

Medically assisted reproduction in Belgium

ARTIFICIAL INSEMINATION AND IVF

Concept

Medically assisted reproduction (MAR) consists of several methods to assist someone in having a child. The most common one is artificial insemination, where the semen (of the intended father or a donor) is injected in the uterus of the women. If artificial insemination does not work, *in vitro* fertilisation can be started. This method is much more complex, as the egg cell will be fertilized outside of the uterus. After this the embryo will be implanted in the uterus. The egg cell can be from the intended mother, but it can also be from a donor. Another possibility is that the embryo as a whole is donated by another couple.¹

The goal of medically assisted reproduction is in first instance to help married couples with fertility problems, and to prevent hereditary diseases from being transmitted to the next generation. Besides these medical reasons, MAR is nowadays also used for social reasons, also called “social infertility”: to fulfil the wish to become parents of lesbian couples and single women.²

Legal framework in Belgium

The governing law on assisted reproduction in Belgium is the Act of 6 July 2007 on medically assisted reproduction and the disposition of supernumerary embryos and gametes (hereafter MAR-act).³

This regulation has been amended by several legislative proposals. These all concern amendments regarding the anonymity and identifiability of donors.⁴

¹ P. De Sutter, “Over voortplanting, genetica en ethiek”, *T.Fam.* 2018, 26; Advisory Committee on Bioethics (2004a) Advice no. 19 of 14 October 2002 on the disposition of cryopreserved embryos. *Bioethica Belgica* 15: 3-11.

² P. De Sutter, “Over voortplanting, genetica en ethiek”, *T.Fam.* 2018, 26.

³ Wet van 6 juli 2007 betreffende de medisch begeleide voortplanting en de bestemming van de overtollige embryo's en de gameten, *B.S.* 17.07.2017.

⁴ T. Wuyts, “Het recht op identiteit in de Belgische rechtsorde”, *T.Fam.* 2015, 60-65.

The Act of 6 July 2007 analysed

Principles

The MAR-act arrived late in Belgium, as medically assisted reproduction was already being practised a long time before the act entered into force. The law affirmed the practice and provided more uniformity and transparency about the operation. Article 5 of this act still allows the freedom of each fertility centre to refuse assisted reproduction, or to set other conditions than those established by the law.⁵ The sexual orientation has no influence on the possibility to obtain an assisted reproduction.⁶

If the parents of an embryo still have embryos left after their own MAR, they can decide whether they want to give the embryos to science for research, have them destructed or donate them to other couples.⁷ However, the donation of embryos to other couples can never happen against payment, it has to be transacted anonymously and non-commercially.⁸

Conditions

However, the Belgian Act sets out several conditions in order to have access to MAR. Firstly, it sets a minimum age limit of 18 years old and a maximum age limit of 45 years old for women in order to donate egg cells.⁹ The limit set to be inseminated with gametes is minimum 18 years and maximum 47 years old; but the request for MAR must have been formulated at the age of 45 years the latest.¹⁰ Different fertility centres are free to set other age limits, but they must remain within the maximum boundaries set by the law.¹¹ Secondly, there must be a fertility problem, whether medically or “socially” (single women and lesbian pairs).¹²

⁵ Article 5 MAR-act.

⁶ Article 2, f, MAR-act.

⁷ Article 10, §2, MAR-act.

⁸ G. PENNING, “Belgian Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes” in *European Journal of Health Law* 2007, 251-260.

⁹ Article 4 MAR-act.

¹⁰ Article 4 MAR-act.

¹¹ Article 5 MAR-act.

¹² Article 6 MAR-act.

Post mortem insemination

There was a lot of discussion about *post mortem* insemination during the preparatory work for the MAR-act.¹³ Afterwards, *post mortem* insemination was made possible under the MAR-act.¹⁴ However, several conditions need to be fulfilled in order for it to take place. Firstly, the partner whose semen will be used after his death must have consented to the *post mortem* insemination. Secondly, it can only be done with the semen of the predeceased partner or with an embryo of the couple.¹⁵ The last condition requires a waiting period of at least 6 months after the death of the partner before the insemination can be started, and a maximum period of 2 years after his death.¹⁶ This waiting period can be explained by the need for a reflection period after the death of a partner, when the decision might be clouded by emotion.¹⁷ Even if all conditions are fulfilled, each fertility centre can still decide to refuse *post mortem* insemination.¹⁸

Regarding the consequences *post mortem* insemination might have for the child, the Belgian Advising Council for Bioethics was divided into two groups.¹⁹ One group was convinced that *post mortem* reproduction entails a serious threat for the wellbeing of the future child.²⁰ The other group of the Advising Council of Bioethics argued that *post mortem* reproduction should not be forbidden, and that the future child can have as much quality of life as any other child not born from this method. However, they also emphasized that good counselling and selection of the applications is needed.²¹

¹³ M. DERESE en G. WILLEMS, "La loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes", *Rev.trim.dr.fam.* 2008, afl. 2, 319.

¹⁴ Article 2, r and s, MAR-act.

¹⁵ Article 15 and 44 MAR-act.

¹⁶ Article 16 and 45 MAR-act.

¹⁷ M. EGGERMONT, "De regelgeving rond MBV: een geïntegreerd overzicht" in *Medisch begeleide voortplanting*, Mortsel, Intersentia, 2014; G. PENNING, "Belgian Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes" in *European Journal of Health Law* 2007, 251-260.

¹⁸ Article 5 MAR-act.

¹⁹ Belgian Advising Council of Bioethics, Advice regarding the reproduction after the death of a partner, 21th June 2004, nr.28.

²⁰ Belgian Advising Council of Bioethics, Advice regarding the reproduction after the death of a partner, 21th June 2004, nr.28.

²¹ Belgian Advising Council of Bioethics, Advice regarding the reproduction after the death of a partner, 21th June 2004, nr.28.

Genetic preimplantation

Genetic preimplantation diagnostics

In IVF, certain embryos *in vitro* will be examined in order to determine which of them shall be implanted.²² Preimplantation diagnostics can only be used in two cases. Firstly, they can choose the gender of the child to avoid gender-related diseases that might run through the family.²³ The fact that the Belgian law allows for this selection in order to exclude genetic diseases ensures compatibility with the case law of the ECHR and the right to respect private and family life.²⁴

Secondly, they can select the child based on its genetics in a way that this child can help their other child (the so-called “rescue baby”), but only if their wish to have the second child is not exclusively there in order to save their second child.²⁵

Use of donor material

The same Act also regulates the use of donor material in a way that certain applications are forbidden or restricted.

Firstly, one cannot inseminate at the same time gametes from different donors,²⁶ nor use embryos from different donors at the same time.²⁷ Secondly, gametes or embryos from the same donor cannot be inseminated in more than six different women.²⁸

Furthermore, it is in principle not allowed to select embryos based on their sex, unless in case of gender related diseases. Nor can parents make a selection based on eugenic criteria, directed at improving non-pathological characteristics of the human kind, such as eye-color.²⁹

²² Article 2, t, MAR-act.

²³ Article 67, 2° MAR-act.

²⁴ Article 8 ECHR; ECRM (2de afd.) 28 augustus 2012, nr. 54270/10, *Costa and Pavan v. Italy*.

²⁵ Article 68 MAR-act.

²⁶ Article 54 MAR-act.

²⁷ Article 25 MAR-act.

²⁸ Article 26 and 55 MAR-act.

²⁹ Article 23 and 52 MAR-act.

Despite the above-mentioned restrictions, the Belgian law allows a minimum of ‘matching’³⁰ between parent and child so that the child could be perceived by outsiders as being the biological child. This matching was allowed by the Belgian law to assure the right to privacy of the parents, in order for them to decide for themselves whether other people may know the child was conceived via assisted medical reproduction. This cannot, according to the Belgian Act, be seen as a forbidden eugenic practice.³¹

As regards the age of gametes donors, several limits are established by the Belgian law. Gametes can be given by women from the age of 18 years old until the day before they reach the age of 46.³² Gametes from male donors are subjected to a minimum age limit of 18 years old by the donors; there is no maximum age limit.³³ However, in both cases each fertility centre can set different age limits, as long as they stay within the boundaries set by the law.³⁴ For instance, the fertility centre from UZ Leuven (Belgium) only allows the donation of gametes from women between the age of 21 years old and 35 years old, because the female fertility rapidly degrades with aging.³⁵ For male donors of gametes, the fertility centre of UZ Leuven only accepts gametes from donors between the age of 25 and 45 years old.³⁶

There is an exception, however, where even a minor can give his/her gametes in order to freeze them when he/she suffers from a medical condition (for instance cancer) which can lead to infertility later in life.³⁷ This exception allows him/her to use IVF later with his/her own gametes.³⁸

³⁰ Article 2, v, MAR-act.

³¹ Article 24 and 53 MAR-act; Advies Kinderrechtencommissariaat “Alles in het teken van recht op afstammingsinformatie”, 23 februari 2015.

³² Article 4 MAR-act.

³³ Article 4 MAR-act.

³⁴ Article 5 MAR-act.

³⁵ <https://www.uzleuven.be/nl/fertiliteitscentrum/eiceldonor-worden>

³⁶ <https://www.uzleuven.be/nl/fertiliteitscentrum/spermadonor-worden>

³⁷ Article 4 MAR-act.

³⁸ P. De Sutter, “Over voortplanting, genetica en ethiek”, *T.Fam.* 2018, 26.

Problems in practice

Determining kinship

One of the problems with medically assisted reproduction is that the legal parentage of a child is usually based on a biological-genetical tie, which is absent when the child has been conceived with the sperm of a donor.³⁹ While the *mater semper certa est* provision in Belgium ensures that the mother is automatically recognized as the legal parent of the child when she gives birth to it, the father is left behind with no biological link to the child.⁴⁰ In order to accommodate this issue, the Belgian legislator inserted special provisions in the MAR-act.⁴¹ Instead of using the biological-genetical link as a basis to establish legal parentage, the intention of the donor and the intended parents now serves as the basis to determine the legal parentage in cases of medically assisted reproduction.⁴² The MAR-act states that from the moment of implantation with gametes or embryos, the provisions of the Belgian Civil code regarding kinship must be interpreted in favor of the intended parents.⁴³ Furthermore, the Act states that no donor or donor couple can start legal proceedings in order to establish any kinship towards the child born with their biological material. Also, the intended parents cannot set up legal actions against the donor in order to establish legal parentage of the donor.⁴⁴

³⁹ P. De Sutter, "Over voortplanting, genetica en ethiek", *T.Fam.* 2018.

⁴⁰ Article 315 Belgian Civil Code 1804.

⁴¹ Article 27 and 56 MAR-act.

⁴² M. EGGERMONT, "De regelgeving rond MBV: een geïntegreerd overzicht" in *Medisch begeleide voortplanting*, Mortsel, Intersentia, 2014; G. PENNING, "Belgian Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes" in *European Journal of Health Law* 2007, 251-260.

⁴³ Article 27 and 56 MAR-act.

⁴⁴ Article 27 and 56 MAR-act.

Tourism

Despite the transparency of the Act, there are still a lot of Belgians going abroad to receive medically assisted reproduction.⁴⁵ The reason for this is that the waiting list to receive a donated egg cell are long (for instance compared to Spain). Another reason to have the treatment abroad may lay in the fact that selection based on the sex is forbidden in Belgium (in contrast to Turkish-Cyprus for instance). This tourism of Belgians going abroad to get the medically assisted reproduction is often criticized, as some countries try to make as much profit as possible from these operations. Some of them allow for selection based on purely eugenic reasons, and they sometimes pressure women into donating eggs.⁴⁶

Anonymity of donors

The current debate in medically assisted reproduction in Belgium is mainly focused on the fact that the MAR-act ensures that fertility centers provide absolute anonymity regarding the donors of gametes and embryos.⁴⁷ A lot of discussion has been going on whether this violates the right of a child to know his/her biological parents.⁴⁸

- The Advising Council of Bioethics in Belgium gave its opinion on this matter, stating that the right of a child to know his/her biological descent does not outweigh the right to respect the private life of the parents.⁴⁹ Parental legitimacy is rather based on social parenthood than on genetic descent.⁵⁰ The reason that the Council gave this advice is mainly due to the fact that they are afraid that nobody wants to be a donor anymore if their anonymity is no

⁴⁵ Knack 11 oktober 2017: Een baby maken? Dat doe je in het buitenland; <http://fertiltravel.nl/>

⁴⁶ P. De Sutter, "Over voortplanting, genetica en ethiek", *T.Fam.* 2018, 26

⁴⁷ M. EGGERMONT, "De regelgeving rond MBV: een geïntegreerd overzicht" in *Medisch begeleide voortplanting*, Mortsel, Intersentia, 2014.

⁴⁸ Article 7.1 United Nations Convention on the Rights of the Child; L. PLUM, "Het recht van het kind om zijn ouders te kennen (art. 7.1. IVRK) na heterologe medisch begeleide voortplanting, adoptie en draagmoederschap in België", *TJK* 2012.

⁴⁹ Article 8 European Convention on Human Rights.

⁵⁰ M. EGGERMONT, "De regelgeving rond MBV: een geïntegreerd overzicht" in *Medisch begeleide voortplanting*, Mortsel, Intersentia, 2014.

longer assured.⁵¹ On the other hand, one could argue that the donor and the birthparents made the decision for medically assisted reproduction, while the child born from this decision had no say at all.⁵² Shouldn't the child then at least get to decide later whether he wants to know his biological and genetic parents? Despite these debates taking place, the anonymity of donors is still the main principle in Belgian law regarding medically assisted reproduction.⁵³

- The Administrative Court of Belgium gave its opinion on the very same issue of donor anonymity, hereby taking a more negative stance towards anonymity than the Advising Council of Bioethics.⁵⁴ The Administrative Court rejects absolute anonymity for donors of gametes and embryos and stated that every person with an interest should be able to ask in order for the anonymity to be lifted. Finally, the Administrative Court said that access to certain non-identifiable genetic data should always be possible.⁵⁵ This opinion of the Court was based on the case *Odièvre v France* from the European Court of Human Rights.⁵⁶ In this case, an adopted child wanted to acquire information about her biological parents, which the French state did not allow as the French legislation protected a mother's right to keep her identity concealed. The ECHR decided that the interests of all parties need to be balanced and protected according to article 8 of the ECHR.⁵⁷ The fact that France allowed the child to gain non-identifiable data about its biological parents was enough

⁵¹ L. PLUYM, "Het recht van het kind om zijn ouders te kennen (art. 7.1. IVRK) na heterologe medisch begeleide voortplanting, adoptie en draagmoederschap in België", *TJK* 2012.

⁵² L. PLUM, "Het recht van het kind om zijn ouders te kennen (art. 7.1. IVRK) na heterologe medisch begeleide voortplanting, adoptie en draagmoederschap in België", *TJK* 2012.

⁵³ Article 28 and 57 MAR-act; L. PLUYM, "Het recht van het kind om zijn ouders te kennen (art. 7.1. IVRK) na heterologe medisch begeleide voortplanting, adoptie en draagmoederschap in België", *TJK* 2012.

⁵⁴ Opinion nr. 3-417/3, Belgian Administrative Court attached to the legal proposal regarding medically assisted reproduction and the destination of supernumerary embryos and gametes, *Parl.St. Senat* 2005-06.

⁵⁵ Opinion nr. 3-417/3, Belgian Administrative Court attached to the legal proposal regarding medically assisted reproduction and the destination of supernumerary embryos and gametes, *Parl.St. Senat* 2005-06.

⁵⁶ ECHR, *Odièvre v. France*, 2003.

⁵⁷ ECHR, *Odièvre v. France*, 2003.

to reconcile both the interest of the child as well as the interest of the biological mother.⁵⁸

No central registrations

The MAR-act does not foresee any form of central registration, which means that in practice the same donor might donate gametes in different fertility centers. This can cause more than six women to get impregnated by the same donor, thereby violating the MAR-act.⁵⁹

Case law

Belgian case law

Medically assisted reproduction gave lead to several proceedings before Belgian courts and tribunals. Most of these cases concern the determination of the paternal descent of a child born from medically assisted reproduction when there is no marriage.⁶⁰ There are also some cases in Belgium where the judge accepted that the consent to start a medically assisted reproduction procedure was proof that it was not a marriage of convenience.⁶¹

However, an interesting case was in 2011 before the Belgian Constitutional Court when several non-profit organizations complained about the fact that the MAR-act allowed supernumerary embryos to be used for research.⁶² According to these organizations this constituted a violation of the respect for the identity of a person conceived through medically assisted reproduction. According to them, an embryo

⁵⁸ R. BAUWENS, *Internationale aspecten in de verschillende takken van het recht*, Gent, Larcier, 2005.

⁵⁹ M. EGGERMONT, "De regelgeving rond MBV: een geïntegreerd overzicht" in *Medisch begeleide voortplanting*, Mortsel, Intersentia, 2014.

⁶⁰ Arbrb. Leuven 20 januari 2011, AR nr. 10/207/, onuitg; G. VERSCHULDEN, "Overzicht van rechtspraak inzake MBV (exclusief draagmoederschap)", Mortsel, Intersentia, 2014.

⁶¹ Supreme Court 8 februari 2008, Arr.Cass. 2008, 374, Pas. 2008, 386, *T.Fam.* 2008; G. VERSCHULDEN, "Overzicht van rechtspraak inzake MBV (exclusief draagmoederschap)", Mortsel, Intersentia, 2014.

⁶² Belgian Constitutional Court 10 juni 2010, nr. 68/2010, BS 20 augustus 2010, 54192.

should be considered as being a legal subject from the moment of conception, and therefore embryos could not be disposed of for research.⁶³ The organizations claimed a violation of article 22bis of the Belgian Constitution, together with the right to life laid down in article 2.1 ECHR⁶⁴, article 6 ICCPR⁶⁵ and article 6.1 UNCRC⁶⁶. Article 22bis of the Belgian Constitution guarantees the right of each child to respect its moral, physical, mental and sexual integrity. The final judgement of the Belgian Constitutional Court declared that article 22bis of the Belgian Constitution did not cover the rights of embryos and fetuses, and therefore it declined the appeal for annulment.⁶⁷

European case law

Cases from the European Court of Human Rights have a lot of importance and they tend to influence the decisions of Belgian judges in an important way. The case-law from the European Court of Human Rights mostly underlines that the right of an individual to receive a child via medically assisted reproduction concerns the right to private life, as laid down in article 8 of the European Convention on Human Rights.⁶⁸ Also, the right to respect private and family life in article 8 ECHR includes the right to respect the decision to become a genetic parent.⁶⁹

One of the cases from the European Court of Human Rights that had a lot of impact in Belgium is the *Dickson* case. In this case the Court ruled that medically assisted reproduction cannot be refused just because one of the partners is imprisoned, if this is the only way for the couple to conceive a child.⁷⁰ The European Court considered the granting of access to artificial insemination as a positive obligation of the

⁶³ Belgian Constitutional Court 5 oktober 2011, nr. 146/2011, BS 15 december 2011, 74516, T.Gez. 2011-12; G. VERSCHELDEN, "Overzicht van rechtspraak inzake MBV (exclusief draagmoederschap)", Mortsel, Intersentia, 2014.

⁶⁴ European Convention on Human Rights 4th November 1950.

⁶⁵ International Covenant on Civil and Political Rights Commentary 19th December 1966.

⁶⁶ United Nations Convention on the Rights of the Child 20th November 1989.

⁶⁷ Belgian Constitutional Court 5 oktober 2011, nr. 146/2011, BS 15 december 2011, 74516, T.Gez. 2011-12.

⁶⁸ EHRM (4de afd.) 7 maart 2006, nr. 6339/05, *Evans v. United Kingdom*; EHRM (1ste afd.) 1 april 2010, nr. 57813/03, *S.H. and others v. Austria*.

⁶⁹ ECHR 4 december 2007, nr. 44362/04, *Dickson v. United Kingdom*; G. VERSCHELDEN, "Overzicht van rechtspraak inzake MBV (exclusief draagmoederschap)", Mortsel, Intersentia, 2014.

⁷⁰ ECHR 4 december 2007, nr. 44362/04, *Dickson v. United Kingdom*.

government to ensure the right to reproduction.⁷¹ In Belgium, the *Dickson* case had a lot of consequences for detained and imprisoned people who wanted to make use of medically assisted reproduction procedures. There is now no prohibition anymore in Belgium for an imprisoned person to give his gametes in order to conceive a child with his partner by using medically assisted reproduction.⁷²

Conclusion

Artificial insemination and IVF is well regulated in Belgium by the MAR-act of 2007. Despite this legal framework there are still some problems in practice. The main problem that is currently the topic of most debates in Belgium is the question regarding anonymity of donors. As other neighbouring countries, like the Netherlands, are moving from donor anonymity towards more emphasis on the right of the child to know his/her biological descent, Belgium seems to linger behind.

⁷¹ ECHR 4 december 2007, nr. 44362/04, *Dickson v. United Kingdom*.

⁷² G. VERSCHULDEN, "Overzicht van rechtspraak inzake MBV (exclusief draagmoederschap)", Morsel, Intersentia, 2014.

SURROGACY

Concept

Surrogacy takes place when a woman bears a child with the intention not to keep it for herself and take on motherhood, but to pass the child on to the intended parents after giving birth. There is an agreement between the surrogate mother and the intended parent(s) before the fertilisation of the child takes place.⁷³

Several forms of surrogacy can be distinguished from each other. The first distinction must be made between altruistic surrogacy and commercial surrogacy. The first type only provides a remuneration for incurred costs of the pregnancy and hospital services.⁷⁴ The commercial surrogacy, on the other hand, provides more than a remuneration for costs. It also gives a payment to the surrogate mother for the act of surrogacy on itself, as a service.⁷⁵

The second distinction has nothing to do with the payment, but with the technological method used. Low-tech surrogacy takes place when the ovum of the surrogate mother is used, so there is no need for IVF (artificial insemination suffices). High-tech surrogacy always requires IVF, as the ovum comes from someone other than the surrogate mother (a donor or the intended parent).⁷⁶

Surrogacy in Belgium is nowadays most often used by gay couples⁷⁷, as adoption procedures are difficult in Belgium, and they sometimes prefer a child that is also biologically linked to one of them.⁷⁸

⁷³ K. DANHIEUX en L. DEFRUYT, "Economisch onderzoek van draagmoederschap: een kostenonderzoek aan de hand van enkele case-studies", 2014 UGENT; L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

⁷⁴ J. DE HAESE, "De erkenning in België van buitenlandse geboorteakten en rechterlijke beslissingen waarin Belgen als wensouders na draagmoederschap vermeld staan", o.l.v. Prof. Dr. Gerd Verschelden, Gent, 2012-2013.

⁷⁵ K. DANHIEUX en L. DEFRUYT, "Economisch onderzoek van draagmoederschap: een kostenonderzoek aan de hand van enkele case-studies", 2014 UGENT; L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

⁷⁶ J. DE HAESE, "De erkenning in België van buitenlandse geboorteakten en rechterlijke beslissingen waarin Belgen als wensouders na draagmoederschap vermeld staan", o.l.v. Prof. Dr. Gerd Verschelden, Gent, 2012-2013; L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

⁷⁷ A.R. DANA, "The state of surrogacy laws: deterring legal parentage for gay fathers", *Duke Journal of Gender Law & Policy* 2010-11.

⁷⁸ L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

Absence of a legal framework

In Belgium there is no legal framework for surrogacy, the MAR-act does not regulate surrogacy because at the time they planned on enacting a second act specifically for surrogacy.⁷⁹ However, none of the pending legislative proposals actually led to a separate act on surrogacy.⁸⁰

This situation means an agreement on surrogacy will in principle be void and not legally enforceable. The reason is that it is contrary to public order, as it has no valid object or cause.⁸¹ A legal obligation of the mother to give up her child at birth is contrary to the fundamental right of the mother to take on motherhood herself.⁸² On the other hand, surrogacy is also not explicitly forbidden in Belgium, although commercial surrogacy might give lead to criminal proceedings.⁸³ This is because according to the Belgian Civil code, only something that can be traded can be the object of a legal obligation.⁸⁴ Therefore, as a person cannot be traded under Belgian law, the sale of a child through surrogacy can be found illegal under the Belgian Civil law and the fundamental rights treaties that Belgium is a party to.⁸⁵

Problems in practice

Parenthood according to Belgian law

This lack of a legal framework also means that the Belgian law regarding parentage and parenthood is not adapted to surrogacy, which then leads to the problem that the surrogacy mother will always be the legal parent of the child in Belgium (*mater semper certa est*)⁸⁶, and the only option to circumvent this will be through adoption by

⁷⁹ Report of the Commission for social affairs, *Parl.St.* Senat 2005-06, nr. 3-1440/9.

⁸⁰ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENAËVE, KUL 2016-2017.

⁸¹ Article 1131 and article 1133 Belgian Civil Code 1804.

⁸² L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

⁸³ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENAËVE, KUL 2016-2017.

⁸⁴ Article 1128 Belgian Civil Code 1804.

⁸⁵ P. SENAËVE, "Juridische aspecten van het draagmoederschap", *VI.T. Gez.* 1988.

⁸⁶ Article 315 Belgian Civil Code 1804.

the intended parents.⁸⁷ This always requires the consent of the surrogacy mother⁸⁸, which means that any surrogacy agreement made before the child was born is not enforceable. The surrogacy mother can still refuse to give the child after giving birth.⁸⁹ This might seem like the surrogacy mother has the advantage of the law on her side, but it might also be in her disadvantage when she gives birth to a disabled child and the intended parents do no longer want to take the child.⁹⁰ Adoption can also take years, in order for all formalities of the procedure to be fulfilled.⁹¹

Surrogacy tourism

Besides the fact that the surrogacy mother can withdraw her consent, and that there is no legal protection of the factual relation between child and intended parents during the first years, other problems arise especially when nationals go abroad to countries where surrogacy is legalized. The main issue here is that the birth certificate of a child born from surrogacy might not be recognized when the intended parents want to return with the child to Belgium.⁹² Due to the *mater semper certa est* principle in Belgian law, the foreign birth certificates will be invalid.⁹³ In practice, most Belgian courts tend to solve this problem by recognizing the father as legal parent, so that at least one of the intended parents has a legal bond with the child.⁹⁴

⁸⁷ A. DE WOLF, "Draagmoederschap in België en Frankrijk: een stand van zaken" in K. BOELE-WOELKI en M. ODERKERK (eds.), *(On)geoorloofdheid van het draagmoederschap in rechtsvergelijkend perspectief*, Antwerpen, Intersentia, 1999; L. PLUYM, "Draagmoederschap naar Belgisch en Nederlands recht" in *F&R* mei 2015.

⁸⁸ Article 348-3 Belgian Civil Code 1804.

⁸⁹ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENAEVE, KUL 2016-2017.

⁹⁰ J. DE HAESE, "De erkenning in België van buitenlandse geboorteakten en rechterlijke beslissingen waarin Belgen als wensouders na draagmoederschap vermeld staan", o.l.v. Prof. Dr. Gerd Verschelden, Gent, 2012-2013.

⁹¹ M. SIJMONS, "Anoniem donorschap en kinderrechten", promotor Prof. Dr. J. PUT, UHASSELT 2014-2015.

⁹² J. DE HAESE, "De erkenning in België van buitenlandse geboorteakten en rechterlijke beslissingen waarin Belgen als wensouders na draagmoederschap vermeld staan", o.l.v. Prof. Dr. Gerd Verschelden, Gent, 2012-2013.

⁹³ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENAEVE, KUL 2016-2017.

⁹⁴ Court of Nijvel 6 April 2011, *Act. dr. fam.* 2011.

1. *Belgian case law*

A Belgian case that should be mentioned here is one from the Brussels court of first instance.⁹⁵ The case concerned a Belgian man living in Monaco, who asked for a surrogacy agreement with a surrogacy mother in Florida, United States.⁹⁶ The child was conceived via *in vitro* fertilisation with the egg cell of an anonymous donor. The Belgian man was the biological father of the child. A birth certificate was established with the Belgian man as the biological father; the identity of the surrogacy mother was left out of the certificate.⁹⁷

Upon his return to Monaco, the father went to the Belgian embassy in order to establish the Belgian nationality of the child. However, several arguments were raised by the Belgian official registrar, who refused to accept the birth certificate issued by the United States.⁹⁸ The Belgian embassy stated that it could not recognize the legal parentage of the father, as the identity of the legal mother was unknown on the certificate. In the end the father went to the Court of first instance in Brussels, which decided in his favor.⁹⁹

This is one of the few cases where a Belgian judge explicitly stated that there is no legal framework for surrogacy in Belgium, but then decides that this should not be a reason to refuse the child's birth certificate.¹⁰⁰ The reason for his judgement finds itself in the primordial interest of the child, that is often emphasized in Belgian case-law.¹⁰¹

⁹⁵ Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

⁹⁶ L. DESCHUYTENEER, "De beoordeling van een draagmoederschapsovereenkomst uit Florida: alle wegen leiden naar erkenning", Note under Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

⁹⁷ Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

⁹⁸ L. DESCHUYTENEER, "De beoordeling van een draagmoederschapsovereenkomst uit Florida: alle wegen leiden naar erkenning", Note under Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

⁹⁹ Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

¹⁰⁰ Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

¹⁰¹ Court of First Instance Brussels, 15th February 2016, No. 2015/416/B.

2. European case law

Important case-law on the European level regarding this topic on surrogacy tourism are the decisions of the ECHR in *Mennesson v. France* and *Labassee v. France* (26 June 2014); also the decision by ECHR in *Paradiso and Campanelli v. Italy* (27 January 2015; 24 January 2017) needs to be addressed in this essay.¹⁰² Finally, the case of *D and Others v. Belgium* will be mentioned.

- *Mennesson v. France* and *Labassee v. France*

In the first two cases France refused to recognize the relationship between the parent and the child that was born from a surrogacy agreement. Although their relationship was legally recognized in the United States, France kept refusing to establish the legal parenthood.¹⁰³ In the end the ECHR decided there was no violation regarding the parents right to private and family life (article 8 ECHR) but there was a violation of the child's right to respect his/her private life in light of the same article 8.¹⁰⁴ The Court ruled that the fact that France did not recognize the child's identity due to the fact it was born from a surrogacy agreement that was legal abroad, fell outside the margin of appreciation that states have regarding decisions about surrogacy.¹⁰⁵

- *Paradiso and Campanelli v. Italy*

In the case of *Paradiso and Campanelli v. Italy* an Italian couple travelled to Russia in order to get a surrogacy agreement with a Russian woman. The child was born and the Italian Court then refused to register the Russian birth certificate. Following this the child was even removed from them and then adopted by another family.¹⁰⁶ However, in this case the ECHR decided there was no violation of article 8,¹⁰⁷ as

¹⁰² Press release issued by the Registrar of the ECHR (ECHR 185; 26.06.2014).

¹⁰³ ECHR case *Mennesson v. France*, 26 June 2014 (no. 65192/11); ECHR case *Labassee v. France*, 26 June 2014 (no. 65941/11).

¹⁰⁴ European Convention on Human Rights (4 november 1950, signed in Rome); Press release issued by the Registrar of the ECHR (ECHR 185; 26.06.2014).

¹⁰⁵ Press release issued by the Registrar of the ECHR (ECHR 185; 26.06.2014); ECHR case *Mennesson v. France*, 26 June 2014 (no. 65192/11); ECHR case *Labassee v. France*, 26 June 2014 (no. 65941/11).

¹⁰⁶ ECHR case *Paradiso and Campanelli v. Italy*, 24 January 2017 (no. 25358/12).

¹⁰⁷ European Convention on Human Rights (4 november 1950, signed in Rome)

there was no biological relation between them, and the child had only stayed with them for a very short period of time. Because of this the child's right to article 8 ECHR was not violated, although the Court did recognize the emotional hardship this decision caused for the parents.¹⁰⁸

- *D and Others v. Belgium*

In this case the Belgian authorities refused to give travel documents to a child born from a Belgian father with a surrogacy agreement in Ukraine.¹⁰⁹ The case went to the European Court of Human Rights, who found that article 8 of the Convention was applicable because it concerned the matter of family life.¹¹⁰ The fact that the Belgian authorities refused to provide the necessary travel documents had caused a separation of the family, which meant this concerned their right to respect for family life.¹¹¹ Still, taking all these circumstances into consideration, the European Court of Human Rights decided the time of separation was not unreasonably long. The fact that the Belgian State wanted to ensure that a human being was not being illegally trafficked, pursued a legitimate objective.¹¹² Furthermore, the applicants could have expected that this legal control of the Belgian authorities would take some time, and so the European Court decided that the Belgian State had acted within the margin of appreciation provided by article 8 of the Convention.¹¹³

¹⁰⁸ ECHR case *Paradiso and Campanelli v. Italy*, 24 January 2017 (no. 25358/12).

¹⁰⁹ ECHR case *D. and Others v. Belgium*, 8 July 2014 (no. 29176/13); Information Note on the Court's case-law No. 177.

¹¹⁰ Article 8 European Convention on Human Rights (4 november 1950, signed in Rome).

¹¹¹ ECHR case *D. and Others v. Belgium*, 8 July 2014 (no. 29176/13); Press release issued by the Registrar of the Court ECHR 252 (2014), 11 September 2019.

¹¹² ECHR case *D. and Others v. Belgium*, 8 July 2014 (no. 29176/13).

¹¹³ Article 8 European Convention on Human Rights (4 november 1950, signed in Rome); ECHR case *D. and Others v. Belgium*, 8 July 2014 (no. 29176/13).

Belgian case law

Since surrogacies happen outside any legal framework and mostly go unnoticed, there is little case-law about surrogacy in Belgium. Still, some cases can be mentioned here.

Case of Baby J

One case was the case of “Baby J”, where the Belgian surrogacy parents were convicted of inhuman/ degrading treatment towards their child, because they sold the child to a Dutch couple.¹¹⁴ The legal basis used here was article 417,3° of the Belgian Penal Code. According to the Belgian judge, surrogacy fell under this article, as it was a violation of the human dignity of a living person.¹¹⁵

Case of Baby D

However, the most important case that should be mentioned here is the case of “Baby D”.¹¹⁶ This case concerned a child born from a Belgian surrogacy mother, on the request and payment of a Belgian couple and with their husband’s sperm. However, right before the child was born the surrogacy mother had secretly sold the child to a Dutch couple. The judge then decided eventually that the child gets to stay with the Dutch couple, but he also decided to condemn that couple for degrading treatment of the child.¹¹⁷

In this case, not only the national Penal code was invoked, but the Belgian judge also ruled there was a violation of the International Convention on the rights of the child.¹¹⁸ More specifically, article 35 of the Optional Protocol to the Convention on the

¹¹⁴ Case “Baby J” Corr. Gent (19e k.) 14 mei 2012, notitienr. GE42.LA.91920/08/GZ4, unpubl.

¹¹⁵ Article 417,3° Belgian Penal Code.

¹¹⁶ Case “Baby D”, Utrecht tribunal 26/10/2005, No. 197521//FA RK 05-3560.

¹¹⁷ Case “Baby D”, Utrecht tribunal 26/10/2005, No. 197521//FA RK 05-3560.

¹¹⁸ Article 417 Belgian Penal Code; International Convention on the Rights of the Child, signed 20th November 1989.

sale of children, child prostitution and child pornography was violated according to the judge.¹¹⁹

Later on appeal the Dutch couple was acquitted, but the decision of the judge case remains a landmark case in Belgium. Still this case did not lead to any legal framework, although it brought forward a lot of discussions in parliament.¹²⁰

The decision of the Belgian court on appeal stands in stark contrast with what was decided in first instance. The appellate court decided that no crime had been committed, as the child had not been born yet before it was given to the Dutch couple. Therefore, there can only be a violation of article 417 of the Belgian Penal Code when the child is, for a second time, being “sold” to someone else. Commercial surrogacy on its own is not sufficient to speak of the crime of degrading treatment (Belgian Penal Code) and the selling of children (Optional Protocol UN Convention Rights of the Child).¹²¹

Ethical issues

Ethical questions mainly surround the socially unaccepted idea of selling a child, and the commercialisation of a woman’s body. For these reasons several scholars in Belgium point to the solution of adoption, but these procedures are often long and difficult, and most couples also want to have a biological tie with the child. Adoption requires several conditions to be fulfilled, amongst which the condition that the adoption must be in the interest of the child. There have been some cases in Belgium where the judge decided that the adoption following a surrogacy was not in the benefit of the child, and therefore dismissed the claim by the intended parent(s).¹²²

Another argument of those who are against a legal framework for surrogacy in Belgium, fosters the idea that the surrogacy mother might care less for the child’s health during her pregnancy, as it is not hers. Also, the intended parents might refuse the child if it is born with disabilities. However, no scientific research can confirm these speculations.¹²³

¹¹⁹ Optional Protocol to the International Convention on the rights of the child about the sale of children, child prostitution and child pornography, 18th January 2002.

¹²⁰ L. PLUYM, “Draagmoederschap naar Belgisch en Nederlands recht” in *F&R* mei 2015.

¹²¹ L. PLUYM, “Draagmoederschap naar Belgisch en Nederlands recht” in *F&R* mei 2015.

¹²² L. PLUYM, “Draagmoederschap naar Belgisch en Nederlands recht” in *F&R* mei 2015.

¹²³ L. PLUYM, “Draagmoederschap naar Belgisch en Nederlands recht” in *F&R* mei 2015.

Towards a legal accord on surrogacy in Belgium?

In general, several institutions, organisations and political parties seem to realize the need for a legal framework for surrogacy in Belgium.

Legislative proposals and the Advising Council of Bioethics

There is no legislation yet for surrogacy in Belgium, but there is an important advice given by the Belgian Advising Council of Bioethics which allows for surrogacy but only under certain conditions and if it has a non-commercial character. According to the Advising Council, surrogacy should be strictly medically assisted, and it should only be possible for straight couples who have a serious medical problem and cannot conceive a child in any other way.¹²⁴

At the moment there are several legislative proposals pending concerning the matter of surrogacy, amongst them is a proposal to organize centres for surrogacy, shaped after the image of fertility centres for IVF.¹²⁵ Currently only four of the thirty-four fertility centres want to guide surrogacy, none of them accepts commercial surrogacy.¹²⁶

Recommendations of the National Council of the Order of Physicians

As there is no legal framework for surrogacy in Belgium, the national order of physicians formulated some fundamental deontological recommendations for doctors concerned in this practice.¹²⁷ The recommendations require several conditions that need to be fulfilled in order for a surrogacy to take place with the help of a doctor. Firstly, any pregnancy for the intended parents must be medically impossible. Following that, the surrogacy mother needs to get a medical, psychological and social examination to determine her motives and her ability to deliver a healthy child. The surrogacy mother must also be informed about the legal procedures and medical complications that might arise during the surrogacy period and after. Lastly, the

¹²⁴ Belgian Advising Council of Bioethics – Advice nr 30 (5/7/2004).

¹²⁵ Legislative proposal 54-0425 concerning the organisation of surrogacy centres in Belgium.

¹²⁶ L. PLUYM, *Draagmoederschap*, Gent, Larcier, 2014, 7.

¹²⁷ X, 'Adviezen van de Nationale Raad: draagmoeder', *Tijdschrift van de Nationale Raad – Orde van Geneesheren* 2010/131, p. 5.

Order recommends only a reasonable compensation for the surrogacy mother, thereby condemning any commercial surrogacy agreement.¹²⁸

Belgian Senate report

Also, hearings in the Senate (gathered in the commission of institutional affairs) led to a report examining the possibilities for a legal regulation regarding surrogacy.¹²⁹

In this Senate report, the main political parties in Belgium already expressed their opinions about a possible legislation for surrogacy. Most of them want a legal act on surrogacy, except for the Christian party which wants to keep a general prohibition.¹³⁰

However, all of them agree surrogacy should not be commercial¹³¹: only a fixed compensation should be given for medical costs. Most Belgian parties also support the fact that surrogacy should be allowed for everyone, regardless of their sexual orientation or their marital status. All political fractions agree that there should be a medical problem in order for a surrogacy to take place.¹³²

Some of the parties require that a surrogacy mother must have already given birth to another child before she becomes a surrogacy mother. One political party also supports the idea that the surrogacy mother must have the chance to get an abortion in case the child is handicapped.¹³³

¹²⁸ X, 'Adviezen van de Nationale Raad: draagmoeder', Tijdschrift van de Nationale Raad – Orde van Geneesheren 2010/131, p. 5.

¹²⁹ Senat report examining the possibilities for a legal regulation regarding surrogacy, *Parl. St. Senaat*, 2015-16, nr. 6-98/2.

¹³⁰ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENA EVE, KUL 2016-2017.

¹³¹ Legal proposition 9th September 2010 to regulate surrogacy, *Parl. St. Senat*, BZ 2010, nr 5-130/1; Legal proposition 23th September 2010 concerning surrogacy mothers, *Parl. St. Senat*, BZ 2010, nr 5-160/1; Legal proposition 6th October 2010 concerning surrogacy, *Parl. St. Senat*, BZ 2010, nr 5-236/1 and Legal proposition 5th April 2011 regarding the organization of surrogacy centres, *Parl. St. Senat*, BZ 2010, nr 5-929/1.

¹³² Senat report examining the possibilities for a legal regulation regarding surrogacy, *Parl. St. Senaat*, 2015-16, nr. 6-98/2.

¹³³ J. JACOBS, "Naar een wettelijke regeling voor het draagmoederschap in België", o.l.v. Prof. Dr. P. SENA EVE, KUL 2016-2017.

Recommendations of The European Society of Human Reproduction and Embryology (ESHRE)

On European level there seems to be even more consensus on the acceptance of non-commercial surrogacy.¹³⁴ In its 10th statement the ESHRE gave some recommendations regarding the age limit of surrogacy women, a “cooling down” period for all parties and the advice to only implant one embryo at the same time.¹³⁵

Conclusion

Overall, one can conclude that there is a great need for a legal framework on surrogacy in Belgium. In practice, there is a lot of openness about surrogacy in Belgium, as long as it is done without commercial intentions. But a legal framework could offer the legal certainty that is needed for the surrogacy mother and the intended parents.¹³⁶ This is because the main problem in Belgium is that currently legal parenthood is not adapted to the surrogacy concept, which makes it hard for the intended parents to have a legal tie with the child. Adoption is still the only way out but is not an ideal solution due to the many requirements that accompany a long adoption procedure.¹³⁷

¹³⁴ J. DE HAESE, “De erkenning in België van buitenlandse geboorteakten en rechterlijke beslissingen waarin Belgen als wensouders na draagmoederschap vermeld staan”, o.l.v. Prof. Dr. Gerd Verschelden, Gent, 2012-2013.

¹³⁵ ESHRE, “Task force on ethics and law nr.10: surrogacy”, 24th June 2005.

¹³⁶ J. DE ROOVER, “Draagmoederschap: psychologisch acceptabel” o.l.v. Prof.dr. K. DEMYTTENAERE, KUL 2019.

¹³⁷ L. PLUYM, *Draagmoederschap*, Gent, Larcier, 2014, 1.