was ultimately born in 2001.\textsuperscript{293} After the birth of the child, the petitioner sought from the authorities that their name must be mentioned as mother and father on the birth certificate of the child.\textsuperscript{294} However, the Director of vital statistics refused to register the name of the female petitioner as mother of the child on the basis that she had not given birth to the child.\textsuperscript{295}

Aggrieved by the order, the petitioner applied to the Supreme Court of British Columbia on 11\textsuperscript{th} June 2003 to issue an order declaring the petitioners as mother and father of the child. Further they sought declaration that the same must be reflected by the vital statistics agency in the birth register.\textsuperscript{296} Thus the issue before the court was that whether the court could and should declare the genetic parents of the child to be parents for the purpose of the birth registration maintained by the vital statistics

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  \item \textsuperscript{286} \textit{Id.}, para 22.
  \item \textsuperscript{287} 2003BCSC 1783, 2003 Couswell BC 2955.
  \item \textsuperscript{288} \textit{Ibid.}, para 1.
  \item \textsuperscript{289} \textit{Supra} note 287 para 6 (b).
  \item \textsuperscript{290} \textit{Id.}, para 6 (c).
  \item \textsuperscript{291} \textit{Id.}, para 10.
  \item \textsuperscript{292} \textit{Id.}, para 6 (7).
  \item \textsuperscript{293} \textit{Id.}, para 1.
  \item \textsuperscript{294} \textit{Id.}, para 2.
  \item \textsuperscript{295} \textit{Ibid.}
  \item \textsuperscript{296} \textit{Supra} note 287 para 3.
\end{itemize}
\end{footnotesize}
The court found that there were no cases concerning the parentage of the children born out of gestational surrogacy agreements in the state. Therefore the court referred to three Canadian and three American cases in relation to surrogacy agreements. Before analyzing the cases, the court laid stress on the significance of the registration of birth and made a reference to the case of Trociuk v. British Columbia (2003) 14 B.C.L.R. (4th) 12 where in the Supreme Court of Canada dealt with the issue of birth registration and its significance. The court in this case held that the Vital Statistics Act discriminated against the biological father of the child by providing the right to the biological mother by excluding the name of the biological father in the birth registration of the child. The court ordered that the defect must be rectified with in a period of 12 months from the decision of the court. It was further held by the court that if the same was not rectified with in the specified period then the provision would be null and void. Thus the court in this case gave equal right to both biological mother and father to get entered their name in the birth register of the child. The court referred to another case of B. (R) v. Children’s Aid Society of Metropolitan Toronto, 1994 1 S.C.R. 315 where in the birth registration was held as an important means of participation in the life of the child. The court held that it was a mean to make strong the ties between the parents and the child.

The court considered the Canadian case C. (J.) v. Manitoba 2000 MBQB 173 in which the court declined an advance declaration that the genetic mother would be the mother of the child before the actual birth of the child. However, the court stated that the department of the vital statistics must reflect the name of the surrogate as an individual giving birth to the child. Another case referred by this court was L. v. P. where in the court declared the genetic mother to be the mother of a child born out of the surrogacy contract. In another case R. (J.) v. H (2002) O.T.C. 764 which was decided by Superior Court of Ontario it was directed by the court that the birth registration must declare the genetic parents as the biological parents of the child. The court further referred to three American cases in which the status of the genetic

297 Id., para 5.
298 Id., para 13.
299 Id., para 14.
300 Id., para 15.
301 Id., para 19.
302 Id., para 20.
303 Id., para 21.
mother was considered.\textsuperscript{304} The first case was \textit{J. (R) v. Utah} 261 F. Supp. (2d) 1268 the court held that if the parents present the biological evidence in relation to the child, they could not be prevented from being legally recognized as the parents of the child.\textsuperscript{305} Further in the case of \textit{Soos v. Superior Court in and for County of Maricopa}, 182 Ariz. 1470 (Ct. App. 1994) the court declared the Arizona statue as invalid which allow a biological father to prove paternity and automatically confer the motherhood to the surrogate mother irrespective of the fact that the intended mother was the genetic mother of the child.\textsuperscript{306} Finally the court took in to account the landmark case of California court where it was held that the gestational surrogate had no parental rights over the child born out of surrogacy arrangements.\textsuperscript{307}

After considering all the relevant cases and considering the fact that all the parties intended that the genetic parents must be treated as the parents of the child, the court declared the petitioners as father and mother of the child respectively.\textsuperscript{308} Further the court held that the birth registration must reflect the same information in relation to the child.\textsuperscript{309} Thus the court granted the petition in favour of the petitioners.

\textbf{5.6.3. \textit{W. (H.L.)} v. \textit{T. (J.C.)}}\textsuperscript{310} In the present case, the Plaintiffs were H.L.W., the biological and surrogate mother and T.H.W, husband of H.LW. The defendants were J.C.T., the biological father and J.T., wife of J.C.T.\textsuperscript{311} The advertisement was put up by the defendants in 2004 for seeking a surrogate. The surrogate mother H.L.W. responded to the advertisement on 12\textsuperscript{th} May 2004. The conversation started with the help of the emails and finally the parties met to agree for the terms and conditions of the surrogacy agreement. It was decided between the parties that no compensation would be exchanged but remuneration would be paid for all the expenses incurred in relation to the undertaking and carrying of the pregnancy. It was indicated by the husband of the surrogate that as they already had children, no further child was required on their part. This indirectly showed that they had no intention to keep the

\textsuperscript{304} Id., para 23.
\textsuperscript{305} Id., para 24.
\textsuperscript{306} Id., para 25, 26 and 27.
\textsuperscript{308} Id., para 31.
\textsuperscript{309} Id., para 32.
\textsuperscript{310} 2005 CarswellBC 2898.
\textsuperscript{311} Id., para 3.
child after delivery. However, the parties agreed that contact would be maintained with the child. It included a photo of the child in a year and occasional copy of the report card. The surrogate particularly wished that there must be an on going relationship with the child so that the child should know that she is the birth mother.\textsuperscript{312}

On 24\textsuperscript{th} September the parties reached to an agreement that the surrogate would be artificially inseminated in home with the sperm of the J.C.T. Following insemination, the pregnancy was confirmed by the physician.\textsuperscript{313} In the month of June however, certain differences started between the parties in relation to some claim for the expenses.\textsuperscript{314} The outcome was that the surrogate was very upset and regretted decision of carrying a child on behalf of couple.\textsuperscript{315} The surrogate and her husband avoided conversation with the defendants.\textsuperscript{316} In between a baby boy was born on 7\textsuperscript{th} August and named as A.C.T.\textsuperscript{317} The defendants were informed only after the birth of the child.\textsuperscript{318} On 9\textsuperscript{th} August, the discussion again took place regarding the establishment of relations with the child which was not refused by the defendants.\textsuperscript{319}

On 10\textsuperscript{th} August, the child was discharged from the hospital. On discharge, the surrogate requested for a goodbye ritual from the side of their family which was also accepted by the defendants. She also handed over some self addressed envelops to the defendants in order to maintain relation with the child.\textsuperscript{320} Again on 13\textsuperscript{th} September surrogate wanted that the child should spend time with the family and again demanded ongoing relationship with the child.\textsuperscript{321} As the defendants were not so interested, the surrogate moved an application to the court for the custody of the child on the basis that as the defendants had not met with what was agreed for ongoing relationship of the child, they could not be trusted for taking care of the child.\textsuperscript{322} She further refused to the process of adoption.\textsuperscript{323}

\textsuperscript{312} Id., para 5.
\textsuperscript{313} Id., para 4.
\textsuperscript{314} Id., para 9.
\textsuperscript{315} Id., para 10.
\textsuperscript{316} Id., para 12.
\textsuperscript{317} Id., para 2.
\textsuperscript{318} Id., para 13.
\textsuperscript{319} Id., para 14.
\textsuperscript{320} Id., para 15.
\textsuperscript{321} Id., para 18.
\textsuperscript{322} Id., para 17.
\textsuperscript{323} Id., para 24.
The court considered all the relevant circumstances of the present case and the position of the parties. The court found that the birth of the child took place due to the fact that the defendants were not having any issue. The plaintiffs were already having four children. There was no need of further child. The defendants were already taking well care of the child. The court further took into account the position of the parties in relation to the maintaining of the ongoing relationship. The court found that the above settle terms and conditions were only having limited applicability. These terms were incorporated only in the sense that the child must know that the birth mother was not J.T. but H.L.W and further that she was a caring and loving birth mother. The court considered the report of the physician regarding the impact of disassociating the child from the defendant mother. The court while considering the letter of the physician found that there would be adverse impact on the child for short span of time if the child would be separated from the defendant mother. The court also considered that from the time of the birth of the child, the child was living with the defendants. Considering all these facts and circumstances, the court dismissed the application of granting custody order and decided that the custody would remain solely with the defendants.

5.6.4. D. (M.) v. L. (L.) In the present case M.D. and J.D. were married couple. M.D. was unable to bear the child due to medical reason. The family friend of the couple L.L. showed her willingness to act as a surrogate for the couple. The applicants entered into gestational carriage agreement with L.L. and I.L. (husband of L.L.) in 2006. Under the agreement, L.L. agreed to act as a gestational carrier with embryo implanted in her by using ova of M.D. and sperm of J.D. It was also agreed between the parties that the child would be given in the permanent custody of the applicants immediately after birth. It was further agreed that the applicants would be

324 Id., para 26.
325 Id., para 25.
326 Id., para 27.
327 Id., para 29.
328 Id., para 36 and 37.
329 Id., para 41.
330 Id., para 47.
331 2008 CarswellOnt 1290.
332 Id, para 4.
333 Id., para 5.
treated not only as genetic parents but also the social parents of the child.\textsuperscript{334} In 2007 the child was born who was named as E.D. After the birth of the child, it was required as per law to get the registration of live birth of the child. The process however, required further that the name of surrogate must be mentioned as a mother in the register irrespective of the agreement entered in to between the parties.\textsuperscript{335} The applicants were further informed by the registrar that if they wanted that their name must be entered in to the birth register, they could obtain the order from the court.\textsuperscript{336} Thus the applicants brought a motion under Rule 14 (10) of Family Rules for an order declaring them to be mother and father of E.D. They further seek an order for declaring L.L. and her husband not to be mother and father of the child.\textsuperscript{337} Further it was requested by the applicants that their status of mother and father must be reflected in the birth register maintained by the deputy registrar.\textsuperscript{338} The court firstly considered that whether it had the jurisdiction or not to try and hear the matter. The court took in to account the different provisions of law. The court found that it had jurisdiction to issue declaration under Section 4 of Children’s Law Reform Act (CLRA)\textsuperscript{339} and Section 97 of Court of Justice Act.\textsuperscript{340} Further it had the jurisdiction under Section 21 of CLRA to grant custody of the child.\textsuperscript{341} Under the Vital Statistics Act, the court had the authority to direct the registrar to certify the birth.\textsuperscript{342} While considering the issue

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  \item \textsuperscript{334} Id., para 12.
  \item \textsuperscript{335} Id., para 6.
  \item \textsuperscript{336} Id., para 7.
  \item \textsuperscript{337} Id., para 2, Rule 14(10) of the Family Law Rules permits a motion to be brought with respect to procedural, uncomplicated or unopposed matters.
  \item \textsuperscript{338} Id., para 3.
  \item \textsuperscript{339} Id., para 15, Section 4 of the CLRA states: 4(1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
  \item (2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.
  \item (3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.
  \item \textsuperscript{340} Id., para 16, Section 97 of the Courts of Justice Act (CJA): The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.
  \item \textsuperscript{341} Id., para 17, Section 21 of the CLRA provides: A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.
  \item \textsuperscript{342} Id., para 18 and 19, The Vital Statistics Act (VSA) governs the registration of births in Ontario: 9 (1) The mother and father, or either of them, in such circumstances as may be prescribed, or such other person as may be prescribed, shall certify the birth in Ontario of a child in the manner, within
\end{itemize}
of declaration of genetic parents to be parents of the child, the court found that it was having jurisdiction as the parentage conferred under Section 4 was not confined to biology.\textsuperscript{343} The court took in to account the case of \textit{D. (K.G.) v. P. (C.A.)} where in the single father who used his sperm to fertilize an ova from anonymous donor and carried forward by surrogate was allowed to be certified as sole parent in the birth register.\textsuperscript{344} The court held that in the circumstances of the present case also there was no difficulty in declaring the applicants as parents of E.D. It was in the best interest of the child to make such declaration.\textsuperscript{345}

The court then took up another issue of declaring the husband of the surrogate not to be child’s father. The court found that there was no real issue with respect to jurisdiction to declare I.L., husband of the surrogate not to be E.D.’s father.\textsuperscript{346} The court found that Section 4 not only concerns with positive declaration of paternity, but also covered a declaration of non paternity.\textsuperscript{347} In holding so the court also considered the case of \textit{Raft v. Shortt} where declaration of non paternity was also held to be covered under Section 4 of the CLRA.\textsuperscript{348} The court further considered another issue of declaring L.L. not to be E.D.’s mother. The court for this purpose considered the definition of birth used in Vital Statistics Act (VSA).\textsuperscript{349} The court found that the term mother was not defined under the provisions of the Act. However, the term mother could not be acquainted with a woman giving birth.\textsuperscript{350} The court examined the real intention of the legislature while framing CLRA and found that the statute was

\begin{itemize}
\item the time and to the person prescribed by the regulations.
\item The VSA allows for the certificate of birth to be amended, after a court has made an order under section 4 of the CLRA declaring a person or persons to be a parent:
\item 9 (7) On receiving a certified copy of an order under section 4, 5 or 6 of the Children's Law Reform Act respecting a child whose birth is registered in Ontario, the Registrar General shall amend the particulars of the child’s parents shown on the registration, in accordance with the order.
\end{itemize}

\textsuperscript{343} \textit{Id.}, para 36.
\textsuperscript{344} \textit{Id.}, para 38, 2002 CarswellOnt 3445.
\textsuperscript{345} \textit{Id.}, para 40.
\textsuperscript{346} \textit{Id.}, para 41.
\textsuperscript{347} \textit{Id.}, para 42.
\textsuperscript{348} 1986 CarswellOnt 271.
\textsuperscript{349} \textit{Vital Statistics Act, 1948}, Ch. 97, section 1(a):
\textit{"birth"} means the complete expulsion or extraction from its mother of a foetus which did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached.
\textsuperscript{350} \textit{Supra} note 331, para 54.
intended to serve the best interest of the child. However, the court found that there is a gap between VSA and CLRA and it is required to be fulfilled in order to ensure the best interest of the child. The court held that in order to fill up the gap and considering the best interest of the child, the surrogate who was not even a genetic mother was to be declared as not a mother. Considering all the aspects the court ordered that the custody of the child would be granted to the applicants. The deputy registrar for the province of Ontario was directed by the court to amend the registration certificate of birth of the child in such a way that the applicants were considered as the father and mother of the child born out of surrogacy arrangement. The court, however, refused to order that the records in the possession of the registrar must be sealed as the provisions of VSA specifically provides for the maintaining of confidentiality in the record.

5.6.5. W. (J.A.) v. W. (J.E.) In the present case the parties entered into gestational surrogacy agreement. The applicants J.A. and J.E. were husband and wife. They were unable to have child normally. The respondents i.e. surrogate J.E.W. and her husband agreed to assist in getting the child. The sperm and egg was provided by the applicants. The genetic mother and the surrogate mother were sisters. The parties entered into memorandum of understanding and agreement for gestational surrogacy where in it was agreed that the applicants should be declared as the parents of the child and they should also be given legal custody. There was no compensation exchanged between the parties. A baby boy was born on 3rd September, 2010. Since then the child was in the care and protection of the genetic parents. The genetic parents moved an application before the court for declaration of parentage.

351 Id., para 60.
352 Id., para 61 and 62.
353 Id., para 67.
354 Id., para 69.
355 Id., para 83.
356 Id., para 76, section 53 of the VSA provides: (1) No division registrar, sub-registrar, funeral director, person employed in the service of Her Majesty or other prescribed person shall communicate or allow to be communicated to any person not entitled thereto any information obtained under this Act, or allow any such person to inspect or have access to any records containing information obtained under this Act.
357 2010 CarswellNB 605.
358 Id., para 2.
359 Id., para 3.
There were three issues before the court. First was whether the court had jurisdiction to make a declaration of parentage in favour of the genetic parents. Second issue was regarding the jurisdiction to make order of custody of child in favour of genetic parents. Third issue was that whether the direction could be given to registrar general of vital statistics by the present court. The court considered that in the present case there was nothing mentioned in the agreement which makes it in contravention of the provisions of Assisted Human Reproduction Act. The court considered that the statutory jurisdiction to declare parentage is found in Family Services Act, Part VI. The court took in to account Section 96 (1) and Section 96 (3) of Family Services Act which also provides jurisdiction to the court to issue such declaration. The court also found that the fact that the child was born through gestational surrogacy could not limit the jurisdiction of the court for declaration. The court found that there were no good reason for law or public policy which restricted the jurisdiction of the court. In finding so the court took in to account the case of R. (J.) v. H. (L.) and Rypkema v. British Columbia in which the custody of the child was granted to the intended parents.

The court further took up second issue and found that the court had jurisdiction to grant custody to the genetic parents. The court considered Section 129 (1) and (2) of Family Services Act in order to deal with the issue which provides for joint or

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360 Id., para 9.
361 Id., para 6.
362 Id., para 8.
363 Section 100 (1) ..., any person having an interest in the matter may apply to the court for a declaratory order that a man is recognized in law to be the father of a child or that the woman is the mother of a child.
Section 100 (2) Where the court finds on a balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.
Section 100 (3) Where the court finds that a presumption of paternity exists under section 103 and unless it is established, on a balance of probabilities, that the presumed father is not the father of the child, the court may make a declaratory order confirming that the paternity is recognized in law.
364 Section 96 (1) ..., for all purposes of the law of the Province a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside the marriage.
Section 96 (3) The parent and child relationship as determined under subsection (1) ... shall be followed in the determination of other kindred relationships flowing there from.
365 Supra note 357, para 20.
367 2003 BCSC 1784.
individual custody by parents.\(^\text{369}\) The court found that in the present case as the parents were the genetic parents, the parentage of children, support obligation, child custody and access were more important legal mechanism as compared to adoption.\(^\text{370}\) Regarding the next issue of directions to the registrar general, the court found that as the parents were declared as having right to parentage and custody of the child, there was no need to declare specifically an order to the registrar general.\(^\text{371}\) In holding so the court took in to account Section 107 of Family Services Act which imposes a duty on the registrar general to record the birth parentage after it was declared by the competent court.\(^\text{372}\) Thus the applicants were declared as the parents of the child and it was further ordered by the court that they would have custody of the child.

**5.6.6. Tian v. Ren**\(^\text{373}\) In the present case the application was filed by the intended mother for the declaration on leave to appeal over the order of refusal made by the Chamber Court.\(^\text{374}\) Mr. Ren and Ms. Tian agreed to get the child with the help of surrogacy arrangement in 2007. It was agreed in between them that they would be raising the child in Canada. The sperm was provided by Mr. Ren, but egg was not provided by Ms. Tian. A child was born as a result of the surrogacy arrangement. Tian was neither the biological nor birth mother of the child, however, her name was entered in the birth certificate as mother of the child. She took no step to adopt the child.\(^\text{375}\) Meanwhile the couple separated. Tian decided that it was in the best interest of the child to raise him in Canada. The Citizenship and Immigration Canada decided that the child could not immigrate to Canada as she was neither biological nor birth mother of the child.\(^\text{376}\) Due to this Tian had to inform Ren about this fact. She asked for help from him as he was a Canadian citizen and also biological father of the child.

\(^{368}\) *Supra* note 357, para 23.

\(^{369}\) Section 129 (1) Unless otherwise agreed by written agreement or unless otherwise ordered by the court, where the child has more than one parent, the parents jointly have custody of the child.

\(^{370}\) *Supra* note 357, para 27 and 28.

\(^{371}\) *Id.*, para 34.

\(^{372}\) *Id.*, para 33.

\(^{373}\) 2013 CarswellBC 774, 2013 BCCA 140.

\(^{374}\) *Id.*, para 1.

\(^{375}\) *Id.*, para 5.

\(^{376}\) *Id.*, para 7.
With his help the child could migrate to Canada.\textsuperscript{377} Tian also filed an application before the Chamber Court for making an order compelling Ren to establish paternity for the purpose of migration of the child. He agreed but upon a condition that child would live with him and would break all the ties from her.\textsuperscript{378}

The Chamber Judge decided that the proper process for determining parenting agreement was provided under Family Relation Act. Further it was concluded that it was in the best interest of the child to make a DNA order on the condition that Tian facilitate communication between the child and father immediately.\textsuperscript{379} After hearing the order from the Chamber Judge, Tian again moved to the Judge for the purpose of reconsideration of the order. However, the court declined to interfere in the previous order.\textsuperscript{380} Moreover, the court varied the order to the extent that the court found that conducting DNA was not in best interest of the child.\textsuperscript{381} Further the court found that the previous order of the court was discretionary not mandatory.\textsuperscript{382} A notice of appeal was again filed by the applicant to the present court after the variation of order was refused by the Chamber Court.\textsuperscript{383} It was alleged by the applicant in the leave to appeal that the Chamber Judge had erred in law as there was no change of circumstances. Further the changed order was based on the consent of Ren. Further it was alleged that there was misinterpretation of application of Citizenship and Immigration Bulletin by that court.\textsuperscript{384} Regarding the first allegation, the present court found that there was no error on the part of the Chamber Judge since there was change of the circumstances in the sense that there was change in the mind of Ren regarding the immigration of the child to Canada. He wanted that the child should come to Canada only when he would become somewhat older so that he could establish communication and relationship with the child that was refused by the mother.\textsuperscript{385} The court found no merit in the second allegation. The court also refuted the third allegation of the applicant on the reason that the bulletin would be applicable only when she would adopt the child.\textsuperscript{386}

\textsuperscript{377} Ibid.
\textsuperscript{378} Supra note 373, para 8.
\textsuperscript{379} Id., para 9 and 10.
\textsuperscript{380} Id., para 17.
\textsuperscript{381} Id., para 15.
\textsuperscript{382} Id., para 16.
\textsuperscript{383} Id., para 18.
\textsuperscript{384} Id., para 24.
\textsuperscript{385} Id., para 26.
\textsuperscript{386} Id., para 34.
Thus taking in to account the above circumstances the court dismissed her application for leave to appeal.  387

5.7 Judicial Response to Surrogacy in India: As there is no enacted law in India in relation to the surrogacy agreements, the courts in India has taken up references from different countries in order to resolve the matter. 388 The Indian courts have not come across a number of surrogacy disputes. 389 The disputes in relation to surrogacy before the courts mainly involves the issues of nationality, citizenship etc in respect of the foreign surrogacy agreements. There is no such case where the surrogate has refused to hand over the child to the intended parents. Although India serves as international hub for surrogacy arrangements, the Indian courts have not yet extensively dealt with the matter. 390

5.7.1. Baby Manji Yamada v. Union of India 391 The present writ petition filed before the Supreme Court under Article 32 of Constitution of India, 1950 was in the form of a challenge to certain directions issued by Division Bench of Rajasthan High Court relating to the production and custody of the child Manji Yamada who was born as a result of the surrogacy arrangement. The petition was filed by Emiko Yamada who claimed to be grandmother of Baby Manji. The facts of the case represented that the biological parents Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India in 2007 to have a child through surrogacy as the child could not be conceived through natural process. They made an agreement with the surrogate in Anand, state of Gujarat. The child was born on 25th July, 2008. The municipality at Anand also issued the birth certificate in the name of the genetic parents. However, before the birth of the child there arose some matrimonial dispute between the couple. The result was that the father wanted to take the custody of the child but the mother was not interested. On 3rd August, 2008, the child was moved to Arya hospital, Jaipur due to some law and order situation in Gujarat. The father also had to leave the country due to expiration of

387 Id., para 38.
391 AIR 2009 SC 84.
visa. The grandmother was having the custody of the child after father left India. The writ petition was filed by an NGO named Satya demanding the custody of the child before the Rajasthan High Court. The Union of India through Ministry of Home Affairs, State of Rajasthan through Principal Secretary, The Director General of Police, Government of Rajasthan and Superintendent of Police were also made parties to the petition.

The main contention in that petition was that as there is no law in relation to surrogacy in India, so a lot of irregularities are committed by people including the money rackets. Due to this reason and on these basis along with securing safety and welfare of the child the custody was demanded by the NGO. The present petitioner filed writ petition against the petition by NGO challenging the locus standi of the NGO to file petition as there was no illegal custody in so far as it relates to the child. According to her the petition before the Rajasthan High Court was named as public interest litigation, but there was no involvement of public interest in it. The present court did not go in to the detail of locus standi of the NGO but examined and analyzed the meaning, its forms and its applicability of surrogacy contracts in India.

The court took in to account the role of Commission for protection of child rights and found that it was the right of the commission to inquire in to any violation for ensuring the safety and welfare of the child. For this purpose the commission could also take suo moto action. The court further found that no such complaint was filed in the present case in relation to violation of rights of the child. Thus the court disposed off the writ petition by giving a direction that if any person had any grievance in relation to violation of rights of the child, then the matter had to be dealt by the commission. The court issued no orders on the grievance of the petitioner for permission to travel including issuance of passport as the court found that the matter was under consideration of the central government. The grievance according to the court could be addressed only after making the order by the government. Thus the court disposed of the petition without any order as to cost with a direction that all the

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392 Id., para 2 at 85.
393 Id., para 2 at 84.
394 Id., para 3 at 85.
395 Id., para 5 to 12 at 86 and 87.
396 Id., para 4 and 13 at 84 and 87.
proceedings relating to the present petition before the High Court would also stand disposed.  

5.7.2. Jan Balaz v. Anand Municipality  

In the present case the main question for consideration before the court was that whether a child born out of surrogacy arrangement in India to Indian surrogate was an Indian citizen if the biological father was a foreign national. The petitioner in the present case was a German national named Jan Balaz and his wife Susanne Anna Lohle was also a German citizen. The wife was unable to conceive due to biological reasons. She was not even in the position to donate her egg. The couple contacted Assisted Reproductive Technology Clinic at Anand, Gujarat which was headed by doctor Nayanaben Patel. The surrogate was arranged and the parties entered in to a contract of surrogacy. It was agreed by the surrogate that she would hand over the child to the intended parents after delivery. Further she agreed that she would not take any responsibility about the well being of the child and the legal obligation in relation to the child would be of the intended parents. Thus by making use of in vitro fertilization technique, the embryo created on the basis of the sperm of the petitioner and the egg of the anonymous donor was placed in the womb of the surrogate mother. The surrogate mother gave birth to two baby boys on 4-1-2008.

After the birth of the children, an application was made by the petitioner to Anand Nagar Palika for the purpose of registration of birth certificate. The birth certificate was issued which depicted petitioner as father and surrogate mother as the mother of the children. The petitioner and his wife were German citizens but they were working in the United Kingdom (UK) and wanted to settle down there only. For this purpose they applied to the visa consulate of UK in India. The authorities required the passports of children. The petitioners then applied for the Indian passports as the children were born in India and were Indian citizens. The passport authorities issued the passport to the children in which the petitioner and surrogate mother were shown as the father and mother respectively. However, later on intimation was sent by the

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397 Id., para 18 at 87.  
399 Id., para 1 at 21.  
400 Id., para 2 at 21.  
401 Id., para 3 at 22.
passport authorities to the petitioner for surrendering the passport till further order was passed by the High Court before whom the case was pending.\(^{402}\) The petitioner on the direction of the court surrendered the passports on 14-5-2009 before the passport authorities of Ahmedabad. After surrendering the passport the petitioner sought directions from the court about returning the passport as the children were Indian citizens.\(^{403}\) In order to find out that whether the children were Indian citizens and whether the passports were required to be returned to the intended parents, the court took in to account different provisions of law as applicable to surrogacy in other countries. The court also took in to account the arguments advanced by both sides.

The court took in to account the detail affidavit filed by the regional passport authorities of Ahmedabad which stated that surrogate mother could not be considered as the mother of the children rather the intended parents were the real parents. Since the intended parents were German citizens, the children could not acquire the citizenship of India as per law.\(^{404}\) Further it stated that the Passport Act, 1967 also provides that the passport can only be issued to the Indian citizens.\(^{405}\) On the other hand it was submitted by the counsel for petitioner that the children were Indian citizens as the surrogate mother was Indian. So the passport could not be denied to them.\(^{406}\) The court pointed out number of legal, moral and ethical issues which had arisen out of the agreements of surrogacy. The court considered the position of surrogacy in Ukraine, California, Japan and Germany and found that the situation differed from country to country.\(^{407}\) In Germany apart from the surrogacy agreements, artificial insemination, egg donation are criminal offences.\(^{408}\) However, the court found that this was not so in India as there is no law for dealing with the surrogacy agreements and making them criminal offences or prohibiting them.\(^{409}\) The court also took in to account the case decided by Supreme Court in which the passports were not issued, simply an identity certificate was issued as a transit document.\(^{410}\)

\(^{402}\) Id., para 4 at 22.

\(^{403}\) Id., para 5 at 22.

\(^{404}\) See Section 3 (1) (b) Citizenship Act, 1955.

\(^{405}\) Section 6 (2) (a) Passport Act, 1967.

\(^{406}\) Supra note 398, para 7 at 23.

\(^{407}\) Id., para 11 and 12 at 24.

\(^{408}\) Id., para 13 at 24.

\(^{409}\) Id., para 14 at 24.

\(^{410}\) Baby Manji Yamada v. Union of India AIR 2009 SC 84.
The court found that the present case was primarily concerned with the relationship of the child with surrogate or the egg donor. The court recognized that in the absence of any legislation to the contrary the gestational surrogate would be considered as the natural mother of the children. The anonymous donor according to court was not the mother as her identity and privacy was to be maintained and she could not be forced to disclose her identity. The court further analyzed that even if the egg donor was treated as mother then also in both the cases the mother was an Indian national. Thus the children were Indian nationals and could be granted citizenship by birth under Section 3 (1) (c) (ii) of Citizenship Act, 1955. The court further directed the passport authorities to return the passports as there was no need to issue identity certificate to the children as they were Indian Citizens. The court however, raised a caution that there was immediate need to address the complicated issue of surrogacy by the legislature.

5.7.3. *K. Kalaiselvi v. Chennai Port Trust, Represented by Chairman, Chennai* In the present case a writ petition was filed by a woman employee working in Chennai Port Trust to consider whether she was entitled to avail maternity leave in case of child born through surrogacy agreement. The petitioner was working as an Assistant Superintendent in traffic department of Chennai port trust from last 24 years. She was married and had a son who died in the road accident at an age of 20 years on 31.01.2009. The uterus of woman was removed due to some problem on 30.04.2008. Thus she was unable to bear other child. She wanted a child after the death of her only son. So she entered in to surrogacy agreement with Prashanth Multi Specialty Hospital Chennai with consent of her husband. A female baby was born on 08.02.2011. She applied for maternity leave in order to look after the baby. However, she was informed by the authorities that she was not entitled for the maternity leave as the child was born through surrogacy process. The petitioner therefore requested for sanctioning the leave on the basis of looking after the child. She also requested the authorities to reimburse the medical expenses and issue the FMI card incorporating new born child. She was granted two months leave treating it as special case.

411 Supra note 398, para 16 at 25.
412 The Section provides that even if one of the parents is an Indian citizen, the child born can get the Indian citizenship by birth if he or she is born in India.
413 Supra note 398, para 17 and 22 at 24 and 25.
414 2013 (3) *MLJ* 493.
However, the leave was subsequently cancelled and the request for inclusion of child name in FMI was also rejected by the authorities. She appeared before the authorities to consider the birth certificate which showed her and her husband as the mother and father of the child respectively.\footnote{Id., para 1.}

So the present petition was filed to set aside the order granted by the authorities and to grant leave to the petitioner on equal footing in terms of Rule 3A of the Madras Port Trust (Leave) regulations, 1987. The rule depicts that the leave is available to the female employee if the child is adopted in specific cases.\footnote{Id., para 2.} The respondent filed a counter submission that the case of the petitioner was referred to Ministry of Shipping and Surface Transport for clarification and guidelines and they were informed that there were no provisions or guidelines in this relation. So it was on the basis of the advice of the Ministry that the leave of the petitioner was cancelled. The respondent further pleaded that inference could not be taken from the Maternity Benefit Act, 1961 as it also do not contain any provision in relation to the present case.\footnote{Supra note 413, para 5.}

The court considered the case of Baby Manji Yamada\footnote{Supra note 390.} which provided the meaning of surrogacy, various types of surrogacy etc.\footnote{Supra note 413, para 6 to 16.} The petitioner counsel referred to the judgment of Anna Johnson v. Mark Calvert\footnote{Supra note 33.} where Supreme Court of California had recognized that the childhood and motherhood were entitled to same care and assistance whether born in or out of wedlock.\footnote{Supra note 413, para 6 to 16.} The petitioner also referred to Beijing Declaration, United Nations Assembly Resolution of 1989 which pointed

\begin{verbatim}
Rule 3-A provides for Leave to female employees on adoption of a child: A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) up to one year subject to the following conditions:

(i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;

(ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under:

(a) If the age of the adopted child is less than one month, leave up to one year may be allowed.

(b) If the age of the child is six months or more, leave up to six months may be allowed.

(c) If the age of the child is nine months or more leave up to three months may be allowed.
\end{verbatim}
toward the explicit recognition and reaffirmation of rights of women to control their health and rights of child to life, survival and development respectively. In the light of these arguments the petitioner submitted that child and mother in the present case was also entitled to have bonding in between them. So in the interest of the child, the leave should be granted. Moreover, the petitioner submitted that it was not necessary that if the rule did not include surrogacy agreement because it was not prevalent at the time of enactment of the provision, that it could not be recognized in law at present. Moreover, if law could provide child care leave in case of adoptive parents, that should also be available in the present situation. The court accepted all the argument given by the counsel on the behalf of the petitioner. The court found that there was nothing immoral or unethical of the petitioner who entered in to the surrogacy arrangement. For all the practical purposes she was the mother of the child. So she was entitled to all the rules and regulations as the other persons were entitled. Moreover, the purpose of Rule 3A is to establish a proper bonding between the mother and the child and this was applicable in the present case also. The court thus allowed the writ petition directing the Chennai port trust to grant leave to the petitioner in terms of Rule 3A recognizing the child born through surrogacy arrangement.

Thus after analyzing the judicial responses of different countries it can be safely concluded that the courts in different countries have decided different case laws according to the facts and circumstances of the cases and applicable law. However, the conflict becomes more complicated when the applicable law is not clear. In such situation the courts are left with no option but to analyze the case after exercising discretion. The court in that case sometimes took in to account the interest and intention of the parties, some time the welfare and best interest of the child. The judicial decisions in different countries reflects that there is need to place the surrogacy arrangement on international front specially for resolving the cases where surrogate is from one country and the intended parents are from other.

422 Supra note 414, para 7.
423 Id., para 9.
424 Id., para 10.
425 Id., para 13.
426 Id., para 16.
427 Id., para 18.